

**A Paralegal's Guide To Understanding The  
Americans with Disabilities Act**

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## **Abstract**

This paper is a primer for paralegals and others with an interest in the Americans with Disabilities Act of 1990 (ADA). My research paper is a comprehensive look at disability discrimination law and the adjudication of claims through the administrative process. With respect to that process, this research paper will give an overview of the Equal Employment Opportunity Commission (EEOC) and its complaints processing procedures for both public and private sector generated allegations of discrimination as relates to the ADA.

ADA protects qualified persons with disabilities from discrimination by employers in hiring, firing, promotions, work assignments and other terms and conditions of their employment.<sup>1</sup> This paper will attempt to define and explain all elements needed to prove a claim a discrimination under the ADA with particular emphasis on significant case law that helps in our understanding of such terms as qualified disabled individual, major life activities, reasonable accommodation, and undue hardship. Additionally, this paper will examine the possible role of a paralegal with respect to the adjudication of a claim of disability discrimination through the administrative process with particular emphasis on preparations leading to an administrative hearing.

There are five titles under the ADA. However, this paper will primarily focus on Title I. This Title is principally concerned with employment related matters whereas Titles II, III and IV are concerned with discrimination by public services, and telecommunications as well as the protection of disabled individuals against discrimination in public accommodations and services.<sup>2</sup> While Titles II, III and IV are important matters, they will not be explored in this paper.

It is through the study and analysis of court cases that we come to understand how laws are interpreted.<sup>3</sup> With that in mind my paper will explore the impact of court cases on the ADA.

When available I will reference Supreme Court decisions that have helped define this Act. My research paper will be divided into three parts. Part I will look at the significant case law, particularly Supreme Court decisions, that have defined the ADA. Part II will focus on processing a claim of discrimination under the ADA and the mediation process. Part III looks at the ADA from the perspective of its problems with the court. Particular emphasis is given to the impact of summary judgments on the lack of success of litigants under the ADA.

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## **Introduction**

A significant number of Americans are disabled. According to a study conducted in 1990, ten percent of all workingmen, aged eighteen to sixty-four, were disabled.<sup>4</sup> Forty-one percent of disabled men worked compared to ninety-five percent of non-disabled men.<sup>5</sup> That same study showed that of the disabled men, who did work, their income was lower; they earned less money; and they were more likely to rely on public assistance than their comparable non-disabled worker.<sup>6</sup> Congress passed the Americans with Disabilities Act to narrow the gap between the non-disabled and the disabled worker.<sup>7</sup>

According to Congress, there were 43 million Americans with a physical or mental disability in 1990. They expected that number to continue increasing. Historically, disabled individuals remained invisible because they were often isolated and separated from the general population. Despite societal efforts to eliminate discrimination, considerable work remains so that the plight of disabled persons is improved in all areas of their lives including housing, employment, transportation, education, and others.<sup>8</sup>

Society has long recognized the problem of discrimination and has offered protections for persons discriminated against on the basis of race, color, sex, national origin, religion, and age. People with disabilities are also treated differently. What they encounter is different however because non-disabled persons are often uncomfortable around disabled persons and will sometimes try to avoid the disabled individual. Even well intentioned people sometimes pity disabled persons and treat them in a patronizing manner. Some members of our society see disabilities as negative and are so uncomfortable in the presence of disabled person that they shun them. There is a stigma associated with being disabled.<sup>9</sup>

With the Civil Rights era of the 1960s came an increased awareness of the needs of disabled persons. By the 1970s Congress had begun efforts to write legislation designed to remove some of the barriers to equality for disabled persons. Toward this effort enactment of the ADA in 1990 was intended to address the myriad of needs of disabled persons in all aspects of their lives. The ADA had the worthy goal

“ . . . to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for [disabled] individuals; and . . . the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”<sup>10</sup>

In enacting the ADA, Congress assured protection for persons with disabilities in employment (Title I), accessibility of state and local government programs and facilities, including public transportation (Title II), removal of barriers to public accommodations (Title III) and in telecommunications (Title IV).<sup>11</sup> While many thought the ADA would become a windfall statute for plaintiffs, the result has been just the opposite. A study of Title I litigation from 1992 to 2002 indicates that employers have been successful in 95 percent of cases.<sup>12</sup> Clearly, disabled workers have had little success in prosecuting claims of discrimination under the ADA.<sup>13</sup> Some believe this lack of success is attributed to the narrow definition of disability by federal courts.<sup>14</sup> Under the ADA, an individual must establish that he or she is an individual with a disability. The ADA defines disability as

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.<sup>15</sup>

A literal reading of this definition would suggest a broad definition of “disability.” However, the Supreme Court has consistently ruled that persons with impairments that adversely impacted some aspect of their employment do not fall within this definition.<sup>16</sup>

My research paper will examine Title I of the ADA by studying significant court rulings in an effort to better understand the ADA and the impact of the court’s limitations on disabled workers who believe they have been discriminated against. Beyond examining how disability law is interpreted, my paper will also examine the adjudication of a disability claim through the administrative process. Finally, my paper will give an overview of how the ADA needs to change from the perspective of advocates for disabled persons. Whether the Americans with Disabilities Act has failed in its intent to protect disabled workers from discrimination is best understood through an analysis of how significant Supreme Court decisions have handicapped plaintiffs.

## **Part I: Title I of the American with Disabilities Act of 1990 Defined**

### **History**

In the 1960s the movement for disability rights began in response to the needs of mentally disabled individuals in mental institutions. Lawyers began to advocate for mental patients based on the treatment that these individuals were receiving. They argued that mental patients had a due process right to receive treatment based on the fact that involuntary commitment deprived them of their liberty.<sup>17</sup> Further, states were constitutionally obligated to provide treatment for the mentally ill. While the courts were beginning to recognize such rights, the states continued their practice of institutionalizing the mentally ill without providing treatment. In *O'Connor v. Donaldson*<sup>18</sup>, and later *Zinermon v. Burch*<sup>19</sup> the Supreme Court ruled that the mentally ill could not be confined involuntarily unless the institution provided treatment or the person was dangerous to himself or others. The Supreme Court, however, did not make its ruling on the basis of a constitutional issue.

Another issue, the “least restrictive alternative” issue, led to the development of disability rights in the Individuals with Disabilities Education Act (IDEA).<sup>20</sup> This concept attempted to balance the legitimate right of governments to limit people’s rights with protecting individuals from government intrusion.<sup>21</sup> After the movement toward protecting institutionalized mentally ill individuals in the 1960s, the next decade of legislation focused on the individual disabled person. From that legislative activity the Rehabilitation Act of 1973 was born.<sup>22</sup>

In the 1970s various interest groups representing disabled individuals began to lobby congress for legislative protections for mentally and physically disabled persons. In response to this public outcry the Rehabilitation Act of 1973 was passed. It provided for vocational rehabilitation services for qualified persons with disabilities. The most important aspect of the

Rehabilitation Act of 1973 was the mandate that no qualified handicapped person be denied employment on the basis of his or her disability. This legislation laid the foundation for the Americans with Disabilities Act that was to come later. From the Rehabilitation Act of 1973 we get terms such as “reasonable accommodation” and “undue hardship.” These concepts are essential to disability law. In the Supreme Court decision of *Southeastern Community College v. Davis*<sup>23</sup> it was determined that employers who received federal money had to make changes to the workplace to allow disabled persons an opportunity to work unless such changes posed an unreasonable burden in terms of financial costs<sup>24</sup>. Similarly, the Education for All Handicapped Children Act (IDEA) laid the foundation for the disabled persons’ rights to an education based on their individual needs.<sup>25</sup> In 1978 Congress amended the Developmental Disabilities Assistance and Bill of Rights Act<sup>26</sup> that provided a variety of protections for persons with developmental disabilities and mental illness.

The 1980s became a period of advocacy by affected individuals. Disabled persons began to advocate for employment, education, and an end to physical barriers that denied them access. In response, the Congress passed the Fair Housing Amendment Act of 1988<sup>27</sup> that made discrimination against the disabled in housing matters a violation of law.<sup>28</sup>

Despite these laws, as early as 1990 there was no federal legislation designed to prohibit employers from discriminating against people with disabilities. The ADA was the next logical development.<sup>29</sup> These protections were designed to address the needs of the nearly 43 million Americans with disabilities.<sup>30</sup>

It is significant to note that the US Constitution is silent with respect to specific nondiscrimination protections for disabled individuals. Disabled individuals, on constitutional grounds, can only challenge a discriminatory practice based on its failure to comply with

provisions under the 14<sup>th</sup> Amendment's equal protection clause that protects against discrimination intended to fulfill a conscious purpose.<sup>31</sup>

### **Disability Defined**

The ADA prohibits discrimination against individuals based on their physical and mental disabilities in employment by public and private employers and requires that places of public accommodation be accessible to the disabled.<sup>32</sup> The ADA applies to employers with 15 or more employees. However, employers with fewer than 15 employees are often covered under state law prohibiting discrimination against disabled workers.<sup>33</sup>

The first place to begin an analysis of the ADA is with the act itself. The ADA prohibits discrimination "...against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>34</sup> The need to define "disability" stems from a basic difference between the ADA and a claim under Title VII of the Civil Rights Act. Under Title VII a claim of discrimination can generate when a person believes they have been treated differently based on a protected purview, i.e. race, sex, age, national origin, or religion. The individual does not have to first proof they are a particular race or sex before proceeding with their claim, only that the complained of act occurred because of their protected purview. By contrast, under the ADA a person has to first prove that they have a statutorily defined "disability" according to the Act before they can move forward with their claim.<sup>35</sup> This is a very difficult requirement because of the nature of a "disability." Disabilities manifest in a wide array of conditions, effect people in a variety of ways, develop at various stages of life, and in general are totally diverse and totally individual. Congress did not want to provide too narrow a definition of "disability" because they

recognized that to set a specific list of conditions or diseases would be an exhaustive list and even then would likely exclude someone. The sheer individual nature of “disabilities” makes it difficult to definitely set a clear standard for the term.<sup>36</sup>

Turning to the ADA for clarity provides little relief because it defines the term “disability” with other imprecise terms such as “impairment”, “substantial limits” and “major life activities.”<sup>37</sup> The ADA provides protection to disabled persons provided they prove that they are qualified individuals with a disability. Conditions that the average person would call a disability do not qualify as such. For example, if a person has a broken leg the condition may be disabling but the individual does not have a statutorily protect disability. Why? Because, assuming no unusual circumstance, a broken leg heals relatively quickly and a “disability” must be permanent. However, if the broken leg heals badly and the individual is left with a permanent limp, that person may qualify as a disabled individual. Similarly, a person suffering from a mental illness of short duration without permanent or longer effect would not find protection under the ADA.<sup>38</sup>

The term “qualified individual with a disability” is key to understanding the ADA. Under the Act the term is defined as a person “with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires.”<sup>39</sup> The definition of “disability” under the ADA is a three-prong approach that states that a disability is:

- (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.<sup>40</sup>

This line of thought was consistent with the Rehabilitation Act of 1973 whose language is identical to the definitions found in the ADA.<sup>41</sup> In fact the Supreme Court addressed the first definition of disability with respect to discrimination in the 1987 decision of *School Board of Nassau County v. Arline*.<sup>42</sup> Ms. Arline was an elementary school teacher with tuberculosis who was terminated because of her illness. The Supreme Court ruled that Ms. Arline had a physical impairment that substantially limited her major life activities by requiring hospitalizations. It further found that the contagiousness of her disease did not preclude her protection under the Rehabilitation Act.<sup>43</sup>

The general definition of “disability” took on new meaning following a series of Supreme Court decisions that were issued in 1999. The most significant of these decisions, *Sutton v. United Air Lines, Inc.*,<sup>44</sup> *Murphy v. United Parcel Service*<sup>45</sup>, *Albertson v. Kirkingburg*<sup>46</sup>, and *Bragdon v. Abbott*<sup>47</sup> will be discussed in detail. They are among the decisions that have played a significant role in understanding the ADA. Specifically, the first three rulings focused on the proper weight to be applied to the concept of mitigating measures when determining whether an individual has an impairment that substantially limits one or more major life activities. These mitigating measures can include such things as the individual’s use of eyeglasses, medications, or the bodies own system.<sup>48</sup>

The ADA extended protection to the private sector and the EEOC was given oversight and implementation authority over the ADA under Title I. EEOC provides guidance on definitions of terms found in the ADA. When a statute is absent with respect to some aspect of the law, courts generally rely on guidance from the regulatory agency responsible for oversight of that statute. Ordinarily one would expect the court to seek guidance from EEOC if there was some question regarding the definition of “disability”. Instead the Supreme Court took issue

with EEOC's definition. In fact, in *Sutton v. United Air Lines*<sup>49</sup> the Court declared that no agency has been granted the authority to define "disability".

*Sutton* involved an employment discrimination claim brought by twin sisters who were airline pilots. Each sister had severe myopia that required the use of lenses as a corrective measure that allowed them to function the same as individuals without a similar impairment. The sisters had each applied for employment as pilots. The airline required that its pilots have an uncorrected visual acuity of 20/100 or better but because the twins had uncorrected visual acuity of 20/200 or worse the airline did not offer them employment with the airlines. The sisters filed a claim of discrimination based on violation of the ADA because the airlines discriminated against them on the basis of their disabilities or because the airlines regarded the twins as having a disability.<sup>50</sup> The EEOC issued an interpretive guidance stating "the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."<sup>51</sup> The first determination by the Court was whether petitioners had stated a claim with respect to the definition of disability. Specifically, the Court first examined whether the petitioners had a physical impairment that substantially limited them in one or more activities. The Court found that because the petitioners conditions were corrected to better than 20/20 with the use of lenses they were not actually disabled within the meaning of disability with respect to subsection (A). For the Court, the determining factor was whether the petitioners were disabled "with or without reference to corrective measures."<sup>52</sup> Petitioners argued that that determination of whether one is substantially limited should be determined without regard to corrective measures because EEOC guidelines provide that interpretation. Respondents argued that impairment does not limit a major life activity if it has been corrected. Further, they argued that

deference should not be given to EEOC interpretations because they conflicted with the meaning of the ADA.<sup>53</sup> The Supreme Court agreed with the respondents saying, “‘substantially limits’ appears in the Act in the present indicative form, we think the language is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability.” Essentially, a finding that one is disabled cannot be based on a condition that could, or would substantially limit a major life activity. The condition must presently limit the major life activities.<sup>54</sup> The Supreme Court invalidated both the plaintiffs’ ADA claims and the EEOC’s Interpretive Guidance on ‘mitigating measures.’ Although it did not totally invalidate EEOC’s regulations it did cast doubt on whether courts should defer to them. Secondly, the Supreme Court made clear its position that, with respect to mitigating measures, determination of whether an individual has a “disability” must be evaluated on an individual basis and should not consider disabled persons as a group.<sup>55</sup> The final point made by the Court evolved from their interpretation of Congress’ intent with respect to coverage under the ADA. The Supreme found that because Congress limited its estimate of the number of disabled persons to 43 million and not the estimated 160 million disable persons in the United States, Congress did not intend to include all persons “with corrected conditions.”<sup>56</sup>

Two other cases, *Murphy v. UPS*<sup>57</sup> and *Albertson’s Inc. v. Kirkingburg*<sup>58</sup>, examined the meaning of ‘mitigating measures’. With these two rulings the court determined that EEOC Interpretive Guidance, as relates to ‘mitigating measures’, were invalid but it did not go so far as to invalidate it in its entirety. However, as a principle of Administrative Law any agency has the right to issue Interpretive Guidance for any statute that Congress has given it authority over and because EEOC has authority over the ADA it can offer guidance to help the public understand the law.<sup>59</sup>

Relying on its decision in *Sutton* the Supreme Court in *Murphy* found that the petitioner was not substantially limited from a major life activity because he was not barred from a particular job as compared to a class of jobs. Murphy was hired as a mechanic, a position that required him to drive a commercial vehicle. To qualify for certification to drive, the petitioner had to prove to the Department of Transportation that he did not have high blood pressure. However, despite his having hypertension, the petitioner was erroneously granted a certification and began working as a mechanic. When the error was discovered, Murphy was terminated because his blood pressure exceeded requirements for certification. The question before the Court was “...the determination of whether an individual’s impairment substantially limits one or more major life activities should be made without consideration of mitigating measures.”<sup>60</sup> Based on *Sutton*, the Court determined that the Court of Appeals correctly ruled that the petitioner’s hypertension was not a disability because his doctor testified that when he was medicated he could function normally. Murphy confirmed the Courts position that the ADA offers no protection to persons with a temporary condition or one that is correctable with medication. The remaining question before the Court was whether the petitioner’s termination was because respondent regarded the petitioner as substantially limited in one or more major life activities. The Court relied on the EEOC definition that defined substantially limited as: “significantly restricted in the ability to perform either a class of jobs or broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.”<sup>61</sup> The EEOC also identified the factors to be considered when determining whether the individual is substantially limited in the major life activity of working, “...the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs).”<sup>62</sup>

The evidence showed that the petitioner was regarded as unable to perform in the class of mechanic jobs requiring that he drive a commercial vehicle but he was not impaired with respect to all mechanic jobs.<sup>63</sup>

Courts consider whether the person is impaired for a broad range of jobs, not a broad class of jobs.<sup>64</sup> The courts generally look at the “[c]ommon job groupings within a particular industry.”<sup>65</sup> Class of jobs includes such classifications as public safety jobs or truck driving jobs but not a specific task or set of duties unique to a particular job. Therefore, firefighting does not meet the definition of class of jobs but truck driving may represent a class of jobs.<sup>66</sup>

The Supreme Court continued to apply its Sutton decision in *Albertsons* when it found that in considering mitigating measures, even when the body’s own system corrects or modifies a condition, it is no different from a condition corrected by artificial means, such as eyeglasses or medication. In *Albertson* the employee, who had monocular vision, was fired from his truck driving job after he failed to meet Department of Transportation basic vision standards. The employee’s brain developed a coping mechanism, which compensated for his disability by subconsciously adjusting his depth perception. The Supreme Court ruled that due to this mitigating measure, the employee was not “disabled”.

Another “broad range of jobs” issue is seen in the case of *James v. Runyon*<sup>67</sup> in which an employee with the US Postal Service, who worked as a mail clerk, was hypersensitive to bites by paper mites. The court found that she was not disabled under the Rehabilitation Act because her condition did not preclude her from working in other positions for which she had been trained.<sup>68</sup> Similarly, in *Deas v. River West*<sup>69</sup> the court found that a technician with epilepsy who worked with substance abuse patients was not fired because her employer regarded her as having an impairment that limited her major life activity of working. It found that she was not impaired for

a broad range of jobs only those jobs that required a keen level of alertness.<sup>70</sup> What each of these cases shows is that disability is determined on an individual basis and is determined by how the condition impairs performance and not the condition itself.<sup>71</sup>

The Court addressed the definition of disability and the issue of contagiousness under the ADA in *Bragdon v. Abbott*.<sup>72</sup> This case is significant for its finding that reproduction constitutes a major life activity. Abbott went to her dentist office for a routine checkup. She was HIV but evidence that she had AIDS was not visible. Nevertheless, her dentist insisted on filling her cavity in the hospital rather than in his office. Abbott sued her dentist under Title III of the ADA, which has oversight over places of public accommodation. She claimed that because her infection was a disability that substantially limited her major life activity of reproduction she was entitled to protection under the ADA. The dentist argued that she was exempt from protection because the Act exempts from protection those persons who pose a direct threat to the health and safety of others. The Supreme Court agreed with Abbott. Although Abbott brought her claim under Title III, the Court's ruling still applies to ADA claims of employment discrimination. The significance of this ruling is that the Court rejected the argument that major life activities only apply to activities of life with a "public, economic, or daily character."<sup>73</sup> The Supreme Court also said that in determining whether a direct threat to the safety and health of others must be determined by a healthcare professional who relies on objective, scientific evidence. An individual's good faith judgment is insufficient to assess risk in the workplace.<sup>74</sup>

In 1997, EEOC issued its Guidance on the ADA and Psychiatric Disorders.<sup>75</sup> EEOC Guidance is not equal to the Act and has questionable persuasiveness with the courts.<sup>76</sup> Nevertheless, the Guidance provides EEOC's position with respect to such considerations as what mental impairment means under the ADA and what is meant by major life activities with

respect to psychiatric disorders.<sup>77</sup> According to the Guidance, mental impairment includes “major depression, bipolar disorder, anxiety disorders (which include panic disorders, obsessive compulsive disorder, anxiety disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders.”<sup>78</sup> The Guidance relied on the Diagnostic and Statistical Manual of Mental Disorders (DSM) to aid in identifying these disorders and acknowledges that not all conditions identified in the DSM are considered mental disorders including drug abuse.<sup>79</sup> Consequently, mental impairments are not automatically “disabilities” but should be analyzed based on whether the condition is an impairment that substantially limits one or more life activities of the individual.<sup>80</sup>

Traits or behaviors such as stress do not automatically meet the definition of mental impairments although they may rise to that level if there is evidence to show that it is related or “linked to mental impairments”.<sup>81</sup> According to the EEOC Guidance whether a major life activity is limited by a mental impairment is determined on individual basis.<sup>82</sup> However, it lists such activities as “thinking, concentrating, and interacting with others...Sleeping is also a major life activity that may be limited by mental impairments.”<sup>83</sup> That a substantial limitation exists can be established through testimony from an expert but can also include testimony from “family members, friends, or coworkers...”<sup>84</sup> based on observations about the individual’s functioning in a variety of settings other than his home or at work.<sup>85</sup>

To better understand the weight given to EEOC Guidance requires a review of court decisions on mental impairment.<sup>86</sup> In *Gaul v. Lucent Technologies, Inc.*,<sup>87</sup> the employee claimed to have a personality disorder that affected his ability to get along with coworkers. He requested an accommodation that provided reassignment to another position that was free of prolonged excessive stress.<sup>88</sup> That court found that the complainant did not qualify for protection under the

ADA because he was not a qualified individual with a disability. According to the court, the complainant could not show that he could perform the essential functions of the position with or without reasonable accommodations. Further, the requested accommodation would ultimately be temporary because the complainant's stress levels would likely fluctuate on a daily basis. To require such an accommodation would pose an undue hardship on the employer.<sup>89</sup>

In *Palmer v. Circuit Court of Cook County*<sup>90</sup> the court found that an employee who has a personality conflict with a supervisor is not limited in a major life activity even if the employee develops depression and anxiety. The court reasoned that the employee could seek another job. Further even if the person develops a mental illness as a consequence of a personality conflict, the employer is not required to retain an employee who makes a threat of violence because such a person is not qualified for continued employment per se.<sup>91</sup> Even when an employee is a recognized alcoholic who is fired because of violent actions committed while drunk, the employee is not entitled to protection under the ADA because the employee is removed based on his conduct, not his disability.<sup>92</sup> In *Reeves v. Johnson Controls World Services, Inc.*,<sup>93</sup> an airport employee with a panic disorder claimed disability discrimination under the ADA when he was removed from his position. The court found that although panic disorder is a disability under the ADA<sup>94</sup> the employee failed to show that his disability substantially limited a major life activity because according to the employee, his panic disorder limited his “[ability] to go to malls alone, to unfamiliar places on overnight trips, or to ride unaccompanied on a train.”<sup>95</sup> The court found that the mobility limitations as specified by the employee did not amount to a major life activity under the ADA.<sup>96</sup>

*Hamilton v. Southwestern Bell Telephone Co.*,<sup>97</sup> provides another example of a mental condition that did not qualify as a disability under the ADA. In this case the court found that the

plaintiff, a phone company manager with posttraumatic stress disorder, was not entitled to protection because his condition did not impair one or more major life activities. Specifically, the plaintiff brought a claim of discrimination against his former employer when he was fired for verbally abusing and striking a co-worker. Hamilton claimed that his behavior was caused by posttraumatic stress disorder that had the effect of causing him to overeat, have thoughts of suicide, and suffer from fatigue. However, by his own testimony he no longer engaged in those activities and was able to operate his own business. The court found that PTSD did not impair a major life activity.<sup>98</sup>

*Soileau v. Guilford of Maine, Inc.*,<sup>99</sup> provides another example. In this case the complainant alleged discrimination under the ADA. However, the court found that he failed to advance his claim on several fronts. The complainant claimed that his disability was an inability to get along with others and depression that lasted a short time. The court found that failure to get along with others is too subjective to be classified as a disability and there was no evidence of impairment to a major life activity. Further, the depression was of too short a duration to qualify as a disability.<sup>100</sup>

The question of depression as a disability under the ADA was also the issue in the case of *Jane Doe v. Board of Education of Fallsburgh Central School District*.<sup>101</sup> In the case, Jane Doe taught English in a New York school as a probationary teacher. Due to depression, Jane Doe, was hospitalized and unable to teach for several months. In her absence school officials learned of problems with her teaching and did not renew her contract. Before she was allowed to return to the classroom to complete the school year, Jane Doe was required to take a psychiatric exam in compliance with the collective bargaining agreement. Jane Doe refused to take the exam and filed a lawsuit instead. Her lawsuit alleged discrimination under the ADA due to her psychiatric

disability. The 2<sup>nd</sup> Circuit Court of appeals ruled that Doe was not disabled under the ADA because her condition did not “substantially limit one or more major life activities”. Ultimately the court determined that the school district’s decision to not renew her contract was based on Doe’s poor work performance, not her depression.<sup>102</sup>

A review of the findings in another case reveals a different conclusion. An employee at IBM was under the care of a psychiatrist for over seven years for attention deficit disorder and depression. When stressors at work and home exacerbated her condition, her psychiatrist requested a leave of absence for her. IBM removed the employee who filed a claim of discrimination under ADA. The 1<sup>st</sup> Circuit found that attention deficit disorder is a permanent disorder and her long-term treatment for depression was sufficient to prove that she had a disability.<sup>103</sup>

In the next example, the court found that the employee was not qualified for the position that she requested as an accommodation. The employee worked at a small group home for severely disabled individuals. Among her duties was the requirement that she dispense medications to residents at the home. The employee, who suffered from severe depression, twice attempted suicide by taking an overdose of drugs including those she was to dispense to residents. The employee requested reassignment to another position at the home but the employer refused. The court agreed with the employer that the employee was not qualified to carryout the essential functions of her position because she could not be trusted to properly monitor and dispense the medications.<sup>104</sup> It is significant to note that following the Supreme Court decisions in *Sutton* and *Murphy*, EEOC published an addendum to its Enforcement Guidance on the ADA and Psychiatric Disabilities. Questions 6-7 and 11 are superseded by the aforementioned rulings in that “whether a person has an ADA “disability” is determined by

taking into account the positive and negative effects of mitigating measures used by the individual.”<sup>105</sup>

In 2002, the Supreme Court issued several decisions that further helped clarify our understanding of the ADA. In *Toyota v. Williams*<sup>106</sup> the Court found that when determining whether impairment is “substantially limiting” the legal question is whether the individual’s impairment affected more than just manual tasks associated with their job.<sup>107</sup> In *Toyota* the plaintiff was a former employee of Toyota Motor Manufacturing who developed carpal tunnel syndrome. Toyota provided an accommodation for the employee that included reassignment to a position in quality control. Even after modifications to the duties of the position, at some point Williams requested further modifications, including the removal of several tasks. Ultimately, Williams began missing time from work and was subsequently terminated by Toyota. Williams alleged discrimination under the ADA.<sup>108</sup> Following a District Court decision rejecting her claim because she was not substantially limited in her major life activities, she appealed to the 6<sup>th</sup> Circuit Court of Appeals where the lower court decision was reversed with a finding that Williams was disabled because of her inability to perform certain work specific manual tasks that included grasping and repetitive movements with her hands and arms above her shoulders for extended periods of time. The Court of Appeals ruled that William’s ability to perform manual tasks associated with daily life activities were not relevant to her claim that she was disabled. On appeal to the Supreme Court the Court confined its review of this case to the proper legal standard to apply when assessing whether a person is limited in performing manual tasks. With that in mind the Supreme Court reversed the 6<sup>th</sup> Circuit ruling. The Court found that when assessing manual tasks, as relates to major life activities, the review should be confined to the person’s ability to perform manual tasks associated with daily life activities not manual tasks

associated with work activities.<sup>109</sup> In so ruling, the Supreme Court made it clear that defining the significant terms of “substantially” and “major” “...need to be interpreted strictly to create a demanding standard for qualifying as disabled [as] confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act.”<sup>110</sup> The Supreme Court found that the regulations failed to define “substantially limited” so they turned to EEOC’s regulations on “disability.” The Court stated that no agency had been given authority to interpret the ADA but because both parties had agreed that EEOC’s interpretations were reasonable, the court deferred to EEOC’s interpretation. EEOC defined “substantially limited” as

“...unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the.... The following factors should be considered in determining whether an individual is substantially limited in a major life activity... The nature and severity of the impairment; the duration or expected duration.... and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”<sup>111</sup>

The Court found that the EEOC did not define substantially limited as it related to manual tasks.<sup>112</sup> Therefore, the Court determined that “substantially” means “‘considerable’ or ‘to a large degree’ .... [And] clearly precludes impairment that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.”<sup>113</sup> “Major” was found to mean “important.” This means that it “...refers to those activities that are of central importance to daily life. In order for performing manual tasks to fit into this category—a category that includes such basic abilities as walking, seeing, and hearing—the manual tasks in question must be central to daily life. If each of the tasks included in the major life activity of performing manual

tasks does not independently qualify as a major life activity, then together they must do so.”<sup>114</sup> On the basis of this analysis the Court determined that the Court of Appeals committed an error in its ruling because it gave greater consideration to the work specific tasks rather than those manual tasks that affect an individual’s personal life.<sup>115</sup> Further, the Court found that the Court of Appeals had the necessary facts to make a proper decision because it had determined that Williams was able to perform manual tasks associated with her daily hygiene and household chores. Significantly, the Supreme Court did not address whether William was substantially limited in a major life activity but remanded the case back to the Court of Appeals for a proper analysis based on their clarifications.<sup>116</sup> Although the ruling in *Toyota* is considered a victory for employers, the ruling did not go so far as to establish that work is not a major life activity.<sup>117</sup>

In *Toyota* the Supreme Court restated its position that impairment must be permanent or long-term. However, the end result of *Toyota* is that EEOC’s “condition, manner, or duration” standard was replaced with the Court’s severe restriction standard.<sup>118</sup> This narrowing of the definition has the affect of excluding more people from the protections of the ADA. However, the *Toyota* decision is applicable in cases involving manual tasks. In other major life activities cases the pre-*Toyota* definition of “substantially limits” including its “condition, manner, or duration” still applies. If the strict *Toyota* standard is applied, then perhaps the plaintiff can argue under the second prong of the definition of disability.<sup>119</sup>

Under the second prong, the disabled individual would have to prove they have a record of such impairment. “Record of impairment” was included in the ADA to protect individuals who have a history of a disability but have either recovered from the disability or were misclassified. For example, cancer, heart disease, mental or emotional problems, are the kinds of conditions for which a person may be able to demonstrate a history of disability. However, to

advance a claim under the “record of impairment” model, the employee must have evidence that the employer had knowledge of the disability. For example, in *Szymanska v. Abbott Laboratories*<sup>120</sup> the complainant, who recovered from cancer, was never able to demonstrate to the satisfaction of the court that the person who made the decision to terminate her knew of the employee’s previous condition by tracking medical claims or that liability for future medical costs were a consideration.<sup>121</sup>

The third prong of the ADA, “regarded as having an impairment”, offers protection for persons who are treated as if they have a disability. The ADA’s interpretive regulations tell us that the “regarded as” provision concerns individuals who: (1) have no impairment that substantially limits a major life activity but nonetheless the employer treats them as if the impairment is substantially limiting; (2) a person has a condition that is not substantially limiting but they are discriminated against because of the attitudes of others; and (3) the individual has no impairment but is discriminated against as if they are impaired.<sup>122</sup> The Supreme Court explained, “...regarded as having an impairment” in *School Board of Nassau County v. Airline*<sup>123</sup>. The Court found that the employee had a record of having tuberculosis and that she was entitled to protection under the Act. Specifically, the Court determined that when the ADA was established, Congress intended to protect individuals against the prejudices and stigma associated with having diseases or conditions considered as disabilities.<sup>124</sup> Another example of how this standard was applied can be seen in the case of *EEOC v. Texas Bus Lines*<sup>125</sup> in which the bus company failed to hire an obese applicant for a bus driver position based on what the company perceived to be impairment of diminished mobility.<sup>126</sup> In another case, a worker with asthma was reassigned to an outdoor job that paid less money because his employer did not want to risk having a worker’s compensation case by permitting him to work inside with fumes. The

court found that the worker had a claim under ADA because the company regarded him as having an impairment that affected the major life activity of breathing.<sup>127</sup> In another example, EEOC was permitted to file a lawsuit based on a showing that a company failed to hire an individual for the position of punch press operator at a manufacturing plant because he had a history of having carpal tunnel syndrome. The applicant was allowed to continue with his case to show whether the company perceived him as having an impairment limiting one or more major life activities.<sup>128</sup>

In one of the largest settlements in the history of the ADA, Mitsubishi Motor Manufacturing of America resolved a claim of discrimination in which applicants with a variety of conditions, included asthma, diabetes, carpal tunnel syndrome, and orthopedic problems, were denied employment because they were perceived as disabled.<sup>129</sup> Finally, with respect to the third “regarded as” definition the EEOC’s Interpretive Guidance gave an example of a situation in which an employee was fired because of a rumor that the individual had HIV. The individual was not infected and had no impairment but was treated as if he was disabled.<sup>130</sup>

According to the Act, a “qualified individual with a disability” is defined as “an individual with a disability who satisfies the requisite skills, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodations, can perform the essential functions of such position.”<sup>131</sup>

EEOC defines essential functions in the following manner:

“(1) The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential function” does not include the marginal functions of the position.

(2) A job function is considered essential for any of several reasons, including but not limited to the following:

- (i) The function may be essential because the reason the position exists is to perform that function;
- (ii) The function may be essential because of the limited number of employee available among whom the performance of that job function can be distributed; and/or
- (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.”<sup>132</sup>

An employer does not have to change its production standards. “[P]roduction standards such as the ability to type a certain number of words per minute or accomplish a certain number of tasks in day, will not be subject to judicial scrutiny regarding whether these standards are actually essential.”<sup>133</sup> The EEOC Interpretive Guidance states: “However, if an employer does

require [such a production standard] it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. [I]f it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.”<sup>134</sup>

With respect to accommodation employers must make “reasonable accommodations” for an “otherwise qualified” individual with a disability.<sup>135</sup> EEOC ADA Title I regulations define “reasonable accommodation” in the following manner.

“(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 or 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 that 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 employees without disabilities.”<sup>136</sup>

Employers are only required to accommodate an individual whose disability is made known to the employer and the employee must request the accommodation. The employer is entitled to request documentation of the employee’s disability.<sup>137</sup> We can look to EEOC’s interpretations for examples of reasonable accommodations.

“Reasonable accommodations may include but is not limited to

- (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities: and
- (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.”<sup>138</sup>

To better understand reasonable accommodation, it is helpful to look at several examples of accommodation principles. Attendance at work is generally considered an essential job requirement and therefore not subject to reasonable accommodation. This is especially true in factory or manufacturing positions but not necessarily true where a change of work schedule will not affect productivity.<sup>139</sup> However, full time work from home is not a reasonable accommodation. In *Vande Zande v. Wisconsin Department of Administration*<sup>140</sup> a worker requested the employer to provide her with a desktop computer and permit her to work from home during the eight weeks required to recover from an illness. The Seventh Circuit ruled that this was unreasonable because the employee’s job required supervision, which could not be achieved if the employee was at home.<sup>141</sup> Title I says that reassignment is a viable option for consideration as a reasonable accommodation. An employee who develops a disability while employed with a company may be entitled to reassignment as an accommodation unless a reasonable accommodation is available that would allow the employee to perform his current job. On the other hand, an applicant is not entitled to reassignment.<sup>142</sup>

One of the most significant cases to address the issue of accommodation is *Chevron v. Echazabal*.<sup>143</sup> In *Chevron* the Supreme Court ruled that employers do not have to provide an

accommodation to an otherwise disabled employee if that accommodation would place the worker in jeopardy of sustaining a serious injury or even death.<sup>144</sup> Specifically, Chevron refused to give Echazabal a job that it believed he was qualified to perform but that his physician and the company physician agreed could potentially do further harm to Echazabal's existing liver condition.<sup>145</sup> This decision came in the wake of employers' concerns that an adverse ruling would put them in the position of possibly having to decide whether to violate one set of rules in order to comply with another conflicting set of rules.<sup>146</sup>

Title I permits employers to put forth defenses against charges of discrimination based on job-related qualification standards consistent with business necessity.<sup>147</sup> One such defense is that an employee poses a "direct threat" to others in the workplace.<sup>148</sup> The Act defines "direct threat" as "...a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." EEOC provides further clarification when it says that in determining whether a person poses a direct threat, there must be an individual assessment of the person's ability to safely perform the essential functions of the job based on "reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence."<sup>149</sup> Four basic factors should be considered when determining whether an individual poses a direct health or safety threat. They are: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."<sup>150</sup> The employer cannot make general assumptions about a presumed risk to the average disabled person. The decision must be based on evidence that a particular disabled individual is at risk of harm if allowed to work in a particular job.<sup>151</sup> In *Chevron*, the court stated that employers are not required to place disabled applicants in positions that place the company at risk of violating Occupational Safety and Health Administration (OSHA) health and safety

regulations.<sup>152</sup> The implication of this ruling is that companies can now look for other areas where they can push back an employee for other qualification standards as well and may not simply be limited to health and safety concerns.<sup>153</sup> This case also leaves open the door for other claims based on a narrowing of qualification standards and employers will likely begin to carefully review its qualification standards for each position to make certain that concerns relative to health and safety matters are clearly defined. This ruling makes clear that the disabled person is not necessarily the best one to decide what is safe for him.<sup>154</sup>

The cost of the accommodation is not relevant to whether it is reasonable. The cost to the employer is addressed when determining whether the reasonable accommodation imposes an undue hardship.<sup>155</sup> Most accommodations have no impact on non-disabled workers. For instance, a disabled worker with a hearing problem may request that verbal instructions be provided in writing. Such an accommodation would not affect a non-disabled co-worker.<sup>156</sup> However, if the disabled person can no longer perform the duties of his position and as an accommodation request reassignment to a vacant position that is covered under a seniority system such an accommodation would have an impact on non-disabled workers vying for the same job.<sup>157</sup> That was the issue before the court in *US Airways*. In *US Airways v. Barnett*<sup>158</sup> the respondent sustained a back injury working at US Airways and was transferred to a less physically demanding job. His new job eventually fell under the companies bid system and put Barnett in jeopardy of losing his job to more senior employees. As an accommodation for his disability, Barnett asked US Airways to allow him to remain in the job, but Airways refused and Barnett lost his job. He filed a suit under the ADA alleging discrimination when he was denied the request accommodation.<sup>159</sup> The question before the Court was whether a requested accommodation that would normally be reasonable becomes unreasonable because the

accommodation would violate a seniority system.<sup>160</sup> The Supreme Court made a compromise ruling that did not support Airways' position that a disabled persons request for an accommodation that trumps a seniority system is always unreasonable and the respondents' position that the court should only consider the requested "accommodation's ability to meet an individual's disability-related needs."<sup>161</sup> Instead, the Court ruled that an employer is entitled to deny reassignment to a position governed by seniority system, but the disabled person is entitled to provide evidence that the employer has made exceptions to the seniority system and one more would not be unreasonable. This would require discovery to show how the employer has implemented the seniority policy, whether exceptions have been made, and the circumstances of those exceptions.<sup>162</sup> The decision in *US Airways* is significant because this is the first time the Court recognized that under the ADA a reasonable accommodation might result in an employer giving preference to a disabled worker.<sup>163</sup> Some believe that the moderate nature of the decision has created uncertainty for the disabled community. The ruling failed to provide clear instruction regarding what would constitute "special circumstances" that would permit an employer to make an exception to a seniority system to accommodate a request under the ADA.<sup>164</sup> Perhaps, the only certainty to come from the *US Airways* decision is that clarity is likely to come only after further litigation.<sup>165</sup>

Job rotation is another possible accommodation request. If an employer can show that rotating its workers has a business purpose, a person requesting exemption from job rotation as an accommodation may not find protection under the ADA because the employee will be considered not "otherwise qualified" if they are unable to perform the rotation.<sup>166</sup> Also, an employer may have to establish a pool of light duty jobs as a reasonable accommodation; however, they are not required to place an employee in a light duty assignment indefinitely.

With respect to equipment modification, this may be a reasonable accommodation when it enables the disabled person to perform an essential job function. Providing a TTY system for a hearing impaired person to communicate by telephone may be a reasonable accommodation and the use of computers and innovative software applications have permitted a number of reasonable accommodations.<sup>167</sup> EEOC embraces the use of sign interpreters and job coaches as examples of reasonable accommodations.<sup>168</sup>

Despite these examples of reasonable accommodations, the ADA does not require an accommodation that poses an “undue hardship” on the employer.<sup>169</sup> Title I defines undue hardship as:

(A) In general

The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

- (i) the nature and cost of the accommodation needed under this chapter;
- (iv) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodations; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (v) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(vi) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, in question to the covered entity.<sup>170</sup>

This means that “undue hardship” is generally defined as an action that requires significant expense or difficulty when considered with respect to the nature and cost of the accommodation, the overall financial resources of the facility, the overall size of the business, the type of operation of the business, and the overall impact of the accommodation on operations of the facility.<sup>171</sup> Generally, courts have concluded that the plaintiff has the initial burden of proof in a reasonable accommodation case. The plaintiff has the burden to prove “reasonable accommodation”, which shows that with an accommodation he would be able to perform the essential functions of the job and that the requested accommodation is a feasible one. If the plaintiff meets his burden of proof, the defendant must show that the requested accommodation is in fact not reasonable because of costs that were not considered or known by the plaintiff.<sup>172</sup>

As might be expected some conditions do not meet the definition of “disability.” The ADA specifically excludes homosexuality and bisexuality as impairments. Additionally, the following conditions are excluded as “disabilities” as well: “transvertism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from a physical impairment”.<sup>173</sup> Also conditions such as “compulsive gambling, kleptomania, or pyromania” or “psychoactive substance use disorders resulting from current illegal use of drugs.”<sup>174</sup>

The ADA specifically excludes current illegal drug users as “qualified individuals with a disability.” However, rehabilitated drug abusers are considered individuals with disabilities under the ADA. On the other hand, alcoholics are protected whether rehabilitated or non-rehabilitated although an employer may prohibit the use of alcohol or drugs at work. An

employer has the right to hold an alcoholic employee (or illegal drug user) to the same standards of performance as other employees.<sup>175</sup> Protection for rehabilitated drug users and alcoholics was included in the ADA because Congress recognized the need for a balance between compassion to support drug users and alcoholics and the legitimate concerns of business persons who have a vested interest in minimizing impaired-related work accidents caused by persons under the influence of alcohol and drugs.<sup>176</sup> However, some have begun to argue for the removal of these protections for all alcoholics and drug abusers arguing that in creating the ADA, Congress intended to offer protection to disabled persons who become disabled through circumstances that they did not control. The argument continues that alcoholics and drug addicts do not fall into this category because they made the choice to abuse drugs and their choice should not negate the employers' opportunity to choose not to employ them.<sup>177</sup> The argument is interesting but protection for rehabilitated alcoholics and drug abusers continues to be adjudicated under the ADA.<sup>178</sup>

In considering cases alleging discrimination based on disability in violation of the ADA, the one thing that is most clear is that each case is decided on an individual or case-by-case basis. That is why some conditions that one might presume to be evidence of impairment do not always meet the requirement. We saw this in the case of *Toyota* in which the plaintiff had carpal tunnel. With respect to carpal tunnel syndrome the Supreme Court reinforced its position that every case should be decided on an individual basis because not every person with this condition is disabled. They noted that the seriousness of carpal tunnel syndrome varies with each individual and attention should be given to the duration of the impairment because to prove disability under the ADA the "impairment" must be permanent or long term.<sup>179</sup>

This same consideration must be given with respect to pregnancy. The EEOC Interpretive Guidelines to Title I of the ADA states that pregnancy is not “impairment” because it is not a condition that is the result of a physiological disorder. Although the interpretive guidelines are helpful, they do not carry the weight of court decisions. Most courts that look at this issue find themselves trying to determine whether pregnancy is a physical impairment. Some have found affirmatively but most courts agree that pregnancy is not a disability under Title I of the ADA because it is not a physical impairment. The court’s reasoning is that to be a physical impairment a physiological condition must have an adverse affect on a bodily system to the extent that a problem arises. The courts have found that pregnancy is not the result of a problem but rather is the consequence of a normal bodily function. Additionally, some courts have relied on the EEOC Interpretive Guidelines that explicitly excludes pregnancy as a “physical impairment”. Furthermore, these courts have relied on EEOC instructions that “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.” Based on this rationale courts have found that pregnancy does not fall under the protection of the ADA because it is not a “physical impairment”. With respect to “major life activities”, courts have found that reproduction is not a major life activity. One such decision found that pregnancy does not negatively affect a woman’s ability to perform tasks such as walking, seeing, or performing other normal life activities.<sup>180</sup>

Courts have also been asked to consider whether obesity is an impairment under the ADA.<sup>181</sup> Most such cases claim discrimination under the third prong of the definition for disability that is they allege discrimination based on being regarded as having an impairment. One of the first cases to consider whether obesity is a disability under the ADA was the case of *Cook v. Department of Mental Health, Retardation, and Hospitals*<sup>182</sup>. Cook applied for a

position of institutional attendant at a facility for people with mental retardation. When the plaintiff applied for the position she was 5'2" and weighed 320 pounds, which classified her as morbidly obese. She had worked at the facility on two previous occasions, the first time for two years and the second for five years. Both times Cook left by her choice with a clean work record, which warranted a job performance rating that she met expectations. During the previous employments at the facility, her weight was nearly the same as when she reapplied.<sup>183</sup> It was during the pre-hire physical the nurse determined that Cook had "no limitations that impinged on her ability to do the job."<sup>184</sup> Nonetheless, the facility did not hire Cook because they claimed that her morbid obesity would negatively affect her ability to evacuate patients in an emergency and put her at greater risk of developing obesity related medical conditions which could result in her missing work or filing a workers' compensation claim.<sup>185</sup> The plaintiff won a monetary award following a jury trial. Defendants appealed the plaintiff's claim of a "perceived disability". The First Circuit found Cook's morbid obesity to be an impairment based on its finding that Cook had a metabolic disorder that was permanent (even if she lost the weight, the condition remained); and because her obesity was caused by a physiological disorder it was involuntary.

In a later case on obesity, the Sixth Circuit in *Ronald D. Andrews v. Ohio*<sup>186</sup> the court ruled that obesity was not an impairment. In *Andrews* several police officers claimed discrimination under the ADA when they were perceived as disabled by their employer because each was overweight and did not meet state fitness standards, which resulted in them experiencing various negative work conditions. The court ruled that the officers had to establish a prima facie case of being regarded as disabled under the ADA that showed that (1) the officers had a physical or mental impairment or were perceived as having such an impairment; (2) the

impairment affected a major life activity; (3) the impairment substantially limited performance of that major life activity.<sup>187</sup> The impairment can be physical or mental. Physical or mental impairment means (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 syndrome, emotional or mental illness, and specific learning disabilities.<sup>188</sup> This definition is further explained in the appendix, which says, “It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term “impairment” does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within “normal” range and are not the result of a physiological disorder.”<sup>189</sup> The Court in *Andrews* distinguished this case from *Cook* because the First Circuit found that Cook’s morbid obesity was caused by a physiological disorder and that her impairment was permanent and involuntary. However, with respect to the plaintiffs in *Andrews*, the Court found that “a mere physical characteristic does not, without more, equal a physiological disorder, where an employee’s failure to meet the employer’s job criteria is based solely on the possession of such a physical characteristic, the employee does not sufficiently allege a cause of action under these statutes.”<sup>190</sup> The Sixth Circuit found that the officers did not “[aver] an impairment or the perception of one; nothing laid out other than that they have certain physical characteristics that Ohio believes troopers should not possess.”<sup>191</sup> Further, the officers did not allege that their weights fell above

the normal range or that they were caused by a physiological disorder, which caused excessive weight.<sup>192</sup>

Some years later the Sixth Circuit revisited the issue of obesity as a disability in *EEOC v. Watkins Motor Lines*.<sup>193</sup> The issue of morbid obesity as an impairment was raised in this case. The defendant was morbidly obese at a weight of 405 pounds. The defendant sustained an on the job injury that resulted in his missing more than 180 days from work. The employer had a policy requiring that the defendant submit a release to return to work from his physician and pass a physical examination. The defendant never met the requirement for a return to work and was terminated, which generated the claim of discrimination based on the company's perception that he was impaired. The Sixth Circuit reaffirmed its position in *Andrews* that "to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition."<sup>194</sup> In a concurring opinion, Justice Gibbons "emphasize [d] that morbid obesity, as opposed to the general condition of being overweight, may have a physiological cause. The EEOC, however, has put forth no evidence in this case either that [the defendant's] morbid obesity has a physiological cause or that morbid obesity, because of the nature of the disorder, always has a physiological cause."<sup>195</sup> The general the conclusion is that obesity is not impairment under the ADA unless it is shown that obesity is caused by a physiological disorder.

A different condition was examined in the Supreme Court decision in *School Board of Nassau County v. Arline*<sup>196</sup>. The Court ruled for the first time on whether a contagious disease, tuberculosis, is a physical disability.<sup>197</sup> In this case the defendant was a schoolteacher with tuberculosis who was terminated because of her illness.<sup>198</sup> Under the Rehabilitation Act the Court was asked to decide whether the defendant was a protected person with a disability. The Court decided that Arline was a disabled person with an impairment that substantially limited her

major life activities because she was frequently hospitalized. The school board argued that Arline was not terminated because the disease affected her, but because of concern over the potential affect of the disease on others who worked with her.<sup>199</sup> The Supreme Court rejected that argument because they determined that the issue must be decided on the basis of the impairment's effect on the individual.<sup>200</sup>

The Supreme Court addressed the issue of disability under the ADA as relates to a contagious disease in the case of *Bragdon v. Abbott*.<sup>201</sup> This case was significant because it addressed the issue of whether human immunodeficiency virus (HIV) is a physical disability.<sup>202</sup> The significance of this issue stems from the fact that providing protection for persons with HIV was a prominent consideration in creating the ADA.<sup>203</sup> Individuals with HIV were thought to be especially open to discrimination because of the stigma associated with their disease.<sup>204</sup> Since enactment of the ADA from 1992 through 1999 EEOC HIV cases represented 2.8 percent of all cases. There is little question that the issue of HIV as a disability is a serious matter.<sup>205</sup> Recognizing this in *Bragdon* the Supreme Court ruled that HIV is an impairment from the moment the person becomes infected because the disease immediately begins to damage the person's white blood cells.<sup>206</sup>

However, under certain circumstances an employer does have the right to weigh legitimate concerns about the health and safety of others. For example a restaurant owner was faced with a concern when he learned that one of his workers, who had a good work record, was diagnosed with AIDS. The employee's food preparation work required that he use a knife in the preparation of salads and other food items. The restaurant had concerns that allowing the employee to continue working might violate OSHA regulations or jeopardize the health of other workers and customers.<sup>207</sup> The ADA states, " In any case in which an individual has an

infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.”<sup>208</sup> The US Department of Health and Human Services publishes a list of such diseases but AIDS and HIV do not appear on the list.<sup>209</sup> A review of *Chevron* reminds us that to use the direct-threat defense the employer must demonstrate that the decision to terminate or reassign an employee must be based on current and objective medical evidence. It cannot simply be based on the company’s perception of risk to the individual.<sup>210</sup> Courts when presented with similar cases as in this example, have allowed employers to transfer the infected employee because the risk of transmission of the disease, though small, carries dire consequences should an accidental transfer occur.<sup>211</sup>

Issues related to disability law are complex. From EEOC and the Courts it is apparent that each case must be analyzed individually. That analysis begins when a charge of discrimination is filed with EEOC. Part II of this paper will undertake a summary examination of how a claim is processed with EEOC.

## **Part II: Processing A Claim Under the Americans With Disabilities Act**

The federal government created a number of regulatory agencies to administer the legislation that affects all aspects of our lives. These administrative agencies, which are organized into commissions and boards, were formed to aid legislative bodies in achieving desired economic and social goals within the existing governmental structure. Legislative bodies provide policy direction but are unable to provide the expertise or routine oversight needed to address the myriad of problems confronted by society.<sup>212</sup> Administrative agencies are established by legislatures through an enabling act that sets the structure, function and powers of that agency. Each agency then assembles experts who focus on one area and work to achieve the objective established by the legislature.<sup>213</sup> Agencies carryout their mandate by making rules, investigating violations of regulations, and adjudicating issues that arise under the regulations that they oversee.<sup>214</sup>

The American With Disabilities Act is regulated by one such administrative agency. The EEOC was given enforcement authority to adjudicate claims of discrimination under Title I of the ADA. Since 1993 the complex nature of the issues under the ADA has led EEOC to develop comprehensive regulations and interpretive guidance for employers and persons with disabilities.<sup>215</sup>

The scope of the ADA is set by statute and applies to every aspect of the employment situation.<sup>216</sup> Prohibition against discrimination as governed by the ADA apply to all private employers who have 15 or more employees, and all state and local government entities no matter the number of employees.<sup>217</sup> The ADA defines what the terms employee and employer mean: “The term “employee” means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United

States.... The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent or such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.”<sup>218</sup>

EEOC in its definition of discrimination identified the various issues to which it would provide guidance and oversight. It states, “It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to: (a) recruitment, advertising, and job application procedures; (b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; (c) Rates of pay or any other form of compensation and changes in compensation; (d) Job assignments, job classifications, organizational structures, position description, lines of progression, and seniority lists; (e) Leaves of absence, sick leave, or any other leave; (f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity; (g) Selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training; (h) Activities sponsored by a covered entity including social and recreational programs; and (i) Any other term, condition, or privilege of employment.”<sup>219</sup>

The EEOC process for filing a charge of discrimination under the ADA is the same as for other discrimination claims.<sup>220</sup> Any individual who believes he has been discriminated against with respect to some aspect of his employment can file a charge with EEOC. If it is necessary to protect the identity of an individual, another person, organization, or agency may file a charge on

behalf of that individual.<sup>221</sup> Federal employees or applicants for employment follow slightly different procedures, which will be discussed separately. An individual from the public sector can file a charge of discrimination in person at a local EEOC office or by mail.<sup>222</sup> The charge should include the complainant's personal information, identifying information on the employer that allegedly committed the discriminatory act, a brief description of what happened that led the individual to file a charge of discrimination, and the date of the alleged discriminatory act.<sup>223</sup> Before a lawsuit may be filed in court, the individual must first engage in the administrative process through EEOC. This process must be initiated within 180 days from the date of the alleged violation. This time frame is strictly enforced but can be extended to 300 days if state or local anti-discrimination law also covers the charge.<sup>224</sup> For persons outside the United States or its territories who are covered under EEO law, those individuals who believe they have been discriminated against should file a charge with the EEOC district office closest to his employer's headquarters or with any EEOC office.<sup>225</sup>

After a charge of discrimination has been filed with EEOC the employer is notified. From there one of several things will happen. The case will be assigned for 'priority investigation' when the preliminary facts appear to show that a law has been violated. The EEOC can request documents, interview people, review documents, and visit the facility as needed. Upon completion of the investigation, they will discuss the findings with the person who made the charge and/or the employer. If both parties are in agreement, EEOC may select the case for participation in its mediation process.<sup>226</sup>

EEOC can dismiss a charge at any time during the process if in its judgment continued investigation will not reveal that a law has been violated. Dismissal can occur at the initial charge taking if the initial interview does not reveal evidence to support a charge. Should that

occur the party would receive a notice from EEOC giving the charging party 90 days to file a lawsuit on his or her own.<sup>227</sup> If the evidence supports the charge of discrimination, both parties will be notified in writing. EEOC will then attempt to develop a remedy for the situation. If the matter is successfully resolved, neither EEOC nor the charging party may pursue the matter in court unless the settlement has been breached. If EEOC does not successfully obtain a resolution, EEOC will decide whether to bring a lawsuit in federal court. In the event EEOC decides not to sue, it will issue a notice closing the case with the right to file a lawsuit on his or her own behalf within 90 days of receipt of the notice. Also, a charging party may request a right to sue letter from EEOC 180 days after the charge was filed with EEOC and can file a lawsuit 90 days from receipt of the notice.<sup>228</sup>

Federal sector employees follow different procedures when they believe they have been discriminated against. Federal employees who wish to file a charge of discrimination should contact the EEO counselor with their agency before they file a formal complaint of discrimination. The individual must make initial contact with the counselor within 45 days of the alleged violation.<sup>229</sup> Under certain circumstances that time frame can be extended, if for example the person was not notified of the time requirement.<sup>230</sup> The EEO Counselor will conduct an initial interview with the aggrieved person and inform the person of their rights under the process including their right to request a hearing before an administrative judge, a final agency decision following completion of the investigation, or other possible rights available under the grievance procedure or Merit System Protection Board.<sup>231</sup> The counselor will notify the alleged responsible agency official that an allegation of discrimination has been made and the counselor will attempt to facilitate a resolution of the matter. If the matter has not been resolved

within 30 days, the counselor must inform the complaining party in writing of their right to file a formal complaint of discrimination.

The formal complaint must be filed within 15 days of receipt of the notice of right to file. “Prior to a request for a hearing . . . an agency may dismiss an entire complaint for any of the following reasons: (1) failure to state a claim, or stating the same claim that is pending or has been decided by the agency or the EEOC; (2) failure to comply with the time limits; (3) filing a complaint on a matter that has not been brought to the attention of an EEO counselor and which is not like or related to the matters counseled; (4) filing a complaint which is the basis of a pending civil action, or which was the basis of a civil action already decided by court; (5) where the complaint has already elected to pursue the matter through either the negotiated grievance procedure or in an appeal to the Merit System Protection Board; (6) where the matter is moot or merely alleges a proposal to take a personnel action; (7) where the complainant cannot be located; (8) where the complainant fails to respond to a request to provide relevant information; (9) where the complaint alleges dissatisfaction with the processing of a previously filed complaint; (10) where the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination.”<sup>232</sup>

If the complaint is accepted for investigation, the agency will develop an impartial report of the facts of the case. The investigation must be completed within 180 days from the date the complaint was filed. Within 30 days of receipt of the investigative report, the complainant will receive a written notification of the right to request a hearing and decision before an EEOC administrative judge or a final agency decision. If a hearing is requested in writing to EEOC, the administrative judge will continue the investigative process to the extent necessary to develop the facts of the case.

The administrative judge will conduct the hearing and issue a decision within 180 days of receipt of the file from the agency. Once the administrative judge has issued its decision the agency has 40 days to issue its final agency decision. The complainant will receive notice of the final agency decision in writing along with notice of their right to file an appeal with EEOC. All appeals to EEOC must be filed with its Office of Federal Operations (OFO) in writing within 30 days of receipt of the final agency decision. A written statement or brief explaining the reason for the appeal must be received by OFO within 30 days of the filing of the appeal. The agency is entitled to submit a reply to the appeal within 30 days of notification that the complainant has filed an appeal.<sup>233</sup>

A civil action from a federal sector complaint of discrimination can be filed in federal court after exhaustion of the administrative process, which may occur: “(1) within 90 days of receipt of the final action where no administrative appeal has been filed; (2) after 180 days from the date of filing a complaint if an administrative appeal has not been filed and final action has not been taken; (3) within 90 days of receipt of EEOC’s final decision on an appeal; or (4) after 180 days from the filing of an appeal with EEOC if there has been no final decision by the EEOC.”<sup>234</sup> Additional rights apply if the complaint alleges discrimination under the Age Discrimination in Employment Act (ADEA) or the Equal Pay Act.<sup>235</sup> Once a lawsuit has been filed all further processing of the complaint with EEOC terminates.<sup>236</sup> Also, additional rights may attach where the complaining party is covered by a collective bargaining agreement or has concurrent rights under the Merit System Protection Board.<sup>237</sup>

Under both federal and public sector administrative processing procedures, EEOC may ask both parties to participate in a mediation process. All charges are not appropriate for mediation. EEOC will determine whether the case is suited for mediation and will consider such

things as, the nature of the case, how complex the issue, the relationship of the parties, and the relief sought by the complainant.<sup>238</sup>

Mediation is a confidential process. In fact, all parties, including the mediator, must sign a statement agreeing to not discuss any matters discussed during mediation. No tape recordings or transcriptions are permitted and the mediator's notes are destroyed. Information revealed during the mediation process cannot be used during the investigative process because to do so would violate the confidentiality requirement.<sup>239</sup>

Mediation is an alternative to the customary investigative and adjudicative processes. A mediator assists the parties in reaching an informal resolution to the matter in dispute. The mediator will facilitate discussion between the parties but will not decide the matter and cannot impose a settlement on either party. The mediators are experienced trained professionals who remain impartial and who have no stake in the outcome. They will not assess fault or offer an opinion as to which party is right or wrong. Both parties must agree to the mediation, therefore if either party refuses to mediate, the process will proceed through the normal process.

Mediation is ideally suited for early in the process before the parties have hardened their positions and can often save valuable resources. However, mediation is encouraged at all stages of the process even after a finding of discrimination. If mediation occurs at the conciliation stage, EEOC will join the negotiations with a mediator serving as the neutral party. Otherwise, EEOC will not participate in the mediation process. If either party wishes to mediate the dispute, they can initiate the request.<sup>240</sup>

The charging party should attend the mediation and the employer should be representative by someone familiar with the charge and who has the authority to resolve the matter. An attorney or other person can represent each party but an attorney is not required or

necessary. When a representative accompanies the parties, the mediator will decide what role the representative will play. The mediator may request that the representative not speak for the party but rather serve in an advisory role only.<sup>241</sup>

Although resolution of the matter is always encouraged, the parties are not required to reach an agreement. If the matter does not resolve during resolution, the matter will resume processing. However, if the matter is resolved but one party believes that the agreement has been violated, the party is advised to contact the alternative dispute resolution coordinator. All agreements reached during mediation are enforceable in court.<sup>242</sup>

If an individual with a disability requires an accommodation to participate in mediation they should notify the mediation provider. If either party is an individual with a disability within the meaning of ADA they have a right to a reasonable accommodation that does not impose an undue hardship. Many mediators will provide an accommodation even if the disability does not meet the legal definition of a “qualified individual with a disability” if doing so encourages full participation by the parties. Some examples of accommodations are: interpreters for the deaf, assistance for the visually disabled, change the time or provide regular breaks to accommodate someone who needs to take medications or take rest breaks, adjust the environment, or allow a personal assistant to accompany a party.<sup>243</sup>

Federal law protects against the effect of employment discrimination on disabled persons even when there was no intent to discriminate on the part of the employer. Therefore, the law protects against both disparate treatment of persons with disabilities and actions that have the effect of disparately impacting a disabled person.<sup>244</sup> A disabled person who believes they have been discriminated against may proceed under either theory. They may either proceed under the disparate treatment theory, which claims that they were treated differently based on a prohibited

factor, in this case their disability. Alternately, they may proceed under the disparate impact theory, which essentially argues that a policy or procedure that on its face appears to be neutral or non-discriminatory, in fact has a disparate impact or greater statistical impact on the protected group of disabled persons. Disparate impact theory is often seen in class action complaints.<sup>245</sup> The Supreme Court established the structure for proceeding under a disparate treatment claim in the case of *McDonnell Douglas Corp. v. Green*.<sup>246</sup> Under the analysis established in this case, the Court stated the initial burden of establishing a prima facie case of discrimination fell on the complainant. Once the charging party has established a prima facie case then the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the complained of action. When the defendant meets this burden the presumption of discrimination disappears. However, the complainant can then present evidence to prove that the defendant's proffered reason is actually a pretext or cloak for discrimination.<sup>247</sup>

In *Raytheon v. Hernandez*<sup>248</sup> employers had hoped that the Supreme Court would rule that employers could apply a blanket no-rehire policy for persons fired for misconduct without fear of violating the ADA. Respondent was a rehabilitated drug user who applied for reemployment with Raytheon two years his resignation from the company for testing positive for cocaine. During the two years away from Raytheon the respondent had become active with church and received counseling from Alcoholics Anonymous. The respondent was denied rehire because the personnel employee stated that the company had a blanket no hire policy for employees terminated for workplace misconduct. The employee denied having knowledge of the respondents previous drug use. The respondent initially alleged discrimination based on disability under a disparate treatment theory and following a summary judgment appealed to the 9<sup>th</sup> Circuit Court and for the first time raised the disparate impact theory as related to the

company's blanket no-rehire policy. The 9<sup>th</sup> Circuit agreed with the respondent as to the disparate impact theory. The significance of this decision is that the Supreme Court ruled that 9<sup>th</sup> Circuit Court applied the wrong analysis when it used disparate impact theory to decide the case when disparate treatment was the proper analysis.<sup>249</sup> The Court made clear that although both claims are available under the ADA they are not to be combined and the disparate impact analysis was not available to Hernandez because he did not raise it in a timely manner. The Supreme Court stated, "Had the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate nondiscriminatory reason under the ADA."<sup>250</sup>

Under Title VII of the Civil Rights Act of 1964 one may be able to establish a claim of hostile environment if they prove: "(1) the harassment was based on a protected category; (2) the harassment was unwelcome; (3) the harassment was so severe as to alter a term or condition or privilege of employment; (4) the discriminatory conduct was objectively hostile such that a reasonable person would perceive the work environment to be hostile; and (5) the discriminatory conduct was subjectively hostile as the plaintiff in fact found the work environment to be hostile."<sup>251</sup> *Meritor Savings Bank v Vinson*<sup>252</sup> and *Harris v Forklift Systems Inc.*<sup>253</sup> established hostile work environment claims based on sexual harassment.<sup>254</sup> The Supreme Court extended the hostile work environment claim to include discrimination based on race, sex, religion, national origin, and age but currently the Supreme Court has not extended the hostile work environment claim to include disability harassment.<sup>255</sup> The different circuits have applied the Title VII standard to disability claims differently. Some have allowed such claims others have rejected hostile work environment harassment based on disability.<sup>256</sup> Fourth and Fifth Circuits have had a plaintiff prevail under such a claim.<sup>257</sup> In an analysis of this issue Scott Thompson

argued, “In applying Title VII jurisprudence, these circuits determined that, in order to establish a hostile work environment harassment claim under the ADA, a plaintiff must prove (1) he was a qualified individual with a disability; (2) he was subject to unwelcome harassment; (3) the harassment was based upon disability; (4) the harassment was sufficiently severe or pervasive as to alter a term, condition or privilege of employment; and (5) a factual basis exists for imputing liability upon the employer (the employer knew or should have known of harassment and failed to take prompt remedial action). . . .When determining whether the work environment was abusive, the Fourth and Fifth circuits set fourth factors to be considered such as ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’”<sup>258</sup> This represents the general requirements for a hostile work environment claim but until the Supreme Court renders a decision on hostile work environment disability harassment each circuit will continue to establish its own parameters.<sup>259</sup>

An individual who believes he has been discriminated against based on disability is entitled to seek relief under Title I of the ADA. The ADA requires the individual to use the remedies of Title VII of the Civil Rights Act of 1964, as amended.<sup>260</sup> Specifically, the ADA provides: “The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106, concerning employment.”<sup>261</sup> Under Title VII of the Civil Rights Act of 1964, as amended the remedy available for a finding of intentional discrimination is equitable, meaning that the respondent is required to stop the discriminatory act and ordered to hire or reinstate the

individual, or whatever is appropriate. Remedy for disability discrimination may include making a reasonable accommodation.<sup>262</sup>

The court may also order equitable relief in the form of back pay from no more than two years prior to the date the charge was filed with EEOC.<sup>263</sup> Back pay and front pay are equitable remedies at the discretion of the court. Back pay is awarded for lost wages and includes other benefits to which the individual may be entitled, such as lost wages at the rate of pay the individual would have made, interest on lost wages, any lost overtime, and pension benefits.<sup>264</sup> Front pay is an appropriate remedy when reinstatement is not available, perhaps because the position is no longer available. Courts have broad discretion with respect to awarding front pay and may limit the time period or even deny front pay.<sup>265</sup> Courts have ruled that because back pay is equitable there is a duty to mitigate damages. The respondent can argue that the back pay should be reduced by any actual wages of the plaintiff or even eliminated where the plaintiff failed to seek employment. However, the employer has the duty to prove that suitable work was available and the plaintiff failed to exercise reasonable diligence to seek work. If the employer meets his burden and the plaintiff fails to demonstrate their effort to mitigate damages the court at its discretion may deny back pay award. The issue of mitigation is fact driven and determined on a case-by-case basis.<sup>266</sup> Other limitations on back and front pay may be imposed at the discretion of the court. One such limitation is based on the collateral source rule. This rule permits the court to consider reducing an award if the employee received money from some source independent of the employer that when added to the award places the employee in a better position than they would have been in had the discrimination never occurred. The court does not want either party to experience a windfall.<sup>267</sup>

Congress amended the Civil Rights Act to include compensatory damages as a possible remedy for future losses and pain and suffering. These same remedies are available under the ADA. However caps were placed on the amount of compensatory and punitive damages that could be awarded based on the number of employees at the company. The fewer the number of employees, the smaller are the allowable compensatory damages.<sup>268</sup> Punitive damages are allowable provided the plaintiff proves (1) an intentional act and (2) the employer had malice (evil motive or intent) or “reckless indifference.”<sup>269</sup> Like the other equitable remedies, prejudgment interest is available at the discretion of the court if it makes the plaintiff whole.<sup>270</sup>

At the discretion of the court or agency, the ADA permits the awarding of reasonable attorney fees to the prevailing party. For a party to prevail in an ADA case (1) the party must receive a judgment after the evidence in the entire case had been heard; or (2) a court order is entered into by consent of the parties.<sup>271</sup>

As has been discussed throughout this paper, if the plaintiff is to prevail they must establish a prima facie case of discrimination based on a disability. To establish the prima facie case a considerable amount of evidence is required. The plaintiff should be prepared to describe their impairment with specificity and identify the major life activities that are affected. They must also show that there are substantial limitations on these major life activities. It is not enough to simply identify a condition, such as diabetes. The plaintiff must identify which major life activities are affected and describe how they are affected. These could include sitting, standing, lifting, reaching, thinking, sleeping, eating, and interacting with others. The plaintiff must keep in mind that the Court has questioned whether working can be considered a major life activity (see *Sutton*). Further, the substantial limitations on work must be for a “class of jobs” not just a particular job. When assessing the substantial limitations on a particular job the

plaintiff should consider the extent of limitations relating to a number of jobs, different types of jobs, and the plaintiffs skills as they relate to other jobs.<sup>272</sup>

After *Toyota* it is essential that the substantial limitations affect major life activities that are central to the plaintiff's daily life and the restrictions should be significant. To provide information sufficient to demonstrate substantial limitations in ones personal daily life it may be necessary to discuss private matters that might cause discomfort.<sup>273</sup>

Since *Sutton* some have suggested that plaintiffs pursue their claim under a "record of disability" or "regarded as having a disability" prong. To establish a "regarded as having a disability" claim the plaintiff must identify the impairment that he or she is regarded as having and the major life activity that the employer mistakenly believes is affected. It may not be enough for the plaintiff to simply show that the employer knew about the impairment. The plaintiff will need to provide proof that the employer erroneously believed that the impairment substantially limited a major life activity.<sup>274</sup>

Meanwhile the employer can refute the claim in a number of ways. They can (1) show that the plaintiff has not identified a impairment; (2) show that the impairment does not substantially limit a major life activity; (3) provide evidence that the impairment that affects a major life activity does not affect it substantially; (4) in a "regarded as claim" show that the employer was not aware that the plaintiff had an impairment; (5) if the employer knew of the impairment show that they did not perceive of the plaintiff as disqualified.<sup>275</sup>

When pursuing a claim under the first prong the plaintiff must describe the mitigating or corrective measures that they are using and describe whether the mitigating measures are not totally effective or how they may be having a negative affect. The employer may want to seek

summary judgment with the argument that the plaintiff is not substantially limited after considering the mitigation and could not have a disability under the Act.<sup>276</sup>

If the plaintiff gets beyond the initial hurdles he or she must then show that he or she is qualified to perform the essential functions of the job, with or without accommodation. They can do this by getting the job descriptions or postings and demonstrate that they are qualified to meet the qualifications. The employer can use federal laws or standards, such as DOT standards for truck drivers, to demonstrate that the person is not qualified to perform the essential functions of the job. The plaintiff can counter by showing that the standard is not related to an essential function. For example, the plaintiff may be able to show that the standard was not listed on the job description or that the employer had deviated from the standard in the past. The plaintiff must identify the accommodation that he requires and that the accommodation is reasonable.<sup>277</sup>

Generally, employers should have a proactive plan that (1) has a policy in place that indicates the company's understanding of the ADA and other laws related to the rights of disabled workers; (2) make sure employees and supervisors understand what the essential functions are of all jobs; (3) implement policies and procedures for employees to use who want to request reasonable accommodations; (4) train managers and supervisors to recognize medical conditions that require some action under the ADA; (5) work cooperatively with employees to identify and implement ways that allow disabled workers to continue working; (6) develop form letters for communicating with health care providers and employees that can be customized to each case; (7) work with medical professionals to get objective analysis of an employees impairment and seek objective contributions from medical professional to develop appropriate accommodations; (8) consider modifications to jobs and reassignment to other positions to

accommodate disabled employees; (9) document every step of the assessment process when analyzing a situation involving an employee with an impairment.<sup>278</sup>

### Part III: Problems With the ADA

Many advocates for disabled workers have expressed concern that the Supreme Court has undermined the positive effect of the ADA.<sup>279</sup> *Sutton v. United Airlines*<sup>280</sup> is the best example of what concerns these advocates. In *Sutton* the Supreme Court stated that it had been called on to determine what Congress meant by “disability.” Specifically, the Court believed that it was called on to determine the proper weight to be given to mitigating and corrective measures in determining whether a person has a disability. The court took the position that the definition was silent on this question and it therefore resorted to its own interpretation to define the word. They determined that the measure of whether a person is disabled should be determined *after* the mitigating measure. However, a review of the legislative history leading up to enactment of the ADA revealed that the committees considering this question “explicitly stated in their reports that they expected the courts to evaluate whether someone was disabled before he or she used mitigating or corrective measures.”<sup>281</sup> Despite the legislative record to the contrary, the Supreme Court concluded otherwise. Justice O’Connor wrote the opinion for the court. In explaining the Court’s reasoning, Justice O’Connor said that the Court considered two points from the statutory language of the ADA. First, she stated that Congress wrote the definition of ‘disability’ in the present tense which the Court took to mean that Congress wanted the court to make its determination based on the individual’s condition in its corrected state. Secondly, she stated that Congress expressed its intent to protect 43 million disabled Americans and not the considerably larger number of actual disabled persons. Therefore, she reasoned that the statute was never intended to broadly define “disability”. What Justice O’Connor did not reference is the remainder of the clause, which “stated that the number of disabled Americans was growing. She treated the 43 million figure as if it were a static figure.”<sup>282</sup> What this debate points to is the

question of how much weight, if any, courts should give to legislative history. One could certainly argue that failure to acknowledge the legislative history in *Sutton* has had a profound consequence for the millions of Americans impacted by the courts decision.<sup>283</sup>

Although the method used by the Supreme Court to discern the meaning of “disability” is subject to debate another debate is underway. That debate questions whether the use of summary judgments has effectively weakened the ADA and whether failure to defer to agency guidance has had a similar result.<sup>284</sup> *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*<sup>285</sup> laid out two steps courts should use to determine statutory meanings. The first step is to look to the statute itself. If that does not provide sufficient clarity then step two ask the court to defer to the agency charged with enforcing the statute. With respect to the ADA, Congress specifically directed courts to defer to agency interpretations, which meant EEOC’s interpretations and Congress stated that courts should interpret the ADA consistent with preexisting interpretations developed from the section 504.<sup>286</sup> Historically, the Supreme Court has shown a willingness to defer to agency interpretations in past decisions such as *Consolidated Rail Corp. v. Darrone*<sup>287</sup> and *School Board v. Airline*<sup>288</sup>. However, the courts have not shown a similar willingness to defer to EEOC interpretive guidelines when determining what the various ADA terms mean.<sup>289</sup> When Title VII was enacted Congress gave EEOC limited authority to promulgate regulations. With the amendment to Title VII EEOC was given greater enforcement authority but there was no change to its authority to promulgate regulations. President Carter used his executive order power to attempt to expand EEOC’s authority but that power belongs to the legislative branch, not the executive. Even with its weak promulgation authority, EEOC has issued guidance and interpretation on specific issues. Nonetheless, the Supreme Court has failed to give deference to EEOC guidance.<sup>290</sup> Also, in deciding cases brought under the ADA the circuit courts have

largely failed to give deference to EEOC guidance. Consequently, the courts have not deferred to EEOC on such matters as the meaning of such terms as “corrective measures” and “mitigating measures”<sup>291</sup> With its decision in *Bragdon*, the Supreme Court instructed the lower courts to give deference to agency interpretations under the ADA. Therefore, because EEOC has determined that a condition is substantially limited *before* application of mitigating measures had the courts given deference to EEOC’s interpretations, the decision in *Sutton* might have been different.<sup>292</sup> Ultimately, what this shows is that the balance of power has shifted to the courts relative to how legislative history will be applied in interpreting legislative statutes, such as the ADA.<sup>293</sup>

With respect to the use of summary judgments, district courts have repeatedly used this procedural tool to dispense with issues brought under the ADA. The result is that courts have repeatedly substituted their judgment for that of juries regarding legitimate issues of fact with respect to such terms as disability, substantial limitations, and essential functions of a job.<sup>294</sup> Courts also create “an impossibly high threshold of proof for defeating a summary judgment motion.”<sup>295</sup> This is accomplished by improperly shifting the burden of proof to the detriment of plaintiffs.<sup>296</sup> The end result is that plaintiffs have experienced limited success litigating cases under the ADA.<sup>297</sup>

## Conclusion

Presumably, legislation designed to offer protection for the disabled worker would have a positive impact on disabled worker employment statistics. However, no such affect is apparent with respect to the Americans with Disabilities Act. In fact, there was a slight decrease in employment percentages for disabled workers after enactment of the Americans with Disabilities Act of 1992.<sup>298</sup> The ADA was created to narrow the gap between the non-disabled and disabled workers as employers were asked to assume unique cost associated with accommodating disabled workers. Instead the Supreme Court has so narrowly defined disability that only small minorities of disabled workers are protected. The result is that people with mild disabilities are not 'disabled' and the severely disabled cannot work.<sup>299</sup> Many employers would have us believe that the cost of accommodation is too high; yet, studies have shown that the mean cost of accommodations is \$935 per person.<sup>300</sup>

In 2002 the Census Bureau reports that 51 million people had physical and mental disabilities. Thirty-three million of the disabled individuals had severe disabilities. In 2002, fifty-six percent of disabled adults had jobs. Of those with severe disabilities forty-three percent had jobs. In terms of dollars and cents, statistics show that the median income for severely disabled workers is \$12,800.00, \$22,000.00 for milder disabilities and \$25,000.00 for those with no disabilities.<sup>301</sup> Many employers are afraid to hire disabled workers because they fear later being sued by these same employees if they have to discipline the worker or deny them a promotion. Although the ADA has certainly raised the awareness of people with disabilities, it has not achieved the great societal goals lauded at its inception.<sup>302</sup>

## Endnotes

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<sup>1</sup> 42 USC § 12101 et. seq.

<sup>2</sup> Peter David Blanck et al, Disability Civil Rights Law and Policy 2-1 (West 2004).

<sup>3</sup> Frank A. Schubert, Grilliot's Introduction to Law and the Legal System 19 (1996).

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