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# Disability or Identity?

## STUTTERING, EMPLOYMENT DISCRIMINATION, AND THE RIGHT TO SPEAK DIFFERENTLY AT WORK

### INTRODUCTION

More than three million Americans stutter,<sup>1</sup> and stuttering affects about 1 percent of the worldwide population.<sup>2</sup> Stuttering refers to involuntary interruptions in a person's speech, where speech "is broken by repetitions (li-li-like this), prolongations (lllllike this), or abnormal stoppages (no sound) of sounds and syllables."<sup>3</sup> The cause of stuttering is unknown,<sup>4</sup> and no cure for the condition has been found.<sup>5</sup> Stuttering ranges in degree from mild to severe, and it often leads to "physical tension and struggle" in the speech muscles.<sup>6</sup> Significantly, most people who stutter<sup>7</sup> experience feelings of embarrassment, anxiety, and fear.<sup>8</sup>

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<sup>1</sup> Another term for stuttering is stammering. *Stuttering Facts and Information*, STUTTERING FOUND., <http://www.stutteringhelp.org/Default.aspx?tabid=17> (last updated Jan. 20, 2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* These are not the only patterns of stuttering. See *Stuttering Info, What Is Stuttering?*, NAT'L STUTTERING ASS'N, <http://www.nsastutter.org/stutteringinformation/generalinformation.html> (last visited Jan. 20, 2011).

<sup>4</sup> *Stuttering Info, What Causes Stuttering?*, NAT'L STUTTERING ASS'N, <http://www.nsastutter.org/stutteringinformation/generalinformation.html> (last visited Jan. 20, 2011). It is not caused by emotional problems or nervousness. *Id.* A recent study, however, suggests that genetics may play a role. Stephanie Smith, *Unlocking a Medical Mystery: Stuttering*, CNN (Feb. 10, 2010, 5:28 PM), <http://www.cnn.com/2010/HEALTH/02/10/stuttering.genes.cell/>.

<sup>5</sup> *Stuttering Info, What Help Is Available?*, NAT'L STUTTERING ASS'N, <http://www.nsastutter.org/stutteringinformation/generalinformation.html> (last visited Jan. 20, 2011).

<sup>6</sup> *Stuttering Info, What Is Stuttering?*, *supra* note 3.

<sup>7</sup> In this note, the terms *stutterer* and *person who stutters* will be used interchangeably. For an insightful piece that discusses these terms as labels, see John C. Harrison, *Are You or Are You Not a Stutterer?*, STUTTERING HOMEPAGE (May 1, 1996), <http://www.mnsu.edu/comdis/kuster/Infostuttering/stuttererornot.html>; see also MARTY JEZER, *STUTTERING: A LIFE BOUND UP IN WORDS* 16-20 (1997).

<sup>8</sup> *Stuttering Info, What Is Stuttering?*, *supra* note 3.

Employment discrimination is a major concern for stutterers.<sup>9</sup> Several studies indicate that people who stutter are disadvantaged in the employment context.<sup>10</sup> According to 85 percent of employers in one study, “stuttering decreases a person’s employability and opportunities for promotion.”<sup>11</sup> According to vocational rehabilitation counselors, who train individuals to enter the workforce, stuttering is “handicapping.”<sup>12</sup> Because stutterers are concerned with discrimination they might face in the workplace, this note considers the extent to which stuttering is covered under federal antidiscrimination statutes. One way to proscribe discrimination based on stuttering is to consider stuttering a disability under the Americans with Disabilities Act (ADA) as amended in 2008;<sup>13</sup> another way is through Title VII of the Civil Rights Act of 1964.<sup>14</sup> Congress would need to amend the Civil Rights Act to accomplish this. This note examines both of these possibilities.

This note argues that the federal government should ban discrimination based on stuttering. This note also argues that the law must carefully contemplate the nature of stuttering; in crafting stuttering antidiscrimination law, policymakers must acknowledge the population of stutterers who do not stutter often but who are still greatly limited by their stuttering, and they must determine how to provide legal protection for these individuals.<sup>15</sup> Either of the two alternatives mentioned above can solve this problem, and this note will demonstrate how both of these solutions might play out. Ultimately, while coverage under Title VII would be more extensive, coverage under the amended ADA is more practical.

Part I of this note explains what stuttering is, including the physical and emotional components of stuttering. Part I also describes the common misconceptions of stuttering and documents why workplace discrimination based on stuttering is a problem that needs to be addressed. Part II discusses the

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<sup>9</sup> William D. Parry, *Fighting Employment Discrimination for People Who Stutter—Under the Amended Americans with Disabilities Act*, STUTTERING & LAW, <http://www.stutterlaw.com/adaaa.htm> (last updated July 14, 2010).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (citing M.I. Hurst & E.B. Cooper, *Employer Attitudes Toward Stuttering*, 8 J. FLUENCY DISORDERS 1 (1983)).

<sup>12</sup> *Id.* (citing M.I. Hurst & E.B. Cooper, *Vocational Rehabilitation Counselors’ Attitudes Toward Stuttering*, 8 J. FLUENCY DISORDERS 13 (1983)).

<sup>13</sup> Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2006 & Supp. II 2009).

<sup>14</sup> Civil Rights Act of 1964, 42 §§ U.S.C. 2000a-2000h-6 (2006).

<sup>15</sup> See *infra* Part I.

original ADA, explaining why it was passed and the statutory scheme through which to bring a discrimination claim. Part II also documents cases involving stuttering discrimination claims that have been brought under the ADA as well as Supreme Court cases in which the ADA's definition of disability was interpreted narrowly. Part III analyzes the ADA Amendments Act (ADAAA), the purposes of the amendments, and how the amendments affect stuttering discrimination claims. Part IV describes how it would be possible for an employee to bring a stuttering discrimination claim under the amended ADA. In Part V, this note proposes an alternative way to view stuttering—as an element of one's personhood and identity, rather than as a disability. Under this identity model, stuttering discrimination would be covered under Title VII of the Civil Rights Act. Part V goes on to compare the two characterizations of stuttering and concludes that, although the identity model is more effective in obtaining stuttering discrimination coverage under the law, viewing stuttering as a disability is the more realistic path to coverage.

I. OVERVIEW OF STUTTERING: SCIENTIFIC BACKGROUND, STEREOTYPES, AND EVIDENCE OF EMPLOYMENT DISCRIMINATION

Stuttering is complex and variable (in kind and degree), and this contributes to misunderstanding and prejudice against stutterers. This part describes what stuttering is and highlights both the physical and emotional aspects of the condition. In documenting the common stereotypes of stutterers, this part demonstrates how these misconceptions limit employment opportunities for people who stutter. Ultimately, this part shows that employment discrimination based on stuttering is a widespread problem. It also describes the emotional element of stuttering, which courts and lawmakers should consider in order to adequately combat stuttering discrimination in the workplace.

A. *Stuttering as a Physical and an Emotional Condition*

There are two major components of stuttering that must both be analyzed to determine a person's severity of

stuttering.<sup>16</sup> First, there is the physical or behavioral part—what an outside observer can perceive.<sup>17</sup> Second, there is the emotional part, which is characterized by a stutterer's feelings and attitudes about stuttering.<sup>18</sup> Severity—or how much someone is limited by stuttering—is the sum of both of these physical and emotional factors for any one person and is therefore highly individualized.<sup>19</sup>

The physical or behavioral characteristics of stuttering are important because they describe the actual disfluency that the outside listener can hear.<sup>20</sup> Factors included in this analysis are how often moments of stuttering occur, how long they last, how much struggle is involved with them, and the types of disfluencies that are involved.<sup>21</sup> Many people think of a severe stutterer as someone who has frequent moments of stuttering that tend to last a long period of time (numerous seconds).<sup>22</sup>

The emotional aspects of stuttering, though, also play a large role in assessing a stutterer's severity—the actual extent to which a person is affected by stuttering.<sup>23</sup> Emotional issues do not cause stuttering; rather, they are often an effect of stuttering.<sup>24</sup> People who stutter often have feelings associated with their stuttering, such as nervousness, anxiety, fear, frustration, shame, and guilt.<sup>25</sup> But people who stutter also have certain attitudes associated with stuttering—that stuttering is bad or wrong, or that stuttering is a sign of weakness and

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<sup>16</sup> Stephen Hood & Chris Roach, *I've Got a Secret—and It's Scaring Me to Death! (The Story of a Covert Stutterer)*, STUTTERING HOMEPAGE (Aug. 18, 2001), <http://www.mnsu.edu/comdis/isad4/papers/hood.html>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Regarding word choice, this note will not often use the terms *mild*, *moderate*, and *severe* to refer to degree of stuttering because the terms are misleading. This note will instead discuss how often someone physically gets into a stuttering block by using terms that refer to the frequency of stuttering. For example, a way to discuss degrees of stuttering is to say that some people stutter frequently, while for other individuals it is barely noticeable. When this note does refer to *mild* or *severe* stuttering, though, assume that this is a reference to frequency of overt stuttering unless otherwise noted.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; see also Barry Yeoman, *Wrestling with Words*, PSYCHOL. TODAY, Nov./Dec. 1998, at 42, 44 (describing how for some stutterers the condition “means an intense and visible struggle to force individual syllables through their lips, a phenomenon that is physically exhausting for the speaker and mentally awkward for the listener”).

<sup>22</sup> Hood & Roach, *supra* note 16.

<sup>23</sup> *Id.*

<sup>24</sup> *Stuttering Info, What Is Stuttering?*, *supra* note 3; *Stuttering Info, What Causes Stuttering?*, *supra* note 4.

<sup>25</sup> Hood & Roach, *supra* note 16.

failure.<sup>26</sup> People who have infrequent moments of stuttering as well as these feelings and attitudes often consciously try not to have a physical block whenever possible.<sup>27</sup> If they are successful at avoiding physical blocks, the emotional aspects of stuttering may increasingly affect them; in this way, the severity of their stuttering conditions would be higher than observable.<sup>28</sup>

Some people are so successful at hiding the physical aspects of stuttering that they become covert stutterers; they are able to hide their stuttering to such a great extent—through various tricks and crutches—that they are able to pass as fluent speakers.<sup>29</sup> Covert stutterers pay an insufferable price, though, because they fear the constant risk of being exposed.<sup>30</sup> One covert stutterer described the cost of hiding: “Constant terror! Fear, panic and anxiety lived with me every waking minute and even into sleep. Thoughts of discovery paralyzed me.”<sup>31</sup> This demonstrates the inaccuracy of describing a covert stutterer as having a mild problem.<sup>32</sup> Crucial to this understanding is that there is not only an emotional aspect to stuttering but that it can actually serve to reduce the frequency of actual physical stuttering blocks.<sup>33</sup> In other words, the emotional aspect can lead an individual to use extremely emotionally taxing behaviors to disguise the physical aspect.

Every person stutters with different levels of physical and emotional severity.<sup>34</sup> An accurate analysis of how much a

<sup>26</sup> *Id.*; see also Yeoman, *supra* note 21, at 44 (explaining that stutterers know “what it’s like to feel defective, to break a parent’s heart, to have trouble navigating the social milieu of the schoolyard”).

<sup>27</sup> Hood & Roach, *supra* note 16.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* Covert stutterers substitute words and feign ignorance to such an extent that sometimes even their family members do not know their secret. Yeoman, *supra* note 21, at 44.

<sup>30</sup> Hood & Roach, *supra* note 16; see also Terry Dartnall, *Passing as Fluent*, STUTTERING HOMEPAGE (2003), <http://www.mnsu.edu/comdis/isad6/papers/dartnall6.html> (The author, a covert stutterer, describes the downside of covert stuttering: “The higher we fly, the harder we fall. The more fluent we appear to be—and are, for long periods—the harder it is when we land on our backsides.” But the author also describes the upside of being covert—not stuttering publicly—and does not ultimately fully endorse or condemn covert stuttering.)

<sup>31</sup> Hood & Roach, *supra* note 16; see also Yeoman, *supra* note 21, at 44 (describing the psychological fear and anxiety that covert stutterers experience).

<sup>32</sup> Hood & Roach, *supra* note 16; see also *supra* note 19.

<sup>33</sup> Hood & Roach, *supra* note 16.

<sup>34</sup> *Id.* One way of demonstrating this is through the analogy of an iceberg. Russ Hicks, *The Iceberg Analogy of Stuttering*, STUTTERING HOMEPAGE (Aug. 18, 2003), <http://www.mnsu.edu/comdis/isad6/papers/hicks6.html>. In an iceberg, the visible amount of ice above the water’s surface is much smaller than the amount of ice that is below the surface. *Id.* The above-the-water part of the stuttering iceberg is the physical

person is affected by stuttering would include an assessment of both the physical and emotional aspects.<sup>35</sup> This is a widely held view in the field of speech pathology.<sup>36</sup> Moreover, this background knowledge is crucial to fully understanding the next section's discussion of stuttering in the workplace.

*B. Stuttering Stereotypes and Their Relation to Stuttering in the Workplace*

People who stutter are subject to society's widespread negative stereotypes about stuttering.<sup>37</sup> There is a widespread belief that stutterers as a group "exhibit certain negative personality traits such as being shy, quiet, nervous, tense, afraid, self-conscious, etc."<sup>38</sup> Moreover, there are common myths that people who stutter are not as intelligent as those who are fluent<sup>39</sup> and that underlying nervousness causes stuttering.<sup>40</sup>

Stuttering in the workplace is a significant issue for people who stutter.<sup>41</sup> A large study of employers' attitudes toward stuttering conducted in 1983 demonstrates employers' widespread negative attitudes toward people who stutter: 30 percent of employers thought that stuttering interferes with job performance, 40 percent thought it negatively affects promotion possibilities, 44 percent thought that stutterers should seek employment that does not require a lot of speaking, and 85 percent thought that stuttering decreases employability to at least some degree.<sup>42</sup> In a 1994 survey of people who stutter, 16 percent of the stutterers had been told that they would not be hired because of their stuttering, more than half thought that their supervisor had misjudged their capabilities because of stuttering, and more than one-third received negative

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aspect of stuttering, while the below-the-surface part is the emotional aspect. *Id.* Not only is this emotional part invisible, but it is often larger than the physical part. *Id.*

<sup>35</sup> Hood & Roach, *supra* note 16.

<sup>36</sup> See J. Scott Yaruss, *Assessing Quality of Life in Stuttering Treatment Outcomes Research*, 35 J. FLUENCY DISORDERS 190, 190 (2010) (noting how "stuttering can involve far more than just observable speech disfluencies" and citing a plethora of sources).

<sup>37</sup> Michael P. Boyle et al., *Effects of Perceived Causality on Perceptions of Persons Who Stutter*, 34 J. FLUENCY DISORDERS 201, 204 (2009).

<sup>38</sup> *Id.*

<sup>39</sup> *Stuttering: Answers for Employers*, STUTTERING FOUND., <http://www.stutteringhelp.org/Default.aspx?tabid=13> (last visited Jan. 20, 2011).

<sup>40</sup> *Stuttering Info, What Causes Stuttering?*, *supra* note 4.

<sup>41</sup> Joseph F. Klein & Stephen B. Hood, *The Impact of Stuttering on Employment Opportunities and Job Performance*, 29 J. FLUENCY DISORDERS 255, 256 (2004).

<sup>42</sup> *Id.* (citing Hurst and Cooper, *supra* note 11, at 1).

performance evaluations because of stuttering.<sup>43</sup> A 2004 survey also documented that people who stutter believe that their stuttering is a “major handicap” in their working lives.<sup>44</sup> More than 70 percent of the stutterers surveyed thought that they had a decreased opportunity to be hired and promoted than nonstutterers, and 69 percent believed that their past job performance was hindered because of stuttering.<sup>45</sup>

## II. THE ORIGINAL AMERICANS WITH DISABILITIES ACT: BACKGROUND AND CASES INVOLVING STUTTERING

One possible way to deal with employment discrimination based on stuttering is through the federal statute that protects employees who have disabilities, the Americans with Disabilities Act.<sup>46</sup> This part begins by discussing Congress’s purpose in passing the Act, and it continues by describing how an employee may bring a discrimination claim under the ADA. Several employees who stutter have brought ADA claims against their employers, but these claims have been largely unsuccessful. One significant reason for this lack of success is that the U.S. Supreme Court had narrowly interpreted certain key provisions of the ADA regarding the definition of *disability*. Ultimately, this part demonstrates that while there was once some likelihood that the ADA would cover stuttering, by the early 2000s the Supreme Court had significantly limited the probability that the ADA would adequately cover claims of discrimination based on stuttering.

### A. Purpose of the ADA

According to Congress, the ADA is meant to counter discrimination faced by people with disabilities who “have often had no legal recourse to redress such discrimination.”<sup>47</sup> Congress found that discrimination against people with

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<sup>43</sup> *Id.* at 257 (citing M. Rice and R. Kroll, *A Survey of Stutterers’ Perceptions of Challenges and Discrimination in the Workplace*, in *STUTTERING: PROCEEDINGS OF THE FIRST WORLD CONGRESS ON FLUENCY DISORDERS*, II 559 (C.W. Starkweather & H.F.M. Peters eds., 1994)).

<sup>44</sup> *Id.* at 266.

<sup>45</sup> *Id.*

<sup>46</sup> 42 U.S.C. §§ 12101-12213 (2006 & Supp. II 2009). This note focuses on Title I, which deals with employment discrimination. *Id.* § 12112. There are two other main parts to the ADA. Title II prohibits discrimination in public services. 42 U.S.C. § 12132 (2006). Title III proscribes discrimination in public accommodations. *Id.* § 12182.

<sup>47</sup> *Id.* § 12101(a)(4).



disabilities was not only a historical problem but a problem that continues to affect American society in a “persist[ent]” and “pervasive” way, too often according people with disabilities “an inferior status in our society.”<sup>48</sup> President George H. W. Bush stated that the ADA would “signal[] the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.”<sup>49</sup> While the existing Rehabilitation Act of 1973 had been effective, its area of coverage was limited and it “left broad areas of American life untouched or inadequately addressed.”<sup>50</sup>

### B. Framework of the ADA

There are several steps to determining discrimination based on disability under the ADA.<sup>51</sup> Courts apply the *McDonnell Douglas*<sup>52</sup> test, which is the standard for most discrimination litigation.<sup>53</sup> To be successful, the employee must first satisfy three requirements to establish a prima facie case of discrimination. First, the claimant must establish disability.<sup>54</sup> Under the ADA, there are three different ways an individual can show disability, any one of which is enough to establish that a disability exists.<sup>55</sup> A plaintiff can establish the presence of a disability if the condition fits within the statutory

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<sup>48</sup> *Id.* §§ 12101(a)(2)-(3), (6).

<sup>49</sup> President George H.W. Bush, *Statement on Signing the Americans with Disabilities Act of 1990*, reprinted in 1 *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990*, PUBLIC LAW 101-336, at 1166 (Bernard D. Reams Jr. et al. eds., 1992).

<sup>50</sup> *Id.* at 1165. The Rehabilitation Act of 1973 was the first federal handicap discrimination statute. 29 U.S.C. §§ 791-94a (2006). It had only a limited effect, though, because it applied just to the federal government, federal contractors, and federal grant recipients. Larry M. Schumaker, *The Americans with Disabilities Act of 1990*, 47 J. MO. B. 542, 542 (1991). Conversely, the ADA has a significantly wider impact on employment: it covers all public and private employers with fifteen or more employees. 42 U.S.C. § 12111(5)(A). Congress defined *disability* under the ADA in the same way that *handicap* was defined in the Rehabilitation Act, and Congress expected the ADA definition to be applied consistently with the definition in the Rehabilitation Act. Schumaker, *supra*, at 543. While this note does not focus on the Rehabilitation Act because of the ADA’s wider scope, the Rehabilitation Act is relevant, and this note will refer to it and its case law where appropriate.

<sup>51</sup> *Andresen v. Fuddruckers, Inc.*, No. Civ. 03-3294 DWF/SRN, 2004 WL 2931346, at \*4 (D. Minn. Dec. 14, 2004).

<sup>52</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>53</sup> GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 37 (3d ed. 2010). In fact, the ADA was modeled on Title VII of the Civil Rights Act. *Id.* at 229; Drew S. Days, III, “Feedback Loop”: *The Civil Rights Act of 1964 and Its Progeny*, 49 ST. LOUIS U. L.J. 981, 992 (2005).

<sup>54</sup> *Andresen*, 2004 WL 2931346, at \*4.

<sup>55</sup> 42 U.S.C. § 12102(1) (Supp. II 2009).

definition of a disability—“a physical or mental impairment that substantially limits one or more [of an individual’s] major life activities.”<sup>56</sup> An employee can also establish the presence of a disability if there is “a record of such an impairment” as denoted in the above statutory definition.<sup>57</sup> The third way an individual can show disability is if he or she is “regarded as having such an impairment.”<sup>58</sup> Here, *regarded as* means that the employer (the person who took the adverse—and potentially discriminatory—employment action) is the one who is regarding (perceiving) the individual as having a disability (even if the person does not actually have a disability). Assuming that a claimant can establish that a disability exists under one of these three possibilities, the next part of the prima facie case requirement is to determine whether the person is “qualified to perform the essential functions of the job, with or without reasonable accommodation.”<sup>59</sup> The third and final element necessary to establish a prima facie case is that the employee suffers an “adverse employment action” because of the disability.<sup>60</sup> If the claimant can establish a prima facie case, a burden-shifting analysis ensues. The employer can rebut this presumption of discrimination “by articulating a legitimate, non-discriminatory reason for the adverse employment action.”<sup>61</sup> If the employer can do this, the burden then shifts back to the plaintiff “to demonstrate that the employer’s non-discriminatory reason is pretextual.”<sup>62</sup>

### C. *Stuttering Cases Under the ADA*

Several cases decided prior to the ADAAA held that stuttering is not a disability. The principal reason for this interpretation was that the plaintiffs failed to claim that stuttering was a significant obstacle in their lives. For example, in *Zhong v. Tallahatchie General Hospital and*

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<sup>56</sup> *Id.* § 12102(1)(A). The Equal Employment Opportunity Commission’s (EEOC) regulations refer to this prong as “actual disability” in order to distinguish it from the other two prongs (not to suggest that this prong brings with it greater rights). Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended, 76 Fed. Reg. 16,978, 16,980 (Mar. 25, 2011). This note will use this term where appropriate to avoid confusion.

<sup>57</sup> 42 U.S.C. § 12102(1)(B).

<sup>58</sup> *Id.* § 12102(1)(C).

<sup>59</sup> *Andresen*, 2004 WL 2931346, at \*4.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (quoting *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999)).

<sup>62</sup> *Id.* (quoting *Kiel*, 169 F.3d at 1135).

*Extended Care Facility*, a hospital said that it fired a medical technologist because he was incompetent.<sup>63</sup> The fired employee filed several discrimination claims, one of which was an allegation that he was improperly terminated under the ADA because of his stutter.<sup>64</sup> The District Court for the Northern District of Mississippi dismissed the claim because the plaintiff, in his deposition, described his stuttering as “very mild, very, very mild” and occurring “[o]nly occasionally.”<sup>65</sup> Plaintiff also testified that his stuttering did not affect his work and that he was able to perform his required tasks “without a[n] accommodation.”<sup>66</sup> In granting summary judgment to the defendant, the court stated that, based on plaintiff’s own testimony, plaintiff’s stuttering clearly did not substantially limit his ability to speak or work and, further, that he had not shown that defendant regarded him as having a disability.<sup>67</sup>

The court in *Preacely v. Schulte Roth & Zabel* similarly held that stuttering is not a disability. There, a legal word processor was fired because the law-firm employer said that he “ma[de] his co-workers feel uncomfortable and unsafe” due to his inappropriate comments and drawings.<sup>68</sup> The plaintiff claimed stuttering discrimination in violation of the ADA.<sup>69</sup> In affirming the district court’s grant of summary judgment to the law firm, the Second Circuit Court of Appeals highlighted that the former employee “admitted that his stutter was neither a physical nor a mental disability . . . and that it did not interfere with his ability to work or talk.”<sup>70</sup>

The court’s decision in *Detko v. Blimpies Restaurant* also involved denial of a stuttering discrimination claim—albeit under Title III of the ADA, which involves claims regarding discrimination by private entities in public accommodations, rather than a discrimination claim under Title I.<sup>71</sup> The plaintiff, a customer of defendant Blimpies

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<sup>63</sup> *Zhong v. Tallahatchie Gen. Hosp. & Extended Care Facility*, No. 2:98CV44-JAD, 1999 WL 33227442, at \*1 (N.D. Miss. Sept. 28, 1999).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at \*3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Preacely v. Schulte Roth & Zabel*, 17 F. App’x 57, 58 (2d Cir. 2001).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 58-59.

<sup>71</sup> *Detko v. Blimpies Rest.*, 924 F. Supp. 555, 557 (S.D.N.Y. 1996). *Detko* is still relevant because the same definition of disability in Title I applies to Titles II and III of the ADA, and whether the plaintiff was disabled was the issue in the case. *See* 42 U.S.C. § 12102(1) (Supp. II 2009).

Restaurant, filed a claim of discrimination on the basis of his stuttering after an incident that occurred when he attempted to order a sandwich in the restaurant.<sup>72</sup> The facts, as alleged by the plaintiff, are particularly interesting. He claimed that he tried to order a sandwich with extra mayonnaise and stuttered on the word “mayonnaise.”<sup>73</sup> The employee serving him, who turned out to be the store’s manager, yelled at him to “[h]urry it up,” and the customer “became embarrassed and distressed.”<sup>74</sup> After the manager stopped preparing the customer’s sandwich, the customer asked to speak with the manager to file a complaint.<sup>75</sup> Meanwhile, another employee served the customer the sandwich.<sup>76</sup> The manager refused to identify himself, threw the sandwich in the trash, grabbed the plaintiff “by the neck[,] and dragged him out of the restaurant.”<sup>77</sup> The court granted Blimpie’s motion to dismiss because the customer did “not allege[] that his impediment *substantially* limit[ed] his speaking or that he is regarded as having such an impairment. . . . [H]e *merely* allege[d] that he stutters, and has particular difficulty with the letter ‘M.’”<sup>78</sup>

In *Zhong*, *Preacely*, and *Detko*, the courts hearing the cases did not find stuttering to be a disability under the ADA. But, these results may be attributable to the fact that each of the three plaintiffs failed to allege that stuttering was a substantial limitation—or admitted outright that it was not. Thus, these plaintiffs do not appear to be exemplars by which to determine stuttering’s status under the ADA.

The court in *Andresen v. Fuddruckers, Inc.* sent a strong signal that stuttering could be covered under the ADA if a plaintiff could demonstrate that her stuttering was severe.<sup>79</sup> Fuddruckers restaurant terminated the plaintiff’s employment after sixteen years of service.<sup>80</sup> While the restaurant claimed that the former employee was fired for poor performance and for drooling and spitting into food, plaintiff “allege[d] that she was fired because she stutter[ed].”<sup>81</sup> The court denied Fuddruckers’s

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<sup>72</sup> *Detko*, 924 F. Supp. at 556.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 557 (second emphasis added).

<sup>79</sup> *Andresen v. Fuddruckers, Inc.*, No. Civ. 03-3294 DWF/SRN, 2004 WL 2931346, at \*6 (D. Minn. Dec. 14, 2004).

<sup>80</sup> *Id.* at \*1.

<sup>81</sup> *Id.*

motion for summary judgment, finding a genuine issue of fact as to whether plaintiff's "stuttering constitute[d] a 'disability' under the ADA."<sup>82</sup> Plaintiff claimed that her stuttering was severe, and that she avoided saying certain words and sounds and entering into speaking situations; she also alleged that she had difficulty speaking in general, especially when communicating with strangers and on the telephone, and that people had difficulty understanding her.<sup>83</sup> A speech pathologist confirmed that her stuttering was severe.<sup>84</sup> Also, the former employee sometimes had excess saliva that, according to her, only happened when she stuttered.<sup>85</sup> Notwithstanding her stuttering and saliva issues, Andresen enjoyed a lengthy, successful term of employment with Fuddruckers until new managers took over the restaurant.<sup>86</sup> Plaintiff's "evidence [was] sufficient to create a genuine issue of fact that her stuttering [was] severe and that it substantially limit[ed] her ability to speak."<sup>87</sup> In its analysis, the court examined *Zhong* and *Preacely* and distinguished them on their facts. Those precedents did "not persuade the Court that [plaintiff's] stuttering [could not], as a matter of law, constitute a disability."<sup>88</sup> The court also determined "that a triable issue of fact exist[ed] as to whether Andresen was qualified to do her job . . . [and] whether she was terminated because of her stuttering."<sup>89</sup>

The Equal Employment Opportunity Commission's (Commission or EEOC) decision in *Manning v. United States Postal Service* also demonstrates that stuttering can be considered a disability.<sup>90</sup> The complainant, Robert Manning, described his stuttering as severe.<sup>91</sup> He said that he could not speak in public and was embarrassed to take classes.<sup>92</sup> Manning claimed that he noticed derogatory graffiti on the stalls in two men's restrooms: the writing mocked his stuttering.<sup>93</sup> Although Manning noticed the graffiti in late winter or early spring 2000

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<sup>82</sup> *Id.* at \*6, \*8.

<sup>83</sup> *Id.* at \*1.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*1-3.

<sup>87</sup> *Id.* at \*6.

<sup>88</sup> *Id.* at \*6 & n.10 (noting that the plaintiffs in *Zhong* and *Preacely* both admitted that they do not stutter frequently).

<sup>89</sup> *Id.* at \*6-7.

<sup>90</sup> Manning, E.E.O.C. Dec. 01A42153, 2004 WL 1810386, at \*1 (Aug. 5, 2004). This case was before the Commission under the Rehabilitation Act, as Manning worked for a federal agency. *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

and discussed the matter with his supervisor, the graffiti was not cleaned off until October 27, 2000.<sup>94</sup> It then reappeared and remained on the walls until the complainant left the Postal Service in March 2001.<sup>95</sup> A psychiatric evaluation stated that Manning only stuttered mildly,<sup>96</sup> but the Commission reversed the administrative judge's ruling of a decision without a hearing.<sup>97</sup> The Commission found a "genuine issue of material fact" as to whether the complainant was "substantially limited in the major life activity of speaking."<sup>98</sup> According to the Commission, a hearing was not only necessary to resolve the issue of fact, but it was crucial: the hearing would give the administrative law judge an opportunity to hear how Manning stuttered.<sup>99</sup>

This finding connotes the individualized inquiry that would be done were stuttering considered solely under a disability theory; stuttering would not be a disability for every person who stutters, but only if it substantially affects that person's speaking.<sup>100</sup> So, while not yet finding that Manning's stuttering substantially limited his speaking, the Commission noted that his stuttering could be deemed substantially limiting if the facts at the hearing bore that out.<sup>101</sup> The Commission further ruled that Manning could possibly be covered under the regarded-as prong of the definition of disability—which protects against discrimination based on stereotypes—if further facts demonstrated this.<sup>102</sup> The Commission noted that stuttering is a condition that is characterized by stigmatizing stereotypes and "attitudinal barriers" that can affect a stutterer's employment opportunities.<sup>103</sup> These stereotypes include the beliefs that people who stutter are "nervous, shy, quiet, self-conscious, withdrawn, tense, anxious, fearful and guarded."<sup>104</sup> In sum, then, considering these pre-ADAAA cases, courts only found stuttering to be a disability when the physical component of stuttering severely

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at \*2.

<sup>97</sup> *Id.* at \*3.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at \*3-4. Note that under the ADAAA, as explained *infra*, a claimant can meet the requirements for the regarded-as prong without showing that he or she was regarded as being substantially limited in a major life activity. *See infra* Part III.B.3.

<sup>103</sup> *Manning*, 2004 WL 1810386, at \*4.

<sup>104</sup> *Id.*

affected an individual. In part, the Supreme Court's interpretation of the ADA required this narrow definition of disability, as discussed in the next section.

*D. Supreme Court Cases Limiting the Definition of Disability Under the ADA*

1. *Sutton v. United Air Lines, Inc.*

In *Sutton*, the Supreme Court addressed the question of whether corrective or mitigating measures must be considered when determining whether an impairment substantially limits a major life activity, the first prong of the ADA test for determining whether a disability exists.<sup>105</sup> The case arose after two sisters applied for employment with United Air Lines as commercial airline pilots.<sup>106</sup> Both sisters had severe myopia; their eyesight was poor enough that without corrective lenses, they could not participate in numerous daily activities.<sup>107</sup> However, with glasses or contact lenses, they could see as well as people who did not have impaired eyesight.<sup>108</sup> After United Air Lines initially invited them for an interview, it realized that they did not meet the company's minimum uncorrected vision requirement.<sup>109</sup> United Air Lines subsequently canceled the interview, and the sisters filed suit, alleging disability discrimination under the ADA.<sup>110</sup> They specifically claimed that "they actually [had] a substantially limiting impairment or [were] regarded as having such an impairment."<sup>111</sup> The district court and the Court of Appeals for the Tenth Circuit found that they had not stated a claim of disability within the meaning of the ADA.<sup>112</sup>

The Supreme Court affirmed with respect to the first claim and held that if a person is taking measures to correct or mitigate an impairment, the effects of those measures "must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."<sup>113</sup> To reach this result, the Court

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<sup>105</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

<sup>106</sup> *Id.* at 475.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 476.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 476-77.

<sup>113</sup> *Id.* at 477, 482 (quoting 42 U.S.C. § 12102(2)(A) (2006)).

looked to three separate provisions of the ADA.<sup>114</sup> The Court first reasoned that the phrase *substantially limits* applies to the present, so that a “person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently ‘substantially limits’ a major life activity.”<sup>115</sup> Next, the Court reasoned that because a determination of disability under the ADA is an “individualized inquiry,” judges should examine an individual based on that person’s actual condition, not general information on how a group of people with the same impairment is usually affected.<sup>116</sup> For the individualized analysis to be accurate, the Court noted that judges must consider a person’s use of mitigating measures.<sup>117</sup> Finally, the Court looked at the number of people with disabilities that Congress cited in the ADA—forty-three million—to conclude that the legislature intended to take a “functional approach to determining disability” rather than a nonfunctional approach.<sup>118</sup> Therefore, because the plaintiffs wore corrective lenses, they could not successfully make a claim that they were substantially limited in any major life activity.<sup>119</sup> The Court in *Sutton* also provided a strict standard for the regarded-as prong of the disability definition. In order to be regarded as disabled, the Court held, the employer must regard the claimant substantially limited in a major life activity; thus, even under the regarded-as prong, substantial limitation is the standard for disability.<sup>120</sup>

2. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*

*Toyota* further limits the definition of disability under the ADA. In *Toyota*, the Supreme Court needed to interpret the terms *substantially* and *major* to determine whether a person

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<sup>114</sup> *Id.* at 482.

<sup>115</sup> *Id.* at 482-83.

<sup>116</sup> *Id.* at 483.

<sup>117</sup> *Id.* at 483-84.

<sup>118</sup> *Id.* at 484-87. The functional approach does not include people who successfully use mitigating measures to overcome their limitations. *Id.* at 485. The nonfunctional approach, also known as the “health conditions approach,” “looks at all conditions that impair the health or normal functional abilities of an individual.” *Id.* at 485, 487. Using this approach, over 160 million Americans would be considered disabled. *Id.* at 487.

<sup>119</sup> *Id.* at 488-89.

<sup>120</sup> *Id.* at 491, 493.



was disabled under the ADA.<sup>121</sup> The case involved Ella Williams, who had been employed in an automobile manufacturing plant by Toyota Motor Manufacturing (Toyota).<sup>122</sup> Over the course of several years, Williams developed pain and was diagnosed with carpal tunnel syndrome and several other conditions.<sup>123</sup> This made it difficult for her to continue working at Toyota.<sup>124</sup> After Williams's employment was terminated, she filed suit against her former employer, claiming that Toyota violated the ADA.<sup>125</sup> Williams claimed that she was disabled because her physical impairments substantially limited her in six ways,<sup>126</sup> each of which she claimed was a major life activity.<sup>127</sup> She also alleged that she was disabled under the ADA because she had a record of impairment and because she was regarded as having an impairment.<sup>128</sup> While the district court ruled in favor of Toyota, the Court of Appeals for the Sixth Circuit reversed and found that Williams was disabled because she had been substantially limited in performing manual tasks.<sup>129</sup> The Supreme Court granted certiorari "to consider the proper standard for assessing whether an individual is substantially limited in performing manual tasks."<sup>130</sup>

In deciding to strictly interpret both *substantially* and *major*, the Supreme Court reversed.<sup>131</sup> The Court reasoned that these terms must be interpreted strictly, in part because of Congress's intent, as discussed in *Sutton*.<sup>132</sup> In order to be substantially limited in performing manual tasks, the Court held that "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives [and that t]he impairment's impact must also be

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<sup>121</sup> *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196-97 (2002), superseded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, as recognized in *Ragusa v. Malverne Union Free Sch. Dist.*, 582 F. Supp. 2d 326, 341 & n.4 (E.D.N.Y. 2008).

<sup>122</sup> *Id.* at 187.

<sup>123</sup> *Id.* at 187-89.

<sup>124</sup> *Id.* at 189-90.

<sup>125</sup> *Id.* at 190.

<sup>126</sup> Williams claimed that her physical impairments substantially limited her in manual tasks, housework, gardening, playing with her children, lifting, and working. *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 190-92.

<sup>130</sup> *Id.* at 192.

<sup>131</sup> *Id.* at 192, 196-97.

<sup>132</sup> *Id.* at 197.

permanent or long term.”<sup>133</sup> Taking into account the individualized inquiry required by the statute, and also the fact that symptoms can “vary widely from person to person” with certain impairments, the Court reasoned that mere evidence of a medical diagnosis would be “insufficient . . . to prove disability status;” rather, whether a person has a disability under the ADA must be based upon the extent of that individual’s impairment.<sup>134</sup> When analyzing the major life activity of performing manual tasks, the Court stated that the main question must be whether the individual “is unable to perform the variety of tasks central to most people’s daily lives,” not just the tasks associated with that person’s specific job.<sup>135</sup> This was a crucial point because “the manual tasks unique to any particular job are not necessarily important parts of most people’s lives.”<sup>136</sup> In this case, there were some manual tasks that Williams was able to do at work, and outside of work she was able to perform many of the manual tasks that are central to most people’s daily lives.<sup>137</sup> Therefore, the court of appeals was incorrect to find that Williams was disabled under the ADA.<sup>138</sup>

### III. THE ADA AMENDMENTS ACT

In response to how the ADA had been interpreted by the Supreme Court in *Sutton* and *Toyota*, Congress passed the ADA Amendments Act in 2008.<sup>139</sup> The Amendments Act significantly broadened the scope of *disability* under the ADA.<sup>140</sup> After expanding on Congress’s purpose in passing the ADAAA, this part details the specific changes in the ADAAA and discusses how each of the changes affects discrimination claims brought on the basis of stuttering. Taken as a whole, the ADAAA decreases plaintiffs’ burdens to show that their stuttering is a disability.

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<sup>133</sup> *Id.* at 198.

<sup>134</sup> *Id.* at 198-99.

<sup>135</sup> *Id.* at 200-01.

<sup>136</sup> *Id.* at 201.

<sup>137</sup> *Id.* at 202.

<sup>138</sup> *Id.* at 203.

<sup>139</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The Equal Employment Opportunity Commission promulgated amended regulations as well, which became effective on May 24, 2011. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended, 76 Fed. Reg. 16,978, 16,978 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630).

<sup>140</sup> ADA Amendments Act of 2008 § 4, 122 Stat. at 3555.

### A. *Congressional Purpose*

One of the major purposes of the ADAAA was to place the emphasis of ADA claims on whether a qualified person has been discriminated against on the basis of disability, rather than on the preliminary question of whether a plaintiff is disabled.<sup>141</sup> Congress deemed the definition of disability less important than the determination of whether covered entities complied with their obligations not to discriminate.<sup>142</sup> The amended statute embraces a wider-encompassing meaning of disability, defining the term “in favor of broad coverage of individuals.”<sup>143</sup> Congress removed two original findings from the ADA because they provided a justification for the Supreme Court to narrowly construe the definition of disability<sup>144</sup>: (1) that there are forty-three million Americans with disabilities,<sup>145</sup> and (2) that individuals with disabilities constitute “a discrete and insular minority.”<sup>146</sup> Removing the findings enlarges the class of individuals that the statute is intended to protect and, by extension, allows for an increasing number of impairments to be considered disabilities.<sup>147</sup> Moreover, the old ADA prohibited discrimination against a qualified individual “with a disability because of the disability of such individual,”<sup>148</sup> while the ADAAA prohibits discrimination against a qualified individual “on the basis of disability.”<sup>149</sup> Therefore, the major purpose of the ADAAA is to make it easier for individuals to be

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<sup>141</sup> *Id.* at 3554; *see also* 29 C.F.R. § 1630.1(c)(4) (2011) (“The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.”).

<sup>142</sup> ADA Amendments Act of 2008 § 2, 122 Stat. at 3554.

<sup>143</sup> 42 U.S.C. § 12102(4)(A) (Supp. II 2009).

<sup>144</sup> ADA Amendments Act of 2008 § 3, 122 Stat. at 3554-55.

<sup>145</sup> 42 U.S.C. § 12101(a)(1).

<sup>146</sup> *Id.* § 12101(a)(7).

<sup>147</sup> *See* ADA Amendments Act of 2008 § 2, 122 Stat. at 3553 (“[L]ower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities . . .”).

<sup>148</sup> 42 U.S.C. § 12112(a) (2006).

<sup>149</sup> *Id.* § 12112(a) (Supp. II 2009). This (subtle) change in language—specifically, the removal of “with a disability”—further demonstrates the way Congress wanted courts to more easily dispense with the question of whether an individual is disabled. UNDERSTANDING THE NEW DISABILITY AND GENETIC DISCRIMINATION LAWS 2008, at 23 (Joyce Gentry et al. eds., 2008) [hereinafter UNDERSTANDING]. In fact, this language was structured on Title VII of the Civil Rights Act. *Id.*

considered disabled under the statute.<sup>150</sup> In and of itself, this legislative purpose makes it more likely that individuals who stutter will be protected by the ADAAA.

*B. Specific Changes Under the ADAAA and How They Relate to Stuttering*

The amendments made numerous changes to the ADA. The changes affect several areas: the definition of *substantially limits*, episodic impairments and impairments in remission, which activities are considered major life activities, effects of mitigating measures, and the requirements of the regarded-as prong. Each of these changes has substantial implications regarding the extent to which stuttering is considered a disability under the ADA.

1. Speaking as a Major Life Activity

No major life activities were listed in the old ADA.<sup>151</sup> The amended statute, though, provides a nonexhaustive list of activities.<sup>152</sup> Under the ADAAA, speaking is explicitly listed as a major life activity.<sup>153</sup> In our society, a limitation on one's ability to speak can interfere with life activities in which people without such limitations regularly engage. Speaking plays a vital role in communication. If there was any doubt as to the significance of speaking in people's daily lives, the statute now removes the ambiguity. Further, because of the "substantially limits" requirement, it would not make sense for the statute to only cover a total inability to speak—i.e., muteness. For many people who stutter, their speech impediment substantially limits—but does not preclude—their ability to speak. Therefore, the inclusion of speaking as a major life activity would make it easier for stuttering to be considered a disability under the ADA.

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<sup>150</sup> See ADA Amendments Act of 2008 § 2, 122 Stat. at 3554 (stating that the purpose of the amendments is "to carry out the ADA's objectives . . . by reinstating a broad scope of protection to be available under the ADA").

<sup>151</sup> 42 U.S.C. § 12102(2) (2006) (disability is defined, but no list is given); UNDERSTANDING, *supra* note 149, at 21. The EEOC did promulgate a regulatory definition, though, and speaking was on that list. 29 C.F.R. § 1630.2(i) (2010) (amended 2011).

<sup>152</sup> 42 U.S.C. § 12102(2)(A).

<sup>153</sup> *Id.*

## 2. *Substantially Limits*: A Less Demanding Standard

The ADAAA establishes that the substantially limits requirement was to be construed significantly more broadly than courts had been interpreting the term.<sup>154</sup> Moreover, there are three specific ways in which *substantially limits* has become a more inclusive standard.

First, only one major life activity needs to be substantially limited for an individual to have a cognizable disability under the ADAAA.<sup>155</sup> Therefore, it would suffice if stuttering substantially limited speaking without substantially limiting any other major life activity.

Second, the amended statute provides coverage for impairments that are episodic or in remission, so long as they fit the statutory definition of disability when they are active.<sup>156</sup> A useful test for determining if an individual's impairment is substantially limiting is whether an individual's activities are limited in "condition, duration and manner."<sup>157</sup> Stuttering could be considered episodic because of how the physical stuttering block does not occur constantly. Sometimes, a person does not physically stutter for long periods of time; there may be days or more between stutters.<sup>158</sup> This person who stutters only intermittently would likely be covered under this amendment. When a person is stuttering, the involuntary interruptions can substantially limit one's ability to speak.

Third, the ADAAA states that the use or lack of use of mitigating or corrective measures cannot be taken into account

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<sup>154</sup> *Id.* § 12102(4)(B) (Supp. II 2009) ("The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008."); ADA Amendments Act of 2008 § 2, 122 Stat. at 3554. Specifically, one purpose of the amendments is to convey congressional intent that the standard for "substantially limits" as articulated in *Toyota* "has created an inappropriately high level of limitation necessary to obtain coverage under the ADA." *Id.* Additionally, Congress found that the EEOC regulations that defined "substantially limits" as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard." *Id.*

<sup>155</sup> 42 U.S.C. § 12102(4)(C) (Supp. II 2009) ("An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability."); 29 C.F.R. § 1630.2(j)(1)(viii) (2011). This is the same as under the original ADA. 42 U.S.C. § 12102(2)(A) (2006).

<sup>156</sup> 42 U.S.C. § 12102(4)(D) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."); 29 C.F.R. § 1630.2(j)(1)(vii).

<sup>157</sup> UNDERSTANDING, *supra* note 149, at 18.

<sup>158</sup> *See Hood & Roach, supra* note 16.

when determining whether or not a person has a disability.<sup>159</sup> The statute lists various mitigating measures that cannot be considered: (1) medication and medical supplies and equipment, (2) assistive technology, (3) reasonable accommodations or auxiliary aids or services, or (4) learned behavioral or adaptive neurological modifications.<sup>160</sup>

There are several ways—including speech therapy<sup>161</sup> and use of assistive devices<sup>162</sup>—people can attempt to mitigate their stuttering. One of the reasons this provision is so important in relation to stuttering is that each of these measures has varying levels of effectiveness for each person who uses them. Just as the cause of stuttering is not understood, what makes these methods effective is also not understood. In this way, it is not a person's fault if these measures do not work to reduce a person's stuttering.<sup>163</sup> In turn, it would be unfair if the availability of mitigating factors weighed against considering stuttering a disability; this would harm those people on whom these techniques were not effective. Furthermore, some people who stutter do not believe in using these methods, and it would be unfortunate to create a situation where—because stuttering could not be recognized as a disability—there is more pressure on people who stutter to use these measures because there would be no other recourse in the workplace.

### 3. Regarded-As Prong Changed

The ADA amendments both broaden and narrow the scope of coverage under the regarded-as prong of disability. A person can now be regarded as having a disability if this

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<sup>159</sup> 42 U.S.C. § 12102(4)(E)(i) (“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of [numerous enumerated] mitigating measures . . . .”); 29 C.F.R. § 1630.2(j)(1)(vi); *see also* ADA Amendments Act of 2008 § 2, 122 Stat. at 3554 (explicitly noting a purpose of the amendments to reject *Sutton*, which had held that impairments need to be determined *with* regard to mitigating measures).

<sup>160</sup> 42 U.S.C. § 12102(4)(E)(i)(I)-(IV). Ordinary eyeglasses and contact lenses, though, can be considered in determining whether an impairment substantially limits a major life activity. *Id.* § 12102(4)(E)(ii).

<sup>161</sup> *See JEZER, supra* note 7, at 68, 76 (noting that there are two different major approaches to speech therapy, but explaining that “what works in the clinic doesn't easily carry over into the real world”).

<sup>162</sup> The SpeechEasy is one such tool. *What Is SpeechEasy?*, SPEECHEASY, <http://www.speecheasy.com/whatispeecheasy.php> (last visited Jan. 21, 2011). It looks like a hearing aid and “mimics the choral effect paired with traditional fluency techniques.” *Id.*; *How It Works*, SPEECHEASY, <http://www.speecheasy.com/whatispeecheasy.php> (last visited Jan. 21, 2011).

<sup>163</sup> *See Stuttering Info, What Causes Stuttering?*, *supra* note 4.

individual can show discrimination based on an actual or perceived impairment, even if the impairment does not limit—or is not perceived to limit—a major life activity.<sup>164</sup> In this way, Congress reinstated the reasoning of *School Board of Nassau County, Florida v. Arline*.<sup>165</sup>

In *Arline*, an elementary-school teacher was fired after she suffered a third relapse of tuberculosis in the span of two years.<sup>166</sup> She brought suit, claiming a violation of the Rehabilitation Act.<sup>167</sup> The Supreme Court found that she was a person with a handicap under the regarded-as prong.<sup>168</sup> Under that part of the definition, the “negative reactions of others” to an impairment can limit a person’s ability to work.<sup>169</sup> In explaining the regarded-as prong, the Court looked to congressional intent to reason that “society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”<sup>170</sup>

Coverage under the regarded-as prong was narrowed under the amendments, though, in two ways. First, impairments that are transitory and minor are not covered under the regarded-as prong.<sup>171</sup> Stuttering is permanent, so it would not be restricted by this provision. Second, and more importantly in this context, the ADAAA does not require reasonable accommodations to be made for people who only fit the definition of disability under the regarded-as prong.<sup>172</sup> This part of the statute resolved a circuit split over whether the third prong required reasonable accommodations.<sup>173</sup>

<sup>164</sup> 42 U.S.C. § 12102(3)(A) (“An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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.*” (emphasis added)); 29 C.F.R. § 1630.2(j)(2).

<sup>165</sup> 480 U.S. 273, 284 (1987). See ADA Amendments Act of 2008 § 2, 122 Stat. at 3554 (articulating a purpose of the amendments to reject *Sutton*’s interpretation of the regarded-as prong and reinstate the reasoning in *Arline*).

<sup>166</sup> *Arline*, 480 U.S. at 276.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 284-86.

<sup>169</sup> *Id.* at 283.

<sup>170</sup> *Id.* at 284.

<sup>171</sup> 42 U.S.C. § 12102(3)(B) (Supp. II 2009) (defining transitory as being six months or less); 29 C.F.R. § 1630.15(f) (2011). But, a transitory impairment can fit the definition of disability under the actual-disability prong or the record-of prong. *Id.* § 1630.2(j)(1)(ix).

<sup>172</sup> 42 U.S.C. § 12201(h); 29 C.F.R. § 1630.9(e). Because of this, the EEOC noted that it is unnecessary to proceed under the actual-disability or record-of prong when an individual is not seeking a reasonable accommodation; the analysis could then be made solely under the regarded-as prong. *Id.* § 1630.2(g)(3).

<sup>173</sup> UNDERSTANDING, *supra* note 149, at 24-25.

This is quite significant in relation to stuttering because it addresses the reality that there may be less protection for people who do not stutter frequently under the actual-disability prong of disability.<sup>174</sup> Under this provision, if a person who stutters is discriminated against because of stuttering, this individual can be regarded as having a disability—even if courts would not consider stuttering as limiting the person’s speaking. This provision seems to allow people who do not stutter frequently to nevertheless gain protection against discrimination. Furthermore, and quite significantly, this may be incentive for people who choose to hide their stuttering—by avoiding speaking situations—to speak up, with the knowledge that (even based on just a few physical blocks) any discrimination can have a legal remedy.

### C. ADAAA Case Law

In *Medvic v. Compass Sign Co., LLC*, a Title I case analyzed under the ADAAA, plaintiff’s claim of discrimination based on stuttering survived defendant’s motion for summary judgment.<sup>175</sup> The plaintiff, Donald Medvic, was employed as a sheet-metal mechanic for the defendant, Compass Signs.<sup>176</sup> Medvic stuttered, and, although he never asked for an accommodation, his supervisors were aware of his speech impediment because they could hear it.<sup>177</sup> Medvic was laid off, and he brought two claims against Compass Signs based on the ADA—that his termination was due to his stuttering disability, and that he was subjected to a hostile work environment.<sup>178</sup> In evaluating Compass Signs’s summary-judgment motion, the court first analyzed whether Medvic was disabled under the

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<sup>174</sup> The reason for this is that infrequent stuttering may not be viewed as a substantial limit on speaking. *See supra* Part I.

<sup>175</sup> *Medvic v. Compass Sign Co., LLC*, Civ. A. No. 10-5222, 2011 WL 3513499, at \*1, \*10 (E.D. Pa. Aug. 10, 2011).

<sup>176</sup> *Id.* at \*1.

<sup>177</sup> *Id.* at \*1-2. The court described Medvic’s stutter as making it difficult for him to communicate orally and sometimes causing him to be unable to say what he wants to say for several minutes. *Id.* at \*1. Medvic’s coworkers, at least once, needed to help him order food while out for dinner. *Id.* at \*2. Medvic accused his supervisors of making fun of his stuttering. Specifically, he claimed they asked him to sing for them and would tell him to just spit it out. *Id.* at \*3. But Medvic said that his stutter did not affect his ability to do his job, and the defendant agreed; once, Medvic’s supervisors considered warning a customer about his stuttering, but they ultimately chose not to do so because he “always found his way.” *Id.*

<sup>178</sup> *Id.* at \*1.



terms of the ADAAA.<sup>179</sup> The court found that there was a genuine issue of fact as to whether Medvic was substantially limited in communicating: stuttering sometimes delayed his speech for minutes at a time, stuttering impeded his social life, he stuttered during his deposition, and his coworkers testified to his stuttering hindering his ability to communicate.<sup>180</sup> The company argued that, because Medvic sat for his deposition, he could not have been substantially limited in his ability to communicate, but the court rejected this argument.<sup>181</sup> The court maintained that Medvic could still be substantially limited in communicating even if he could communicate effectively sometimes.<sup>182</sup> The court cited the ADAAA for further support.<sup>183</sup> Then, the court found that Medvic also survived summary judgment regarding whether he was otherwise qualified for the job and whether the company's action was taken because of his stuttering.<sup>184</sup>

#### IV. BRINGING A WORKPLACE STUTTERING DISCRIMINATION CLAIM UNDER THE AMENDED ADA

The ADAAA was intended to make it easier for claimants to show that they have a disability under the statutory definition of that term. The amendments do make it easier for stutterers to show that they have a disability. This part methodically goes through the statute to document how a successful stuttering discrimination claim can be brought under the ADAAA. The analysis will show how applying the complex nature of stuttering to the definition of disability under the ADAAA can result in broad antidiscrimination coverage for people who stutter. Significantly, one way to address this problem of the emotional aspect of stuttering is to demonstrate that even an infrequent overt stutterer can be considered substantially limited in speaking. In fact, this part will focus on this type of stutterer because of the law's heretofore lack of attention to this area. Still, there are

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<sup>179</sup> *Id.* at \*5-7.

<sup>180</sup> *Id.* at \*6-7. The court seems to stress that Medvic stuttered frequently and with great struggle, "at times rendering him incapable of verbally communicating for himself." *Id.* at \*7. The court referred to the ADAAA: it noted that Medvic took medicine to help him stutter less but that mitigating measures must not be considered, and it explained that his stutter is substantially limiting even though it is episodic. *Id.* at \*7.

<sup>181</sup> *Id.* at \*7.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* The court pointed to the ADAAA here to demonstrate that Congress intended to broaden protections. *Id.*

<sup>184</sup> *Id.* at \*7-10.

shortcomings of coverage in approaching stuttering as a disability.

A. *Establishing Stuttering as a Disability Under the ADAAA*

1. Stuttering Substantially Limits a Major Life Activity

Under the ADAAA, a person who stutters may be able to show that stuttering substantially limits speaking, a major life activity under the Act. This would be an individualized inquiry. But for the inquiry to be proper, it would need to take into account both the physical and the emotional aspects of stuttering. With respect to the physical aspect, the law already accounts for a certain sect of the stuttering population.<sup>185</sup> People who stutter frequently should be able to show that their disfluencies are substantially limiting, while people who stutter infrequently would not be able show that their speech impediments substantially limit their speaking.

The law, however, has not accounted for the emotional aspect of stuttering. Nevertheless, stutterers who are greatly affected by the emotional aspect of stuttering should also be able to show that they are substantially limited in a major life activity. Stuttering can be quite debilitating for an individual, even if an outside listener does not hear many physical stuttered words.<sup>186</sup> This mental struggle, while less overt, can nevertheless be substantially limiting. Significantly, the ADA does cover mental disabilities in addition to physical disabilities.<sup>187</sup> Like certain forms of mental illness, stuttering is sometimes not readily apparent to the outside observer.<sup>188</sup> Coverage for these types of stutterers is not only necessary to seriously deal with stuttering, but it is also practical, as it is possible to gauge the extent to which a stutterer is emotionally affected by stuttering. Significantly, and rather than relying upon the plaintiff's testimony, there is a way for speech pathologists to assess stuttering's full impact on a person's quality of life—an assessment instrument known as the Overall Assessment of the Speaker's Experience of Stuttering

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<sup>185</sup> See *supra* Parts II & III.

<sup>186</sup> See *supra* Part I.

<sup>187</sup> See *supra* Part II.

<sup>188</sup> While this note is not attempting to equate mental illness with stuttering, the ADA does cover mental disabilities. 42 U.S.C. § 12102(1) (Supp. II 2009).

(OASES).<sup>189</sup> Using the OASES would add a measure of objectivity and uniformity to the task of assessing the emotional impact of stuttering on one's life. Although this type of stutrer may be less likely to be discriminated against because this person's physical stuttering is infrequent, qualifying as disabled is nevertheless important because it would allow for reasonable accommodations.<sup>190</sup>

## 2. Regarded as Disabled

The third way to establish a disability—the regarded-as prong—was included in the ADA to protect disabilities not noticeable to the naked eye. Therefore, it is especially relevant to stuttering. This provision was first included in the Rehabilitation Act to protect employees who were discriminated against whether or not they were recognized as handicapped under the definition of the statute.<sup>191</sup> In *Arline*, the Supreme Court interpreted this provision to include an expansive definition of perceived handicaps, finding that Congress was concerned with “protecting individuals from discrimination based on outdated and stereotypic laws and attitudes.”<sup>192</sup>

The third prong and its interpretation in *Arline* are crucial to protecting claimants who suffer from a disability that is perceived based on untrue stereotypes. So many of the problems facing people who stutter are based on false stereotypes and myths. Therefore, even if an employee is not substantially limited by stuttering, his or her employer might perceive the employee as being substantially limited because of the prevalence of these preconceived notions of stuttering. In this way, the regarded-as prong adds a significant layer of protection to those who face discrimination on the basis of stuttering. If, for example, a person is an infrequent stutrer, the speech impediment may not be too bothersome, and this

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<sup>189</sup> See generally Yaruss, *supra* note 36 (explaining this kind of evaluation).

<sup>190</sup> Returning to the plaintiffs in *Zhong*, *Preacely*, and *Detko*, perhaps they would have fit into this category of individuals. We do not know, but they could have been given a quality-of-life assessment. See *supra* note 189 and accompanying text. It is also strange that these plaintiffs would downplay the limiting nature of the very impairment on which they were bringing their disability lawsuit. Perhaps they were covering—downplaying their speech difficulties in order to seem more normal. See *infra* notes 226, 228 and accompanying text.

<sup>191</sup> Allison Ara, Comment, *The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problems of Perceived Disabilities?*, 50 SANTA CLARA L. REV. 255, 258 (2010).

<sup>192</sup> *Id.* at 258-59.

person may not be substantially limited in speaking. But, if an employer hears this individual stutter and discriminates on that basis because of a stereotype associated with stuttering, this person would have a claim under the regarded-as prong. This employee would not be entitled to a reasonable accommodation, but if this individual stutters infrequently and is not bothered by stuttering, it is unlikely that any accommodation would even be desired.

Another instance of the regarded-as prong applying to stuttering is if a person stutters frequently but is not bothered by his or her stuttering. Such an individual would not be substantially limited in speaking because this person would not view stuttering as limiting. But, this person may still face discrimination based on stuttering. Although this employee may fail to qualify as a person with a disability under prong one, prong three should provide coverage: this individual is regarded as being disabled even though the individual does not view stuttering like this. No accommodation would be requested in this situation, as the employee would not feel limited in speaking. This should not be a catchall for truly severe stutterers, though. While it would be a fallback option, a severe stutterer should attempt to show disability under prong one so that he or she is entitled to reasonable accommodations.

### *B. Determining a Qualified Individual*

Once a claimant can establish disability under the terms of the ADAAA, this person must then be able to show the requisite qualifications for the position at issue.<sup>193</sup> “The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position . . . .”<sup>194</sup> Deference is given to the employer in determining which job functions are essential.<sup>195</sup>

People who stutter may find themselves in a “catch-22” situation when speaking or possessing excellent communication skills is an essential job requirement<sup>196</sup>: “If they prove they are ‘substantially impaired’ in speaking, they will not be ‘qualified’ for the job.”<sup>197</sup> “On the other hand, if they prove that they are

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<sup>193</sup> 42 U.S.C. § 12112(a).

<sup>194</sup> *Id.* § 12111(8).

<sup>195</sup> *Id.*

<sup>196</sup> Parry, *supra* note 9.

<sup>197</sup> *Id.*

‘qualified’ to hold a speaking job, they will not be ‘substantially limited’ . . . .”<sup>198</sup> Either way, as the reasoning goes, such a claimant would likely fail to make a prima facie showing of discrimination if he or she is subject to an adverse employment action.<sup>199</sup> While this is a serious concern, it need not always be true. Note that it may be easier for *infrequent stutterers* who demonstrate that they are regarded as being disabled to show that they are qualified for the job because there is no possible catch-22 in that situation. At the same time, though, these employees would not be entitled to a reasonable accommodation.

### C. *What Kinds of Accommodations Are Reasonable?*

It is next necessary to examine what would be considered a reasonable accommodation that an employer could make for an employee who stutters.<sup>200</sup> Under its definition in the statute, a reasonable accommodation can include “job restructuring” and “reassignment to a vacant position,”<sup>201</sup> but the accommodation cannot pose an “undue hardship” to the employer.<sup>202</sup>

There are several possible reasonable accommodations for people who stutter. Presumably, if a person who stutters is uncomfortable because the job involves a lot of speaking (e.g., if this person is often on the telephone, needs to make presentations, or is required to meet with clients), it may be a reasonable accommodation for an employer to assign the employee to another position that involves less speaking, or perhaps change the current position to require less speaking. This may make both the employer and the employee more comfortable. Another example of a reasonable accommodation would be moving an employee’s desk to a less crowded part of the office so that it is easier for the employee to speak on the phone.<sup>203</sup>

A major issue regarding accommodations is disclosure. Employees with disabilities that are not visibly apparent need to disclose these disabilities to employers to be eligible for reasonable accommodations. If an employer does not know about a disability, the employer cannot possibly make any accommodations.

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> 42 U.S.C. § 12111(9).

<sup>201</sup> *Id.* § 12111(9)(B).

<sup>202</sup> *Id.* § 12111(10).

<sup>203</sup> Beth Bienvenu, *The Only Thing We Have to Fear Is . . . The Perfect Job: Tips for Getting (and Keeping) a Job*, STUTTERING HOMEPAGE (Sept. 9, 2006), <http://www.mnsu.edu/comdis/isad9/papers/bienvenu9.html>.

Stuttering is one such disability that may not be readily apparent to supervisors. If a person is a covert stutterer or an infrequent overt stutterer who is uncomfortable enough with stuttering that this person would like the employer to make a reasonable accommodation, it is also likely that the person is uncomfortable with the idea of disclosing the stuttering. A stutterer may be reluctant to tell an employer about his stuttering because of the myths and stereotypes that pervade the public's understanding about stuttering. Certainly, if someone is a covert stutterer, it is the fear and shame associated with stuttering that is keeping this person in the shell.

Here again is a link with mental illness. Stigma and fear of mental disorders make disclosure to employers risky, and “[p]oor self-awareness or self-denial may also make disclosure difficult.”<sup>204</sup> Disclosure is “deliberate” and often “wrenching” for people with psychiatric disorders.<sup>205</sup> Perhaps ironically, considering the purpose of the ADA, people with psychiatric disorders fear disclosing their impairments due to stigma and discrimination; by telling their employer about their condition, such an individual “risks discrimination, teasing or harassment, isolation, [and] stigmatizing assumptions about her ability.”<sup>206</sup>

Conversely, disclosure may be a positive step for people with psychiatric disabilities, as it “may enhance self-esteem, diminish shame, permit coworkers and others to offer support, and even empower another individual’s revelation.”<sup>207</sup> This assessment of the positives and negatives of disclosure by people with mental disabilities echoes the dilemma faced by many covert or mild stutterers.<sup>208</sup> If these individuals choose to disclose, they may be entitled to accommodations, but they must also come out of their stuttering shells. Ultimately, many mild stutterers probably choose to suffer in silence. If they do not discuss their stuttering with their family and friends, it is probably unlikely that they would choose to do so with their

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<sup>204</sup> Christopher G. Bell, *The Americans with Disabilities Act, Mental Disability, and Work*, in *MENTAL DISORDER, WORK DISABILITY, AND THE LAW* 203, 212 (Richard J. Bonnie & John Monahan eds., 1997).

<sup>205</sup> Laura Lee Hall, *Making the ADA Work for People with Psychiatric Disabilities*, in *MENTAL DISORDER, WORK DISABILITY, AND THE LAW*, *supra* note 204, at 241, 258.

<sup>206</sup> *Id.* at 259.

<sup>207</sup> *Id.* at 260.

<sup>208</sup> Such a comparison is by no means precise because stuttering is not a psychiatric disability. It is relevant only inasmuch as mental disabilities and sometimes stuttering would not be readily apparent to an employer. *See supra* Part I.

bosses.<sup>209</sup> And, if they do not choose to disclose, they should not shirk any of their duties.<sup>210</sup> Failure to disclose and discuss reasonable accommodations with an employer combined with failure to fulfill the duties of the job means that an employee can be fired and left without any recourse under the ADA.

V. AN ALTERNATIVE VIEW OF STUTTERING DISCRIMINATION  
BASED ON IDENTITY RATHER THAN DISABILITY

Another way to proscribe discrimination on the basis of stuttering is to view stuttering itself in a different way—not as a disability, but as an identity characteristic. This part discusses the ways stuttering is different from what is usually considered a disability. It then introduces several theories that demonstrate how stuttering might not be considered a disability. This different way of looking at stuttering—as an identity trait, not as a disability—can be covered under antidiscrimination law under Title VII of the 1964 Civil Rights Act.<sup>211</sup> There are both advantages and disadvantages to coverage of stuttering under Title VII. Among the advantages is a second way to account for the emotional aspect of stuttering; if all stutterers are covered under law, the problem of the infrequent physical stutterer is abrogated. Another advantage is that explicit statutory coverage of stuttering discrimination would eliminate the need under the ADA to show that stuttering is a disability and that the individual is qualified for the job. Quite significantly, a further advantage is that such a personhood characterization of stuttering may help to empower people who stutter. Among the disadvantages are that, under Title VII, there would be no accommodations for stutterers, and the statute may be overinclusive and unrealistic.

A. *Viewing Stuttering as Something Other than a  
Disability*

While enforcement against discrimination based on stuttering can be analyzed through disability jurisprudence, there is another way to approach this type of discrimination.

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<sup>209</sup> Note that someone who stutters only infrequently would only be entitled to a reasonable accommodation if it was established that the emotional aspect of stuttering is considered a substantial limitation on speaking. *See supra* Part IV.A.1.

<sup>210</sup> Parry, *supra* note 9.

<sup>211</sup> 42 U.S.C. § 2000e-17 (2006).

There is something strange about viewing stuttering as a disability. It is not as though stutterers cannot speak or cannot express themselves. They are physically *able* to say whatever they want to say; what makes stutterers different from nonstutterers is that it takes them *longer* to say things. This is unlike what one usually considers a disability, when a disabled person is completely unable to do a certain activity.<sup>212</sup> While it is true that stutterers cannot speak quickly, there is very rarely any need to speak so quickly. Rather, it is society that has determined that it is normal to speak without involuntary interruptions and that it is therefore inferior to speak with these interruptions.<sup>213</sup> The theories of acceptance, transfluency, and covering do much to inform this discussion.

Although stutterers commonly feel ashamed of their stuttering and view it as a terrible burden, a growing number of people who stutter are growing to accept it.<sup>214</sup> This self-acceptance can begin with the realization that this is how one talks and that one cannot ever fully change it.<sup>215</sup> With this in mind, acceptance can offer the option of a more self-fulfilling and life-affirming mindset for people who stutter because it eliminates the “shame, guilt and embarrassment that makes speaking difficult.”<sup>216</sup> Note that, under this philosophy, it is the negative *feelings* that make speaking hard, not the actual *physical* production of sounds and words.

*Transfluency* is one scholar’s extension of this idea of self-acceptance.<sup>217</sup> Under the concept of transfluency, stuttering

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<sup>212</sup> See JEZER, *supra* note 7, at 18 (discussing how stuttering differs from other disabilities). *But see* Douglas C. Baynton, *Bodies and Environments: The Cultural Construction of Disability*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 387, 388 (Peter David Blanck ed., 2000) (discussing society’s role in constructing even such an “obvious” disability as mobility impairment by providing the example of a person who cannot walk but who nonetheless can move about freely in a wheelchair to the extent that the “built environment” allows for wheelchair use, noting that “[a]n impairment-centered definition of disability [which the ADA is modeled on] selects walking as a major life activity and rolling on wheels as an inferior substitute necessitated by the inability to engage in a normal life activity”). Still, though, stuttering is different: a person who cannot walk is able to move about in a wheelchair, but a person who stutters can speak intelligibly without any device or aid.

<sup>213</sup> JEZER, *supra* note 7, at 13 (discussing the importance of time and listener reactions to stuttering).

<sup>214</sup> *Stuttering Info, Frequently Asked Questions*, NAT’L STUTTERING ASS’N, <http://www.nsastutter.org/stutteringInformation/FAQ.html> (last visited Jan. 20, 2012).

<sup>215</sup> See Yeoman, *supra* note 21, at 43 (describing the philosophy of the National Stuttering Project, the forerunner to the National Stuttering Association).

<sup>216</sup> *Stuttering Info, Frequently Asked Questions*, *supra* note 214.

<sup>217</sup> Cristóbal Lorient, *The Demedicalization of Stuttering: Towards a Notion of Transfluency*, 3 J. STUTTERING, ADVOC. & RES. 131, 139 (2009).



is viewed as a “distinctive feature or a manifestation of human diversity, but never as a pathological symptom.”<sup>218</sup> Transfluency considers stuttering a “manifestation of diversity in speech pattern, as being black, homosexual and left-handed are expressions of diversity in race, sexual orientation and hemispheric dominance.”<sup>219</sup> According to transfluency, stuttering is a “dramatically different speech pattern,” but it is “as human—or as natural—as the fluent one.”<sup>220</sup> The conception is partially based upon the view that interruptions in stutterers’ speech are not the cause of the problem; rather, the problem is the social stigma that often accompanies those interruptions.<sup>221</sup> People who stutter are often banished to the “closet,”<sup>222</sup> the result of being faced with stereotypes and cruelty from society—manifested in “disapproving gestures, looks, mockery”—that results in “a personal identity associated with pain and suffering.”<sup>223</sup> Transfluency dignifies people who stutter, calling them out of the closet to express themselves and live freely.<sup>224</sup> Therefore, transfluency theory holds that stuttered speech is not worse than fluent speech; it is just different. Under this conception, discrimination protection through the ADAAA

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<sup>218</sup> *Id.* at 131. Perhaps, though, such a characterization can more broadly be applied to the concept of disability, blurring this note’s line of disability and identity. See Baynton, *supra* note 212, at 387 (stating that “activists in the disability rights movement and scholars in the new disability studies increasingly argue that . . . the concept of disability is fraught with ambiguity and based on highly variable cultural rules and values concerning the body, personal competence, social interaction, individual responsibility, dependence and independence”).

<sup>219</sup> Loriente, *supra* note 217, at 131. Employment discrimination on the basis of sexual orientation is not banned under a federal statute. See Matthew Barker, Note, *Employment Law—Antidiscrimination—Heading Toward Federal Protection for Sexual Orientation Discrimination*, 32 U. ARK. LITTLE ROCK L. REV. 111, 129 (2009) (noting that “Congress has made repeated unsuccessful attempts to pass the Employment Non-Discrimination Act,” a bill that would proscribe employment discrimination on the basis of sexual orientation). But, numerous states and municipalities have taken this action, including both New York State and New York City. See, e.g., N.Y. EXEC. LAW § 296 (McKinney 2010); N.Y.C. CODE § 8-107 (2011). A state or municipality could include stuttering discrimination protections in its antidiscrimination statutes before this is done on the federal level in order to judge on a smaller scale whether such a change is effective and meaningful.

<sup>220</sup> Loriente, *supra* note 217, at 131.

<sup>221</sup> *Id.* at 137.

<sup>222</sup> Loriente uses this term: he argues that “medicalization” of stuttering “conveys a lonely and marginalized way of living (symbolized by the metaphor of the closet).” *Id.* at 136. Loriente explains, “The way of life of those living in the closet is directed by lies, secrecy, and silence.” *Id.* at 137 n.6. While *closet* certainly conjures connections with sexual orientation, the concept is not out of place in the context of stuttering. Thus, this note will use *closet* when appropriate, while acknowledging that the term may not bring with it the exact same meaning that it has in the context of sexual orientation.

<sup>223</sup> *Id.* at 137.

<sup>224</sup> *Id.* at 140.

makes less sense because stuttering no longer exists as a disability; it is rather an element of an individual's identity.

Another scholar proposes a legal theory that is relevant in continuing the analysis of stuttering as an identity trait.<sup>225</sup> Described as *covering*, “a subtler form of discrimination has risen,” where discrimination does not aim at groups as a whole but rather at the subset of the group that refuses to assimilate (i.e., cover).<sup>226</sup> Kenji Yoshino identifies a judicial bias towards covering that he views as dangerous because of its perpetuation of inequality, “what reassures one group of its superiority to another.”<sup>227</sup> Groups that society requests to cover are asked “to be small in the world,” to accept inequality and a “second-class citizenship.”<sup>228</sup> According to Yoshino, everybody covers, there is no mainstream, and “[i]t is not normal to be completely

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<sup>225</sup> Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAG., Jan. 15, 2006.

<sup>226</sup> *Id.* Through the lens of sexual orientation, Yoshino describes *conversion* and *passing* as concepts that precede covering. Conversion refers to “attempts to convert homosexuals into heterosexuals.” KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 32 (2006). Passing describes gay individuals living in the closet. *Id.* at 69. Covering, then, refers to muting one's identity on the axis of appearance, affiliation, activism, and association in order to gain mainstream acceptance. *Id.* at 79-80 (referring to gays “acting straight” as an example of covering). While this is not equivalent to stuttering, it is possible to analogize. Conversion would refer to the still-widespread attempts to speak fluently through speech therapy. Passing, therefore, would describe the attempts to hide oneself as a stutterer—using tricks to try not to stutter, the most extreme form of which is to become covert. See *supra* Part I. And, covering, then, would refer to the way people who are open about their stuttering *still* try not to stutter in certain situations where they believe it is less acceptable, or how they continue to downplay the large role that stuttering plays in their lives. Covering would also refer to the people who stutter so frequently that they try not to talk: people know they stutter, but they try to be more “normal” by speaking less. Interestingly, stuttering (as a condition in society) seems to be simultaneously going through each of these three phases.

<sup>227</sup> Yoshino, *supra* note 225. Theoretically, the accommodation model of disability-discrimination law should protect disabled individuals from needing to cover. YOSHINO, *supra* note 226, at 173. But courts have limited this accommodation principle, instead continuing to prefer assimilation. *Id.* at 174-76. Interestingly, Yoshino explains that courts have done this by interpreting the definition of disability strictly, which the ADAAA is designed to change. *Id.* at 175.

<sup>228</sup> Yoshino, *supra* note 225. Yoshino provides some examples of disabled individuals covering—a visually impaired person who dresses well, does not use a cane, and memorizes what she must read aloud, as well as people with mobility impairments who “use able-bodied people as ‘fronts’” to travel with. YOSHINO, *supra* note 226, at 172. Remember, though, that individuals with sight and motion impairments would have difficulty covering because their impairment would tend to be obvious. This is not the case for many stutterers, who can choose to not speak or be covert. Stuttering, then, remains more in the passing phase, which is why explicitly enshrining stuttering antidiscrimination provisions in a statute would likely help stutterers leave their closets. See *infra* Part V.B. And note again how stuttering is different from other disabilities, as it is easier to pass as a nonstutterer than to pass as lacking many other physical impairments.

normal.”<sup>229</sup> Yoshino believes that the “free[dom] to develop our human capacities without the impediment of witless conformity . . . extends beyond traditional civil rights groups.”<sup>230</sup> While stutterers do not constitute a traditional civil rights group, Yoshino believes that this freedom of individual personhood should extend beyond the traditional groups to confront coerced conformity everywhere, blurring the view of what it means to be normal and in the mainstream.<sup>231</sup>

*B. Coverage for Stuttering in the Civil Rights Act*

The alternative view of stuttering would lead to coverage of stuttering discrimination under Title VII of the Civil Rights Act of 1964. This statute prohibits employers’ discrimination on the basis of race, color, religion, sex, or national origin.<sup>232</sup> These categories are all traits or aspects of personhood with which people identify but have historically been imputed with inferiority by society. The statute would need to be amended to cover stuttering: this would not work under the existing framework.<sup>233</sup> While a statute cannot directly change a person’s outlook, explicit coverage of stuttering in Title VII would not only affect the actions of employers, but it may also empower people who stutter to discover more of their true potential.<sup>234</sup>

There are several advantages to covering stuttering under the Civil Rights Act rather than under the ADA. Were stuttering included in this category, the processes under the ADAAA would be dispensed with (i.e., whether stuttering is substantially limiting, whether a stutterer was regarded as having an impairment, and whether a stutterer is qualified for the job). This recognition would eliminate the catch-22 problem

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<sup>229</sup> Yoshino, *supra* note 225.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> 42 § U.S.C. 2000e-2(a) (2006).

<sup>233</sup> Alternatively, an entirely new statute could be created, like the Age Discrimination in Employment Act, which was enacted for age discrimination. The goal is not Title VII coverage precisely, but rather a statutory scheme where stuttering need not undergo the preliminary determination of whether it is substantially limiting for it to be covered (as it does in the disability context).

<sup>234</sup> See Yeoman, *supra* note 21, at 47 (describing one stutterer’s outlook that stutterers need to hear other people stutter so that they can have role models). An organization called Our Time Theatre Company strives to give young people who stutter a safe space to express themselves and pursue their artistic abilities. Taro Alexander, *Our Time Provides Kids Their Time*, 1 J. STUTTERING, ADVOC. & RES. 33, 33-34 (2006) (describing how “an environment of unconditional acceptance transforms . . . fear and shame into confidence and self-esteem”). At Our Time, stuttering on stage during live shows is allowed and encouraged. *Id.* at 35.

of ADAAA enforcement. Plaintiffs would not need to worry that they would be considered substantially limited in speaking and thus not qualified<sup>235</sup> for the job. Conversely, they would not need to be concerned that their qualifications would prevent them from being considered substantially limited. By changing the way stuttering discrimination is conceived, employees would be able to stutter as much or as little as they needed to—or wanted to—fully aware that they are protected against discrimination. And, furthermore, covering all stutterers would solve the problem of taking into consideration stutterers who are more affected by the emotional aspect of stuttering than the physical aspect. In this way, the enforcement of nondiscrimination in the workplace would be more easily accomplished for employees who stutter.<sup>236</sup>

Another reason why the identity model of stuttering antidiscrimination enforcement would be positive is that it would encourage stutterers to come out of their closets.<sup>237</sup> Congress's automatic recognition of stuttering in a statute as a trait protected against discrimination would more easily allow for people who stutter to choose not to hide their speech. To the extent that society wants to encourage openness, the personhood model would likely go far in encouraging (and perhaps accomplishing) it. In fact, research indicates that stutterers face problems in the workplace not only because of discrimination from supervisors, but also because of their own attitudes about their stuttering.<sup>238</sup> One study indicates that some stutterers did not choose the career they wanted because of stuttering and avoided jobs that required use of the telephone or making oral presentations.<sup>239</sup> Another study shows that 50 percent of stutterers looked for jobs requiring little speaking and 21 percent have declined a new job or promotion because of fears associated with stuttering.<sup>240</sup> Some people who stutter feel trapped in an unwanted job because of their stuttering.<sup>241</sup> This

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<sup>235</sup> *Qualified* in this context means that an employer could not say that a job requirement of excellent oral communication skills requires nonstuttered speech. To be qualified, the stutterer would, of course, still need to otherwise satisfy that requirement and meet all other job requirements.

<sup>236</sup> The relative complexity of the ADAAA model that this note proposes would be disposed of. *See supra* Part IV.

<sup>237</sup> *See supra* note 222.

<sup>238</sup> Klein & Hood, *supra* note 41, at 256.

<sup>239</sup> *Id.* at 257 (citing R. Hayhow et al., *Stammering and Therapy Views of People Who Stammer*, 27 J. FLUENCY DISORDERS 1 (2002)).

<sup>240</sup> *Id.* at 266.

<sup>241</sup> *Id.* at 267.

indicates the extent to which stutterers limit themselves in regards to their own employment opportunities. The changing of attitudes like these will ultimately be necessary in order for stutterers to reach their full employment capabilities.

There are also drawbacks to this identity model of stuttering. Because stuttering is a variable trait, the ADAAA may work better; under the *substantially limits* conception, courts would understandably find people who stutter severely to be disabled, and people who stutter mildly not to be disabled.<sup>242</sup> This personhood theory would be overinclusive in that it would cover stutterers who stutter rarely and at the same time are not emotionally affected by stuttering.<sup>243</sup> Also, perhaps some stutterers have such severe impediments or conditions that they are not realistically employable; companies may have business reasons not to hire a severe stutterer. Under the ADAAA, such an individual would not be covered because he or she would not be qualified for the job. Under Title VII, coverage would depend upon the way the statutory amendment is laid out;<sup>244</sup> it's more likely here, though, than under the ADAAA, that this person would be covered, as the identity theory rests on a modicum of acceptance of stuttering in the society at large that is probably not yet present in the culture. But Title VII does not cover everything.<sup>245</sup> Accordingly, a public-safety exception for stuttering may be advisable; stutterers may be ill-suited for certain jobs that depend upon rate of speed in talking (e.g., air-traffic controller).<sup>246</sup> Furthermore, under Title VII, stutterers

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<sup>242</sup> This individualized inquiry would make sense if the level of severity took into account both the physical and emotional aspects of stuttering. But if courts only looked at frequency of stutters, rather than at how much stuttering affects a person holistically, employees would too frequently be mischaracterized. *See supra* Part I.

<sup>243</sup> Some kind of medical diagnosis of stuttering would probably be a wise requirement here, so that individuals who do not stutter do not take advantage of this new statutory provision.

<sup>244</sup> The *McDonnell-Douglas* test would still apply. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); RUTHERGLEN, *supra* note 53, at 37-42.

<sup>245</sup> Title VII permits classifications on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." RUTHERGLEN, *supra* note 53, at 129 (quoting 42 U.S.C. § 2000e-2(e)(1) (2006)). This provision, known as the bona fide occupational qualification (BFOQ), does not include race. *Id.* The BFOQ, though, has been interpreted very narrowly. *Id.* at 129, 143.

<sup>246</sup> And, if the statute were written in a less progressive way, there could be other exceptions besides a safety exception. For example, perhaps employers of broadcasters would still be able to discriminate, if the public would not accept the transfluency notion of people stuttering across the airwaves. For an example of stuttering being accepted on the stage, see *supra* note 234.

would likely not be entitled to reasonable accommodation.<sup>247</sup> While this makes sense in the context of the personhood model,<sup>248</sup> it would be impractical for a stutterer for whom an accommodation would be very helpful. This lack of entitlement to accommodation is a significant drawback because it is likely that most stutterers would not suddenly come to believe in acceptance and transfluency. In other words, many stutterers at this point in time would likely want access to accommodations because they will not be comfortable with their stuttering.

Ultimately, while the identity model would be the more effective way to counter discrimination, the disability model is the more practical method of dealing with this problem at this point in time. Stuttering discrimination conceived as a disability can be covered under the existing ADA, while protection against stuttering discrimination as an identity characteristic would require Congressional action.<sup>249</sup>

## CONCLUSION

Employment discrimination on the basis of stuttering is an important issue to examine because it is widespread and limiting for stutterers, and because there should be legal protection for people who stutter. Coverage for stuttering should include both the physical and emotional aspects of the condition. One way for stuttering to be covered is as a disability under the ADA. The recent amendments to the ADA increase the likelihood that it would be covered. Another way for stuttering to be covered is as an identity characteristic under the Civil Rights Act. Both methods of coverage are compelling. While the Civil

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<sup>247</sup> This assumes that a Title VII amendment for stuttering would track race discrimination, as there is no right to accommodation in that area. There is, though, a certain accommodation right in Title VII regarding religious discrimination, so it's possible that a Title VII amendment for stuttering could include such an accommodation. See RUTHERGLEN, *supra* note 53, at 146-47.

<sup>248</sup> No accommodation would be necessary if stuttered speech were just as valid as nonstuttered speech—there would be nothing for which to accommodate.

<sup>249</sup> Is there a third way to conceive of stuttering? Ruth Colker describes the term “hybrid” as “people who lie between bipolar legal categories—bisexuals, transsexuals, multiracials, and the somewhat disabled.” RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* xi (1996). Regarding disability, she reports that the phrase “temporarily able-bodied” has been used to describe the “transient nature of . . . disability status.” *Id.* at xiii. While Colker focuses on categories like body size, perhaps this can describe stuttering. *Id.* at 165. The variable nature of stuttering can cause it to greatly affect a person's life at times, yet not be any issue at other times. Sometimes this shift can occur over a period of months or years, and other times it can occur within hours or minutes.

Rights Act would provide broader protection, stuttering will more realistically be covered under the amended ADA because it does not require any further congressional action. In whichever way, discrimination based on stuttering should be proscribed so that people who stutter can more easily enjoy the full measure of their civil rights.

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<sup>†</sup> J.D. Candidate, Brooklyn Law School, 2012; B.A., Binghamton University, State University of New York, 2008. I want to recognize the crucial role that the National Stuttering Association plays in providing support for the stuttering community, and to acknowledge the organization's significant effect on my own life, from which this note topic developed. I wish to thank the editors and staff of the *Brooklyn Law Review* for their passion and commitment. I would also like to thank Professor Nelson Tebbe for his useful guidance and suggestions, and Eric Jackson for contributing illuminating source material. Finally, I am eternally grateful for the love, support, and encouragement of my parents and Katherine McCrink.