HARMONIZING STATE AND FEDERAL ANTI-DISCRIMINATION LAW: THE PROBLEM OF THE ADAAA

Joe Dunman[*]

I. INTRODUCTION

Imagine Congress passes a law. The law prohibits discrimination on the basis of "disability," which the law defines three ways. The definitions are vague. Key terms are left undefined. Nevertheless, state legislatures pass their own versions of this law. The state laws include the same definitions for "disability" with the same vague terms, but they also include provisions that say courts should interpret the state laws consistently with the federal law on which they were modeled.

Over the next several years, the Supreme Court narrowly interprets the federal law's definitions, making it very difficult to win a claim of disability discrimination. State courts, following the interpretative mandate of the state laws, follow the Supreme Court's lead, imposing on the state laws the Court's narrow interpretations of the federal law. This makes state law claims similarly difficult to win.

Congress, meanwhile, becomes frustrated because the Supreme Court misinterpreted the law. To fix the problem, Congress amends the federal law to add clarifying examples for its vague terms, and to denounce specific Supreme Court decisions as wrongly decided. The clarifying examples, designed to prevent a backslide to a narrow reading of the law, reassert a much broader scope of coverage than the Supreme Court had previously acknowledged.

Back in the states, the legislatures do nothing. They leave unamended the state laws modeled after the original federal law. That is not to say the amendments to the federal law create a conflict with the state laws; nothing in the unamended state laws contradicts the amended federal law, or vice versa. The state laws only omit the federal law's new, clarifying examples. The old vague terms simply remain unclarified in the state laws.

Later, a plaintiff files suit under a state law, claiming to be "disabled" under one of its still-vague definitions. Under the amended federal law, the plaintiff would easily qualify as disabled; their limitation appears in the list of examples Congress added. But the defendant argues that state and federal

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[*] Assistant Professor, University of Louisville Brandeis School of Law. At the time this article was written, I served as the Managing Attorney of the Kentucky Commission on Human Rights. I am grateful to the University of Louisville Law Review and Colby Birkes for the invitation to contribute to this excellent symposium. Thanks to Colt Sells and Sana Abhari for helpful feedback throughout the writing process, and to Kurt Metzmeier for citation guidance. Special thanks to Jeremiah Reece and Stewart Abney for inspiring the research behind this article and for their advocacy on behalf of disabled people in Kentucky.

law are no longer in harmony, and the old Supreme Court interpretations of the federal law should apply. Because the plaintiff's limitation was not listed before the amendment of the federal law, it should not be considered a disability under the unamended state law's definition. The Court's pre-amendment interpretations are still controlling, says the defendant, because the state legislature did not amend the state law to match the amended federal law. And, regardless of what Congress said about the wrongness of the Supreme Court's pre-amendment interpretations, the state legislature said nothing, so it would exceed judicial authority to impose new federal rules on an old, unchanged state law. Keep the old rules instead, the defendant says. Freeze the state law in time until the state legislature eventually catches up to Congress and amends the state law to match.

The plaintiff counters: Congress explicitly rejected the "old rules" as wrong from the start. It superseded the Supreme Court cases applying those rules and, by implication, superseded state cases that rely on the Supreme Court cases, too. The plaintiff argues that state law, modeled after the federal law, cannot be bound to interpretations that no longer apply—should *never* have applied—to the federal law. And it would frustrate the purpose of the state law to interpret it consistently with a court-defined version of federal law that Congress now says was never correct. The wills of Congress and the state legislature, as expressed in the statutory text, should control, and that text clearly compels the conclusion that the unamended state law and the amended federal law are the same.

What should the court do?

This conflict is not hypothetical. This is an ongoing dilemma faced by many state and federal courts since Congress passed the ADA Amendments Act of 2008,[1] updating the original Americans with Disabilities Act of 1990.[2] Many states anti-discrimination laws were modeled after the original ADA, and courts later imposed on them the Supreme Court's narrow reading of the ADA. Congress passed the ADAAA in response, explicitly rejecting two key Supreme Court cases that narrowly interpreted the ADA: *Sutton v. United Airlines* [3]and *Toyota Motor Mfg., Kentucky, Inc. v. Williams*.[4] And the ADAAA added lists of examples to clarify the vague terms in the ADA's original three-prong definition of "disability."[5] Despite all of this, many state legislatures have

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[1] Americans with Disabilities Amendment Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) [hereinafter ADAAA].

[2] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) [hereinafter ADA].

[3] Sutton v. United Airlines, 527 U.S. 471 (1999).

[4] Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

[5] ADA, *supra* note 2, at § 3(2)(a)-(b), codified as 42 U.S.C. § 12102(2)(a)-(b).

not amended their state versions of the ADA to include the same clarifying provisions.

Since the passage of the ADAAA, both state and federal courts have struggled to reconcile the amended ADA with unamended state statutes. Even with Congress' unambiguous declaration that *Sutton* and *Toyota Motor* were wrong from the start, lower courts have gone both ways, some still applying those superseded cases to state law claims while others have not. And the inconsistency has run deeper; conflicting interpretations have occurred in the same courts, among the same judges, and even in the same cases.

This article explores this problem by focusing on a state where the inconsistency persists: Kentucky. Part II briefly summarizes the ADA, the Supreme Court's cases gutting it, and its eventual amendment by the ADAAA. Part III describes the inconsistent, and sometimes incoherent, efforts of federal and state courts in Kentucky to reconcile the ADAAA with its counterpart, the Kentucky Civil Rights Act. Part III also briefly summarizes differing approaches in other states. In Part IV, this article lists many reasons why courts should harmonize state and federal anti-discrimination law.

II. THE RISE, FALL, AND RISE AGAIN OF THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act passed the House and Senate with overwhelming bipartisan support and was signed into law by President George H.W. Bush on July 26, 1990.[6] Congress passed the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards" to that end.[7] Congress borrowed much of the ADA's language from the Rehabilitation Act of 1973, which prohibited discrimination against "handicap" workers employed by the federal government and its contractors.[8] The ADA's scope was much broader, prohibiting "disability" discrimination by all private employers with fifteen or more employees, covering millions more Americans.[9]

Employers could run afoul of the ADA in two ways: 1) by denying or terminating employment because of a person's status as disabled—discriminatory "adverse employment actions" like those prohibited by Title

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[6] Chai Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 201-02 (2008).

[7] ADA, *supra* note 2, § 2.

[8] Feldblum, *supra* note 6, at 203.

[9] 42 U.S.C. § 12111(5)(a).

VII of the Civil Rights Act,[10] or 2) by failing to make "reasonable accommodations to the known physical or mental limitations" of a disabled employee or by denying employment opportunities to avoid having to accommodate them.[11]

Under the original ADA, a person could be "disabled" (and thus within its protected class) by proving one of three things: that they had "a physical or mental impairment that substantially limits one or more major life activities," that they had "a record of such an impairment," or that they were "regarded as having such an impairment."[12] The law also required a claimant to show that they could, "with or without reasonable accommodation," "perform the essential functions of the employment position … "[13]

Despite its vow to provide clear standards, the original ADA did not define crucial terms like "impairment," "substantially limits," "major life activities," or "essential functions." As administrative complaints and lawsuits rolled in, both the Equal Employment Opportunity Commission (EEOC) and federal courts tried to resolve the ambiguity. They did so in ways that greatly restricted the ADA's protected classification and foreclosed on otherwise meritorious claims.[14]

For example, both the EEOC and the Supreme Court narrowly interpreted the term "substantially limits." In its original ADA regulations, the EEOC defined the phrase to mean "unable to perform a major life activity" or "significantly restricted" in the performance of a major life activity.[15] In *Sutton*, the Supreme Court largely adopted this take but also held that a major life activity must be "presently" substantially limited, meaning a plaintiff who was able to mitigate an impairment through medication or some other means did not count as "disabled" under the law.[16]

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[10] 42 U.S.C. § 12112(b)(1-4) (listing all forms of prohibited discrimination); *see also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2014) ("to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment …").

[11] 42 U.S.C. § 12112(b)(5). The original ADA also offered examples of "reasonable accommodations" such as "making existing facilities used by employees readily accessible to and usable by individuals with disabilities." *Id*. at § 12111(9)(a).

[12] 42 U.S.C. § 12102(2)(a-c). This definition was recodified as 42 U.S.C. § 12101(1)(a-c).

[13] 42 U.S.C. § 12111(8). In other words, an employer was not obligated to accommodate if the employee could not do the job regardless.

[14] For a fuller discussion of the ways the Supreme Court (and the EEOC) "finely parsed" the ADA's original text to narrow the law's scope, *see* Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 10-16 (2013); *and* Danielle Ravencraft, *Why the "New ADA" Requires an Individualized Inquiry as to What Qualifies as a "Major Life Activity"*, 37 N. KY. L. REV. 441, 443-44 (2010).

[15] 29 C.F.R. § 1630.2(j) (repealed 2011).

[16] *Sutton v. United Air Lines, Inc*., 527 U.S. 471, 482-483 (1999), *superseded by statute*, ADAAA (2008). The EEOC's guidance at the time did not specifically say whether mitigating effects should be

In *Toyota Motor*, the Court again cited the EEOC regulations to hold that "substantially limited" meant the impairment had to "be permanent or long term" and had to "prevent" or "severely restrict" a person "from doing activities that are of central importance to most people's daily lives."[17]

The Supreme Court also relied on the EEOC to narrow the third prong of the ADA's disability definition. *Sutton* held that a "regarded as" claimant must show that the employer mistakenly "regard[ed] their impairment as substantially limiting their ability to work," which meant "at a minimum … they are unable to work in a broad class of jobs."[18] This standard required a plaintiff to "essentially both divine and prove an employer's subjective state of mind" that the plaintiff was unable to perform not just their own job but also any similar job the employer could hypothetically contemplate.[19]

These cramped, employer-friendly interpretations were admittedly outcome driven. The Court in both *Sutton* and *Toyota Motor* openly embraced what it believed to be a statutory mandate to minimize ADA claims. Relying solely on the statute's legislative statement that "some 43,000,000 Americans have one or more physical or mental disabilities," the Court reasoned that a broader interpretation of the ADA's definitions would qualify millions more for coverage and thus exceed the law's intended scope.[20] Therefore, the ADA's key terms "need[ed] to be interpreted strictly to create a demanding standard for qualifying as disabled."[21]

The Court's interpretations were not as obviously correct as the Justices suggested. Aspects of *Sutton*, *Toyota Motor*, and related cases "directly contradicted the reasoning of two congressional committees, eight circuit courts, and three agencies."[22] Critically, the Supreme Court ignored the

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considered, but some read it to suggest not. *See* Karl A. Menninger, *Proof of 'Disability' Under the Americans with Disabilities Act*, 33 AM. JUR. PROOF OF FACTS 3d 1 § 8 (1995).

[17] *Toyota Motor Mfg., Ky. v. Williams,* 534 U.S. 184, 198 (2002), *superseded by statute*, ADAAA (2008). Professor Lisa Eichhorn argues that *Toyota Motor* actually "sidestepped" the EEOC regulation on which it purported to rely on by claiming the regulation was "silent" on a critical interpretative issue when it was not, allowing the Court to "g[i]ve itself license to ignore applicable regulatory language and substitute its own language to reflect the so-called plain meaning of statutory terms." The resulting standard was even stricter than the EEOC's, she argues. Lisa Eichhorn, *The* Toyota *Sidestep Catches On*, 33 ADMIN. & REG. L. NEWS 7, 8 (2008).

[18] *Sutton*, 527 U.S. at 491 (citing 29 C.F.R. § 1630.2(j)(3) (repealed 2011)).

[19] Feldblum et al., *supra* note 6, at 214.

[20] *Toyota Motor*, 534 U.S. at 198 (citing *Sutton*, 527 U.S. at 487).

[21] *Id*. Even before *Sutton* and *Toyota Motor*, ADA litigation was remarkably one-sided. Between 1992 and 1998, defendants won 92% of ADA cases. Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1407 (1999). By 2002, the employer win rate had climbed to 95%, according to an ABA survey. *See Employers Win Overwhelming Majority of ADA Cases*, 4 No. 4 WASH. D.C. EMP. L. LETTER 6 (2003).

[22] 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, 246 (2010).

legislative history of the ADA, which showed that Congress intended the law to have a broad scope, and instead divined congressional intent from a narrow reading of the prefatory text.[23]

In reality, the ADA's reference to millions of disabled Americans was not meant to impose a hard cap on coverage. Congress used the Americans with Disabilities Act Amendments Act of 2008 to make this clear. In the ADAAA's "Findings and Purposes" section, Congress listed all of the ways federal courts had misinterpreted the original ADA's definition of "disability," and denounced *Sutton* and *Toyota Motor* by name.[24] "The purposes of this Act are … to carry out the ADA's objectives … by *reinstating* a broad scope of protection to be available under the ADA," "to reject the Supreme Court's reasoning in *Sutton v. United Airlines,* 527 U.S. 471 (1999) …," and to "reject the standards enunciated by the Supreme Court in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) …"[25] Congress blamed *Sutton* and *Toyota Motor* for why "lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities."[26] Following the erroneous lead of the Supreme Court, lower courts had "created an inappropriately high level of limitation necessary to obtain coverage under the ADA," and too strictly interpreted terms like "substantially" and "major."[27] Congress also rejected the EEOC's regulations on which *Sutton* and *Toyota Motor* had relied.[28]

After denouncing the Supreme Court, the ADAAA added clarifying provisions to help courts determine whether a claimant has a qualifying "disability" in a way more in line with the ADA's original purpose.[29] Those provisions include non-exhaustive lists of "major life activities" and "major bodily functions" to which the unchanged definitions of "disability" refer.[30] "Major bodily functions" now include "functions of the immune system" and "normal cell growth" which, if substantially limited, constitute a "physical impairment" sufficient to qualify a plaintiff as "disabled."[31] "Major life activities" now extend to most basic tasks, from "eating, sleeping, walking, [and] standing" to "learning, reading, concentrating [and] thinking."[32] And

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[23] *Id.*

[24] ADAAA, *supra* note 1, at § 2.

[25] *Id*. at § 2(b) (emphasis added).

[26] *Id.* at § 2(a)(6).

[27] *Id*. at § 2(b)(3)-(4)

[28] *Id*. at § 2(a)(8). The EEOC later changed its regulations to reflect the amended ADA. *See* Regulatory and Flexibility Act, 76 Fed. Reg. 16978, 16999 (2011); 29 C.F.R. pt. 1630.

[29] ADAAA, *supra* note 1, at § 3.

[30] 42 U.S.C. § 12102(2)(A)–(B) (The new provisions are careful to say that they "include, but are not limited to" the examples they list).

[31] *Id*. at § (2)(B).

[32] *Id*. at § (2)(A). These enumerated examples may seem self-evident, but without them, federal

the ADAAA rejected *Sutton*'s holding that a mitigated disability was no disability at all.[33]

The ADAAA also clarified the "regarded as" prong in a way that significantly expanded the ADA's reach beyond the Supreme Court's narrow reading. While the first two prongs—actual and past disabilities—apply only to a specific minority of people whose physical or mental conditions meet the respective definitional terms, the clarified "regarded as" prong applies broadly, covering anyone who is perceived to be disabled regardless of how severe that disability is perceived to be.[34] This superseded a key part of *Sutton*, which required plaintiffs claiming to be "regarded as" disabled to prove not only that their employer believed them to be so substantially limited in their major life activities that they were unable to perform the job at issue, but also that they were unable to perform a "broad class" of other hypothetical jobs.[35] Now, a plaintiff must prove only that their employer mistakenly believed them to be "impaired" in a major, non-transitory way.[36]

The ADAAA made it clear: courts should no longer rely on pre-amendment Supreme Court cases when considering claims made under the ADA. But what about claims made under analogous—but unamended—state laws? Should *Sutton* and *Toyota Motor* still apply? Rudimentary principles of stare decisis and logic suggest that if *Sutton* and *Toyota Motor* are bad law for the purposes of the ADA, they should also be bad law for the purposes of state statutes modeled after the ADA. However, not all courts have seen it that way. In some states, federal and state courts have concluded that *Sutton* and *Toyota Motor* are still binding on state anti-discrimination laws until state legislatures amend the laws to match the ADA. Those cases thus live on as a kind of zombie precedent: technically dead but still devouring meritorious claims.[37]

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courts had concluded that serious or fatal conditions such as cancer, ovarian cysts, and cerebral palsy did *not* sufficiently limit plaintiffs' major life activities to qualify for coverage under the ADA. Paul R. Klein, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 CASE W. RES. L. REV. 467, 483 (2010).

[33] 42 U.S.C. § 12102(4)(E) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures … ").

[34] *See* Barry, *supra* note 22, at 226. The ADAAA also amended the ADA to remove from its original "Findings and purpose" section the statement that "individuals with disabilities are a discrete and insular minority … " Pub. L. No. 110-325 at §§ 3(2), 8 (striking subsection (a)(7) from 42 U.S.C. § 12101).

[35] *Sutton*, 527 U.S. at 491.

[36] 42 U.S.C. § 12102(3).

[37] Alternatively, Professor Deborah Widiss refers to *Sutton* and *Toyota Motor* as "shadow precedents." *See* Deborah Widiss, *Still Kickin' After All These Years: Sutton and Toyota Motor as Shadow Precedents*, 63 DRAKE L. REV. 919, 921 (2015) *and* Deborah Widiss & Brian Broughman, *After the Override: An Empirical Analysis of Shadow Precedent*, 46 J. OF LEGAL STUD. 51, 53 (2017). The persistence of "zombie" or "shadow" precedent in civil rights litigation goes beyond disability discrimination claims. For example, dead cases still haunt constitutional rights claims filed under 42

Complicating matters further, not all courts within a particular state agree whether *Sutton* and *Toyota Motor*—or the provisions added by the ADAAA—should apply to claims under unamended state law. Two federal districts may rule in opposite ways or may rule contrary to the state courts. Messier still, the same courts may not even agree with themselves; the same state court or federal district may rule one way in one case but rule the other way in another case. And even more confusing than that, state or federal judges may rule one way but then another over the course of *the same case*.

Take Kentucky as an example. Part III describes how federal and state courts in Kentucky have wavered back and forth on whether to interpret the unamended Kentucky Civil Rights Act (KCRA) consistently with the amended Americans with Disabilities Act. Part III also briefly compares Kentucky's contradictory approaches to the policies adopted by state and federal courts elsewhere.

III. HARMONY THEN DISHARMONY BETWEEN THE AMERICANS WITH DISABILITIES ACT AND THE KENTUCKY CIVIL RIGHTS ACT

Because the KCRA's disability provisions textually mimic the original ADA, state and federal courts initially harmonized the state law with its federal counterpart. But after the ADA was amended in 2008, things went awry: while some courts continued to interpret the laws consistently, others (and sometimes the same courts) decided that the KCRA's lack of identical amendment now made consistent interpretation impossible. This section describes the current, confusing state of affairs.

A. Initial Passage of the KCRA and Subsequent Incorporation of Federal Rules

The Kentucky General Assembly enacted the Kentucky Civil Rights Act (KCRA) in 1966 and modeled it after the federal Civil Rights Act of 1964.[38] In 1992, the Kentucky General Assembly amended the KCRA to include

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U.S.C. § 1983. *See, e.g.*, L. Joe Dunman, *Blind Imitation: the Revolting Persistence of* Bowers v. Hardwick, 33 W. MICH. U. T.M. COOLEY L. REV. 67 (2016). "Zombie law" takes other forms, too, such as state statutes and constitutional provisions that have been declared unconstitutional but nevertheless remain "on the books." *See generally*, Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047, 1050-51 (2022); *and* Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063, 1065 (2021).

[38] *See* Jefferson Cnty. v. Zaring, 91 S.W.3d 583, 586 (Ky. 2002) (discussing the history of the law). The KCRA is codified as KY. REV. ST. CH. 344 (cited here as KRS 344).

"disability" as a protected classification, and incorporated much of the ADA's language verbatim, including its three-prong definition of the term.[39]

ADA (1990) 42 U.S.C. § 12102(2)	**KCRA** (1992) KRS 344.010(4)
As used in this chapter: (2) DISABILITY. The term "disability" means, with respect to an individual— (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.	In this chapter: (4) "Disability" means, with respect to an individual: (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual; (b) A record of such an impairment; or (c) Being regarded as having such an impairment.

The General Assembly also amended the KCRA's statement of purpose to include a reference to the ADA:

> 1) The general purposes of this chapter are:
> (a) To provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 as amended (78 Stat. 241), title VIII of the Federal Civil Rights Act of 1968 (82 Stat. 81), The Fair Housing Act as amended (42 U.S.C. 360), the Federal Age Discrimination in Employment Act of 1967 (81 Stat. 602), *and the Americans with Disabilities Act of 1990* (P.L. 101–336).[40]

So, as of 1992, the definition of "disability" in the ADA and the KCRA were identical, and the KCRA clearly stated an intent to incorporate the ADA's anti-discriminatory mission and terms into Kentucky law.[41]

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[39] *See* 1992 Ky. Acts Ch. 282 (S.B. 210) (amending KRS 344 to add the term "disability" and related provisions to KRS 344.010, 344.020, 344.025, 344.030, 344.040, 344.050, 344.060, 344.070, 344.080, 344.110, 344.120, 344.140, 344.300, 344.360, 344.367, and 344.380).

[40] KRS 344.020 (emphasis added).

[41] Before the disability provisions were added to the KCRA, Kentucky courts had already held that the KCRA should be interpreted consistently with the federal anti-discrimination laws on which it was modeled. *See, e.g.*, Ky. Comm'n on Human Rights v. Commonwealth., Dep't. of Just., Bureau of State Police, 586 S.W.2d 270, 271 (Ky. Ct. App. 1979) (sex discrimination) ("The Kentucky statute is virtually identical to the corresponding section of the U.S. Civil Rights Act of 1964…. Therefore, United States

The first appellate court decision to acknowledge the connection between the ADA and the KCRA was *Brohm v. JH Properties, Inc*. in the Sixth Circuit.[42] Charles Brohm, an anesthesiologist, sued his former employer for disability discrimination under the KCRA.[43] The court noted that "the language of the Kentucky Civil Rights Act mirrors the language of … the Americans with Disabilities Act" and therefore it would "analyze this case by reference to the ADA."[44] The Kentucky Court of Appeals would follow suit two years later in the case of *Noel v. Elk Brand Mfg*., echoing *Brohm* that decisions in KCRA disability claims should be "guided by the ADA."[45]

Meanwhile, another important disability case was working its way through the state court system. In 1997, a man named Herbert Schave sued his former employer, Howard Baer, Inc., for discrimination under the first and third prongs of the KCRA's disability definition.[46] Two years later, Schave won at trial on both theories, and the jury awarded him $500,000.[47] Howard Baer appealed, leading the Kentucky Court of Appeals to consider, for the first time, how physically impaired an employee needed to be to meet the "substantially limited" requirement in the KCRA.[48] The court noted in its opinion a dearth of state case law on the question; Howard Baer cited

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Supreme Court decisions regarding the federal provision are most persuasive, if not controlling, in interpreting the Kentucky statute."); Harker v. Fed. Land Bank of Louisville, 679 S.W.2d 226, 229 (Ky. 1984) (age discrimination) ("The Kentucky age discrimination statute is specially modeled after the Federal law. Consequently, in this particular area we must consider the way the Federal act has been interpreted.").

[42] Brohm v. JH Props., Inc., 149 F.3d 517, 520 (CA6 1998).

[43] *Id.*

[44] *Id*. at 519; *accord* Bryson v. Regis Corp., 498 F.3d 561, 574 (6th Cir. 2007). The *Brohm* court ultimately affirmed the dismissal of the plaintiff's disability discrimination claim. *Brohm*, 498 F.3d at 522-23.

[45] Noel v. Elk Brand Mfg. Co., 53 S.W.3d 95, 100-101 (Ky. Ct. App. 2000). Because the question in *Noel* dealt primarily with causation, not with the plaintiff's status as disabled, the court applied rules from *Monette v. Elec. Data Sys. Corp*., 90 F.3d 1173 (6th Cir. 1996), rather than rules from *Sutton*. *Monette* imposed a sole-cause standard that the Sixth Circuit has since replaced with a but-for standard. *See* Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 315-16 (6th Cir. 2012) (*en banc*); *accord* Hammond v. Norton Healthcare, Inc., No. 2011-CA-000586-MR, 2012 WL 5039465, at *4 (Ky. Ct. App. Oct. 19, 2012).

[46] Howard Baer, Inc. v. Schave, No. 1999-CA-001969, 2001 WL 929990 (Ky. Ct. App. Aug. 17, 2001), *rev'd*, 127 S.W.3d 589 (Ky. 2003) (The Court of Appeals' decision was originally designated "to be published" but was retroactively unpublished by the Kentucky Supreme Court under Ky. R. Civ. P. 76.28(4) (now Ky. R. App. P. 40(D)). The first definitional prong is "actual disability," and the third prong is "regarded as disabled." KRS 344.010(4).

[47] *Baer*, *supra* note 46, at *1. Included in that sum was $100,000 in punitive damages, awarded under the state punitive damages statute, KRS 411.184. *Id.* at *3. The Kentucky Supreme Court would later hold that KRS 411.184 is preempted by KRS 344.450 (the KCRA's damages provision), which does not list punitive damages as an available remedy. *See* Ky. Dep't of Corr. v. McCullough, 123 S.W.3d 130, 137-40 (Ky. 2003).

[48] *See id.*

"numerous cases from other jurisdictions" but "failed to cite a Kentucky case or a case from the U.S. Sixth Circuit Court of Appeals in support of their position."[49] Meanwhile, Schave relied almost entirely on the EEOC's regulatory guidance still in effect at the time.[50] Ultimately, the Court of Appeals concluded that Schave's shoulder injury and subsequent lifting restriction were sufficiently limiting to qualify as an actual disability, and that Howard Baer had wrongly regarded him as unable to work.[51] The court affirmed the verdict against the company.[52]

The Kentucky Supreme Court granted discretionary review.[53] However, it did not reach a decision until 2003, a year after *Toyota Motor*, which, along with *Sutton*, did not exist when Schave originally filed suit. Noting, as did *Brohm* and *Noel* before it, that the KCRA "was modeled after federal law" and had been interpreted "consistently therewith," the Kentucky Supreme Court incorporated the U.S. Supreme Court's narrow rules into the KCRA.[54] Applying *Toyota Motor*, the Kentucky Supreme Court concluded that Schave's shoulder injury was not a disability because "a restriction on lifting heavy objects may disqualify a person from particular jobs but does not necessarily interfere with the central functions of daily life."[55] The court further concluded, citing *Sutton*, that Schave was also not "regarded as" disabled, because the company only perceived him as unable to do his job, not unable to perform tasks "central to [his] daily life."[56] The court remanded the case "with directions to enter judgment for the defendant," meaning Schave's state law claims, filed in 1997, were defeated by incorrect interpretations of federal law handed down years later.[57]

The next important Kentucky decision came soon after *Howard Baer*. In 2001, Don Hallahan sued the Courier-Journal newspaper for disability discrimination and retaliation under the KCRA.[58] He claimed that he was denied promotions and ultimately terminated because his employer mistakenly perceived him to be disabled due to a lower back condition.[59] The Courier-Journal moved for summary judgment, arguing Hallahan could not

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[49] *Baer*, *supra* note 46, at *5-6.

[50] *Id*. at *4-5.

[51] *Id*. at *6.

[52] *Id*. at *8. The court reversed the verdict against two former coworkers, however, because they did not qualify as "employer[s]" under KRS 344.030. *Id.* at *10-11.

[53] Howard Baer, Inc. v. Schave, 127 S.W.3d 589, 591 (Ky. 2003).

[54] *Id*. at 591-92.

[55] *Id*. at 594 (quoting Mack v. Great Dane Trailers, 308 F.3d 776, 780 (7th Cir. 2002) (citing *Toyota Motor*, 534 U.S. at 197)).

[56] *Id*.

[57] *Id*.

[58] Hallahan v. The Courier-Journal, 138 S.W.3d 699 (Ky. Ct. App. 2004).

[59] *Id*. at 704.

prove the newspaper's management considered him to be disabled or that he had suffered adverse actions because of it.[60] The trial court granted the motion and dismissed Hallahan's suit.[61]

The Kentucky Court of Appeals affirmed.[62] Relying largely on *Sutton*, *Toyota Motor*, *Howard Baer*, and the EEOC's guidance at the time, the court ruled that Hallahan could not prove his employer regarded him as disabled.[63] To prove he was unlawfully "regarded as" disabled, Hallahan had to show that the Courier-Journal believed he was unable to do *any* job, not just the one he had.[64] Even though his employer knew he had back-related medical issues, that was not enough to meet the prevailing standard under federal law.[65] Hallahan had not produced evidence that the Courier-Journal "misperceived him as having an impairment or limitation that would have disqualified him from any jobs other than those with this single employer."[66] In support, the Court of Appeals cited numerous federal circuit decisions (most decided after *Sutton*) where workers like Hallahan had been denied recovery despite the causal connection between their employers' misperceptions of their physical abilities and the adverse employment actions they suffered.[67]

By 2004, Kentucky's appellate courts had fully incorporated the narrow, mistaken interpretations of the ADA from *Sutton* and *Toyota Motor* into the KCRA. And since then, both state and federal courts in Kentucky have relied heavily upon both *Howard Baer* and *Hallahan*, not just for their application of pre-ADAAA rules, but also for the general principal that the KCRA and the ADA should be interpreted consistently.[68]

In 2008, the ADAAA made it clear that cases like *Sutton* and *Toyota Motor* (and, by extension, *Howard Baer* and *Hallahan*) were wrong from the start because the original ADA never meant what those cases interpreted it to mean.[69] State and federal courts then should have overruled (or at least

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[60] *Id*.

[61] *Id.*

[62] *Id.* at 711.

[63] *Id*.

[64] *Id*. at 709.

[65] *Id.*

[66] *Id*. at 711.

[67] *Id*. at 712 (citing Pryor v. Trane Co., 138 F.3d 1024 (5th Cir. 1998); Helfter v. United Parcel Service, Inc., 115 F.3d 613 (8th Cir. 1997); Thompson v. Holy Family Hospital, 121 F.3d 537 (9th Cir. 1997); McKay v. Toyota Motor Mfg., U.S.A., Inc., 110 F.3d 369 (6th Cir. 1997); Colwell v. Suffolk County Police Dept., 158 F.3d 635 (2d Cir. 1998); Williams v. Channel Master Satellite Systems, Inc., 101 F.3d 346 (4th Cir. 1996). Hallahan did not seek discretionary review of the Court of Appeals decision.

[68] A search of "citing references" for both cases on Westlaw showed 83 federal and 34 state citations for the Supreme Court's opinion in *Howard Baer*, and 49 federal and 235 state citations for the Court of Appeals' opinion in *Hallahan* (conducted by the author on February 27, 2023).

[69] ADAAA, *supra* note 1, at § 2(3) ("[W]hile Congress expected that the definition of disability under

noted the supersedence of) pre-ADAAA case law and started anew, both in ADA and KCRA claims, because "subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[70]

Instead, some Kentucky and federal courts have applied a sort of tunnel-visioned textualism, freezing the KCRA in time and drawing a false distinction between the original ADA and the ADAAA. According to these courts, the KCRA's definition of disability—which remains identical to the ADA's, even after amendment—must be confined to pre-ADAAA interpretations until the Kentucky General Assembly amends the state law to include the same clarifying provisions now in the federal law. A summary of those decisions follows.

B. Some Federal Courts Distinguish the amended ADA from the KCRA

The first court to carve a gap between the KCRA and the amended ADA was the Sixth Circuit in the unpublished 2011 case *Breen v. Infiltrator Systems*.[71] In *Breen*, a manager sued his former employer for disability discrimination under the KCRA's "regarded as" prong.[72] The court in *Breen* began its analysis by noting "that the disability provisions of the Kentucky Civil Rights Act parallel the requirements of the Americans with Disabilities Act."[73] For example, the basic definition of "person with a disability" remained identical between the two, even after the ADAAA.[74] Nevertheless, and even though the ADA's "regarded as" prong had been amended to clarify that a person could be "regarded as" disabled "whether or not the impairment limits or is perceived to limit a major life activity,"[75] the Sixth Circuit applied the old *Sutton* standard to Breen's KCRA claim, citing *Howard Baer*.[76]

In a parenthetical, the court explained why: "Although Congress recently expanded the definition of 'regarded as disabled,'... that amendment has yet to be incorporated into the Kentucky statute … so the pre–2008 ADA

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the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.").

[70] Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 380–81 (1969).

[71] Breen v. Infiltrator Systems, 417 F. App'x 483 (6th Cir. 2011).

[72] *Id.*

[73] *Id*. at 485.

[74] *Compare* 42 U.S.C. § 12102(1) (2009) *with* KRS 344.010(4) (1992).

[75] 42 U.S.C. § 12102(3).

[76] *Breen*, *supra* note 71, at 486. That standard required the showing that "a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities," or "a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." *Howard Baer*, 127 S.W.3d at 594 (quoting *Sutton* at 489).

standards apply to Breen's claim."[77] As authority, the court cited *Milholland v. Sumner Cnty. Bd. of Educ.*,[78] but *Milholland* did not say a state law had to be amended identically for the ADA's changes to apply. *Milholland* instead held that the ADAAA could not be applied retroactively to pre-amendment conduct.[79] This citation makes sense to some extent, because the conduct at issue in *Breen* occurred prior to the ADAAA, but the Sixth Circuit did not confine Breen's KCRA claim to pre-ADAAA case law for that reason.[80] It could have, and the result would have been the same, but it did not, instead focusing on supposed textual differences between the state and federal law.[81]

Over the course of several months after *Breen*, both federal Districts of Kentucky continued to apply pre-ADAAA standards to KCRA cases, but for inconsistent reasons. In *Webb v. Humana* and *Laws v. Health-South*, they did so on non-retroactivity grounds, citing only *Milholland*.[82] In *Cunningham v. Humana*, however, the Western District cited *Breen* to conclude that "[b]ecause the KCRA has not been amended as was the ADA, cases involving the KCRA apply the pre-amendment ADA law."[83] Then in *White v. Humana*, the Western District cited both reasons—lack of amendment and non-retroactivity—together.[84]

By early 2012, as the ADAAA's enactment grew more distant in time, the KCRA's non-amendment became the dominant reason for distinguishing the state and federal statutes. In *Azzam v. Baptist Healthcare Affiliates*, the Western District heard a claim of disability discrimination filed under both

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[77] *Breen*, *supra* note 71, at 486.

[78] Milholland v. Sumner Cnty. Bd. of Educ., 569 F.3d 562 (6th Cir. 2009).

[79] *Id*. at 567; *accord* Reynolds v. Am. Nat'l Red Cross, 701 F.3d 143 (4th Cir. 2012). *But see* Jenkins v. National Bd. of Med. Exam'rs, 2009 WL 331638, at *1 (6th Cir. Feb. 11, 2009) (Remanding ADA claim filed prior to enactment of ADAAA for reconsideration "[b]ecause this suit for injunctive relief was pending on appeal when the amendments became effective," and therefore, "the amendments apply to this case."). The Sixth Circuit decided *Milholland* five months after *Jenkins* but did not mention it, though the cases are distinguishable because *Jenkins* involved a claim only for prospective relief rather than damages for past conduct. The Honorable Circuit Judge John Rogers wrote both unanimous opinions.

[80] *Breen*, *supra* note 71, at 486.

[81] *Id.*

[82] *See* Webb v. Humana Inc., 819 F. Supp. 2d 641, 645 (W.D. Ky. 2011); *and* Laws v. HealthSouth N. Ky. Rehab. Hosp. Ltd. P'ship, 828 F. Supp. 2d 889, 911 (E.D. Ky. 2011), *aff'd*, 508 F. App'x 404, 409 (6th Cir. 2012).

[83] Cunningham v. Humana Ins. Co., No. 3:10-CV-56-H, 2011 U.S. Dist. LEXIS 98372, at *2 (W.D. Ky. Aug. 31, 2011) (dismissing claims of disability-based disparate treatment and retaliation). *But see* Cunningham v. Humana Ins. Co., No. 3:10-CV-56-H, 2011 U.S. Dist. LEXIS 103408, at *2 (W.D. Ky. Sep. 9, 2011) (later decision in same case drawing no distinction between the definitions of "disability" in the KCRA and the amended ADA but nevertheless dismissing plaintiff's remaining failure-to-accommodate claim.). The late Honorable John Heyburn, District Judge, presided in both *Webb* and *Cunningham*.

[84] White v. Humana Ins. Co., No. 10-570-C, 2011 U.S. Dist. LEXIS 94407, at *2 (W.D. Ky. Aug. 23, 2011) (citing only *Milholland*, *supra* note 78, at 564).

the ADA and the KCRA.[85] In its consideration of the ADA claim, the court acknowledged that the ADAAA had "broadened the definition of disability" and that its standards should apply because the adverse action at issue had occurred after the ADAAA took effect.[86] The KCRA claim, however, was different, because "the KCRA retains the ADA's *former* definition of disability," and therefore that claim had to be assessed under superseded, pre-amendment case law.[87] Rather than simply citing *Breen* as authority for this conclusion, as it had in *Cunningham*, the Western District in *Azzam* explained in a footnote that the court "[would] not assume that the Kentucky legislature, by drafting language in 1992 that mirrored federal law at the time … intended to incorporate federal legislative alterations that occurred in 2008."[88] Left unexplained was why the court assumed instead that the Kentucky legislature, by drafting language in 1992 that mirrored federal law at the time, had intended to incorporate federal *judicial* alterations that occurred in 1999 and 2002.

Three years after *Azzam*, the Eastern District of Kentucky reached the same conclusion on its own in *Dickerson v. City of Georgetown*.[89] In that case, the court distinguished the amended ADA from the KCRA because "Kentucky courts have not yet addressed how the amendments to the ADA affect a KCRA disability discrimination analysis" and because "the Kentucky legislature [has not] amended the KCRA as Congress did to broaden the scope of what is meant by disability."[90] "Accordingly," said the court, it would "construe Plaintiff's state law claims based on the analysis still used by Kentucky courts, which use the approach taken by federal courts *before* the amendments took effect."[91] That analysis came solely from *Howard Baer* and *Hallahan*.[92] To decide that the plaintiff was neither actually disabled nor regarded as disabled, the *Dickerson* court cited no Kentucky case that still applied pre-amendment standards *after* the ADA's amendment.

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[85] Azzam v. Baptist Healthcare Affiliates, Inc., 855 F. Supp. 2d 653 (W.D. Ky. 2012).

[86] *Id*. at 658.

[87] *Id*. at 657 (emphasis in original).

[88] *Id*.

[89] Dickerson v. City of Georgetown, No. 5:14-cv-39-JMH, 2015 U.S. Dist. LEXIS 66314 (E.D. Ky. May 20, 2015).

[90] *Id*. at *3.

[91] *Id*.

[92] *Id*. at *2-3. Meanwhile, the Western District of Kentucky continued to rely on *White, supra* note 84, and *Breen*, *supra* note 71, to distinguish the ADA from the KCRA and apply pre-ADAAA case law. *See* Brown v. Humana Ins. Co., 942 F. Supp. 2d 723, 731 (W.D. Ky. 2013) (citing *White*); *and* Darby v. Gordon Food Servs., No. 3:11-cv-00646-DJH, 2015 U.S. Dist. LEXIS 74135, at *5 (W.D. Ky. June 8, 2015) (citing *Breen* and *Brown*).

With *Dickerson*, now all three federal courts in Kentucky had constrained the KCRA to the superseded rules of pre-ADAAA case law under the guise of judicial restraint; in the absence of state judicial or legislative action, the federal courts would maintain the status quo. This ostensibly cautious position soon gave way to a more aggressive stance, however, at the expense of basic principles of federalism and stare decisis.

Every student of federal courts dutifully memorizes two key rules. The first is that federal courts sitting in diversity apply the substantive law of the state in which the claim arises.[93] The second is that "district court decisions adjudicate present controversies but do not create law for future cases."[94] Yet in disability discrimination cases, Kentucky's federal courts took it upon themselves to declare state law. For authority they looked only to themselves, even though certification is always available under Kentucky court rules "if … questions of law of this state may be determinative of the cause … and it appears to that court or a party that there is no controlling precedent in the decisions of" Kentucky appellate courts.[95]

The 2016 case of *Laferty v. United Parcel Service*[96] and later decisions well illustrate this problem. At issue was whether the plaintiff, a former truck driver for the defendant, qualified as "disabled" under any of the three prongs of the KCRA's definition.[97] At the start of its analysis, the Western District acknowledged both that the ADA had been amended and that "courts interpret the KCRA consistent with the ADA."[98] But, in a footnote citing only unpublished federal decisions, the court explained that it would *not* interpret the laws consistently this time, because:

> The Court's research has revealed no published Kentucky cases addressing how the ADAAA affects, if at all, claims for disability discrimination brought under the KCRA. Federal courts continue to interpret the KCRA consistent with pre-ADAAA jurisprudence. … Until such time as the Kentucky Supreme Court or General Assembly speaks on this issue, the Court will take that approach.[99]

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[93] Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938) (the so-called "Erie Doctrine").

[94] Joseph Mead, *Stare Decisis in Inferior Courts of the United States*, 12 NEV. L. J. 787, 789 (2012).

[95] Ky. R. App. Pr. 50(A) (2023) (previously Ky. R. Civ. P. 76.37(1)).

[96] Laferty v. United Parcel Service, Inc., 186 F. Supp. 3d 702 (W.D. Ky. 2016).

[97] *Id*. at 708.

[98] *Id*..

[99] *Id*. (citing *Breen*, *supra* note 71, at 486; *Darby*, *supra* note 92, at *5 n.2; *Dickerson*, *supra* note 89, at *3; *Brown*, *supra* note 92, at 731; *Azzam*, *supra* note 85, at 658; and *Webb*, *supra* note 82, at 645).

It is unclear why neither the court nor the parties in *Laferty* asked the Kentucky Supreme Court to "speak on this issue" (through certification) rather than rely on a string of unpublished federal court decisions to answer an important and unresolved question of state law. Perhaps the Kentucky Supreme Court would have agreed that, to keep the KCRA and ADA in harmony, the legislature needed to amend the state law. Or perhaps it would have simply followed the textual and judicial rules of consistent interpretation to incorporate the ADA's amendments into the state law. Regardless, the question went uncertified and the court in *Laferty* resuscitated *Sutton* and *Toyota Motor* once again.[100]

The next year, the Sixth Circuit took a bolder approach. In *Krueger v. Home Depot USA, Inc.*, the court again ruled that the KCRA's definitions were bound by superseded federal case law.[101] But this time, rather than acknowledge the legislative ambiguity and humbly defer to the status quo like the courts claimed to do in *Azzam* and *Laferty*, the Sixth Circuit presumed to speak *for* the Kentucky General Assembly:

> [Plaintiff] also argues that evaluating his discrimination on the basis of a perceived-disability claim under the "regarded as" standard is no longer applicable as the ADA was amended in 2008. However, the Kentucky legislature adopted the language in the KCRA in 1992 and intended it to reflect the language of the ADA at that time, not the subsequent amendments. Thus, the KCRA retains the ADA's former definition of disability. See *Azzam v. Baptist Healthcare Affiliates, Inc*., 855 F. Supp. 2d 653, 657 n.2 (W.D. Ky. 2012) ("The Court will not assume that the Kentucky legislature, by drafting language in 1992 that mirrored federal law at the time, see 1992 Ky. Acts 282, § 1, intended to incorporate federal legislative alterations that occurred in 2008."). [Plaintiff's] argument is meritless….[102]

Remarkably, the Sixth Circuit in *Krueger* cited an unpublished federal district court decision as the sole authority on a question of state law and transformed that court's statement that it "would not assume" the Kentucky General Assembly intended to do something into an affirmative statement of

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[100] *Id.*

[101] Krueger v. Home Depot USA, Inc., 674 F. App'x 490, 494 (6th Cir. 2017). The court below made no reference to the KCRA and dismissed solely for failure to state a claim under the ADA. *See* Krueger v. Home Depot United States, No. 3:14CV-664-CRS, 2015 U.S. Dist. LEXIS 104910 (W.D. Ky. Aug. 10, 2015).

[102] *Krueger*, 674 F. App'x at 494.

what the Kentucky General Assembly intended to do.[103] It also ignored the express purposes of both the KCRA and the ADA, thus missing the more logical conclusion: if the 1992 Kentucky legislature intended the KCRA to "reflect the language of the ADA at that time," the best source for what the ADA's language meant at the time is what Congress said it meant, as found in the ADAAA's statement of purpose, not in superseded Supreme Court case law from 1999 and 2002.

In sum, nearly a decade after the passage of the ADAAA, the federal courts in Kentucky had produced a significant body of unpublished decisions holding that the Kentucky Civil Rights Act should no longer be interpreted consistently with the Americans with Disabilities Act. In *none* of those cases did the federal courts acknowledge the KCRA's own statement of purpose, refer to the legislative record of the General Assembly, seek certification of the question, or otherwise identify any Kentucky case law showing that the KCRA was meant to be forever bound to superseded judicial interpretation that came after its enactment. Those unpublished decisions also ignored contemporaneous and contradictory rulings *from the same federal courts*.

C. Other Federal Courts Harmonize the KCRA and ADA

At the same time the Sixth Circuit and the Eastern and Western Districts of Kentucky were ruling that the Americans with Disability Act's amendments could not be incorporated into the Kentucky Civil Rights Act, the same courts were ruling the opposite way. Sometimes even the same judge ruled in opposite ways—not just in different cases but also in the same case.

The same courts. In the 2011 case of *Gesegnet v. J.B. Hunt*, the Western District of Kentucky applied post-amendment ADA standards to a KCRA claim of disability discrimination "because the events in question took place after the effective date of the ADAAA."[104] Discussing the ADA's clarified definitional standards, the court made no reference to *Breen* (which predated *Gesegnet* by two months) and made no suggestion that the KCRA's lack of identical amendment made any difference at all.[105]

In 2015, long after *Breen*, the Sixth Circuit incorporated ADA standards into the KCRA despite their absence in the state law. In *Banks v. Bosch Rexroth*, the plaintiff brought disability discrimination claims under the

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[103] *Id.*

[104] Gesegnet v. J.B. Hunt Transp., Inc., No. 3:09-CV-828-H, 2011 U.S. Dist. LEXIS 57537, at *2 (W.D. Ky. May 23, 2011). This fact distinguished the case from the rule in *Milholland*, *supra* note 78, that the ADAAA was not retroactive.

[105] *See Id.*

KCRA but not the ADA.[106] A key question in *Banks* was whether the KCRA required a disabled employee seeking an accommodation to undergo an independent medical examination at the behest of their employer.[107] Pointing to the text of the KCRA, the plaintiff in *Banks* argued that the state law, unlike the ADA, included no such requirement.[108] The court disagreed and explained its reasoning:

> Though Banks concedes that the ADA permits employers to require IMEs of employees in certain circumstances, she argues that because the KCRA has no language analogous to 42 U.S.C. § 12112(d)(4)(A), that provision of the ADA has no bearing on interpretation of the KCRA. This argument, however, ignores the provision in the KCRA that "[t]he general purposes of this chapter [the KCRA] are ... [t]o provide for execution within the state of the policies embodies in ... the Americans with Disabilities Act of 1990" and several other enumerated federal civil rights statutes. KRS § 344.020(a). Given this express statement of purpose in the KCRA itself, the Kentucky Supreme Court's statement that the KCRA is to be interpreted in accord with the ADA, [*Howard Baer v.*] *Schave*, 127 S.W.3d at 592, and the absence of a signal from the Kentucky legislature or courts that the ADA's provisions about medical examinations of an employee should not apply, we can only conclude that the KCRA tracks the ADA with respect to those provisions as well.[109]

Had the Sixth Circuit applied the same reasoning in *Breen* that it did in *Banks*, it seems unlikely it would have decided that the KCRA should not incorporate the ADA's amendments. After all, there was no "signal from the Kentucky legislature or the courts that the ADA's provisions … should not apply," regardless of whether those provisions were original or added later by amendment.[110] *Banks*, of course, makes no reference to *Breen*.[111]

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[106] Banks v. Bosch Rexroth Corp., 610 F. App'x 519, 526 (6th Cir. 2015), *affirming* 15 F. Supp. 3d 681, 691 (E.D. Ky. 2014) (also interpreting the KCRA consistently with the amended ADA).

[107] *Banks*, 610 F. App'x at 531.

[108] *Id.*

[109] *Id*. at 531–32.

[110] *Id*.

[111] Coincidentally, the Sixth Circuit's rejection of the ADA's amended text in *Breen*, and its contradictory incorporation of the ADA's original text in *Banks*, worked to the benefit of the employer in both cases.

The same judge. Meanwhile, less than a month after *Banks*, the judge who wrote the *Azzam* opinion for the Western District of Kentucky had a change of heart.[112] In *Kimbro v. Department of Public Advocacy*, plaintiff Terri Kimbro brought disability claims under the ADA and the KCRA, alleging her employer discriminated against her on the basis of a breathing impairment.[113] "Breathing" is an example of a "major life activity" added to the ADA by the ADAAA but not listed in the KCRA.[114] For that reason, the defendant argued that Kimbro could not be considered "disabled" under the unamended KCRA and relied on *Azzam* for authority.[115]

Remarkably, the court in *Kimbro* distinguished *Azzam* and relied on *Gesegnet* instead.[116] The plaintiff in *Azzam*, according to *Kimbro*, "claimed to be limited in the major life activity of working," but "was not disabled because she was able to return to work…."[117] That fact alone made the difference. The difference in legislative intent between the KCRA and the amended ADA—which the court had made sure to point out in *Azzam*—was apparently no longer relevant. And, the *Kimbro* court said, *Azzam* was not controlling because each disability claim must be assessed on its own.[118] The court then used *Gesegnet* to illustrate the broad statutory purpose of the amended ADA, and incorporated the ADA's amended definitional terms into the KCRA by assumption:

> Kimbro has presented medical proof that she suffered from respiratory problems that impaired her ability to breathe, a major life activity. In light of the Congress's intent to provide broad coverage under the ADA, the Court finds Kimbro has provided sufficient proof. See, e.g., *Gesegnet v. J.B. Hunt Transp., Inc.*, 2011 U.S. Dist. LEXIS 57537, 2011 WL 2119248 (W.D.Ky.2011) ("The Court doubts that the medical and personal evidence here is sufficient to show an actual inability to perform a basic function of life. Nevertheless, given the broad definition of disability Congress intended, the Court will assume that Plaintiff has a disability under the ADAAA").[119]

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[112] Senior District Judge for the Western District of Kentucky, the Honorable Thomas B. Russell.

[113] Kimbro v. Dep't of Pub. Advocacy, No. 5:13-CV-215, 2015 U.S. Dist. LEXIS 76103, at *1 (W.D. Ky. June 11, 2015).

[114] 42 U.S.C. § 12102(2)(A) (2009).

[115] *Kimbro*, *supra* note 113, at *4.

[116] *Id.*

[117] *Id*.

[118] *Id*. (citing 29 C.F.R. § 1630.2(j)(1)(iv) (2012)) ("[T]he facts of any one case may at best be instructive of an unrelated case.").

[119] *Id*. at *5.

The same case. The Eastern District of Kentucky similarly reversed course, like the Western District had between *Azzam* and *Kimbro*, but in the opposite direction and within the same case. In late January 2017, two years after *Kimbro* and just under a month after the Sixth Circuit again carved a gap between the amended ADA and KCRA in *Krueger*, the Eastern District of Kentucky relied on post-ADAAA federal law to decide whether diabetes qualified as a "disability" under the KCRA.[120] In *Sanders v. Bemis Company I*, the court drew no distinction at all between the state and federal standards. It ultimately concluded that the plaintiff was not disabled under the KCRA—not because the KCRA lacked the standards of the amended ADA, but because the plaintiff had "not put forth sufficient evidence to demonstrate his diabetes should be considered a disability for the purpose of the KCRA."[121] The court in *Sanders I* made no reference to *Breen*, *Azzam*, or any other case discussed so far.[122]

Sanders later filed a motion to reconsider, which the same judge rejected in *Sanders v. Bemis Company II*.[123] This time though, the court took a very different approach to the question of which law applied to the plaintiff's disability claim. Sanders argued that the court had improperly considered the ameliorative effects of his insulin pump when concluding that his diabetes was not a "disability" under the KCRA.[124] The court denied taking the pump into account, but even if it had, the court said, such an account would have been permitted under *Sutton v. United Air Lines*.[125] Even though "[that] aspect of *Sutton* was rejected by Congress in 2008," the rule still applied in Kentucky because, under *Breen* and *Laferty*, "the KCRA is interpreted consistent with pre-ADAAA, rather than post-ADAAA, jurisprudence."[126] Therefore, "*Sutton* remains the law of the land when it comes to … the ADA rather than the amended ADAAA."[127]

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[120] *Sanders v. Bemis Co.*, No. 3:16-cv-00014-GFVT, 2017 U.S. Dist. LEXIS 12304, at *3-4 (E.D.Ky. Jan. 30, 2017) (hereinafter "*Sanders I*").

[121] *Id*. at *5.

[122] For its determination that the KCRA and ADA should be interpreted consistently, the latter's amendments notwithstanding, the court in *Sanders I* cited only *Bryson*, *supra* note 44, at 574, and *Noel*, *supra* note 45, at 100-01, two cases decided long before the passage of the ADAAA.

[123] Sanders v. Bemis Co., No. 3:16-cv-00014-GFVT, 2017 U.S. Dist. LEXIS 125090, at *15 (E.D. Ky. Aug. 8, 2017) (hereinafter "*Sanders II*").

[124] *Id*. at *4-5.

[125] *Id*. at *5.

[126] *Id*. (citing *Breen*, *supra* note 71, at 486; and *Laferty*, *supra* note 96, at 707).

[127] *Id*. The court in *Sanders II* did not acknowledge that "the ADA" is the same law as "the amended ADAAA," or that the ADA now expressly states that *Sutton* never should have been "the law of the land." *See* ADAAA, *supra* note 1, at § 2(a)(4).

The drastic inconsistency from one case to another, or from one dispositive motion to another, is difficult for any court observer to explain. But to be fair, before early 2017, the federal courts hearing disability claims under the KCRA were deciding these cases without guidance from Kentucky courts on whether the ADA's amendments applied to the state law. And that guidance, when it did come, was just as inconsistent.

D. Kentucky Courts First Harmonize the Laws But Then Change Course

In May 2017, the Kentucky Court of Appeals finally weighed in on whether the Americans with Disability Act's amendments applied to disability claims brought under the unamended Kentucky Civil Rights Act. In *Tanner v. Jefferson County Board of Education*, a unanimous panel of the court acknowledged the long-held rule that Kentucky courts deciding state law disability claims "may look to federal case law in interpreting Kentucky's Act" because of "the similar language and the stated purpose of the [state law]."[128] After quoting the three-prong definition of "disability" from the KCRA, the court in *Tanner* quoted the ADAAA's clarification that an individual can be "regarded as" disabled "whether or not the impairment limits or is perceived to limit a major life activity."[129] This language does not appear in the KCRA but the *Tanner* court incorporated it anyway, without reference to *Breen*, *Azzam*, *Laferty*, or any other federal decision dealing with the question.[130] And despite ruling on a novel question of state law, *Tanner* was unpublished, though at least there was now some kind of state case law on the topic.[131]

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[128] Tanner v. Jefferson Cty. Bd. of Educ., No. 2015-CA-001795-MR, 2017 Ky. Ct. App. Unpub. LEXIS 384, at *2 (Ky. Ct. App. May 26, 2017) (citing *Hallahan*, *supra* note 58; *Howard Baer*, *supra* note 53; KRS 344.020).

[129] *Id*. (citing 42 U.S.C. § 12120(1)(c) (2009)).

[130] Still to the benefit of the employer; the court in *Tanner* affirmed the trial court's grant of summary judgment to the Board of Education. *Id*. at *6.

[131] In *Sanders II*, the Eastern District of Kentucky acknowledged the *Tanner* decision but ignored it, relying instead on *Laferty*, *supra* note 96:

> The Court has discovered one Kentucky Court of Appeals decision which cites ADAAA provisions. See Tanner v. Jefferson Cnty. Bd. of Educ…. Nevertheless, to the Court's knowledge, 'no published Kentucky cases address[ ] how the ADAAA affects, if at all, claims for disability discrimination brought under the KCRA." Laferty, 186 F. Supp. 3d at 707 n.3. The Sixth Circuit and a number of federal district courts continue to apply pre-ADAAA jurisprudence to their KCRA analyses, and "[u]ntil such time as the Kentucky Supreme Court or General Assembly speaks on this issue, the Court will take that approach." *Id*. (compiling cases).

The pendulum swung back quickly. The first *published* Kentucky appellate decision on this issue came the next year, in May 2018, and went the other way. In *Larison v. Home of the Innocents*, another unanimous panel of the Kentucky Court of Appeals concluded that no, the ADA's amendments did not apply to KCRA claims after all.[132]

Khristina Larison was employed by the Home of the Innocents when she suffered a severe and incapacitating stroke.[133] After miscommunication between her husband and her managers while she was in recovery, Larison's employer discharged her from her job on the false assumption that she intended to resign rather than to go on medical leave.[134] She sued for disability discrimination under the KCRA but not the ADA.[135]

The court in *Larison* agreed with her that she had suffered an adverse employment action but decided Larison was not "disabled" under state law because she had eventually recovered from her stroke.[136] Under the amended ADA, a serious but short-term impairment, even if "lasting or expected to last fewer than six months," would meet the definition of a "disability."[137] Not, however, under the KCRA: citing only the "will not assume" footnote from the Western District's opinion in *Azzam*, the Kentucky Court of Appeals in *Larison* waved the amended ADA aside: "[N]o matter these current definitions," the court repeated, "'the KCRA retains the *former* definition of disability[,]' prior to the 2008 Amendments of the federal law."[138] That "former definition" had incorporated a three-part test from the EEOC's pre-ADAAA regulations, which the *Larison* court then applied.[139] And even though Larison had suffered a stroke and lost her job six years *after* the ADAAA took effect, the Court of Appeals relied largely on the unpublished Sixth Circuit case of *Spence v. Donahoe*, which, like *Milholland*, had applied rules from *Sutton* and *Toyota Motor* because the conduct at issue had pre-dated the ADAAA.[140] Curiously, the court in *Larison* made no reference to

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Sanders II, *supra* note 123, at *5. The *Sanders II* court omitted from its note the contrary federal holdings of *Gesegnet* (*supra* note 104), *Banks* (*supra* note 106), and *Kimbro* (*supra* note 113).

[132] Larison v. Home of the Innocents, 551 S.W.3d 36, 43-44 (Ky. Ct. App. 2018).

[133] *Id*. at 39.

[134] *Id*. at 39-40.

[135] *Id.*

[136] *Id.*

[137] *Id*. at 43 (citing 29 C.F.R. § 1630.2(j)(ix) (2012)). The court acknowledged that "[o]n its face, it appears that Ms. Larison would easily satisfy this requirement as it is undisputed that her stroke substantially limited her ability to perform several major life activities…." *Id*.

[138] *Id*. (quoting *Azzam*, *supra* note 85, at 658).

[139] *Id*. (noting in a parenthetical that those EEOC regulations had stopped being effective six years before).

[140] Spence v. Donahoe, 515 F. App'x 561, 569 (6th Cir. 2013).

Tanner, even though one of its judges was a member of both unanimous panels.[141]

E. Momentum Against Harmony Builds

Meanwhile, the federal courts continued to waver, but only briefly. On May 8, 2018, the Western District of Kentucky applied the amended ADA to a KCRA claim of disability discrimination in *Popeck v. Rawlings Company*.[142] Adrianne Popeck sued her former employer for several claims including disability discrimination under both the ADA and the KCRA.[143] The Western District analyzed these claims together and drew no distinction between the federal and state laws.[144] It also distinguished the facts of *Sanders I* and quoted at length from *Jenkins v. National Board of Medical Examiners*, an unpublished Sixth Circuit case that had acknowledged the clear statement of purpose and expansive effect of the ADA's amendments.[145] Applying the post-amendment standards, the Western District found that Popeck's irritable bowel syndrome qualified as a disability under both the ADA and the KCRA, but ultimately affirmed dismissal because she could not prove she was qualified for the job or that her needs could be reasonably accommodated.[146]

On May 16, eight days after *Popeck*, the Kentucky Court of Appeals decided *Larison*.[147] Now, finally, there was a published state court opinion on the relationship between the KCRA and the amended ADA. And because of it, the federal courts abandoned any effort to harmonize the two laws.

The first court to cite *Larison* was the Eastern District of Kentucky in *Rose v. United Parcel Service*.[148] UPS terminated James Rose, a truck driver, for claiming non-work time on his timesheet.[149] Rose blamed the lost time on a urinary condition and sued his former employer for disability discrimination under the KCRA (but not the ADA).[150] Rose argued that the ADA's amendments should apply to the KCRA.[151] The court, however,

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[141] The Honorable Deborah Lambert, now a Justice of the Kentucky Supreme Court.

[142] Popeck v. Rawlings Co. LLC, No. 3:16-CV-00138-GNS-DW, 2018 U.S. Dist. LEXIS 74799 (W.D. Ky. May 3, 2018), *aff'd*, Popeck v. Rawlings, Company, LLC, 791 F. App'x 535, 542 (6th Cir. 2019) (noting that the plaintiff abandoned her KCRA claims on appeal).

[143] *Popeck*, 2018 U.S. Dist. LEXIS 74799, at *1.

[144] *Id*. at *5.

[145] *Id*. at *7 (quoting *Jenkins*, *supra* note 79, at *3).

[146] *Id*. at *8, 10.

[147] *Larison*, *supra* note 132.

[148] Rose v. UPS, No. 5:17-CV-378-REW, 2019 U.S. Dist. LEXIS 50374 (E.D. Ky. Mar. 26, 2019).

[149] *Rose*, 2019 U.S. Dist. LEXIS 50374, at *4.

[150] *Id*. at *4-5.

[151] *Id*. at *6.

disagreed, discussing the question at length and concluding that the KCRA should continue to be bound by pre-amendment cases like *Sutton* and *Toyota Motor* (which it applied).[152]

Rose was the first court decision to fully acknowledge the inconsistency of Kentucky disability case law. The Eastern District first cited *Krueger*, *Breen*, *Sanders II*, *Lafferty*, *Larison*, and *Azzam* to illustrate that "most courts continue to apply pre-2008 ADA jurisprudence to KCRA analysis."[153] *Azzam* especially, the *Rose* court said, "emphasized the imprudence of assum[ing] the Kentucky legislature, by drafting language in 1992 that mirrored federal law at the time…intended to incorporate federal legislative alterations that occurred in 2008."[154]

Attempting to distinguish those cases, Rose argued that the ADA's amendments were "more consistent with the original purpose of the KCRA" and pointed to *Tanner*, *Gesegnet*, *Banks*, and *Kimbro* to show that not all courts had split the KCRA from its updated federal counterpart.[155] The Eastern District showed no concern; this "small minority of cases" was not compelling because they "applied the ADAAA to KCRA claims … without analysis, or indiscriminately applied ADAAA standards to scenarios involving both ADA and KCRA counts," and "still rel[ied] heavily on pre-2008 case law."[156] Then, in a footnote, the Eastern District went further: "Nothing but common lineage and traditional parallelism would warrant treating Kentucky's 1992 enactment as modified by Congress sixteen years later. Those are not enough."[157] However, just like the courts in *Azzam* and *Laferty*, the *Rose* court offered no explanation as to why the KCRA should instead be bound by superseded case law that also post-dated its enactment.

Since *Rose* (and *Larison*), the consensus among federal courts in Kentucky has shifted against harmonizing the KCRA's definition of "disability" with its still-identical counterpart in the amended ADA, sometimes to paradoxical effect .[158] For example, in *Stover v. Amazon*, the

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[152] *Id*.

[153] *Id*.

[154] *Id*.

[155] *Id*. The *Rose* opinion does not say whether the plaintiff cited *Popeck*, *supra* note 142, in their briefing.

[156] *Id*.

[157] *Id*. The court did not explain *why* "common lineage" and "traditional parallelism" were "not enough."

[158] *See, e.g.*, Grainger v. Hoskin & Muir, Inc., No. 3:19-CV-00347-GNS, 2019 U.S. Dist. LEXIS 210630, at *4 (W.D.Ky. Dec. 6, 2019) (citing *Larison*, *supra* note 132, and *Azzam*, *supra* note 85, that KCRA is narrower than ADA but concluding that plaintiff was disabled under both); Watkins v. Shriners Hosps. for Children, No. 5:18-CV-548-REW-MAS, 2020 U.S. Dist. LEXIS 81077, at *9 (E.D. Ky. May 8, 2020) (citing *Larison* as "controlling authority" to apply pre-amendment rules to a KCRA claim); Koch v. Thames Healthcare Group, LLC, 855 F. App'x 254, 258 (6th Cir. 2021) (citing *Breen*, *supra* note 71, and *Krueger*, *supra* note 101, to apply pre-amendment standards); *and* Hopkins v. Bunzl Retail Servs., LLC, No. 5:22-CV-

Eastern District of Kentucky ruled, in order, that (1) the KCRA is bound by pre-amendment ADA rules,[159] (2) Crohn's Disease does not qualify as a disability under those pre-amendment rules,[160] and, (3) because the KCRA's definition of disability is the same as the amended ADA's, Crohn's Disease is not a disability under the amended ADA, either.[161]

A consensus against harmonization has also emerged in the Kentucky Court of Appeals. First, in *Hernandez v. Mayfield Consumer Products*, that court cited *Breen* and *Brown v. Humana* to conclude that obesity was not a qualifying disability under the KCRA.[162] Then, in late 2021, the Kentucky Court of Appeals heard the case of *Norton Healthcare v. Turner*.[163]

Plaintiff Joyce Turner, a nurse who sought treatment for cancer, sued Norton Healthcare, her former employer, for disability discrimination under the KCRA, and a jury awarded her over $1 million in damages.[164] Norton appealed the denial of its motion for judgment notwithstanding the verdict, arguing that Turner's cancer was not a sufficient impairment to qualify her as disabled under the KCRA.[165] Turner countered that the KCRA should incorporate the ADA's amendments and that cancer qualifies as a disability

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13-TBR, 2022 U.S. Dist. LEXIS 94684, at *3 (W.D. Ky. May 25, 2022) (citing *Koch*, applying different rules to same facts, holding plaintiff not "regarded as" under either pre- or post-amendment standards). In cases where the plaintiff's qualification as "disabled" is undisputed, the divide between the ADA and KCRA is left unmentioned. *See, e.g.*, Bogart v. University of Kentucky, 766 F. App'x 291, 298 (6th Cir. 2019); Sublett v. Masonic Homes of Ky., Inc., No. 21-5959, 2022 U.S. App. LEXIS 19876, at *2 (6th Cir. July 18, 2022); Brown v. Metro, No. 3:19-cv-937-DJH-CHL, 2022 U.S. Dist. LEXIS 59767, at *2 (W.D. Ky. Mar. 31, 2022); and Taulbee v. Bell Cty. Sheriff's Dep't, No. 6:21-CV-143-REW-HAI, 2022 U.S. Dist. LEXIS 19623, at *4 (E.D. Ky. Feb. 3, 2022).

[159] Stover v. Amazon, 442 F. Supp. 3d 971, 984 (E.D. Ky. 2020).

[160] *Id*. at 986.

[161] *Id*. at 987 (comparing the definitions of KRS 344.010(4) (1992) and 42 U.S.C. 12102(1) (2009)). On appeal, the Sixth Circuit affirmed but drew no distinction between the KCRA or ADA at all. *See* Stover v. Amazon.com, LLC, No. 21-5421, 2022 U.S. App. LEXIS 737, at *3 (6th Cir. Jan. 10, 2022) ("Because there is no substantive distinction between those two types of claims for purposes of the issues discussed in this opinion, our references to the ADA apply equally to the KCRA.").

[162] Hernandez v. Mayfield Consumer Prods., No. 2020-CA-0459-MR, 2021 Ky. App. Unpub. LEXIS 59, at *5 (Ky. Ct. App. Jan. 22, 2021). *But see* Ashby v. Brady, No. 2020-CA-1578-MR, 2021 Ky. App. Unpub. LEXIS 725 (Ky. Ct. App. Dec. 17, 2021). Despite similarly applying pre-amendment ADA rules to a KCRA claim, *Ashby* differs from *Hernandez* in several ways. First, *Ashby* states that "[t]he KCRA's disability provisions incorporate the definitions under the Federal Americans with Disabilities Act" without noting any conflict caused by the ADAAA. Second, *Ashby* relies only on *Hallahan*, *supra* note 58, before applying pre-amendment ADA rules—it does not cite to any prior federal case dealing with this question. And, later in the opinion, the court, citing *Howard Baer*, *supra* note 53, applies the ADA's "direct threat exemption" from 42 U.S.C. § 12113(b) (2009) to Ashby's claim even though the KCRA lacks that provision.

[163] Norton Healthcare, Inc. v. Turner, Nos. 2019-CA-0328-MR, 2019-CA-0569-MR, 2021 Ky. App. Unpub. LEXIS 743 (Ky. Ct. App. Sept. 17, 2021).

[164] *Id*. at *1.

[165] *Id*.

because "normal cell growth" is now listed as an example of a "major life activity" under 42 U.S.C. 12102.[166]

The court sided with Norton. Even though "[o]ne need not be an oncologist to see the merit in Turner's position that cancer limits normal cell growth," the problem for Turner was that "'normal cell growth' appears only in the ADAAA definition of what constitutes a qualifying disability," not in the unamended KCRA.[167] "Neither the plain language of the KCRA nor its accompanying case law has embraced 'normal cell growth' as a major life activity."[168] The court declined Turner's invitation to "revisit *Larison*'s holding" and instead opted to "echo the reasoning embraced by the … Western District" in *Laferty* that "[u]ntil such time as the Kentucky Supreme Court or General Assembly speaks on this issue," it would constrain the KCRA to the ADA's pre-amendment interpretations.[169]

The General Assembly so far remains silent, but the Kentucky Supreme Court may soon speak on the issue. In early 2022, it granted review of *Turner*, but at the time this article was published, a decision in that case was still pending.[170] As of now, however, this is the current state of the law for disability claims filed under the Kentucky Civil Rights Act. State and federal courts, for the most part, continue to impose superseded federal court rules upon the KCRA, while in a few cases those same courts have harmonized the KCRA with the ADA as amended. Left in their wake is a confusing and contradictory patchwork of mostly unpublished decisions as precedent.

F. Conflict, Harmony, or Distinction in Other States

Kentucky is not the only state with this problem.[171] The closest comparator is Pennsylvania. Like the KCRA, the Pennsylvania Human Relations Act was modeled after the original ADA and, like the KCRA, has

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[166] *Id*. at *2. The EEOC and other courts agree with Turner's arguments. *See, e.g*., 29 C.F.R. § 1630.2(j)(iii) (2012) ("[C]ancer substantially limits normal cell growth" and thus "will, at a minimum, substantially limit the major life activities."); Oehmke v. Medtronic, Inc., 844 F.3d 748, 756 (8th Cir. 2016) ("Cancer, even while in remission, is clearly a covered disability under the ADA."); *and* Angell v. Fairmount Fire Protection Dist., 907 F. Supp. 2d 1242, 1250-1251 (D. Colo. 2012) (finding cancer to be a disability under the post-amendment ADA and collecting similar holdings in other federal courts).

[167] *Turner*, *supra* note 163, at *4.

[168] *Id*.

[169] *Id*.

[170] Turner v. Norton Healthcare, Inc., No. 2022-SC-0004-DG, 2022 Ky. LEXIS 213 (Apr. 20, 2022). Some of the research for this article also appears in an amicus brief co-filed in that case by the author, on behalf of the Kentucky Commission on Human Rights, in support of Appellant Turner (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4189203).

[171] A survey of all fifty states does not fit within the confines of this article. This article will instead highlight a few notable comparator states.

not been amended to add the ADAAA's provisions.[172] Also like in Kentucky, Pennsylvania federal courts have wavered back and forth on whether the statutes remain in harmony with each other after the ADA's amendment. Some federal courts initially ruled that the PHRA is no longer coextensive with the ADA.[173] Others ruled the opposite.[174] Still others noted the dispute but dodged the question.[175]

Then, in 2018, in an unpublished decision called *Lazer Spot*, the Commonwealth Court of Pennsylvania (an intermediate appellate court) applied post-amendment ADA standards to a PHRA claim, rejecting the defendant's argument that the ADAAA made the two laws distinct.[176] That put an end to the conflict in the courts. Unlike federal courts in Kentucky, which mostly ignored or distinguished the analogous Kentucky Court of Appeals decision in *Tanner* (prior to *Larison*), federal courts in Pennsylvania have since ruled consistently with *Lazer Spot*, holding that the amended ADA and unamended PHRA remain coextensive.[177] To date, neither the Pennsylvania Supreme Court nor the Third Circuit have weighed in, nor has the statute been amended.[178]

Outside of Kentucky and Pennsylvania, other states have had no reason to decide the effect of the ADA's amendment. Some state anti-discrimination laws, like those in Wisconsin and New Jersey, define "disability" in

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[172] *Compare* 43 Pa. Cons. Stat. § 954(p.1) (defining "handicap or disability"), *with* 42 U.S.C. § 12102(2) (1990), *and* 42 U.S.C. § 12102(1) (2009) (same). The only difference is that the Pennsylvania definition excludes "current, illegal use of or addiction to a controlled substance."

[173] *See* Rubano v. Farrell Area School Dist., 991 F. Supp. 2d 678, 689 (W.D. Pa. 2014); Canfield v. Movie Tavern, Inc., No. 13-cv-03484, 2013 U.S. Dist. LEXIS 173877, at *5 (E.D. Pa. Dec. 12, 2013); Szarawara v. Cty. of Montgomery, No. 12-5714, 2013 U.S. Dist. LEXIS 90386, at *2 (E.D. Pa. June 27, 2013); Deserne v. Madlyn & Leonard Abramson Ctr. for Jewish Life, Inc., No. 10-03694, 2012 U.S. Dist. LEXIS 68852, at *3 (E.D. Pa. May 17, 2012).

[174] See McFadden v. Biomedical Sys. Corp., No. 13-4487, 2014 U.S. Dist. LEXIS 2363, at *2 (E.D. Pa. Jan. 9, 2014); *and* Conklin v. Hawbaker Eng'g, LLC, No. 4:18-CV-02128, 2019 U.S. Dist. LEXIS 181437 (M.D. Pa., at *2 (M.D.Pa. Oct. 21, 2019).

[175] *See* Blassingame v. Sovereign Sec., LLC, No. 17-1351, 2017 U.S. Dist. LEXIS 123980, at *8 (E.D. Pa. Aug. 7, 2017); Gucker v. U.S. Steel Corp., 212 F. Supp. 3d 549, 559 (W.D. Pa. 2016); and Rocco v. Gordon Food Serv., 998 F. Supp. 2d 422, 428 (W.D.Pa. 2014), *aff'd*, 609 F. App'x 96, 97 (3d Cir. 2015).

[176] Lazer Spot, Inc. v. Pa. Human Rels. Comm'n, 184 A.3d 200, at *3–5 (Pa. Commw. Ct. 2018).

[177] *See* Kairys v. S. Pines Trucking, Inc., No. 2:19-CV-1031-NR, 2021 U.S. Dist. LEXIS 97600, at *5 (W.D. Pa. May 24, 2021); and Myatt v. Cathedral Vill., No. 19-130, 2019 U.S. Dist. LEXIS 89500, at *2 (E.D. Pa. May 29, 2019). Pennsylvania state courts have also consistently followed *Lazer Spot*. *See* Garten v. Pa. Human Rels. Comm'n, 242 A.3d 997, at *3 (Pa. Commw. Ct. 2020); and Sigman v. Dep't of Corr., 253 A.3d 849, at *3–4 (Pa. Commw. Ct. 2021).

[178] In Morgenfruh v. Larson Design Group, the Middle District of Pennsylvania held that the PHRA and the amended ADA remain coextensive. Morgenfruh v. Larson Design Grp., Inc., No. 4:18-CV-00021, 2019 U.S. Dist. LEXIS 159750, at *2 (M.D. Pa. Sept. 19, 2019). The Third Circuit affirmed but with no discussion beyond citing a 1996 case for the rule that "[c]laims under the PHRA are interpreted coextensively with ADA claims." Morgenfruh v. Larson Design Grp., Inc., 826 F. App'x 141, 142 (3d Cir. 2020) (citing Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996)).

materially different ways than either the original or amended ADA and thus do not rely on federal case law for interpretative guidance.[179] Other state laws have similar language to the ADA but are nevertheless interpreted independently, such as in Massachusetts and Iowa.[180]

Meanwhile, federal courts in Oklahoma have never drawn a distinction between the amended ADA and the unamended Oklahoma Anti-Discrimination Act, which still has the same vague definition of "disability" as the original ADA.[181] For example, in the 2016 case of *Hancock v. Greystar Management Services*, the Western District of Oklahoma noted without any apparent reservation that "the same burden of proof that governs the ADAAA also governs the OADA" because "the protections provided by the OADA are 'co-extensive with the protections provided by federal law under the ADA.'"[182] To date, no courts in that state have found any conflict between the amended federal law and the unamended state law.[183]

Part IV explains why state and federal courts in Kentucky, and anywhere else a conflict has arisen between the amended ADA and an unamended (but

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[179] *See* Wis. Stat. Ann. § 111.32(8) (defining "individual with a disability" as a person with "a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work"); *and* N.J. Stat. Ann. § 10:5-5(q) (exhaustively defining "disability" to mean "physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impairment, or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological, or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological, or neurological conditions which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.").

[180] *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 959-964 (Mass. 2001) (rejecting *Sutton* as inconsistent with the text, legislative intent, and public policy behind the ADA-equivalent state anti-discrimination statute); Goodpaster v. Schwan's Home Service, Inc., 849 N.W.2d 1, 9 (Iowa, 2014) (rejecting *Sutton* and *Toyota Motor* not because of the ADAAA but because "we are not bound by the language of federal statutes when interpreting language of the [Iowa Civil Rights Act]."). *See also* Widiss, *supra* note 37, at 932-934 (describing differing state approaches since the ADA's amendment).

[181] Okla. Stat. tit. 25, § 1301(4).

[182] Hancock v. Greystar Mgmt. Servs., L.P., No. CIV-15-1095-R, 2016 U.S. Dist. LEXIS 143758, at *2 (W.D. Okla. Oct. 18, 2016) (quoting Hamilton v. Oklahoma City Univ., 911 F. Supp. 2d 1199, 1206 (W.D. Okla. 2012), *aff'd*, 563 F. App'x 597 (10th Cir. 2014)). *See also* Hawkins v. Schwan's Home Serv., No. CIV-12-0084-HE, 2013 U.S. Dist. LEXIS 74509, at *10 (W.D. Okla. May 28, 2013) ("'[T]he protections provided by the OADA are co-extensive with the protections provided by federal law under the ADA.' … Because plaintiff's ADAAA claims fail, his claim under the OADA similarly fails.") (quoting Engles v. Hilti, Inc., No. 11-CV-491-JED-PJC, 2013 U.S. Dist. LEXIS 48812, at *6 (N.D. Okla. Apr. 4, 2013)); *and* Fulton v. People Lease Corp., 241 P.3d 255, 261 (Okla. Civ. App. 2010) (OADA's provisions are still coextensive with federal law because "[t]he stated purpose of the OADA is to implement the policies embodied in several federal statutes … ").

[183] A search of Westlaw, conducted by the author on February 22, 2023, did not reveal any Oklahoma state court cases dealing with this question.

otherwise analogous) state anti-discrimination law, should follow the lead of Oklahoma courts. The correct approach is harmony.

IV. THE KENTUCKY CIVIL RIGHTS ACT AND SIMILAR STATE STATUTES SHOULD BE HARMONIZED WITH THE AMENDED ADA

There are many good reasons why courts should interpret the unamended Kentucky Civil Rights Act consistently with the amended Americans with Disabilities Act. The same goes for textually similar laws in other states. "Textually similar" means a state law includes (1) a definition of "disability" effectively identical to the definition in the original ADA[184] and (2) a clear statement of legislative purpose that the state law was meant to further the policies of the ADA or to be interpreted consistently with it.[185]

First, the KCRA clearly states that its purpose is "to provide for the execution within the state of the policies embodied in the … Americans with Disabilities Act of 1990."[186] The policy embodied in the ADA has always been a "clear and comprehensive … mandate for the elimination of discrimination against individuals with disabilities" through "clear, strong, consistent, enforceable standards."[187] Congress always intended the ADA to provide "broad coverage" and expected the courts to interpret the law accordingly.[188] This purpose was not revoked by amendment. Rather than articulate new policies, the ADAAA *reaffirmed* the ADA's original policies through clarification of its terms and abrogation of errant judicial interpretations.[189] Thus, the "policies embodied in the ADA of 1990" to which the KCRA refers are no different today than they were in 1992.

Second, despite the effort of federal and state courts to distinguish the ADA's "former" definition from its "current" definition,[190] there has only ever been *one* definition of "disability" in the ADA; Congress added additional provisions to provide clarity to that definition's vague terms, but the actual three-prong definition was left undisturbed.[191] There is thus no "former" definition that now differs from the current one, and at any rate it remains identical to the definition of "disability" in the KCRA.[192] The KCRA

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184 *See* KRS § 344.010(4) (definition of "disability").
185 *See* KRS § 344.020(1) (statement of purpose).
186 *Id*.
187 42 U.S.C. § 12101(b)(1) (1990); 42 U.S.C. § 12101(b)(1) (2009).
188 ADAAA, *supra* note 1, at § 2(1)-(2).
189 *Id*. at § 2(1)-(6).
190 *Larison*, *supra* note 132, at 43 (quoting *Azzam*, *supra* note 85, at 658).
191 *Compare* 42 U.S.C. § 12102(2) (1990), *with* 42 U.S.C. § 12102(1) (2009).
192 *Compare* 42 U.S.C. § 12102(1) (2009), *with* KRS § 344.020(4) (1992).

only lacks the clarifying terms later amended. This does not mean that the KCRA's definition is no longer consistent with the ADA's.

Third, none of the ADA's amended provisions contradicts any provisions of the unamended KCRA. Where the ADA now lists many examples of "major life activities," the KCRA lists no examples, but that does not create contradiction. The KCRA simply lacks the clarification; it does not say "major life activities do not include" the activities listed in the amended ADA. Though Kentucky courts have at times inferred legislative intent from the General Assembly's "silence,"[193] there is no reason to interpret the KCRA's lack of amendment as a legislative *rejection* of the ADA's amended examples because the KCRA is not truly "silent" on the question of its relationship to the ADA.[194]

Fourth, forever binding the KCRA to the "pre-amendment standards of the ADA" requires reliance on superseded cases like *Sutton* and *Toyota Motor*. Congress, in no uncertain terms, denounced those cases as being wrong from the start.[195] They are bad law for interpreting the ADA, and, because the KCRA's purpose is the same as the ADA's, also bad law for interpreting the KCRA. That makes state cases like *Howard Baer* and *Hallahan*, which impose *Sutton* and *Toyota Motor* on the KCRA, bad law too. Stare decisis "does not apply to a case where it can be shown that the law has been misunderstood or misapplied."[196] "This is particularly true when [past] decisions were based on the interpretation of statutes which have undergone fundamental revisions."[197] "[S]tare decisis does not, and indeed cannot, require application of a court-made rule in the face of a statute to the contrary; or, for that matter, a later-in-time court ruling to the contrary."[198]

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[193] *See, e.g.*, Kindred Healthcare v. Harper, 642 S.W.3d 672, 681 (Ky. 2022) (citing Sweeney v. King's Daughters Med. Ctr., 260 S.W.3d 829, 833 (Ky. 2008)) (lack of time limitation in worker compensation statute suggested legislative intent to allow claims at any time).

[194] KRS § 344.020(1). *But see* Toyota Motor Mfg., Ky., Inc. v. Prichard, 532 S.W.3d 633, 636 (Ky. 2017) ("[T]he failure of the legislature to change a known judicial interpretation of a statute [is] extremely persuasive evidence of the true legislative intent. There is a strong implication that the legislature agrees with a prior court interpretation of its statute when it does not amend the statute interpreted." (quoting Rye v. Weasel, 934 S.W.2d 257, 262 (Ky. 1996)). The *Prichard* principle would be compelling here but for the KCRA's express statement of purpose to follow the ADA in KRS § 344.020(1). A fair reading of that provision suggests the Kentucky General Assembly did not need to "change a known judicial interpretation" on its own when Congress did so already through the ADAAA. The *Prichard* principle would also be compelling here but for the fact that the General Assembly almost immediately amended the statute at issue in that case, superseding it and Hall v. Hosp. Res., Inc., 276 S.W.3d 775 (Ky. 2008), on which *Prichard* relied. *See* Slaughter v. Turns, 607 S.W.3d 692, 693 (Ky. 2020).

[195] ADAAA, *supra* note 1, at § 2(1)-(6).

[196] Chestnut v. Commonwealth, 250 S.W.3d 288, 296 (Ky. 2008).

[197] Brooks v Elderserve, Inc. v. Hagerty, 614 S.W.3d 903, 910 (Ky. 2021). Arguably, the ADAAA's revisions to the ADA were "fundamental" to the extent that they rejected the Supreme Court's prior interpretations of its unchanged definitional terms.

[198] Carter v. Bullitt Host, LLC, 471 S.W.3d 288, 296 (Ky. 2015).

Fifth, even if "the Kentucky legislature adopted the language in the KCRA in 1992 and intended it to reflect the language of the ADA at that time,"[199] that does not mean the legislature intended to incorporate the Supreme Court's later interpretations but not the ADA's later amendments. As the ADA's amendments expressly say, "the language of the ADA" *never* meant what the Supreme Court later said it meant.[200] Thus it cannot be correct that the Kentucky legislature meant the KCRA to be bound by cases like *Sutton* and *Toyota Motor*, because they were mistaken readings of "the language of the ADA at that time."[201] The best indicator of what the legislature intended is KRS 344.020(1), which says the purpose of the KCRA is to embody the policies of the ADA, which have only been reaffirmed by later amendment.[202]

Sixth, because "[t]he KCRA is to be interpreted with the ADA's purpose and interpretation in mind," courts must "consider the ADA when interpreting vague language in the KCRA."[203] The unchanged definition of "disability" in the KCRA remains as vague as the day it was enacted. Because it is vague, and because it is still identical to the definition in the amended ADA, courts should look to the ADA's amendments to clarify the KCRA's terms. For instance, where the KCRA uses the vague term "major life activities," courts should look to the ADA's list of examples to help define what the term means in the KCRA. There is no reason to look elsewhere, especially because Congress rejected conflicting judicial interpretations.[204]

Seventh, inconsistent interpretation of the KCRA and ADA complicates the statutory mission of the Kentucky Commission on Human Rights, the state agency that enforces the KCRA.[205] The KCHR is obligated by the statute to cooperate with the federal Equal Employment Opportunity Commission.[206] Under a work-sharing agreement, all disability discrimination claims filed in Kentucky are considered dual-filed with both agencies.[207] That agreement also requires the KCHR to apply post-

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[199] *Krueger*, *supra* note 101, at 494.

[200] ADAAA, *supra* note 1, at § 2(1)-(6).

[201] *Id.*

[202] At any rate, a literal application of the "language at that time" principle would mean the legislature intended to incorporate *neither* later legislative amendment *nor* later judicial interpretation, because neither existed yet in 1992.

[203] Barnett v. Central Kentucky Hauling, LLC, 617 S.W.3d 339, 340 (Ky. 2021).

[204] ADAAA, *supra* note 1, at § 2(1)-(6).

[205] *See* KRS § 344.190 (listing the administrative powers of the agency).

[206] KRS § 344.190(5).

[207] *See* EEOC, *The ADA: Your Responsibilities as an Employer*, https://www.eeoc.gov/publications/ada-your-responsibilities-employer (last visited May 12, 2023) ("This booklet explains the part of the ADA that prohibits job discrimination. This part of the law is enforced by the U.S. Equal Employment Opportunity Commission and State and local civil rights enforcement agencies that work with the Commission.").

amendment ADA standards when it investigates and prosecutes complaints.[208] Court decisions holding that the ADA and the KCRA are fundamentally different in scope and definition not only make that cross-agency cooperation impractical, but also effectively write out the requirement for cooperation from the state law. And this is not a conflict necessarily unique to Kentucky. It would arise in any state with an unamended state law modeled after the ADA and a similar relationship between its civil rights enforcement agency and the EEOC.[209]

Eighth, and finally, inconsistent interpretation of the ADA and KCRA complicates the civil adjudication of dual-filed complaints. Like in *Azzam*, plaintiffs often file claims of disability discrimination under both federal and state law.[210] In cases where the parties dispute a plaintiff's qualification as "disabled," courts must apply two different standards to the same facts, and engage in a lengthier, more complicated—perhaps even contradictory—analysis.[211] In *Grainger v. Hoskin & Muir*, for example, the Western District of Kentucky analyzed the same facts twice, first to determine if the plaintiff's foot injury qualified as a disability under the amended ADA and then again to determine if that injury qualified under the "former definition" KCRA.[212] The court, denying the defendant's motion to dismiss, concluded that the plaintiff had pleaded sufficient facts to state a claim under both laws, but took an additional six paragraphs to do it because it analyzed the KCRA claim separately.[213] Meanwhile, in *Watkins v. Shriners Hospital for Children*, the Eastern District similarly conducted lengthy, separate analyses to conclude that the plaintiff's cancer met the amended ADA's definition of "disability" but not the KCRA's unamended definition.[214] Based on the same facts, the court in *Watkins* denied summary judgment on the federal claim but granted it on the state claim.[215]

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[208] *See* Kentucky Commission on Human Rights, *Who We Are*, https://kchr.ky.gov/About/Pages/Who-We-Are.aspx (last visited May 12, 2023) ("Certified with substantial equivalency to…the U.S. Equal Employment Opportunity Commission, the Kentucky Commission on Human Rights also enforces the policies set forth in … The U.S. Americans with Disabilities Act and other federal civil rights laws.").

[209] The EEOC maintains work-sharing agreements with dozens of state and local "Fair Employment Practices Agencies" throughout the country. See Equal Employment Opportunity Commission, *EEOC-FEPA State and Local Contracts/Worksharing Agreements*, https://www.eeoc.gov/state-and-local-programs (last visited May 12, 2023). *See also* 29 C.F.R. § 1601.74(a) (listing all FEPAs, including the Kentucky Commission).

[210] *Azzam*, *supra* note 85, at 657 (identical claims under the ADA and KCRA).

[211] *See e.g.*, *Hopkins*, *supra* note 158, at *3 (analyzing identical ADA and KCRA claims under different standards).

[212] *Grainger*, *supra* note 158, at *2-5.

[213] *Id*. at *5.

[214] *Watkins*, *supra* note 158, at *5, 10.

[215] *Id*. at *11.

This double standard not only wastes judicial time, but it also encourages forum shopping because the same claim filed under the ADA alone in federal court could have a better chance of success than under an unamended state law in state court. Many states have a judicial policy against forum shopping[216] for a variety of reasons.[217] In Kentucky, the opposition to forum shopping arises from a sense of unfairness and unpredictability. The Kentucky Supreme Court has called "offensive" the possibility that a suit "for the same transaction…in a federal court instead of in a state court a block away should lead to a substantially different result."[218] Inconsistent interpretation frustrates not only this policy but also defeats the very purpose of state anti-discrimination laws when it pressures plaintiffs to seek remedies only under federal law or only in federal courts.

V. CONCLUSION

State and federal courts should interpret the Kentucky Civil Rights Act (and any similar state civil rights acts) consistently with the amended Americans with Disabilities Act. There is no "pre-amendment ADA" still in effect, and the Supreme Court cases that interpreted it too narrowly can no longer be cited as authority, whether a state statute has been amended identically or not. To correctly interpret unamended state laws, courts must incorporate post-amendment ADA provisions (as applied by federal courts)[219] or they will need to interpret state laws independently from federal case law.[220] Inconsistent interpretation frustrates the purpose of both state and federal anti-discrimination law, because it continues to impose rules that Congress said were contrary to the mission of the ADA, a mission shared by state law analogues. And, finally, inconsistency does a disservice to the victims of disability discrimination, because it makes the law unpredictable and unfairly benefits employers.

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[216] Hannah Mehrle, *Forum Shopping Within the United States Patent and Trademark Office*, 70 CASE W. RES. L. REV. 791, 799 (2020) ("Forum shopping occurs when a litigant picks a certain jurisdiction or court over another in order to get a more favorable result.").

[217] *See* Richard Maloy, *Forum Shopping? What's Wrong With That?*, 24 QUINNIPIAC L. REV. 25, 27 (2005) (describing different states' reasons for discouraging the practice).

[218] Fite & Warmath Const. Co., Inc. v. MYS Corp., 559 S.W.2d 729, 733 (Ky. 1977).

[219] *See, e.g.*, Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 318-319 (6th Cir. 2019) (abrogating cases applying pre-amendment case law to post-amendment claims under the ADA).

[220] Oklahoma's approach is ideal, and most consistent with a state statute's express purpose to further the policies of the ADA, but Iowa's independent approach is acceptable, too, because it similarly avoids the error of following federal case law that Congress declared should not be followed.