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Cover Page Footnote

Associate Member, 2014–2015, University of Cincinnati Law Review. The author would like to thank Professor Sandra Sperino at the University of Cincinnati College of Law for her invaluable help formulating this Comment's topic and Megan Milo for her unwavering encouragement.

EVERYBODY'S VAPING FOR THE WEEKEND: NICOTINE ADDICTION AS A WORKPLACE DISABILITY

*Matthew M. Allen**

*"I am currently trying to quit, will I be hired?
Unfortunately no. The use of the patch or other cessation tools will
generate a positive test and thus nullify any job offer."
- Mercy Memorial Hospital System: Nicotine Hiring Policy¹*

I. INTRODUCTION

"The changing patterns and extent of tobacco use are a pertinent aspect of the tobacco-health problem," concluded the groundbreaking 1965 Surgeon General's Advisory Committee's report on the hazards of cigarette smoking.² In the fifty years since the Surgeon General's report, the "patterns and extent of tobacco use" have continued to evolve throughout American society. Although largely on the decline, cigarette smoking rates have fluctuated over the years and vary greatly depending on age, race, gender, and other socio-economic factors.³ The reluctance of Americans to give up tobacco, regardless of its well-known negative health effects, "is maintained primarily by dependence on nicotine."⁴ Today, American society faces the next epoch of tobacco use and nicotine addiction: the electronic cigarette.

The soaring popularity of electronic cigarettes, which some financial analysts currently estimate to be a 2.5 billion dollar industry,⁵ begets infinite questions for American lawmakers, health advocates, and the general public. One study recently estimated that 288 unique electronic cigarette brands were available for sale to the American public in 2012; by 2014, that number nearly doubled to 466 unique electronic cigarette

* Associate Member, 2014–2015, *University of Cincinnati Law Review*. The author would like to thank Professor Sandra Sperino at the University of Cincinnati College of Law for her invaluable help formulating this Comment's topic and Megan Milo for her unwavering encouragement.

1. *Nicotine Free New Hiring Policy*, MERCY MEMORIAL HOSP. SYS., <http://www.mercymemorial.org/Main/NicotineFreeFAQ.aspx> (last visited Nov. 2, 2014).

2. U.S. DEP'T HEALTH, EDUC. & WELFARE, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICES* 25 (1964).

3. *Current Cigarette Smoking Among Adults in the United States*, CTR. DISEASE CONTROL & PREVENTION., http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/ (last visited Nov. 2, 2014).

4. Karl Olov Fagerstrom et al., *Nicotine Addiction and its Assessment*, 69 *EAR NOSE THROAT J.* 763, 763 (1990).

5. Mike Esterl, *Big Tobacco's E-Cigarette Push Gets a Reality Check*, *WALL ST. J.* (Aug. 26, 2014), <http://online.wsj.com/articles/big-tobaccos-e-cig-push-gets-a-reality-check-1409078319>.

brands.⁶ The rise of electronic cigarette consumption will almost certainly usher in a tidal wave of complex litigation. Although there are many potential litigation issues developing around the electronic cigarette industry, this Comment will focus on the conflict between employees who consume electronic cigarettes as a novel form of nicotine replacement therapy and employers who subject employees and potential employees to conditional nicotine tests.

Since the rise of modern tobacco regulation began in the mid 1960's, so-called smoker's rights groups, often funded by the tobacco industry, have publically criticized government and employer tobacco regulation as a violation of civil liberties.⁷ Numerous lawsuits have been filed in an effort to protect smoker rights.⁸ In virtually every instance, such lawsuits have failed. If the current legal landscape remains unchanged, it is highly improbable that active tobacco consumers will ever enjoy a form of legal protection in most jurisdictions.

However, by transitioning the legal argument from protecting current smokers to protecting nicotine addicts, who are trying to quit smoking by using various forms of nicotine replacement therapy, different results may occur. Individuals attempting to quit traditional cigarettes by switching to electronic cigarettes may potentially enjoy a form of legal protection under the Americans with Disabilities Act (ADA)—a law enacted by Congress to “ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream.”⁹

Enactment of the 2008 Americans with Disabilities Amendment Act (ADAAA) significantly expanded the ADA's definition of disability.¹⁰ Since passage of the ADAAA in 2008, no lawsuit has challenged the prevailing belief that nicotine addiction is not a disability under the law. This Comment argues that the ADAAA's statutory configuration,

6. Shu-Hong Zhu et al., *Four Hundred and Sixty Brands of E-Cigarettes and Counting: Implications for Product Regulation*, 23 TOBACCO CONTROL iii3 (2014).

7. *National Smokers' Alliance Exposed*, AM. NONSMOKERS' RIGHTS, <http://www.no-smoke.org/getthefacts.php?id=95> (last visited Nov. 2, 2014).

8. See *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 465 (S.D.N.Y. 2004).

9. President George H. Bush, Remarks of President George Bush at the Signing of the Americans with Disabilities Act, (July 26, 1990), available at http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html.

10. See Amelia Michele Joiner, *The ADAA: Opening the Floodgates*, 47 S.D. L. REV. 331, 360–61 (2010) (“The ADAAA directs that “[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals under this [Act], to the maximum extent permitted by the terms of this [Act].” In fact, the term “broaden” appears in the findings and purposes section of the ADAAA “no less than five times.”).

coupled with recent case law developments, can be interpreted to protect nicotine addicts who consume electronic cigarettes during smoking cessation attempts. Nicotine withdrawal typically manifests several mental and physical impairments, which could be considered disabilities under the ADA. Therefore, if nicotine addiction (as described in this Comment) qualifies as a disability under the ADA, electronic cigarette consumption should, for purposes of aiding smoking cessation, be extended to employees as a reasonable accommodation under the ADA.

Part II of this Comment presents a relevant contextual understanding of electronic cigarettes and focuses on the current health debate surrounding the industry. Part III introduces the increasingly popular employer practice of subjecting employees and potential employees to a conditional nicotine test. Part IV provides the relevant ADA standards and applicable case law. Part V argues that nicotine addiction, as manifested during the nicotine withdrawal period, constitutes a disability under current ADA standards. Finally, Part VI asserts that employers should, in certain circumstances, allow electronic cigarette consumption as a reasonable accommodation for individuals substantially impaired by a nicotine addiction.

II. ELECTRONIC CIGARETTES

A. Background

The first electronic cigarette can be traced to a patent filed by Herbert A. Gilbert in 1963.¹¹ Gilbert's patent described his invention, titled *Smokeless Non-Tobacco Cigarette*, as "an object to provide a safe and harmless means for and method of smoking by replacing burning tobacco and paper with heated, moist, flavored air; or by inhaling warm medication into the lungs in case of a respiratory ailment under direction of a physician."¹² Gilbert's conception of a smokeless, electronically powered cigarette lay dormant for years.¹³ Instead of seizing the opportunity when it was first realized, tobacco companies pursued other alternative cigarette devices, such as filter and low-tar cigarettes, to combat the wave of criticism and regulation.¹⁴

11. U.S. Patent No. 3200819 A (filed Apr. 17, 1963).

12. *Id.*

13. See Margret Sampson & Jeff Gritton, *Intellectual Property and the E-Cigarette*, COR. COUNS. (Sept. 24, 2014), <http://www.corpcounsel.com/home/id=1202671171378/Intellectual-Property-and-the-Ecigarette-Boom?mcode=1202617073467&curindex=0&slreturn=2014091916194...>

14. See Janine K. Cataldo & Ruth E. Malone, *False Promises: The Tobacco Industry, "Low Tar" Cigarettes, and Older Smokers*, 56 J. AM. GERIATRICS SOC'Y 1716, 1723 (2008).

Credit for inventing the modern electronic cigarette is frequently attributed to Hon Lik, a Chinese pharmacist.¹⁵ In 2003, Lik, through his company Ruyan Group, developed and began selling the modern electronic cigarette in China.¹⁶ By 2007, Lik and other Chinese companies began exporting electronic cigarettes to the United States.¹⁷ Lik first patented his electronic cigarette design in 2010; since then, nearly one hundred electronic cigarette patents have been filed with the USPTO U.S. patent services.¹⁸ What began as a cottage industry, with transactions predominantly occurring over the Internet, quickly turned into a multibillion-dollar enterprise, with little signs of slowing down.¹⁹

The engineering and technical characteristics of electronic cigarettes could fill volumes of research. In fact, the first wave of litigation surrounding electronic cigarettes stemmed from patent disputes.²⁰ The U.S. Court of Appeals for the District of Columbia proffered the following summary of how electronic cigarettes typically work:

Electronic cigarettes are battery-powered products that allow users to inhale nicotine vapor without fire, smoke, ash, or carbon monoxide. Designed to look like a traditional cigarette, each e-cigarette consists of three parts: the nicotine cartridge, the atomizer or heating element, and the battery and electronics. The plastic cartridge serves as the mouthpiece and contains liquid nicotine, water, propylene glycol, and glycerol. The atomizer vaporizes the liquid nicotine, and the battery and electronics power the atomizer and monitor air flow. When the user inhales, the electronics detect the air flow and activate the atomizer; the liquid nicotine is vaporized, and the user inhales the vapor.²¹

Although the technical structures of most electronic cigarette brands are generally comparable, that is where most similarities end. Electronic cigarette diversity can be quickly understood by considering the array of colloquial terms used for electronic cigarette devices. Depending on what brand is being used, what region it is used in, or who is using it,

15. See Barbra Demick, *A High-Tech Approach to Getting a Nicotine Fix*, L.A. TIMES (Apr. 25, 2009), <http://articles.latimes.com/2009/apr/25/world/fg-china-cigarettes25>.

16. See Margret Sampson & Jeff Gritton, *Intellectual Property and the E-Cigarette Boom*, CORP. COUNS (Sept. 24, 2014), <http://www.corpcounsel.com/id=1202671171378/Intellectual-Property-and-the-E-cigarette-Boom?slreturn=20150521135000>.

17. *Id.*

18. *Id.*

19. See Cyrus K. Yamin et al., *E-Cigarettes: A Rapidly Growing Internet Phenomenon*, 153 ANNALS INT'L MED. 607 (2010).

20. See Kit Chellel, *Imperial Tobacco Unit Sparks E-Cig Patent Dispute in U.S. Suits*, BLOOMBERG (Mar. 11, 2014 7:59 AM), <http://www.bloomberg.com/news/2014-03-11/imperial-tobacco-unit-sparks-e-cig-patent-dispute-in-u-s-suits.html>.

21. *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 893 (D.C. Cir. 2010).

electronic cigarettes are referred to as “e-cigs,” “hookah sticks,” “vape pens,” and many other names.²² A major difference between various electronic cigarettes is their concentration of liquid nicotine. Electronic cigarette nicotine concentrations typically range from 0 to 24 milligrams.²³ The range of nicotine concentrations allows electronic cigarette users to actively control the amount of nicotine they consume which, argue electronic cigarette advocates, can assist in smoking cessation.

B. Growing Popularity

The soaring popularity of electronic cigarettes represents an unprecedented advent of alternative tobacco use. The proportion of American adults who tried electronic cigarettes skyrocketed from 0.6 percent in 2009 to 2.7 percent in 2010²⁴ and electronic cigarette sales across the United States have exploded in recent years.²⁵ Some financial analysts speculate that electronic cigarette sales will surpass traditional cigarette sales by 2047.²⁶ Few comprehensive sociological studies have been conducted to fully examine the common characteristics of electronic cigarette users; most reports come from general surveys conducted by governmental regulatory agencies such as the Centers for Disease Control (CDC) or the Food and Drug Administration (FDA).²⁷ However, it can be said with some certainty that electronic cigarettes consumers are typically young individuals or traditional smokers, who use electronic cigarettes as a novel cessation devise.²⁸

According to the 2013 National Survey on Drug Use and Health, the most recent survey published by the U.S. Department of Health and Human Services gauging national tobacco trends, 66.6 million Americans over the age of 12 use tobacco products, which amounts to

22. See Matt Richtel, *E-Cigarettes, by Other Names, Lure Young and Worry Experts*, N.Y. TIMES (Mar. 4, 2014), http://www.nytimes.com/2014/03/05/business/e-cigarettes-under-aliases-elude-the-authorities.html?_r=0.

23. *Id.*

24. See Annette K. Regan et al., *Electronic Nicotine Delivery System: Adult Use and Awareness of the 'E-Cigarette' in the USA*, 22 TOBACCO CONTROL 19 (2013).

25. See *Electronic Cigarettes Electronic International Group Announces 1st Half Result up 875%*, BLOOMBERG (Aug. 20, 2014 6:35 PM), <http://www.bloomberg.com/article/2014-08-20/aiADJuu4Aa4.html>.

26. See Andrew Goodman, *E-Cigarettes Are Smoking Hot – Four Ways to Invest in Them*, FORBES (Jan. 5, 2013 11:59 AM), <http://www.forbes.com/sites/agoodman/2013/12/05/e-cigarettes-are-smoking-hot-4-ways-to-approach-them/>.

27. *About One in Five U.S. Adult Cigarette Smokers have Tried an Electronic Cigarette*, CTR. DISEASE CONTROL & PREVENTION (Feb. 28, 2013), http://www.cdc.gov/media/releases/2013/p0228_electronic_cigarettes.html.

28. See Maciej L. Goniewicz et al., *Patterns of Electronic Cigarette Use and User Beliefs about their Safety and Benefits: An Internet Survey*, 32 DRUG & ALCOHOL REV. 133, 133–35 (2013).

25.5 percent of the American population.²⁹ That is a striking figure. However, perhaps more concerning for health advocates is the overwhelming inability of that 27.4 percent of the population to break their nicotine addiction. According to one study:

Seventy percent of smokers say they would like to quit, and every year, 40% do quit for at least 1 day. Some highly addicted smokers make serious attempts to quit but are able to stop only for a few hours. Moreover, the 80% who attempt to quit on their own return to smoking within a month, and each year, only 3% of smokers quit successfully.³⁰

For years, pharmaceutical companies, the FDA, and other health advocates have searched for effective nicotine replacement therapies to help tobacco users quit, with mixed results.³¹

The FDA has acknowledged that most individuals “experience symptoms of nicotine craving and withdrawal” while attempting to quit tobacco use.³² “These symptoms—which include an urge to smoke, depression, trouble sleeping, irritability, anxiety, and increased appetite—may occur no matter which method of stopping you choose.”³³ International and domestic efforts to curb the symptoms of nicotine addiction during withdrawal periods have fostered a massive smoking cessation industry that “is estimated to be worth \$1.9 billion a year and is expected to reach \$2.3 billion by 2016.”³⁴ A 2014 marketing survey found that electronic cigarettes are currently the most popular smoking cessation devices in the United States.³⁵ It is estimated that 57 percent of American smokers use electronic cigarettes as a cessation device, more than those using over the counter products and prescription

29. U.S. DEPT. HEALTH & HUMAN SERV., SUBSTANCE ABUSE AND MENTAL HEALTH SERVICE ADMINISTRATION, RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 47 (2013) (“55.8 million persons (21.3 percent of the population) were current cigarette smokers; 12.4 million (4.7 percent) smoked cigars; 8.8 million (3.4 percent) used smokeless tobacco; and 2.3 million (0.9 percent) smoked tobacco in pipes”).

30. Neal L. Benowitz, *Nicotine Addiction*, 263 NEW ENG. J. MED. 2295 (2010).

31. See Shu Hong Zhu et al., *Interventions to Increase Smoking Cessation at the Population Level: How much Progress has Been Made in the Last Two Decades?*, 21 TOBACCO CONTROL 110 (2012).

32. *FDA 101: Smoking Cessation Products*, U.S. FOOD & DRUG ADMIN. <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm198176.htm> (last visited Nov. 6, 2014).

33. *Id.*

34. Basharut A. Syed & Kitika Chaudhari, *Smoking Cessation Drugs Market*, 12 NATURE REV. DRUG DISCOVERY 97, 98 (2013).

35. *The Impact of Electronic Cigarettes on the Smoking Cessation Market: What Pharam Marketers Need to Know*, KANTER MEDIA, http://pages.kantarmediahealthsurvey.com/rs/kantarmediasrds/images/Kantar-Media_e-cigarette-impact-201408.pdf?mkt_tok=3RkMMJWWfF9wsRoku6vNZKXonjHpfX56usrUK63IMI%2FOER3FOvrPUfGjI4ARMFil%2BSLDwEYGJlv6SgFSLXMMalu2LgKXBk%3D (last visited Nov. 6, 2014).

products combined.³⁶

Many tobacco consumers find existing nicotine replacement products ineffective. Although nicotine replacement therapies do, by most accounts, help smokers initially quit tobacco, many smokers are prone to relapse after a short period of time.³⁷ Some studies suggest that around 93 percent of tobacco consumers using over-the-counter nicotine replacement products, such as nicotine gum and the nicotine patch, return to smoking within six months.³⁸ As a result, many tobacco consumers have turned to electronic cigarettes as a novel form of nicotine replacement therapy.³⁹

It is crucial to stress that, currently, electronic cigarettes are not an approved form of nicotine replacement therapy by the FDA nor endorsed, as such, by vast majority of health experts. This Comment does not in any way suggest that electronic cigarettes are indisputably proven as a healthy or clinically proven form of nicotine replacement therapy. Regardless, the reality is that many more Americans are turning to electronic cigarettes in an effort to combat the oftentimes unsurpassable side effects of nicotine withdrawal.

C. Health Debate

As electronic cigarette consumption continues to gain momentum, it is only a matter of time before lawmakers enact comprehensive regulations governing the rapidly growing industry.⁴⁰ The principal justification for electronic cigarette regulation will hinge on public health concerns.⁴¹ However, the prevailing uncertainty surrounding the long-term health effects of electronic cigarette consumption complicates and calls into question the ability of lawmakers to regulate the industry.

36. *Id.*

37. See Thomas R. Kirchner et al., *Relapse Dynamics During Smoking Cessation: Recurrent Abstinence Violation Effects and Lapse-Relapse Progression*, 121 J. ABNORMAL PSYCHOLOGY 187 (2012).

38. See John R. Hughes et al., *A Meta-Analysis of the Efficacy of Over-the-Counter Nicotine Replacement*, 12 TOBACCO CONTROL 21, 25 (2003) (Study found that over a six-month period, only 7 percent of smokers using over the counter nicotine replacement therapies successfully quit tobacco).

39. Paul T. Harrell et al., *Electronic Nicotine Delivery Systems ("E-Cigarettes"): Review of Safety and Smoking Cessation Efficacy*, 115 OTOLARYNGOL HEAD & NECK SURGERY 381, 389 (2014) ("Estimates of the US population who have ever used e-cigarettes in 2010 ranged from 2% to 3%. A survey conducted in the beginning of 2012, before major televised e-cigarette advertisements, reported that about 8% had tried e-cigarettes with a 1% rate of current use; among current smokers, 32% had tried e-cigarettes and 6% used currently. Most report smoking cessation as the primary reason for use.").

40. See Elizabeth A. Harris, *29 States Seek Tighter E-Cigarette Regulations*, N.Y. TIMES (Aug. 8, 2014), http://www.nytimes.com/2014/08/09/business/29-states-seek-tighter-e-cigarette-regulations.html?_r=0.

41. See *FDA Warns of Health Risk Posed by E-Cigarettes*, U.S. FOOD & DRUG ADMIN (Sept. 17, 2013), <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm173401.htm>.

The electronic cigarette health debate can typically be segmented into three distinct categories.⁴² First, electronic cigarettes are not harmful to a person's health.⁴³ Second, electronic cigarettes may be harmful, but they are less harmful than traditional cigarettes.⁴⁴ Third, electronic cigarettes pose significant health risks and should not be used until further studies are conducted.⁴⁵

The first and third factions of the electronic cigarette health debate are typically outliers; no serious medical studies suggest that electronic cigarettes are conclusively safe and few argue that electronic cigarettes are inherently deadly. Most studies tend to conclude that electronic cigarettes are, at the very least, less harmful than traditional cigarettes, but these studies also caution that more research is needed.⁴⁶ There is little doubt that electronic cigarettes, specifically the liquid nicotine component, contain some harmful elements.⁴⁷ However as one study noted, "the level of potentially toxic compounds in e-cigarette vapor are 9-450-fold lower than those in the smoke from convectional cigarettes."⁴⁸

The underlying belief of some health experts and many individual consumers is that electronic cigarettes, if nothing else, are the lesser of two evils when compared to traditional cigarettes.⁴⁹ Individuals who continue smoking traditional cigarettes are almost certainly going to

42. See Sabrina Tavernise, *A Hot Debate Over E-Cigarettes as a Path to Tobacco, or From It*, N.Y. TIMES (Feb. 22, 2014), <http://www.nytimes.com/2014/02/23/health/a-hot-debate-over-e-cigarettes-as-a-path-to-tobacco-or-from-it.html>.

43. No serious medical studies claim that electronic cigarettes are entirely safe nor do the vast majority of electronic cigarette advocates. See *Electronic Cigarettes FAQs*, CONSUMER ADVOCATES FOR SMOKE-FREE ALT. ASS'N, http://casaa.org/FAQS_ecig.html (last visited Nov. 22, 2014) ("While anything containing nicotine cannot be called 100% safe, evidence from numerous studies strongly suggests that they are magnitudes safer than tobacco cigarettes.").

44. See Zachary Cahn & Michael Siegel, *Electronic Cigarettes as harm Reduction Strategy for Tobacco Control: A Step Forward or a Repeat of Past Mistakes?*, 32 J. PUB. HEALTH POLICY 16 (2011) ("We conclude that electronic cigarettes show tremendous promise in the fight against tobacco-related morbidity and mortality. By dramatically expanding the potential for harm reduction strategies to achieve substantial health gains, they may fundamentally alter the tobacco harm reduction debate.").

45. See Priscilla Callahan-Lyon, *Electronic Cigarettes: Human Health Effects*, 23 TOBACCO CONTROL ii36, ii38 (2014) ("Although e-cigarettes have potential advantages over traditional cigarettes, there are many deficiencies in the available data. Differences in product engineering, components and potential toxicities make it difficult to discuss e-cigarettes as a single device. E-cigarettes may be useful in facilitating smoking cessation, but definitive data is lacking. E-cigarettes may provide a less harmful source of nicotine than traditional cigarettes, but evidence of decreased harm with long-term use is not available.").

46. See *Id.*

47. See Jean Francois Etter et al., *Analysis of Refill Liquids for Electronic Cigarettes*, 108 ADDICTION 1671 (2013).

48. Maciej Lukasz Goniewicz et al., *Levels of Selected Carcinogens and Toxicants in Vapour from Electronic Cigarettes*, 23 TOBACCO CONTROL 133, 132 (2013).

49. See Amy L. Fairchild et al., *The Renormalization of Smoking? E-Cigarettes and the Tobacco "Endgame"*, 379 NEW ENG. J. MED. 293, 295 (2014).

suffer from severe medical ailments caused by smoking.⁵⁰ The prevailing rationale amongst electronic cigarette advocates is that switching to electronic cigarettes, at a minimum, cannot be any more harmful than continued consumption of traditional cigarettes.⁵¹ The outcome of the electronic cigarette health debate will ultimately depend on further longitudinal studies. However, one thing is certain: many Americans will continue to consume electronic cigarettes, as they do traditional cigarettes, regardless of long-term effects.

It should be noted that as electronic cigarette consumption has grown in popularity, poison control centers have experienced increased reports of nicotine poisoning.⁵² Incidents of nicotine poisoning typically arise from ingestion of the liquid nicotine used to refill various electronic cigarettes.⁵³ The majority of these incidents occur when children accidentally consume liquid nicotine.⁵⁴ Lawmakers have begun the process of enacting legislation that will “child proof” liquid nicotine containers.⁵⁵ Efforts to protect children and prevent nicotine poisoning are laudable. However, it is critical to distinguish between harms caused by accidental ingestion of liquid nicotine in its purest form and harms caused by adults actively consuming electronic cigarettes. Evidence suggests that nicotine poisoning can also occur from consuming approved forms of nicotine replacement therapy such as nicotine gum, especially amongst children.⁵⁶

In the legal context, uncertainty surrounding the health effects of electronic cigarettes first manifested in *Sottera, Inc. v. Food & Drug Admin.*,⁵⁷ where the U.S. Court of Appeals for the District of Columbia held that the FDA could not regulate electronic cigarettes under the

50. See generally Michael J. Thun et al., *50-Year Trends in Smoking Related Morality in the United States*, 368 *NEW ENG. J. MED.* 315 (2013).

51. See Amy L. Fairchild & James Colgrove, Op-Ed, *The Case for Tolerating E-Cigarettes*, *N.Y. TIMES* (Dec. 8, 2013), <http://www.nytimes.com/2013/12/09/opinion/the-case-for-tolerating-e-cigarettes.html>.

52. See Matt Richtel, *Selling a Poison by the Barrel: Liquid Nicotine for E-Cigarettes*, *N.Y. TIMES* (Mar. 23, 2014), <http://www.nytimes.com/2014/03/24/business/selling-a-poison-by-the-barrel-liquid-nicotine-for-e-cigarettes.html>.

53. *Id.*

54. See, *New CDC Study Finds Dramatic Increase in E-Cigarette-Related calls to Poison Centers*, *CENT. DISEASE CONTROL & PREVENTION* (Apr. 3, 2014), <http://www.cdc.gov/media/releases/2014/p0403-e-cigarette-poison.html>.

55. Press Release, Senator Sherrod Brown, With 300 Percent Increase in Accidental Poisonings Liked to Liquid Nicotine, Sen. Brown Announces Plan to Protect Children (July, 28, 2014), <http://www.brown.senate.gov/newsroom/press/release/with-300-percent-increase-in-accidental-poisonings-linked-to-liquid-nicotine-sen-brown-announces-plan-to-protect-children>.

56. See S.C. Smolinske, *Cigarette and Nicotine Chewing Gum Toxicity in Children*, 8 *HUMAN & EXPERIMENTAL TOXICOLOGY* 27 (1988).

57. *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 293 (D.C. Cir. 2010).

Federal Food, Drug, and Cosmetic Act (FDCA).⁵⁸ In *Sottera*, the plaintiffs, electronic cigarette manufacturers, sought to enjoin the FDA from preventing the importation of electronic cigarettes into the United States.⁵⁹ In an effort to prevent the importation of electronic cigarettes, the FDA had invoked the FDCA's power to deny the importation of "adulterated, misbranded or unapproved drug/device combinations."⁶⁰

The district court held that the FDA "cannot regulate customarily marketed tobacco products under the FDCA's drug device provisions."⁶¹ However, the FDA "can regulate tobacco products marketed for therapeutic purposes under those provisions and that it can regulate customarily marketed tobacco products under the Tobacco Act."⁶² Consequently, the *Sottera* holding significantly limited the FDA's ability to regulate the electronic cigarette industry.⁶³ Unlike the FDCA, which grants the FDA the power to conduct rigorous clinical testing, the Tobacco Act merely allows the FDA to "restrict how the products are marketed, manufactured, and distributed."⁶⁴

Since the Surgeon General's seminal 1963 report, federal and state lawmakers have taken years to pass comprehensive regulations of traditional cigarette consumption.⁶⁵ President Barack Obama, a former smoker himself, recently acknowledged that it took nearly fifteen years to pass the 2009 Family Smoking Prevention and Tobacco Control Act, the most recent comprehensive federal regulation of the tobacco industry.⁶⁶ In April of 2014, the FDA proposed legislation that would compel electronic cigarette manufacturers to, among other things, "report product and ingredient listings" and only "market products after FDA review."⁶⁷

However, the FDA's proposed legislation has been wildly criticized and will likely take years to implement.⁶⁸ Many critics argue that the FDA

58. 21 U.S.C. § 315 (2012).

59. *Sottera*, 627 F.3d at 893.

60. *Id.*

61. *Id.* at 898.

62. *Id.*

63. *Id.*

64. Laura Kirshner, *D.C. Circuit Rules FDA Cannot Block E-Cigarette Imports - Sottera, Inc. v. FDA*, 37 AM. J. L. & MED. 194, 198 (2011).

65. See Elizabeth Brown Alphin, *Federal Tobacco Regulation: The Failure of FDA Jurisdiction over Tobacco and the Possibility of Compromise through A Congressional Regulatory Scheme*, 40 BRANDEIS L.J. 121 (2001).

66. President Barack Obama, Remarks by the President at the Signing of the Family Smoking Prevention and Tobacco Control Act (June 22, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-signing-family-smoking-prevention-and-tobacco-control-act>.

67. *FDA Proposes to Extend its Tobacco Authority to Additional Tobacco Products, Including E-Cigarettes*, U.S. FOOD & DRUG ADMIN. (Apr. 24, 2014), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm394667.htm>.

68. Lalita Clozel, *FDA to Begin Regulating E-Cigarettes*, L.A. TIMES (Apr. 23, 2014),

should not “jump the gun” with excessive regulating before further studies are conducted.⁶⁹ As one critic stated, “the FDA should ensure a minimum safety threshold while keeping e-cigarettes available to those that need them.”⁷⁰

As lawmakers understandably struggle to pass a comprehensive regulatory scheme, private employers will likely blaze the frontier in electronic cigarette regulation. As a result, courts will have to determine how electronic cigarette consumption fits within the parameters of existing law.

III. NICOTINE DISCRIMINATION AT THE WORKPLACE

As “the patterns and extent of tobacco” consumption has changed over the last five decades, laws regulating tobacco use have also changed. From banning cigarette advertisements on television,⁷¹ to enacting wide-reaching public smoking’s bans,⁷² American lawmakers have struggled to stay one step ahead of the tobacco industry.⁷³ Since the American public first recognized the dangerous health effects of cigarette smoking, efforts to prevent smoking at the workplace and in public areas have faced numerous obstacles.⁷⁴ However, significant progress has been made largely due to increased awareness of second hand smoke.⁷⁵ Office buildings, restaurants, bars, factories, and

<http://www.latimes.com/nation/la-na-ecigs-fda-20140424-story.html>.

69. See Zachary Cahn & Michael Siegel, *Electronic Cigarettes as a Harm Reduction Strategy for Tobacco Control: A Step Forward or a Repeat of Past Mistakes?*, 32 J. PUB. HEALTH & POL’Y 16, 16–31 (2011) (“The push to ban electronic cigarettes may repeat the mistakes of the past in the name of avoiding them. Regulatory policy for electronic cigarettes and other novel nicotine products must be guided by an accurate understanding of how they compare to tobacco cigarettes and NRT [nicotine replacement therapy] in terms of reducing toxic exposures and helping individual smokers quit.”).

70. Nick Dantonio, *Vape Away: Why A Minimalist Regulatory Structure Is the Best Option for FDA E-Cigarette Regulation*, 48 U. RICH. L. REV. 1319, 1367 (2014).

71. 15 U.S.C.A. § 1331 (1965).

72. Public smoking bans are enacted and enforced by the states. See OHIO REV. CODE ANN. § 3791.031 (2014).

73. See Alan E. Scott, *The Continuing Tobacco War: State and Local Tobacco Control in Washington*, 23 SEATTLE U. L. REV. 1097 (2000) (“[D]espite its enormous toll on the public health and the large number of underage smokers, tobacco products continue to enjoy relative immunity from regulation. This immunity seems to stem from the tobacco industry’s vast financial resources, aggressive opposition to all forms of regulation, and unparalleled intrusion into the political process. Because of the tobacco industry’s influence over federal and state legislators, it is extremely difficult to pass effective tobacco control regulation at federal and state levels.”).

74. See Christiana V. Mangurian & Lisa A. Bero, *Lessons Learned From the Tobacco Industry’s Efforts to Prevent the Passage of Workplace Smoking Regulation*, 20 AM. J. PUB. HEALTH 1926, 1926 (2000) (“Three main strategies to prevent regulation were to (1) develop a coalition of business interests to oppose the regulation, (2) increase economic arguments between hearings, (3) increased media coverage.”).

75. See Jessica Niezgodna, *Kicking Ash(Trays): Smoking Bans in Public Workplaces, Bars, and Restaurants Current Laws, Constitutional Challenges, and Proposed Federal Regulation*, 33 J. LEGIS.

workshops all across the country that were once filled with smoke have now largely cleared the air and appropriately exiled smokers to outside corners and street curbs.⁷⁶

In recent years, the most significant change in workplace smoking regulations has been the growing prevalence of employer's testing job applicants and current employees for nicotine.⁷⁷ Many states, such as Kentucky, have enacted legislation prohibiting employers from refusing to hire individuals "because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking."⁷⁸ However, more and more private employers around the country have made employment conditional on applicants passing nicotine tests.⁷⁹ Employer concerns about productivity and the rising cost of healthcare may create an incentive to further standardize this practice.⁸⁰

Nicotine testing has been greatly scrutinized by so-called smokers' rights organizations, tobacco companies, tobacco friendly lawmakers, and privacy advocates.⁸¹ Even more concerning than employers refusing to hire tobacco-consuming employees is that individuals trying to quit tobacco, by using nicotine replacement therapies, are also subject to detrimental employment actions under most no-nicotine policies.⁸² Most employers consider a positive test induced by nicotine replacement therapy products as the equivalent of traditional cigarette smoking or chewing tobacco.⁸³

For example, the Carroll Hospital Center in Maryland recently announced a no-nicotine hiring policy to take effect in 2015. The

99 (2006).

76. *Id.*

77. A.G. Sulzberger, *Hospitals Shift Smoking Bans to Smoker Bans*, N.Y. TIMES (Feb. 10, 2011), http://www.nytimes.com/2011/02/11/us/11smoking.html?pagewanted=all&_r=0.

78. KY. REV. STAT. § 344.040.

79. See Ashlea Ebeling, *More Employers Shun Tobacco Users*, FORBES (Mar 7, 2013 7:41 PM), <http://www.forbes.com/sites/ashleaebeling/2013/03/07/more-employers-shun-tobacco-users/>.

80. See Leslie Kwoh, *Warning: Smoking is Hazardous to Your Employment*, WALL ST. J. (Apr. 5, 2013), <http://online.wsj.com/articles/SB10001424127887323916304578404510897946472>.

81. *Lifestyle Discrimination in the Workplace Your Right to Privacy Under Attack*, AM. CIVIL LIBERTY UNION (March 12, 2002), https://www.aclu.org/racial-justice_womens-rights/lifestyle-discrimination-workplace-your-right-privacy-under-attack.

82. See Micah Berman & Rob Crane, *Mandating A Tobacco-Free Workforce: A Convergence of Business and Public Health Interests*, 34 WM. MITCHELL L. REV. 1651, 1674 (2008) ("Any testing mechanism should be able to distinguish between active tobacco users and those who are using only nicotine replacement therapies (NRT) such as nicotine patches or nicotine gum. Nicotine use alone does not impose substantial health costs on employers, and employees should be encouraged to use NRT products in their efforts to keep from smoking--not punished for doing so.")

83. See Ann Wallace Allen, *E-Cigarettes Prompt New Questions for Health-Focused Employers*, IDAHO BUSINESS REVIEW (July 9, 2014), <http://idahobusinessreview.com/2014/07/09/e-cigarettes-prompt-new-questions-for-health-focused-employers/>.

hospital's policy clearly states:

A nicotine user is any individual who uses nicotine products including, but not limited to, cigarettes, cigars, pipes and chewing tobacco. This policy also applies to e-cigarettes, which are regulated by the Food and Drug Administration as a nicotine product. Use of nicotine patches and nicotine gum also will contribute to a positive test result.”⁸⁴

Because the hospital's policy implements a pass-fail screening process, a former smoker trying to overcome a debilitating nicotine addiction with nicotine replacement therapy will be denied employment.⁸⁵ No-nicotine policies, such as Carroll Hospital Center's policy, send a frightening message to the thousands of Americans struggling with nicotine addiction. In essence, employers utilizing such policies indiscriminately tell former smokers that their efforts to quit are without merit. The legality and practicality of including a positive nicotine test derived from electronic cigarette consumption and other traditional forms of nicotine replacement therapy in an employer's pre-employment screening process will be a new legal frontier for this issue.

The privacy ramifications of making employment contingent on passing a test for a substance that has not been conclusively proven to be dangerous are an important consideration. However, the privacy argument will likely be an uphill battle for consumers hoping to use electronic cigarettes as a cessation tool in an effort to prevent employment termination. National precedent firmly indicates that “smokers do not share some immutable characteristic beyond their control and they do not require special protection by the courts because of vast discrimination against smokers or their political powerlessness.”⁸⁶ Furthermore, the United States District Court for the District of Maryland recently rejected, though on limited grounds, a plaintiff's claim that his former employer's nicotine test policy violated Massachusetts's privacy laws.⁸⁷ Therefore, electronic cigarette consumers and advocates will turn to alternative legal methods, in the hopes of preventing employers from taking adverse employment action against those who test positive for nicotine as a result of electronic cigarette consumption.

84. *Nicotine-Free Hiring Policy in 2015*, CARROLL HOSP. CTR., <http://www.carrollhospitalcenter.org/nicotine-faqs> (last visited Nov. 6, 2014).

85. *Id.*

86. *Gallagher v. City of Clayton*, 699 F.3d 1013, 1018 (8th Cir. 2012) *cert. denied*, 133 S. Ct. 2354, 185 L. Ed. 2d 1067 (U.S. 2013).

87. *Rodriguez v. EG Sys., Inc.*, 639 F. Supp. 2d 131, 134 (D. Mass. 2009) (Plaintiff “does not have a protected privacy interest in the fact that he is a smoker because he has never attempted to keep that fact private.”).

IV. THE AMERICANS WITH DISABILITIES ACT

A. *Background*

When Congress passed the ADA in 1990, it “acknowledged that discrimination against the disabled continues to be a serious problem in the United States.”⁸⁸ Intended as a broad piece of legislation, the ADA aimed at protecting the rights of disabled individuals in all aspects of life. The Act’s stated purpose was: “(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;” and “(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”⁸⁹ Unfortunately, enforcement and judicial interpretation of the ADA has proven to be anything but clear, comprehensive, and consistent.⁹⁰

The most prevalent portion of the ADA, and one of the most frequently litigated portions, protects disabled individuals in the workplace. Title I of the ADA states that “no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁹¹ When bringing an ADA employment discrimination lawsuit, plaintiffs have the burden of proving a four-prong prima facie case.

Although conceptions of the ADA prima facie case vary slightly depending on jurisdiction, plaintiffs typically have to prove that: “(1) [the] plaintiff’s employer is subject to the ADA; (2) [the] plaintiff was disabled within the meaning of the ADA; (3) [the] plaintiff was otherwise qualified to perform the essential functions of her job, with or without reasonable accommodation; and (4) [the] plaintiff suffered adverse employment action because of her disability.”⁹² The historical problem for courts considering ADA employment lawsuits has been determining what exactly constitutes a disability under the ADA.⁹³

88. Reese John Henderson Jr., *Addiction as Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act of 1990*, 44 VAND. L. REV. 713 (1991).

89. 42 U.S.C.A. § 12101 (2009).

90. Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1814 (2005).

91. 42 U.S.C.A. § 12112(a) (2009).

92. *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 198 (2d Cir. 2004).

93. See Elizabeth A. Crawford, *The Courts’ Interpretations of A Disability Under the Americans with Disabilities Act: Are They Keeping Our Promise to the Disabled?*, 35 HOUS. L. REV. 1207, 1208 (1998) (“The definition of “disability” in the ADA may appear to be deceptively simple after an initial reading. Upon closer examination, however, it immediately becomes clear that the most difficult question of all is, perhaps, the first one asked—who are those individuals covered by the ADA? Sifting

As passed in 1990, the ADA defined disability as “(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 impairment.”⁹⁴ Unfortunately, this broad definition of disability “provided little guidance to courts, and its application has failed to achieve the Act's stated goal.”⁹⁵ The judiciary’s inability to establish a consistent interpretation of what constitutes a disability under the ADA is, as some experts have argued, representative of the “continuing existence of unfair and unnecessary discrimination and prejudice that denies people with disabilities the opportunity to compete on an equal basis.”⁹⁶

B. 2008 Amendments

In the early 2000s a series of Supreme Court decisions significantly narrowed the breadth of protection available under the ADA. In *Sutton v. United Airlines, Inc.*, the Supreme Court held that the ADA did not protect airline pilots who suffered from severe myopia, even though they were able to improve their vision using corrective measures such as contact lenses.⁹⁷ The Supreme Court held:

A “disability” exists only where an impairment “substantially limits” a major life activity, not where it “might,” “could,” or “would” be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently “substantially limits” a major life activity.⁹⁸

In *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, the Court extended its limited interpretation of the ADA in *Sutton* by holding that the ADA definitions of disability, substantially limits, and major life activity “need to be interpreted strictly to impose create a demanding standard as disabled.”⁹⁹ The Court’s *Sutton* and *Toyota Motor* holdings were widely criticized for contradicting the ADA’s intent of providing broad

through the terms of the ADA is akin to walking through a maze, as every definition of every term has elements that must be defined.”)

94. 42 U.S.C.A. § 12112(a) (2009).

95. Paul R. Klein, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 CASE W. RES. L. REV. 467, 468 (2010).

96. 42 U.S.C.A. § 12101(8) (2009).

97. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 2146–47, 144 L. Ed. 2d 450 (1999), overturned due to legislative action (2009).

98. *Id.* at 482.

99. *Id.*

protection for disabled individuals.¹⁰⁰

In an effort to ameliorate this narrow application of the ADA, President George W. Bush signed into law the ADA Amendment Acts of 2008 (ADAAA).¹⁰¹ “The ADA Amendments Act made important changes to the ADA’s definition of “disability,” making it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute.”¹⁰² Enactment of the ADAAA expanded the definition of disability by significantly broadening the “major life activities” prong of defining a disability.¹⁰³

C. Addiction and the ADAAA

One of the most unique, and at times controversial, disabilities potentially covered under the ADAAA is addiction.¹⁰⁴ Statutorily, the ADAAA offers some protection to individuals who have struggled with addiction; notably, an entire section of the ADAAA’s employment provisions is devoted to the illegal use of drugs and alcohol.¹⁰⁵ The ADAAA clearly states that individuals currently using illegal drugs do not qualify as disabled.¹⁰⁶

However, the ADAAA grants some protection for individuals who: (1) have completed a rehabilitation program and are no longer using illegal drugs; (2) are currently enrolled in a rehabilitation program and are no longer using illegal drugs; or (3) have been erroneously regarded as using illegal drugs.¹⁰⁷ Historically, courts have been reluctant to extend protection to individuals who bring claims of addiction discrimination under the ADA.¹⁰⁸

In 2003, the Supreme Court decided its first opinion considering an ADA addiction disability claim in *Raytheon Co. v. Hernandez* by reversing a lenient Circuit Court interpretation of the ADA’s addiction provisions.¹⁰⁹ In *Raytheon*, the plaintiff, a twenty-five year employee of

100. ADA Amendments Act of 2008, Pub. L. No. 110–325, § (2)(a)(4), 122 Stat. 3553 (2008).

101. See Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U.L. REV. COLLOQUY 217 (2008).

102. See Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667 (2010).

103. 42 U.S.C.A. § 12102 (2009).

104. See Reese John Henderson Jr., *Addiction As Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act of 1990*, 44 VAND. L. REV. 713 (1991).

105. 42 U.S.C.A. § 12114 (2009).

106. *Id.* at § 12114(a).

107. *Id.* at § 12114(b).

108. See *Hoffman v. MCI Worldcom Commc'ns, Inc.*, 178 F. Supp. 2d 152, (D. Conn. 2001) (“Drug use, however, is not addiction, and addiction is not necessarily a disability.”).

109. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003).

the defendant, voluntarily resigned after testing positive for cocaine.¹¹⁰ Two years later, after rehabilitating himself, the plaintiff reapplied to work at defendant's company.¹¹¹ The plaintiff's application was rejected.¹¹²

Subsequently, the plaintiff brought suit under the ADA alleging the defendant violated the ADA by denying his application based on past drug use.¹¹³ The defendant argued that its policy—to not rehire employees previously discharged for conduct violations—was a neutral policy that did not violate the ADA.¹¹⁴ The district court, without comment, granted defendant's motion for summary judgment.¹¹⁵ On appeal, in *Hernandez v. Hughes Missile Sysm.*, the Ninth Circuit reversed the district court's grant of summary judgment holding that the defendant's "policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction."¹¹⁶

After granting certiorari, the Supreme Court reversed the Ninth Circuit's holding, reasoning that the defendant was entitled to summary judgment because its "no-rehire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules."¹¹⁷ This holding is illustrative of the judiciary's reluctance to find employers liable under the ADA for implementing harsh no-hire or termination policies against individuals who have struggled with addiction.

D. ADA Precedent Regarding Nicotine as an Addiction

The argument that nicotine addiction should be considered a disability under the ADA is not without precedent. In *Stevens v. Inland Waters, Inc.*, a Michigan appellate court affirmed a trial court's holding that nicotine addiction is not a disability.¹¹⁸ In *Stevens*, the plaintiff was fired from his job as a security guard for repeatedly smoking inside the

110. *Id.* at 46.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 53.

115. *Id.* at 48.

116. *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030, 1036 (9th Cir. 2002) *vacated sub nom.* *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003).

117. *Raytheon*, 540 U.S. at 54–55.

118. *Stevens v. Inland Waters, Inc.*, 220 Mich. App. 212 (1996).

guardhouse during shifts.¹¹⁹ Following termination, the plaintiff brought suit against his former employer under the Michigan Handicappers Civil Rights Act (HCRA). Although slightly different, the HCRA and the ADA serve a similar legislative purpose and “share definitional similarities.”¹²⁰

In *Stevens*, the plaintiff argued that he was entitled to HCRA protection because his nicotine addiction affected his “ability to choose not to smoke” and limited his “body's ability to be without discomfort when not smoking.”¹²¹ The court found this argument unpersuasive, holding that “even if plaintiff's addiction to nicotine affected his ‘ability to choose not to smoke’ and limited his ‘body's ability to be without discomfort when not smoking’ it did not substantially limit a major activity.”¹²² Accordingly, the court reasoned that deeming nicotine addiction as a disability under the HCRA, or the ADA, “would do a gross disservice to the truly handicapped.”¹²³

In 2001, the United State District Court for the District of Maryland considered a complainant advocating that nicotine addiction should be considered a disability under the ADA.¹²⁴ In *Braashear v. Simms*, the plaintiff, a Maryland inmate, challenged the Maryland Department of Public Safety and Correctional Services’ smoking ban in Maryland prisons as a form of discrimination under the ADA.¹²⁵ The Maryland District court emphatically rejected the inmate’s claim, holding:

Congress could not possibly have intended the absurd result of including smoking within the definition of “disability,” which would render somewhere between 25% and 30% of the American public disabled under federal law because they smoke. In any event, both smoking and “nicotine addiction” are readily remediable, either by quitting smoking outright through an act of willpower (albeit easier for some than others), or by the use of such items as nicotine patches or nicotine chewing gum. If the smokers' nicotine addiction is thus remediable, neither such addiction nor smoking itself qualifies as a disability within the coverage of the ADA, under well-settled Supreme Court precedent.¹²⁶

However, the well-settled Supreme Court precedent the *Braashear*

119. *Id.* at 214.

120. *Id.* at 216.

121. *Id.* at 218.

122. *Id.*

123. *Id.* at 219.

124. *Braashear v. Simms*, 138 F. Supp. 2d 693 (D. Md. 2001).

125. *Id.*

126. *Id.* at 695.

Court references is no longer well settled or precedent.¹²⁷ Enactment of the ADAAA effectively overruled the Supreme Court's narrowed interpretation of the ADA that guided the *Braashear* Court's holding. Furthermore, the advent of electronic cigarettes has come to challenge conventional understandings of nicotine cessation therapies.¹²⁸

Electronic cigarettes are not currently considered by the FDA to be an acceptable nicotine replacement product. However, "the fact that there isn't industry-wide, definitive proof that e-cigs help all smokers quit for good may be irrelevant to smokers."¹²⁹ The FDA's reluctance to recognize electronic cigarettes as approved nicotine replacement therapy likely rest on two assumptions. First, the FDA is reluctant to approve a product that has not been significantly vetted.¹³⁰ Second, and perhaps more important, the FDA and other anti-electronic cigarette advocates fear the growing electronic cigarette popularity could re-normalize smoking.¹³¹ However, as new medical research fosters a better understanding of using electronic cigarettes as a smoking cessation device, it is reasonable to believe the FDA may reevaluate its current stance.¹³²

V. NICOTINE ADDICTION AS A DISABILITY

In order to receive protection under the ADAAA, plaintiffs must establish the four-prong prima facie test. The second, third, and fourth prongs of the ADAAA are, in most circumstances, readily proven. To satisfy these prongs, a plaintiff must demonstrate that he is qualified for the position, that the employer discriminated against him on the grounds of disability, and that the employer is covered by the ADAAA. Proving that nicotine addiction is a disability under the ADAAA is far more difficult for plaintiffs seeking protection from detrimental employment

127. The *Braashear* holding refers to Supreme Court's holding in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), which was explicitly overruled by enactment of the ADAAA.

128. See Michael B. Siegel et al., *Electronic Cigarettes As a Smoking-Cessation Tool: Results from an Online Survey*, 40 AM. J. PREVENTATIVE MED. 472 (2011) ("The finding that most individuals who used e-cigarettes at least reduced the number of tobacco cigarettes they smoked suggests that if proven safe, e-cigarettes may be a potentially important tool for harm reduction, especially among smokers who have found currently available pharmaceutical smoking-cessation options to be ineffective. The present study suggests that this alternative approach to smoking cessation is worthy of further investigation.").

129. Jayne Krahn, *The E-Cig Bummer*, KANTER MEDIA (Aug. 14, 2014), <http://us.kantar.com/business/health/2014/kantar-media-data-on-the-electronic-cigarette-boom/>

130. Kristen Bell & Helen Keane, *Nicotine Control: E-Cigarettes, Smoking, and Addiction*, 23 INT. J. DRUG POLICY 242, 247 (2012).

131. *Id.*

132. *E-Cigarettes: Questions and Answers*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm225210.htm> (last visited Nov. 25, 2014) (the FDA acknowledges that its stance on electronic cigarettes may change in the future).

actions arising from a positive nicotine test.

Some advocates have argued that the most probable avenue for finding nicotine addiction as a disability is under the third prong of the ADA's definition of disability.¹³³ Under the third prong of the ADA's disability definition, an employee may be entitled to ADA protections if they are erroneously regarded as disabled by an employer.¹³⁴ It has been argued that "if employers choose not to hire applicants merely by virtue of their status as nicotine users, arguably, those companies are 'regarding' nicotine users as disabled."¹³⁵

However, this argument faces difficult obstacles. It is unlikely that the Supreme Court's precedent in *Raytheon Co. v. Hernandez* will be overturned. If an employee challenges an employer's no-nicotine hiring policy as a form of "regarded as disabled" discrimination, the employer will almost certainly be able to justify its policy by citing legitimate non-discriminatory reasons. There is little doubt that overarching health concerns and the higher healthcare costs associated with tobacco consumers are legitimate reasons for employers to implement no-nicotine policies.

Though difficulties will certainly arise, a promising avenue for nicotine addicts seeking protection from adverse employment action lies in convincing courts and the general public that nicotine addiction is a disability that warrants accommodation under the ADA. Although major tobacco companies denied the fact for decades, there is little doubt amongst serious medical experts that nicotine is a highly addictive substance.¹³⁶ In 1988, a Surgeon General's report presented the following conclusions drawn from longitudinal studies of nicotine addiction:

1. Cigarettes and other forms of tobacco are addicting.
2. Nicotine is the drug in tobacco that is addicting.
3. The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.¹³⁷

The prevailing obstacle in arguing that nicotine addiction should be considered a disability under the ADA is a limited cultural

133. Jessica L. Roberts, *Healthism and the Law of Employment Discrimination*, 99 IOWA L. REV. 571, 598 (2014).

134. 42 U.S.C.A. § 12101(8) (2009).

135. Roberts, *supra* note 133, at 598–99.

136. See I.P. Stolerman & M. J. Jarvis, *The Scientific Case that Nicotine is Addictive*, 117 PSYCHOPHARMACOLOGY 2 (1995).

137. U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL* 9 (1998).

understanding of nicotine addiction.¹³⁸ Too frequently health advocates, the FDA, and non-smokers echo the District Court of Maryland's sentiment that "both smoking and nicotine addiction are readily remediable."¹³⁹ Furthermore, critics of including nicotine addiction as a disability under the ADAAA often argue that nicotine addiction is the result of voluntary behavior and therefore does not warrant ADAAA protections.¹⁴⁰ These sentiments are simplistic and unfounded.¹⁴¹ Nicotine addiction should not be viewed in absolutes. The growing body of addiction literature proves that a variety of situational, genetic, social, and economic factors, that are often out of an individual's control, strongly influence addiction tendencies.¹⁴²

Nicotine addiction is a pervasive and destructive force, which the vast majority of American tobacco consumers are unable to overcome.¹⁴³ As one compressive multinational study found, "the overwhelming majority—about 90 percent—of adult smokers across Canada, the United States, the United Kingdom, and Australia regret having started smoking."¹⁴⁴ Nicotine addiction is often derived from a variety of factors outside the control of addicted individuals.¹⁴⁵ Far less research has been conducted linking nicotine addiction to hereditary or genetic

138. See Ronald Bayer & Jennifer Stuber, *Tobacco Control, Stigma, and Public Health: Rethinking Relations*, 96 AM. J. PUB. HEALTH 47, 49 (2006). ("For example, policies and cultural standards that result in isolation and severe embarrassment are different from those that cause discomfort. Those that provoke a sense of social disease are not the same as those that mortify. Acts that seek to limit the contexts in which smoking is permitted are different from those that restrict the right to work, to access health or life insurance, or to reside in communities of one's choice.")

139. *Brashear v. Simms*, 138 F. Supp. 2d 693, 695 (D. Md. 2001).

140. Christopher Valleau, *If You're Smoking You're Fired: How Tobacco Could Be Dangerous to More Than Just Your Health*, 10 DEPAUL J. HEALTH CARE L. 457, 478 (2007) ("Although nicotine addiction may be considered an impairment, smoking, regardless of its addictiveness, is ultimately a voluntary behavior. One might argue that those who advance claims that smoking, or nicotine addiction, should qualify as a disability under the ADA are in fact insulting those who are actually disabled and in need of the protection the ADA was intended to provide.")

141. See Sonja B. Starr, *Simple Fairness: Ending Discrimination in Health Insurance Coverage of Addiction Treatment*, 111 YALE L.J. 2321, 2336 (2002).

142. See generally CHAD EPPS & ELIZABETH LAURA WRIGHT, PERIOPERATIVE ADDICTION: CLINICAL MANAGEMENT OF THE ADDICTED PATIENT 35–50 (Ethan O. Bryson & Elizabeth A. M. Frost eds., 2012) ("Addiction is a complex disease influenced by genetic, environmental, developmental, and social factors. Once viewed as a moral weakness in character, substance use disorders are now defined as maladaptive patterns of substance use leading to inability to control use despite significant consequences.")

143. See *A Word About Success Rates for Quitting Smoking*, AM. CANCER SOS'Y, <http://www.cancer.org/healthy/stayawayfromtobacco/guidetoquittingsmoking/guide-to-quitting-smoking-success-rates> (last visited Nov. 12, 2014).

144. Geoffrey T. Fong et al., *The Near Universal Experience of Regret Among Smokers in Four Countries: Findings from the International Tobacco Control Policy Evaluation Survey*, 6 NICOTINE & TOBACCO RES. 341, 348 (2004).

145. See Darren Mays et al., *Parental Smoking Exposure and Adolescent Smoking Trajectory*, 133 PEDIATRICS 983 (2014) ("Parental smoking is associated with adolescent smoking uptake and regular smoking, suggesting intergenerational transmission of smoking behavior within families.")

factors than alcoholism.¹⁴⁶ However, some studies suggest that individuals may be genetically predisposed to nicotine addiction.¹⁴⁷ Additionally, smoking rates are far more prevalent in low income and minority communities.¹⁴⁸ Commenting on the ethical ramifications of employers not hiring tobacco consumers, an article from the New England Journal of Medicine recently stated that:

The broader claim that it is fair to exclude smokers because they are responsible for raising health care costs is too simplistic. It ignores the fact that smoking is addictive and therefore not completely voluntary. Among adult daily smokers, 88% began smoking by the time they were 18, before society would consider them fully responsible for their actions. Much of this early smoking is subtly and not so subtly encouraged by cigarette companies. As many as 69% of smokers want to quit, but the addictive properties of tobacco make that exceedingly difficult: only 3 to 5% of unaided cessation attempts succeed. It is therefore wrong to treat smoking as something fully under an individual's control.¹⁴⁹

In order to successfully argue that nicotine addiction is a disability under the ADA, a few distinct arguments must be made. Most importantly, it must be proven that nicotine addiction is (1) “a physical or mental impairment” that (2) “substantially limits one or more major life activities of such individual.”¹⁵⁰ Few would argue that nicotine addiction manifests physical or mental impairments.

Nicotine addiction is intrinsically connected to tobacco consumption.¹⁵¹ While debate exists as to whether nicotine itself is physically or mentally harmful,¹⁵² there is little doubt that “nicotine is

146. U.S. DEPT. HEALTH & HUMAN SERVS., HOW TOBACCO SMOKE CAUSES DISEASE: THE BIOLOGY AND BEHAVIORAL BASIS FOR SMOKING-ATTRIBUTABLE DISEASE: A REPORT OF THE SURGEON GENERAL 137 (2010) (“Smoking behavior and nicotine addiction have generated far less research in behavioral genetics than have other addictive behaviors such as alcoholism. This is despite evidence from animal studies suggesting that key factors—such as the number and distribution of nicotinic receptors and the development of nicotine tolerance—are under a strong genetic influence.”).

147. See David G. Gilbert & Brenda O. Gilbert, *Personality, Psychopathology, and Nicotine Responses as Mediators of the Genetics of Smoking*, 25 GENETIC BEHAV. 133, 147 (1995).

148. See Rosemary Hiscock et al., *Socioeconomic Status and Smoking: A Review*, 1248 ANNALS N.Y. ACAD. SCI. 107, 123 (2102).

149. Haral Schmidt et al., *The Ethics of Not Hiring Smokers*, 368 NEW ENG. J. MED. 1369 (2013).

150. 42 U.S.C.A. § 12102(1)(a) (2009).

151. See Neal L. Benowitz, *Neurobiology of Nicotine Addiction: Implications for Smoking Cessation Treatment*, 121 AM. J. MED. S3 (2008) (“Nicotine sustains addictive tobacco use, which in turn causes premature disability and death.”).

152. See Helge I. Waldum et al., *Long-Term Effects of Inhaled Nicotine*, 58 LIFE SCI. 1229 (1996) (Clinical study concluded that rats exposed to long term nicotine inhalation did not coincide with increased mortality).

one of the main psychoactive ingredients in tobacco that contributes to the harmful tobacco smoking habits.”¹⁵³ The adverse effects of tobacco use, induced by nicotine addiction, are well documented.¹⁵⁴ More difficult to argue is that nicotine addiction substantially limits a major life activity.

Under the ADAAA, major life activities include, but are not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”¹⁵⁵ While it is difficult to prove a current smoker’s addiction to nicotine substantially limits a major life activity, scientific evidence suggests that individuals attempting to quit smoking suffer serious impairments, which may qualify as a disability under the ADAAA.¹⁵⁶

The most compelling argument that many nicotine addicts attempting to quit smoking experience a substantial limit of a major life activity is that nicotine withdrawal adversely affects concentration, thinking, and sleeping, all of which are explicitly substantial limits under the ADAAA.¹⁵⁷ Although the vast majority of studies focus on the adverse effects of tobacco consumption, medical experts have recently conducted research to gain a better understanding of the physical and mental symptoms of tobacco withdrawal. These studies indicate that the serious mental and physical impairments caused by former smokers abstaining from tobacco and nicotine are one of the leading variables that prevent the vast majority of nicotine addicted Americans from quitting.¹⁵⁸

In *The Health Consequences of Smoking – 50 Years of Progress*, the Surgeon General provided a detailed summarization of the medical community’s current understanding of nicotine’s effects on the human body.¹⁵⁹ Among the report’s findings, an entire section was devoted to

153. Athina Markou, *Neurobiology of Nicotine Dependence*, 363 PHIL. TRANSACTIONS ROYAL SOC’Y: BIOLOGICAL SCI. 3159 (2008).

154. See Margaret E. Mattson et al., *What are the Odds that Smoking will Kill You?*, 77 PUB. HEALTH 425 (1987).

155. 42 U.S.C.A. § 12102(2)(a) (2009).

156. See John R. Hughes, *Effects of Abstinence from Tobacco: Valid Symptoms and Time Course*, 9 NICOTINE & TOBACCO RES. 315, 323 (2007) (“First, valid withdrawal symptoms from stopping tobacco include anger, anxiety, depression, difficulty concentrating, impatience, insomnia, and restlessness. Second, several symptoms may be abstinence effects but have not been replicated in large studies: constipation, cough, dizziness, increased dreaming, mouth ulcers, nausea, and sore throat.”).

157. 42 U.S.C.A. § 12102(2)(a) (2009).

158. See Rebecca L. Ashare et al., *Cognitive Function during Nicotine Withdrawal: Implications for Nicotine Dependence Treatment*, 76 NEUROPHARMACOLOGY 581 (2014) (“Although nicotine withdrawal is associated with a variety of symptoms, withdrawal-related cognitive deficits are gaining attention as a core dependence phenotype and a target for medication development efforts.”).

159. U.S. DEP’T HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING – 50 YEARS OF PROGRESS: A REPORT BY THE SURGEON GENERAL I* (2014).

how nicotine affects cognitive functions.¹⁶⁰ Some older studies have found that nicotine consumption among habitual smokers may have cognitive-enhancing properties.¹⁶¹ However, many studies have also found that when regular tobacco consumers abstain from nicotine, cognitive function is adversely affected.¹⁶² The Surgeon General's Report summarized the current literature on the correlation between nicotine withdrawal and cognitive function by stating:

In adults, the negative effects of nicotine withdrawal on cognitive function have been documented in both humans and animals, and the administration of nicotine during withdrawal mitigates cognitive impairment. In dependent smokers, abstinence from smoking is associated with reductions in working memory and sustained attention, and the adverse effects on attention can be seen as early as 30 minutes after smoking the last cigarette.¹⁶³

Physical and mental impairments that affect concentration and thinking are statutorily recognized disabilities under the ADAAA.¹⁶⁴ As one Court stated, even before enactment of the ADAAA in 2008, thinking, along with sleeping, "are certainly of central importance to daily life."¹⁶⁵ However, the argument that cognitive impairments caused by addiction satisfy the ADAAA's definition of disability has minimal precedent. In *Cunningham v. Nature's Earth Pellets, L.L.C.*, a plaintiff argued that her former employer violated the ADAAA by regarding her as disabled "based on her addiction to prescription drugs."¹⁶⁶ On appeal, the Eleventh Circuit upheld the lower court's granting of the defendant's motion for summary judgment.¹⁶⁷ The Eleventh Circuit reasoned that the plaintiff was unable to establish that her perceived drug addiction substantially limited her ability to concentrate, among other things.¹⁶⁸

The Eleventh Circuit's *Cunningham* holding signifies that a plaintiff

160. *Id.* at 121.

161. See Robert West & Sarah Hack, *Effect of Cigarettes on Memory Search and Subjective Ratings*, 38 PHARMACOLOGY BIOCHEMISTRY & BEHAV. 281 (1991).

162. See A.C. Parrott et al., *Cigarette Smoking and Abstinence: Comparative Effects upon Cognitive Task Performance and Mood State over 24 Hours*, 11 HUM. PSYCHOPHARMACOLOGY 391, 398 (1996) ("Smoking abstinence can affect not only feeling states, but also task performance. Active smokers generally display higher performance than deprived smokers, on various measures of sustained attention: rapid visual information processing, the Mackworth clock test, and letter cancellation.").

163. U.S. DEP'T HEALTH & HUMAN SERVS., *supra* note 159, at 121.

164. 42 U.S.C.A. § 12102(2)(a) (2009).

165. *E.E.O.C. v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 616 (5th Cir. 2009).

166. *Cunningham v. Nature's Earth Pellets, L.L.C.*, 433 F. App'x 751, 752 (11th Cir. 2011).

167. *Id.*

168. *Id.* (Plaintiff testified that "she was able to breathe and get ready for work; she performed regularly the tasks of a shipping clerk, which required her to monitor the supply of company products and coordinate deliveries of those products; and she exercised sufficient independence of thought and concentration to withdraw from a rehabilitation facility against the advice of her physicians.").

asserting that nicotine withdrawal manifests mental and physical cognitive impairments must provide significant evidence that such impairments substantially limit a major life activity. Prior to 2008, this would have proven to be nearly impossible for multiple reasons. First, impairments caused by nicotine withdrawal are not generally permanent.¹⁶⁹ Second, using electronic cigarettes to curb such impairments is a corrective measure.

Prior to the 2008 Amendments, ADA precedent typically held “intermittent, episodic impairments are not disabilities.”¹⁷⁰ However, numerous courts have recently held that ADAAA protection extends to individuals suffering from temporary disabilities. For example, in *Summers v. Altarum Inst., Corp.*, the Fourth Circuit held that “nothing about the ADAAA or its regulations suggests a distinction between impairments caused by temporary injuries and impairments caused by permanent conditions.”¹⁷¹ Additionally, the ADAAA provides that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”¹⁷² The ADAA’s liberalized definition of disability can accordingly be extended to temporary disabilities such as the cognitive impairments that arise from nicotine withdrawal.

The Supreme Court’s *Sutton* decision, which held that disabilities cured or improved by corrective measures are not protected by the ADA, was also overturned by passage of the ADAAA. The ADAAA clearly states “the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”¹⁷³ Accordingly, courts should be prevented from asserting that the various approved and unapproved forms of nicotine replacement therapy, which mitigate nicotine addiction withdrawal symptoms, disqualify nicotine addiction as a disability.¹⁷⁴

While breaking a nicotine addiction, tobacco consumers experience a variety of mental and physical impairments that not only increase the likelihood of smoking relapse, but also adversely affect the day-to-day life of such individuals. Although the well-documented correlations between nicotine abstinence and impaired cognitive functions are a likely avenue for invoking ADAAA protections, other major

169. See Thomas J. Gould et al., *The Duration of Nicotine Withdrawal-Associated Deficits in Contextual Fear Conditional Parallels Changes in Hippocampal High Affinity Nicotinic Acetylcholine Receptor Upregulation*, 62 NEUROPHARMACOLOGY 2118 (2012).

170. *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995).

171. *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 333 (4th Cir. 2014).

172. 42 U.S.C.A. § 12102(4)(D) (2009).

173. 42 U.S.C.A. § 12102(E).

174. See Elizabeth Rader et al., *No Smokers Allowed*, 30 ASS'N CORP. COUNSEL 80, 84 (2012).

impairments are also associated with nicotine addiction during withdrawal periods. Other impairments include insomnia, decreased sleep rates,¹⁷⁵ and depression.¹⁷⁶ In order for nicotine addiction to qualify as a disability under the ADA, plaintiffs will have to demonstrate, with ample evidence, that the impairments caused by nicotine withdrawal substantially limit a major life activity. Given the judiciary's predictable reluctance toward granting ADA protection to nicotine addicted individuals, this will be a difficult task for potential plaintiffs. However, if more employers begin implementing no-nicotine policies, the ADA may be the only legal recourse for the thousands of Americans battling nicotine addiction.

VI. REASONABLE ACCOMMODATION

Although there is no "magic cure" for nicotine addiction, research strongly suggests that various forms of nicotine replacement therapy are helpful during the nicotine withdrawal process.¹⁷⁷ As one expert stated, "the odds of successful smoking cessation are improved with pharmacotherapy, such as nicotine medications and bupropion. These therapies are believed to work primarily by replacing nicotine or simulating nicotinic effects in the brain, thereby reducing withdrawal symptoms experienced during cessation."¹⁷⁸ In the most conservative application of the argument, employers allowing electronic cigarette consumption as a reasonable accommodation would merely allow employees to consume electronic cigarettes outside the workplace in order to lessen impairments caused by nicotine withdrawal.

As previously discussed, the FDA has not formally approved electronic cigarettes as a conclusively safe smoking cessation tool.¹⁷⁹ However, recent studies suggest that electronic cigarette consumption significantly increases a smoker's ability to quit by ameliorating withdrawal symptoms.¹⁸⁰ As the American Heart Association recently

175. See Ian M. Colrain et al., *The Impact of Smoking Cessation on Objective and Subjective Markers of Sleep: Review, Synthesis, and Recommendations*, 6 NICOTINE & TOBACCO RES. 913 (2004).

176. See Alexander H. Glassman et al., *Smoking, Smoking Cessation and Major Depression*, 26 J. AM. MED. ASS'N 1546 (1990).

177. See Robert West & Xiaolei Zhou, *Is Nicotine Replacement Therapy for Smoking Cessation Effective in the "Real World"? Findings from a Prospective Multinational Cohort Study*, 62 THORAX 1998, 1002 (2007) ("NRT [nicotine replacement therapy] use was associated with improved chances of long term abstinence when controlling for nicotine dependence.")

178. Neal L. Benowitz, *Neurobiology of Nicotine Addiction: Implications for Smoking Cessation Treatment*, 121 AM. J. MED. S3, S9 (2008).

179. See *E-Cigarettes: Questions and Answers*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm225210.htm> (last visited Nov. 11, 2014).

180. See Lynne Dawkins et al., *The Electronic-Cigarette: Effects on Desire to Smoke, Withdrawal Symptoms and Cognition*, 37 ADDICTIVE BEHAV. 970 (2012).

summarized, with the caveat that more research is required, “if a patient has failed initial [smoking cessation] treatment, has been intolerant to, or refused to use conventional smoking cessation medication, and wishes to use e-cigarettes to aid quitting, it is reasonable to support the attempt.”¹⁸¹

Recent studies have also found that electronic cigarette consumption vastly improves the prospective memory¹⁸² and working memory¹⁸³ functions of abstinent smokers. Prospective memory is generally defined as the cognitive ability to remember to perform future tasks.¹⁸⁴ Working memory is typically defined as the cognitive ability to retain “information necessary for such complex cognitive task as language comprehension, learning and reasoning.”¹⁸⁵ It is not difficult to imagine how decreased prospective and working memory functions could substantially limit a major life activity, especially at the workplace. Therefore, it should not be considered unreasonable for employers to allow former smokers to consume electronic cigarettes, or other forms of nicotine replacement therapy, while completing the tobacco abstinence process.

The ADAA defines a reasonable accommodation as:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.¹⁸⁶

“While the reasonable accommodation requirement may appear on its face to be relatively straight-forward, in practice the requirement is often

181. Aruni Bhandnagar et al., *AHA Policy Statement: Electronic Cigarettes*, 130 J. AM. HEART ASS'N, 1418, 1428 (2014).

182. See Lynee Dawkins et al., *Nicotine Derived From the Electronic Cigarette Improves Time-Based Prospective Memory in Abstinent Smokers*, 3 PSYCHOPHARMACOLOGY 377, 383 (2013) (“To conclude, consistent with a growing body of evidence suggesting that nicotine can improve PM [prospective memory], this study observed a facilitative effect of nicotine delivered via e-cigarette on time-based PM in abstinent smokers.”).

183. See Dawkins et al., *supra* note 180, at 972 (“Nicotine derived via use of the electronic cigarette also improved working memory performance particularly at the longer interference intervals.”).

184. See Gills O, Einstein, *Normal Aging and Prospective Memory*, 16 J. EXPERIMENTAL PSYCHOLOGY 717 (1990).

185. Alan Baddeley, *Working Memory*, 255 SCI. 556 (1992).

186. 42 U.S.C.A. § 12111(9) (2009).

difficult.”¹⁸⁷ A prevailing difficulty in garnering an accommodation under the ADAAA is that accommodations depend on the facts and circumstances of each case.¹⁸⁸ Although most nicotine addicts suffer from impairments during the nicotine withdrawal period, these impairments differ in degree and duration.¹⁸⁹ For a plaintiff to argue that electronic cigarette consumption should be a reasonable accommodation for the disability of nicotine addiction, each plaintiff will have to individually demonstrate how the hypothetical accommodation applies to their given situation. However, allowing electronic cigarette consumption as a reasonable accommodation for the disability of nicotine addiction, regardless of specifics, should generate fewer problems than other accommodation requests.

Unlike some accommodation proposals, an accommodation for electronic cigarettes should not cause an employer hardship, let alone undue hardship. In fact, allowing employees to use electronic cigarettes or other forms of nicotine replacement therapy during the tobacco abstinence process could solve significant problems for employers. First and foremost, through such an accommodation employers would not have to turn away applicants or fire employees for failing to break an addiction. This could benefit employers in any number of ways, including fostering a better relationship with applicants and employees and ensuring that highly qualified workers are not turned away because they are struggling, as so many Americans do, to quit nicotine. As the evidence presented throughout this Comment suggests, employers should be able to reap these benefits without incurring excessive healthcare cost or lost productivity, which are the general justifications for no-nicotine policies.

The hypothetical accommodation would not require employers to create new positions¹⁹⁰ or allow employees to take indefinite leaves of absence,¹⁹¹ which are generally considered unreasonable accommodations. Employers should be prevented from implementing adverse employment actions, such as refusing to hire or terminating employees who fail nicotine tests, because of electronic cigarette consumption or the use of other nicotine replacement therapies. To accommodate nicotine addiction as a disability, employers with no-nicotine policies would, simply, have to grant nicotine-addicted

187. John E. Matejkovic & Margaret E. Matejkovic, *What Is Reasonable Accommodation Under the ADA? Not an Easy Answer; Rather A Plethora of Questions.*, 28 MISS. C. L. REV. 67 (2009).

188. *Di Lella v. Univ. of D.C. David A. Clarke Sch. of Law*, 570 F. Supp. 2d 1, 8 (D.D.C. 2008).

189. See Siddharth Chandra et al., *Within-Day Temporal Patterns of Smoking, Withdrawal Symptoms, and Craving*, 117 DRUG & ALCOHOL DEPENDENCE 118 (2001).

190. See *White v. York Int'l Corp.*, 45 F.3d 357, 362 (10th Cir. 1995).

191. See *Boykin v. ATC/VanCom of Colorado, L.P.*, 247 F.3d 1061, 1065 (10th Cir. 2001).

employees the ability to consume electronic cigarettes during non-work hours in order to accommodate the mental and physical impairments induced by nicotine withdrawal.

The ADAAA explicitly provides that nothing in the Act “shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I, in transportation covered by subchapter II or III, or in places of public accommodation covered by subchapter III.”¹⁹² Therefore, it is unlikely that employees or potential hires will be allowed to consume electronic cigarettes at the workplace as a form of accommodation.¹⁹³ Aside from the legal impracticality of arguing that nicotine addicts should be allowed to consume electronic cigarettes at work, such an argument is contradictory to the goal of recognizing nicotine addiction as a disability under the ADAAA. The critical purpose of extending electronic cigarette consumption as an accommodation to nicotine addicted employees is not to enhance smoker rights. Rather, the purpose is to protect individuals struggling with nicotine addiction from adverse employment actions.

VII. CONCLUSION

Advancing the argument that mental and physical impairments associated with nicotine addiction during nicotine withdrawal periods are a disability under the ADAAA will challenge the judiciary, and, in turn, the American public's understanding of tobacco consumption and nicotine addiction. Undoubtedly, asserting that nicotine addiction should be considered a disability, even in the limited circumstances described in this Comment, may antagonize a great deal of people. Like the Michigan Applet Court in *Stevens*, many will argue that recognizing nicotine addiction as a disability “would do a gross disservice to the truly handicapped.”¹⁹⁴

However, from a public policy standpoint, recognizing nicotine addiction as a disability has the potential to save countless lives, which is hardly a disservice to anyone. Despite decades of research and millions of dollars spent on anti-smoking campaigns, 27 percent of the American public continues to smoke cigarettes. Extending ADA

192. 42 U.S.C.A. § 12201(b) (2009).

193. It should be noted that debate exist as to whether or not current public smoking bans include electronic cigarettes. Some states, such as New York, have banned electronic cigarettes in public places and other states are currently debating how to regulate the activity. See Bruce Kennedy, *Popularity of E-Cigarettes Spark Issues at Work*, CBS NEWS (Aug. 21, 2014), <http://www.cbsnews.com/news/e-cigarettes-in-the-workplace/>.

194. *Stevens v. Inland Waters, Inc.*, 220 Mich. App. 212, 219 (1996).

protection to nicotine addicted individuals while they complete the withdrawal process will not be an automatic fix for the thousands of Americans struggling with nicotine addiction. Nonetheless, extending legal protection to such individuals and insulating them from detrimental employment actions in many respects fulfills the ADA's statutory goals.

As the ADA states, "society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."¹⁹⁵ Addiction is a complicated social and biological phenomenon and few social problems are as pervasive and destructive as nicotine addiction. Society has largely failed to assist nicotine addicts' efforts to quit smoking. Employers, the judiciary, and lawmakers should help individuals overcome their addictions, rather than penalizing them.

The increasingly popular trend of employers subjecting employees and potential employees to conditional nicotine tests, without regard for positive test results triggered by nicotine replacement therapies, further isolates and segregates individuals struggling with nicotine addiction. Not only are nicotine addicted individuals frequently unable to break a vicious addiction cycle, they are denied employment opportunities and the chance at a better life. Recognizing nicotine addiction as a disability under the ADA and allowing traditional tobacco consumers to utilize electronic cigarettes as a means to aid smoking cessation is an important step for fulfilling the ADA's stated goals and facilitating national efforts to eliminate smoking.

195. 42 U.S.C.A. § 12101(2) (2009).