

DELUSIONS OF RIGHTS: AMERICANS WITH PSYCHIATRIC DISABILITIES, EMPLOYMENT DISCRIMINATION AND THE AMERICANS WITH DISABILITIES ACT

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I. INTRODUCTION

The AMERICAN PSYCHIATRIC GLOSSARY defines a delusion as "[a] false belief based on an incorrect inference about external reality and firmly sustained despite clear evidence to the contrary."¹ This Article suggests that a belief that Title I of the Americans with Disabilities Act ("ADA") protects an individual from employment discrimination based on psychiatric disability or perceived psychiatric disability amounts to a delusion of rights.

When the Americans with Disabilities Act was passed in 1990, one of its principal goals was to enhance employment opportunities for people with disabilities who wanted to and could work but were being kept out of the job market because of discrimination on the basis of disability.² When President Bush signed the Americans with Disabilities Act in the Rose Garden among hundreds of people with disabilities, the mood was one of tremendous hope and triumph.³ President Bush predicted that "with today's signing of the landmark Americans with Disabilities Act, every man, woman and child with a disability can now pass through

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1. AMERICAN PSYCHIATRIC GLOSSARY 35 (Jane E. Edgerton and Robert J. Campbell III, eds., 7th ed. 1998). Among the most frequently reported delusions are delusions of control, poverty, and reference. Delusions of control are beliefs "that one's feelings, impulses, thoughts, or actions are not one's own but have been imposed by some external force[.]" *Id.* Delusions of poverty are convictions that "one is or will be bereft of all material possessions" and delusions of reference are convictions that "events, objects, or other people in the immediate environment have a particular and unusual significance (usually negative)." *Id.*

2. 42 U.S.C. § 12101 (1994).

3. *President Signs Disabilities Act, 2,000 Cheer Long-Awaited Independence*, L.A. DAILY NEWS, July 27, 1990, at N1.

once-closed doors, into a bright new era of equality, independence and freedom."⁴

Ten years later, it is increasingly clear that these hopes are not being realized for people with disabilities. There is both a public and judicial backlash against the Americans with Disabilities Act.⁵ A 1997 survey of 261 federal appellate ADA employment discrimination decisions showed courts siding with defendants in about 80% of cases.⁶ A more comprehensive survey of 1,200 ADA cases decided by federal appellate courts since 1992 found that employers won over 90% of litigated cases.⁷ An update of this survey, encompassing cases decided in 1999, found employers winning 95.7% of the time in federal appellate court.⁸

Testimony at congressional hearings held to consider the ADA, as well as research submitted to Congress, cited discrimination as a significant cause of the striking level of unemployment among people with disabilities.⁹ For many years, research has also consistently shown that people with psychiatric disabilities are subject to more severe employment discrimination than people with other kinds of disabilities.¹⁰ Notwithstanding this, or perhaps as a reflection of it, claims of employment discrimination by people with psychiatric disabilities have been the subject of particularly virulent attacks by opponents of the Americans with Disabilities Act.¹¹

Courts appear to share some of the stereotypes about mental illness that motivated the passage of the Americans with Disabilities Act.¹² Of-

4. *Id.*

5. See, e.g., WALTER OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE, 138-40 (1997); ALAN DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994). The perception is that the ADA is being used to file frivolous lawsuits, see *Hey Kids! Let's File a Frivolous Lawsuit*, PLAIN DEALER, Oct. 24, 1999, at 4G, or that it is a bonanza for lawyers. See Brad Hahn, *Bill May Deter Some ADA Suits Many Lawyers Abusing Act Sponsors Say*, SUN-SENTINEL (Palm Beach ed.), Feb. 9, 2000, at 4B.

6. 9 Disability Compl. Bulletin (LRP) No. 5 (Mar. 27, 1997) ("[A] . . . recent review [of ADA cases] revealed only six findings of disability among 110 decisions."). The Tenth Circuit sided with defendants in 94% of cases, the Fourth Circuit in just under 93% of cases. 10 Disability Compl. Bull. (LRP) No. 10 (Nov. 20, 1997).

7. AMERICAN BAR ASSOCIATION COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403 (1998).

8. John W. Parry, *1999 Employment Decisions Under the ADA Title I - Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 348 (May/June 2000).

9. 136 CONG. REC. H571-05 (1990) (statement of Sen. Mazzoli).

10. Marjorie Baldwin, *Can the ADA Achieve Its Employment Goals?*, in THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 549, 537-52 (Jan. 1997); MENTAL DISORDER, WORK DISABILITY AND THE LAW 35, 60 (Richard Bonnie and John Monahan eds., 1997); U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, PSYCHIATRIC DISABILITIES, EMPLOYMENT, AND THE AMERICANS WITH DISABILITIES ACT, (visited Sept. 10, 2000) <<http://www.ota.nap.edu/pdf/1994idx.html>>.

11. Jerry Adler, *My Brain Made Me Do It*, NEWSWEEK, Jan. 26, 1998, at 56; OLSON, *supra* note 5.

12. Comments made by judges regarding psychiatric disabilities include: "Paranoid schizo-

ten, courts give short shrift to ADA claims involving psychiatric disability. One judge dismissed several ADA suits by people with post-traumatic stress disorder or, as the judge referred to it, "so-called post-traumatic stress disorder."¹³ In one case, the judge dismissed the suit on the ground that post-traumatic stress syndrome was not a disability without any consideration of the plaintiff's individual situation.¹⁴ The judge dismissed a second case without waiting for a motion to dismiss by defendants.¹⁵ Another judge refused to permit a plaintiff with a psychiatric disability to amend his complaint before a responsive pleading was filed, even though plaintiffs have an unqualified right under the Federal Rules of Civil Procedure to amend under these circumstances.¹⁶ In fact, an examination of both reported cases and research supports the conclusion that people with psychiatric disabilities have received minimal benefit from the ADA's protections against employment discrimination.

There are multiple reasons for the failure of Title I of the ADA to protect Americans with psychiatric disabilities from employment discrimination. The primary reason is that courts have interpreted "disability" and conceptualized "discrimination" in ways that exclude most people with psychiatric disabilities from the protections of the ADA. Courts have long assumed that disability discrimination is a kind of benign neglect. Discrimination on the basis of disability is equated with maintenance of ignorant and false beliefs about the impact of the functional limitations on a person's ability to be productively employed.

But people with psychiatric disabilities are not primarily discriminated against because of mistaken assessments of their abilities to conduct major life activities. The public is afraid of people with psychiatric disabilities. Families are ashamed of them. Friends are uneasy or vanish when they hear of a diagnosis. Children taunt them. They are assaulted and killed by strangers. The depth of discomfort caused by the revelation that an individual has a mental illness is not related to any perception that the individual is substantially limited in major life activities. Like people who are HIV-positive or have AIDS, the degree to which

phrenia often entails the sort of violent outbursts (or threats of violence) that an employer need not accommodate." *Wilson v. Chrysler*, 172 F.3d 500, 513 (7th Cir. 1999) (Easterbrook, J., concurring). Judge Posner begins the recitation of facts in one case by noting that the plaintiff "had a manic fit." *Midway v. Runyon*, 77 F.3d 189, 190 (7th Cir. 1996).

13. *Freeman v. City of Inglewood*, No. 96-55270, 1997 U.S. App. LEXIS 11789, at *1 (9th Cir. May 16, 1997) (reversing district court's dismissal).

14. *Hoffman v. City of Inglewood*, No. 95-55508, 1997 U.S. App. LEXIS 11790, at *1 (9th Cir. May 16, 1997) (reversing district court's dismissal).

15. *Freeman*, 1997 U.S. App. LEXIS 11789, at *2.

16. *Duda v. Board of Educ. of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054, 1056 (7th Cir. 1998) (reversing lower court for refusing to accept amended complaint when Rule 15 of the Federal Rules of Civil Procedure provided a right to amend at any time prior to defendant's response).

people with mental illness are limited in major life activities is largely irrelevant to the uneasiness and fear the conditions engender in others. Unlike people who are HIV-positive or have AIDS, however, discrimination against people with psychiatric disabilities can also take the form of disbelief or skeptical hostility, based on the assumption that the employee does not suffer any limitations at all but is simply trying to extract unwarranted concessions from management. Thus, requiring a person to show that he or she is substantially limited in a major life activity misses the point of discrimination against people on the basis of psychiatric disability.

In any event, the "substantial limitation in major life activities" prong of the definition of disability only makes sense in defining when employers should have to provide reasonable accommodations. It makes no sense in the traditional form of discrimination claim, where the employee is not asking for accommodations but simply to be treated the same as everyone else. Many people with psychiatric disabilities, and most whose claims are based on perceived psychiatric disabilities, fall into this category.

The purpose of this Article is first to provide a broad overview of the statutory and regulatory provisions of the Americans with Disabilities Act as they have been applied to people with psychiatric disabilities. This will be covered in Part II. Part III will focus specifically on the ways in which courts have used the requirement of "substantial limitations on major life activities" to rule against plaintiffs in ADA cases, especially plaintiffs with psychiatric disabilities. In Part IV the Article will propose a number of solutions to the problems presented.

II. OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT AND ITS APPLICATION TO PEOPLE WITH PSYCHIATRIC DISABILITIES

The requirements of the ADA are contained in its statutory language and in regulations issued by the agencies empowered by Congress to enforce the ADA. The Equal Employment Opportunity Commission ("EEOC") is the agency charged by Congress with interpreting and enforcing the provisions of the ADA.¹⁷ The EEOC has issued detailed regulations interpreting Title I of the Americans with Disabilities Act.¹⁸

The EEOC has also issued a number of documents to assist employers and employees in determining the requirements and protections of the Americans with Disabilities Act.¹⁹ For example, the EEOC issued an

17. 42 U.S.C. § 12116 (1994).

18. 29 C.F.R. § 1630 (2000).

19. These include commentary on its regulations, a Technical Assistance Manual, and Enforcement Guidance on subjects ranging from the ADA and worker's compensation, to the ADA and applications for disability benefits, and the meaning of "reasonable accommodations" and "undue hardship" under the ADA.

Enforcement Guidance on what constitutes permissible pre-employment inquiries about disability, which replaced, and considerably revised, a prior Enforcement Guidance which had been the subject of considerable disgruntlement and protest from employers.²⁰ Most notoriously, the EEOC issued an Enforcement Guidance aimed at clarifying the obligations of employers to persons with psychiatric disabilities.²¹ This Enforcement Guidance was issued on March 25, 1997, and was greeted with howls of outrage that far exceeded any previous response to EEOC Enforcement Guidance.²²

The EEOC's regulations have received uneven deference from the courts. As this Article illustrates, the circuits are split on a number of issues on which the EEOC has taken a firm position. These discrepancies range from the question of whether a former employee has standing to sue under Title I to the issue of whether an individual must prove he or she is disabled in order to challenge an illegal pre-employment inquiry about disability.

A. Definition of Disability

In order to qualify for protection under the Americans with Disabilities Act, an individual must have a disability. "Disability" is defined in three ways:

- (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.²³

The primary reason that plaintiffs alleging employment discrimination under the ADA are losing their cases is that courts hold that they do not meet the definition of disability under the ADA.²⁴ The inclination of

EEOC Enforcement Guidance: *The ADA and Psychiatric Disabilities*, 8 FEP Manual (BNA) 405:7461 (1997); EEOC ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICAN WITH DISABILITIES ACT (ADA), 2000 WL 1183721 ("EEOC GUID."), July 27, 2000; APPENDIX TO PART 1630: INTERPRETIVE GUIDANCE ON TITLE I OF ADA; Publication No. EEOC - MIA - TECHNICAL ASSISTANCE MANUAL; EEOC Enforcement Guidance: *Reasonable Accommodations and Undue Hardship Under the ADA*, 8 FEP Manual (BNA) 405:7601 (1999).

20. EEOC Enforcement Guidance: *Pre-employment Disability-Related Questions and Medical Examinations*, 8 FEP Manual (BNA) 405:7191 (1995).

21. EEOC Enforcement Guidance: *The American with Disabilities Act and Psychiatric Disabilities*, 8 FEP Manual (BNA) 915:002 (1997).

22. James J. McDonald Jr. & Johnathan P. Rosman, *EEOC Guidelines on Psychiatric Disabilities: Many Problems, Few Workable Solutions*, EMPLOYER REL. L.J., Oct. 11, 1997; *Disabilities: Commission Counsel Calls EEOC Guidance on Psychiatric Disabilities 'Enlightened' Start*, Empl. Pol'y & L. Daily (BNA) at D9 (Mar. 12, 1998).

23. 42 U.S.C. § 12102(2) (1994).

24. See, e.g., Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the*

lower courts to find that plaintiffs are not disabled applies to plaintiffs with all different kinds of disabilities but is even more pronounced in the case of people with psychiatric disabilities.²⁵

As might be expected, a substantial number of cases involving discrimination on the basis of psychiatric disability are brought by plaintiffs who assert that they are not disabled but are regarded as disabled by their employers.²⁶ Because the EEOC and the Supreme Court have held that the "regarded as disabled" prong of the definition of disability means that the employer must regard the employee as being substantially limited in one or more major life activities, courts have effectively insulated discrimination by employers who were simply hostile or uncomfortable with mental illness, as long as they believed the plaintiff was not limited in one or more major life activities.²⁷

Finding that a plaintiff does not meet the definition of disability under the ADA enables the court to avoid any consideration of whether the defendant's actions were discriminatory.²⁸ Thus, employers' actions based on concededly illegitimate stereotypes or hostility have been insulated from judicial review.²⁹ In addition, because questions of whether a

Scope of Disability Under the Americans with Disabilities Act, 68 U. COLO. L. REV. 107 (1997); Arlene Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997); Robert Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997). A comprehensive article surveying a number of practicing lawyers confirmed this perception: the lawyer who has brought the greatest number of ADA suits in Connecticut estimated that one half of summary judgments adverse to the plaintiff were on the issue of disability, and other attorneys agreed. Paul Frisman, *Study Suggests Employees Treated Unfairly Under Americans with Disabilities Act*, CONN. L. TRIB., Apr. 19, 1999, at 1. An attorney with the National Employment Lawyer's Association confirmed that "many ADA cases fail when the plaintiff cannot prove he or she has a disability." *Id.*

25. Parry, *supra* note 8.

26. *Cody v. Cigna Health Care of St. Louis*, 139 F.3d 595, 598 (8th Cir. 1998); *Pouncy v. Vulcan Materials*, 920 F. Supp. 1566, 1580 (N.D. Ala. 1996); *McConnell v. Pioneer Hi-Bred Int'l*, No. 98-4060-KES, 2000 U.S. Dist. LEXIS 3335, at *1 (D.S.D. Jan. 25, 2000); *Alvarado v. Chicago Bd. of Educ.*, No. 95-C-7718, 1996 WL 166947 (N.D. Ill. Mar. 14, 1996); *Barnes v. Cochran*, 944 F. Supp. 897, 901 (S.D. Fla. 1996); *Burke v. Nalco Chem. Co.*, No. 96-C-981, 1996 U.S. Dist. LEXIS 10190, at *14 (N.D. Ill. July 18, 1996).

27. See, e.g., *Schwartz v. ComEx and N.Y. Mercantile Exch.*, No. 96-3386, 1997 WL 187353 (S.D.N.Y. April 15, 1997).

28. *Ellison v. Software Spectrum*, 85 F.3d 187, 189 (5th Cir. 1996) (stating that "[f]or the ADA claim, the court held that [plaintiff's] breast cancer was not a requisite 'disability' within the meaning of the ADA. Therefore, it did not rule on the other elements of that claim. Likewise, because [the court concluded] that summary judgment as to disability [was] proper, [it did not] need not reach those other elements. . .").

29. *Bridges v. City of Bossier*, 92 F.3d 329, 331-32 (5th Cir. 1996) (noting that defendant conceded the only reason it refused to hire plaintiff was because he had a mild form of hemophilia). Although plaintiff presented undisputed evidence that he could safely perform the duties of a firefighter, and that the city had failed to undertake the individualized inquiry mandated by the ADA, plaintiff lost because the court held he was not disabled, and the City did not perceive him as disabled, but only as unable to be a firefighter. See *Bridges*, 92 F.3d at 331. The court never reached the question of whether the City's perceptions that plaintiff's mild hemophilia prevented him from being a firefighter were correct or based on myths and stereotypes. See *id.* See also *Thurston v. Henderson*, No. 99-40-P-H, 2000 U.S. Dist. LEXIS 2410, at *24-25 (D. Me. Jan.

plaintiff is disabled are often resolved against the plaintiff at the summary judgment stage, most ADA employment discrimination cases never go to trial.³⁰ Although ADA cases apparently do well if they do make it to trial,³¹ appellate courts frequently reverse or reduce verdicts in favor of the plaintiff.³²

1. Diagnoses of ADA Plaintiffs with Psychiatric Disabilities

The fourth edition of the Diagnostic and Statistical Manual issued by the American Psychiatric Association lists 374 diagnoses.³³ Many people with emotional difficulties receive a variety of different diagnoses throughout their lives. Until recently, the EEOC coded all discrimination charges by people with psychiatric disabilities under a single heading without differentiation by diagnosis. The EEOC now collects data about employment discrimination complaints according to five categories: anxiety disorder, depression, manic depressive disorder, schizophrenia, and other.³⁴

Six percent of all complaints received by the EEOC are filed by people with depression.³⁵ An examination of case law reveals that most

5, 2000) (explaining that the court does not reach the question of whether the numerous incidents reported by plaintiff are discriminatory because it finds plaintiff not disabled as a matter of law).

30. 10 Disability Compl. Bull. (LRP) No. 10 (Nov. 20, 1997).

31. See Frisman, *supra* note 24; Hamlin v. Charter Township of Flint, 165 F.3d 426, 438 (6th Cir. 1999) (affirming verdict of \$500,000 in favor of fire chief with heart condition); Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1340 (11th Cir. 1999) (affirming verdict of \$585,120 in favor of claims adjuster who suffered from alcoholism, post-traumatic stress syndrome and depression).

32. Sometimes appellate courts review a district court's granting of judgment as a matter of law to defendants notwithstanding a plaintiff's jury verdict. Lindenau v. Wortz Co., No. 98-7056, 2000 U.S. App. LEXIS 21415, at *2 (10th Cir. Aug. 23, 2000) (affirming district court's judgment as matter of law); DiSanto v. McGraw-Hill, 220 F.3d 61 (2d Cir. 2000) (affirming district court's judgment in favor of defendant notwithstanding jury verdict of \$180,000 back pay, \$100,000 compensatory damages and \$1,000,000 punitive damages in favor of plaintiff with depression). In other cases, appellate courts reverse jury verdicts. Shiplett v. Amtrak, No. 97-2056, 1999 U.S. App. LEXIS 14004, at *27 (6th Cir. June 17, 1999) (reversing jury verdict for engineer with depression and anxiety); Buchanan v. City of San Antonio, 85 F.3d 196, 199 (5th Cir. 1996) (reversing district court's \$300,000 jury verdict to applicant who suffered from depression after the court granted directed verdict to plaintiff on liability and held trial on damages issue only); Poin-dexter v. Atchison, Topeka & Santa Fe Ry. Co., 168 F.3d 1228, 1232 (10th Cir. 1999) (reversing jury verdict in favor of plaintiff with panic disorder); Cannice v. Norwest Bank of Iowa, 189 F.3d 723, 728 (8th Cir. 1999) (reversing jury damage award to plaintiff with depression); Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 304 (4th Cir. 1998) (reducing jury verdict of \$117,500 in compensatory damages for man with brain tumor to \$10,000); Roberts v. Unidynamics Corp., 126 F.3d 1088, 1094-95 (8th Cir. 1997) (reversing jury verdict in favor of employee who claimed he had been perceived to be HIV-positive).

33. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDER 4 (4th ed. 1994).

34. Kathryn Moss et al., *Assessing Employment Discrimination Charges Filed by Individuals with Psychiatric Disabilities Under the Americans with Disabilities Act*, 9 J. DISABILITY POL'Y STUDIES 81, 102 (1998).

35. EEOC Marks ADA 10th Anniversary with Report, Two Policy Guidances, 18 Disability Compl. Bull. (LRP) No. 1, at 8 (Aug. 10, 2000).

people with psychiatric disabilities suing under Title I of the ADA report one of three diagnoses: depression, bipolar disorder or post-traumatic stress syndrome ("PTSD").³⁶ However, some plaintiffs in Title I cases have been diagnosed with schizophrenia or personality disorders. These plaintiffs have included teachers,³⁷ courthouse employees,³⁸ pilots,³⁹ police officers,⁴⁰ assistant hospital administrators⁴¹ and computer programmers.⁴²

The scarcity of claims by people with diagnoses of borderline personality disorder and multiple personality disorder suggests that the levels of stigma and discrimination against people with these diagnoses are so high that people with these diagnoses either do not want to disclose the diagnosis, cannot obtain counsel, or have given up on any chance of having discriminatory activity against them punished or corrected.⁴³

People with personality disorders are subjected to stereotypes as harmful, or more harmful, than those associated with other diagnoses such as depression or schizophrenia. The U.S. Civil Rights Commission's 1998 report on the EEOC's enforcement of Title I noted:

Two commentators have wondered whether [the] EEOC is requiring an employer to accommodate behaviors such as the paranoid employee's penchant for spreading false and destructive rumors, the borderline employee's manipulation of supervisors and coworkers, the histrionic employee's sexually provocative dress and innuendo, or the narcissistic manager's insensitiv-

36. *Americans with Disabilities Act of 1990 (ADA) Cumulative ADA Charge Data - Merit Factor Resolutions* (visited Sept. 3, 2000) <<http://www.eeoc.gov/stats/ada-merit.html>>.

37. *Patterson v. Chicago Ass'n for Retarded Children*, No. 96-C-4713, 1997 WL 323575, at *1 (N.D. Ill. June 6, 1997).

38. *Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351 (7th Cir. 1997).

39. *Witter v. Delta Airlines*, 138 F.3d 1366, 1367 (11th Cir. 1998).

40. In fact, the majority of Title I cases filed by plaintiffs who have been diagnosed with personality disorders are filed by police officers. See, e.g., *Turner v. City of Univ. Heights*, No. 98-3489, 1999 U.S. App. LEXIS 22246, at *2 (6th Cir. Sept. 9, 1999); *Yinger v. City of Dearborn*, No. 96-2384, 1997 U.S. App. LEXIS 33189, at *2 (6th Cir. Nov. 18, 1997); *Davidson v. Atlantic City Police Dep't*, No. 96-3384, 1999 U.S. Dist. LEXIS 13553, at *1-*2 (D.N.J. June 28, 1999); *DiBenedetto v. City of Reading*, No. 96-CV-5055, 1998 U.S. Dist. LEXIS 11804, at *1-*2 (E.D. Pa. July 16, 1998).

41. *Doe v. Milwaukee County*, 871 F. Supp. 1072, 1073 (E.D. Wisc. 1995).

42. *Schwartz v. The Comex and N.Y. Mercantile Exch.*, No. 96-CIV-3386, 1997 WL 187353, at *1 (S.D.N.Y. Apr. 15, 1997).

43. Among literally thousands of Title I cases under the ADA filed by people with psychiatric disabilities, there have been two reported cases filed by people with multiple personality disorder (now classified as "dissociative identity disorder"). *Olson v. General Elec. Aerospace*, 966 F. Supp. 312, 313 (D.N.J. 1997) and *Doe v. County of Milwaukee*, 871 F. Supp. 1072, 1073 (E.D. Wisc. 1995). This is not because the Diagnostic and Statistics Manual of Mental Disorders has replaced the term "multiple personality disorder" with "dissociative identity disorder." There is only one reported case filed by a plaintiff with dissociative disorder. *Marshall v. Metal Container Corp.*, No. 98-1595, 1998 U.S. App. LEXIS 27863 (7th Cir. Oct. 27, 1998) (stating that plaintiff also had "severe" case of borderline personality disorder).

ity and denigration of subordinates.⁴⁴

In fact, the Civil Rights Commission was so concerned about the impact of including people with personality disorders among those protected by the ADA that it devoted several pages of its report to the subject, and concludes by expressing doubt about the wisdom of "the [EEOC] guidance's assertion that personality disorders are potential disabilities under the ADA. . . ."⁴⁵

It hardly needs to be noted that there is no reported case or anecdote in any of the research involving an employee asking for the kinds of accommodations suggested by the U.S. Civil Rights Commission for their "paranoid," "borderline," histrionic, or "narcissistic" personality disorders.⁴⁶

The personality disorders, especially borderline personality disorder, often reflect little more than the diagnoser's intense dislike of the person diagnosed. Some clinicians have even suggested doing away with the diagnosis of borderline personality disorder because its connotations are so pejorative.⁴⁷ It is apparent from reading the Civil Rights Commission's report that its major concern is that conduct such as violence, or traits such as rudeness, obnoxiousness, or "being a jerk," which the Commission associates with personality disorders, will be protected under the ADA.

To center this concern on personality disorders is itself a manifestation of discrimination against a particular set of diagnoses. The obnoxious or troubling behavior associated by the Civil Rights Commission with personality disorders in fact accompanies a number of disabilities, including diabetes when insulin control is a problem,⁴⁸ organic brain damage⁴⁹ and multiple sclerosis.⁵⁰ Yet only people with personality dis-

44. U.S. CIVIL RIGHTS COMMISSION, HELPING EMPLOYERS COMPLY WITH THE ADA: AN ASSESSMENT OF HOW THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IS ENFORCING TITLE I OF THE AMERICANS WITH DISABILITIES ACT 122 (1998). Although the source of this "wondering" is cited, the U.S. Civil Rights Commission neither puts these remarks in quotations nor dissociates itself from them in the text or notes.

45. *Id.*

46. In fact, very few disability discrimination cases are filed by people who state that their disability is a personality disorder. In researching this Article and a forthcoming book on employment discrimination against persons with psychiatric disabilities and the ADA, the author read over eight hundred cases. Of this number, only 67 were filed by people with diagnoses of personality disorders.

47. Association of Therapeutic Communities, *The Need for an NHS Policy on Developing the Role of Therapeutic Communities in the Treatment of "Personality Disorder,"* Position Statement 3 (Sept. 1999).

48. *Gilday v. Mecosta County*, 124 F.3d 760, 761 (6th Cir. 1997); *Siciliano v. Chicago Local 458 3-M*, No. 96-C6555, 1997 U.S. Dist. LEXIS 20519, at *17 (N.D. Ill. Dec. 18, 1997).

49. *Gasper v. Perry*, 155 F.3d 558 (4th Cir. July 2, 1998) (stating that organic brain damage led a man to be "impulsive, disinhibited, excessively loquacious, and to have difficulty reading social cues[,] including an episode where the subject took a fellow employee's umbrella with a duck head and, holding the head close to her face, made quacking noises at her.") This kind of

orders are singled out for a discussion that certainly raises important issues regarding accommodation, workplace culture, and the rights of fellow employees. As Joel Dvoskin has written "[T]here are some diagnoses that hurt people very much. All too often, the result of a psychiatric diagnosis is to stigmatize certain people as dishonest, unlikable, and worst of all hopeless . . . no diagnosis hurts more than that of a personality disorder."⁵¹

People who are diagnosed with personality disorders are subject to all the negative implications of mental illness diagnoses, including involuntary commitment, forcible medication, loss of child custody, loss of employment,⁵² expulsion from the military without benefits, and more.⁵³ However, people diagnosed with personality disorders rarely receive any of the benefits associated with disability status, such as disability benefits, priority for receipt of mental health services, or exemption from criminal responsibility.⁵⁴

The few claims by people with personality disorders, or even more commonly accepted diagnoses such as PTSD or obsessive-compulsive disorder, are likely to be treated by courts with skepticism as to whether they constitute disabilities under the ADA or whether they even exist.⁵⁵ Of the most common diagnoses, depression has been recognized most frequently by courts as a disability under the Americans with Disabilities Act.⁵⁶

2. Substantial Limitation

In order to satisfy the definition of disability, an employee or appli-

behavior raises questions about the extent to which work environments must expand the notion of what is socially acceptable in order to accommodate people with disabilities, and the extent to which accommodations must be made by fellow employees rather than the employer.

50. *Boelman v. Manson State Bank*, 522 N.W.2d 73, 76 (Iowa 1994) (stating that employee was terminated because his multiple sclerosis made it difficult for him to get along with others); *Bussey v. West*, 86 F.3d 1149 (4th Cir. June 4, 1996) (stating that employee's multiple sclerosis made her "irritable" and "lose her temper").

51. Joel Dvoskin, *Sticks and Stones: The Abuse of Psychiatric Diagnosis in Prison*, in THE J. OF THE CAL. ALLIANCE FOR THE MENTALLY ILL 20 (1997); See also George E. Vaillant, *The Beginning of Wisdom is Never Calling a Patient a Borderline*, 1 J. PSYCHOTHERAPY PRAC. & RES. 117-34 (1992).

52. *Lassiter v. Reno*, 885 F. Supp. 869, 874 (E.D. Va. 1995) (disqualifying persons with a history of a basic personality disorder from employment with the United States Marshal's Service).

53. See Susan Stefan, *The Impact of the Law on Women with Diagnoses of Borderline Personality Disorder Related to Childhood Sexual Abuse*, in WOMEN'S MENTAL HEALTH SERVICES: A PUBLIC HEALTH PERSPECTIVE 240, 245 (Bruce Levin et al. eds., 1998).

54. *Id.*

55. See *supra* text accompanying notes 12-16.

56. *Keith v. Ashland Inc.*, No. 98-4539, 2000 U.S. App. LEXIS 1940, at *10 (6th Cir. Feb. 8, 2000) (stating that "[d]epression is, of course, a recognized disability under the ADA . . .").

cant must have a physical or mental impairment that substantially limits one or more major life activities.⁵⁷

The EEOC has defined "substantially limited in major life activities" to mean:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.⁵⁸

The Supreme Court recently held in *Sutton v. United Air Lines, Inc.*⁵⁹ that the substantial limitations caused by a disability must be assessed within the context of any mitigating measures taken by a plaintiff to diminish the impact of his or her disability.⁶⁰ This holding is contrary to the legislative history of the ADA and to the EEOC regulation based on that history, which provided that a plaintiff's disability was to be assessed in its unmitigated state.⁶¹ Cases prior to the *Sutton* trilogy⁶² had used the EEOC mitigation rule to find that plaintiffs who were receiving treatment for psychiatric disabilities were disabled because they would have been disabled without medication, counseling or both.⁶³ Cases since the *Sutton* trilogy have specifically adverted to the Court's holding in *Sutton* in finding that plaintiffs who were receiving psychiatric treatment, especially medication, were not disabled.⁶⁴

The interpretation of the substantial limitation requirement raises a major issue for people with psychiatric disabilities because of the intermittent nature of the limitations caused by psychiatric disabilities. Psy-

57. 42 U.S.C. § 12102 (1994).

58. 29 C.F.R. § 1630.2(j)(1) (2000).

59. 527 U.S. 471 (1999).

60. *Sutton*, 527 U.S. 471, 482-83; see also *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999).

61. *Sutton*, 527 U.S. at 507-12 (Stevens, J., dissenting).

62. The *Sutton* trilogy consists of *Sutton v. United Airlines* 527 U.S. 471 (1999), *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555 (1999).

63. *Sherback v. Wright Automotive Group*, 987 F. Supp. 433, 437 (W.D. Pa. 1997); *McCorry v. Kraft Food Ingredients*, No. 94-6505, 1996 U.S. App. LEXIS 26305, at *16 (6th Cir. Oct. 3, 1996).

64. *Spades v. City of Walnut Ridge*, 186 F.3d 897, 899 (8th Cir. 1999); *Robb v. Horizon Credit Union*, 66 F. Supp. 2d 913, 918 (C.D. Ill. 1999); *Andrews v. United Way of Southwest Ala.*, No. 98-1142-P-C, 2000 U.S. Dist. LEXIS 1969, at * 28 (S.D. Ala. Jan. 28, 2000); *McConnell v. Pioneer Hi-Bred Int'l*, No. 98-4060, 2000 U.S. Dist. LEXIS 3335, at *19 (D.S.D. Jan. 25, 2000). But see *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999); *Schumacher v. Souderton Area Sch. Dist.*, No. 99-1515, 2000 U.S. Dist. LEXIS 563, at *26 (E.D. Pa. Jan. 21, 2000) (requiring a more sensitive, fact-specific approach to cases involving plaintiffs taking psychotropic medications to ameliorate their disabilities).

chiatric disabilities tend to be episodic.⁶⁵ If an individual is not substantially limited all the time, how often does he or she have to be substantially limited to qualify as disabled? Is the very condition of being intermittently subject to substantial limitations sufficient to qualify as a disability? There are plenty of other disabilities with these characteristics: AIDS in its early stages, epilepsy, diabetes, lupus, multiple sclerosis, and other conditions all manifest themselves episodically.

Other courts have followed the lead of Judge Richard Posner, who wrote early on in the development of ADA jurisprudence that "an intermittent impairment that is a characteristic manifestation of an admitted disability is, we believe, a part of the underlying disability. . . . Often the disabling aspect of a disability is, precisely, an intermittent manifestation of the disability, rather than the underlying impairment."⁶⁶

3. *What are Major Life Activities?*

In order to be deemed disabled, an individual must be substantially limited in "one or more of the major life activities."⁶⁷ The text of the ADA does not define "major life activities." "Major life activities" were initially defined by EEOC regulations primarily in terms of physical disabilities such as walking, seeing, breathing, and performing manual tasks, although some activities, such as learning, were clearly targeted at certain mental disabilities, and others, such as caring for one's self, represented overlap between mental and physical disabilities.⁶⁸

The EEOC, the Supreme Court and lower courts have spent substantial effort to flesh out the meaning of "major life activities." In the process, they have laid bare a fascinating social anthropology of American culture and values. For example, one panel of the Ninth Circuit ruled that difficulty sleeping only constitutes a limitation on a major life activ-

65. Some courts have decided that episodes of acute psychiatric disability are too "temporary" by nature to qualify as disabilities, even though an individual has been diagnosed or received treatment over years of time. *See, e.g., Soileau v. Guilford of Me.*, 105 F.3d 12, 16 (1st Cir. 1997).

66. *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995); *see also Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 599 (7th Cir. 1998).

67. 29 C.F.R. § 1630.2(g)(1) (2000).

68. These examples of major life activities were very much oriented to physical disabilities. Partially in response to the concerns of the psychiatric disability community, the EEOC added examples of major life activities in its Enforcement Guidance on the Definition of Disability that reflected the limitations associated with some psychiatric disabilities: thinking, concentrating and interacting with others. Finally, in its Enforcement Guidance in the ADA and Psychiatric Disabilities, the EEOC added sleeping as a major life activity. EEOC ENFORCEMENT GUIDANCE, DEFINITION OF THE TERM "DISABILITY" § 902; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: THE AMERICAN WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997). The EEOC has advised that in determining whether a person is limited in a major life activity, its investigators should consider all other life activities before considering whether a person is limited in the major life activity of working. 29 C.F.R. § 1630, app. (2000) (discussing 29 C.F.R. § 1630.2(j)). However, as discussed in Part III, many courts look to whether a plaintiff is substantially limited in work first, or at least concurrently, with their analysis of other major life activities.

ity if it limits the ability to work.⁶⁹ The EEOC's Interpretive Guidance adds sitting, standing, lifting and reaching, with citations to the legislative history of the ADA.⁷⁰ Interestingly, the Technical Assistance Manual lists all of these as examples of major life activities but substitutes "reading" for "reaching."⁷¹

A number of courts have refused to adopt the EEOC's suggestions regarding what activities constitute major life activities, especially major life activities likely to be affected by psychiatric disability. Thus, although the EEOC considers personal interactions, sleep, and concentration to be major life activities, some circuits have held that these are not major life activities.⁷² Courts that have held that "interacting with others" is a major life activity have required the plaintiff meet an extremely high threshold to show that he or she was substantially limited in interacting with others: "plaintiff must show that his 'relations with others were characterized on a regular basis with severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.'" (quoting EEOC on *Psychiatric Disabilities* at 5).⁷³

B. "Otherwise Qualified for Employment"

The applicant must also be "otherwise qualified" for the position.⁷⁴ This means that the applicant or employee must be able to perform the "essential functions" of the position.⁷⁵ An employee who could perform

69. *Innes v. Mechatronics*, No. 96-35515, 1997 U.S. App. LEXIS 18000, at *7-*8 (9th Cir. July 17, 1997). This is certainly a mistaken interpretation of the ADA, and would lead to bizarre but analogous conclusions in the case of people like Stephen Hawking and Judge David Tatel, Court of Appeals for the D.C. Circuit, who have disabilities that substantially limit major life activities but whom still work very well in their chosen professions.

70. 29 C.F.R. § 1630 app. (2000).

71. EEOC TECHNICAL ASSISTANCE MANUAL, I-2.2(a)(ii) (1992).

72. The First, Second, Ninth, Tenth, and Eleventh Circuits have recognized sleep as a major life activity. *Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir. 1998); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999); *Pack v. K-Mart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999); *Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1134 (11th Cir. 1996). The Second Circuit recognizes reading as a major life activity. *Bartlett v. New York State Bd. of Law Exam'rs*, No. 97-9162, 2000 U.S. App. LEXIS 22212, at *23 (2d Cir. Aug. 30, 2000). The Third and Ninth Circuit have recognized interacting with others as a major life activity. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999); *McAlindin*, 192 F.3d at 1234. The First Circuit has both accepted it and rejected it. *Criado*, 145 F.3d at 442 (accepting); *Soileau v. Guilford of Me.*, 105 F.3d 12 (1st Cir. 1997) (rejecting). The Third Circuit has recognized "thinking" as a major life activity. *Taylor*, 184 F.3d at 307. The Tenth Circuit has rejected "concentrating" as a life activity. *Pack*, 166 F.3d at 1305. The Ninth Circuit has recognized "engaging in sexual relations" as a major life activity. *McAlindin*, 192 F.3d at 1234.

73. *McAlindin*, 192 F.3d at 1235 (quoting EEOC on *Psychiatric Disabilities* at 5). The Ninth Circuit was adopting the standard suggested by the EEOC in its GUIDANCE ON PSYCHIATRIC DISABILITIES E-4 (1997).

74. 42 U.S.C. § 12112(b)(5) (1994).

75. *Id.* § 12111.

the essential elements of the job if the employer provided reasonable accommodations for the individual's disability will be considered otherwise qualified, and an employer who refuses to provide reasonable accommodations will be held to have discriminated against the employee.⁷⁶ Essential qualifications for employment have been deemed to include the ability to get along with others.⁷⁷ This is ironic since courts have refused to recognize the ability to get along with others as a "major life activity" for purposes of determining whether a plaintiff who is substantially limited in the ability to get along with others is disabled.⁷⁸

A particularly troubling development under the ADA has been an increasing tendency by courts to find that plaintiffs with psychiatric disabilities are not "otherwise qualified" for employment if they do not seek or remain in psychiatric treatment, including taking psychotropic medication.⁷⁹

C. Definition of "Employment"

Title I of the Americans with Disabilities Act prohibits discrimination on the basis of disability in the context of employment.⁸⁰ The employment context is broadly defined: the ADA forbids any discrimination in the "terms and conditions" of employment, including recruitment, hiring, promotion, transfer, employee benefits, training, fringe benefits, layoff and termination.⁸¹ Employers, labor unions, referral agencies, organizations providing training or apprenticeship programs, and organizations providing fringe benefits are all prohibited from discriminating on the basis of disability under Title I.⁸² The liability of organizations providing fringe benefits has been the subject of considerable litigation under the ADA by people with psychiatric disabilities, who have challenged disability benefit packages that provide drastically lower benefits for psychiatric disabilities than physical disabilities.⁸³ Although the circuit courts are split on the procedural question of whether former employees can sue under Title I of the ADA,⁸⁴ the substantive challenges to health or disability insurance packages with dras-

76. *Id.* § 12112(b)(5).

77. *Baker v. City of New York*, No. 97-CV-5829, 1999 U.S. Dist. LEXIS 14324, at *11-12 (E.D.N.Y. Jan. 28, 1999).

78. *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997).

79. *See, e.g., Philips v. Union Pac. R.R.*, 216 F.3d 703, 707 (8th Cir. 2000).

80. 42 U.S.C. § 12112(a).

81. *Id.*

82. *Id.*

83. *See, e.g., EEOC v. Aramark Corp.*, 208 F.3d 266 (D.C. Cir. 2000); *Connors v. Maine Med. Ctr.*, 42 F. Supp. 24 (D. Me. 1999).

84. *Ford v. Schering-Plough*, 145 F.3d 601, 607 (3d Cir. 1998) (holding that former employees do retain such a right); *Gonzalez v. Garner Food Serv.*, 89 F.3d 1523 (11th Cir. 1996) (holding that former employees have no right to sue under Title I).

tically lower mental health benefits have uniformly failed in the circuit courts.

As I have argued elsewhere, Americans with psychiatric disabilities can be divided into two groups: people for whom disability or perceived disability has become their primary identity, whose abilities are often greatly underestimated, and those who "pass" by silence, hiding, lying, or minimizing their difficulties, whose sufferings are greatly underestimated.⁸⁵ This division is clear when it comes to employment. People in the first group are often clients of state mental health systems and may be involved in job programs, supported employment, transitional employment programs, or consumer-run programs. These people are publicly defined as disabled before attempting to enter the employment market, and they generally do so with the assistance or mediation of a government or private non-profit organization. Although these individuals would probably have little difficulty in convincing a court that they met the definition of disability for purposes of the ADA,⁸⁶ they are basically not part of mainstream competitive employment in America and they rarely sue employers.⁸⁷

The second group of Americans with psychiatric disabilities are employed in mainstream jobs. In many cases, the job situation itself appears to have created the disability: increasing expectations by employers of longer hours, stressful interactions with supervisors, and abusive situations at work. These people are the plaintiffs in Title I cases involving psychiatric disabilities.⁸⁸ It should be understood that they have the same kinds of diagnoses as the first group. They also have experiences of hospitalization, sometimes repeated and extensive.⁸⁹ They take psychotropic medications and sometimes Electroconvulsive Therapy ("ECT"). They attempt suicide⁹⁰ and have breakdowns.⁹¹ These same plaintiffs also have long histories of productive employment, promo-

85. See generally SUSAN STEFAN, *UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT* (2000).

86. But see *Phillips v. Wal-Mart Stores*, 78 F. Supp. 2d 1274, 1277 (S.D. Ala. 1999) (stating that plaintiff who was in a coma for four months after a car accident, was left with a traumatic brain injury that required him to relearn how to speak, walk, and read, who was on Social Security for fourteen years and had a Supported Employment certificate from Vocational Rehabilitation, was not disabled for purposes of the ADA).

87. But see *EEOC v. Hertz Corp.*, No. 96-72421, 1998 U.S. Dist. LEXIS 58 (E.D. Mich. Jan. 6, 1998) (excoriating the EEOC, comparing the EEOC's legal position with the Emperor who claimed to have new clothes, and wondering how the EEOC could advance its goal of employment for the handicapped if it punished would-be employers like defendant for their generosity).

88. See Susan Stefan, *You'd Have to be Crazy to Work Here: Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 798-89 (1998).

89. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 309 (3d Cir. 1999); *Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492, 494 (10th Cir. 2000); *McConnell v. Pioneer Hi-Bred Int'l, Inc.*, No. 98-4060-KES, 2000 U.S. Dist. LEXIS 3335, at *5 (D.S.D. Jan. 25, 2000).

90. *EEOC v. Amego*, 110 F.3d 135, 137 (1st Cir. 1997).

91. *Doyal*, 213 F.3d at 484.

tions, and employment awards. These are the people who are losing employment discrimination claims because they are found not to meet the definition of disability under the ADA.

D. Definition of Discrimination

The Americans with Disabilities Act specifically prohibits a number of different forms of discrimination.⁹² These protections are worded to prohibit irrational discrimination and are relatively deferential to employers' business needs. For example, employers are prohibited from using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out individuals with disabilities.⁹³ However, employers may use these standards, tests or criteria if they are job-related to the specific employment in question and are consistent with business necessity.⁹⁴ Therefore, employers are prohibited from making selections that are not job-related and that bear no relationship to business necessity.⁹⁵

Likewise, employers illegally discriminate if they fail to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the accommodation would create an undue hardship on the operation of the business.⁹⁶ Therefore, employers may refuse accommodations, even reasonable ones, if they would create an undue hardship on the business.⁹⁷

Two forms of discrimination defined by the ADA are of particular importance to people with psychiatric disabilities. The first is the specific provision of the ADA prohibiting employers from asking an applicant for a position whether he or she has a disability.⁹⁸ The second is the requirement that information from permitted medical tests be kept confidential and in a separate file from the employee's regular employment file.⁹⁹

1. Prohibition on Inquiries Relating to Mental Illness or Treatment

The language of the Americans with Disabilities Act is clear: "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a

92. 42 U.S.C. § 12112 (1994).

93. *Id.* § 12112(b)(6).

94. *Id.*

95. *See id.*

96. *Id.* § 12112(b)(5)(A).

97. 42 U.S.C. § 12112(b)(5)(A).

98. *Id.* § 12112(d)(2)(A).

99. *Id.* § 12112(d)(3)(B).

disability or as to the nature or severity of such disability.¹⁰⁰ These questions cannot be raised in writing on employment applications, in person during employment interviews, nor in testing required for employment. An employer may ask any applicant whether he or she has the ability to perform job-related functions.¹⁰¹ Once the applicant has actually been offered a job, the employer may require him or her to have a medical examination,¹⁰² as long as all entering employees have that examination and information is maintained in separate files and treated as confidential.¹⁰³

This protection has been diminished and diluted in a number of ways in the ten years since the ADA took effect. First, the EEOC and the courts have interpreted the ADA to permit some forms of "psychological testing."¹⁰⁴ Although the EEOC has taken the position that any employment applicant confronted with a prohibited question on an application, who was not hired, could challenge the question,¹⁰⁵ the circuit courts have divided on the question of whether an applicant must have a disability to challenge prohibited questions.¹⁰⁶

The ADA also permits employers to test job applicants for the use of illegal substances in their urine.¹⁰⁷ It is clear from the case law that these tests reveal the presence of prescription medications, including psychotropic medications.¹⁰⁸ Thus, an applicant who is taking psychotropic

100. *Id.* § 12112(d)(2)(A).

101. *Id.* § 12112(d)(2)(B).

102. 42 U.S.C. § 12112(d)(3).

103. *Id.* § 12112(d)(3)(B).

104. See EEOC ENFORCEMENT GUIDANCE: *Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995). While the EEOC prohibits tests designed to reveal impairments in mental health or that would provide evidence that would lead to identifying a mental disorder or impairment, it has permitted "personality" tests and tests that identify people's "traits." See *id.* at 16-17. Courts have interpreted this guidance to permit tests for "behavior problems" and "emotional instability" see *Thompson v. Borg-Warner Protective Services*, 16 A.D.D. 344 (N.D. Cal. 1996).

105. *Griffin v. Steel-Trek Inc.*, 160 F.3d 591 (10th Cir. 1998).

106. Compare *Griffin v. Steel-Tek, Inc.*, 160 F.3d 591, 595 (10th Cir. 1998) (holding that applicant need not be disabled to challenge employer's asking of question prohibited by ADA); *Fredenberg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1181-82 (9th Cir. 1999) (holding that applicants need not prove they are qualified individuals with a disability to challenge a medical exam under the ADA); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1228-1229 (10th Cir. 1997) (explaining that plaintiff's ability to maintain an alleged ADA violation does not require proof that she is an individual with a disability), with *Armstrong v. Turner Indus.*, 141 F.3d 554, 561 (5th Cir. 1998) (arguing that applicant must prove that he has a disability or is regarded by the employer as disabled in order to challenge questions normally prohibited by ADA regulations).

107. 42 U.S.C. 12114(d)(1).

108. *Wyland v. Boddie-Noell*, No. 98-1163, 1998 U.S. App. LEXIS 29355, at *1 (4th Cir. Nov. 17, 1998) (stating that employee tested positive because of presence of prescription pain medications); *Shippett v. Amtrak*, No. 97-2056, 1999 U.S. App. LEXIS 14004 (6th Cir. June 17, 1999) (employee's screen-tested positive for benzodiazapine because employee was taking Xanax for anxiety problems). Some employers even perform unauthorized tests for conditions such as syphilis, sickle cell trait, and pregnancy. *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998) (dismissing ADA claim because there was no showing that results of

medications can be identified as such by any employer who requires drug screenings, and the employer can simply refuse to hire the applicant without ever discussing the issue of why the applicant is taking the medications.¹⁰⁹ It should be noted, however, that employers violate the ADA if they require employees to report all prescription drugs they are taking unless such a requirement can be shown to be job-related and consistent with a business necessity.¹¹⁰

In addition, the protection accorded by the prohibition against asking applicants about their history of mental health diagnoses and treatment is circumvented by the fact that employees can be required to answer questionnaires about their health histories if an employer is searching for new group health coverage.¹¹¹ Finally, courts have given employers wide latitude to order employees to submit to fitness-for-duty examinations, including mental health testing, if they have reasons to be concerned about an employee's behavior,¹¹² and even when they do not have reason to be concerned.¹¹³ Once psychiatric evaluations are required of an employee, the employer is largely insulated from challenges to adverse employment actions if those actions are based on a psychiatric or psychological evaluation of the employee, even when the mental health professional is an employee or contractor of the employer. The basis for the recommendations of the mental health professionals in these evaluations is rarely examined, although it is more likely to be scrutinized if the recommendation is favorable to the employee.¹¹⁴ However, mental health professionals may be more restrained than employers, and their recommendations sometimes help an employee show the employer's actions were unreasonable.

In addition, an employee who requests a leave of absence because of a psychiatric disability can be forced to submit to testing to evaluate his or her fitness to return to work,¹¹⁵ and may have to agree to take medication, undergo psychotherapy,¹¹⁶ or comply with "any and all" treatment

unauthorized tests were not kept confidential).

109. See *supra* text accompanying note 100.

110. *Cheyenne Mountain*, 124 F.3d at 1230-31.

111. *Barnes v. Benham Group, Inc.*, 22 F. Supp. 2d 1013, 1021 (D. Minn. 1998).

112. *Phillips v. Union Pac.*, 216 F.3d 703, 707 (8th Cir. 2000); *Krocka v. City of Chicago*, 203 F.3d 507, 514 (7th Cir. 2000); *Duda v. Board of Educ. of Franklin Park*, 133 F.3d 1054 (7th Cir. 1998); *Miller v. Champaign Community Unit Sch. Dist.*, 983 F. Supp. 1201, 1205 (C.D. Ill. 1997).

113. *Cossette v. Minnesota Power and Light*, 188 F.3d 964, 966 (8th Cir. 1999) ("[d]espite satisfactory job performance, [plaintiff's] supervisor suspected that she suffered from literacy deficits, dyslexia, and perhaps other intellectual deficiencies, and she ordered [plaintiff] to undergo testing at a local university clinic.").

114. *Winder v. Heckler*, No. 83-C-9560, 1986 U.S. Dist. LEXIS 30744 (N.D. Ill. Jan. 7, 1986). For an example of a court questioning defendant's expert examinations, see *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 309 (3d Cir. 1999).

115. *Yin v. State of Cal.*, 95 F.3d 864, 868 (9th Cir. 1996); *Rice v. City of Oakland*, No. 97-1897, 1999 U.S. Dist. LEXIS 8330 (N.D. Cal. May 24, 1999).

116. *Fontanilla v. City of San Francisco*, No. 98-4539, 1999 U.S. App. LEXIS 34118 (9th Cir.

recommendations before being permitted to return to work.¹¹⁷ Courts have uniformly upheld these requirements.¹¹⁸

Finally, a former employee who was known to the employer to be disabled during his or her employment, and who seeks reemployment, may be required to submit a medical release before being considered.¹¹⁹ It is no surprise that many of these cases have arisen in the context of psychiatric disability.¹²⁰

2. Requirement of Confidentiality of Medical Records

Despite the requirement that records of a disability obtained through medical examinations be kept confidential, case law reflects that this confidentiality protection is subject to a number of exceptions¹²¹ and is in any event breached with some regularity.¹²² Several circuits have held that a plaintiff need not prove that he or she is disabled to prevail on a claim under the ADA that the employer violated this provision of the ADA.¹²³

3. The Employer Must Be Aware of the Employee's Disability

For an employer to be liable for discrimination on the basis of actual disability under Title I of the ADA, the employee must have made the employer aware that he or she had a disability.¹²⁴ This requirement se-

Dec. 27, 1999).

117. *McAlindin v. San Diego County*, 192 F.3d 1226, 1231 (9th Cir. 1999) (stating that before returning to work, plaintiff would be required to submit to fitness for duty examination and "had to obtain the required treatment"); *Keith v. Ashland*, No. 98-4539, 2000 U.S. App. LEXIS 1940 (6th Cir. Feb. 8, 2000).

118. *See, e.g., Derbis v. United States Shoe Corp.*, 67 F.3d 294 (4th Cir. 1995) (requiring employee to get a "clean bill of health" before returning to work).

119. *Harris v. Harris and Hart*, No. 98-35949, 2000 U.S. App. LEXIS 3713 (9th Cir. Mar. 13, 2000).

120. *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 668 (1st Cir. 1995) (holding employer did not violate ADA by requiring employee with known mental illness to provide medical certification for re-employment); *Brumley v. Pena*, 62 F.3d 277 (8th Cir. 1995) (holding that the FAA retained the right to require plaintiff's medical condition be verified in order to determine re-employment rights).

121. EEOC Notice No. 915.002 (May 19, 1994) (Example 3) (stating that the confidentiality provisions of the ADA are not applicable to disability information obtained before the ADA took effect). Courts have also held that the confidentiality provisions do not apply to information obtained from employees in order to get group health insurance, *Barnes v. Benham Group*, 22 F. Supp. 2d 1013, 1021 (D. Minn. 1998), nor to be immune from discovery in ADA claims by other employees. *Scott v. Leavenworth Unified Sch. Dist.*, 78 F. Supp. 2d 1198, 1201 (D. Kan. 1999) (explaining that school psychologist with depression sought personnel files of other employees she claimed had been given accommodations that she had been denied).

122. *Keene v. TECO Energy Corp.*, No. 98-2406-CIV-T-17B, 2000 U.S. Dist. LEXIS 2271 (M.D. Fla. Mar. 1, 2000); *Scott*, 78 F. Supp. 2d at 1201.

123. *Fredenberg v. Contra Costa County*, 172 F.3d 1176, 1182 (9th Cir. 1999); *Cossette v. Minnesota Power and Light*, 188 F.3d 964, 966 (8th Cir. 1999).

124. *Hedberg v. Indiana Bell Tel.*, 47 F.3d 928, 931 (7th Cir. 1995).

verely restricts the utility of the ADA for people with psychiatric disabilities under the ADA. Case law, social science research, and reports by people with psychiatric disabilities suggest that most job applicants and employees with psychiatric disabilities are extraordinarily reluctant to disclose their disabilities.¹²⁵ This is both because of the stigma and shame associated with mental illness and because of pragmatic reasons.¹²⁶ The predominant conclusion drawn by people with psychiatric disabilities is that hiding their disabilities provides far more protection from discrimination than the ADA ever would, and the case law canvassed in this Article amply supports this conclusion.

In addition, courts have been extraordinarily restrictive in interpreting the requirement that the employer must be aware of the employee's disability. The Eighth Circuit has held that when an employee's sister told the employer that the employee was in a mental hospital, the statutory requirement that the employer be informed of an employee's disability was not satisfied.¹²⁷ The Fifth Circuit has held that an employee did not sufficiently inform an employer of his disability when he told his supervisor he had bipolar disorder.¹²⁸ Still other courts have held that an employer who forces an employee to take medical leave because of a psychiatric condition or forbids the employee from returning to work without a psychological evaluation does not "know" the employee is disabled for purposes of the ADA.¹²⁹

Of course, an employee may still sue under the ADA if the employer has discriminated on the basis of its perceptions that the employee is disabled.¹³⁰ In this case, the employee need not show that he or she has a disability.¹³¹ However, as discussed in Part III, this provision of the ADA has not been helpful to plaintiffs who charge that employers perceived them as having a psychiatric disability, because the employer must either regard them as substantially limited in a major life activity or as unable to perform a broad class of jobs. This will be discussed more fully below.

125. *EEOC v. Amego*, 110 F.3d 135, 138-39 (1st Cir. 1997).

126. *Rogers v. CH2M Hill*, 18 F. Supp. 2d 1328 (M.D. Ala. 1998) (stating that the plaintiff alluded to hesitancy in disclosure).

127. *Miller v. National Gas Co.*, 61 F.3d 627 (8th Cir. 1995).

128. *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155 (5th Cir. 1996).

129. *Cody v. Cigna Healthcare*, 139 F.3d 595, 599 (8th Cir. 1998); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 883 (6th Cir. 1996). In addition, an employer who merely suggests or offers an employee medical leave does not "know" the employee is disabled. *Crandall v. Paralyzed Veterans Ass'n*, 146 F.3d 894, 898 (D.C. Cir. 1998).

130. 42 U.S.C. § 12102(2)(c) (1994).

131. *Weber v. Strippit, Inc.*, 186 F.3d 907, 914 (8th Cir. 1999).

4. The Requirement of an "Adverse Employment Action"

Although the term is not contained in the language of the statute or the regulations, courts have held that in order to sue under the ADA, a worker or applicant must have experienced an "adverse employment action."¹³² Courts have interpreted the meaning of this term fairly narrowly.¹³³

For example, in *Duda v. Board of Education of Franklin Park Public School District*,¹³⁴ plaintiff, a school custodian with bipolar disorder, brought his diary to work and wrote in it during his breaks.¹³⁵ The diary was stolen by two other custodians, who copied it and distributed it to school officials.¹³⁶ Rather than disciplining the custodians for theft, school officials banned Duda from school grounds because the diary was interpreted as containing a threat to kill his boss.¹³⁷ He was not permitted to return to work without a fitness evaluation by three psychiatrists.¹³⁸ He was required, as a condition of employment, to continue taking medication, continue counseling, continue attending AA, and to report to the school any changes in his medication.¹³⁹ He was told not to return to the school he had been working in and not to speak to people in the new school where he was assigned.¹⁴⁰ He was told not to bother applying for a better position.¹⁴¹ The district court's holding that none of these allegations amounted to an "adverse employment action" was reversed on appeal, but the Seventh Circuit implied that the School District had been prudent in requiring the psychiatric evaluations.¹⁴²

In fact, several circuit courts have held as a matter of law that being required to submit to a mental or psychiatric examination is not an "adverse employment action[.]" and an employee who is fired for refusing to submit to such an examination has no cause of action under ADA.¹⁴³ Another court found no adverse employment action when a professor told his class not to associate with another professor, "and implied that it might be more convenient if, as with animals, society could put unwanted people to sleep."¹⁴⁴

132. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1336 (11th Cir. 1999).

133. *See, e.g., Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 814 (6th Cir. 1999).

134. 133 F.3d 1054 (7th Cir. 1998).

135. *Duda*, 133 F.3d at 1055.

136. *Id.* at 1055.

137. *Id.* Neither the district court nor the Court of Appeals quoted the language directly, although the Court of Appeals implied that the language was ambiguous.

138. *Id.* at 1056.

139. *Id.*

140. *Duda*, 133 F.3d at 1056.

141. *Id.*

142. *Id.* at 1060-61.

143. *See, e.g., Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999).

144. *Chrouser v. DePaul Univ.*, No. 95-C-7363, 1998 U.S. Dist. LEXIS 8179, at *18-19

5. *Prohibition of a Hostile Work Environment*

People with psychiatric disabilities are particularly likely to experience hostile work environments, often because supervisors or fellow employees do not believe that they are disabled and resent any accommodations provided to them. When an employee's diagnosis is known at work, he or she may be subject to overt harassment or belittling¹⁴⁵ or subtle discrimination in the form of lowered job expectations.

While it is helpful that most district courts have recognized a cause of action under the ADA for a "hostile work environment,"¹⁴⁶ the environment must be egregiously hostile for an employee to prevail under this cause of action.¹⁴⁷ Most hostile work environment claims appear to be foreclosed to plaintiffs at the summary judgment stage.¹⁴⁸ If a plaintiff can actually get to a jury with a hostile work environment claim, he or she may be able to collect substantial damages.¹⁴⁹ A separate statute limits compensatory damages under the Americans with Disabilities Act.¹⁵⁰ In several successful jury cases, the facts surrounding the claim seem similar to or less egregious than the facts of claims dismissed by judges at the summary judgment stage.

6. *Nature of Discrimination Claimed by Plaintiffs with Psychiatric Disabilities*

As might be expected, the kinds of ADA claims brought by people with psychiatric disabilities are distinctively different from ADA claims brought by people with physical disabilities. First, many of the claims can be characterized as "pure" discrimination claims. That is, the employee is not asking for any accommodations, but alleging that he or she suffered an adverse employment action simply because of disability or,

(N.D. Ill. May 20, 1998).

145. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1327 (11th Cir. 1999); *Haysman v. Food Lion*, 893 F. Supp. 1092, 1098 (S.D. Ga. 1995).

146. Although many circuit courts have assumed for the purpose of deciding a case that a cause of action exists under the ADA for a hostile work environment, no circuit has squarely held that the ADA includes claims for discrimination on the basis of a hostile work environment. *Walton v. Mental Health Assoc.*, 168 F.3d 661, 667 (3d Cir. 1999); *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1998); *Conley v. Village of Bedford Park*, 215 F.3d 703, 712 (7th Cir. 2000); *Vollmert v. Wisconsin Dep't of Transp.*, 197 F.3d 293, 297 (7th Cir. 1999); *Cannice v. Norwest Bank Iowa*, 189 F.3d 723, 725 (8th Cir. 1999); *Anthony v. City of Clinton*, No. 98-6188, 1999 U.S. App. LEXIS 13229, *9-10 (10th Cir. June 15, 1999).

147. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (discussing hostile work environment claims in terms of sexual harassment).

148. See, e.g., *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681 (8th Cir. 1998).

149. *Farley*, 197 F.3d at 1335 (upholding a jury's compensatory damage award of \$300,000); *Shippett v. Amtrak*, No. 97-2056, 1999 U.S. App. LEXIS 14004, at *2 (6th Cir. June 17, 1999) (vacating jury verdict award of \$500,000).

150. 42 U.S.C. § 1981a(b)(3) (1994) (limiting compensatory damages available under the ADA according to the number of persons employed by the employer).

more likely, perceived disability. Although part of the backlash against the ADA has been against the obligation to provide reasonable accommodations, some courts have used the absence of a request for reasonable accommodations by a plaintiff with psychiatric disabilities to conclude that he or she is not truly disabled.¹⁵¹ In other cases, the minimal nature of the requested accommodation has been cited to conclude that the employee is not disabled.¹⁵²

7. *Psychotropic Medication and Reasonable Accommodations*

Psychotropic medications raise issues in some ADA cases brought by people with psychiatric disabilities. Ironically, although people with psychiatric disabilities are encouraged and sometimes even forced to take medication for their conditions, a number of ADA cases arise because people are precluded from employment if they are taking psychotropic medications, or subject to extreme surveillance and monitoring even if their job-related conduct has been free of any problems.

For example, the Chicago police force required any police officer who was taking Prozac, even those with consistently good performance evaluations who exhibited no signs of psychological illness, to participate in the Department's "Personnel Concerns Program" ("PCP").¹⁵³ This program was typically reserved for officers with disciplinary problems.¹⁵⁴ The Chicago Police Department's policy was to put all officers on psychotropic medication in the PCP because they are deemed to have "significant deviations from an officer's normal behavior."¹⁵⁵ In another case, the Sixth Circuit upheld a railroad's requirement that the plaintiff cease taking Xanax or be terminated from his position.¹⁵⁶

The question of whether an employer can force an employee to take medications is one that has arisen in connection with a number of disabilities. In a recent case with disturbing implications, a court held that an asthmatic plaintiff who refused to take steroids because she was concerned they would adversely affect her pituitary adenoma was neither disabled nor otherwise qualified for her position. The court stated that "[s]ince plaintiff's condition is correctable by medication and since she voluntarily refused the recommended medication, her asthma did not

151. See, e.g., *Finnicum v. Evant, Inc.*, No. 98-3347, 1999 U.S. App. LEXIS 9849, at *5 (6th Cir. May 17, 1999) (pointing out that plaintiff had not asked for accommodation in the context of concluding that she was not disabled by her psychiatric condition).

152. See, e.g., *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15-16 (1st Cir. 1997) (observing that one factor to be considered in whether a person is substantially limited in a major life activity is the "nature and severity" of the impairment).

153. *Krocka v. City of Chicago*, 203 F.3d 507, 511 (7th Cir. 2000).

154. *Krocka*, 203 F.3d at 511.

155. *Id.*

156. *Shiplett v. Amtrak*, No. 97-2056, 1999 U.S. LEXIS 14004 (6th Cir. June 17, 1999).

substantially limit her in any major life activity. A plaintiff who does not avail herself of proper treatment is not a 'qualified individual' under the ADA."¹⁵⁷

Courts have held in the past that plaintiffs with a psychiatric conditions who refuse to take medication or to seek treatment are in essence "creating" their handicap¹⁵⁸ or not otherwise qualified for their jobs.¹⁵⁹

On the other hand, an employer is not required to suggest, compel, or force an individual into treatment as a reasonable accommodation. Several cases in which employees suggested that the employer was required to make psychiatric referrals¹⁶⁰ or to compel employees to seek treatment as a reasonable accommodation¹⁶¹ have been brusquely rejected by the courts.

Finally, an employer may not require an employee who has not demonstrated performance problems at work to enter a treatment program by calling its requirement a "reasonable accommodation" when such accommodation was not sought by the employee.¹⁶²

E. Reasonable Accommodations

An accommodation is "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."¹⁶³ The term "reasonable accommodation" means:

- (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- (ii) Modifications or adjustments to the work environment, or to the manner circumstances under which the position held or desired is customarily performed that enable a qualified individual with a disability to perform the essential functions of a position; or
- (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated em-

157. *Tangires v. Johns Hopkins Hosp.*, 79 F. Supp. 2d 587, 596 (D. Md. 2000), *aff'd*, No. CA-98-4181-H, 2000 WL 1350647 (4th Cir. 2000).

158. *Franklin v. United States Postal Serv.*, 687 F. Supp. 1214, 1218 (S.D. Ohio 1988) (Rehabilitation Act case).

159. *Roberts v. Fairfax*, 937 F. Supp. 541, 547-48 (E.D. Va. 1996).

160. *See, e.g., Brookins v. Indianapolis Power and Light Co.*, 90 F. Supp. 541, 548 (E.D. Va. 1996).

161. *Roberts*, 937 F. Supp. at 548.

162. *Miners v. Cargill Communications, Inc.*, 113 F. 3d 820, 825 (8th Cir. 1997).

163. 29 C.F.R. § 1630.2(o) (1999).

ployees without disabilities.¹⁶⁴

When people with psychiatric disabilities ask for accommodations, the requests fall into three major categories: (1) transfer; (2) working fewer hours; or (3) leave. All of these are accommodations explicitly anticipated by the ADA.¹⁶⁵ Yet courts tend to reject these accommodations—especially requests for transfer—because they disapprove of the *reason* the plaintiff is requesting the accommodation which is usually for difficulty in getting along with a new supervisor.¹⁶⁶ In the typical ADA case brought by someone with a psychiatric disability involving a request for accommodations, a plaintiff who has worked well for years in a particular job begins having trouble with the appointment of a new supervisor, asks to be transferred, is refused, ultimately fired, and goes on disability benefits.¹⁶⁷

1. Requirement of Interactive Process in Determining Accommodations

Most courts have held that employers have an obligation to engage in an "interactive process" with disabled employees to determine whether accommodations are available for their disabilities.¹⁶⁸ Different circuits have taken different positions about the extent of the employer's and employee's obligations to engage in the interactive process.¹⁶⁹

The Seventh Circuit has held that the employer's obligations in the interactive process may be heightened in the case of employees with serious psychiatric disabilities.¹⁷⁰

2. What Constitutes a "Reasonable" Accommodation

The accommodation that is most frequently requested by plaintiffs with a psychiatric disability in reported cases is transfer. Transfer is explicitly defined as a reasonable accommodation by the ADA (assuming that a position is available or soon will be) and by the EEOC.¹⁷¹ Transfer requires no additional expenditure of funds by the employer. Nevertheless, the vast majority of courts have held that this accommodation is not

164. *Id.*

165. For a collection of these cases, see Susan Stefan, *You'd Have to Be Crazy to Work Here: Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795 (1998).

166. *Id.*

167. Stefan, *supra* note 53, at 15.

168. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 312 (3d Cir. 1999); Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996).

169. Fjellstad v. Pizza Hut of Am., Inc., 188 F.3d 944 (8th Cir. 1999); Templeton v. Neodata Servs., Inc., 162 F.3d 617 (10th Cir. 1998).

170. Bultemeyer v. Fort Wayne Community Sch., 100 F.3d 1281 (7th Cir. 1996).

171. 29 C.F.R. § 1630.2(o)(2)(ii) (1999).

"reasonable" in the case of people with psychiatric disabilities.¹⁷²

F. Direct Threat

The ADA permits employers to discriminate against a disabled employee if he or she presents "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."¹⁷³ Originally, the direct threat exception was intended to apply to exclude employees with contagious diseases, but was amended shortly before final passage of the ADA specifically with psychiatric disabilities in mind.¹⁷⁴ Although the regulations of the Department of Justice implementing Titles II and III are faithful to the language of the ADA in applying the "direct threat" exception only to employees who present a danger to others, the EEOC has exceeded its statutory authority by defining "direct threat" to include a danger to self. The Ninth Circuit recently rejected the EEOC's position.¹⁷⁵

G. Protection Against Retaliation for Exercising Rights Under the ADA

The ADA also protects both disabled and non-disabled workers against retaliation for taking actions to protect or enforce their rights under the ADA.¹⁷⁶ A worker need not be disabled or otherwise qualified for employment to sue an employer for retaliation.¹⁷⁷ In making that finding, the Third Circuit strongly analogized to Title VII law, and looked to the fact that, by its own terms, the ADA protects "any individual" who claims to have been retaliated against because he or she has "opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter."¹⁷⁸

III. THE DEFINITION OF DISABILITY UNDER TITLE I AND PLAINTIFFS WITH PSYCHIATRIC DISABILITIES

[W]hile Congress intended the ADA to protect 43 million dis-

172. See, e.g., *Pack v. Kmart*, 166 F.3d 1300, 1304, n.4 (10th Cir. 1999) (stating that although plaintiff argued that her employer discriminated against her in its failure to transfer her out of her pharmacy position, the court refused to consider the issue in light of its holding that, on the evidence presented at trial, plaintiff could not demonstrate that she was disabled under the ADA).

173. 42 U.S.C. § 12111(3) (1994).

174. H.R. REP. NO. 101-485, pt. 2, at 76 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 358-59.

175. *Echazabal v. Chevron USA*, No. 98-55551, 2000 U.S. App. LEXIS 23744, at *9-*10 (9th Cir. May 23, 2000).

176. 42 U.S.C. § 12203(a).

177. *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 498 (3d Cir. 1997).

178. 42 U.S.C. § 1203(a).

abled Americans, the Fifth Circuit hasn't been able to find them.¹⁷⁹

As noted above, the failure of ADA plaintiffs in general to prevail in employment discrimination litigation is attributable for the most part to findings by courts that they do not meet the definition of "disability" under the ADA. Courts usually concede that plaintiffs have a physical or mental impairment. However, in many cases the plaintiff's impairments are not seen as substantially limiting one or more of the plaintiff's major life activities.¹⁸⁰ Courts have found that plaintiffs with cancer,¹⁸¹ emphysema and schizophrenia¹⁸² are not "substantially limited in their major life activities."

By doing this, courts have followed a path that both Congress and the Supreme Court considered and rejected:¹⁸³ the privileging of more socially acceptable—and socially visible—disabilities, such as blindness, deafness, and paraplegia,¹⁸⁴ which are always found to substantially limit major life activities, and the exclusion of less acceptable disabilities, such as HIV-infection, substance abuse and psychiatric disabilities. The Supreme Court has vacillated, reminding lower courts in *Bragdon v. Abbott*¹⁸⁵ that the ADA was meant to have a broader scope and cover a range of disabilities, but substantially narrowing the defini-

179. Attributed to an attorney practicing in the Fifth Circuit. Paul Frisman, *Study Suggests Employees Treated Unfairly Under Americans with Disabilities Act*, CONN. LAW TRIBUNE, Apr. 19, 1999, at 1.

180. See, e.g., *Greer v. Emerson Elec. Co.*, 185 F.3d 917 (8th Cir. 1999).

181. See, e.g., *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999).

182. See, e.g., *Patterson v. Chicago Ass'n for Retarded Citizens*, 150 F.3d 719 (7th Cir. 1998).

183. From the beginning, Congress has consistently made it clear that its definitions of "handicap" in the Rehabilitation Act and "disability" in the ADA were intended to be broad in scope. See, e.g., S. REP. NO. 93-1297 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6388.

184. Courts repeatedly, in the course of ruling against plaintiffs claiming other disabilities, compare those conditions unfavorably with blindness, deafness, and/or paraplegia: "[High cholesterol] is wholly unlike blindness or paraplegia or the other conventional disabilities that trigger the protection of the ADA." *Christian v. St. Anthony Med. Ctr.*, 117 F.3d 1051, 1052 (7th Cir. 1997); *Runnebaum v. Nationsbank of Md.*, 95 F.3d 1285, 1290 (4th Cir. 1996) (*en banc*) (observing that determinations of disability must be made on a case-by-case basis and are based on whether a major life activity is limited). Commentators have been even more explicit, calling blindness, deafness, and paraplegia "prototypical statutory disabilities" or "classic impairments." James M. Zappa, *The Americans with Disabilities Act of 1990: Improving Judicial Determinations of Whether an Individual is "Substantially Limited,"* 75 MINN. L. REV. 1303, 1304 n.14 (1991). Blindness has always been the most privileged of the disabilities. When Congress passed Title IX of the Civil Rights Act in 1972, it prohibited discrimination on the basis of gender or blindness in federally funded programs. 20 U.S.C. §§ 1681-1688 (1995). Blindness is also separated out in disability benefits law and is the only condition which entitles the individual to *per se* disability benefits without further proof of disability. Thus, under current law, Judge David Tatel of the D.C. Circuit is entitled to receive disability benefits. In addition, many government programs which grant disability benefits grant more generous benefits to blind people. See, e.g., *Vaughn v. Sullivan*, 83 F.3d 907 (7th Cir. 1996) (upholding Indiana Medicaid plan which allowed blind persons, but not other disabled persons, to disregard PASS income when calculating eligibility for Medicaid benefits).

185. 524 U.S. 624 (1998).

tion of disability in the *Sutton* trilogy handed down in 1999, despite contradictory legislative history.¹⁸⁶

The "substantial limitation on major life activities" requirement of the disability definition in the ADA comes directly from the ADA's predecessor, Section 504 of the Rehabilitation Act.¹⁸⁷ This statute was designed to provide vocational rehabilitation benefits to people with handicaps.¹⁸⁸ Its earliest definition of handicap was one that caused a "substantial handicap to employment."¹⁸⁹ Within a year, Congress recognized the difficulties this presented to the anti-discrimination provisions of the Rehabilitation Act, which were revised to define "disability" differently. The new definition, which parallels the current definition in the ADA, contained the substantial limitation in major life activities language.¹⁹⁰

The "substantial limitation" language was useful in limiting eligibility for government services under the Vocational Rehabilitation Act. It is also a logical way of delineating the class of people who may be entitled to reasonable accommodations. Employers should not be required to provide accommodations to an employee unless the employee is substantially limited in one or more major life activities. However, the "substantial limitation" definition of disability defeats the purpose of the ADA when an employee is not requesting an accommodation, but is simply asking to be treated like every other employee. Employees are terminated, demoted or transferred explicitly because of a physical or mental impairment and then lose discrimination claims when courts conclude that they are not substantially limited in a major life activity and are not so regarded by their employer.

To require a qualified employee who has clearly been subjected to unwarranted discrimination on the basis of a condition or impairment, or perceived condition or impairment, to prove that he or she is substantially limited in a major life activity, or is perceived as being substantially limited in a major life activity, misses the point of how disability discrimination happens. This is particularly true when it comes to people with psychiatric disabilities.

The problem with the requirement that an individual be substantially limited in major life activities, or be regarded as being so limited, is that it leaves open the possibility of "pure" discrimination, where the adverse employment action is taken out of deep antipathy for the diagnosed con-

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

187. Rehabilitation Act of 1973, § 504 (codified at 29 U.S.C. § 794(a) (1994 & Supp. IV 1998)).

188. Rehabilitation Act of 1973, P.L. 93-112, § 7(6), 1973 U.S.C.C.A.N. (87 Stat. 355) 409, 414.

189. *Id.*

190. 29 U.S.C. § 705(9)(B) (Supp. IV 1998).

dition rather than any mistaken perception of its effects on an individual's ability to work. This reaction is most likely to occur with the very disabilities that are the subject of the greatest social disapprobation. Perversely, the "substantial limitations" clause of the disability definition provides the employer immunity to discriminate against the most stigmatized disabilities.

In addition, the focus on substantial limitation on major life activities undermines the purpose of prohibiting discrimination against people with disabilities, because the focus of inquiry in determining whether a person is substantially limited in a major life activity implicitly revolves around the nature and duration of the disability, whereas acts of discrimination often occur on the basis of a perception which took minutes to form. A discriminatory attitude is one which an employer brings into an interaction, not one that is formed by or springs from an employee's disability.

*A. Origins of the Requirement of Substantial Limitation
on Major Life Activities*

While race discrimination laws were written from the outset to prevent discrimination, the origins of the definition of disability used in the ADA was in legislation designed to provide benefits and services on the basis of disability. This affected the definition of handicap in a way that disability discrimination law scholars and policymakers have not considered.

The main purpose of the Rehabilitation Act of 1973 was to redirect vocational rehabilitation services to people with the most severe impairments because vocational rehabilitation services had been assisting less severely impaired people.¹⁹¹ The definition of "handicapped" that was adopted in 1973 included "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services."¹⁹² This definition was written to define the class of people who could receive vocational rehabilitation benefits and did not fit well as a definition of people to be protected from disability discrimination. Definitions that demarcate a class to receive federal benefits are intended to be narrow. Definitions to prohibit discrimination can be much broader.

Congress recognized as much. In 1974, attempting to clarify that the anti-discrimination provision applied not only to people who were handicapped but to those who were regarded as handicapped, Congress

191. Rehabilitation Act of 1973 § 2(i), 1973 U.S.C.A.N. 409, 414.

192. Rehabilitation Act of 1973 § 7(6), 1973 U.S.C.A.N. 409, 414.

introduced the current definition which applied only to the anti-discrimination provisions of the Rehabilitation Act.¹⁹³ However, rather than writing a new definition entirely, the drafters of the 1974 amendments chose to revise the old standard to broaden it and, in addition, to add people with a history of handicap or who were regarded as having a handicap.¹⁹⁴ At that time, Congress made clear that it intended to prohibit discrimination against anyone on the basis of disability and not just recipients of vocational rehabilitation services. Indeed, the legislative history explicitly indicated that people who were not handicapped at all, but only perceived as handicapped, were intended to be covered by the anti-discrimination provisions.¹⁹⁵ The legislative history equated Section 504 with Title VI of the Civil Rights Act of 1964.¹⁹⁶ Referring to the expansion of the definition of "handicapped" to include those who were regarded as being handicapped, the Senate Committee stated that this definition was intended to

include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as Title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority.¹⁹⁷

In 1978, Congress amplified on the connection with Title VI of the Civil Rights Act by amending the Rehabilitation Act to state that "the remedies, procedures and rights set forth in Title VI . . . shall be available to *any person* aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."¹⁹⁸

As a practical matter, one of the reasons to require that an impairment substantially limit a plaintiff in one or more major life activities was because regulations to the Rehabilitation Act required that employers reasonably accommodate the known disabilities of employees.¹⁹⁹ Because reasonable accommodations required alterations and expendi-

193. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111, 1974 U.S.C.C.A.N. (88 Stat. 1617) 1862, 1865.

194. *Id.*

195. S. REP. NO. 93-1297, at 39 (1974).

196. *Id.*

197. *Id.*

198. 29 U.S.C. § 794a(a)(2) (1994) (emphasis added).

199. The Administration was extremely reluctant to issue these regulations, and did so only after activists occupied the office of the Secretary of Health, Education and Welfare ("HEW"), Joseph Califano. Activists occupied the regional office of HEW in San Francisco for almost a month. JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 66 (Times Books 1994). A federal court ordered HEW to issue the regulations. *Cherry v. Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976).

tures on the part of employers, there was an understandable desire to limit the people who could claim those accommodations to those who were substantially limited in one or more major life activities.²⁰⁰

Defendants in Section 504 cases rarely contested the issue of whether a plaintiff was handicapped under the Act.²⁰¹ This was not because plaintiffs under Section 504 had more serious disabilities than ADA plaintiffs. Plaintiffs were found to be disabled under the Rehabilitation Act with conditions nearly identical to those presently being found by courts to not constitute disabilities under the ADA: asbestosis,²⁰² asthma,²⁰³ cancer,²⁰⁴ rheumatoid arthritis,²⁰⁵ diabetes,²⁰⁶ multiple

200. See, e.g., *Excerpts from Secretary Joseph A. Califano's Preamble to Section 504 Regulations, Title 45 Public Welfare*, 2 MENTAL HEALTH LAW PROJECT, LEGAL RIGHTS OF MENTALLY DISABLED PERSONS, 1473, 1478 (Practicing Law Institute, 1979).

201. Instead, the most common defenses raised under the Rehabilitation Act centered around whether: (1) the Rehabilitation Act provided a private right of action; (2) the employer received federal funds as required under the Act; or (3) liability depended on the federal funds being intended primarily to assist employment. The Supreme Court held, with regard to the third defense, that they do not. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 637 (1984). It is telling that the A.L.R. Annotation, *Who is "Individual With Handicaps" Under the Rehabilitation Act of 1973?*, 97 A.L.R. FED. 40 (1990), did not appear until 1990, and was preceded by several annotations related to private right of action, Richard P. Shafer, Annotation, *Availability of Private Right of Action Under § 503 of Rehabilitation Act of 1973 (29 U.S.C.A. § 793), Providing That Certain Federal Contracts Must Contain Provision Requiring Affirmative Action to Employ Qualified Handicapped Individuals*, 60 A.L.R. Fed. 329 (1982), and the applicability of the Rehabilitation Act to specified programs or activities. W.A. Harrington, Annotation, *Construction and Effect of § 504 of the Rehabilitation Act of 1973 (29 U.S.C.A. § 794) Prohibiting Discrimination Against Otherwise Qualified Handicapped Individuals in Specified Programs or Activities*, 44 A.L.R. FED. 148. (1979).

202. Compare *Fynes v. Weinberger*, 677 F. Supp. 315, 321 (E.D. Pa. 1985) (finding plaintiffs with asbestosis to be handicapped under the Rehabilitation Act), with *Robinson v. Global Marine Drilling*, 101 F.3d 35, 36 (5th Cir. 1996) (finding plaintiff's 50% reduction in lung capacity due to asbestosis may evidence impairment but was not evidence of a disability under ADA). Although *Fynes* was brought under Section 501, which unlike Section 504 requires affirmative action to hire disabled individuals, there is no distinction between the definition of handicapped under Sections 501 and 504.

203. Compare *Jennings v. Alexander*, 715 F.2d 1036, 1043 (6th Cir. 1983) (noting severe asthma was an example of a handicap), with *Ventura v. City of Independence*, No. 95-3582, 1997 U.S. App. LEXIS 4102, at *8 (6th Cir. Mar. 4, 1997) (finding plaintiff with asthma not substantially limited in major life activities).

204. Compare *Harrison v. Marsh*, 691 F. Supp. 1223, 1229 (W.D. Mo. 1988) (finding plaintiff, whose breast cancer required removal of a substantial amount of muscle from her upper arm and shoulder, was considered handicapped), with *Ellison v. Software Spectrum Inc.*, 85 F.3d 187, 191 (5th Cir. 1996) (finding plaintiff's side effects resulting from breast cancer did not qualify as a disability under ADA); *Malewski v. Nationsbank of Fla.*, 978 F. Supp. 1095, 1100 (S.D. Fla. 1997) (noting that plaintiff suffering swelling, fatigue and pain due to breast cancer did not show disability under ADA); *Madjlessi v. Macy's West Inc.*, 993 F. Supp. 736, 741-42 (N.D. Cal. 1997) (holding plaintiff suffering nausea and fatigue as a result of chemotherapy for breast cancer was not disabled under ADA).

205. Compare *Gelman v. Department of Educ.*, 544 F. Supp. 651 (D.C. Colo. 1982) (allowing plaintiff with rheumatoid arthritis to amend his complaint under the Rehabilitation Act via FED. R. CIV. PRO. 15(a)), with *Sutton v. New Mexico Dep't of Children, Youth and Families*, 922 F. Supp. 516, 519 (D.N.M. 1996) (plaintiff with degenerative arthritis requiring walker and surgery not disabled under the ADA).

206. Compare *Commonwealth, DOT, Bureau of Driver Licensing v. Tinsley*, 564 A.2d 286 (Pa. 1989) (finding diabetes was disabling under § 504), with *Dechert v. City of Ulysses*, No. 93-1295-PFK, 1995 U.S. Dist. LEXIS 14526 (D. Kan. Sept. 6, 1995) (finding diabetic plaintiff, who

sclerosis,²⁰⁷ and one eye.²⁰⁸

The number of times where a plaintiff found to be handicapped under the Rehabilitation Act can be "twinning" with a losing ADA case presenting the same disability is startling. Congress had no reason to believe when it passed the ADA that the courts would closely scrutinize the degree to which a plaintiff was substantially limited by his or her impairment in order to exclude the plaintiff from protection under the ADA.²⁰⁹ In fact, the legislative history makes it clear that Congress considered a number of impairments to be *per se* disabilities, including blindness,²¹⁰ paraplegia,²¹¹ mental retardation,²¹² HIV infection,²¹³ cancer,²¹⁴ and perhaps epilepsy.²¹⁵ In another key anti-discrimination statute, the Fair Housing Act,²¹⁶ people whose psychiatric disabilities were principally expressed in interpersonal difficulties, either with the landlord or other tenants or both, are always assumed to be disabled by the courts.²¹⁷

207. *Compare Hutchings v. Erie City and County Library Bd. of Dir's*, 516 F. Supp. 1265, 1266 (D.C. Pa. 1981) (alluding that dormant multiple sclerosis was a handicap under the Rehabilitation Act), *with Frazier v. Simmons*, 90 F. Supp. 2d 1221, 1225 (D. Kan. 2000) (finding plaintiff whose multiple sclerosis resulted in 50% loss of vision, balance problems, and loss of strength in his hands was not disabled under the ADA); *Sorensen v. University of Utah Hosp.*, 1 F. Supp. 2d 1306, 1311 (D. Utah 1998) (holding that plaintiff's five days of multiple sclerosis symptoms not disability under ADA).

208. *Compare Holly v. City of Naperville*, 603 F. Supp. 220, 229 (N.D. Ill. 1985) (noting plaintiff who was blind in one eye was handicapped), *with Hallums v. Coca Cola Bottling Co.*, 874 S.W.2d 30, 32 (Tenn. Ct. App. 1993) (finding plaintiff's monocular vision did not constitute a handicap under the ADA); *Santiago v. Temple Univ.*, 739 F. Supp. 974, 978 (E.D. Pa. 1990) (holding partial loss of vision in one eye was not a handicap under the ADA), *and Still v. Freeport-McMoran Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) (holding plaintiff who was blind in one eye not disabled under the ADA).

209. Interestingly, courts that find an impairment amounts to a disability often cite to Rehabilitation Act precedent. However, in the wake of ADA cases, some judges are now deciding that plaintiffs are not disabled under the Rehabilitation Act. *McCarter v. West*, 910 F. Supp. 519 (D. Kan. 1995) (holding individual with multiple sclerosis, fibromyalgia, and chronic back pain not "disabled" under Section 501).

210. H.R. REP. NO. 101-485, pt. 3, at 28 (1990) ("For example, [that] . . . a person who is blind is substantially limited in the major life activity of seeing . . .").

211. *Id.*
212. *Id.*
213. *Id.* at n.18 ("Persons infected with the Human Immunodeficiency Virus are considered to have an impairment that substantially limits a major life activity, and thus are considered disabled under the first test of this definition.") See Memorandum of Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, Sept. 27, 1988, at 9, reprinted in *Hearings on S. 933, the Americans with Disabilities Act, before the Committee on Labor and Human Resources*, 101st Congress, 1st Sess., S. Hrg. 101-156, at 346 (1989).

214. *Id.* at 29. ("This test is intended to cover those who have a record of an impairment. This includes a person who has a history of an impairment that substantially limited a major life activity, such as those who have recovered from an impairment Examples include a person who had, but no longer has, cancer . . .").

215. H.R. REP. NO. 101-485, pt. 3, at 28 (1990) ("For example, [that] a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test . . .").

216. 42 U.S.C. § 3601 (1994).
217. *Weisner v. 321 West 16th St. Ass'n*, No. 00-1423, 2000 U.S. Dist. LEXIS 12000 (Aug. 22, 2000); *Township of West Orange v. Whitman*, 8 F. Supp. 2d 408 (D.N.J. 1998).

Since so few defendants focused on the issue of the plaintiff's handicap or disability in cases brought under either the Rehabilitation Act or the Fair Housing Act, there is no question that Congress anticipated or approved of the overwhelming resort to the defense that plaintiffs are not disabled, now the most common defense asserted under Title I of the ADA.

The requirement that an employee be substantially limited in major life activities, or to be regarded as substantially limited by the employer, is particularly problematic because it is often irrelevant to many disability-related prejudices, which arise primarily out of discomfort with difference. For example, the prejudice against psychiatric disabilities often takes the form of a fear of violence.²¹⁸ When one plaintiff returned to his job after being hospitalized for bipolar disorder, his co-workers called him "psycho", "wild man," "schitzo," and "freak."²¹⁹ When another plaintiff revealed that he had attention deficit disorder at an employer's "trust exercises," an employee who became the plaintiff's supervisor called him "the psycho on Prozac who's going to shoot the place up."²²⁰ However, perceiving someone to be violent does not necessarily mean perceiving them as substantially limited in one or more major life activities. Or, perversely, the prejudice itself often takes the form of an adamant belief that the person really is not limited in major life activities, but is simply self-indulgent, obnoxious²²¹ or prone to exaggeration of difficulty. A reporter for the *Washington Post* who returned to work after being hospitalized for depression reported the reactions of her co-workers: "[s]ome people awkwardly changed the subject. Others tried to cover their discomfort with bluster. 'Well, snap out of it!' one person said cheerfully, implying, I guess, that feeling better was just a matter of trying harder."²²²

Psychiatric disabilities are not unique in this regard. Prejudice against conditions such as cancer and HIV-infection is also not necessarily related to mistaken perceptions about limitations on major life activities.²²³

In fact, people with impairments such as back conditions, heart con-

218. In accounts in the popular media of opposition to the newly released EEOC guidelines on employer obligations to people with psychiatric disabilities under the ADA, lawyers and attorneys are quoted as worrying about workers who are violent or "going postal in the workplace." Terry Carter, *Unhappy to Oblige*, A.B.A. J., July, 1997, at 36-37.

219. *Stewart v. Bally Total Fitness*, No. 99-3555, 2000 U.S. Dist. LEXIS 10047, at *2 (E.D. Pa. July 21, 2000).

220. *Hopkins v. Electronic Data Servs. Corp.*, 196 F.3d 655, 658 (6th Cir. 1999). The court characterized this remark as "ambiguous." *Hopkins*, at 661.

221. Carter, *supra* note 218, at 37. (noting that one management lawyer accused the EEOC of promulgating regulations that would "permit jerks to claim disabling conditions.").

222. TRACY THOMPSON, *THE BEAST: A RECKONING WITH DEPRESSION* 206 (Putnam 1990).

223. See generally SUSAN SONTAG, *ILLNESS AS METAPHOR*, (Farrar, Straus & Giroux, N.Y. 1978); *AIDS AND ITS METAPHORS*, (Farrar, Straus & Giroux, New York, 1989).

ditions, and asthma, where the principal question is whether an individual is erroneously perceived to be substantially limited in major life activities, are subject to a qualitatively different kind of discrimination than people whose conditions are perceived by others to create such a difference as to be the primary aspect of the individual's identity. The latter conditions—perceived to constitute the person's identity for the rest of society—include blindness, deafness, paraplegia, and AIDS, which are easily recognized as disabilities by courts, as well as psychiatric disabilities, which are not.²²⁴ The aversion and discomfort felt by employers and fellow employees towards people with these disabilities transcends belief that the person is substantially limited in major life activities. People's fear and discomfort in the presence of an individual with a diagnosis of mental illness is not based on what he can do, but what he might do in the future, just as people's fear and discomfort in the presence of someone diagnosed HIV-positive is not what that person can or can't do, but whether somehow they will get sick too. It is precisely this sort of aversion that Congress repeatedly referred to and intended to prohibit.²²⁵ In fact, in a study of professionals and managers in key decision-making positions regarding employment, the degree of social distance expressed regarding various conditions and disabilities shows very little correlation between an unwillingness to work with an individual and the degree to which his or her condition substantially limited one or more major life activities.²²⁶ While these managers expressed a willingness to work with people who had heart disease, cancer, diabetes, a stroke, polio, epilepsy, cerebral palsy, and paraplegia, they expressed an unwillingness to work with (in ascending order of their unwillingness) homosexuals, ex-convicts, people with mental illness, juvenile delinquents, alcoholics,²²⁷ and drug addicts.

Congress knew this. The repeated references in the legislative history to various examples of discrimination bears it out. The academically competitive child with cerebral palsy was excluded from school, not because his teacher thought he couldn't do the work, but because his

224. One useful (although hardly perfect) test for whether a disability is one that is perceived to overpower an individual's identity is to ask whether it is the sort of disability that makes strangers and acquaintances avoid talking to the individual. Another is to look at linguistic constructions to see whether people are identified in terms of the disability: the blind, the deaf, the mentally ill.

225. See *supra* text accompanying notes 193-95.

226. Gary L. Albrecht, Vivian G. Walker & Judith A. Levy, *Social Distance from the Stigmatized: A Test of Two Theories*, 16 SOC. SCI. MED. 1319, 1322 (1982). The study asked the managers to rate a series of conditions on a scale with "2" being a willingness to have the individual as a regular friend, "3" being a willingness to work beside the person, up to "5," a willingness to have the person as a mere speaking acquaintance. *Id.*

227. The irony of these findings is, of course, that these managers probably work with more alcoholics than any other group listed in the study. See *id.*

"physical appearance 'produced a nauseating effect on others,'"²²⁸ an auction house tried to forcibly remove a woman in a wheelchair not because the employees thought she couldn't participate in the auction but because she was "disgusting to look at;"²²⁹ the woman with arthritis was denied a job "not because she could not do the work but because college" trustees thought normal students shouldn't see her[.]"²³⁰ In other words, these people were discriminated against not because of other people's mistaken assessment of their abilities or the degree to which their life activities were limited, but because of a core discomfort with and aversion to their difference. The class of people who suffer pervasive social disadvantage because of a medical or mental condition is not the same as the class of people who are perceived as being substantially limited in a major life activity due to a physical or mental impairment. Underestimation or mistaken estimation of people's functional capacity is a secondary attribute of the discriminatory attitude and serves as a poor proxy to reflect it. We have always preferred to think of our mistakes with disabled people as over charitable paternalism rather than loathing and contempt. However, to articulate and follow an anti-discrimination standard based on the former rather than the latter risks missing a lot of discriminatory activity.

For example, in *Schwartz v. The Comex and New York Mercantile Exchange*,²³¹ an employee who had worked for defendant for five years, receiving promotions and raises, was terminated by defendant after plaintiff's supervisor learned that plaintiff was diagnosed with a psychiatric disability.²³² The supervisor remarked that the plaintiff would not have been hired had the employer known of his mental illness and began to ridicule and harass him because of his mental illness, culminating in plaintiff's eventual termination.²³³ The court held that these allegations did not state a claim under the ADA.²³⁴ The reason for the court's holding was that:

[The plaintiff] would have to allege facts that would indicate that because of [the supervisor's] misperception of paranoid thought disorder, he treated plaintiff as unable to perform major life activities . . . [Plaintiff] merely asserts that [his supervisor] ridiculed and fired him, but he does not state that [the supervisor] or COMEX regarded him as unable to work or perform any

228. S. REP. NO. 101-116, at 7 (1989).

229. *Id.* (Testimony of Judy Heumann).

230. *Id.*

231. No. 96-3386, 1997 U.S. Dist. LEXIS 4658 (S.D.N.Y. April 15, 1997).

232. *Schwartz*, 1997 U.S. Dist. LEXIS 4658, at *2 (recognizing that since this case was decided on the defendant's motion to dismiss, the court accepted plaintiff's allegations as true).

233. *Id.* at *2.

234. *Id.* at *5.

of the other major life activities described in the regulations. In fact, plaintiff alleges that COMEX rewarded him with raises and promotions throughout his five year tenure, in recognition of his capabilities . . . [Plaintiff] cannot merely claim, without alleging further facts, that his employer's perception of paranoid thought disorder was equivalent to a view that plaintiff was impaired in the performance of a major life activity.²³⁵

The equivalent of this logic in a race discrimination case would be a holding that an African-American had not stated a claim because he alleged the employer had fired him solely because he was black, and not because the employer believed any associated stereotypes or misperceptions about blacks being lazy or unqualified. Schwartz did not request any kind of accommodation. Instead, he alleged that he was capable of doing his job well and was only fired because his employer learned he had mental illness.

These results, and many others like them, miss the crux of discrimination law. Discrimination law prohibits an employer from taking adverse action against an employee on the basis of an irrational antipathy towards his or her race, gender, or physical or mental condition, *in addition to* prohibiting actions based on a manifestly unjustifiable belief about the limitations that race, gender, or physical or mental condition place on the employee's abilities or performance. If an employer harbors an irrational discomfort, aversion, or antipathy towards a person based on race or physical or mental condition, the employer's belief that the condition does not limit the employee's life activities should not excuse the employer, because his own antipathy limits the employee's working opportunities in a way the employee can do nothing to overcome.²³⁶

The "substantial limitation" element attributes too much rationality to the manner in which people discriminate. In effect, it gives credit for a certain level of thoughtfulness and analysis, when discrimination rarely proceeds past the level of noticing and recoiling from difference. Thus, it is no surprise that research has been showing for over thirty years that people who are prejudiced against minorities or have a high level of ethnocentricity also tend to be prejudiced in general.²³⁷

Because blindness, deafness, and paraplegia form the unstated norm

235. *Id.* at *8-*9 (emphasis added).

236. Unfortunately, because of an EEOC regulation discussed below, an employer also remains free to unjustifiably believe that an employee cannot perform his or her job, as long as the employer claims not to believe that the disability restricts the employee from "a whole class of jobs" or "a wide range of jobs."

237. For a thorough collection of the research supporting this, see Clark Freshman, *What Ever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between Different Minorities*, 85 CORNELL L. REV. 313 (2000) (discussing how different kinds of discrimination often really reflect generalized discrimination).

of disability law, and because each requires some form of reasonable accommodation, there has also been an assumption on the part of many courts that without a request for reasonable accommodation, a plaintiff somehow cannot make out a case of disability discrimination.²³⁸ This may reflect a sense on the part of the courts that an individual who does not need accommodations cannot be substantially limited in one or more major life activities. This is true despite the EEOC's dual admonition that limitations in work should be considered last, not first, in assessing limitations on major life activities, *and* that pervasive social discrimination against a particular disability, can itself constitute a substantial limitation on the major life activity of work.²³⁹ Yet perversely, an individual who is known to be diagnosed with some of the most socially despised conditions, mental illness or the HIV virus, may be excluded from the protections of the ADA despite the adverse reactions of others because he or she *did not* ask not for accommodations, but simply the opportunity to do the job.²⁴⁰

In addition, the requirement of substantial limitation on major life activities, or perception of substantial limitation, serves as a terrible punishment and disincentive to people who by dint of overwhelming efforts and courage have managed to function in spite of their disabilities, only to be told, in effect, that their efforts prove that they are not disabled at all. The term "self-accommodation" has been coined to describe the efforts people make privately to deal with their disabilities.²⁴¹ Self-accommodations are made by people with both physical and mental disabilities:

One full-time employed person who is blind remarked, 'People frequently say, 'I don't consider you disabled.' That's because I make accommodations to my disability . . . I'm accommodating all the time, but they don't know or realize it.' In the context of work, the person who successfully accommodates to a disability renders the disability invisible, even when the disabil-

238. *Boersig v. Union Elec. Co.*, 219 F.3d 816, 823 (8th Cir. 2000); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998); *Matuska v. Hinckley Township*, 56 F. Supp. 2d 906, 917 (N.D. Ohio 1999).

239. 29 C.F.R. § 16302(j) (2000).

240. *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 750 (N.D. Ill. 1998); *Zillyette v. Capital One Fin. Corp.*, 1 F. Supp. 2d 1435, 1444 (M.D. Fla. 1998).

241. Examples of self-accommodation include both conscious and unconscious adaptations by the person with disabilities. Unconscious adaptations are exemplified by people with monocular vision. *See, e.g., Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898 (E.D. Pa. 1997); *Bartlett v. N. Y. State Bd. of Law Exam'r*, 156 F.3d 321 (2d Cir. 1998) (finding that a person with a reading disability or dyslexia through self-accommodation achieved average reading skills when compared to general population); *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) (finding a police officer blinded in one eye self-accommodated or subconsciously adjusted himself to the impairment; his brain mitigated the effects of the impairment).

ity is blindness. For a person with mental illness, the disability is even less apparent than blindness. The person's accommodations are likely to go unnoticed because they involve a successful management of a class of mental events. The following account is from a young man with atypical psychosis who works as a part-time courier.

The voices are talking to me almost all the time at work. The medicine only makes them softer, but they never go away completely . . . And when I try to ignore them, they get softer, and I can hear them whispering, 'He's not listening to us He pretends he can't hear us.' If I pay attention, they get louder, and start callin' me names. . . saying I'm bad and that God's gonna punish me for what I did I have to concentrate all the time so they don't get loud so I can't hear.' (Kaufmann, private communication)

This man exerts a considerable effort to block out the voices and notes that he is often exhausted after two or three hours on the job. His disability and resultant accommodation are not apparent to his employer, and he does not mention the voices to either his supervisor or his coworkers. He presents himself as able-bodied and feels ashamed about what the voices say to him and the fact that he keeps this experience secret. For an invisible disability, one gets neither credit for successfully managing limitations nor presumptive protection from discrimination.²⁴²

The result of the draining and overwhelming efforts made at self-accommodation is sometimes that courts conclude the person is not disabled at all. For example, in one opinion (later withdrawn) a district court judge concluded that a plaintiff could not be psychiatrically disabled because she had managed to successfully complete law school, and no one with a psychiatric disability could do this.²⁴³ Nor was this court an aberration. In *Olson v. General Electric Astrospace*,²⁴⁴ the Third Circuit concluded that plaintiff's "ability to function normally despite what appear to be serious psychological and emotional problems defeats [his claim that he is disabled under the ADA]."²⁴⁵ This is like telling Tom Dolan, the asthmatic American swimmer who won a Gold Medal at the 1996 Olympics, that he simply did not have asthma, because otherwise he would not have won the Gold Medal; or Wilma Ru-

242. Jean Campbell & Caroline L. Kaufmann, *Equality and Difference in the ADA: Unintended Consequences for Employment of People with Mental Health Disabilities*, in *MENTAL DISORDER, WORK DISABILITY, AND THE LAW* 221, 230 (Richard J. Bonnie & John Monahan eds., 1997).

243. *Clark v. Virginia Bd. of Bar Exam'r*, No. 94-211-A, 1994 WL 364443 (E.D. Va. July 11, 1994), *vacated*, 861 F. Supp. 512, 519 (E.D. Va. 1994).

244. 101 F.3d 947 (3d Cir. 1996).

245. *Olson*, 101 F.3d at 953.

Rudolph that she really did not have polio because she, too, won a Gold medal. It is the reverse of what Congress sought to accomplish in passing the ADA: to recognize people's transcendent abilities, not their disabilities.²⁴⁶

In a number of cases, courts have explicitly premised a finding that the plaintiff was not disabled on the fact that he or she made it to work on time, did not take leaves of absence, and asked for no accommodations.²⁴⁷ In one case, a plaintiff had colitis and depression.²⁴⁸ Plaintiff was hospitalized for two weeks for her depression, was in therapy, and took medication.²⁴⁹ The court found:

While it is true that plaintiff missed two weeks of work because of her depression when she was admitted to Four Winds Hospital in 1994, there is no credible evidence on the record that her ability to perform her job was "substantially limited" because of her depression. Plaintiff alleges that her depression caused her to lose sleep and as a result she would be exhausted at work and cry. Plaintiff testified at her deposition, however, that apart from the two-week hospital stay, she never missed work because of her depression.

The cases where depression has been held to substantially interfere with an individual's ability to work involve factual situations far more serious than the case at hand . . . [P]laintiffs were repeatedly hospitalized, took numerous or extended leaves of absence from work, and depression repeatedly interfered with the plaintiff's ability to get to work on time and perform effectively.²⁵⁰

Ironically, in two of the three cases referred to by the judge, which involved "factual situations far more serious than the case at hand," the plaintiff lost because she was deemed not qualified for the job.²⁵¹ In fact, in cases where plaintiffs are tardy or take too many leaves, they are generally found to be unable to meet the essential elements of the job.²⁵² Thus, when disabled plaintiffs' efforts to conceal their disability are reasonably successful, courts find they are not disabled; when the plaintiffs' struggles to conceal their disabilities are less successful, or where

246. 135 CONG. REC. 19,801 (1989).

247. See, e.g., *Johnson v. New York Med. College*, No. 95-8413, 1997 WL 580708 (S.D.N.Y. 1997).

248. *Johnson*, 1997 WL 580708, at *1 (colitis caused "cramping, rectal bleeding, lower back pain, diarrhea, mucous, explosive stool, tiredness, and nausea," as well as "accidents" if she could not get to the bathroom on time).

249. *Id.* at *2.

250. *Id.* at *7.

251. *Guice-Mills v. Derwinski*, 967 F.2d 794 (2d Cir. 1992); *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983).

252. See, e.g., *Greer v. Emerson Elec. Co.*, 185 F.3d 917 (8th Cir. 1999).

the plaintiff reveals her disability under the mistaken impression that her employer will be sympathetic,²⁵³ plaintiffs also lose their cases because they are considered not otherwise qualified for the position.²⁵⁴

There are other ways in which plaintiffs with psychiatric disabilities are subject to "Catch-22" situations under the ADA. For example, although the EEOC has made clear in its Compliance Manual that "interacting with others" is a major life activity,²⁵⁵ several courts have rejected this interpretation.²⁵⁶ It is particularly ironic for courts to hold that interacting with others is not a major life activity because a substantial number of decisions finding plaintiffs with psychiatric disabilities not otherwise qualified for employment do so on the grounds that "getting along with others" is an essential function of the job in question, and of employment in general.²⁵⁷ Therefore, "getting along with others" is not a major life activity, in the sense that a plaintiff who is substantially limited in this activity can be considered disabled, but it *is* an essential element of employment. Attorneys should argue that substantial limitation in any activity which is considered to be an essential element of employment must inherently be a substantial limitation of work, which *is* a major life activity.

In race discrimination law, employers are liable if they discriminate against a plaintiff believed to be a member of a minority.²⁵⁸ There is no additional requirement that the employer hold negative stereotypes, such as laziness or lack of intelligence, about that minority or that individual. The focus is on whether the employer's adverse action was taken on the basis of race or sex.²⁵⁹ In Title I cases under the ADA, an employer is free to intentionally discriminate on the basis of disability—including failure to hire, termination and demotion—as long as the employer convinces the court it does not regard the employee as substantially limited in one or more major life activities.²⁶⁰

253. *Doe*, 704 F.2d at 1407.

254. *Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1133 (11th Cir. 1996).

255. EEOC COMPLIANCE MANUAL, 902.3(b) (1997).

256. *Soileau v. Guilford of Me.*, 105 F.3d 12, 15 (1st Cir. 1997); *Breiland v. Advance Circuits, Inc.*, 976 F. Supp. 858, 864 (D. Minn. 1997).

257. *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999). See also *Stauffer v. Bayer Corp.*, No. 3:96 CV-661RP, 1997 WL 588890 (N.D. Ind. 1997); EEOC ENFORCEMENT GUIDANCE: THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES at n.15 (March 25, 1997).

258. 42 U.S.C. § 2000e-2 (1994).

259. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983) (finding that Title VII protects both men and women against sex discrimination); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976) (noting that Title VII prohibits discrimination against any race).

260. *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35 (5th Cir. 1996) (holding that an employee with asbestosis which reduced lung capacity to 50% of normal was not disabled for purposes of the ADA; court did not reach employer's refusal to rehire after layoff); *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996) (holding that a city refused to hire an individual with mild hemophilia for a firefighter position on the basis of his hemophilia; court did not regard the indi-

The requirement that a disability "substantially limit one or more life activities" has done more to vitiate the protections of the ADA in employment situations than any other single factor. It appears to be puzzling and unnecessary in light of the other elements a plaintiff must prove under the ADA. If the plaintiff proves that he or she is impaired, or regarded as impaired, and that he or she can perform the essential functions of the job, and that the employer took adverse and unjustified action against the employee on the basis of the impairment, what does the "substantial limitation" provision add?

B. Courts' Current Interpretation of "Substantial Limitations on Major Life Activity"

Courts have increasingly ruled that severe, chronic illnesses, including cancer, are not disabilities under the ADA, because they do not constitute substantial limitations on major life activities.²⁶¹ In addition, courts have held that perceptions of serious illness which result in demotion or termination are not perceptions of disability under the ADA.²⁶² The Seventh Circuit held that an employee who alleged that she was fired because she was perceived by her employer as having a serious medical condition did not state a claim under the ADA.²⁶³ "If the employer discriminates against [employees] on account of their being (or being believed by him to be) ill, even permanently ill, but not disabled, there is no violation [of the ADA]."²⁶⁴ Although Judge Posner was not explicit, his disjunction of "ill, even permanently ill" and "disabled" can only be explained by reference to the requirement of substantial limitation on major life activities, since permanent illness must surely be considered an impairment.²⁶⁵

vidual as substantially limited in major life activities); *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997).

261. See, e.g., *Hirsch v. National Mall & Servs., Inc.*, 989 F. Supp. 977, 981 (N.D. Ill. 1997).

262. See, e.g., *EEOC v. R.J. Gallagher Co.*, 959 F. Supp. 405, 409 (S.D. Tex. 1997).

263. *Christian v. St. Anthony Med. Ctr.*, 117 F.3d 1051, 1053 (7th Cir. 1997). The plaintiff's alternate allegation, that she was fired because of the cost of the treatment to the employer's health plan was also held, without citation to any relevant ADA case law, regulation, or legislative history, to not state a claim. *Christian*, 117 F.3d at 1053. In fact, ADA case law, regulations, and legislative history all stand for the proposition that such an allegation states a claim under the ADA. 29 C.F.R. § 1630.15(a) app. (1999); H.R. REP. NO. 101-485, pt. 3, at 70 (1990); S. REP. NO. 101-116, at 85 (1989).

264. *Christian*, 117 F.3d at 1053.

265. Although the ADA does not define impairment, the regulations have defined impairment as:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine, or
- (2) Any mental or psychological disorder, such as mental retardation, organic brain

It is difficult to exaggerate the extent to which courts are excluding plaintiffs from the class of disabled persons. The *reductio ad absurdum* of the courts' insistence on finding plaintiffs not substantially limited in a major life activity are the cases where plaintiffs are found not to be disabled under the ADA even though they died during the pendency of the litigation.²⁶⁶ Plaintiffs found to be without disabilities include persons with terminal cancer.²⁶⁷ Even after the Supreme Court's decision in *Arline*,²⁶⁸ courts have found people with tuberculosis not to be disabled for the purposes of the ADA, in effect rejecting *Arline*.²⁶⁹ In fact, if anything, successful plaintiffs under the Rehabilitation Act had far less severe impairments than ADA plaintiffs. Examples include a "very mild case of petitmal epilepsy"²⁷⁰ and a "slight loss of hearing and reduced sense of balance."²⁷¹

This is equally true in the area of psychiatric disability. Under the Rehabilitation Act, a past history of "schizophrenic reaction" sufficed to qualify the plaintiff as handicapped, because the focus was on whether the defendant discriminated against the plaintiff, not whether the plaintiff was handicapped.²⁷² Under the ADA, plaintiffs with depression, bipolar disorder, and even paranoid schizophrenia have been held to not be disabled because they are not substantially limited in a major life activity.²⁷³

Although Congress did instruct that the ADA could not be read to grant less protection than Section 504 of the Rehabilitation Act,²⁷⁴ it is quite clear that this is happening on a systemic level in determinations

syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(l) (2000).

266. See, e.g., *Jerina v. Richardson Auto., Inc.*, 960 F. Supp. 106 (N.D. Tex. 1997) (holding that deceased plaintiff who suffered from Chronic Fatigue Syndrome, depression, panic disorder, and high blood pressure related to other disabilities did not establish that his ability to work was substantially limited, and thus that he was "disabled" within meaning of the ADA).

267. *Hirsch v. National Mall & Servs., Inc.*, 1989 F. Supp. 977, 980 (N.D. Ill. 1997); *EEOC v. R.J. Gallagher Co.*, 959 F. Supp. 405, 409 (S.D. Tex. 1997).

268. *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987).

269. E.g., *Lester v. Trans World Airlines, Inc.*, No. 95-C-2349, 1997 WL 417814 (N.D. Ill. July 23, 1997).

270. *Cain v. Archdiocese of Kansas City*, 508 F. Supp. 1021, 1023 (D. Kan. 1981).

271. *Lemmo v. Willson*, 583 F. Supp. 557, 558 (D. Colo. 1984) (dismissing plaintiff's case, however, because employer was not receiving federal funds).

272. *Doe v. Syracuse Sch. Dist.*, 508 F. Supp. 333, 335-36 n.3 (N.D.N.Y. 1981) ("Plaintiff's ability to meet the definition of a handicapped individual . . . is unchallenged"). See also *Tyler v. Runyon*, 70 F.3d 458, 467 (7th Cir. 1995) ("it is undisputed that as a paranoid schizophrenic, Tyler was in a class of people protected by the Rehabilitation Act").

273. E.g., *Finnicum v. Evant, Inc.*, 181 F.3d 100 (6th Cir. 1999) (holding that a plaintiff with bipolar disorder failed to show she was substantially limited in one or more major life activities); *Patterson v. Chicago Ass'n for Retarded Citizens*, 150 F.3d 719 (7th Cir. 1998) (holding plaintiff with schizophrenia not disabled under the ADA); *Smoke v. Wal-Mart Stores*, No. 98-1370, 2000 U.S. App. LEXIS 2478 (10th Cir. Feb. 17, 2000) (plaintiff with severe depression not disabled under ADA).

274. S. REP. No. 101-116, at 84 (1989).

of whether a plaintiff is disabled.²⁷⁵ The Supreme Court has recently reiterated the command that the ADA must not be read to give less protection than the Rehabilitation Act.²⁷⁶ Yet because ADA cases are decided one at a time on a highly fact-specific basis, it is difficult to make this argument in any individual case.²⁷⁷

It is true that under the ADA, Congress intended to exclude plaintiffs with "minor" or "trivial" conditions from the protections of disability discrimination law.²⁷⁸ Unlike race and gender, disability can exist across a wide spectrum from trivial and minor to extremely severe, requiring some kind of line-drawing to identify those who should be protected against discrimination. However, while Congress used "infected fingers" and "the common cold" as examples of "handicaps" that would not be covered by the law prohibiting disability discrimination,²⁷⁹ courts have recently found plaintiffs with asbestosis, hemophilia,²⁸⁰ HIV-infection,²⁸¹ breast cancer,²⁸² and prostate cancer²⁸³ not to be disabled because the plaintiff was not substantially limited in major life activities and/or not perceived to be limited in major life activities. One employee was diagnosed with Hodgkin's Disease, underwent several surgeries, was treated with radiation, saw a psychologist for major depression, could not stay at work full time after he returned because he became ill, and was still found not to be disabled nor perceived to be disabled by his employer.²⁸⁴

C. The Irrelevance of "Substantial Limitations" Analysis to Discrimination on the Basis of Psychiatric Disability

Although the focus of many ADA cases is whether the disability will impair job performance, this is not necessarily the case with those involving psychiatric disabilities. In fact, the wish of employers to exclude employees with the most stigmatized disabilities, such as mental illness or HIV-seropositivity, may have nothing to do with the employer's assessment of the employees' capacity to do the job. This wish

275. See *supra* notes 201-208 and accompanying text.

276. *Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998).

277. See *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (showing that the burden of establishing a disability under the ADA is an individualized one and must be determined on a case-by-case basis).

278. H.R. REP. NO. 101-485, pt. 3, at 28 (1990) (requiring that the impairment be one that "substantially limits a major life activity.").

279. S. REP. NO. 101-116, at 23 (1989).

280. *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996).

281. *Runnebaum v. Nationsbank of Md., N.A.*, 123 F.3d 156 (4th Cir. 1997).

282. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996).

283. *Bumstead v. Jasper County*, 931 F. Supp. 1323 (E.D. Tex. 1996).

284. *Nave v. Woolridge Constr. of Pa., Inc.*, No. 96-2891, 1997 U.S. Dist. LEXIS 9203 (E.D. Pa. June 30, 1997).

may not even arise out of the employer's assumptions about the degree to which these people are substantially limited in their major life activities.

A congressional committee report also made clear that an inquiry into whether a person was substantially limited in the major life activity of working should only take place if the individual was not substantially limited in any other major life activity.²⁸⁵ The EEOC followed the committee's guidance when it promulgated regulations requiring courts to only find substantial limitations in working if the individual was not substantially limited by his or her impairment in any other major life activity.²⁸⁶ A number of courts have explicitly recognized and followed this requirement.²⁸⁷

However, a growing number of courts are ruling against plaintiffs who cannot show that the substantial limitations they identify affect their work performance.²⁸⁸ This clearly misreads legal requirements. It is particularly perverse in that it punishes employees who struggle with loss of sleep and other limitations but still accomplish work objectives.

Finally, the committee flatly stated that "[a] person with an impairment who is discriminated against in employment is also limited in the major life activity of working."²⁸⁹ The only exception recognized by the committee to this very explicit and broad instruction was a very narrow one:

[A] person who is limited in his or her ability to perform only a particular job, *because of circumstances unique to that job site or the materials used*, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in the major life activity of working if he has a mild allergy to a specialized paint used by one employer which is not generally used in the field in which the painter works.²⁹⁰

Note that even this narrow exception applies to a situation where the plaintiff claims an inability to work at a particular job (and therefore presumably a reasonable accommodation), not a situation where the plaintiff's position is that he or she can do the job with no accommoda-

285. H.R. REP. NO. 101-485, pt. 3, at 28-29 (1990).

286. 29 C.F.R. § 1630 app. (2000) (explaining the intended scope of 29 C.F.R. § 1630.2(j)).

287. See, e.g., *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 784 (3d Cir. 1998); *Pryor v. Trane Co.*, 138 F.3d 1024, 1027 (5th Cir. 1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998).

288. See, e.g., *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 598 (8th Cir. 1998) (finding against the plaintiff for a number of reasons, including her work performance).

289. H.R. REP. NO. 101-485, pt. 3, at 29.

290. *Id.*

tion whatsoever.²⁹¹

In fact, in *School Board of Nassau County v. Arline*,²⁹² the Supreme Court noted that even if an individual's impairment did not substantially limit major life activities, the negative reactions of others "could nevertheless substantially limit that person's ability to work. . . ."²⁹³ The Court underscored the fact that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."²⁹⁴ The committee cited *Arline* approvingly several times throughout the legislative history.²⁹⁵ The requirement that the employee be substantially limited in one or more major life activities, or be perceived as such by the employer, creates a difficulty that could be overcome by faithful adherence to *Arline* and the legislative history.

Since *Arline*, however, the Supreme Court has questioned whether work should even be considered a major life activity when interpreting the ADA.²⁹⁶ The EEOC has promulgated an interpretation of what it means to be substantially limited in the major life activity of work which compounds and exacerbates the problems created by the "substantial limitation" language in general.²⁹⁷

D. There Is No Justification for Requiring that an Employer's Discriminatory Action Based on Erroneous Perception of Impairment Must Import the Substantial Limitation Prong

An individual may also be disabled for the purposes of the statute if he or she can show that the employer regarded him or her as having a disability.²⁹⁸ Although the Supreme Court in *Arline* and a congressional committee considering the ADA made clear that someone excluded from a job because of an employer's irrational prejudice about his or her disability should be able to successfully claim that he or she was regarded as disabled,²⁹⁹ the Supreme Court recently retreated from this view in *Sutton v. United Air Lines, Inc.*³⁰⁰ Both *Sutton* and the EEOC require a

291. The continuation of the example makes it clear that the committee saw this example as a reasonable accommodation situation. *Id.*

292. 480 U.S. 273 (1987).

293. *Arline*, 480 U.S. at 283.

294. *Id.* at 284.

295. H.R. REP. NO. 101-485, pt. 3, at 30, 34, 45.

296. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999).

297. *Id.* at 491-92 (quoting the EEOC's definition of "substantial limitation" and concluding that "[t]o be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice.").

298. 29 C.F.R. § 1630(2)(1) (2000).

299. H.R. REP. NO. 101-485, pt. 3, at 30; *Arline*, 480 U.S. at 283.

300. 527 U.S. 471, 493 (1999) (observing that because the position of global airline pilot is not a "class" of jobs, the airline's vision requirements for its pilots did not constitute a showing that the airline regarded the ADA plaintiffs as substantially limited in the major life activity of work-

finding that the employer regards the employee as substantially limited across a class of jobs.³⁰¹ This requirement has eviscerated the protection of the third prong of the disability definition.

The justifications for including the requirement of substantial limitation on major life activities do not apply to the definition of disability involving either a record of disability or being regarded as disabled. Generally, employees who claim they are regarded as disabled are not asking for any accommodations. Rather they are challenging adverse treatment based on an erroneous perception of their capabilities.

In *Campbell v. Freudenberg-Nok*,³⁰² although plaintiff presented her employer with a doctor's note permitting her to return to work with no restrictions, her employment was terminated "because [her employer] believed that working would aggravate her condition."³⁰³ Nevertheless, the court decided that the employer did not believe Mrs. Campbell was substantially limited in the major life activity of working, and therefore that she did not meet the definition of "regarded as being disabled" under the ADA.³⁰⁴ In fact, under some courts' interpretation of the regulations, an employer who demotes or transfers employees is immune from liability because the very fact that the employer offered another position demonstrates that the employer believed the employee was capable of working in the other position.³⁰⁵

Under the present interpretation, the employer that wishes to be rid of an employee perceived as disabled can do so more easily the more clearly qualified and competent the employee happens to be. Thus, courts repeatedly refer to the fact that a plaintiff was able to secure other employment as proof that he or she was not, in fact, disabled.³⁰⁶

IV. SOLUTIONS

The courts' use of the substantial limitations language of the ADA to preclude consideration of disability discrimination cases has been criticized in legal scholarship,³⁰⁷ federal agency oversight,³⁰⁸ Congress-

ing).

301. 29 C.F.R. § 1630.2(j)(3)(i); *Sutton*, 527 U.S. at 492.

302. No. 3:95-CV-586RP, 1997 WL 284820 (N.D. Ind. Apr. 14, 1997).

303. *Campbell*, 1997 WL 284820, at *6.

304. *Id.* at *6.

305. *McKibben v. Hamilton County*, No. 99-3360, 2000 U.S. App. LEXIS 12123, at *17 (6th Cir. May 30, 2000).

306. *Williams v. Avnet, Inc.*, 910 F. Supp. 1124, 1133 (E.D.N.C. 1995), *aff'd sub nom. Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996); *Kubsch v. National Standard Co.*, No. 3:94-CV-752RP, 1995 U.S. Dist. LEXIS 16363 (N.D. Ind. Sept. 11, 1995); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 200 (4th Cir. 1997); *Zirpel v. Toshiba Am. Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (relying in part on the fact that the plaintiff had secured jobs subsequent to her discharge to find that the plaintiff, who had panic disorder, was not disabled).

307. R. Bales, *Once is Enough: Evaluating When a Person is Substantially Limited in Her*

sional hearings,³⁰⁹ and by attorneys in the field. There are a number of short term and long term solutions to this problem.

In the short term, plaintiffs' attorneys have to expect the argument that their clients are not disabled or perceived as disabled and be prepared to furnish evidence to defeat such arguments. Plaintiffs' attorneys can maximize the chance that their clients will be found disabled by showing that the disabilities from which the plaintiffs suffer impairs their sleeping, concentration,³¹⁰ thinking, or social interactions in general. If possible, they should avoid the argument that the major life activity that is limited by the plaintiff's disability is work, especially if it can only be illustrated through the plaintiff's current employment. Rather, the disability should be presented as both historical and pervasive. Attorneys should, if possible, present evidence that the condition has affected past employment and past social interactions, and not only the current work environment. Plaintiffs' experts should testify about the condition and how the nature of the condition has affected plaintiff in the past and will likely affect the plaintiff's future employment and future life activities. Cases have survived motions for summary judgment when the plaintiff underscores the biological nature of the disability—often depression—and emphasizes that it is a long-term, if not a life-long, condition.³¹¹ In addition, experts should emphasize certain patterns of interaction, rather than allowing the plaintiff-supervisor problems to be seen as unique.

Another possible solution is to resort more often to state anti-discrimination statutes, which have been proving notably more successful of late. The language of some state anti-discrimination statutes presents a panoply of available options. In an increasing number of cases, plaintiffs who lose their ADA claims because they are found not to be substantially limited in major life activities or regarded as such retain

Ability to Work, 11 HOFSTRA LAB. L.J. 203 (1993); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997); Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997); Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997).

308. U.S. COMMISSION ON CIVIL RIGHTS, HELPING EMPLOYERS COMPLY WITH THE ADA: AN ASSESSMENT OF HOW THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IS ENFORCING TITLE I OF THE AMERICANS WITH DISABILITIES ACT 85 (1998).

309. Testimony of Melinda Maloney, Subcommittee on Disability Policy, Labor and Human Relations Committee, U.S. Senate, July 26, 1995, available at 1995 WL 446705 (F.D.C.H.).

310. Although the Tenth Circuit recently held that concentration was not a major life activity, most courts have followed the EEOC's ENFORCEMENT GUIDANCE in holding that it is. *Compare* Pack v. K-Mart Corp., 166 F.3d 1300, 1305 (10th Cir., 1999), with *Glowacki v. Buffalo Gen. Hosp.*, 2 F. Supp. 2d 346, 351 (W.D.N.Y. 1998).

311. See, e.g., *Krocka v. Bransfield*, 969 F. Supp. 1073, 1085 (N.D. Ill. 1997), *aff'd sub nom. Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000).

state claims under differently worded state anti-discrimination laws.³¹² Some plaintiffs even choose to proceed under state laws alone. These state laws generally do not contain a "substantial limitation" clause, and yet they appear to be successful at warding off claims based on broken fingers and bad colds. For example, the state of Washington requires proof that the plaintiff both had an abnormal condition and was discriminated against because of the abnormal condition.³¹³ The State of New Jersey defines "handicapped" as suffering from any mental, psychological, physiological or neurological condition which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.³¹⁴

A more ambitious solution is to amend the Americans with Disabilities Act to discard the "substantial limitation in major life activity" prong in "pure" employment discrimination cases, where the employee is not asking for any accommodations at all. The "substantial limitation" requirement makes sense as a parallel to the reasonable accommodation requirement imposed on employers. If employers must spend money or readjust their policies and practices, then there is an understandable incentive to limit the number of people who can assert such claims. When the employee is not asking for accommodations, but simply to be treated like everyone else, it is illogical to require the employee to prove substantial limitations on major life activities, since the employee's argument, in effect, centers around the absence of any limitations relevant to the employment.³¹⁵

312. *Olson v. General Elec. Aerospace*, 966 F. Supp. 312, 315-16 (D.N.J. 1997) (finding that plaintiff with "dissociative condition" that "appears to be nearly life-long in duration and has been evidenced in his adult life by several acute psychiatric hospitalizations" was found not disabled under the ADA because of no finding of substantial limitation in major life activities, but qualified under New Jersey's LAD) *rev'd in part*, 101 F.3d 947 (3d Cir. 1996); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 155 (2d Cir. 1998) (plaintiff's panic disorder not a disability under the ADA because "everyday mobility" was not a major life activity, but plaintiff stated a claim under state law); *see also Failla v. City of Passaic*, 146 F.3d 149, 153-55 (3d Cir. 1998).

313. *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993) (construing the Washington State Discrimination Statute, RCW 49.60.010-.330).

314. N.J. STAT. ANN. § 10:5-5(q) (West 1993). In interpreting this law, the New Jersey courts have explicitly ruled that it does not contain a "substantial limitations" requirement. *Gimello v. Agency Rent-A-Car Sys., Inc.*, 594 A.2d 264, 275 (N.J. Super. Ct. App. Div. 1991).

315. For example, in *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 190-91 (5th Cir. 1996), the court refused to find that the plaintiff, who had been diagnosed with breast cancer and undergone radiation treatments, was disabled because "no special accommodations were necessary for [plaintiff], and that at all times, she had demonstrated the physical and mental ability to work . . . she never missed a day of work." The court also refused to find any material fact in dispute about whether her employer regarded her as disabled, in spite of the fact that "[d]uring a meeting in 1994, in which the departmental reduction was discussed, a member of the human resources department asked whether any of the potentially affected employees had special circumstances that needed to be considered; [her employer] responded, 'Phyllis has cancer'." *Ellison*, 85 F.3d at 193.

V. CONCLUSION

Both the statutory structure and the judicial interpretation of the American with Disabilities Act have operated to immunize the purest form of disability discrimination—that based on profound discomfort and/or hostility, rather than mistakes about competence and capability. Unfortunately, this form of discrimination is the one that primarily plagues people who have or are perceived as having psychiatric disabilities.

People with psychiatric disabilities are among those most harmed by the courts' emphasis on the "substantial limitation of major life activities" aspect of the definition of disability. The harm is unnecessary and contrary to the intent of Congress, which made its explicit intent to prohibit both kinds of discrimination—the "pure" discomfort/hostility and the mistaken attributions of incapacity—as clear as possible through statutory language, legislative history, and floor debate of the Americans with Disabilities Act.

