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NOT DEAF ENOUGH: CAN YOU HEAR DISCRIMINATION?

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ABSTRACT

Hearing loss is a disability that affects thousands of Americans and severely inhibits one's ability to participate in society. Although it is quite common, hearing loss is often considered an "invisible disability" because one cannot always tell that someone has hearing loss just by looking at them. Because of this, there are several misconceptions and misunderstandings surrounding hearing loss as a whole. While the enactment of the Americans with Disabilities Act ("ADA") codified protections for many individuals with disabilities, the complexity of hearing loss meant that it was often overlooked by the courts in ways that deafness, another type of hearing disability, was not. As a result, many individuals with hearing loss fell through the cracks of the ADA's purported protections, and stigmas surrounding the disability remained or were pushed to the surface.

This Note explores judicial jurisprudence in its analysis and interpretation of hearing loss under both the ADA and the Americans with Disabilities Act Amendments Act of 2008

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("ADAAA"). This Note seeks to compare and contrast the ways in which courts evaluated hearing loss and takes a critical look at its analysis under both versions of the statute. Further, this Note highlights and explores common stigmas surrounding hearing loss evident in these interpretations, while addressing stereotypes that stem from a greater misunderstanding of the disability as a whole. Finally, this Note serves as a point of advocacy, with a hope that a more thorough understanding of hearing loss will help courts to continue properly evaluating the disability with a more inclusive analysis under the ADAAA. As readers will see, hearing loss, whether it be mild or severe, was squarely among the disabilities that the ADA was always intended to protect.

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"So often in life the things that you regard as an impediment turn out to be great, good fortune."[**]

I. HEARING LOSS: THE QUIET DISABILITY

Hearing loss is a disability that affects 48 million people in the United States.[1] Of that population, 30 million suffer from hearing loss in both ears.[2] One in five Americans over age twelve suffer from some level of hearing loss,[3] including 3 million children.[4] Of those children, 1.3 million are under the age of three.[5] As for the older population, thirty-three percent of Americans aged sixty-five to seventy-four suffer from hearing loss, which also affects almost fifty percent of those aged seventy-five and older.[6]

Hearing loss is often called an "invisible disability."[7] With no visual markers, those unaffected by the disability often do not know that they are dealing with someone who is hearing impaired, and have a hard time understanding the effects of the condition.[8] Because of its invisibility, those affected may not even realize that they have hearing loss, and 15 million of those affected avoid seeking help and assistance.[9] This loosely translates to one in three people with hearing loss never seeking treatment or visiting an audiologist.[10]

** Justice Ruth Bader Ginsburg (1933-2020).

1. *Hearing Loss & Tinnitus Statistics*, HEARING HEALTH FOUND., https://hearinghealthfoundation.org/hearing-loss-tinnitus-statistics/ (last visited Aug. 10, 2020).

2. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2014-1, DEAFNESS AND HEARING IMPAIRMENTS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (2014), https://www.eeoc.gov/eeoc/publications/qa_deafness.cfm [hereinafter EEOC DEAFNESS AND HEARING IMPAIRMENTS].

3. *Hearing Loss & Tinnitus Statistics*, *supra* note 1.

4. *Statistics and Facts About Hearing Loss*, CTR. FOR HEARING AND COMMC'N, https://chchearing.org/facts-about-hearing-loss/ (last visited Aug. 10, 2020).

5. *Id.*

6. *Hearing Loss & Tinnitus Statistics*, *supra* note 1.

7. *See, e.g.*, Jen Christensen, *Hearing Loss an "Invisible," and Widely Uninsured, Problem*, CNN: HEALTH (Sept. 12, 2016, 1:20 PM), https://www.cnn.com/2012/07/10/health/hearing-aid-insurance/index.html. Its invisibility impacts many in the United States. ("If hearing loss were officially considered a disability, it would rank as the largest disability class in the country."). *Id.*

8. Li-Korotky, *As an Invisible Disability, Hearing Loss Often Goes Ignored*, PAC. NW. AUDIOLOGY (Oct. 12, 2018), https://pnwaudiology.com/blog/as-an-invisible-disability-hearing-loss-often-goes-ignored/.

9. *Statistics and Facts About Hearing Loss*, *supra* note 4. This can also be due to negative stereotypes and stigmas, as discussed *infra* Part IV.A.3.

10. *See* Lisa Rapaport, *One in Three U.S. Adults with Hearing Problems Don't Seek Help*, REUTERS: HEALTH NEWS (Nov. 28, 2017, 4:17 PM), https://www.reuters.com/article/

Hearing loss can be caused by several factors, including genetics, noise, trauma, side effects of medication, infections, and age.[11] The consequential effects of hearing loss vary from individual to individual, and such difficulties may include communication barriers, difficulty adjusting to limited sound, social withdrawal, and depression.[12]

The effects of hearing loss are most prevalent in children. For example, a child with hearing loss can miss as much as fifty percent of a classroom discussion.[13] The earlier hearing loss occurs in a child's life, the more serious the condition is, as it has significant effects on a child's vocabulary development, speech, and even their academic achievement.[14]

For those affected by hearing loss, hearing aids provide significant, life-changing benefits.[15] The assistance provided by hearings aids is necessary for those with such a disability, and about eighty percent of hearing loss can be treated with hearing aids.[16] Benefits of hearing aids include lowering the risk of dementia by five times, reversing psychological and emotional changes, and offsetting cognitive decline.[17] These benefits extend to all facets of life, as those with unaided hearing loss earn annually $20,000 less than those using hearing aids or cochlear

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us-hearing-healthcare/one-in-three-u-s-adults-with-hearing-problems-dont-seek-help-idUSKBN1DS2TZ.

11. *Hearing Loss & Tinnitus Statistics*, *supra* note 1.

12. Andrea Ciorba, Chiara Bianchini, Stefano Pelucchi &Antoonio Pastore, *The Impact of Hearing Loss on the Quality of Life of Elderly Adults*, NAT'L CTR. FOR BIOTECHNOLOGY INFORMATION, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3393360/ (last visited Aug. 14, 2020); *Hearing Loss - How It Affects People*, BETTER HEALTH CHANNEL, https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/hearing-loss-how-it-affects-people (last updated Apr. 2017); EEOC DEAFNESS AND HEARING IMPAIRMENTS, *supra* note 2; *Myth vs Fact The Truth About Hearing Loss*, AM. ACAD. OF AUDIOLOGY, https://www.audiology.org/sites/default/files/AAM%20Poster%20(40x60).pdf (last visited Feb. 24, 2020). With invisibility also comes isolation; individuals with untreated hearing loss are often excluded from communication, and often feel lonely, isolated, depressed, and frustrated. *Id.*

13. *Statistics and Facts About Hearing Loss*, *supra* note 4.

14. *Effects of Hearing Loss on Development*, READING ROCKETS, https://www.readingrockets.org/article/effects-hearing-loss-development (last visited Aug. 10, 2020).

15. *Hearing Loss & Tinnitus Statistics*, *supra* note 1.

16. *Id.* Being treated with hearing aids by no means equates to hearing loss being "cured" by hearing aids. These devices simply provide a mechanism by which the quality of one's hearing may be improved. The author of this Note has worn hearing aids since age six, and even with hearing aids, she still relies heavily on lipreading, she cannot tell what direction sounds are coming from (referred to as a loss of "locality"), she cannot understand speech when it comes through her left ear, and she cannot hear when others try to call her from behind.

17. *Id.*

implants.[18] People who are fitted with hearing aids can tremendously improve their quality of life and maintain meaningful relationships while comfortably and safely engaging in the world around them.[19]

There are several laws that protect those with disabilities, most notably the ADA and its subsequent amended version, the ADAAA.[20] Among the primary focuses of the ADA are preventing discrimination on the basis of a disability and providing reasonable accommodations to those who may need them. However, the way the ADA was subsequently applied to cases involving hearing loss led courts to question whether hearing loss merited disability protections at all.

II. THE ADA AND ITS PROTECTIONS

On July 26, 1990, the ADA was passed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[21] The ADA was the nation's first comprehensive civil rights law for people with disabilities.[22] Congress noted that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[23] The ADA gave those with disabilities federal civil rights protections while also extending equal opportunity to qualified individuals in several sectors of society.[24]

At the time it was enacted, President George H. W. Bush remarked, "[w]ith today's signing of the landmark Americans [with] Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom."[25] The Act noted that 43 million Americans suffered from one or

18. *Hearing Loss Facts and Statistics*, HEARING LOSS ASS'N OF AM., https://www.hearingloss.org/wp-content/uploads/HLAA_HearingLoss_Facts_Statistics.pdf (last updated May 2018).

19. *6 Benefits of Using Hearing Aids*, HEARING AID ASSOCS.: THE BLOG, https://hearingaidassociates.com/blog/benefits-using-hearing-aids/ (last visited Sept. 16, 2020).

20. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (amended 2008).

21. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327, 328 (1990) (codified as amended at 42 U.S.C. § 12101(b)(1)).

22. *ADA – Findings, Purpose, and History*, ADA ANNIVERSARY, https://www.adaanniversary.org/findings_purpose (last visited Feb. 22, 2020).

23. 42 U.S.C. § 12101(a)(7).

24. Jennifer Carroll & Molly James, *Audiologists and the Americans with Disabilities Act: What You Need to Know*, AUDIOLOGY ONLINE (Aug. 27, 2007), https://www.audiologyonline.com/articles/audiologists-and-americans-with-disabilities-937.

25. President George H.W. Bush, *Remarks on Signing the Americans with Disabilities Act of 1990*, GEORGE H.W. BUSH PRESIDENTIAL LIBR. & MUSEUM (July 26, 1990), https://bush41library.tamu.edu/archives/public-papers/2108 (last visited Feb. 1, 2021).

more disabilities,[26] and that individuals with disabilities are a "discrete and insular minority" who have been subject to purposeful unequal treatment, political powerlessness, and erroneous stereotypic assumptions.[27] As a result, the ADA listed among its purposes the goals of eliminating discrimination against individuals with disabilities and ensuring that the federal government played a central role in enforcing the standards set forth in the Act.[28]

The ADA is split into five titles: I) Employment, II) Public Services, III) Public Accommodations and Services Operated by Private Entities, IV) Telecommunications, and V) Miscellaneous Provisions.[29] This Note will not focus specifically on any of these titles, but instead on the ADA's *definition* of a disability.[30]

No titles of the ADA explicitly address hearing loss, nor do they explicitly address deafness.[31] The original ADA statute also omitted a concrete list of disabilities covered by the Act.[32] However, Title IV is unique in that it is one of the few places in the ADA where one could infer that some level of hearing impairment would be covered. Title IV covers telecommunications systems, which ensure the availability of closed-captioned television for public service announcements and relay communication systems for telephones.[33] The text of the Act itself defines a telecommunications device as a "Telecommunications Device for the

26. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(1), 104 Stat. 327, 328 (1990).

27. *Id.* § 2(a)(7), 104 Stat. at 329.

28. 42 U.S.C. § 12101(b)(1)–(3). Other purposes of the Act included providing "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *Id.* § 12101(b)(2). Also listed among its purposes was "to invoke the sweep of congressional authority" through the use of the fourteenth amendment to address discrimination. *Id.* § 12101(b)(4).

29. Title I of the ADA focuses on employment interests, prohibiting employers from discriminating against otherwise qualified individuals with disabilities. 42 U.S.C. §§ 12111–12117. Title II focuses on public entities, ensuring that qualified members of society with a disability will not be excluded from or subjected to discrimination under any state program or service. *Id.* at §§ 12131–12165. Title III is concerned with private entities and the equal choice of retail goods and service providers for those with disabilities. *Id.* at §§ 12181–12189. Title IV covers the accessibility of telecommunications technology, which covers relay communication systems and more notably, closed captioning. 47 U.S.C. § 225 (this codification was due to a change in the numbering system, which addresses the inconsistencies in the citations). Finally, Title V covers miscellaneous and technical provisions regarding state immunity, attorney's fees, and other matters. *Id.* at §§ 12201–12213.

30. *See* 42 U.S.C. § 12102.

31. *See generally* 42 U.S.C. §§ 12101–12213 (amended 2008).

32. *Id.* § 12102.

33. 47 U.S.C. § 225.

Deaf."[34] Although this is the definition given, Title IV states that these communication services are for hearing impaired and speech impaired individuals, not distinguishing between deaf and hard of hearing people.[35]

The ADA is arguably the most well-known and comprehensive statute in the field of disability law and its protections. Although it did not give a concrete list of the disabilities that it covers, its definition of a disability was meant to be broad enough to cover a wide range of impairments.[36] One would naturally assume that the ADA would unquestionably offer protections to those with hearing loss, among many other disabilities. However, the way courts applied the ADA created a narrow definition of a disability that, in effect, constricted the range of disabilities that it covered. For example, courts applying the ADA to hearing-impaired claimants often measured the disability as one of degree, or how "bad" the condition was, rather than considering hearing loss a disability on its face.[37] This faulty application allowed hearing loss to fall through the cracks of the statute. As a result, many individuals suffered from hearing loss but were not considered to have a disability under the ADA. This result unfortunately allowed the ADA to discriminate against those hearing-impaired claimants who were not "deaf enough."

A. The ADA's Definition of a Disability

The ADA defines the term disability as "a physical or mental impairment that substantially limits a major life activity."[38] This definition of a disability includes as disabled those who have a record of such an impairment or those regarded as having an impairment.[39] A "[p]hysical or mental impairment" is defined as:

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34. *Id.* § 225(a)(2).
35. *Id.* § 225.
36. 42 U.S.C. § 12102.
37. *See infra* Parts III, III.A., & IV.A.
38. *Id.* § 12102(1)(A).
39. *Id.* § 12102(1)(B)–(C). This Note will be focusing on the first prong of the ADA's (and as amended, the ADAAA's) definition of a disability, with a particular focus on the "substantially limits" and "major life activity" language of the statute. *See id.* § 12102(1)(A). This Note seeks to explore this language and analyze how it has been interpreted in judicial jurisprudence in regard to hearing loss as a disability. It is important to note that the "substantially limits" language was heavily relied on for the statute's other definitions of a disability as well. *See* Regulations to Implement the Equal Employment Provisions of The Americans With Disabilities Act, 29 C.F.R. § 1630.2(k)(1) (2020) (stating that a person has a "record of" a disability "if the individual has a history of, or has been misclassified as having, a mental or physical impairment that *substantially limits one or more major life activities*.") (emphasis added); *see also* 29 C.F.R. § 1630.2(l)(1)–(3) (1992) (requiring that an

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.[40]

Before the enactment of the ADAAA, "substantially limits" generally referred to the inability to perform or being significantly restricted in performing a major life activity that the average person in the general population could do.[41] At the time, Equal Employment Opportunity Commission ("EEOC") guidelines stated that a substantial limitation would be evaluated in terms of degree of severity of the limitation and the length of time it restricted a major life activity.[42] Put differently, an impairment only substantially limited a major life activity if the individual was completely unable to engage in the major life activity, the individual was significantly restricted in the major life activity as

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individual demonstrate that their impairment is "treated by a covered entity as having a *substantially limiting* impairment.") (emphasis added). *Compare* 29 C.F.R. § 1630.2(l)(1)–(3) (1992) *with* 29 C.F.R. § 1630.2(l)(1)–(3) (2020) (the current version of the Code which reflects the changes brought forth by the ADAAA, which no longer requires that an individual meet the "substantially limits a major life activity" prong to qualify as disabled, but instead focuses on the presence of adverse employment actions but only after this amendment). Because this Note focuses on the issues with the "substantially limits" language broadly, and mostly under the original version of the statute, further inquiry into these additional definitions is unnecessary because "substantially limits" was a sufficient condition for any definition of a disability under the original version of the ADA.

40. 29 C.F.R. § 1630.2(h)(1)–(2) (2020).

41. *See* 29 C.F.R. §§ 1630.2(j)(1)(i)–(ii) (1992). *But see* 29 C.F.R. §§ 1630.2(j)(1)(i)–(ix) (2020) (reflecting a much broader expansion of the definition of "substantially limits" after the enactment of the ADAAA in 2008; *see infra* Part V. *See, e.g.*, *Section 902 Definition of the Term Disability*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/section-902-definition-term-disability (last visited Sept. 29, 2020).

> The Compliance Manual Section on the Definition of the Term "Disability" has been removed from this website, since the analysis in it has been superseded by the ADA Amendments Act of 2008 (ADAAA). The ADAAA makes it easier for individuals challenging employment actions under Title I of the ADA to establish that they meet the definition of 'disability' and are thus protected by the law.

Id.

42. U.S. EQUAL EMP. OPPORTUNITY COMM'N, 2 EEOC COMPLIANCE MANUAL 915.002, 902.15 (1991) [hereinafter EEOC COMPLIANCE MANUAL].

compared to the average person, and the limitation was permanent, or long-term in length.[43]

Because the ADA did not include a list of covered disabilities, the substantially limits standard looked into "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[44] Whether or not an individual had a substantially limiting impairment required an extensive, individualized analysis that was determined on a case-by-case basis.[45] The inquiry was not based on the name or type of the impairment, but rather the effect that impairment had on an individual.[46] The EEOC Compliance Manual in effect in 1991 stated that the reason an individualized approach was necessary was "because the same types of impairments often vary in severity and often restrict different people to different degrees or in different ways."[47]

An individual could prove the existence of an impairment under the ADA in several ways, and it was not limited to expert testimony.[48] Other information taken into consideration could include anything relevant that described the restrictions resulting from the impairment.[49] This information could come from the individual bringing the claim, others who had direct knowledge of the individual's restrictions, or even an investigator's personal observations.[50]

As an early precursor to the topic discussed in this Note, the EEOC Compliance Manual also noted that, "[i]n very rare instances, impairments are so severe that there is no doubt that they substantially limit major life activities. In those cases, it is undisputed that the complainant is an individual with a disability."[51] Interestingly enough, deafness was listed as an example of a undisputed disability that required no further analysis by a court on whether or not such an impairment met the standard of a disability under the ADA.[52] On the contrary, the same guidelines noted that an individual who used hearing aids may not have a disability because the individual's impairment may

43. *See generally* 29 C.F.R. § 1630.2(j)(1)–(2) (1992).
44. 29 C.F.R. § 1630.2(j)(2)(i)–(iii) (1992).
45. *See* EEOC COMPLIANCE MANUAL, *supra* note 42, at 902.15–16.
46. *Id.* at 902.16.
47. *Id.* at 902.19.
48. *Id.* at 902.21–22.
49. *Id.* at 902.22.
50. *Id.*
51. *Id.* at 902.21.
52. *Id.* Other examples of where a court accepted without discussion that a certain impairment automatically constituted a disability included insulin-dependent diabetes, legal blindness, manic depressive syndrome, and alcoholism. *Id.*

only "*mildly*" affect their hearing and "may not *substantially limit* the individual's ability to hear."[53]

A major life activity included functions such as caring for oneself and performing tasks, but also included "walking, seeing, hearing, speaking, breathing, learning, and working."[54] Similar to how the ADA omitted a list of covered disabilities under the Act, EEOC guidelines noted that there was also no exhaustive list of major life activities.[55] A condition would substantially limit a major life activity for purposes of the ADA if it would significantly restrict the condition, manner, or duration under which the individual could perform the major life activities listed above as compared to the average person.[56]

B. Further Narrowing the Definition of a Disability Through Case Law

In seeking to interpret and further define these terms under the ADA, the Supreme Court in *Bragdon v. Abbott* held that the ADA only addressed substantial limitations, not "utter inabilities."[57] This statement seemed in line with EEOC guidelines, which noted, "[a]n impairment does not significantly restrict major life activities if it results in only mild limitations."[58] EEOC guidelines also stated that the ADA applied to people with "substantial, as distinct from minor, impairments."[59] However, this strict application of a disability under the ADA was an early indicator that courts would largely focus their evaluations of disabilities based on some sort of "degree." One could also infer that disabilities would only be protected if they were "bad enough" to fit a narrow set of guidelines.

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53. *Id.* at 902.37 (emphasis added). *See infra* Part IV.A (discussing how hearing aides were evaluating under the *Sutton* standard's mitigating measure analysis).

54. 29 C.F.R. § 1630.2(i) (1994).

55. *See* EEOC COMPLIANCE MANUAL, *supra* note 42, at 902.6.

56. 29 C.F.R. § 1630.2(j)(1)(ii) (1994).

57. Bragdon v. Abbott, 524 U.S. 624, 641 (1998). The "Bragdon Test" for determining whether an impairment constituted a disability was succinctly narrowed down to 1. determining whether the condition was a physical impairment, 2. determining whether the life activities the claimant argues were affected by the impairment constitute major life activities under the ADA, and 3. determining whether the impairment substantially limited that major life activity. *Id.* at 631.

58. EEOC COMPLIANCE MANUAL, *supra* note 42, at 902.19.

59. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2002-2, THE ADA: QUESTIONS AND ANSWERS (2002), https://www.eeoc.gov/eeoc/publications/adaqa1.cfm [hereinafter EEOC QUESTIONS AND ANSWERS] ("An individual with epilepsy, paralysis, a substantial hearing or visual impairment, mental retardation, or a learning disability would be covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, infection, or broken limb, generally would not be covered.").

It appears that later in the opinion, the majority in *Bragdon* tried to qualify this narrow statement by adding, "[w]hen significant limitations result from the impairment, the definition is met *even if the difficulties are not insurmountable*."[60] But this statement only created a confusing dichotomy. In other words, the disability itself needed to be narrow and significant enough to be worthy of ADA protections, but to ensure that the ADA only applied to this narrow subset of individuals, the showing of a major life activity needed to be so broad that only a few would be affected.

The best example of this dichotomy can be found in the Second Circuit case, *Reeves v. Johnson Controls World Services, Inc.*[61] This case echoed the holding in *Bragdon* by stating that "only significant impairments will enjoy the protection of the ADA."[62] In order to keep consistent with this purpose, this case held that the definition of a major life activity must be kept broad, because narrowing that definition would lessen the plaintiff's burden of proving a substantial limitation.[63] In *Reeves*, the plaintiff sought to prove that "everyday mobility" was a major life activity consistent with the definition as set forth by the ADA.[64] The plaintiff suffered from a mental impairment, namely panic attacks, that he asserted substantially limited his everyday mobility.[65] In evaluating his claim, the court made a helpful analogy that encompassed both the narrow range of disabilities under the ADA with the need to define major life activities broadly. The court noted:

> For example, while it might be hard to show that a very mild cough substantially limits the major life activity of "breathing," it would be far easier to make an individualized showing of a substantial limitation if the major life activity were instead defined more narrowly as, say, the major life activity of "breathing atop Mount Everest." Depending upon how narrowly he may frame the scope of the "major life activity," the plaintiff's burden of making an individualized showing of substantial limitation will vary accordingly.[66]

60. *Bragdon*, 524 U.S. at 641 (emphasis added).
61. 140 F.3d 144, 151–53 (2d Cir. 1998), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533 (codified as amended at 42 U.S.C. §§ 12101–12213).
62. *Id.* at 152.
63. *Id.*
64. *Id.* at 147.
65. *Id.* at 147–49.
66. *Id.* at 152.

Furthermore, in finding that the plaintiff's definition of a major life activity happened to be coextensive with his symptoms, the court held that the plaintiff was "form-fitting" a definition of a major life activity by trying to define it too narrowly.[67] In the court's view, this allowed the plaintiff to "circumvent the hurdle" of the high burden the court found was necessary to prove a substantial limitation for the purpose of finding the existence of a disability.[68] The court elaborated on this point by noting that "[w]e must determine 'whether the impairment at issue substantially limits the plaintiff's ability to perform one of the major life activities *contemplated by the ADA*, not whether the particular activity that is substantially limited is important *to him*.'"[69] Defining major life activities broadly was interpreted to be consistent with the primary purpose of the ADA, as the court noted:

> We do not think that such major life activities as seeing, hearing, or walking are major life activities only to the extent that they are shown to matter to a particular ADA plaintiff. Rather, they are treated by the EEOC regulations and by our precedents as major life activities per se.[70]

With an intense, fact-specific inquiry into the substantially limits prong, individuals who suffered from hearing loss would quickly find it difficult to meet. Where courts inquired into the "severity" of the disability before considering it as such, hearing loss was not automatically considered a disability per se, but had to be proven by a further inquiry. Defining major life activities broadly would seem to support that anyone with hearing loss would have an impairment, as one would assume that a person with hearing loss would have a condition that would easily affect the major life activity of hearing. However, as later court interpretations would show, many individuals with hearing

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67. *Id.*

68. *Id.* at 152–53. Therefore, the plaintiff in this case did not have a disability under the ADA. Some of the plaintiff's assertions of how his mental impairment affected the major life activity of everyday mobility included not being able to take vacations, go to a shopping mall alone, or take certain ground transportation. *Id.* at 147–49.

69. *Id.* at 152. To better summarize, the analysis under the substantially limits prong is fact-sensitive and assessed in an individualized nature. Because major life activities are assessed more broadly, the analysis is the opposite. Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156, 170 (4th Cir. 1997) ("[T]he statutory language [of the ADA] — with its reference to 'the major life activities'. . . implies that a corresponding case-by-case inquiry . . . is not necessary. For example, working is one of the major life activities of the ADA . . . even though working may not be of particular "significance" or "importance" to a given plaintiff.").

70. *Reeves*, 140 F.3d at 152.

loss were not considered to have a disability under the ADA, where those who were deaf did. As a result, only those with hearing loss "bad enough" fell within the purview of its protections.

III. NOT "DEAF" ENOUGH: THE PROBLEMATIC INQUIRIES INTO HEARING LOSS

Due to the severity of the condition, deafness typically qualified under the ADA as a disability that substantially limited a major life activity. In their analyses of deafness, courts would occasionally consider other effects, such as how a deaf individual coped with their impairment and the nature of the disability itself. However, though courts typically considered deafness to be a disability, and with very minimal analysis, hearing loss did not get the same deference. In other words, courts typically were not comfortable classifying hearing loss as a disability unless it was extremely severe. This reflected a misunderstanding of the complexities of hearing loss, in which a "one size fits all" analysis was not appropriate. These interpretations not only perpetuated negative stereotypes surrounding this disability, but are also consistent with stigmas and societal misunderstandings that still surround hearing loss today.

After the enactment of the ADA, courts typically did not engage in a lengthy analysis of whether or not a deaf person had a disability under this statute.[71] In fact, according to EEOC guidelines, "people who are deaf should easily be found to have a disability . . . because they are substantially limited in the major life activity of hearing."[72] In contrast, these guidelines stated that in regards to hearing loss, "[i]ndividuals with a hearing impairment *other than deafness* will meet the first part of the ADA's definition of a disability *if they can show* that they are substantially limited in hearing or another major life activity."[73] But why

71. *See* Mayberry v. Von Valtier, 843 F. Supp. 1160, 1164 (E.D. Mich. 1994) ("It is undisputed that plaintiff's deafness is a disability under the ADA."); Goodpaster v. Schwan's Home Serv., Inc., 849 N.W.2d 1, 11 (Iowa 2014) (acknowledging that blindness, deafness, and epilepsy are "clearly protected" (citing Scott H. Nichols, *Iowa's Law Prohibiting Disability Discrimination in Employment: An Overview*, 32 DRAKE L. REV. 273, 328–29 (1983))); Duty v. Norton-Alcoa Proppants, 293 F.3d 481, 499 (8th Cir. 2002) (Nangle, J., concurring) (referring to deafness as a "typical disabilit[y]" covered by the ADA); Adeyemi v. Dist. of Colum., No. 04-1684 (CKK), 2007 U.S. Dist. LEXIS 24179, at *38 (D.D.C. Mar. 31, 2007) ("Plaintiff is permanently deaf. . . . Hearing is considered a major life activity . . . and its permanent loss fits the definition of 'disability' under the ADA.") (citations omitted).

72. EEOC DEAFNESS AND HEARING IMPAIRMENTS, *supra* note 2.

73. *Id.* (emphasis added).

did deafness automatically fall within the purview of the ADA's protections, and hearing loss only did some of the time?

Once an individual asserted that they were deaf, the court's analysis stopped, and the court acknowledged that the impairment was a disability under the ADA without further question. Sometimes, such as in the case of *Paulone v. City of Frederick*, the court's analysis was as short as one sentence; "Paulone, a deaf woman, is a qualified individual with a disability."[74] Short, face-value acceptance of deafness as an automatic disability under the ADA became the norm.[75] However, a different analysis followed when plaintiffs with hearing loss sought to avail themselves of the same protections.

Although the ADA did not include a list of protected disabilities, it seemed that courts unofficially included one when they evaluated deafness. The fact-specific and case-by-case inquiries into deafness itself were quite short when a deaf individual invoked a claim under the ADA. Courts recognized that deafness was among the "conditions that will always substantially limit [a] major life activit[y] of . . . deaf individuals."[76] On the other hand, hearing impaired individuals had their claims heavily scrutinized based on the "degree" of their disability and how well they were able to cope with their impairment. Such a fact-specific inquiry often deprived such plaintiffs from availing themselves of the ADA's protections.

A. Judges as Audiologists: Slamming Hearing Loss Under the Gavel

Courts engaged in a much more rigorous analysis to decide whether or not an individual's hearing loss constituted a disability for purposes of the ADA. This created an unfortunate precedent in which only certain "forms" of hearing loss constituted a disability, instead of recognizing hearing loss as a disability on its face. Although courts analyzed disabilities under the substantially limits prong on a case-by-case basis, those analyses were largely ripe with misunderstandings of hearing loss that led to misconceptions of the condition. As a result, the ADA's already-narrow protections became even narrower for those with hearing loss.

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74. 718 F. Supp. 2d 626, 634 (D. Md. 2010). Although this case was decided after the enactment of the ADAAA, its short analysis and inquiry into deafness is noteworthy for the purposes of this Note.

75. *See id.*; *see, e.g.*, EEOC v. United Pub. Workers Local 646, No. 97-00381, 1999 U.S. Dist. LEXIS 22654, at *13 (D. Haw. Feb. 18, 1999) (holding that the plaintiffs, who were deaf, had a disability under the ADA) ("[T]hey are disabled for purposes of the ADA. They have both been deaf since birth.") (emphasis omitted).

76. Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156, 166 n.5 (4th Cir. 1997).

In evaluating hearing loss, some courts have used a person's decibel ("dB") levels—a method used by audiologists to measure one's hearing—when deciding whether or not an individual's hearing loss rises to the level of a disability.[77] Normal hearing for adults would include any decibel levels up to twenty-five dB.[78] Levels between twenty-six and forty dB constitute mild hearing loss, whereas forty-one to seventy dB would be considered moderate hearing loss.[79] Decibel levels ranging from seventy-one to ninety dB is considered severe hearing loss, and, finally, hearing loss at ninety-one or more dB is considered profound.[80] Evaluating hearing loss pursuant to dB levels may seem facially objective and attractive for courts to use, but using this as the basis of determining disability status was not always accurate without understanding how additional factors affected those with hearing loss. As a result, these analyses were often misinformed and stripped many hearing-impaired individuals of ADA protections.

Although courts have not stated that there is a "minimum" level of hearing loss that constitutes a disability under the ADA,[81] weighing the severity of an individual's hearing loss is not always helpful when hearing loss exists across a broad spectrum. This has led to erroneous assumptions that only those who are very worse off in terms of their hearing actually have a disability. For example, in *Matlock v. City of Dallas*, it would appear that the plaintiff's case would merit the protections of the ADA; the plaintiff suffered from an impairment—hearing loss—which arguably would substantially limit the major life activity of hearing.[82] Thus, the plaintiff's categorization of the major life activity affected was broad, consistent with prior EEOC guidelines and the dichotomy suggested in *Bragdon*.[83] However, the court held that the plaintiff's hearing loss did not rise to the level of a disability under the

77. *See, e.g.*, Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032, 1040–41 (D. Ariz. 1999).

78. *Hearing and Hearing Loss*, HOW'S YOUR HEARING? ASK AN AUDIOLOGIST, https://www.howsyourhearing.org/hearingloss.html (last visited Jan. 14, 2020). For background on measuring hearing range and hearing loss, see *Hearing Loss and Deafness: Normal Hearing and Impaired Hearing*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., https://www.ncbi.nlm.nih.gov/books/NBK390300/ (last updated Nov. 30, 2017).

79. *Hearing and Hearing Loss*, *supra* note 78.

80. *Id.*

81. *Finical*, 65 F. Supp. 2d at 1040. *But see* Downing v. UPS, 215 F. Supp. 2d 1303, 1306–07, 1309 (M.D. Fla. 2002) (holding that there was no dispute that a plaintiff who was considered deaf, but whose hearing ranged between 41–45 dB with hearing aids, suffered from a disability and that his hearing loss did limit a major life activity under the ADA).

82. Matlock v. City of Dall., No. 3:97-CV-2735, 1999 U.S. Dist. LEXIS 17953, at *3 (N.D. Tex. Nov. 12, 1999).

83. Bragdon v. Abbott, 524 U.S. 624, 641 (1998); *see also* EEOC QUESTIONS AND ANSWERS, *supra* note 59.

ADA, because with hearing aids, the plaintiff experienced "only a small percentage" of hearing loss, with the focus here being on the "small percentage" language.[84] This holding weighed the extent and degree of the plaintiff's hearing loss, rather than accepting hearing loss as a disability on its face like courts did with deafness.[85]

On the contrary, where individuals exhibited a profound or "severe" level of hearing loss, courts more readily found the existence of a disability under the ADA. For example, in *Bryant v. Better Business Bureau of Greater Maryland, Inc.*, the court held that the plaintiff's hearing loss, categorized as "[a] hearing loss approaching deafness," provided "no serious dispute" that the plaintiff was disabled under the ADA.[86] The court held that this level of hearing loss substantially limited a major life activity, and that EEOC regulations specifically stated that "hearing" was one of the life activities contemplated by the ADA.[87] The court noted that the plaintiff's hearing loss was "permanent and severe,"[88] which might further suggest that this was the reason behind the court's willingness to classify it as a disability. In essence, the closer one's hearing loss approached deafness, or the worse an individual's hearing loss was, the closer it would get to disability protections under the ADA.[89]

As discussed, courts were making determinations of whether or not an individual's hearing loss constituted a disability on a whim, and without much guidance or consistency. Because neither the statute itself or EEOC guidelines provided concrete guidance on how to evaluate its

84. *See Matlock*, 1999 U.S. Dist. LEXIS 17953, at *1. The court considered dB levels in its analysis. *See id.* at *3.

85. *See* Perkins v. St. Louis Cty. Water Co., 160 F.3d 446, 449 (8th Cir. 1998) ("Hearing impairment, *depending on its severity*, can be a disability under the ADA.") (emphasis added).

86. 923 F. Supp. 720, 743 (D. Md. 1996).

87. *Id.*

88. *Id.*

89. It appears that severity or "degree" of hearing loss was the marker for courts in evaluating the disability, but the level of severity needed to prove the existence of a disability under the ADA was never fully fleshed out. *See* Cadorna v. City & Cty. of Denver, No. 04-cv-01067-REB-CBS, 2006 U.S. Dist. LEXIS 37997, at *22 (D. Colo. June 8, 2006) ("[A]lthough plaintiff's evidence suggests that his hearing loss exceeds certain levels, there is no evidence that this *degree* of hearing loss, albeit permanent, significantly restricts plaintiff 'as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.'") (emphasis added) (citations omitted); *see also* Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1029 (W.D. Va. 1997) (holding that a plaintiff who suffers from moderately severe to severe hearing loss, or in other words short of a total hearing impairment, had a disability under the ADA).

terms,[90] it is plausible that two plaintiffs, with the same level of hearing loss, might face different results on their disability determination. Furthermore, those evaluations themselves were often problematic. Not only was it unfair to assume that those with a lesser degree of hearing loss were not entitled to the same protections as those who suffered from more, but by not recognizing the effects of the disability, courts erroneously held that lesser degrees of hearing loss were not substantially limiting. Even the lowest levels of hearing loss, otherwise known as "mild" hearing loss, can have debilitating effects including cognitive decline, dementia, Alzheimer's, and the inability to understand regular speech over time.[91] Communication barriers, psychological distress, embarrassment, and self-criticism are also various other ways in which the broad major life activity of hearing is substantially limiting for those with hearing loss.[92]

IV. *SUTTON V. UNITED AIR LINES*: WHEN "MITIGATING MEASURES" ERASE A DISABILITY

A major setback in the protections the ADA purported to give individuals with disabilities came in the form of a Supreme Court decision, *Sutton v. United Air Lines*.[93] This case created severely restrictive precedent that required courts to take into account any "mitigating measures" an individual utilized to cope with their disability.[94] The effects of these mitigating measures would be used in order to determine whether or not that person's condition was substantially limiting, and thus whether or not that individual had a disability within the meaning of the ADA.[95] Hearing aids would inevitably become a factor in courts' analyses with regard to the mitigating measures analysis, which furthered an even deeper misunderstanding of hearing loss as a whole. Most detrimental, however, was how the decision in *Sutton* narrowed even further the definition of what constituted a disability under the ADA.

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90. *See supra* Part I.A.

91. *See* Debbie Clason, *Living with Mild Hearing Loss*, HEALTHY HEARING, https://www.healthyhearing.com/report/7733-Living-with-mild-hearing (last updated Nov. 26, 2019).

92. COMM. ON DISABILITY DETERMINATION FOR INDIVIDUALS WITH HEARING IMPAIRMENTS, HEARING LOSS: DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS 167 (Robert A. Dobie & Susan B. Van Hemel eds., 2004), https://www.ncbi.nlm.nih.gov/books/NBK207836/.

93. 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533 (codified as amended at 42 U.S.C. §§ 12101–12213).

94. *Id.* at 482–84.

95. *Id.*

Sutton did not involve a hearing disability, but rather a visual impairment.[96] The two petitioners suffered from a condition called myopia which, without any corrective glasses or contact lenses, severely restricted them from daily activities such as driving a car and shopping in public stores.[97] With corrective measures for their eyesight, they functioned "identically" to others without the condition, and they filed an ADA claim alleging disability discrimination after they were denied employment as pilots for failing an uncorrected visual acuity test.[98] Finding that the petitioners did not have a disability within the meaning of the ADA, the Court in *Sutton* held that both the positive and negative effects of mitigating measures must be taken into account when deciding whether or not a person meets the substantially limits prong of the ADA's definition of a disability.[99] The petitioners' vision was 20/20 with corrective measures and thus not substantially limiting, and as a result of this new rigid standard, they did not have a disability under the ADA.[100]

Sutton rejected agency interpretations of the ADA which stated that the substantially limits prong should be evaluated without regard to mitigating measures.[101] The Court further narrowed the substantially limits prong by stating that the ADA only protected disabilities that could not be mitigated or corrected, which narrowed this definition further by omitting those disabilities that "'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."[102] In this regard, the Court sought to draw yet another distinction amongst disabled individuals by stating that if an individual could cope with their disability well enough, there was no need to deem them disabled under

96. *Id.* at 475.
97. *Id.*
98. *Id.* at 475–76.
99. *Id.* at 482.
100. *Id.* at 488–89.
101. *Id.* at 482 ("We conclude that respondent is correct that the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures— both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act. The dissent relies on the legislative history of the ADA for the contrary proposition that individuals should be examined in their uncorrected state. . . . Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history."). The Court did not give much reason for straying so remarkably from agency guidelines.
102. *Id.* at 482–83.

the ADA.[103] The majority in *Sutton* held that viewing the effects of a disability as part of a whole group, rather than viewing it in light of the individual suffering from it, would run contrary to the purposes of the ADA.[104]

Sutton further limited those who could benefit under the Act after evaluating studies conducted on the number of people suffering from a disability. The Court noted that when the ADA was passed, the Act stated that 43 million people were affected by a disability.[105] However, the majority also noted that subsequent studies found that over 160 million people suffered from a disability, and found that over 100 million people needed corrective lenses and that 28 million people were hearing-impaired.[106] From these numbers the *Sutton* Court held:

> Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's

103. *Id.* at 482–84 ("For instance, under [the alternative] view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes. Thus, the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals.").

104. *Id.* at 483–84. While this statement may be true, it does not take into account how courts would later apply this standard. There are benefits to viewing disabilities on the basis of group membership, insofar as it eliminates the opportunity for a court to conclude that only certain people have a disability while drawing erroneous assumptions on the basis of "degree" of disability. But applying the ADA on an individualized, case-by-case basis can only work in theory if the complexities and range of effects of a disability are fully understood. On the same day that *Sutton* was decided, the Court decided *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 564 (1999) *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533 (codified as amended at 42 U.S.C. §§ 12101–12213). In *Albertson's*, the petitioner suffered from amblyopia, an uncorrectable condition that left him with 20/200 vision in one eye and monocular vision. *Id.* at 559. The Court noted that in its decision below, the Ninth Circuit incorrectly interpreted the substantially limits prong by equating a "significant restriction" with "difference" in the way the petitioner's disability affected his ability to see, which in turn "undercut the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Id.* at 564–65. The Court would also employ the same reasoning as it did in *Sutton* by noting the importance of taking into consideration the effects of mitigating measures with respect to a plaintiff's disability. *See id.* 565–67.

105. *Sutton*, 527 U.S. at 486.

106. *Id.* at 487.

> coverage is restricted to only those whose impairments are not mitigated by corrective measures.[107]

The practical effects of *Sutton*'s decision are contemplated in the dissenting opinions, with various references to hearing impairments.[108] Justice Stevens noted that the majority's opinion was inconsistent with a House Committee report that demonstrated that the actual intent of the ADA was to consider disabilities in their unmitigated state.[109] The Court's seemingly inconsistent opinion is best encapsulated by Justice Stevens's comment in his dissent that "merely treatable" disabilities—such as an individual who wore hearing aids for their hearing loss—would no longer be covered under the ADA. He noted, "[t]he text of the Act surely does not require such a bizarre result."[110]

After *Sutton*, the Supreme Court decided *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, holding that "'substantially limits' suggests 'considerable' or 'to a large degree'"[111] and that more than a mere medical diagnosis of a disability was needed for an impairment to count as a disability under the ADA.[112] The Court also defined "major" in "major life activities" as "activities that are of central importance to daily life" or those activities "greater in dignity, rank, importance, or interest."[113] Where disabilities are often handled by specialists and specific doctors in the medical field, stating that more than a medical diagnosis is needed highlights the court's focus on how a particular individual can cope with their disability. As a result, *Toyota* codified the problematic evaluation of disabilities the Court previously engaged in by

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107. *Id.*

108. *See, e.g.*, *id.* at 513 (Breyer, J., dissenting) (stating that we cannot draw a statutory line that excludes some people that Congress did intend to protect, such as those who successfully use corrective devices like hearing aids).

109. *Id.* at 500 (Stevens, J., dissenting) (stating that a person with poor hearing should be considered to have an impairment that substantially limits a major life activity, "even if the hearing loss is corrected by the use of a hearing aid"; "[A] person who is hard of hearing is substantially limited in the major life activity of hearing" (citations omitted)).

110. *Id.* at 498–99 (citing Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 281 (1987) (holding that a person who had a hearing impairment but has since been cured is still considered to have a disability under the ADA's "a record of such an impairment" prong)).

111. 534 U.S. 184, 196 (2002) *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533 (codified as amended at 42 U.S.C. §§ 12101–12213). In *Toyota*, the petitioner suffered from bilateral carpal tunnel syndrome and bilateral tendinitis which a doctor found precluded her from lifting more than 20 pounds. *Id.* at 187–88.

112. *Id.* at 196–97. The Court also cited *Albertson's* in support of its narrow definition of a disability. *Id.* at 197 ("'[M]ere difference' does not amount to a "significant restriction' and therefore does not satisfy the EEOC's interpretation of 'substantially limits.'" (quoting Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999))).

113. *Toyota*, 534 U.S. 184 at 197.

requiring evidence of the extent of the impairment, the extent of its limitation, and the extent of its effect on an individual before classifying a condition as a disability.[114]

As Justice Stevens noted in his *Sutton* dissent, bizarre results did follow.[115] With this new test requiring courts to examine how hearing loss affected one's life activities in light of one's attempts to correct it,[116] when hearing aids offered a successful improvement for those with hearing loss, individuals who used them successfully were no longer found to have a disability under the ADA. Once again, courts' analyses of hearing loss post-*Sutton* became one of degree, and the inquiry began to focus on how *well* an individual's hearing aids worked for them, rather than focusing on hearing loss being substantially limiting itself.

A. Ditch the Hearing Aids or You Don't Have a Disability Under the ADA

Sutton's analysis of the ameliorative effects of mitigating measures naturally became an inquiry into how effective one's hearing aids were when evaluating ADA claims on the basis of a hearing disability. This inquiry still hinged on one of degree that was present pre-*Sutton*, but changed where effectiveness of one's hearing aids was now the primary indicator of whether or not a person had a disability under *Sutton*'s new standard. Absent a few outliers that strayed from this framework,[117] courts again employed an ill-informed reasoning that did not account for substantially limiting effects of hearing loss, simply because they deemed a claimant's hearing aids "effective." However, this essentially created a "part-time" disability, as hearing aids are removable and are not worn for twenty-four hours a day. Although hearing aids can "treat" hearing loss, the effects of the disability can *still* be substantially limiting, notwithstanding their use.

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114. *Id.* at 198–99. The Court ultimately concluded that the respondent in *Toyota* did not have a disability under the ADA. *Id.* at 200–02. The Court stated that it was improper to deem irrelevant the fact that the respondent could tend to her hygiene and household chores. *Id.* at 201–02. However, the Court held that her difficulty with dressing herself, having to avoid certain manual tasks, and avoid playing with her children were not enough to prove that her condition substantially limited a major life activity, holding that, "these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives." *Id.* at 201. *See also* Nathan Catchpole & Aaron Miller, Comment, *How a Narrowing ADA Threatens to Exclude the Cognitively Disabled*, 2006 B.Y.U.L. REV. 1333, 1360 (2006) (discussing the effects of the extremely narrow disability determinations under *Sutton*, *Toyota*, and *Albertson's*).

115. *See Sutton*, 527 U.S. at 499 (Stevens, J., dissenting).

116. *Id.* at 482 (majority opinion).

117. *See, e.g.*, text accompanying *infra* notes 126–133.

In applying the ADA post-*Sutton* to cases involving hearing loss, courts operated under an erroneous assumption that hearing aids "corrected" the disability. In vacating the lower court's prior judgment, the court in *Ivy v. Jones*[118] held that "the district court should have examined Ivy's hearing loss as corrected when determining whether she was substantially impaired."[119] The court found that where Ivy's hearing could be corrected by up to ninety-two percent with one hearing aid and ninety-six percent with two, her "corrected" hearing was not something that substantially limited a major life activity.[120] Considering again the case of *Matlock v. City of Dallas* in the post-*Sutton* framework, the court held that the plaintiff had hearing loss, but was not disabled under the ADA, because his use of mitigating measures restored "virtually normal hearing with the use of hearing aids."[121] Similarly, in *Fromm v. MVM, Inc.*, the court found, "[b]ecause [p]laintiff's hearing loss is corrected to normal by a hearing aid, we follow *Sutton* in concluding that he has no claims under any of the acts based on an actual disability."[122] These decisions suggest that the effectiveness of one's assistive technology, namely hearing aids, were the true indicator of whether or not a person had a disability under the narrow purview of *Sutton*.

Even though both hearing aids and cochlear implants were considered examples of mitigating measures,[123] courts were much more lenient in finding that deaf individuals who used cochlear implants were still disabled under the ADA. In *Robertson v. Las Animas County Sheriff's Department*, the plaintiff stated that his deafness was not substantially limiting with the use of his cochlear implant and considered his deafness to be a communication problem rather than a disability.[124] Even considering the use of his cochlear implant in accordance with *Sutton*, the court held that "there [wa]s more than sufficient evidence for a reasonable jury to conclude that Mr. Robertson [wa]s substantially

118. 192 F.3d 514 (5th Cir. 1999).

119. *Id.* at 516.

120. *Id.*

121. Matlock v. City of Dall., No. 3:97-CV-2735, 1999 U.S. Dist. LEXIS 17953, at *3 (N.D. Tex. Nov. 12, 1999).

122. Fromm v. MVM, Inc., No. 1:CV-04-1315, 2004 U.S. Dist. LEXIS 30024, at *20 (M.D. Pa. Dec. 14, 2004). Interestingly enough, the plaintiff here was fired from his job due to his hearing loss. *Id.* at *3. The court noted, "Plaintiff 'has a significant hearing loss in the conversational range' . . . 'decreased ability to hear soft sounds and distinguish speech' . . . and an inability to 'localize the direction of sound, an essential job function.'" *Id.* at *8. This leads one to wonder why the plaintiff could be fired from his job because of his impairment, but yet that impairment somehow does not rise to the level of a disability.

123. 29 C.F.R. § 1630.2(j)(5)(i) (2020). This is an updated version of the Federal Register, but includes what constituted a mitigating measure.

124. *See* 500 F.3d 1185, 1194 (10th Cir. 2007).

limited in his ability to hear."[125] This once again highlights the different ways in which courts treated hearing loss versus deafness under the ADA, which further extended to their analysis of mitigating measures. The same ways that cochlear implants did not fully "fix" the plaintiff's disability in *Robertson*, hearing aids also do not cure one's disability either.

There are a few, rare outliers post-*Sutton* that strayed from the traditional mitigating factor analysis. These cases turned the inquiry of the degree of one's hearing loss and the effectiveness of one's assistive technology into a careful consideration of how hearing loss should still constitute a disability with or without hearing aids. In *Wilson v. Aetna Life & Casualty Co.*, a plaintiff diagnosed with mild hearing loss brought a discrimination claim against his employer, partly alleging disability discrimination.[126] The court did inquire into the degree of the plaintiff's hearing loss, but took note that one of the main substantial effects of his disability was his trouble carrying on conversations with others.[127]

Despite the plaintiff's benefit from and use of a hearing aid, the court held that "[the plaintiff's] hearing loss—even when mitigated—is permanent."[128] Even with hearing aids, the effect of his disability still transcended their use.[129] Most notably, the court recognized for what seems to be the first time that wearing hearing aids did not serve as an automatic cure for the disability, as a person does not hear the same way with hearing aids as a person with normal hearing hears without them.[130] Although the decision and analysis in *Wilson* was a small post-*Sutton* victory, the court did still note that, "[i]n the end, the court must make its own determination of whether there is a question of fact on the issue of disability."[131]

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125. *See id.*

126. 195 F. Supp. 2d 419, 420–21 (W.D.N.Y. 2002).

127. *Id.* at 422–24.

128. *Id.* at 428 (alteration in original).

129. *Id.* at 428–29. The court noted that the plaintiff still had trouble, even with his hearing aids, engaging in the same activities he thought the hearing aids would correct, namely having conversations with others. *Id.*

130. *Id.* Rather than rely on the improvement of the plaintiff's communication abilities through the use of hearing aids, the court delved further and noted that the data they were relying on came from isolated hearing tests in uncommon environments, which were not indicative of their effectiveness in real-world situations. The court indicated that these tests are performed in sound-proof booths, and day-to-day conversations typically have ambient or background noise. *Id.* This extended inquiry is different from the court's analysis of the data in *Ivy*, where the court took the improvement at face value. *See* Ivy v. Jones, 192 F.3d 514, 516 (5th Cir. 1999).

131. *Wilson*, 195 F. Supp. 2d 419 at 429. The court in its opinion also distinguished its holding from *Finical* and *Matlock*. The court noted that the case at hand differed "significantly" from *Matlock*, because the plaintiff's hearing here was not "virtually normal"

Post-*Sutton*, few courts have applied a more understanding and informed analysis towards hearing loss such as in *Wilson*, albeit a few outliers who interpreted *Sutton* more empathetically for such plaintiffs.[132] However, even with subtle victories hidden amongst *Sutton*'s discriminatory new precedent,[133] these cases still focused on the effectiveness of one's hearing aids rather than viewing hearing loss as a disability whose effects existed notwithstanding their use.[134]

1. Adjusting to Hearing Aids: Not an Overnight Fix

The reasoning set forth in *Sutton* once again perpetuated negative stereotypes and misunderstandings surrounding hearing loss as a disability. Hearing aids are crucial in treating hearing loss and are very effective in improving one's quality of life and helping those affected navigate the world around them when properly fitted.[135] The key word here, however, is "treated." Hearing aids may be beneficial for those with hearing loss, but they are by no means a "cure." They can help individuals better navigate their hearing loss but are also not a replacement for the normal ear.[136] The effects of hearing loss are still prevalent even where those hearing aids may be deemed "effective" by the courts.

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when wearing hearing aids. *Id.* at 427. The court also noted that they had less data about the plaintiff's hearing loss to evaluate than in both *Finical* and *Matlock*. *Id.* at 428. One could thus interpret this as a showing that an extensive, hard look into the "degree" of one's hearing loss is not exactly necessary to reach the conclusion that hearing loss can constitute a disability. *See, e.g.*, Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032 (D. Ariz. 1999); Matlock v. City of Dall., No. 3:97-CV-2735, 1999 U.S. Dist. LEXIS 17953, at *3 (N.D. Tex. Nov. 12, 1999).

132. An outlier in the traditional *Sutton* treatment of hearing loss can be found in *EEOC v. Centura Health Corp.*, No. 05-cv-01826-WDM-MJW, 2007 WL 2788836 (D. Colo. Sept. 20, 2007). Here, the court applied ADA protections to the plaintiff alleging wrongful discharge and considered her hearing loss in its unmitigated state without hearing aids, even though this case was decided after *Sutton*. *Id.* at *2–4. The court decided this way because the plaintiff was not using hearing aids at the time her employer fired her. *Id.* at *3–4.

133. *See, e.g.*, Gaines v. N.Y.C. Transit Auth., 528 F. Supp. 2d 135, 146 (E.D.N.Y. 2007), *aff'd*, 353 F. App'x 509 (2d Cir. 2009) (holding that a reasonable jury could find that the plaintiff was substantially limited in a major life activity under the ADA because his hearing aids only provided him with "minimally better hearing").

134. *See id.*

135. HEARING LOSS ASSOCIATION OF AMERICA, *Fact Sheet: Hearing Aids, Health Benefits and Insurance Coverage*, *in* HEARING LOSS ASSOCIATION OF AMERICA EMPLOYMENT TOOLKIT 27, https://www.hearingloss.org/wp-content/uploads/Employment_Toolkit-2018.pdf (last visited Nov. 12, 2019).

136. E-mail from Eileen Lancaster, Audiologist, HearUSA, to author (Jan. 10, 2020, 4:51 PM EST) (on file with author) ("Without hearing aids, some people withdraw from group interactions—they decide to not go to the movies with their friends, or to their bridge game, or to the restaurant—and withdrawing from these social interactions can certainly lead to depression.").

An example of this misunderstanding surrounding mitigating measures was illustrated in *Preston v. City of North Las Vegas*, where a plaintiff who was deaf in her left ear and had thirty percent hearing loss in her right ear was not considered to have a disability under the ADA.[137] The plaintiff had a hearing assisted device which she used occasionally, but the court stated that by not using it, Preston was "choosing . . . to function in spite of her hearing loss."[138] Preston asserted that she had difficulty in performing her job duties due to her hearing loss, but the court instead erroneously concluded that, because her issues in having to read lips to communicate "could have been mitigated by the corrective measures available to her," she did not present evidence that her hearing loss substantially limited a major life activity under the ADA.[139]

In *Miller v. Taco Bell Corp.*, rather than state at the outset that a plaintiff with dB levels of sixty in her right ear and eighty in her left ear had a disability, the court also took into consideration the fact that "she was such a good lip-reader" and how much one hearing aid improved her condition.[140] The court further commented that "[p]laintiff's ability to function, despite her hearing limitation, is apparent."[141]

One of the main issues with relying on individual coping mechanisms such as lipreading for those with hearing loss is that they are not always effective. For example, when a person tries to cope with deafness or hearing loss through lipreading, only thirty to forty-five percent of the English language can be effectively understood, and those with disabilities should not be expected to have to cope in this way.[142] Furthermore, if hearing loss were automatically recognized as a disability without considering additional factors, such as how bad the person was affected by it, "it would rank as the largest disability class in

137. Preston v. City of N. Las Vegas, No. 2:03-1165, 2007 WL 1016995, at *2–3 (D. Nev. Mar. 30, 2007).

138. *Id.* at *3.

139. *See id.*

140. 204 F. Supp. 2d 456, 461, 463 (E.D.N.Y. 2002) Although the court held that there was a triable issue of fact with regard to whether or not the plaintiff had a disability under the ADA, plaintiff's hearing loss based on her dB levels would place her in the range of severe hearing loss. *Id.*; *see supra* text accompanying notes 77–80. *But see* Shiflett v. G.E. Fanuc Automation, 960 F. Supp. 1022, 1028–29 (W.D. Va. 1997) (holding that a person who can hear, but only with the aid of a hearing device, is disabled for purposes of the ADA). This is not to suggest that *Shiflett* is the norm; the court still held that not everyone who wears hearing aids is necessarily disabled. *Id.* at 1034.

141. *Miller*, 204 F. Supp. 2d 456, 463 (E.D.N.Y. 2002).

142. Lydia Callis, *Lip Reading Is No Simple Task*, HUFFPOST, https://www.huffpost.com/entry/lip-reading-is-no-simple-task_b_9526300 (last updated Mar. 24, 2017). Lipreading is also "exhausting." *Id.*

the country."[143] The sheer number of those affected should not have precluded it from being a substantially limiting disability.

No matter how effective one's hearing aids may be, hearing aids cannot restore hearing to normal, or heal hearing loss.[144] Hearing aids amplify sounds, and the brain receives sound in particular ways that trigger neural responses.[145] However, a hearing aid user receives an "amplified" distorted sound that is a combination of sound from their own ear and a foreign third frequency source—the hearing aid itself.[146] This distorted sound is unfamiliar to the brain and creates a disconnect when the brain does not recognize the distorted sounds it hears.[147] This disconnect is akin to not understanding someone who is speaking another language, and it is never fully one hundred percent overcome by the hearing aid user.[148]

It can take several months, and even years, for a person to forge new neural patterns to begin to overcome that disconnect.[149] As a result, audibility does not equal complete intelligibility.[150] As hearing loss is an invisible disability, people on the outside may not understand these complexities, nor will they understand the internal struggle a new hearing aid user is facing when adapting to their hearing aids, which could be the reason why the plaintiff in *Preston* was uncomfortable utilizing hers.[151] Furthermore, any benefits that may stem from wearing hearing aids are only temporary, as hearing aids are only worn throughout the day and come on and off since they are not permanently

143. Christensen, *supra* note 7.

144. *Will Hearing Aids Restore My Hearing?*, HOUSE OF HEARING (Feb. 24, 2019, 9:32 AM), https://houseofhearing.ca/blog/will-hearing-aids-restore-my-hearing/; *see also Frequently Asked Questions About Hearing Aids*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/otolaryngology/specialty_areas/hearing/faq.html (last visited Nov. 8, 2019).

145. *See generally* Hanin Karawani, Kimberly A. Jenkins & Samira Anderson, *Neural and Behavioral Changes After the Use of Hearing Aids*, 129 CLINICAL NEUROPHYSIOLOGY 1254 (2018); *see also Will Hearing Aids Restore My Hearing?*, *supra* note 140.

146. Nicholas Lesica, *Hearing Aids: Limitations and Opportunities*, 71 HEARING J. 43, 43 (2018), https://journals.lww.com/thehearingjournal/Pages/ArticleViewer.aspx?year=2018&issue=05000&article=00012&type=Fulltext; *see* Wilson v. Aetna Life & Cas. Co., 195 F. Supp. 2d 419, 428–29 (W.D.N.Y. 2002) (discussing that the sound the plaintiff hears is different from those heard every day by normal-hearing people).

147. *See generally* Lesica, *supra* note 146.

148. *Id.* at 43, 46.

149. *Id.*

150. *Id.*

151. *See generally* Jill von Bueren et. al, *5 Reasons People Don't Wear Their Hearing Aids*, HEARING LIKE ME (July 21, 2016), https://www.hearinglikeme.com/5-reasons-people-dont-wear-their-hearing-aids/.

fixed to the ear.[152] This misunderstanding by the courts further marginalized those with hearing loss from crucial disability protections.

The courts' analyses under *Sutton* were particularly problematic, as they lacked this essential information regarding hearing aids. By simply viewing hearing aids as a way to correct hearing loss, courts ignored substantial effects that transcended their use. Viewing hearing loss in light of mitigating measures post-*Sutton* discriminated against hearing loss as a disability, as the courts again applied an erroneous assumption that hearing aids themselves mitigated the disability altogether.

2. Stigmas Surrounding Hearing Loss

By not viewing hearing loss as an automatic disability that per se warranted protections under the ADA, courts added to and perpetuated a negative stereotype that continued to be harmful to those with hearing impairments. "Stigma" can be defined as "the possession of, or belief that one possesses, some attribute or characteristic that conveys a social identity that is devalued in a particular social context."[153] Of those affected by hearing loss, only twenty percent seek treatment.[154] Where common stigmas by outsiders involving hearing loss include misconceptions that those with a hearing impairment are "old, senile, and socially unfit,"[155] it is demoralizing for individuals to seek protections under the ADA only to be denied them on the basis that what they were "complaining" about was not "that bad."

For this reason, many people deny the existence of their disability,[156] which is problematic for the separate reason that delaying assistive

152. Lynda Clark et al., *Just Got New Hearing Aids Today. How Many Hours a Day Should I Wear Them to Begin With?*, HEARING TRACKER (Apr. 3, 2017), https://www.hearingtracker.com/ask/just-got-new-hearing-aids-today-how-many-hours-a-day-should-i-wear-them-to-begin-with. New users may only wear them for a couple hours per day, as the new source of sound can be overwhelming and uncomfortable until they have fully adjusted. *Wearing Hearing Aids: How Long Is Too Long?*, SIGNIA, https://www.signia-hearing.com/blog/wearing-hearing-aids/ (last visited Feb. 13, 2020).

153. Lisa Packer, *Negative Stigma Is Concern for People with Hearing Loss*, HEALTHY HEARING, https://www.healthyhearing.com/report/52576-Seniors-worried-about-the-stigma-of-hearing-aids (last updated Oct. 24, 2017).

154. *Stigma of Hearing Loss*, AUDIOLOGY & HEARING AID SOLS., https://www.audioandhearing.com/news/stigma-of-hearing-loss.html (last visited Feb. 20, 2020).

155. Jean Pierre Gagné et al., *Stigma and Self-Stigma Associated with Acquired Hearing Loss in Adults*, HEARING REV. (Aug. 2, 2011), https://www.hearingreview.com/hearing-loss/stigma-and-self-stigma-associated-with-acquired-hearing-loss-in-adults.

156. Margaret I. Wallhagen, *The Stigma of Hearing Loss*, 50 GERONTOLOGIST 66, 66–68 (2009), https://academic.oup.com/gerontologist/article/50/1/66/692298; *The Stigma of Hearing Loss*, SOUND RELIEF HEARING CTR., https://www.soundrelief.com/the-stigma-of-hearing-loss/ (last visited Feb. 21, 2020).

technology like hearing aids can actually make one's hearing worse.[157] Further, a lot of the stigma surrounding hearing loss hinges on a fear of how those affected think others will react to them.[158] With a lack of an informed and supportive understanding by the courts of the internal struggle of the hearing impaired, the court's treatment of hearing loss further marginalized this affected group from society.

Denial of one's hearing loss has also led to courts finding that a plaintiff does not have a disability under the ADA. In *Fraterrigo v. Akal Security, Inc.*, hearing tests revealed that the plaintiff had a significant level of hearing loss in the conversational range.[159] However, the plaintiff denied the existence of his disability, leading the court to conclude:

> Fraterrigo's hearing loss did not affect the major life activity of hearing because, by his own account, his hearing loss was mild. When asked in his deposition whether his 'loss of hearing [had] impacted [his] day-to-day life in any way,' Fraterrigo's reply, remarkably, was '[n]o.' . . . Confirming that he had not misspoken, Fraterrigo stated that he had never been treated for hearing loss, that he didn't wear a hearing aid, that he didn't believe he needed to wear a hearing aid, and that no one had ever suggested that he wear a hearing aid. . . . He even went so far as to say, 'Well, I don't feel right now that I have a hearing problem. I think I could hear pretty good.' . . . Lest there be any doubt as to his position, Fraterrigo added that he did not feel he had a hearing impairment 'at all.'[160]

The court held that no reasonable jury could find that the plaintiff's hearing loss affected the major life activity of hearing, "given Fraterrigo's direct and unequivocal sworn statements."[161] Here, the plaintiff's inability to come to terms with his disability, as a result of stigma or personal self-consciousness, had detrimental effects and deprived him of ADA protections he should have been entitled to.

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157. Lindsey Banks, *Will My Hearing Get Worse if I Don't Wear a Hearing Aid?*, CLEAR LIVING, https://www.clearliving.com/hearing/hearing-aids/impact-of-not-wearing-them/ (last updated Mar. 31, 2020); *Need hearing aids, but don't wear them? Here's what happens*, YOURHEARING, (AUG. 5, 2020), https://www.yourhearing.com/blog/need-hearing-aids-but-dont-wear-them-heres-what-happens.

158. Wallhagen, *supra* note 156.

159. Fraterrigo v. Akal Sec., Inc., No. 06 Civ. 9861 (SHS), 2008 U.S. Dist. LEXIS 87451, at *4 (S.D.N.Y. Oct. 29, 2008). The audiologist in this case concluded that because of plaintiff's level of hearing loss, he was not qualified to perform the essential functions of his job. *Id.* at *5.

160. *Id.* at *13.

161. *Id.* at *13–14.

Early cases involving hearing loss under the ADA involved inquiries into how bad the disability itself was, and how well individuals could cope with the disability. Therefore, rather than all people with hearing loss being protected by the ADA, only the ones whose disability was "bad enough" were protected. However, this perpetuated stigmas and stereotypes surrounding hearing loss as a disability that went misunderstood by the courts. These kinds of misinformed attitudes go hand-in-hand with these stigmas, and affected the perception of invisible disabilities such as hearing loss when evaluated under the ADA.

With hearing loss marginalized from disability protections after the court's interpretation in *Sutton* combined with misunderstandings of the effects and stigmas of the disability itself, the ADAAA of 2008 provided a more inclusive definition of a disability. The ADAAA reaffirmed Congress's intentions for the ADA to be interpreted in favor of broader coverage for individuals with disabilities and lowered the standards applied by the courts to achieve this goal.[162] Whereas hearing loss was arguably discriminated against as a disability under the ADA, the ADAAA had the potential to offer a better and more inclusive standard for analyzing hearing loss as a disability.

V. THE ADAAA: UNDERSTANDING THAT HEARING AIDS ARE TEMPORARY, BUT THE DISABILITY IS PERMANENT

Substantial improvements in the field of disability law can be attributed to the passing of the Americans With Disabilities Amendments Act of 2008, in which Congress explicitly noted that the way the courts interpreted the word "disability" under the ADA narrowed the scope of its intended protections.[163] Whereas the original intent of the ADA was to provide broad coverage and protections for those with disabilities, Congress found that the rigid interpretation of the substantially limits prong "incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities."[164] The ADAAA explicitly rejected the holdings in both *Sutton* and *Toyota*, as their interpretations of the ADA caused lower

162. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2011-3, FACT SHEET ON THE EEOC'S FINAL REGULATIONS IMPLEMENTING THE ADAAA (2011), https://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm [HEREINAFTER EEOC ADAAA FACT SHEET].

163. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3)–(5), 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213).

164. *Id.* § 2(a)(1), (6)–(8); ("[T]he holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."). *Id.* § 2(a)(4).

courts to "creat[e] an inappropriately high level of limitation necessary to obtain coverage under the ADA."[165]

Rejection of the *Sutton* substantially limits standard meant that mitigating measures, such as hearing aids, would no longer erase the existence of a disability under the statute. Rejection of the *Toyota* standard, where "substantially" and "major" were narrowly interpreted in determining whether or not an individual was "disabled" under the ADA, broadened the scope of disability protections for individuals by no longer requiring that the restriction on a major life activity be "severe."[166] The ADAAA's rejection of these limiting standards would prove especially helpful for disabilities that originally fell through the cracks, especially for "invisible" disabilities, such as hearing loss, whose effects are more personal to the individual. Most notably, EEOC regulations were modified to state that "[a]n impairment need not prevent, or significantly severely restrict, the individual from performing a substantial life activity."[167]

With the passing of the ADAAA, the previous intense, fact-specific inquiry into whether or not an individual had a disability under the statute was relaxed considerably. EEOC regulations finally included a list of covered disabilities that would automatically merit protections.[168] Furthermore, for more "invisible" disabilities, the regulations stated that "other types of impairments may be disabling for some individuals but not for others," but where such conditions required slightly more analysis of an individual's condition, "[t]he standards for determining whether such an impairment has been shown to be a disability are intended to be construed in favor of broad coverage, and should not demand an extensive analysis."[169]

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165. *Id.* § 2(b)(2), (4)–(5); ("Congress finds that the current . . . regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard."). *Id.* § 2(a)(8).

166. *Id.* § 2(b)(4). Congress rejected the Court's analysis in *Toyota* for creating too high of a standard when the Court held that in order for an individual to be substantially limited in a major life activity, that individual had to have an impairment that "prevent[ed] or severely restrict[ed] the individual from doing activities that are of central importance to most people's daily lives." *Id.*

167. 29 C.F.R. § 1630.2(j)(1)(ii) (2020).

168. Equal Employment Opportunity Commission, 74 Fed. Reg. 183 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630), https://www.govinfo.gov/content/pkg/FR-2009-09-23/html/E9-22840.htm. This list was not exhaustive, but included (and was not limited to) autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, and a host of psychological disorders. *Id.*

169. *Id.*

Perhaps the most notable change in the ADAAA was an expansion of the "regarded as" prong of the ADA.[170] The broader reading of this particular prong offered protections for disabled individuals that focused on how a person was treated because of a physical or mental impairment, "rather than what an employer may have believed" about the person's disability under the original version of the statute.[171] Under the ADAAA, a person was "regarded as having such an impairment" if the individual was subject to a prohibited action on the basis of a perceived disability.[172] Most notably, the new "regarded as" prong did not require that an individual prove they were substantially limited in a major life activity.[173]

Under the ADAAA, hearing impaired plaintiffs were able to more easily avail themselves of the statute's protections. The inquiries into such plaintiffs' hearing loss were often shorter, less intrusive, and reflected a more inclusive understanding of disabilities that did not preclude plaintiffs based on how "bad" one's disability was. Although some cases continued to fall through the cracks, hearing loss reached a new level of understanding under the ADAAA in a way it should have under the original version of the statute.

A. Modifying the Sutton *Standard: Evaluations of Hearing Loss Under the ADAAA*

By eliminating the analysis of the ameliorative effects of mitigating measures when determining whether or not an individual has a disability under the ADA, Congress intended for courts to interpret substantially limits more broadly and to the "maximum extent permitted" by the ADAAA.[174] For those with hearing loss, this change would mean that ADA protections no longer hinged on the effectiveness of their hearing aids, their ability to lipread, or their efforts to make do with other self-correcting behaviors. With the rigid *Sutton* substantially limits standard modified, hearing aids were no longer viewed as a "cure" for hearing loss, and were not an impediment to receiving protections under the ADA.

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170. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a)(3), 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213).

171. EEOC ADAAA FACT SHEET, *supra* note 162.

172. 29 C.F.R. § 1630.2(l)(1) (2020).

173. *Id.*; *see also* DiGiosia v. Aurora Health Care, Inc., 48 F. Supp. 3d 1211, 1218 (E.D. Wis. 2014) (stating that "the ADAAA expanded the scope of the ADA's 'regarded as' [prong] to cover perceived impairments even if no one thought those impairments were substantial.").

174. EEOC ADAAA FACT SHEET, *supra* note 162.

The ADAAA expressly mentioned that hearing aids were an example of a mitigating measure that should not be taken into consideration when determining whether a disability substantially limits a major life activity.[175] EEOC guidelines made clear that under the ADAAA, courts would still be engaging in "individualized assessment[s]" of whether or not an impairment substantially limited a major life activity, the same as under the ADA.[176] However, this was qualified by stating that this "determination . . . should not require an extensive analysis."[177] Although not mentioning hearing loss specifically, the ADAAA included a provision that stated that "learned behavioral or adaptive neurological modifications" would be considered a mitigating measure that should not be taken into consideration under the substantially limits prong.[178]

Hearing loss reached a new level of acknowledgement as a disability under the ADAAA, even if the ADAAA's new level of protections were sometimes questioned. For example, the Seventh Circuit noted, "an employer who fired someone because he had ten percent hearing loss would violate the ADAAA, whereas such an act would not violate the ADA because *no one would ever argue that the minor hearing loss* impacted a major life activity."[179] Shortly after the passing of the ADAAA, the EEOC's Notice of Proposed Rulemaking also included a specific example of hearing aids in offering its guidance:

> An individual who uses hearing aids, a cochlear implant, or a telephone audio device due to a hearing impairment is an individual with a disability where, without the benefit of the mitigating measure, he would be substantially limited in the major life activity of hearing or any other major life activity.[180]

This reflects the presumption that several of the cases discussed previously in this Note may have been decided differently under the

175. 42 U.S.C. § 12102(4)(E)(i)(I). The ADAAA also states that mitigating measures such as "medication, medical supplies, equipment, or appliances, low-vision devices ([excluding contacts and regular eyeglasses]), prosthetics, . . . cochlear implants or other implantable hearing devices, . . . oxygen therapy equipment" and "assistive technology" should not be considered when evaluating whether or not a person has a disability. *Id.* § 4(E)(i)(I)–(II).

176. EEOC ADAAA FACT SHEET, *supra* note 162.

177. *Id.*

178. 42 U.S.C. § 12102(4)(E)(i)(IV). One can reasonably argue that this provision could be construed to include behaviors such as lipreading.

179. DiGiosia v. Aurora Health Care, Inc., 48 F. Supp. 3d 1211, 1218 (E.D. Wis. 2014) (emphasis added).

180. Equal Employment Opportunity Commission, 74 Fed. Reg. 183 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630), https://www.govinfo.gov/content/pkg/FR-2009-09-23/html/E9-22840.htm.

ADAAA if not considering hearing loss in its corrected state with hearing aids or other mitigating measures.[181]

The ADAAA's rework of the *Sutton* substantially limits prong proved more inclusive for those with hearing loss. Consistent with EEOC guidelines, courts' inquiries into the disability were less intrusive as well, more easily finding that individuals with hearing loss had a disability under the ADAAA. In *Howze v. Jefferson County Committee for Economic Opportunity*, the court easily found, and with very little inquiry into the impairment's severity, that a plaintiff with bilateral hearing loss[182] who wore hearing aids had a disability within the purview of the ADAAA.[183] In *EEOC v. Heartland Automotive Services*—which included a plaintiff who wore hearing aids—the court easily found that the plaintiff had a disability under the ADA, stating, "[t]he parties do not dispute that Davidson is disabled. They agree that Davidson suffers from sensorineural hearing loss. Thus, the Court need not analyze this element . . . ."[184]

Analyses under the ADAAA also reflected a broader understanding of the effects of hearing loss, and this new understanding resulted in finding that more individuals with hearing loss had a disability. In *Spencer v. National City Bank*, the court took note of the difficulties that the plaintiff experienced when communicating as a result of her hearing loss.[185] After noting that the plaintiff's hearing loss was not temporary, but permanent, the court held that the plaintiff had a disability under the ADA.[186] Further, with regard to mitigating measures, courts after the enactment of the ADAAA explicitly realized that coping mechanisms, or learning to manage one's hearing loss, should not be considered in court analyses.[187]

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181. *See supra* cases discussed in Part IV.A.

182. "A bilateral hearing loss is a hearing loss in both ears." *Bilateral Hearing Loss*, HEAR-IT, https://www.hear-it.org/bilateral-hearing-loss (last visited Aug. 18, 2020).

183. Howze v. Jefferson Cnty. Comm. for Econ. Opportunity, No. 2:11-CV-52-VEH, 2012 WL 3775871, at *11 (N.D. Ala. Aug. 28, 2012).

184. EEOC v. Heartland Automotive Services, No. 12-2054-STA-dkv, 2013 WL 6065928, at *9 (W.D. Tenn. Nov. 18, 2013).

185. 732 F. Supp. 2d 778, 788–89 (S.D. Ohio 2010). The court noted that the plaintiff had to lipread and be directed to a customer's face in order to assist them and frequently asked people to repeat themselves. *Id.*

186. *Id.* at 789.

187. *See* Rose v. Baptist Child.'s Homes of N.C., No. 1:19-CV-620, 2019 WL 5575878, at *4 (M.D.N.C. Oct. 29, 2019) (holding that neither the plaintiff's ability to manage her hearing loss nor the plaintiff's husband's testimony that the disability did not substantially limit her are not factors to be considered in an analysis of determining a disability after the enactment of the ADAAA).

The ADAAA functioned to eliminate the intense and intrusive evaluations into hearing loss that would often differ from court to court. As a result, a much more standardized—and fairer—analysis of hearing loss prevailed. In *Messenheimer v. Coastal Pet Products*, the plaintiff used hearing aids due to severe hearing loss.[188] Without further analysis into how well the plaintiff functioned with her hearing aids, or a further inquiry into the degree of her hearing loss, the court found that "[t]he primary purpose of the [ADAAA of 2008] was to 'reinstat[e] a broad scope of protection under the ADA. . . . As such, the Court finds that Messenheimer has made a sufficient showing that she has a disability within the meaning of the ADA."[189] The analysis became more akin to the way deafness was originally analyzed under the ADA—short, simple, and conclusory—in finding that such plaintiffs fell within the purview of the ADA's protections.[190]

There are, however, still some existing issues with courts' interpretations of hearing loss, even after the enactment of the ADAAA. For one, some courts still inquire into the extent of one's hearing loss in determining whether it merits disability protections, which suggests that once again only hearing loss that is "bad enough" will qualify as a disability.[191] In *Mengel v. Reading Eagle Co.*, the court held that hearing loss in one ear was not substantially limiting enough to constitute a disability, even under the ADAAA.[192] The court in *Mengel* noted that the plaintiff "only" suffered from hearing loss in one ear, not bilateral deafness, which would constitute an automatic disability under EEOC regulations.[193] The court looked to those regulations, which stated that not every impairment would constitute a disability under the ADAAA, in finding that the plaintiff's difficulty hearing in her noisy workroom did

188. Messenheimer v. Coastal Pet Prods., No. 5:17-cv-738, 2018 U.S. Dist. LEXIS 126067, at *17 (N.D. Ohio July 27, 2018).

189. *Id.*

190. *See* Nelson v. N. Broward Med. Ctr., No. 12-61867-CIV-ROSENBAUM/SELTZER, 2013 U.S. Dist. LEXIS 180703, at *34 (S.D. Fla. Dec. 27, 2013) ("Nelson's hearing loss qualifies as a 'disability,' as the regulations specifically list 'hearing' and 'communicating' as major life activities. Therefore, Nelson's diminished capacity to hear and communicate as a result of his hearing loss qualifies as a 'physical impairment that substantially limits one or more major life activities.'") (internal citations omitted).

191. *See* U.S. EEOC v. Big Lots Stores, Inc., No. 2:17-CV-73, 2018 WL 4656413, at *1–2 (N.D.W. Va. Sept. 27, 2018) ("[T]he federal courts have held that plaintiffs with hearing loss similar to Johnson's [bilateral deafness] had produced sufficient evidence of disabilities.") *Id.* at *3.

192. Mengel v. Reading Eagle Co., No. 11-6151, 2013 WL 1285477, at *3–4 (E.D. Pa. Mar. 29, 2013.

193. *Id.* at *3; EEOC DEAFNESS AND HEARING IMPAIRMENTS, *supra* note 2.

not constitute a disability.[194] The court held that the plaintiff "did not mention any specific instances where her hearing loss caused a problem other than that she 'didn't hear some things.'"[195] But not being able to hear "some things" is essentially the effect of having hearing loss. What more did the court want this plaintiff to prove?

In another disappointing decision, *Ballard v. Solid Platforms, Inc.*, the court held that the plaintiff's high-frequency hearing loss did not impede his normal hearing function and that it did not affect his daily life activities.[196] The opinion in *Ballard* is striking, because although decided after the enactment of the ADAAA, its analysis closely mirrors the problematic post-*Sutton* analyses of hearing loss.[197] The court noted that the plaintiff used closed-captioning and sat close to the TV while watching, and concluded from these facts that the plaintiff's disability did not substantially affect his daily life.[198] The court also reasoned that his hearing did not significantly restrict him from performing his job, minus some difficulty communicating with his coworkers.[199] The court again rendered its decision after an analysis into the degree of plaintiff's hearing loss, and concluded that the plaintiff did not present evidence that his hearing loss substantially limited a major life activity.[200]

With respect to *Ballard*, high frequency hearing loss is "one of the most common configurations of hearing loss."[201] High frequency hearing loss substantially limits individuals because it makes it challenging to understand speech.[202] Common side effects also include the inability to hear common noises that many others take for granted, such as birds

194. 29 C.F.R. § 1630.2(j)(1)(ii) (2020); *Mengel*, 2013 WL 1285477, at *3–4; *see also* Curley v. City of N. Las Vegas, No. 2:09-CV-01071-KJD-VCF, 2012 U.S. Dist. LEXIS 58247, at *11 (D. Nev. Apr. 25, 2012) ("Even under the broadened definition of disability in the now-amended ADA 'not every impairment will constitute a disability within the meaning of [the ADA].'" (quoting 29 C.F.R. § 1630.2(j)(1)(ii))).

195. *Mengel*, 2013 WL 1285477, at *4 (quoting the plaintiff's deposition).

196. Ballard v. Solid Platforms, Inc., No. 2:10 cv 238, 2012 WL 1066760, at *1, *13 (N.D. Ind. Mar. 27, 2012) (considering mitigating measures such as having to use closed-captioning or sitting close to the TV).

197. The court did not mention that it was retroactively applying the ADA, nor did it mention the changes brought forth by the ADAAA, which in a case decided in 2012, should have been the statutory precedent.

198. *Id.* at *1. Here, the court was weighing the effects of mitigating measures in its determination of a disability, which the ADAAA was explicitly clear was not the appropriate way to evaluate disabilities.

199. *Id.*

200. *Id.* at *13.

201. Beth McCormick, *All Ears: What Is High-Frequency Hearing Loss?*, STARKEY (Aug. 8, 2017), https://www.starkey.com/blog/2017/08/High-frequency-hearing-loss.

202. *Id.*

chirping or a doorbell.[203] For the court in *Ballard* to state that the plaintiff's hearing impairment did not impede his normal hearing function was to base its reasoning on a standard that the ADAAA was explicitly enacted to reverse.

Analyses such as *Mengel* and *Ballard* under the ADAAA are disappointing, especially when the text of the ADAAA seemed to eradicate these faulty reasonings. Furthermore, the less stringent ADAAA standard did not apply retroactively, but instead only to cases where the conduct occurred *after* the enactment of the 2008 amendments. As a result, claims where the conduct in question took place before 2008 would be evaluated under the *Sutton* standard, which would prevent a number of people from availing themselves of the ADAAA's broader application.[204] Although this issue is less prevalent after the enactment of the ADAAA, there are still significant ways in which hearing loss can fall through the cracks of the ADA's protections, whether it be the date at which the claim was filed, or a court's misunderstanding of hearing loss by continuing to treat it as a disability of degree. Despite this, these cases appear to be few and far between, which allows hearing-impaired plaintiffs to finally avail themselves of much-needed disability protections, thanks to the ADAAA.

VI. RECOMMENDATIONS FOR A MORE INCLUSIVE ANALYSIS

The purpose of the ADAAA was to reemphasize the broader definition of a disability so that its interpretation would cover individuals in the way that the ADA was originally intended to.[205] As noted earlier in this

203. *Id.*

204. *See* Jeffries v. Verizon, No. 10-2686, 2012 WL 4344197, at *9 (E.D.N.Y. Aug. 31, 2012). Here, the court employed the *Sutton* and *Toyota* standards to a case involving a plaintiff with documented hearing loss because the conduct occurred prior to the effective date of the ADAAA. *Id.* It begs the question, however, of whether the court would have accepted his disability at face value as in *Howze* without a further inquiry of degree. *See also* Kemp v. Holder, 610 F.3d 231, 236 (5th Cir. 2010) ("Kemp concedes that he filed his lawsuit before the ADAAA became effective, but he urges us to find that the ADAAA may be applied retroactively such that we may consider whether Kemp was disabled in a major life activity without regard to the mitigating effects of his hearing aids. . . . [E]ven though Kemp's claim might fare differently if the ADAAA applied, we are bound to follow Sutton and evaluate whether his impairment constitutes a disability when taking into account the benefit imparted by his hearing aids. . . . Kemp readily admits that he is not substantially limited in any life activity when he wears his hearing aids, so we find no error in the district court's conclusion that he does not have a 'disability' . . . .").

205. *The Americans With Disabilities Act Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/americans-disabilities-act-amendments-act-2008 (last visited Jan. 31, 2021).

Note,[206] analyses of hearing loss after the enactment of the ADAAA were broader and reflected a deeper understanding of its implications on the individual. This was due to a shift in the type of analysis courts employed when evaluating disabilities under this new standard. In order to avoid regressing back to a *Sutton*-level analysis, courts must be cognizant in their analyses and instead view a disability under a more inclusive universal approach, rather than revert back to a medical model approach.

The medical model of a disability is consistent with pre-ADAAA analyses of a disability under the original statute. The medical model views a disability as something "bad," "abnormal," or "problematic" that needs to be "fixed," "cured," or "removed."[207] This view also involves separating those who are "truly disabled" from those who may thought to be less so.[208] This approach, as prior court analyses under the original ADA demonstrate, "fails to pay attention to significant problems in our society and the role of our physical, social, and attitudinal environments in either producing barriers or promoting accessibility and inclusion."[209]

On the contrary, because the ADAAA broadened the definition of what constitutes a disability, the analysis itself shifted from a medical model to more of a social, universal model. The social model distinguishes between a disability and the idea of an impairment, taking into account systemic barriers, negative attitudes, and exclusion from society that result from one's disability.[210] The social model does not see a disability as a problem with the individual per se, but instead views the problem with society's response to the individual.[211] This model focuses on acknowledging that certain attitudes and stigmas may play into what we view as a disability, but encourage a more inclusive understanding.[212] Employing the social model of a disability with analyses under the ADAAA is crucial for people with invisible disabilities like hearing loss,

206. *See supra* Part V and accompanying cases.

207. Alise de Bie & Kate Brown, *Models of Disability*, PRESSBOOKS, https://flexforward.pressbooks.com/chapter/models-of-disability/ (last visited Dec. 28, 2020); *see also Social and Medical Models of Disability: Paradigm Change*, http://www.artbeyondsight.org/dic/definition-of-disability-paradigm-change-and-ongoing-conversation/ (last visited. Jan. 17, 2021).

208. 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, 210 (2010).

209. di Bie & Brown, *supra* note 208.

210. See *Social and Medical Models of Disability: Paradigm Change*, *supra* note 208. This model takes into account 1) impairments, or problems in body function or structure; 2) activity limitations, or difficulties encountered by a person in execution tasks or actions; and 3) participation restrictions, such as problems experienced by a person in certain life situations. *Id.*

211. *See* Barry, *supra* note 209 at 212.

212. *Id.*

who may not at the outset "look" impaired but suffer from societal stigmas because of their disability.[213]

The changes brought forth by the ADAAA to the original statute signal a shift toward a more social model as the understanding of a disability. This is especially evident in the cases involving hearing loss that were decided after the enactment of the ADAAA. When courts are the ones evaluating whether or not an individual's impairment constitutes a disability under the ADA, it is important that their analysis does not stray back to a medical model. Doing so would not only deprive disabled plaintiffs from statutory protections, but would further reflect a less inclusive attitude towards disabilities as a whole.

VII. CONCLUSION

Hearing loss is an invisible disability in which its effects are so complex and exist on so wide a spectrum that it is often difficult to understand the unique challenges hearing impaired plaintiffs face. Originally, such misunderstandings, along with common stigmas and stereotypes, unfortunately resulted in extremely narrow holdings of what did and did not constitute a disability, often to the detriment of those with hearing loss. After the Supreme Court's decision in *Sutton* and its companion cases, this line of reasoning further perpetuated societal stigmas surrounding hearing loss as a disability, including the use of hearing aids.

The enactment of the ADAAA broadened the scope of what constituted a disability under the ADA, and such determinations were less intrusive into the "degree" of one's hearing loss which in turn led to greater protections for hearing impaired plaintiffs. Hearing impaired plaintiffs were finally able to avail themselves of the protections they should have originally received under the original statute. Although there are examples of cases after the ADAAA that still evaluate hearing loss too narrowly, the amended version of the statute signals a more inclusive understanding of disabilities as a whole that provides a promising template for disability analyses in the future. In terms of hearing loss, courts should continue to strive to move forward with a more comprehensive understanding of and empathy for the effects of this disability, so as to not risk hearing loss once again falling through the cracks of the statute. With the passing of the ADAAA, hearing impaired

213. *Id.* at 279 ("Stigma is a poor indicator because it ignores those who have, had, or are perceived as having non-stigmatized impairments and who nevertheless experience adverse treatment because of them.").

plaintiffs do not need to worry about whether they are not "deaf enough," but can be assured that they were *always* in fact "enough."