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Nothing to Sneeze At: Severe Food Allergy as a Disability under the ADA Amendments Act of 2008

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COMMENT

NOTHING TO SNEEZE AT: SEVERE FOOD ALLERGY AS A DISABILITY UNDER THE ADA AMENDMENTS ACT OF 2008

JASON MUSTARD*

“The moral test of government is how it treats those who are in the dawn of life . . . the children; those who are in the twilight of life . . . the elderly; and those who are in the shadow of life . . . the sick . . . the needy . . . and the disabled.”

—Hubert H. Humphrey¹

I. INTRODUCTION

For an estimated fifteen million Americans, living with food allergies is a daily reality.² Nearly six million of those affected are children, a number representing eight percent of the children in the United States.³ The prevalence of individuals diagnosed with food allergies is growing,⁴

* J.D. Candidate, Golden Gate University School of Law, 2015. Special thanks to Professors J. Kosel and E. Christiansen for taking the time to offer guidance in the writing of this Comment. Their insights were invaluable and much appreciated. I would also like to thank my wife, Jovinia, and my two kids, Timothy and Mia, who have offered amazing support as I have journeyed through law school. In the interest of full disclosure, my son, Timothy, lives with severe food allergies. He is an extremely bright child who loves to play and learn, but he faces the threat of anaphylaxis with every trip to a restaurant or school cafeteria. It is my hope that this Comment will help to make the world a little easier to manage for Timothy and anyone who suffers from severe food allergies.

¹ *Disability Quotes—Collection of Quotations Regarding Disabilities*, DISABLED WORLD, <http://www.disabled-world.com/disability/disability-quotes.php> (last revised Feb. 17, 2015).

² *Food Allergy Facts and Statistics for the U.S.*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/document.doc?id=194> (last visited Feb. 1, 2015).

³ *Id.*

⁴ Ruchi S. Gupta et al., *The Prevalence, Severity, and Distribution of Childhood Food Allergy in the United States*, PEDIATRICS (June 20, 2011), <http://pediatrics.aappublications.org/content/128/1/e9.full> (last visited Feb. 1, 2015).

and the prevalence of those with severe food allergies that have the potential of life-threatening reactions to certain types of food is also increasing.⁵ Although science has yet to provide an answer as to why food allergies are on the rise, the reality is that for millions of Americans every meal, snack, or treat presents a potential threat.

Despite the disabling nature of severe food allergies, federal laws enacted to protect individuals with disabilities have not protected those with severe food allergies.⁶ Courts have repeatedly refused to grant disability status to those with severe food allergies, choosing to read the language of the Rehabilitation Act of 1973 and the original language of the Americans with Disabilities Act (ADA) narrowly, rather than looking to Congress's intended purpose for these laws to provide broad protection for individuals with physical impairments.⁷ The result has been a lack of accommodation and protection for those with food allergies in public places, such as schools and places of employment.⁸

In 2008, Congress sought to correct what it deemed were court decisions contrary to the congressional purpose of broad protections under the ADA.⁹ That year, Congress passed the Americans with Disabilities Amendments Act (ADAA), which targeted language in the original ADA that courts had used to undermine Congress's intentions for the original ADA to include a broad range of disabilities, including severe food allergies.¹⁰ The ADAA expanded the class of individuals protected by the ADA with amendments that both overruled judicial decisions contrary to the intent of the ADA and provided intentionally inclusive language.¹¹

Until recently, the courts have had few opportunities to apply the ADAA to cases involving individuals with severe food allergies. However, a 2013 settlement between the Department of Justice and a private university, and an Iowa case decided a few days later, have shed new light on how the ADAA will be implemented in the future.¹² These de-

⁵ *Id.*

⁶ *See, e.g.,* Land v. Baptist Med. Ctr., 164 F.3d 423, 424–25 (8th Cir. 1999).

⁷ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4), 122 Stat. 3553 (noting that Supreme Court decisions had “narrowed the broad scope of protection intended to be afforded by the ADA”).

⁸ Tess O'Brien-Heinzen, *A Complex Recipe: Food Allergies and the Law*, 83 WIS. LAW., May 2010, at 8, 8.

⁹ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), (b)(1), 122 Stat. 3553 (declaring a central purpose of the ADAA was to reinstate the “broad coverage” of protection intended to be afforded by the ADA).

¹⁰ H.R. REP. NO. 110-730(I), § 8 (2008) (stating that the courts have narrowed the interpretation of the definition of disability in the ADA despite the fact that the law was intended to be broad and inclusive).

¹¹ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553.

¹² Settlement Agreement Between the United States of America and Lesley University (Jan. 25, 2013), available at http://www.ada.gov/lesley_university_sa.htm; Knudsen v. Tiger Tots Cmty.

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velopments, combined with a close evaluation of the ADA, make it clear that the courts must change direction on disability-discrimination claims brought by individuals with severe food allergies under the ADA.

This Comment argues that the courts must classify individuals with severe food allergies as having a disability under the ADA going forward and accordingly must extend the accommodations and protections that come with that designation to these individuals. Part II of the Comment examines the prevalence and severity of food allergies in the United States. Part III examines the history of disability law and how that law has been applied to individuals with severe food allergies. Part IV discusses the status of severe food allergies going forward in light of the ADA and the effect of the law on recent legal developments. Part V concludes that it is time for the courts to follow Congress's clear intent as expressed in the ADA.

II. SEVERE FOOD ALLERGIES IN MODERN AMERICA

Individuals with food allergies have immune systems that react adversely to certain food proteins.¹³ Where the average person's immune system has little or no negative reaction to a particular food protein, the immune system of a person allergic to that protein attacks it as though it were "a harmful pathogen, such as a bacterium or virus."¹⁴ Allergic reactions can affect a number of different organs and physiological systems, including the skin, the respiratory system, and, in the most serious cases, the cardiovascular system.¹⁵ Roughly 90% of food allergies are caused by one of a small number of foods, commonly referred to as the "Big Eight."¹⁶ These foods include peanuts, the most common food allergy, milk, soy, wheat, tree nuts, eggs, shellfish, and fish.¹⁷

Although the majority of those who suffer food-allergy attacks experience only mild symptoms, such as hives or nasal congestion, a significant percentage of those with food allergies can experience more serious symptoms like diarrhea, shortness of breath, or an obstructive swelling of

Child Care Ctr., No. 12-0700, 828 N.W.2d 327 (unpublished table decision), 2013 WL 85798 (Iowa Ct. App. Jan. 9, 2013).

¹³ Christian Nordqvist, *What Is Food Allergy? What To Do When Food Allergy Is Expected*, MEDICAL NEWS TODAY, <http://www.medicalnewstoday.com/articles/14384.php> (last updated Nov. 17, 2013).

¹⁴ *Id.*

¹⁵ *About Food Allergies: Symptoms*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/symptoms> (last visited Feb. 1, 2015).

¹⁶ Nordqvist, *supra* note 13.

¹⁷ Nordqvist, *supra* note 13.

the lips, tongue, and throat, known as anaphylaxis.¹⁸ Anaphylaxis is the most serious potential result of an allergy attack because it can be fatal, in most cases because aid is not given quickly enough.¹⁹

In addition to the threat of anaphylaxis, one of the key factors that drive the need for statutory protection for those with food allergies is the fact that the prevalence of food allergies is growing.²⁰ A recent study published in the official journal of the American Academy of Pediatrics found that there were nearly six million children in the United States with at least one food allergy in 2010.²¹ That number amounted to 8% of all of the children in the United States,²² a rise of more than 18% from 1997 to 2007.²³ The study also found that over two million of those children had a history of severe allergic reactions to food.²⁴ These six million children, combined with an estimated nine million adults who have at least one food allergy, results in almost 5%, or nearly one out of every twenty people in this country, having food allergies.²⁵

It is no surprise, then, that food allergies account for nearly 200,000 visits to the emergency room each year and more than 300,000 ambulance calls for children suffering from food-allergy attacks.²⁶ Unfortunately, it is also no surprise that more than 15% of children with food allergies have suffered attacks at school, sometimes with fatal results.²⁷

¹⁸ *About Food Allergies: About Anaphylaxis*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/anaphylaxis> (last visited Feb. 1, 2015).

¹⁹ *Id.*

²⁰ Gupta et al., *supra* note 4 (“Findings suggest that the prevalence and severity of childhood food allergy is greater than previously reported.”).

²¹ *Id.*

²² *Id.*

²³ *Adolescent and School Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/healthyyouth/foodallergies/> (last updated Oct. 13, 2013).

²⁴ Gupta et al., *supra* note 4 (stating that 38.7% of the 5.9 million children with food allergies—2,283,300 children—suffer from severe food allergies).

²⁵ *Food Allergy Facts and Statistics for the U.S.*, *supra* note 2; *U.S. and World Population Clock*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited Feb. 1, 2015) (listing the current population of the United States at more than 317 million).

²⁶ *Food Allergy Facts and Statistics for the U.S.*, *supra* note 2.

²⁷ *See id.*; Noreen S. Ahmed-Ullah, *Seventh-Grader Dies of Food Allergy at Chicago School*, CHICAGO TRIBUNE, Dec. 20, 2010, http://articles.chicagotribune.com/2010-12-20/news/ct-met-allergic-death-cps-1221-20101220_1_food-allergy-epipens-allergic-reaction; Elizabeth Landau, *Girl's Death Highlights Allergy Safety in Schools*, CNN (Jan. 12, 2012), <http://edition.cnn.com/2012/01/11/health/living-well/food-allergies-schools/>.

III. FOOD ALLERGIES AND THE LAW

A. THE REHABILITATION ACT OF 1973, THE AMERICANS WITH DISABILITIES ACT, AND FOOD ALLERGIES

The Rehabilitation Act was Congress's first attempt to address the needs of individuals with disabilities.²⁸ Section 504 of the Rehabilitation Act provides that individuals with disabilities cannot be discriminated against by any program or organization receiving any federal funding.²⁹ The Act includes schools, universities, and any other "corporation, partnership, or other private organization, or an entire sole proprietorship" that receives federal assistance or funding.³⁰ For purposes of the Act, an individual with a disability is an individual who (1) has a "physical or mental impairment that substantially limits one or more major life activities of such individual," (2) has "a record of such an impairment," or (3) is "regarded as having such an impairment."³¹ Major life activities in the definition of disability include eating, sleeping, breathing, reading, and concentrating.³²

Although the stated purpose of the Rehabilitation Act was to provide persons with disabilities with an equal opportunity to work for employers receiving federal funding,³³ the courts have consistently held that the Act also provides students with protections from discrimination at schools and universities that receive federal funding.³⁴ For students at the elementary and secondary levels, the Act is carried out through Free and Appropriate Public Education regulations, under which schools are required to create Individualized Education Plans (IEPs) for students with handicaps.³⁵ While IEPs for students with severe food allergies could provide for many of the precautions necessary for these students to enjoy a safe school environment—proper precautions for field trips, food options in the cafeteria, or proper training for educators and staff in the event of an anaphylaxis reaction—the fact that allergies have not been considered a disability under federal law has kept many schools from

²⁸ Martin Schiff, *The Americans with Disabilities Act, Its Antecedents, and Its Impact on Law Enforcement Employment*, 58 MO. L. REV. 869, 874–75 (1993).

²⁹ 29 U.S.C.A. § 794(a) (Westlaw 2015).

³⁰ 29 U.S.C.A. § 794(b) (Westlaw 2015).

³¹ See 29 U.S.C.A. § 705(20)(B) (Westlaw 2015) (adopting definition of "disability" found in ADA, 42 U.S.C.A. § 12102(1) (Westlaw 2015)).

³² 42 U.S.C.A. § 12102(2)(B) (Westlaw 2015).

³³ 29 U.S.C.A. § 701(b)(1) (Westlaw 2015); see also 29 U.S.C.A. § 720 (Westlaw 2015).

³⁴ See, e.g., *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979); *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1046–48 (9th Cir. 1999); *Sanders v. Marquette Pub. Sch.*, 561 F. Supp. 1361, 1368–69 (W.D. Mich. 1983).

³⁵ 34 C.F.R. § 104.33 (Westlaw 2015).

going to the expense and effort of creating IEPs for students with food allergies.

The ADA was passed in 1990 with the goal of extending the protections of the Rehabilitation Act of 1973 to individuals with disabilities in the private sector as well.³⁶ With the stated goal of “the elimination of discrimination against individuals with disabilities,” the ADA was the first truly comprehensive civil-rights protection for persons with disabilities.³⁷ However, the courts have interpreted the ADA and the Rehabilitation Act to be largely synonymous in identifying and providing protections for persons with disabilities.³⁸ This interpretation reflects the congressional intent behind amending the Rehabilitation Act in 1992 to make sure “the precepts and values embedded in the Americans with Disabilities Act are reflected in the Rehabilitation Act of 1973.”³⁹ The amendments included making the definition of “disability” the same in both laws.⁴⁰ Thus, an examination of the applicability of the ADA to individuals with severe food allergies also demonstrates how the Rehabilitation Act will be applied to those individuals.⁴¹

B. THE APPLICATION OF THE ORIGINAL AMERICANS WITH DISABILITIES ACT TO INDIVIDUALS WITH FOOD ALLERGIES

The ADA requires that employers, including all government employers and private employers with more than 15 employees, provide “reasonable accommodations” for employees and applicants with disabilities.⁴² Despite the specific focus on employment in the statutory language, the courts have also applied the “reasonable accommodation”

³⁶ 42 U.S.C.A. § 12101 (Westlaw 2015).

³⁷ See 42 U.S.C.A. § 12101(b)(1) (Westlaw 2015).

³⁸ See, e.g., *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1078 (W.D. Wis. 1998) (“Section 504 of the Rehabilitation Act . . . contains a materially identical definition of ‘handicapped individuals’ [as the ADA’s definition] and the two acts are generally treated by courts as synonymous.”).

³⁹ S. Rep. 102-357, at 2 (Aug. 3, 1992).

⁴⁰ See 29 U.S.C.A. § 705(20)(B) (Westlaw 2015); 42 U.S.C.A. § 12102(2) (Westlaw 2015).

⁴¹ *Coons v. Sec’y of the U.S. Dep’t of the Treasury*, 383 F.3d 879, 884 (9th Cir. 2004) (“The standards used to determine whether an act of discrimination violated the Rehabilitation Act are the same standards applied under the Americans with Disabilities Act . . .”).

⁴² 42 U.S.C.A. § 12111(5A) (Westlaw 2015) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.”); 42 U.S.C.A. § 12111(9) (Westlaw 2015) (stating the definition for “reasonable accommodation”); 42 U.S.C.A. § 12112(b)(5A) (including the failure to provide reasonable accommodations for employees or applicants who have a disability as a type of discrimination).

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requirement to government programs, including places of public accommodation and public schools.⁴³ However, no clear definition of a reasonable accommodation is provided for non-employment accommodations.⁴⁴

The ADA's protections are enforced by several federal agencies, including employment regulations from the Equal Employment Opportunity Commission (EEOC).⁴⁵ EEOC regulations regarding the ADA provide that a person with a disability who is substantially limited in conducting at least one major life activity is under the protection of the law.⁴⁶ The EEOC regulations also provide guidelines for determining when a major life activity is substantially limited due to an individual's disability.⁴⁷ When first promulgating the regulations, the EEOC pointed out that the determination of whether a disability substantially limits an individual's ability to participate in a major life activity was to be "made without regard to the availability of medicines, assistive devices, or other mitigating measures."⁴⁸ According to the EEOC, making a disability determination without regard to medicines and other mitigating measures reflected the express intent of Congress when drafting the ADA.⁴⁹

Following this line of reasoning, it is clear that the ADA's protections for those with disabilities should have applied to individuals with severe food allergies since its enactment. Severe food allergies fundamentally affect an individual's ability to eat and breathe, and by extension can affect a person's ability to learn, work, or do just about anything else.⁵⁰ While the effect on these major life activities can usually be mitigated with proper medication and precautions, these factors were never intended by Congress to be considered when deciding whether an individual has a disability that qualifies for ADA protections.⁵¹ Unfortunately, the courts have typically taken a different view of the ADA's requirement of reasonable accommodations.

⁴³ See, e.g., *Stern v. Univ. of Osteopathic Med. & Health Scis.*, 220 F.3d 906, 908 (8th Cir. 2000); *Nathanson v. Med. Coll. of Pa.*, 926 F.2d 1368, 1383 (3d Cir. 1991).

⁴⁴ See 42 U.S.C.A. § 12111(9) (Westlaw 2015).

⁴⁵ *Americans with Disabilities Act (ADA)*, U.S. DEP'T LAB., <http://www.dol.gov/odep/topics/ADA.htm> (last visited Feb. 1, 2015) ("Enforcement for the ADA is shared among several Federal agencies, with the Equal Employment Opportunity Commission (EEOC) responsible for its employment provisions.").

⁴⁶ 29 C.F.R. § 1630.2 (Westlaw 2015).

⁴⁷ 29 C.F.R. § 1630.2(j) (Westlaw 2015).

⁴⁸ Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (July 26, 1991) (codified at 29 C.F.R. pt. 1630).

⁴⁹ *Id.*

⁵⁰ *About Food Allergies*, FOOD ALLERGY RES. & EDUC. (table), <http://www.foodallergy.org/about-food-allergies> (last visited Feb. 1, 2015).

⁵¹ Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726.

C. FOOD ALLERGY CASE LAW UNDER THE ORIGINAL AMERICANS WITH DISABILITIES ACT

The landmark case for an ADA claim for a severe food allergy⁵² is *Land v. Baptist Medical Center*.⁵³ In *Land*, an Arkansas mother sued a daycare center that refused to provide care for her daughter due to her peanut allergy.⁵⁴ After the daughter suffered her second allergic attack while in the facility's care, the facility refused to provide further services for the girl.⁵⁵ The mother sued under the ADA and lost in the district court, which decided that the daughter did not have a disability covered by the ADA.⁵⁶ The Eighth Circuit came to the same conclusion, pointing to the facts that because the girl could eat any food other than peanuts, and that her breathing was only affected during an allergic attack, her food allergy did not substantially limit any major life activities.⁵⁷ The court reasoned that because the girl's allergy attacks were infrequent and manageable, she did not qualify for protection under the ADA.⁵⁸

A federal district court in California came to a similar conclusion in *Bohacek v. City of Stockton*.⁵⁹ In *Bohacek*, a mother sued the city of Stockton on behalf of her son, who had a peanut allergy.⁶⁰ The boy was enrolled in a city-run summer camp, but due to his allergy, the camp refused to allow him to participate in camp activities unless the mother remained on the premises with the appropriate medication for any potential allergic reaction.⁶¹ Citing *Land*, the *Bohacek* court quickly dismissed the ADA claim because, in the court's opinion, the fact that a peanut allergy can limit a person's ability to breathe did not qualify that person as having a disability under the ADA.⁶²

These two cases demonstrate the general approach taken by the courts when considering ADA claims for those with food allergies.⁶³ Food allergies are episodic in nature, and although always present, an

⁵² See, e.g., Food Allergies under the ADA, Tenn. Op. Att'y. Gen. No. 05-178 (2005) (noting that *Land* "is the leading case on the issue").

⁵³ *Land v. Baptist Med. Ctr.*, 164 F.3d 423 (8th Cir. 1999).

⁵⁴ *Id.* at 424-25.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 425.

⁵⁹ *Bohacek v. City of Stockton*, No. CIV S-04-0939 GGH, 2005 WL 2810536 (E.D. Cal. Oct. 26, 2005).

⁶⁰ *Id.* at *1.

⁶¹ *Id.* at *1-2.

⁶² *Id.* at *4.

⁶³ Michael Borella, Note, *Food Allergies in Public Schools: Toward a Model Code*, 85 CHL.-KENT L. REV. 761, 772 (2010) (explaining that the courts typically apply *Land* when deciding ADA claims involving food allergies).

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allergy limits an individual's ability to breathe, eat, or participate in any other major life activity only when triggered by certain foods. These factors have proved to be a formidable obstacle to obtaining a court ruling that a food allergy is a disability under the ADA.

Even disability cases that present similar questions have failed to change the courts' stance regarding food allergies and the ADA. In *Fraser v. Goodale*,⁶⁴ Ms. Fraser sued her former employer under the ADA for discriminating against her due to her diabetes.⁶⁵ Fraser suffered from a "severe and life-threatening" form of diabetes but was not allowed to eat at her desk, even though maintaining an appropriate blood-sugar level depended on her ability to eat when necessary.⁶⁶ As a result, Fraser passed out at work and complained to her supervisor's superior.⁶⁷ However, rather than disciplining the supervisor, the employer terminated her employment a few months later.⁶⁸

The district court held that Fraser did not have a disability protected under the ADA, but the Ninth Circuit reversed that decision, stating that "[u]nlike a person with ordinary dietary restrictions, [Fraser] does not enjoy a forgiving margin of error" and, thus, the court held that "we must permit those who are disabled because of severe dietary restrictions to enjoy the protections of the ADA."⁶⁹

Like the plaintiff in *Fraser*, those with severe food allergies do not enjoy a "forgiving margin of error" when it comes to their dietary choices. Instead, like the plaintiff in *Fraser*, they must carefully evaluate every food before it is consumed or severe consequences, including death, can result. The *Fraser* court even recognized that although "eating specific types of foods, or eating specific amounts of food, might or might not be a major life activity . . . peanut allergies might present a unique situation because so many seemingly innocent foods contain trace amounts of peanuts that could cause severely adverse reactions."⁷⁰

Despite the parallels between *Fraser* and the aforementioned cases involving food allergies, and the *Fraser* court's specific comments regarding peanut allergies, the overwhelming majority of courts have been unwilling to move from the *Land* court's stance that food allergies do not

⁶⁴ *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003).

⁶⁵ *Id.* at 1034.

⁶⁶ *Id.* at 1035.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1041.

⁷⁰ *Id.* at 1040.

qualify for ADA protection.⁷¹ According to one commentator, a potential explanation for this stance may be that the courts have been desensitized to the “legitimate claims” of individuals with severe food allergies due to the fact that a majority of food allergy claims come from prisoners who complain of food allergy discrimination without providing an “adequate factual basis” for their claims.⁷² Whatever the reason, this consistent, yet erroneous, stance of the courts has prevented those with severe food allergies from finding any relief or protection under the ADA.

The United States Supreme Court has not heard any cases concerning the status of food allergies as a disability under the ADA, but the reasoning of two Court decisions seemed to support the *Land* Court’s holding. In *Sutton v. United Air Lines, Inc.*,⁷³ the Court heard arguments concerning the application of twin sisters with poor vision who applied to be pilots for United Airlines.⁷⁴ The plaintiffs sued United for discrimination under the ADA, claiming their poor vision was a disability under the ADA.⁷⁵

Despite the fact that other appellate courts had uniformly held that disabilities should be determined without the consideration of available remedies or mitigating measures, the district court, and subsequently the Tenth Circuit, decided that because the plaintiffs “could fully correct their visual impairments” they were not substantially limited in any major life activity.⁷⁶ The Supreme Court agreed.⁷⁷ Because the Court found that the enacted language of the ADA could not reasonably be read to bar the consideration of corrective measures in determining whether an individual has a disability, the Court declined to consider legislative history that would support such a reading.⁷⁸ Instead, the Court reasoned that determining whether a person has a disability under the ADA is an “individualized inquiry” and that a disability exists “only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would’ be substantially limiting if mitigating measures were not taken.”⁷⁹ A central justification for this reasoning was based on the number of persons with disabilities, 43 million, specified by Congress in

⁷¹ See, e.g., *Bohacek v. City of Stockton*, No. CIV S-04-0939 GGH, 2005 WL 2810536, at *5 (E.D. Cal. Oct. 26, 2005) (dismissing the *Fraser* court’s statement on peanut allergies as “apparent dict[um]”).

⁷² Borella, *supra* note 63, at 770.

⁷³ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

⁷⁴ *Id.* at 475.

⁷⁵ *Id.* at 476.

⁷⁶ *Id.* at 476–77.

⁷⁷ *Id.* at 477.

⁷⁸ *Id.* at 482.

⁷⁹ *Id.* at 482.

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its findings set forth in the ADA.⁸⁰ The Court reasoned that if Congress had “intended to include all persons with corrected physical limitations among those covered by the ADA, it undoubtedly would have cited a much higher number of disabled persons in the findings.”⁸¹ The Court applied similar analysis in two companion cases to *Sutton*,⁸² *Murphy v. United Parcel Service, Inc.*,⁸³ and *Albertson’s, Inc. v. Kirkingburg*.⁸⁴

In the wake of *Sutton* and its companion cases, the congressional intention regarding mitigating measures in the determination of a disability effectively went out the window.⁸⁵ Hundreds of cases followed the reasoning in *Sutton* in just the first year following the decision, and the Supreme Court vacated or remanded many cases for reconsideration under the new limitations of the ADA.⁸⁶ In general, *Sutton* and its companion cases created more questions than answers for the lower courts, resulting in more-complex litigation that often presented new barriers for individuals who had disabilities with available mitigating measures.⁸⁷ *Sutton* effectively shut the door to plaintiffs with severe food allergies who sought protection under the ADA, with courts deciding that the availability of mitigating measures prevented most allergy claims from qualifying for ADA protection.⁸⁸

The second Supreme Court decision that had a direct impact on the current disability status of individuals with severe food allergies was *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.⁸⁹ In *Toyota*, an employee who worked on an auto assembly line sued Toyota for failing to provide her with reasonable accommodations for her impairments, which included carpal tunnel syndrome.⁹⁰ The district court granted summary judgment to Toyota, deciding that the plaintiff did not have a

⁸⁰ *Id.* at 486–87; see Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328.

⁸¹ *Id.* at 487.

⁸² Allison Duncan, Note, *Defining Disability in the ADA: Sutton v. United Airlines, Inc.*, 60 LA. LAW REV. 967, 971–74 (2000).

⁸³ *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999).

⁸⁴ *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

⁸⁵ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(6), 122 Stat. 3553 (“[A]s a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities . . .”).

⁸⁶ Duncan, *supra* note 82, at 977–78.

⁸⁷ Arlene B. Mayerson & Kristan S. Mayer, *Defining Disability in the Aftermath of Sutton: Where Do We Go from Here?*, DISABILITY RTS. EDUC. & DEF. FUND (Mar. 20, 2000), <http://dredf.org/publications/mayerson.html>.

⁸⁸ See, e.g., *Walker v. City of Vicksburg*, No. 5:06cv60-DCB-JMR, 2007 WL 3245169, at *8 (S. D. Miss. Nov. 1, 2007); *Kropp v. Me. Sch. Admin. Union #44*, No. 06-81-P-S, 2007 WL 551516, at *17 (D. Me. Feb. 16, 2007).

⁸⁹ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

⁹⁰ *Id.* at 187–88.

disability under the ADA.⁹¹ The Sixth Circuit disagreed, concluding that the plaintiff's impairment prevented her from performing manual tasks, which the court classified as major life activities.⁹²

The Supreme Court reversed the Sixth Circuit's decision, holding that the appellate court had not applied the proper standard in determining whether the plaintiff had a disability covered under the ADA.⁹³ Instead, the Court held that the ADA must be given a strict interpretation to "create a demanding standard for qualifying as disabled."⁹⁴ For the plaintiff in *Toyota*, this meant that because she was not limited in performing "activities that are of central importance to most people's daily lives," her impairments could not qualify her as having a disability under a strict reading of the ADA.⁹⁵ For thousands more plaintiffs claiming protection from discrimination under the ADA, the *Toyota* Court "created an inappropriately high level of limitation necessary to obtain coverage under the ADA."⁹⁶

The combined effect of *Sutton* and *Toyota* was to narrow the definition of "disability" under the ADA and limit impairments that qualified for protection under the original congressional intent of the law.⁹⁷ As one commentator put it, lower courts that followed the Supreme Court's lead in these cases raised "an already-high hurdle for ADA plaintiffs, who always have the burden of proving their disabled status as a threshold matter."⁹⁸ However, *Sutton* and *Toyota* also had another effect: these cases and the decisions they influenced inspired a movement that led Congress to take the ADA back into its own hands.

D. THE ADA AMENDMENTS ACT OF 2008

When the original ADA was signed into law, millions of Americans with disabilities believed it would provide a new era of unprecedented protection of their civil rights. As he signed the ADA, President George H.W. Bush called the law a "landmark" and declared that "every man, woman, and child with a disability can now pass through once-closed

⁹¹ *Id.* at 184.

⁹² *Id.*

⁹³ *Id.* at 201–02.

⁹⁴ *Id.* at 197.

⁹⁵ *Id.* at 198.

⁹⁶ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553.

⁹⁷ Lisa Eichhor, *The Toyota Sidestep Catches On*, 33 ADMIN. & REG. L. NEWS 7, 8 (Summer 2008), available at 33-SUM ADMIN. & REG. L. NEWS 7 (Westlaw).

⁹⁸ *Id.* at 9.

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doors into a bright new era of equality, independence, and freedom.”⁹⁹ However, this rosy prediction of the law’s effect would lose much of its shine in the wake of the *Sutton* and *Toyota*. Justice Stevens in his dissent in *Sutton* argued that giving the ADA a “miserly” rather than “generous” construction was effectively being unfaithful “to the remedial purpose of the Act.”¹⁰⁰

The Supreme Court’s “miserly” limitations on the ADA did have far-reaching effects, causing plaintiffs with impairments such as diabetes, cancer, heart conditions, and other disabilities to fail to qualify as having disabilities under the Court’s more stringent approach to the ADA.¹⁰¹ Supporters of the ADA believed that the Court had failed to properly consider Congress’s intentions for the ADA and instead chose to apply the reasoning of its own decisions to determine the proper application of the ADA.¹⁰² Congress agreed, stating that the Court had “narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.”¹⁰³

The ADAA was engineered both to reject the Court’s limitations on the ADA and to restore the promise of the original law.¹⁰⁴ These goals were achieved by amending the ADA to include an expanded and more-detailed definition of disability as well as rules of construction regarding that definition.¹⁰⁵

The new definition of disability took direct aim at the *Toyota* Court’s stringent application of the original ADA’s language. The original ADA had only defined “disability” under the three prongs of “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an im-

⁹⁹ 154 Cong. Rec. H6066 (daily ed. June 25, 2008) (statement of Rep. Hoyer (D-Md.) quoting the President on the floor of the House during debate over the ADA Amendments Act of 2008), available at <http://www.gpo.gov/fdsys/pkg/CREC-2008-06-25/pdf/CREC-2008-06-25.pdf>.

¹⁰⁰ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 495 (1999) (Stevens, J., dissenting).

¹⁰¹ *ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 18 (2007) (statement of Rep. Hoyer (D-Md.), House Majority Leader).

¹⁰² See, e.g., Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 199–200 (2010); Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 206 (2010) (“In fact, the narrowing of coverage under the ADA is used in law schools across the country as a textbook example of how language intended by Congress to mean one thing can be interpreted by courts to mean something completely different.”).

¹⁰³ H.R. REP. NO. 110-730(I) (June 23, 2008).

¹⁰⁴ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553.

¹⁰⁵ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553.

pairment; or (C) being regarded as having such impairment,”¹⁰⁶ and thus left the door open for the Court to supply its own interpretation of the term.¹⁰⁷ Under the ADAA, the definition of disability was expanded to include a nonexclusive list of major life activities and major bodily functions.¹⁰⁸ The amendment also provides protection for individuals who have faced discrimination due to “an actual or perceived physical impairment, whether or not the impairment limits or is perceived to limit a major life activity.”¹⁰⁹ As a clear manifestation of Congress’s intent to restore the broad and inclusive purpose of the ADA, these changes dismantled any assertion that the definition of “disability” should be read or applied strictly to those seeking protection from discrimination.¹¹⁰

The amendments directed at the Supreme Court’s “miserly” construction of the ADA were equally forceful. The addition of the rules of construction for the definition of “disability”¹¹¹ to the original ADA’s definition of “disability” took aim at *Sutton* and its companion cases, as well as the many lower court decisions that came in *Sutton*’s wake, and served to reestablish the ADA as a truly inclusive law.¹¹²

These rules require the law to be “construed in favor of broad coverage of individuals” and the term “substantially limits” to be viewed in light of the stated purposes of the ADAA.¹¹³ In addition, the rules allow a finding of disability to be based on an impairment that limits only one major life activity, or an impairment that is episodic or in remission “if it would substantially limit a major life activity when active.”¹¹⁴ Most pointedly, the rules also reinstitute the original congressional intent that the presence or availability of mitigating measures should not be factored into the determination of an individual’s disability in most cases.¹¹⁵

The effect of the ADAA on the courts has been more gradual than immediate on disability claims.¹¹⁶ While most courts correctly recognized that the ADAA superseded the Supreme Court’s strict limitations

¹⁰⁶ Original text of Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3(2), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12102 (amended 2008)), available at <http://www.ada.gov/archive/adastat91.htm#Anchor-Sec-47857>.

¹⁰⁷ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196–98 (2002).

¹⁰⁸ 42 U.S.C.A. § 12102(2) (Westlaw 2015).

¹⁰⁹ 42 U.S.C.A. § 12102(3)(A) (Westlaw 2015).

¹¹⁰ See Barry, *supra* note 102, at 265 (noting that the “regarded as” prong of the ADAA would become the “primary vehicle for discrimination claims” due to the amendment’s inclusive nature).

¹¹¹ 42 U.S.C.A. § 12102(4) (Westlaw 2015).

¹¹² ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553.

¹¹³ 42 U.S.C.A. § 12102(4)(A), (B) (Westlaw 2015).

¹¹⁴ 42 U.S.C.A. § 12102(4)(C), (D) (Westlaw 2015).

¹¹⁵ 42 U.S.C.A. § 12102(4)(E) (Westlaw 2015).

¹¹⁶ See Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL’Y J. 5, 27 (2013).

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on the ADA, many plaintiffs have failed to qualify under the definition of “disability” in the ADAA.¹¹⁷ Many plaintiffs with claims that predated the enactment of the ADAA were disappointed by the courts’ determination that the ADAA did not apply retroactively.¹¹⁸

However, these limitations demonstrate that although the intent of Congress was to make the protections of the ADA broad, Congress never intended to make the law an absolute security blanket for anyone with any type of impairment. Even the language of the ADAA provides limitations on those whose impairments qualify as disabilities.¹¹⁹ Still, the overall effect of the ADAA has been to broaden the class of individuals who qualify for protection under the law’s definition of disability.¹²⁰ Whether the definition now includes those with severe food allergies remains unsettled, but recent cases are positive indications for the future.

IV. THE STATUS OF SEVERE FOOD ALLERGY AS A DISABILITY MOVING FORWARD

A. THE ADAA: A RENEWED HOPE

For those with severe food allergies, the changes provided by the ADAA represent a renewed hope that federal law finally offers a legal basis for accommodations and protection from discrimination. Specifically, these protections cannot be brushed aside like Congress’s original intentions for the ADA were disregarded in *Sutton* and *Toyota*.¹²¹ Before the ADAA, many public and private businesses, programs, and institutions that resisted or denied requests to reasonably accommodate individuals with food allergies relied on the courts’ general refusals to

¹¹⁷ See, e.g., *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 853 (9th Cir. 2009) (noting that although the plaintiff had a disability even under the stricter definition, the ADAA leaves no doubt the plaintiff qualified as having a disability); *Primmer v. CBS Studios, Inc.*, 667 F. Supp. 2d 248, 257 n.5 (S.D. N.Y. 2009) (noting that *Sutton* and *Toyota* were overturned by the ADAA).

¹¹⁸ See, e.g., *Moran v. Premier Educ. Grp., LP*, 599 F. Supp. 2d 263, 271–72 (D. Conn. 2009).

¹¹⁹ See, e.g., 42 U.S.C.A. § 12102(3)(B) (Westlaw 2015) (excluding minor and transitory impairments from the “regarded as” prong of the definition of “disability”); 42 U.S.C.A. § 12102(4)(E)(i)(I) (Westlaw 2015) (excluding ordinary eye glasses and contact lenses from the mitigating measures that cannot be considered when determining whether an individual has a disability).

¹²⁰ Barry, *supra* note 116, at 27–31.

¹²¹ Borella, *supra* note 63, at 773 (“It seems likely the Supreme Court and lower courts will construe the amended ADA more in favor of sufferers of severe food allergies than they had construed the previous version of the ADA.”).

include allergies under the ADA's disability definition.¹²² However, the language of the ADAA makes it clear that the *Land* standard is no longer applicable to individuals with severe food allergies and can no longer be used to deny coverage under the law.

The ADAA's definition of disability not only included a list of major life activities that included eating and breathing,¹²³ but the law also added major bodily functions in the definition. This includes functions that are key to disability claims of individuals with food allergies, such as functions of the immune system, digestion, bowel functions, and respiratory functions.¹²⁴ Because a severe allergic reaction to food can affect all of these bodily functions as well as the specified major life activities of eating and breathing,¹²⁵ severe food allergies must qualify under the ADAA's expanded definition of disability. However, this argument does nothing to erode the decision in *Land*, which was based on the episodic nature of the plaintiff's daughter's peanut allergy and the potential mitigating measures available, including the option to avoid foods containing peanuts.¹²⁶

The language of the ADAA, though, also provides rules of construction that dismantle the *Land* court's holding. Specifically, the ADA was amended to include an impairment that is "episodic," even if that impairment only "would substantially limit a major life activity when active."¹²⁷ This rule of construction perfectly describes the reasoning used against the plaintiff in *Land*¹²⁸ and provides a strong argument that individuals with food allergies can no longer be denied coverage under the ADA.

Similarly, the reasoning of the *Land* and *Bohacek* courts, that the mitigating factors also prevented those with food allergies from qualifying as having a disability under the ADA, can no longer be upheld.¹²⁹ In one of the lengthiest additions to the ADA, the ADAA codifies the original congressional intent that mitigating measures cannot be factored into the determination of disability.¹³⁰ Medicine and "reasonable accommodations" are also included in the list of mitigating measures,¹³¹ and this

¹²² Tess O'Brien-Heinzen, *supra* note 8, at 8 (noting that under the original ADA, "schools and employers have not been quick to accommodate food allergy sufferers").

¹²³ 42 U.S.C.A. § 12102(2)(A) (Westlaw 2015).

¹²⁴ 42 U.S.C.A. § 12102(2)(B) (Westlaw 2015).

¹²⁵ *About Food Allergies: About Anaphylaxis*, *supra* note 18.

¹²⁶ *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 424–25 (8th Cir. 1999).

¹²⁷ 42 U.S.C.A. § 12102(4)(D) (Westlaw 2015).

¹²⁸ *Land*, 164 F.3d at 424–25.

¹²⁹ *See id.*; *see also* *Bohacek v. City of Stockton*, No. CIV S-04-0939 GGH, 2005 WL 2810536, 4 (E.D. Cal. Oct. 26, 2005).

¹³⁰ 42 U.S.C.A. § 12102(4)(E) (Westlaw 2015).

¹³¹ 42 U.S.C.A. § 12102(4)(E)(i)(I), (III) (Westlaw 2015).

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language applies directly to individuals suffering from severe food allergies. These individuals rely on medicines like asthma inhalers, antihistamines, and epinephrine to counteract the symptoms of allergy attacks.¹³² Those with severe food allergies also rely on reasonable accommodations, like alternative school cafeteria food options and special food preparation precautions, to avoid potential allergic reactions.¹³³ The *Land* court indicated that a food allergy does not constitute a disability under the ADA if it is manageable,¹³⁴ but the ADAA clearly states that this is the wrong test to apply when determining if an impairment is a disability under the ADA.¹³⁵

B. RECENT ADAA DECISIONS AND SETTLEMENT CONCERNING FOOD ALLERGIES

The language of the ADAA makes it clear that individuals with severe food allergies can no longer be denied reasonable accommodations or protections under the ADA. Although no courts have directly confronted *Land* in light of the ADAA, a small number of opinions have indicated that the *Land* standard's days are numbered.

In *Lopez-Cruz v. Instituto de Gastroenterologia de P.R.*,¹³⁶ one of the few cases to distinguish *Land*, a nurse in Puerto Rico brought an ADA claim against her employer, which required her to use a chemical to clean medical equipment despite her allergic reactions to the chemical.¹³⁷ In dictum, the court recognized that the *Land* standard would prevent the plaintiff from qualifying as having a disability under the ADA, but the court also noted that the ADAA had expanded the definition of disability to include episodic impairments and to preclude courts from considering mitigating measures.¹³⁸ Finding it unnecessary to decide these questions at the pleading stage, the court held that the plaintiff had sufficiently alleged that she had a disability under the ADA and denied the defendant's motion to dismiss.¹³⁹

¹³² *About Food Allergies: Treatment & Managing Reactions*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/treating-an-allergic-reaction> (last visited Feb. 16, 2015).

¹³³ *Managing Food Allergies at School*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/managing-food-allergies/at-school> (last visited Feb. 16, 2015).

¹³⁴ *Land*, 164 F.3d at 425.

¹³⁵ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553 (amending 42 U.S.C. § 12102 to provide rules of construction that expressly allow for episodic impairments to be defined as disabilities and that forbid the consideration of mitigating measures in determining whether an individual's impairment qualifies as a disability).

¹³⁶ *Lopez-Cruz v. Instituto de Gastroenterologia de P.R.*, 960 F. Supp. 2d 367 (D.P.R. 2013).

¹³⁷ *Id.* at 368–69.

¹³⁸ *Id.* at 371 n.8.

¹³⁹ *Id.* at 371–72 & n.8.

In what may be the clearest indication of the future of severe food allergies under the ADA, the U.S. Department of Justice (DOJ) announced in January 2013 that it had reached a settlement with Lesley University, a private Massachusetts university of 6,000 students. The settlement required the school to accommodate students with food allergies and celiac disease in the university's mandatory meal program.¹⁴⁰ It followed a 2009 complaint that the university had violated the ADA by failing to accommodate students with food allergies.¹⁴¹ In a supplement intended to provide answers concerning the implications of the agreement, the DOJ stated that “[s]ome individuals with food allergies have a disability as defined by the ADA, particularly those with more significant or severe responses to certain foods.”¹⁴² While the supplement also explained that the “ADA does not require every place of public accommodation that serves food to the public” to provide accommodations for individuals with food allergies,¹⁴³ the DOJ guidance that schools must accommodate students with food allergies or face charges of ADA violations was made clear.¹⁴⁴

In *Knudsen v. Tiger Tots Community Child Care Center*,¹⁴⁵ an Iowa Court of Appeals decision made within weeks of the Lesley University Settlement, the court echoed the DOJ's new stance on food allergy as a disability under the ADA.¹⁴⁶ In *Knudsen*, a mother sued when her daughter was denied enrollment in a childcare center due to the girl's allergy to tree nuts.¹⁴⁷ The trial court denied the mother's argument that the ADAA rather than *Land* should provide the prevailing standard to determine whether the girl had a disability under the law.¹⁴⁸ The court of appeals reversed that decision, holding that the ADAA provided the “framework for an analysis of ‘disability’ under [Iowa] state law” and that the ADAA's rules of construction clearly included episodic impairments like food allergies.¹⁴⁹

¹⁴⁰ *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*, U.S. DEP'T JUST., no. 1 (Jan. 25, 2013), http://www.ada.gov/q&a_lesley_university.htm.

¹⁴¹ Settlement Agreement Between The United States of America and Lesley University, *supra* note 12.

¹⁴² *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*, *supra* note 140, no.1.

¹⁴³ *Id.* no. 2.

¹⁴⁴ *Schools Must Accommodate Food Allergies, Says DOJ; Courts Review Matter*, 24 No. 3 ADA Compliance Guide Newsletter 2, 2 (2013).

¹⁴⁵ *Knudsen v. Tiger Tots Cmty. Child Care Ctr.*, No. 12-0700, 828 N.W.2d 327 (unpublished table decision), 2013 WL 85798 (Iowa Ct. App. Jan. 9, 2013).

¹⁴⁶ *Id.* at *1.

¹⁴⁷ *Id.* at *1-2.

¹⁴⁸ *Id.* at *1.

¹⁴⁹ *Id.* at *2.

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These two cases and the Lesley University Settlement give a clear signal that individuals with severe food allergies should expect to qualify as having a disability under the ADAA so long as the allergy, when active, substantially limits a major life activity.¹⁵⁰ However, these opinions are recent and some courts are still adhering to the *Land* standard despite the changes to the ADA.¹⁵¹ In light of the clear language of the ADAA, this type of decisionmaking by the courts is a clear violation of both the intent and the letter of the law. As one commentator noted, the future is bright for disability rights advocates, but plaintiffs must be diligent in taking advantage of the inclusive changes to the ADA.¹⁵²

V. CONCLUSION

For millions of Americans with severe food allergies, the ADA has failed to live up to its promise, especially in light of the holding of *Land* and the reasoning of *Sutton* and *Toyota*, which would have excluded individuals with severe food allergies from pleading successful ADA claims. The ADAA expressly overruled the restrictive approach to the ADA taken by *Sutton* and *Toyota*, and, although it did not specifically name *Land*, the ADAA effectively overruled that case as well. In addition, the DOJ's stated position that some individuals with severe food allergies have disabilities under the ADA and a growing recognition by some courts that the ADAA has broadened the scope of "disability" demonstrate that the status of food allergy as a disability is truly evolving.

It is time for all courts to recognize that *Land* is no longer good law in the wake of the ADAA and that individuals with severe food allergies must be provided the protections and accommodations of the ADA. At the very least, plaintiffs with severe food allergies should be afforded their day in court to challenge discrimination based on their disabilities. Millions of Americans live with the reality that every meal or snack is a potentially life-threatening event, and the number of individuals facing that reality grows every day. With the ADAA, Congress made it clear that severe food allergies are nothing to sneeze at; rather, they are real disabilities that deserve protection and accommodation. It is time for the courts to follow Congress's lead and follow the law.

¹⁵⁰ *Id.* at *3.

¹⁵¹ *See, e.g.*, *Rodriguez v. Putnam*, No. CV 11-8772-CJC (PJW), 2013 WL 1953687, at *5 (C. D. Cal. May 8, 2013) (following *Land* to determine whether a plaintiff's peanut allergy amounted to a disability under the ADA).

¹⁵² Barry, *supra* note 116, at 31-34.

