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Is My Impairment "Minor?": How Courts Should Analyze the "Transitory and Minor" Exception of the ADA

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I. Introduction

What is a "minor impairment?" Over the last decade, courts have had serious contention over how to analyze the term in the employment discrimination context. To be regarded as having a disability under the Americans with Disabilities Act ("ADA"), an impairment must not be "transitory and minor."[1] While the ADA explicitly defines transitory, it does not define minor.[2] Without an exact definition from Congress in the ADA, the United States Courts of Appeals have been divided on how to interpret the term. The confusion among the courts has led to decisions that have left employees without recourse for their injuries and for adverse employment actions based on their disabilities.

With this confusion, decisions like *Randall v. United Petroleum Transports, Inc*. have prevailed throughout the country.[3] In *Randall*, an employee suffered a seizure disorder. His employer concluded that he would be unable to drive for six months.[4] When he sued for being regarded as being disabled during this period, the court denied his claim since it held his impairment was transitory, so he was not regarded as disabled.[5] There was no discussion of whether the impairment could be minor, or if that was important.[6] Had the court required the perceived impairment to also be minor to be outside the protection of the statute, a different decision might well have been rendered. More stringent standards for courts to follow when

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[1] 42 U.S.C § 12102 (3) (2018).
[2] *See id.*
[3] 131 F. Supp. 3d 566 (W. D. La. 2015).
[4] *Id.* at 572.
[5] *Id.*
[6] *See id.*

discussing the transitory and minor exception could help lead to fewer decisions like *Randall*, where employees are unfairly treated due to their short-term impairments.

The goal of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[7] Signed into law by President George H. W. Bush in 1990,[8] the ADA has been described as the most influential federal civil rights legislation enacted since the Civil Rights Act of 1964.[9] The Act "guarantees that people with disabilities have the same opportunities as everyone else to participate in the mainstream of American life—to enjoy employment opportunities, to purchase goods and services, and to participate in State and local government programs and services."[10] The ADA consists of five titles, and Title I, the employment title, covers employers with fifteen or more employees.[11] To be protected under the ADA, the individual must have a disability.[12] Individuals are disabled when they have an impairment that substantially limits one or more major life activities, a history of having such an impairment, or are regarded as having an impairment.[13]

This Comment will focus on the third prong of disability: a person who is regarded as having an impairment. More specifically, this Comment will focus on: the transitory and minor exception to being regarded as being disabled. Since it was added to the ADA in the Americans Against Disability Amendments Act of 2008 ("ADAAA"), there have been concerns there will

[7] 42 U.S.C. § 12101(b)(1).
[8] *Introduction to the ADA*, ADA.GOV, https://www.ada.gov/ada_intro.htm (last visited Dec. 19, 2020).
[9] Americans with Disabilities Act and ADA Civil Rights Summary, AFFIRM ABLE ACTION ASSOCIATES, http://www.disability-access.org/ada.php (last visited Dec. 19, 2020).
[10] *Introduction to the ADA, supra* note 8.
[11] Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 386 (2019).
[12] *Introduction to the ADA, supra* note 8.
[13] *See* 42 U.S.C. § 12102(1).

be significant confusion over the transitory and minor exception's analysis, and the concerns have persisted.[14]

This Comment calls for courts to interpret the ADAAA and the transitory and minor exception in three specific ways. First, the transitory and minor exception should be an affirmative defense brought by the employer who has the burden of proof. Second, courts should analyze transitory separately from minor. Third, minor should be defined using a commonsense standard that will be described fully later in this comment.

Part II of this Comment will discuss the history of the ADAAA and the transitory and minor exception. It will also discuss the circuit split on the exception, and the four standards courts use. Part III will discuss *Eshleman v. Patrick Industries,*[15] a recent and seminal case in employment discrimination, and the court's analysis of transitory and minor. It will also elaborate on the Third Circuit's recent approach for which party should hold the burden of proof for the exception and the analysis of transitory and minor. Part IV will argue why the exception should be an affirmative defense brought by the employer, and why transitory should be analyzed separately from minor. It will discuss how this can be found in a direct reading of the ADA, its amendments, and other regulations. Part V will pose a working definition of "minor" the courts can use. The section will discuss various definitions of the word minor from a variety of fields and how it should be best interpreted by the courts. Part VI will briefly conclude.

II. The History and Interpretation of the ADAAA's Transitory and Minor Exception

A. ADA Title I: What is a Disability?

[14] *See* Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1028 ("What is clear is that the 'minor' impairment exclusion will generate considerable uncertainly and litigation").
[15] 961 F.3d 244 (3d Cir. 2020).

The ADA was passed in 1990 with overwhelming support in both houses of Congress.[16] Congress intended to protect individuals with disabilities.[17] The Act protects a narrowly defined group of individuals, similar to Title VII of the Civil Rights Act.[18]

The ADA divides the definition of a disability into three separate prongs.[19] The first prong is "a physical or mental impairment that substantially limits one or more major life activities of such individual."[20] The second prong is "a record of such an impairment."[21] The third prong, and the main focus of this Comment, is "being regarded as having such an impairment."[22] Under the ADA as amended, an individual meets the third prong if the individual "establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[23] This section, however, explicitly excludes impairments that are "transitory and minor."[24] The Act defines a transitory impairment as an impairment with an "actual or expected duration of six months or less."[25] The Act does not, however, define the word "minor."[26] Overall, the statute requires that the definition of disability should be construed as broadly as possible and to the maximum extent allowed by the Act.[27]

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[16] Porter, *supra* note 11, at 386.
[17] *Id.*
[18] Title VII of the Civil Rights Act prohibits "discrimination against any individual . . . because of such individual's race, color, religion, sex, or national origin". 42 U.S.C. § 703(a)(1). The ADA "provides a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101.
[19] 42 U.S.C. § 12102(1).
[20] *Id.* § 12102(1)(A). The statute gives some examples of a major life activity including "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." The ADA also defines the operations of major bodily functions, which included "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."
[21] *Id.* § 12102(1)(B).
[22] *Id.* § 12102(1)(C).
[23] *Id.* § 12102(3).
[24] *Id.*
[25] 42 U.S.C. § 12102(3).
[26] *See id.*
[27] *Id.* § 12102 (4). In the original draft of the ADA, the Act considered an impairment a disability provided the disability included "being regarded as having such an impairment," if the impairment substantially limited a major life activity. Effectively, it combined the first and third factors, but this was changed in 2009 to the current language

B. The ADAAA and its Purpose

When the ADA was enacted, there was general optimism from legislators and activists alike the Act would be effective in providing a "national mandate for the elimination of discrimination against individuals with disabilities."[28] Within the third "regarded as" prong of disabilities, Congress hoped the statute would "curb 'society's accumulated myths and fears about disability.'"[29] Unfortunately, this did not pan out as planned, as several Supreme Court cases significantly narrowed the class of protected "disabled employees" beginning in 1999.[30] The most significant of these cases was *Sutton v. United Air Lines, Inc.* in which the Court held a plaintiff is not protected by virtue of being regarded as disabled unless the employer perceives the plaintiff's impairment as one that would substantially limit a major life activity.[31] It also held mitigating measures, such as medication and prosthetic devices, should be taken into account in determining whether a person is disabled for purposes of the ADA.[32] These narrow holdings by the Court made it more difficult for plaintiffs to make claims under the original ADA, and posed a "serious obstacle" to eliminate discrimination of individuals with disabilities.[33] In response to the Supreme Court, Congress enacted the ADA Amendments Act of 2008 to expand the reach of the statute's prohibitions.[34]

The goal of the ADAAA was to make it easier for an individual seeking protection under the ADA to establish he or she had a disability within the meaning of the statute.[35] With the enactment of the ADAAA, Congress overturned several Supreme Court decisions, including

described above. Anita Silvers and Leslie Francis, *An Americans with Disabilities Act for Everyone, and for the Ages as Well*, 39 CARDOZO L. REV 669, 678 (2017).
[28] Befort, *supra* note 14, at 993.
[29] *Id.* (quoting *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987)).
[30] *Id.* at 993–94.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *See* Befort, *supra* note 14, at 993.
[35] ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 § 2.

Sutton, that Congress believed too narrowly interpreted the definition of disability.[36] The Amendments stated disability should be read in favor of broad coverage for individuals.[37] The ADAAA furthered Congress's intent to give a workable standard by "adopting 'rules of construction' to use when determining if an individual is substantially limited in performing a major life activity."[38] These rules of construction came directly from the statute.[39]

First, Congress stated the term "substantially limits" from the first prong of disabilities requires a lower standard of functional limitation than the degree applied by the courts in the past.[40] The impairment is not required to fully prevent or even significantly restrict a major life activity to be substantially limiting, however not every impairment constitutes a disability.[41] It also stated an impairment that is episodic or in remission could also be "substantially limiting" if it substantially limits a major life activity when active.[42] Overall, the statute required that the standard be construed broadly for maximum coverage allowable by the ADA.[43]

The ADAAA also required a path to "make it easier" for individuals to establish coverage under the "regarded as" prong of the definition of disability.[44] The ADAAA redefined the focus to "how a person has been treated because of a physical or mental impairment (that is not transitory and minor), rather than what an employer may have believed about the nature of the person's impairment."[45] However, employers are not required to accommodate employees who are only regarded as having a disability.[46]

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[36] *Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA*, EQUAL EMP'T OPPORTUNITY COMM'N & CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE. [hereinafter EEOC Fact Sheet], https://www.eeoc.gov/laws/guidance/fact-sheet-eeocs-final-regulations-implementing-adaaa (last updated May 3, 2011).
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] EEOC Fact Sheet, *supra* note 36.
[43] *Id*.
[44] *Id*.
[45] *Id*.; ADA Amendments Act of 2008, Pub. L. 110–325, 122 Stat. 3553 § 2.
[46] *See* EEOC Fact Sheet, *supra* note 36.

C. EEOC Interpretations of the Transitory and Minor Exception

Due to the concerns over how the transitory and minor exception was being inconsistently implemented and decided by the courts, the EEOC took an official position in September 2009 when it proposed several rules on how to interpret the ADA following the passage of the ADAAA.[47] The EEOC regulations were codified in the Code of Federal Regulations after public comment.[48] In the regulations, the EEOC stated the "transitory and minor" exception must be argued as an affirmative defense.[49]

> It may be a defense to a charge of discrimination by an individual claiming coverage under the "regarded as" prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) "transitory and minor." *To establish this defense, a covered entity must demonstrate that the impairment is both "transitory" and "minor."* Whether the impairment at issue is or would be "transitory and minor" is to be determined objectively. A covered entity may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor.[50]

In the Appendix of the Federal Regulations, the EEOC included a few examples as to how the transitory and minor exception should be applied.[51] The first requirement was that the determination of "transitory and minor" must be made objectively.[52] In the first example, an individual who is denied a promotion due to a minor back injury would be "regarded as" having a disability if the back injury lasted or was expected to last six months or more.[53] Even though

[47] Gordon Good, Comment, *The Americans with Disabilities Act: Short-Term Disabilities, Exceptions, and the Meaning of Minor*, 37 U. DAYTON L. REV. 99, 111 (2011).
[48] *Id.* at 111 n.91.
[49] *See* 29 C.F.R. § 1630.15(f)(2011)
[50] *Id.* (emphasis added).
[51] *Id.*
[52] *Id.*
[53] *Id.*

the injury was minor, since it was not transitory it would not meet the exception.[54] On the other hand, if an employer discriminated against an employee based on the employee's bipolar disorder, which the EEOC states is not transitory and minor, the employee is "regarded as" being disabled even if the employer *subjectively* believes the disorder is transitory and minor.[55] As a general rule, the EEOC requires that "regarded as" disability claims should be construed broadly, but the "transitory and minor" exception should be construed narrowly.[56]

D. Congress's Interpretation of the ADA, the ADAAA and the Transitory and Minor Exception

When Congress originally wrote the ADA, the goal was to make it a less challenging standard for employees to receive protection under the law. In fact, Congress "did not expect or intend that this would be a difficult standard to meet."[57] During the deliberations of the ADAAA, the House Committee on Education and Labor explicitly rejected *Sutton* and instead stated the fact that an individual was discriminated against due to a perceived or actual impairment would be sufficient to claim a disability.[58]

Regarding the "transitory and minor" exception, the Committee stated the exception was necessary because individuals seeking coverage under the "regarded as" prong did not need to meet the "functional limitation requirement" of the first two prongs.[59] Without this exception, the "regarded as" prong could cover individuals "who are regarded as having common ailments like the cold or flu."[60] The inclusion of the exception was created to prevent "potential abuse of the Act" and misapplication of resources to individuals with "minor ailments that last only a

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[54] *Id.*
[55] 29 C.F.R. § 1630.15(f)(2011).
[56] Kevin Barry, Brian East & Marcy Karin, *Pleading Disability after the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1, 21 (2013).
[57] H.R. Rep. No. 110–730 pt. 2, at 13 (2008).
[58] *Id.*
[59] *Id.*
[60] *Id.*

short period of time."[61] The Committee decided the exception for coverage should be construed narrowly as an exception to the general rule for broad coverage of "regarded as" impairments.[62]

E. Circuit Courts' Split Interpretations of the "Transitory and Minor" Exception

Even with the EEOC's and Congress's guidelines for interpretation, courts are split as to how to interpret the "transitory and minor" exception. The courts are divided over whether the employer or employee must prove the "transitory and minor" exception, and how transitory and minor should be evaluated. There are four main approaches the courts have followed in discussing "transitory and minor." The first, discussed in Part 1 of this section, is that the employer must bring the affirmative defense of "transitory and minor" and has the burden of proof. The second, discussed in Part 2 below, is that the employee has the burden of proof of proving the impairment is not transitory and minor. The third, discussed in Part 3, is when a court implicitly holds an impairment is minor because it is transitory. The fourth, discussed in Part 4, requires evaluating transitory and minor separately.

1. Employer Needs to Prove the Defense

In the Sixth, Seventh, and Ninth Circuits, the courts have held the employer is required to bring forward the affirmative defense of transitory and minor and thus has the burden of proof.[63] The Seventh Circuit discussed this approach first in 2015 in *Silk v. Board of Trustees, Moriane Valley Cmty. Coll., Dist. No. 524*.[64] The plaintiff in *Silk* was an adjunct professor at Moraine Valley Community College who underwent heart surgery and went on medical leave.[65] The professor did not give any notification when he would return, and about a month later the

[61] *Id*.
[62] *Id*.
[63] Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 319 (6th Cir. 2019); Nunies v. HIE Holdings, Inc., 908 F.3d 428 (9th Cir. 2018); Silk v. Board of Trustees, Moriane Valley Cmty. Coll., Dist. No. 524, 795 F.3d 698 (7th Cir. 2015).
[64] 795 F.3d 698 (7th Cir. 2015).
[65] *Id*. at 701–02.

College told the professor it would need a doctor's medical release when he returned.[66] He sent back his release and requested to take on a full course load upon his return.[67] After monitoring him on a smaller class load, the College claimed his teaching methods were poor and terminated him.[68]

The Seventh Circuit held that, to defeat the plaintiff's claim that he was eligible for protection as regarded as disabled, the College is required to argue the plaintiff's injury was both transitory and minor to "head [plaintiff] off at the pass."[69] The Court held the standard is an objective one where the College must prove Silk's injury was actually transitory and minor.[70] The College had the burden of proof to show that the injury was transitory and minor, and the court held that it failed to do so.[71] The court cited to the Code of Federal Regulations to hold that the College must prove the injury was transitory and minor, and may not just "subjectively believe[]" it.[72] The court stated that the College had not given any evidence for how long the impairment would last, so it had not established that the heart condition was transitory or minor.[73]

The Ninth Circuit also held the exception to be an affirmative defense.[74] A delivery driver with a shoulder injury was ultimately fired after he requested a "part-time, less-physical warehouse job" in the company.[75] The employee was told he had in effect resigned, but he had documentation from a doctor of his injury and inability to work for a short period of time.[76] The company argued that the burden was on the driver to show his impairment was not transitory or

[66] *Id.* at 702–03.
[67] *Id.* at 703.
[68] *Id.* at 703–04.
[69] *Silk*, 795 F.3d at 706.
[70] *Id.*
[71] *See id.*
[72] *Id.*
[73] *Id.*
[74] Nunies v. HIE Holdings, Inc., 908 F.3d 428 (9th Cir. 2018).
[75] *Id. at* 428–31.
[76] *Id.* at 431–32.

minor in order to be covered by the ADA, but the Ninth Circuit disagreed.[77] The court followed the EEOC's guidance and held the "'transitory and minor' exception is an affirmative defense, and '[a]s such, the employer bears the burden of establishing the defense.'"[78] Since the employer did not offer any evidence to show that the injury was transitory and minor, the court stated it did not need to offer any additional analysis on the exception.[79]

The Sixth Circuit held an employer can rebut a prima facie case of "regarded as" disability with proof that the impairment is transitory and minor.[80] The plaintiff-employee was a certified registered nurse anesthesiologist with a degenerative retinal condition that made it difficult for her to read screens from a distance.[81] The employee was fired and made a claim that she was regarded as being disabled.[82] The court held the employer had the burden to show evidence that the impairment was transitory and minor to defeat ADA coverage.[83]

2. Employee Needs to Rebut the Exception

Unlike the courts in the first category, some circuits courts have put the burden of proof on the plaintiff to show the impairment was not transitory and minor. In the Tenth Circuit, the court used that standard in *Adair v. City of Muskogee*.[84] In the case, the plaintiff was a firefighter who injured his back during a training exercise.[85] He attempted to come back to work, but the department required him to get a medical evaluation.[86] The doctors said he was unfit to work as a firefighter again, and the department required him to either retire or be terminated.[87] The court's reading of the ADAAA required the plaintiff to show "(1) he has an actual or perceived

[77] *Id.* at 435.
[78] *Id.* (quoting 29 C.F.R. pt. 1630, app. § 1630.2(l)).
[79] *See id.*
[80] Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 319 (6th Cir. 2019).
[81] *Id.* at 311.
[82] *Id.* at 314.
[83] *Id.* at 319–21.
[84] 823 F.3d 1297 (10th Cir. 2016).
[85] *Id.* at 1301.
[86] *Id.*
[87] *Id.*

impairment, (2) that impairment is neither transitory nor minor, and (3) the employer was aware of and therefore perceived the impairment at the time of the alleged discriminatory action."[88] Therefore, the court in dicta required a "regarded as" plaintiff to give proof the impairment was neither transitory nor minor.[89] Ultimately, the court stated it was irrelevant in this case as the plaintiff's injury was so serious that he could no longer be a firefighter, so he was not a qualified individual that could bring a regarded-as claim.[90]

As described in more detail later, the Third Circuit in *Eshleman v. Patrick Industries* also required the plaintiff to carry the burden of persuasion that the impairment is not transitory and minor.[91]

3. Implying Minor from Transitory

In the next category of cases discussing the transitory and minor exception are decisions in which the court implicitly held that the impairment was minor because the impairment was transitory, without any other discussion of minor. In *White v. Interstate Distribution Company*, the Sixth Circuit held that since the plaintiff's injuries lasted less than six months, they were objectively transitory and, thus, minor.[92] The plaintiff, White, was a maintenance truck and trailer tech for Interstate Distribution Company.[93] Plaintiff was injured outside of work and requested leave under the Family and Medical Leave Act.[94] His doctor recommended one to two months of temporary work restrictions, but his boss told him there were no positions available to him under those restrictions.[95] The court rejected plaintiff's "regarded as" disability claim, since "the ADA explicitly states that the 'regarded as' definition 'shall not apply to impairments that

[88] *Id.*
[89] *Id.* at 1306.
[90] Adair, 823 F.3d at 1306.
[91] See Part III.A.1 for further discussion.
[92] 43 Fed. Appx. 415, 420 (6th Cir. 2011).
[93] *Id.* at 417.
[94] *Id.*
[95] *Id.* at 417–18.

are transitory and minor."[96] The court stated that a transitory impairment is an impairment with an actual or expected duration of six months or less.[97] There was no dispute between the parties that White's impairments were transitory, as his doctor expected his restrictions to be in effect for only a month or two."[98] Because the injuries only lasted two months at most, the court held that White's argument failed as a matter of law, ignoring any other analysis of minor.[99]

The Fifth Circuit also found an impairment was "transitory and minor" because the injury lasted less than six months in *Lyons v. Katy Independent School District*.[100] Lyons was a teacher and coach of three sports for Katy Independent School District.[101] During the summer of 2014, she underwent lap band surgery.[102] Because of the surgery, she informed her principal that she was unable to attend the summer sports camps.[103] She was then demoted from her position and taken off the coaching staff of two sports.[104]

The court held the injury was objectively transitory and minor because "the actual or expected duration of any impairment related to the lap band procedure was less than six months. . . . There are no facts in dispute regarding the transitory and minor nature of the perceived impairment."[105]

Prior to *Eshleman*, the Third Circuit also considered the transitory and minor exception in *Budhun v. Reading Hospital and Medical Center*.[106] Budhun was a typing secretary[107] who broke her fifth metacarpal (pinky finger) outside of work and went to work later that day with

[96] *Id.* at 420.
[97] *Id.*
[98] *White*, 43 F. Appx. at 420.
[99] *See id.*
[100] 964 F.3d 298 (5th Cir. 2020).
[101] *Id.* at 300.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 303.
[106] 765 F.3d 245 (3d Cir. 2014).
[107] *Id.* at 248.

her hand in a metal splint.[108] She had met with her doctor who taped three of her fingers together.[109] Plaintiff informed her employer that, even though she had a splint on her hand, she could still work—albeit not as fast as she used to.[110] Her employer disagreed that she could work unrestricted: if you "were truly unrestricted in your abilities, you would have full use of all your digits;" she was fired upon her return to work.[111] Budhun sued, claiming she was regarded as having a disability, but the court rejected the claim, holding it is "abundantly clear that [her employer] considered Budhun to have a broken bone in her hand and nothing more."[112] The court held a "regarded as" claim would not lie if "the impairment is 'transitory and minor,' which means it has an 'actual or expected duration of six months or less.'"[113] Budhun conceded as much because she described her injury as "temporary."[114] Since she specifically conceded her injury prevented her from using three fingers for approximately two months, the court held the plaintiff's injury was objectively transitory and minor.[115]

III. The *Eshleman v. Patrick Industries* Decision and the Transitory and Minor Analysis

Eshleman v. Patrick Industries is an example of a robust analysis by a circuit court of the transitory and minor exception. William Eshleman was a truck driver for Patrick Industries beginning in July 2013, and went on medical leave from October 14, 2015 through December 14, 2015 to have surgery to remove a nodule from his left lung.[116] Prior to taking leave, he let his supervisor know he would be taking leave and getting tested for cancer.[117] After the two month leave, he returned to work at full capacity without restrictions.[118] Six weeks later, he had a

[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Budhun*, 765 F.3d at 259.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] Eshleman v. Patrick Indus., 961 F.3d 244, 244 (3d Cir. 2020).
[117] *Id*.
[118] *Id*.

severe respiratory infection that lasted four days, and he obtained supervisor approval to use vacation days during that time off.[119] He returned to work at full capacity right afterwards, but was fired at the end of the next day.[120] The Superintendent first informed him that his termination was due to "performance issues," but Eshleman claimed he had excellent reviews from the month before.[121] Later, the company announced the termination was because he did not call out sick.[122] Even later, Patrick Industries asserted it terminated him for "behavioral issues."[123] Eshleman contended Patrick Industries regarded him as disabled and violated the ADAAA by firing him because of the time he took off for his biopsy and sickness.[124]

The District Court conceded Eshleman had sufficiently pled a "regarded as" disability case[125] but he had failed to allege his perceived impairment was not "transitory and minor."[126] The court stated an affirmative defense to an ADA claim "may be raised if it is apparent on the face of the complaint the impairment, or perceived impairment, is 'transitory and minor'—meaning it has an actual or expected duration of six months or less."[127] The court further stated Eshleman acknowledged his first medical leave lasted only eight weeks and his second leave lasted four days.[128] Then, Eshleman was cleared to work with no restrictions.[129] The court held that because the actual or expected duration of Mr. Eshleman's impairment lasted less than six months, it was a transitory and minor injury.[130]

A. Reasoning by the Third Circuit

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[119] *Id.*
[120] *Id.*
[121] *Id.* at 244–45.
[122] *Eshleman*, 961 F.3d at 244–45.
[123] *Id.* at 244.
[124] *Id.*
[125] Eshleman v. Patrick Indus., No. 17-4427, 2019 U.S. Dist. LEXIS 24082, at *3 (3rd Cir. Feb. 14, 2019).
[126] *Id.* at *6.
[127] *Id.* at *7.
[128] *Id.* at *4.
[129] *Id.*
[130] *Id.* at *9–10.

1. Reasoning about the Pleading Standard

This procedural posture at the Third Circuit was review of the grant of a motion to dismiss for failure to state a claim.[131] On appeal, the court was solely addressing whether "Eshleman's complaint sufficiently allege[d] a regarded-as impairment that is not transitory and minor."[132] Eshleman contended that the District Court neglected to address whether his impairment that his employer perceived was transitory and minor. On appeal, the Third Circuit discussed how to decide whom had the burden of proof, how to analyze transitory and minor, and how to evaluate minor.

2. Third Circuit's Reasoning about Burden of Proof

Even though the Third Circuit cited to the Code of Federal Regulations and insinuated the transitory and minor exception was a defense[133], it stated that the phrase "affirmative defense . . . is imperfect shorthand."[134] The court stated the statutory texts required a regarded-as disability claims to include a non-transitory or non-minor perceived impairment.[135] Therefore, the court held that even if the employer does not include a transitory and minor defense, the plaintiff needed to allege a transitory and minor impairment to state a legally sufficient claim, giving the plaintiff the burden of proof to show the impairment was neither transitory nor minor.[136]

3. Third Circuit's Reasoning about Transitory and Minor Analyses

On appeal, Eshleman contented that even though his injury was transitory, the District Court needed to separately evaluate whether his impairment was minor.[137] The Third Circuit agreed with Eshleman's argument.[138] The court noted the ADA's definition of transitory, but it

[131] Eshleman v. Patrick Indus., 961 F.3d 244, 244 (3rd Cir. 2020).
[132] *Id.* at 247.
[133] *Id.*
[134] *Id.* at 246 n.25.
[135] *Id.*
[136] *Id.*
[137] *Eshleman*, 961 F.3d at 247.
[138] *Id.*

then held, "The ADA does not, however, apply this definition to minor."[139] The court explained that although the ADA is silent on the meaning of minor, "29 C.F.R. § 1630.15(f) states: 'To establish this defense, a covered entity must demonstrate that the impairment is both 'transitory' and 'minor.' Whether the impairment at issue is or would be 'transitory and minor' is to be determined objectively."[140]

The court further explained how the EEOC interpretations directly stated that the six-month time limit applied only to the "transitory" prong of the exception.[141] The EEOC regulations also noted the transitory and minor exception requires a court find that "an impairment is both transitory and minor, and the six-month limit applie[s] only to the 'transitory' prong."[142] The court quoted an example from the EEOC guidelines that discussed a "minor back injury" that lasted more than six months.[143] Even though the injury was minor, the impairment was not transitory.[144] This example showed that when an injury is only minor and not transitory, it does not meet the exception.[145] Therefore, the court held the opposite should also be true—when an impairment is only transitory but is objectively not minor, it should be outside the exception, as well.[146] Ultimately, the court held "it was clear under the ADA regulations 'transitory' is just one prong of the 'transitory and minor' exception."[147]

Finally, the court also held its standard—excluding impairments only when they are *both* transitory *and* minor—furthered Congress's intent in expanding coverage through the ADA Amendments Act of 2008.[148] As the House Judiciary Committee Report on the ADAAA

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[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.* at 248.
[143] *Eshleman*, 961 F.3d at 248.
[144] *See id.*
[145] *Id.* at 247.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 247.

explained, when including "regarded as" claims under the ADA "Congress did not expect or intend that this would be a difficult standard to meet."[149] The Report further explained the "transitory and minor" exception was intended to weed out only "claims at the lowest end of the spectrum of severity," such as "common ailments like the cold or flu," and the exception "should be construed narrowly."[150] Treating transitory and minor as separate and distinct elements was therefore consistent with the intent to afford broad coverage under the "regarded as" provision.[151] Similar to the language and intent of the ADA and its implementing regulations, the Third Circuit regarded "transitory" and "minor" as separate and distinct inquiries required to meet the "transitory and minor," unlike decisions of other circuit courts.[152] The court also cited district courts that followed similar reasoning.[153]

4. Third Circuit's Reasoning Why *Budhun* Is Distinguishable

The court distinguished an earlier case discussing the "transitory and minor" exception.[154] In *Budhun*, the plaintiff had a broken bone in her hand and no other issues, while in Eshleman's case he was perceived to have serious ongoing heart issues.[155] The *Eshleman* court conceded

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[149] *Eshleman*, 961 F.3d at 247.
[150] *Id.*
[151] *Id.*
[152] *See id.* at 251.
[153] *Id.* at 251 n.64 (*see also* Mesa v. City of San Antonio, No. SA- 2018 U.S. Dist. LEXIS 2018 WL at *12, *18 (W. D. Tex. Aug. 16, 2018) (explaining that "[t]he regulations and EEOC guidance indicate that 'transitory' and 'minor' are separate and distinct requirements" and holding that "[e]ven assuming that [plaintiff]'s perceived shoulder injury was transitory, [defendant] has not conclusively shown that it was minor" where the injury required transport to the emergency room by ambulance, treatment with prescription pain medications, and injury-related work restrictions on climbing, reaching, and lifting); Bush v. Donahoe, 964 F. Supp. 2d 401, 422–23 (W. D. Pa. 2013) (evaluating the treatment and symptoms, ability to perform work duties, and restrictions and limitations on activity to determine a sprained ankle/foot is objectively minor because, although a sprained ankle/foot requiring a walking cast is transitory because it heals in less than six months, "[t]hat does not end the inquiry. . . . as Defendant must also show that [plaintiff's] impairment was minor."); Davis v. Vermont, Dep't of Corr., 868 F. Supp. 2d 313, 327 (D. Vt. 2012) ("In addition, Defendant is unable to show from the face of the Second Amended Complaint that the impairment was minor. Accordingly, Defendant at this stage of the case cannot sustain the defense that the perceived impairment is both transitory and minor."); Mayorga v. Alorica, Inc., No. 12-21578, 2012 U.S. Dist. LEXIS 103766, at *9 (S. D. Fla. July 25, 2012) (declining to dismiss plaintiff's claim based on pregnancy complications as "transitory and minor" because whether the impairment "was 'minor' presents a . . . question of fact that is not properly resolved on a motion to dismiss. It cannot be determined from the face of the Complaint, nor the record as it currently stands, whether [plaintiff]'s impairment was minor.").
[154] Eshleman, 961 F.3d at 248–49.
[155] *Id.* at 249.

that *Budhun* could be read to suggest that any impairments that last or are expected to last at least six months are "transitory and minor," but such an interpretation was at most dicta since the injury was objectively non-serious.[156] *Budhun* should not be "interpreted as imposing a rigid six-month-or-more requirement on establishing 'regarded as' claims."[157]

5. Third Circuit's Reasoning for How to Evaluate Minor

The Third Circuit gave some insight on how to evaluate the term "minor," but did not give an exact standard for how to define it. The court explained that, because "minor" is not defined in the statute, courts should approach the issue on a case-by-case basis.[158] Further, the court held the district court should have considered a variety of factors, including "the symptoms and severity of the impairment, the type of treatment required, the risk involved, and whether any kind of surgical intervention was anticipated or necessary—as well as the nature and scope of any post-operative care."[159] *Eshleman* again distinguished *Budhun* by using these factors listed above in its analysis. The court compared a broken pinky (the injury in *Budhun*) with a surgical procedure to remove a lung nodule (the injury in *Eshleman*), and described them as "hardly comparable."[160] The risks and post-operative care involved for a surgery on a vital organ like a lung, the court reasoned, were important consideration.[161] The court viewed these factors as crucial "even if the impairment has an anticipated recovery time of two months and is therefore 'transitory.'"[162]

The Third Circuit stated that not all "one-time surgeries" are automatically minor, but there is nuance to that statement.[163] The severity of the disability does not depend upon how

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[156] *Id.*
[157] *See id.*
[158] *Id.*
[159] *Id.*
[160] *Eshleman*, 961 F.3d at 249.
[161] *Id.*
[162] *Id.* at 250.
[163] *Id.* at 250 n.58

often there is surgical intervention.[164] The court held that "[w]e do not need expert testimony to appreciate that a very serious medical condition may nevertheless require only a single surgical procedure. Organ transplants are, perhaps, the best example of this."[165] Since the injury suffered was potentially non-minor and successfully pled, the court reversed the motion to dismiss and remanded the case back to the district court to analyze whether the injury was minor or not.[166]

IV. Why the Exception Should be an Affirmative Defense with Separate Analyses for Transitory and Minor

Although the courts have discussed the transitory and minor exception in a variety of ways, I recommend the exception should be (1) considered as an affirmative defense pled and proven by the employer and (2) analyzed by the courts in a way that separates the analyses of transitory and minor. This section will show why the plain readings of the statutes and regulations in question support these recommendations.

A. Affirmative Defenses

1. Plain Language Reading of the ADA

While the circuit courts are divided over whom should be required to plead and prove the "transitory and minor" exception, a direct reading of the ADAAA combined with legislative intent show a need for the employer to bring the affirmative defense. In the ADA, Congress stated an individual met the "regarded as" prong of disability if the individual "established that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to

[164] *Id.* at 250.
[165] *Id.*
[166] *Eshleman*, 961 F.3d at 250.

limit a major life activity."[167] In the next section, Congress described the transitory and minor exception, but did not explicitly state which party has the burden of proof.[168]

Congress's silence on the exception confirmed the employer has the burden to bring the defense. If Congress intended to require the plaintiff to show her impairment was transitory and minor, it would have combined the two bullets together. Instead, it kept the transitory and minor separated by an "and", which made them separate from the individual's burden to show they have a "regarded as" disability.

Critics of this Comment's recommended standard could make an argument the intent that transitory and minor require separate analyses is overly ambiguous based on a strict reading of the ADA, which states an impairment must be transitory *and* minor to be excluded from coverage. While that may be plausible, the legislative intent given by the EEOC and Congress, explained below, combined with the direct reading of the statute make it clear the exception requires the employer to bring the burden of proof; therefore the transitory and minor exception is an affirmative defense.

2. Deference to the EEOC

Along with the strict reading of the statute, there is legislative intent that the transitory and minor exception requires the employer to have the burden of proof, effectively making it an affirmative defense. Under Title I of the ADA, Congress explicitly gave the EEOC rule-making power.[169] The Supreme Court gave deference to the EEOC's power as long as it considered the regulations reasonable.[170] The Supreme Court discussed this power of a government agency like

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[167] 42 U.S.C. § 12102(3)(A).
[168] *See id.* § 12102(3)(B).
[169] *Id.* § 12116; *What You Should Know: EEOC Regulations, Subregulatory Guidance and other Resource Documents*, EQUAL EMP. OPPORTUNITY COMM'N & C.R. DIV., U.S. DEP'T OF JUST., https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource (last updated May 5, 2016); Theodore W. Wern, *Note, Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, *60 OHIO ST. L.J. 1533, 1533–34 (1999).*
[170] Theodore W. Wern, *supra* note 169.

the EEOC in its widely cited opinion of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[171] In *Chevron,* the court stated when reviewing a government agency's construction of a statute it administers, it is confronted with two different questions.[172] The Court explained:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[173]

This comment contends that *Chevron* deference to the EEOC's interpretation of the transitory and minor exception would not be required. The first step of *Chevron* requires Congress must have given direct guidance on the particular statutory provision in question; the *Eshleman court* and others have logically held that, under the ADA, it is unambiguous that "'transitory' is just one prong of the 'transitory and minor' exception."[174] However, some courts may interpret this guidance in the text of the ADA as ambiguous.[175] If so, the Supreme Court has held when Congress delegates authority to an administrative agency to make rules "carrying the force of law," the agency's interpretation would qualify for *Chevron* deference.[176] The EEOC has explicitly provided that "to establish this defense, *a covered entity* must demonstrate

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[171] 467 U.S. 837 (1984).
[172] *Id.* at 842.
[173] *Id*. at 842–43.
[174] *See id.;* Eshleman v. Patrick Indus., 961 F.3d 244, 248 (3d Cir. 2020).
[175] *Chevron*, 467 U.S. at 842–43.
[176] See United States v. Mead Corp., 533 U.S. 218, 218 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority. Such delegation may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.")

that the impairment is both 'transitory' and 'minor.'"[177] The EEOC's guidance requires an employer to bring the affirmative defense of transitory and minor, and gives the employer the burden of proof to show why the injury meets the exception.

Thus, the plain language of the ADA is enough to prove the exception is an affirmative defense that requires separate analyses for transitory and minor. However, if it is considered to be too ambiguous, the EEOC's interpretation of the affirmative defense is a reasonable one and should be given deference by the courts.

B. Why Courts Should Analyze "Transitory and Minor" Separately

The direct text of the ADA reads that the "regarded as" prong of disability "shall not apply to impairments that are transitory and minor."[178] Since Congress used the word "and," normal rules of English grammar dictate both prongs must be met.[179] Proponents of this theory have stated that if Congress had wanted the standard to be one or the other, Congress would have used the word "or" instead of "and."[180] Since Congress defined a transitory impairment as "an impairment with an actual or expected duration of six months or less,"[181] but did not define minor, it arguably made them fully separate terms, requiring separate analyses.

The EEOC regulations also confirm the hypothesis that transitory and minor should be interpreted separately. In its guidance regarding the transitory and minor exception, the EEOC gives examples of how the courts should interpret the exception.[182] Most crucially, the EEOC states if an injury is minor but it lasts more than six months, it would not meet the exception.[183] Based on this reasoning, an injury would need to be separately discussed to see if it is transitory

[177] 29 C.F.R. § 1630.15(f)(2011)(emphasis added).
[178] Gordon Good, Comment, *The Americans with Disabilities Act: Short-Term Disabilities, Exceptions, and the Meaning of Minor*, 37 U. DAYTON L. REV. 99, 121 (2011) (citing 42 U.S.C. § 12102 (3)(B)).
[179] *See id.* at 119 n.143.
[180] *See id.* at 119.
[181] 42 U.S.C. § 12102(3).
[182] 29 C.F.R. § 1630.15(f)(2011).
[183] *Id.*

(lasting less than six months) and then if it is minor. The court in *Eshleman* correctly applied this standard when citing the EEOC regulations and congressional reports.[184] Other circuit courts should follow this precedent of analyzing transitory and minor separately when determining if the exception to "regarded as" disabilities is met.

V. Defining a Minor Impairment

This section will give a background on the word "minor." First, it will go over how the dictionary defines minor. Then, it will describe how medical professionals define minor injuries, show how the EEOC has used minor in the past, and recommend defining minor using a commonsense approach that makes sure that "minor" is construed as narrowly as possible and as close as possible to the medical definition.

A. Dictionary Definition of Minor

Minor is a word with a multitude of meanings, and, without further context, a minor impairment could confuse a reader. In the Merriam-Webster dictionary, there are three separate entries for the word "minor."[185] In the context of this paper, however, minor is defined as "inferior in importance, size, or degree: comparatively unimportant" or "not serious or involving risk to life."[186] The Black's Law Dictionary does not specifically define minor in the context of a minor impairment, but it does define a minor fact as "the term given to an unimportant finding, fact or the circumstances of a case."[187] This definition may give some context for how a minor injury could be defined, as it should only be added to an impairment that is so very unimportant or inferior.

B. Medical Definitions of Minor Injuries

[184] *See* Eshleman v. Patrick Indus., 961 F.3d 244, 248 (3d Cir. 2020).
[185] *Minor*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/minor (last visited Oct. 28, 2020).
[186] *Id.*
[187] *Minor Fact*, BLACK'S LAW DICTIONARY, https://thelawdictionary.org/minor-fact/ (last visited Oct. 29, 2020).

In medical journals, there are multiple studies on minor injuries and how they are defined. Overall, the journals agree minor injuries in the medical setting are often impairments that send someone to urgent care centers or potentially the emergency room.[188] Minor injuries are often classified in diagnoses as "fractures/dislocations, sprains/strains, wounds/burns/infections, minor head injuries, eye/ear/nose/oral injuries."[189] Exclusions to that rule include "triage category 1 or 2, major trauma, critical care admission, or injuries and fractures to the hip or neck or femur."[190] Some other examples of minor injuries are "animal bites, broken or fractured bones, burns, cuts and lacerations, injuries from car accidents, injuries from falls, injuries from sports or outdoor activities, muscle sprain or strain (especially ankles, knees and shoulder)."[191] Recovery from many of these injuries only last a few days or weeks, but timing of the injury is not the only factor in deciding whether an injury is minor.[192]

C. EEOC Definition of Minor in Other Contexts

The EEOC has not explicitly defined "minor," but it has referenced the term when describing the opposite of a substantial impairment.[193] Since there have been no definitions that affect the transitory and minor exception, research on minor will need to extend past the EEOC's definition.

D. Recommendation for Defining Minor Under the ADAAA

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[188] *See Minor Cuts and Injuries? We Can Treat That*, PHYSICIANONE URGENT CARE, https://physicianoneurgentcare.com/onsite-services/minor-injuries/ (last visited Sept. 24, 2020).
[189] Matthew Lutze, Margaret Fry & Robyn Gallagher, *Minor Injuries in Older Adults have Different Characteristics, Injury Patterns, and Outcomes when Compared with Younger Adults: An Emergency Department Correlation Study*, 23 INT'L EMERGENCY NURSING 1, 168 (2015).
[190] *Id*.
[191] *Urgent Care for Minor Injuries*, SUTTER HEALTH, https://www.sutterhealth.org/services/urgent/minor-injury (last visited Sept. 24, 2020).
[192] *See* Lutze, Fry & Gallagher, *supra* note 189, at 168.
[193] *See The ADA: Your Employment Rights as an Individual with a Disability*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability (last visited Oct. 29, 2020) ("To be protected under the ADA, you must have, have a record of, or be regarded as having a *substantial, as opposed to a minor*, impairment. A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning or working.") (emphasis added).

Congress's intent was to make "transitory and minor" a narrow exception,[194] so therefore the definition of minor must also be construed narrowly. Reports from the Committee of Education & Labor say the exception was intended to block only claims "lying at the lowest end of the spectrum of severity" like colds and flus. Therefore, the standard should keep as close to that as possible. The question for jurors when considering "minor" should be: Would a reasonable person would consider the injury or impairment minor?

When pondering a reasonable definition of minor, medical definitions should be considered. The definition should be reasonably based on the injuries that send people to urgent care and to their doctor's offices, and on the colds and flus that Congress sought to keep as the minimum for a minor impairment. Procedures like the lap band surgery in *Lyons* or the heart surgeries in *Silk* and *Eshleman* are more serious than minor injuries, like the broken finger in *Budhun*.[195] A reasonable jury would find there is a distinction between these two classes of injuries. While time is a factor in determining if an injury is minor, it is not the only factor considered in defining a minor impairment. The consequences of not analyzing the standard carefully could potentially lead to serious orthopedic injuries, appendicitis, and even mini-strokes being considered transitory and minor, which would not be in line with congressional intent.[196] The jury should be allowed the opportunity to decide whether it would reasonably believe the impairment is minor, rather than just having to go by the length of time of the impairment.

VI. Conclusion

[194] H.R. Rep. No. 110–730 pt. 2, at 13 (2008).
[195] *See* Lyons v. Katy Indep. Sch. Dist., 964 F.3d 298 (5th Cir. 2020); Silk v. Board of Trustees, Moraine Valley Cmty. Coll., Dist. No. 524, 795 F.3d 698 (7th Cir. 2015); Eshleman v. Patrick Indus., 961 F.3d 242 (3d Cir. 2020); Budhun v. Reading Hosp. & Med. Ctr., 765 F.3d 245 (3d Cir. 2014).
[196] Kevin Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 23–24 (2013).

The goal of the ADA and the later ADAAA was to be construed broadly to offer protection for individuals with qualified disabilities. In order to follow the goal of the ADA and the ADAAA to broadly provide protection for individuals with qualified disabilities, the transitory and minor exception to "regarded as" disabilities must be construed narrowly. To do so, the exception must be brought as an affirmative defense by the employer, who will then have the burden of proof. As well, transitory and minor should be analyzed separately, and courts should follow the lead of the Third Circuit in *Eshleman* in that regard. The word minor should also be analyzed using a commonsense standard, keeping in mind that Congress only wanted to protect against claim for disability for those with colds or the flu.[197] To protect employees that have serious recurring seizures like the employee in *Randall* and the teacher that was recovering from lap band surgery in *Lyons*, more stringent standards for courts to follow when discussing the transitory and minor exception should keep these employees from being discriminated against and treated unfairly due to their short-term impairments.[198] To achieve this, the courts should require employers to prove impairments are transitory and minor, both terms should be analyzed separately, and the term minor should be construed narrowly.

[197] *See* H.R. Rep. No. 110–730 pt. 2, at 13 (2008).
[198] See Randall v. United Petroleum Transports, Inc., 131 F. Supp. 3d 566 (W. D. La. 2015); Silk, 795 F.3d at 698; Lyons, 964 F.3d at 298.