2003

The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act

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THE JUDICIAL DISABLING OF THE EMPLOYMENT DISCRIMINATION PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT*

By Charles B. Craver**

I. INTRODUCTION

On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law by then President George Bush.[1] The ADA constitutes the most extensive disability civil rights law ever enacted.[2] It provides extensive protection against various types of discrimination for individuals with serious physical and mental disabilities. At the official signing ceremony, President Bush described the ADA as "the world's first comprehensive declaration of equality for people with disabilities."[3]

The primary impetus for the ADA was the historic societal discrimination against individuals with disabilities. Congress acknowledged that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."[4] Congress further stated that "historically, society has tended to isolate and segregate individuals with disabilities, and, . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[5]

> Two-thirds of all disabled Americans between the age of 16 and 64 are not working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled persons, who are not working, say that they would like to have a job. Translated into absolute terms, this means that about 8.2 million people with disabilities want to work but cannot find a job.[6]

In addition, Congress recognized that disabled persons constitute a "discrete and insular minority

who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . ."[7] People with disabilities occupy inferior positions socially and economically. They are much poorer and less well educated than non-disabled persons.[8] Congress further realized that public fears, misperceptions, and ignorant stereotypes regarding the disabled were so commonplace that societal discrimination adversely affected many people who were not truly disabled.[9] Congress thus decided to extend statutory protection not only to persons with actual disabilities, but also to individuals with records of prior disabilities who are no longer significantly inhibited by their previous conditions and persons who are regarded by others as being disabled even when they are not.[10]

Although other sections of the ADA proscribe discrimination with respect to such areas as public transportation[11] and public accommodations,[12] Title I expressly prohibits discrimination against disabled individuals in employment.[13] When it was enacted, disability rights advocates hoped this new statute would provide disabled persons with expansive protection against various forms of employment discrimination. Their expectations have unfortunately not been realized. A series of recent Supreme Court decisions have narrowed the scope of ADA coverage to severely limit statutory protection to individuals with relatively severe disabilities.

This article will explore the propriety of the Supreme Court's ADA decisions concerning their impact on employment discrimination coverage. It will suggest alternative approaches that would be more consistent with both the express statutory provisions and the underlying legislative intent. Part II will review the basic scope of ADA employment discrimination coverage. Part III will then evaluate the way in which Supreme Court decisions have defined and

restricted ADA coverage. In Part IV, I will indicate how I think the Supreme Court should interpret the applicable ADA provisions.

II. SCOPE OF ADA EMPLOYMENT DISCRIMINATION COVERAGE

The employment discrimination provisions of the ADA cover employers with fifteen or more regular employees, employment agencies, and labor organizations.[14] No regulated entity "shall discriminate 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."[15] Covered parties are required to make "reasonable accommodations" for known physical or mental limitations that will enable disabled persons to perform the essential functions of jobs, where such accommodations can be accomplished without undue hardship on the operation of the business.[16] These provisions expressly proscribe *discriminatory treatment* that is effectuated *because of* disabling conditions.[17] The statute also prohibits *disparate impact* discrimination that results – whether intentionally or inadvertently – from facially-neutral employment criteria that cause the disqualification of disproportionate percentages of disabled persons, unless the covered entities can demonstrate that the challenged factors are job-related and consistent with business necessity.[18] When employment tests are used, they must be administered to disabled individuals in a manner that ensures that the results accurately reflect the actual capabilities of these persons despite their impairments.[19]

To protect employment applicants who do not have obvious impairments from possible disability discrimination, the ADA prohibits pre-employment medical examinations and pre-

employment inquiries concerning applicant medical conditions.[20] Pre-employment medical examinations may only be undertaken *after* job offers have been made, all new employees are subject to such examinations, the medical information obtained is kept confidential in separate medical files, and the medical information is not used to discriminate against qualified individuals because of their disabling conditions.[21] While general medical questions may not be asked of job applicants, employers may describe the job-related functions for the positions in question and ask prospective employees whether they could perform those tasks.[22] Once employees begin to work for covered firms, post-employment medical examinations may not be required – they may only be conducted on a voluntary basis.[23]

The three critical inquiries under the applicable employment discrimination provisions concern: (1) who are "disabled" individuals under the statute; (2) which disabled individuals are "qualified" for the positions in question; and (3) what "reasonable accommodations" may enable disabled persons to perform the essential functions of those positions. The ADA contains a three-part definition of "disability:"

> The term "disability" means, with respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.[24]

This definition was taken almost verbatim from the Rehabilitation Act.[25] Under the first prong, individuals with current impairments that substantially limit any major life activity are protected. The second prong applies to persons who previously suffered from disabling conditions of a

substantially limiting nature, and have records of such, but who are no longer substantially limited. The third prong includes individuals who do not have disabling conditions, but are erroneously thought to have one. They may have impairments that are not substantially limiting, but employers believe those conditions cause them to be substantially limited. They may alternatively have no impairments, but employers incorrectly think they have conditions which, if they had them, would be substantially limiting. If an individual's situation falls within any prong, that person is entitled to ADA coverage.[26]

Although Congress failed to provide definitions of "substantially limits" or "major life activities," it suggested that the definitions previously established by agencies empowered to enforce different provisions of the Rehabilitation Act should be applied to ADA cases.[27] Department of Health, Education & Welfare (HEW) regulations promulgated under the Rehabilitation Act define "physical and mental impairments" to include physiological disorders, cosmetic disfigurements, and anatomical losses affecting neurological, musculoskeletal, sensory, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine systems and mental retardation, organic brain syndrom, emotional or mental illness, and specific learning disabilities.[28] Equal Employment Opportunity Commission (EEOC) regulations adopted pursuant to ADA administrative authorization have adopted this HEW approach.[29] Relevant Rehabilitation Act regulations define "major life activities" to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[30] ADA committee reports expressly endorsed these administrative interpretations.[31]

EEOC regulations define the term "substantially limits" to cover individuals who are

unable to perform a major life activity that average persons in the general population can perform or who are significantly restricted as to the manner under which they can perform a major life activity compared to the manner under which average people in the general population can perform the same major life activity.[32] When determining whether disabling conditions are substantially limiting, EEOC regulations indicate that three factors should be considered: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; [and] (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[33]

Under the ADA, a "'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[34] "Reasonable accommodations" include ready accessibility for disabled persons, job restructuring, part-time or modified work scheduling, reassignment to vacant positions, acquisition or modification of equipment, the provision of readers or interpreters, and other similar accommodations.[35] The term "undue hardship" means "an action requiring significant difficulty or expense, when considered in light of . . . – (i) the nature and cost of the accommodation . . .; (ii) the overall financial resources of the facility or facilities involved . . .; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise . . . upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business . . ., with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity . . ."[36]

The employment discrimination provisions of the ADA are enforced against private sector parties through the procedures set forth in Section 706 of Title VII of the Civil Rights Act of 1964.[37] Persons who believe they have been discriminated against must file charges with the EEOC, which tries to conduct investigations and determine whether it appears that violations have occurred. If EEOC investigators find cause to believe unlawful discrimination has taken place, the EEOC may decide to sue on behalf of the claimants. In most cases, however, regardless of whether the EEOC investigators have found cause or no cause to think discrimination has occurred, the agency issues right-to-sue letters informing the claimants of their right to file law suits.

III. SUPREME COURT INTERPRETATIONS OF ADA COVERAGE

The most pertinent pre-ADA case decided by the Supreme Court was *School Board of Nassau County v. Arline*,[38] a case that arose under Section 504 of the Rehabilitation Act,[39] which prohibits federal fund recipients from discriminating against "otherwise qualified" individuals with disabilities.[40] Arline was an elementary school teacher. She had tuberculosis that occasionally became contagious. After her third contagious incident within two years, the school district terminated her employment. She brought a Rehabilitation Act suit.

The *Arline* Court had to initially decide whether a person with a contagious disease should be considered a "handicapped [now 'disabled'] individual." The Court acknowledged two important factors. First, that contagious conditions that affect fundamental body systems constitute covered impairments.[41] The Court also recognized the validity of the HEW regulation defining "major life activities," used in the Rehabilitation Act definition of "handicap," to

include "working."[42] "Congress plainly intended the Act to cover persons with a physical or mental impairment . . . that substantially limited one's ability to work. '[T]he primary goal of the Act is to increase employment of the handicapped'."[43]

Although the Court found Arline to be disabled by her contagious disease, it did not decide that she was entitled to her former teaching position. It held that she could only prevail if she could demonstrate that despite her condition she was "qualified" to teach elementary school. The Court indicated that the lower courts had to make an individualized assessment of the potential impact of Arline's contagious disease on others to determine if she was "qualified."[44] Borrowing from an amicus brief filed by the American Medical Association, the *Arline* Court articulated the standards to be applied to such inquiries:

> [Findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[45]

Given the real risk of tuberculin contagion and the severe nature of the potential harm to others exposed, it was evident that school teachers with such contagious diseases would not be considered "qualified" under the Rehabilitation Act. Except in unusual situations, no accommodation could be made for such teachers that would enable them to perform their regular duties without undue rick of harm to others.

Following the *Arline* decision, many people erroneously thought that the Supreme Court had held that persons with contagious tuberculosis could work as school teachers. They failed to appreciate the fact that contagious people would not be "qualified" to work with others who

might become infected by their disease. In response to this public outcry, Congress amended the Rehabilitation Act to explicitly indicate that persons who have "currently contagious" diseases or infections are not covered by the employment provisions of that enactment.[46] This legislative change was specifically limited to contagious conditions that would pose a serious risk of harm to others. It did not otherwise alter the approach taken by the Supreme Court in *Arline*. As a result, claimants found to have covered disabilities must still prove that, with or without accommodations, they are "qualified" to perform the positions in question.

The first major Supreme Court decision interpreting the disability provisions of the ADA did not involve an employment dispute; it concerned an asymptomatic HIV infected individual who had been denied regular treatment at a dental office.[47] The *Bragdon* Court initially noted that the ADA's disability definition was taken almost verbatim from the definition contained in the Rehabilitation Act, and it recognized that "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[48] The Court also noted the ADA provision indicating that ADA sections are to be interpreted in conformity with regulations issued by Federal agencies under the Rehabilitation Act.[49]

The *Bragdon* Court next reviewed the HEW regulation indicating that covered physical impairments include those affecting the reproductive system.[50] Since the Court found that "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself," it agreed that reproduction constitutes a "major life activity."[51] It next found that HIV infected persons are substantially limited in their ability to reproduce due to the threat to their sexual partners and to children born to HIV infected mothers.[52] The claimant thus had a condition that

substantially limits a major life activity within the meaning of the ADA. Although the *Bragdon* case did not involve employment rights, it is interesting to note that the Supreme Court approvingly cited an EEOC regulation indicating that asymptomatic HIV infected people constitute covered persons.[53]

The first coverage decisions arising under the employment discrimination provisions of the ADA were issued in 1999. *Sutton v. United Air Lines, Inc.*[54] Concerned twin sisters who applied to become global pilots with United. Both suffered from severe myopia which caused each to have uncorrected visual acuity of 20/200 in one eye and 20/400 in the other. Nonetheless, with corrective lenses, they both had at least 20/20 vision in both eyes. Although they both met United's other global pilot requirements, they were denied consideration for positions by virtue of a company policy requiring uncorrected visual acuity of at least 20/100. They then brought claims under the ADA.

The *Sutton* Court had to initially decide whether mitigating measures, such as corrective lenses and prescription medication, should be considered when determining whether particular conditions substantially limit major life activities. It noted that a regulation promulgated by the EEOC pursuant to its administrative authority to interpret the employment discrimination provisions of the ADA expressly stated that "[t]he determination of whether an individual is substantially limited . . . must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[55] The Court indicated that while different administrative agencies had been given the authority to issue interpretative regulations pertaining to their respective sections of the ADA, none was empowered to issue regulations concerning the generally applicable provisions which contained the statutory definition of

"disability."[56] The Court thus questioned the propriety of administrative regulations defining disabling conditions. This was a somewhat surprising observation, because it would preclude relevant administrative agencies from issuing regulations that could be used to initially determine whether individuals raising claims under the different parts of the ADA are subject to disability coverage. Perhaps recognizing this anomaly, the Court decided to evaluate the appropriateness of the EEOC regulation as if it had been properly promulgated.

The *Sutton* Court considered the overall framework of the ADA and concluded that the EEOC regulation constituted an impermissible interpretation of the Act's scope. Justice O'Connor, writing for the seven-Justice majority, stated that "it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is 'substantially limited' in a major life activity. . ."[57] She emphasized the fact that the ADA is phrased in the present verb tense, and concluded that "[a] disability exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."[58] Justice O'Connor also noted that the ADA requires an individualized determination of disability status, and suggested that the EEOC guideline mandating that disability coverage be evaluated without regard to mitigating measures runs counter to the need for an individualized assessment.[59]

The final factor undermining the propriety of the EEOC regulation concerned the statement in the congressional findings section of the ADA indicating that "some 43,000,000 Americans have one or more physical or mental disabilities."[60] Justice O'Connor reasoned that if everyone with medical conditions controlled through eyeglasses, prostheses, and medications

were considered disabled, far more than 43,000,000 people would be included; over 160,000,000 persons would be covered.[61] She thus found that the EEOC regulation did not constitute a permissible interpretation of the ADA's disability definition.

Dissenting Justices Stevens and Breyer disagreed with this portion of the majority decision. They cited comments in the House and Senate reports indicating that disability determinations should be made without consideration of mitigating measures.[62] Since they thought that the EEOC regulation reflected this legislative intent, they argued that it should have been sustained.

Although the *Sutton* majority rejected the claimants' assertion that they were entitled to protection under the first prong of the statutory definition of disability, due to their normal visual acuity in the corrected state, it still had to determine whether they were protected under the third prong as persons who were "regarded as" disabled by United. There was no doubt that they had been rejected for global pilot positions because of their uncorrected visual capabilities. Did this mean that United regarded them as "disabled"? Justice O'Connor held no, by restricting the scope of the third prong:

> There are two apparent ways in which individuals may fall within [the "regarded as"] definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.[63]

The Court thus had to determine whether United believed that the claimants' correctable myopia substantially limited them with respect to a major life activity.

The *Sutton* majority acknowledged that the applicable EEOC regulation states that

working constitutes a major life activity.[64] The Court questioned whether working should really be considered a major life activity, pointing out that even the EEOC regulation treats working as a "residual life activity" that should be "considered, as a last resort, *only* '[i]f an individual is not substantially limited with respect to *any other* major life activity.'"[65] The Court wholly ignored the fact that it had previously recognized in the *Arline* case that working was a "major life activity" under the Rehabilitation Act.[66] Nonetheless, the Court assumed that working constituted a major life activity for purposes of resolving the *Sutton* case.

The EEOC regulation only considers impairments to be substantially limiting with respect to the ability of persons to work when their conditions significantly restrict their capacity "to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[67] Justice O'Connor indicated that while Congress had acknowledged that the potential negative impact of societal myths regarding the actual capabilities of persons with mental or physical impairments could be as handicapping as real disabilities, it did not intend to preclude employers from establishing valid employment standards that might adversely affect some people with medical conditions – so long as these criteria do not substantially limit their opportunities to work.[68] United's visual acuity standard clearly disadvantaged the *Sutton* claimants, but it did not disqualify them from a class or range of jobs. It merely prevented them from becoming global pilots. They retained the capacity to function as regional pilots, courier service pilots, or pilot trainers. They were thus not regarded as being substantially limited in their ability to work.[69]

Murphy v. United Parcel Service[70] concerned a truck mechanic with high blood pressure.

His work with United Parcel Service required him to drive commercial vehicles which meant that he had to obtain a Department of Transportation (DOT) health certificate. Although his hypertension was mitigated by prescription medication, his blood pressure remained sufficiently elevated to prevent him from obtaining DOT certification. As a result, he was terminated by United Parcel Service. He claimed that this action contravened the ADA.

The same seven-Justice majority that decided the *Sutton* case rejected Murphy's claim. Justice O'Connor reiterated the fact that an impairment would only constitute an actual disability if, in the mitigated state, it substantially limited a major life activity.[71] Since the blood pressure medication taken by Murphy ameliorated the negative impact of his hypertension, he was not substantially limited due to that condition. The Court next had to decide whether United Parcel Service regarded Murphy as disabled with respect to his ability to work by terminating him because of his failure to obtain DOT health certification. The Court reaffirmed the *Sutton* view that persons are only "regarded as" disabled with respect to their ability to work when they are considered unable to perform a class or range of jobs, but not when employers merely believe that they are precluded from performing particular jobs.[72] The majority Justices noted that while Murphy could not work as a mechanic for a firm requiring DOT health certification, he could work in various other mechanic positions that did not involve the driving of vehicles covered by DOT regulations. As a result, he was only considered by United Parcel Service to be unqualified for a particular job and not a broad range of mechanic jobs, rendering him unprotected under the ADA.[73]

On the same day the Supreme Court issued its *Sutton* and *Murphy* decisions, it announced its opinion in *Albertson's, Inc. v. Kirkingburg*.[74] Kirkingburg was a truck driver who suffered

from amblyopia, an uncorrectable eye condition that left him with 20/200 vision in one eye effectively leaving him with monocular vision.[75] Despite this condition, Kirkingburg had learned to compensate for his monocularity and was less affected than other people suffering from amblyopia. Albertson's hired Kirkingburg as a truck driver, a position that required a DOT fitness certification mandating a minimum corrected visual acuity of at least 20/40 in each eye.. He was examined by a physician who erroneously certified him. Kirkingburg injured himself at work and took some time off. When he returned to work, another eye examination discovered that he actually failed to satisfy the minimal DOT vision requirement. DOT told him he would have to obtain a waiver, under a test program being conducted by DOT to determine if it should modify its long-standing visual acuity standards, if he wished to continue to drive. He applied for a DOT waiver, but was terminated by Albertson's, while his waiver petition was pending, because of the fact he failed to meet the usual DOT visual standard. Even though he was thereafter granted a DOT waiver, Albertson's refused to reemploy him. He filed suit under the ADA.

The District Court granted Albertson's motion for summary judgement, because it found that Kirkingburg was not qualified to be a truck driver due to his visual impairment. The Ninth Circuit Court of Appeals reversed, however, finding that Kirkingburg's monocularity constituted a disability due to its impact on his ability to see. The Ninth Circuit failed to consider Kirkingburg's own measures taken to mitigate the impact of his amblyopia.

The Supreme Court unanimously rejected the Ninth Circuit's approach, holding that even an individual's personal mitigation efforts must be considered when determining whether an impairment substantially limits a major life activity. "We see no principled basis for

distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[76] While the Court recognized that monocularity may be substantially limiting for some people, it might not be for others who have learned to cope with it. Disability status should not be based on group generalizations, but must be decided on a case-by-case basis considering the particular circumstances affecting the claimant.[77] While "people with monocular vision 'ordinarily' will meet the Act's definition of disability, . . . [w]e simply hold that the Act requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial."[78]

The *Albertson's* Court went on to consider whether Kirkingburg was "qualified" within the meaning of the ADA. It noted that covered entities may impose minimal standards for positions that adversely affect disabled applicants, so long as those criteria are "job-related and consistent with business necessity, and . . . performance cannot be accomplished by reasonable accommodation . . ."[79] The ADA specifically recognizes that employers may impose limitations designed to ensure that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[80] Even though the Ninth Circuit had indicated that the DOT waiver program precluded Albertson's from claiming that Kirkingburg was unable to perform his driving job safely, the Supreme Court rejected this reasoning.[81] It noted that the waiver program was experimental and concluded that Albertson's had the right to rely on the long-standing DOT visual acuity standards that Kirkingburg could not satisfy.[82]

The most recent Supreme Court decision pertaining to the ADA definition of disability

was issued last June. *Toyota Motor v. Williams*[83] concerned a production line worker who developed bilateral carpal tunnel syndrome and bilateral tendinitis that significantly reduced her range of motion and weight lifting capabilities.[84] She was ultimately transferred from her engine fabricating assembly line position to a quality control team. Her team was initially responsible for only paint inspections, and Williams was able to perform these tasks satisfactorily for a couple of years. Toyota finally decided that quality control teams had to perform other inspection tasks that required workers to apply a light oil to the hood, fender, doors, rear quarter panel, and trunk of passing cars.[85] These wiping duties compelled Williams to hold her hands and arms at shoulder height for several hours at a time, and she began to experience pain in her neck and shoulders. She asked to be reassigned to the visual paint inspection tasks which she previously performed, but Toyota refused. She began to miss work and was eventually terminated. She filed a claim under the ADA alleging that her impairments substantially limited her ability to perform manual tasks.

The District Court rejected Williams' ADA claim, finding that she had failed to demonstrate that she was substantially limited with respect to the major life activities of performing manual tasks or working.[86] The Sixth Circuit Court of Appeals reversed, finding that Williams was substantially limited with regard to the performance of manual tasks associated with her work. A unanimous Supreme Court rejected the Sixth Circuit's approach.

The Supreme Court initially noted that Congress intended the term "disability" under the ADA to be interpreted in accordance with the regulatory interpretations that had been established under the Rehabilitation Act.[87] Nonetheless, "[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits

a major life activity."[88] The HEW regulations listed various "major life activities," including the performance of manual tasks.[89] Although the HEW regulations do not define the term "substantially limits," EEOC regulations do provide guidance in this area.

> [S]ubstantially limited" means "[u]nable to perform a major life activity that the average person in the general population can perform"; or "[s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the . . . manner . . . under which the average person in the general population can perform that same major life activity.[90]

When evaluating substantially limiting claims, "the following factors should be considered: '[t]he nature and severity of the impairment; [t]he duration or expected duration of the impairment; and [t]he permanent or long-term impact or the expected permanent or long-term impact of or resulting from the impairment.'"[91]

The Court first evaluated Williams' claim that she was substantially limited in her ability to work. Although the Court again refused to hold that work was a major life activity, it assumed that is was for analytical purposes.[92] It reiterated the view that persons are only substantially limited with respect to work when they can demonstrate the inability to perform a class of jobs or a broad range of jobs, and the Court intimated, without deciding, that Williams' condition was not so expansively limiting.[93] It then held that the Sixth Circuit had erred when it evaluated Williams' ability to perform manual tasks associated with her work. The Court indicated that the lower court should have instead assessed her capacity to perform "the variety of tasks central to most people's daily lives, not . . . [those] associated with her specific job."[94] Since Williams was still able to brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house, the Court found that her impairment did not substantially

limit her ability to perform the manual tasks associated with everyday life.[95]

Two other 2002 Supreme Court decisions also concerned the scope of employment discrimination protection available under the ADA. *Chevron U.S.A., Inc. v. Echazabal*[96] involved an oil refinery worker with Hepatitis C which affected his liver. He was employed by independent contractors to work at an oil refinery owned by Chevron U.S.A., and he twice sought employment directly with Chevron U.S.A. at that facility. Chevron U.S.A. rejected his applications because of his Hepatitis C, and it finally asked the independent contractor for which he was then working not to assign him to jobs that exposed him to toxins that might exacerbate his liver condition.[97] After the contractor laid Echazabal off, he filed a claim against Chevron U.S.A. under the ADA. Chevron U.S.A. defended under an EEOC regulation permitting employers to deny people positions that would pose a "direct threat" to their own health.[98] The District Court accepted this Chevron U.S.A. defense, but the Ninth Circuit Court of Appeals reversed. It held that the statutory exception contained in the ADA was limited to situations in which impaired individuals would pose a direct threat to the health or safety of others in the workplace.[99] Since Echazabal's condition merely posed a threat to his own health, his situation did not fall within this provision.

A unanimous Supreme Court rejected the Ninth Circuit's approach. It acknowledged that the statutory exception was limited to circumstances in which an impaired person posed a direct threat to others, but found that the EEOC regulation extending the exclusion to persons posing a direct threat to themselves constituted an acceptable interpretation of the statute's general qualification standards.[100] To prevent unreasonably paternalistic attitudes to limit the employment opportunities of disabled individuals, the Court indicated that "[t]he direct threat

defense must be 'based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,' and upon an expressly 'individualized assessment of the individual's present ability to safely perform the essential functions of the job.'"[101] The case was remanded to the lower courts to allow them to determine the seriousness of any risk the oil refinery work would pose to Echazabal's liver condition.

In *US Airways, Inc. v. Barnett*,[102] the Supreme Court had to determine the impact of employer-established seniority rules on the statutory duty of covered firms to offer disabled individuals reasonable accommodations that could be provided without undue hardship. Barnett was a cargo handler who injured his back.[103] He was transferred to a less physically demanding mailroom position that he was able to perform. The mailroom position was subject to periodic bidding under the US Airways seniority system. When the position became open for bidding two years after Barnett first occupied it, he learned that two workers with greater seniority were seeking it. He asked US Airways to make an exception for him due to his back injury, but US Airways refused to do so. Barnett claimed that US Airways thus violated its duty to offer him a reasonable accommodation for his back condition.

The District Court rejected Barnett's ADA claim, holding that the need for US Airways to modify its established seniority system would have created an "undue hardship."[104] The Ninth Circuit reversed, holding that the existence of a seniority system was simply a factor to be considered in the undue hardship analysis. The Supreme Court rejected the Ninth Circuit's approach.

The Court initially noted that the ADA requires employers to offer reasonable accommodations to individuals with disabilities, including reassignment to vacant positions,

where such accommodations can be accomplished without undue hardship.[105] US Airways cited its seniority system and argued that any accommodation that would conflict with established seniority expectations would be "unreasonable." Even though the US Airways seniority system was unilaterally established, and did not result from a collective bargaining relationship, and US Airways "reserve[d] the right to change any and all" aspects of the system at will, the Court decided to treat all established seniority systems similarly.[106] While a modification of seniority expectations may not adversely affect employer interests, it would have a significant impact on worker expectations.[107] As a result, while proposed accommodations that would conflict with established seniority policies would not constitute undue hardships to the affected employers, they would usually be "unreasonable" because of the adverse effects on the expectations of more senior employees.[108]

The Court thus established a presumption that proposed accommodations that would alter worker expectations under established seniority systems would be "unreasonable." To overcome this presumption, claimants would have to demonstrate either that the employer so frequently makes changes in the system that employee expectations are minimal or that the system contains so many exceptions that one more exception will not unduly affect worker interests.[109] Under such circumstances, a proposed exception to seniority rights may be found to constitute a "reasonable" accommodation. The case was remanded to the lower courts to allow Barnett to present any evidence that might overcome the presumption that his proposed accommodation was unreasonable because of its conflict with the established seniority system,

IV. EVALUATION OF SUPREME COURT APPROACH

The Supreme Court appears to be concerned about two aspects of the employment discrimination protections contained in the ADA. First, the Court seems to think that Congress went too far in extending such expansive protection to millions of individuals with physical and mental impairments. Second, the Court apparently fears that if claimants are found disabled within the meaning of the ADA, they will obtain or retain positions they are not fully capable of performing. The short response to the Court's first concern is that it is none of the Court's business. If Justices are not satisfied with particular legislation, they should run for Congress and try to amend the statute they find offensive. As members of the judiciary, they should feel obliged to interpret and apply the statutory provisions as they think Congress intended them to be applied – even if they do not like the results.

The Court's second concern fails to appreciate the entire scope of the ADA. The statute is not as expansive as the Justices may fear. Its protections are limited to persons with conditions that *substantially limit* one or more major life activities. People who are only moderately affected are not covered, unless they are discriminated against because of records of prior impairments or because they are regarded as having substantially limiting impairments they do not actually have. Furthermore, even if individuals are substantially limited, the ADA does not guarantee them employment. They must be able to demonstrate that they are "qualified" employment candidates. The Supreme Court thus ignores the true paradox associated with the employment discrimination provisions of the ADA. You have to be so significantly limited by your condition to be protected that you are often unable, with or without an accommodation, to perform the essential functions of the job.[110] In addition, if proposed accommodations are found to be "unreasonable" or to constitute "undue hardships," the claimants will be denied protection. As a direct result of the

Supreme Court's judicial narrowing of ADA coverage, Disability Act plaintiffs win less often than plaintiffs seeking redress under other Federal anti-discrimination statutes.[111]

A third factor may also underlie the Supreme Court's parsimonious approach to ADA cases – the expanding civil rights docket of federal district courts. The number of employment discrimination complaints filed in district courts almost tripled over the past decade from 8413 in 1990 to 22,412 in 1999.[112] These claims accounted for 8.6 percent of civil actions filed in district courts in 1999.[113] Plaintiffs prevailed in fewer than one-third of the cases culminating in verdicts, generating median awards of $137,000 in 1998.[114] Part of the increased civil rights caseload is attributable to the enactment of the ADA in 1990. Judges frequently complain privately about the high volume of employment discrimination claims that produce relatively modest awards for prevailing plaintiffs. They hate to spend substantial judicial time on such cases.

If the Supreme Court establishes narrow coverage standards for ADA plaintiffs, it can increase the number of employment discrimination cases that can be disposed of though defendant summary judgment motions. The most effective way to accomplish this objective is to define "disability" narrowly, as the Court has done. If lower courts are required to determine whether disabled persons are qualified to perform essential job functions, with or without reasonable accommodations, these fact-specific inquiries would make it difficult for trial courts to dispose of these cases through summary judgment motions. Additional proceedings would be required that would often culminate in bench or jury trials.

In *Cleveland v. Policy Management Systems Corp.*,[115] the Supreme Court could have further reduced the need for trials in ADA cases involving plaintiffs who had previously sought Social Security disability benefits claiming to be totally unable to work. The lower courts had

held that people who file ADA law suits after they had applied for Social Security disability benefits should generally have their ADA claims dismissed, because their ADA assertions of discrimination against qualified disabled individuals were contradicted by their prior Social Security disability claims.[116] Although the Supreme Court could have accepted this approach to defeat most ADA discrimination claims filed by people who had previously asserted totally disabling conditions for Social Security purposes, it chose not to do so. The *Cleveland* Court acknowledged the fact that Social Security administrators determine how disabled applicants are without regard to whether they could perform essential job functions with the aid of accommodations, while the ADA expressly obliges covered entities to offer disabled job candidates reasonable accommodations whenever they are available.[117] Thus claimants could be totally disabled for Social Security purposes, yet remain employable for ADA purposes. The Court went on to suggest, however, that ADA plaintiffs who had previously filed disability claims with the Social Security Administration would have to provide courts with explanations that would be "sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of [the] job, with or without reasonable accommodation.'"[118] The *Cleveland* Court has thus made it fairly easy for district courts to grant defendant summary judgment motions in these cases, except when plaintiffs can convince trial judges that their prior Social Security disability assertions are not entirely inconsistent with their current ADA employment discrimination allegations.

A. *DEFINITION OF 'DISABILITY"*

The ADA defines "disability" to include: (1) individuals with impairments that substantially limit one or more major life activities; (2) persons with a record of such impairment; and (3) people who are "regarded as" being so impaired.[119] Under the actually disabled prong, claimants must establish three critical factors: (1) they have physical or mental impairments (2) that are substantially limiting (3) with respect to some major life activity. The first part of this proof construct is generally straight forward. Physical and mental impairments include medical conditions that are recognized by physicians as psysiological or psychological disorders. ADA claimants generally present expert medical testimony to establish this prerequisite to coverage.

The second factor requires proof that the demonstrated impairments are substantially limiting with regard to some major life activity. EEOC regulations have borrowed from HEW regulations under the Rehabilitation Act to list as "major life activities" "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[120] Although the first eight are relatively uncontroversial, the Court has had a more difficult time with the ninth: "working." In cases like *Sutton*, the Court initially questioned whether the EEOC had the regulatory authority under the ADA to promulgate regulations defining the term "disability," because the EEOC's authority extends to the employment discrimination provisions of that statute and the definitions are set forth in the preliminary sections of the Act.[121] Since the employment discrimination section only covers individuals with "disabilities," it would be incongruous to deny the EEOC the power to adopt regulations indicating which medical conditions fall within the statute's general coverage. So long as the EEOC regulations defining "disability" are consistent with the statutory language the agency is

explaining, the EEOC interpretations should be accorded judicial deference since promulgated by the expert agency given the authority to interpret the relevant sections of the act.[122]

The EEOC's inclusion of "working" as a "major life activity" should similarly be considered uncontroversial.[123] For members of the active labor force, their employment is critical to their economic and emotional well-being. People's identities are directly affected by their work. So are their financial circumstances. If this factor were not alone sufficient to convince the Court to accept working as a major life activity, the fact that Congress expressly proscribed discrimination against qualified disabled individuals under the Title I of the ADA should emphasize the critical nature of employment in that statutory scheme. If working is not considered a major life activity, this would seriously undermine the entire employment discrimination portion of the ADA. There are individuals whose impairments do not substantially limit them with respect to other major life activities, but do substantially limit them with regard to their ability to work.[124] Congress clearly intended to protect such people.

The most significant part of the *Sutton* decision concerns the impact of mitigating measures on the substantially limiting portion of the disability definition. Although EEOC and Department of Justice regulations indicated that the disability question should be answered without regard to mitigating factors,[125] I find myself in agreement with the *Sutton* majority – but not for the identical reasons. They were concerned that if disability determinations were to be made considering the unmitigated status of claimants, courts would be forced to deal with purely hypothetical circumstances. They would have to speculate about how limited the individuals would be if their impairments were not ameliorated through medication, eye glasses, hearing aids, or prostheses. Such an approach would not be that speculative. Expert witnesses would be

asked to evaluate claimants in their unmitigated state and testify how those particular persons would be limited with respect to major life activities. How well would a visually impaired person function without corrective lenses? How mobile would a person be without a prosthesis or a wheelchair? How would a diabetic or person with a bi-polar condition function without prescription medication? It would not be that difficult for judges or juries to determine the degree to which impaired claimants would be affected in their unmitigated state.

Why then do I agree with the *Sutton* Court's decision to make disability determinations considering claimants in their mitigated state? The first prong of the ADA's disability definition only protects persons with conditions that are *substantially limiting*. If the adverse effects of medical impairments can be significantly diminished through appliances or medications, the persons with those conditions would not be truly limited.[126] It is thus apparent that the administrative regulations requiring courts to decide whether medical conditions are substantially limiting without regard to ameliorative measures are inconsistent with the express language of the ADA. If mitigating measures enable otherwise impaired people to function relatively normally, they can hardly be considered disabled under the first prong of the statutory definition. Support for this interpretation is provided by Professor Robert L. Burgdorf, Jr., a disability rights advocate who drafted the original ADA bill introduced in Congress. In an extensive article published the year after the ADA was enacted, he indicated that conditions controlled through mitigating measures would not be considered covered.[127]

> Even with some "traditional" disabilities, it may not be easy to show that a condition significantly limits a major life activity. Conditions such as epilepsy, controlled by medication; diabetes, in which insulin treatment is progressing routinely; cancer, multiple sclerosis and other conditions during periods of remission;

> cosmetic disfigurements such as facial scars or deformities; lower-leg amputations where the individual has a properly fitted prosthesis; and many other conditions traditionally considered to be "disabilities" may not have a substantial impact on performance of major life activities.[128]

Erica Worth Harris has similarly acknowledged that persons with mitigated conditions should not be accorded ADA coverage under the first prong:

> Individuals with controlled impairments do not suffer from a fundamental difference in living historically and have not been subjected to discrimination. No social stigmas attach to controlled impairments precisely because they are controlled. No stereotypes or misperceptions attach to controlled impairments because they have no obvious effect on the daily activities on the individuals.[129]

Ms. Harris has also noted that even if impaired individuals were evaluated in their unmitigated states to determine initial statutory coverage, firms would be under a statutory duty to provide them with reasonable accommodations for their conditions.[130] The most obvious accommodations for such persons would be to provide them with the mitigation measures that would, under the *Sutton* approach, render them non-disabled. While this is correct, this approach differs in one critical aspect from the *Sutton* Court's approach. Under *Sutton*, people whose impairments can be controlled through mitigating measures are not "disabled." Under the rejected EEOC approach, however, such persons would be found disabled if their unmitigated conditions were substantially limiting, necessitating reasonable accommodations for their impairments. As a result, employers that discriminated against them because of their unmitigated states would be in violation of the ADA. Nonetheless, because of the fact the ADA definition requires proof of actual limitations, I find the *Sutton* Court's pronouncement with respect to the impact of mitigating measures to be defensible.

Where impairments actually do diminish the capacity of people to perform various job

tasks, when should these persons be considered disabled for ADA purposes? As the *Sutton* Court recognized, the applicable EEOC regulation requires proof that the adversely affected people are "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes . . ."[131] For some purposes, the first part of this regulatory definition should be controlling, while for others the second part should be pertinent.

For individuals with general employment skills, they should only be considered substantially limited with respect to their ability to work where they are unable to perform "a broad range of jobs." If their skills and background render them qualified to perform different jobs despite their inability to perform some jobs, they should not be treated as disabled. On the other hand, individuals with highly specialized training relevant to a particular "class of jobs" should be entitled to statutory protection when impairments substantially limit their capacity to work in that class of jobs.

The Sutton sisters had extremely focused training; they were jet pilots. They hoped to obtain high-paying global pilot positions with a major air line. In the civilian setting, these skills were primarily for commercial flying positions. While their vision was normal when they wore glasses, their uncorrected visual acuity failed to meet usual air line standards. This caused them to be disqualified from an entire class of jobs – that of global pilot. If their myopia rendered them ineligible for global pilot positions with commercial air lines, they should have been considered "substantially limited" with regard to this "class of jobs." As such, the *Sutton* Court should have found them subject to ADA coverage. Even though they could have worked as regional pilots or as pilot trainers, they had not obtained their extensive training merely to qualify them for such lower-paying occupations.

If the Sutton sisters had been found disabled, would they ipso facto have been entitled to pilot positions with United? Not necessarily. They would still have had to demonstrate that, with or without a reasonable accommodation, they could have performed the essential functions of the job safely and efficiently. As we shall explore in the next section, it is not clear whether they could have carried this burden.

The *Murphy* case provides a perfect example of a claimant whose situation had to be evaluated with respect to his ability to perform "a broad range of jobs." Murphy was a truck mechanic. Because of high blood pressure, Murphy could not obtain the commercial license he needed to work on trucks for United Parcel Service. Despite Murphy's hypertension, he was able to work as a mechanic for various firms that did not require him to have a commercial license. Given his training and experience, he was thus not substantially limited with respect to "a broad range of jobs."

The *Kirkingburg* case raised more complex issues. Although the Supreme Court was correct in considering mitigation measures undertaken through the claimant's own body system, it failed to fully appreciate the impact of monocular vision on a person's ability to see. Kirkingburg's self-correction efforts may have minimized the impact of his amblyopia on his ability to see things at a distance, those efforts would have been of minimal help with respect to depth perception at short distances.[132] This fact should have induced the Court to acknowledge that he was still substantially limited with respect to his ability to see compared to people without such an impairment. The Court implicitly conceded this point, since it went on to determine whether Kirkingburg was "qualified" for truck driving positions with Albertson's.

Should Kirkingburg have been found disabled because of the impact of his amblyopia on

his ability to work? He was a truck driver with general employment skills. Although he could not drive for Albertson's because of his inability to satisfy minimal DOT vision standards, his distance vision was not severely affected. There is thus every reason to believe that he could have obtained other driving positions that did not require DOT certification. In addition, he may have been qualified to perform various non-driving jobs that would not have required short-distance depth perception. Unless he could have demonstrated the inability to perform "a broad range of jobs" for someone with his education, training, and experience, he should not have been considered disabled with respect to the impact of his amblyopia on his capacity to work.

The *Williams* case provides another example of someone who should have to demonstrate that she was unable to perform "a broad range of jobs" before she would be entitled to ADA coverage. Williams had a general education and was trained to perform production line work. With this background, she could presumably have worked for various manufacturing firms, or could have used her general skills in the service sector. As a result, it would not have been sufficient for her to show that she could no longer work for Toyota. She would have had to prove the inability to work in "a broad range of" manufacturing and/or service jobs.

In the actual case, Williams did not try to establish Disability Act protection using the major life activity of working. She instead relied upon her inability to perform manual tasks. Had she tried to fit her situation within the working life activity, she should have been considered covered. With rather severe bilateral carpel tunnel syndrome and bilateral tendinitis, she could hardly use her hands and arms, and found it painful to lift her arms above her shoulders.[133] These limitations rendered her incapable of performing most production jobs, most office or clerical jobs, and most retail or service jobs. As such, she was substantially limited with regard to her

ability to work in "a broad range of jobs" commensurate with her training and experience.

The Supreme Court also erred when it found that Williams had not established that she was substantially limited with respect to her ability to perform manual tasks. Even though she could brush her teeth, comb her hair, clean, cook, and wash with some difficulty, she was severely restricted regarding her ability to perform these basic tasks compared to members of the general population. Short of a total loss of the use of both hands and arms, it would be difficult to imagine a more severely impaired person. It was thus incongruous for the Court to find her not disabled. Had it done so, however, she would still have had a difficult time proving that she was "qualified" to work for Toyota.

As the "Supreme Legislature" judicially narrowed the ADA definition of "disability," it repeatedly cited the first section of the ADA estimating the number of disabled persons in the U.S. to be 43,000,000.[134] While they reworked the operative ADA language, the Justices ignored both this legislative finding and the expansive congressional purpose underlying the ADA. Given the Court's parsimonious interpretive decisions, it is likely that far fewer than 43,000,000 Americans are now covered under the first prong of that Act's disability definition. Although the Court found it appropriate to cite that figure when it worked to limit coverage, it wholly ignored it when the congressional finding no longer supported its statutory construction.

Even when claimants are not actually limited because of the availability of mitigating measures, they may be "regarded as" disabled under the third prong of the statutory definition. In *Sutton*, the Court suggested two situations in which persons may be "regarded as" disabled: "(1) a covered entity mistakenly believes that a person has a physical [or mental] impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes

that an actual, nonlimiting impairment substantially limits one or more major life activities."[135]

One could logically argue that employers that refuse to employ impaired people (or persons they think are impaired) because of their medical conditions (or perceived medical conditions) "regard" such persons as being "disabled." When Congress enacted the ADA with its three-prong definition of "disability," it was as concerned with persons who were considered by covered entities to be disabled as with individuals who are actually disabled. This was based upon the reasonable belief that common prejudices, misperceptions, and ignorant stereotypes, about people with non-disabling physical and mental impairments could be as devastating as actually disabling conditions.[136] This concern induced Congress to include the third prong in the definition of "disability," to protect non-disabled people who are "regarded as" disabled by unthinking or wrong-thinking parties.[137]

If every impairment or perceived impairment relied upon by covered entities to deny people employment were considered covered under the "regarded as" prong, the vast majority of individuals denied employment opportunities could file ADA claims. They could assert that their wearing of glasses, slight birth marks, minimal limps, or minor depression caused them to be denied these opportunities because they were "regarded as" disabled. Such an approach would create an intolerable burden for both the EEOC and the courts. It would also go beyond anything that Congress could have imagined. As a result, the *Sutton* Court was probably correct in limiting the scope of the third prong to situations in which employers believe non-disabling conditions are substantially limiting or they mistakenly think that individuals have impairments that would be substantially limiting if they actually had them.

Although I agree with the general standards enunciated by the *Sutton* Court to delineate

the scope of the "regarded as" prong of the disability definition, I think the Court has applied its standards in an overly narrow manner. In *Sutton*, *Murphy*, and *Kirkingburg*, the Court recognized that particular employers may have refused to employ the claimants because of perceived disabilities. Since the Court assumed, however, that positions with other firms not so predisposed could be obtained, the Court found that the negative presumptions of the defendant-employers did not substantially limit the ability of the claimants to obtain employment in "a wide range of jobs."

The Court should have acknowledged the likelihood that other covered firms may have shared the same stereotypical beliefs as did United Air Lines, Albertson's, and United Parcel Service. The Court should thus have asked whether such widely-held stereotypical beliefs concerning persons with the conditions affecting the claimants would have substantially limited their chances of obtaining employment in a class or range of jobs.[138] If so, the Court should have found that these individuals were "regarded as" disabled with respect to their ability to work.[139] As noted earlier, the inquiry with respect to the Sutton sisters should have been limited to their ability to gain employment as global pilots, since that was the real class of jobs for which they had been trained. For Murphy and Kirkingburg, the inquiry should have been more expansive due to their more generalized backgrounds as a mechanic and a truck driver.

Had the Supreme Court approached the *Sutton*, *Murphy*, and *Kirkingburg* cases more appropriately, the Justices would have found the claimants to be actually disabled under the first prong or "regarded as" disabled under the third prong. I should parenthetically note that while the Court should clearly have found Williams disabled under the first prong because of the substantially limiting impact of her impairments on her ability to perform manual tasks and to

work in most jobs for which she was qualified, she could also have established statutory coverage under the "regarded as" prong due to the fact Toyota thought she could no longer perform basic manual tasks and essential job functions. Nonetheless, the Court's apparent underlying fear that such findings would have enabled these individuals to obtain or retain the positions in question was erroneous. These claimants would still have been required to demonstrate that they were qualified, with or without reasonable accommodations, to perform the essential functions of the positions they sought.

B. *QUALIFIED TO PERFORM THE ESSENTIAL JOB FUNCTIONS*

When ADA claimants establish that they are actually disabled, they gain general Disability Act coverage. Nonetheless, they are a long way from prevailing on their employment discrimination claims. It is not unlawful to discriminate against disabled persons – only to discriminate against *qualified* disabled people.[140] A "qualified individual with a disability" is defined narrowly to include only those persons with disabilities "who, with or without reasonable accommodation, can perform the essential functions of the employment position[s]" they hold or desire.[141]

If individual disabilities pose a direct threat to the health or safety of others or to themselves, are they "qualified" under the ADA? For example, disabled persons may wish to operate equipment that could injure other people if they had seizures or fainting spells. Air line pilots or vehicle drivers with vision problems that cannot be fully corrected through glasses or surgery may pose a greater risk to members of the diving public than unimpaired drivers. People with serious contagious diseases may threaten to infect coworkers or customers. Section

12113(b)[142] explicitly states that "qualification standards" may include a requirement that disabled persons "not pose a direct threat to the health or safety of other individuals in the workplace." Whenever such threats to others can be established, the adversely affected disabled people will be found unqualified – unless reasonable accommodations could be adopted without undue hardship that would eliminate the risk to others.

Suppose the risk is only to the disabled individuals themselves? Exposure to certain substances may exacerbate existing conditions. Persons subject to seizures could be seriously injured if they had an attack while working on elevated platforms or scaffolding. Individuals with liver or kidney problems may have their conditions adversely affected by exposure to toxic substances. Should "paternalistic" employers be able to reject such people to protect them from their own impairments, or should they be allowed to assume the risks generated by their own conditions? In *United Automobile Workers v. Johnson Controls, Inc.*,[143] the Supreme Court rejected an employer's effort to restrict the employment of fertile female employees in areas that would expose them to elevated lead levels, because such exposure might cause birth defects in their offspring. The Court held that under the Pregnancy Discrimination Amendment to Title VII,[144] firms could only establish employment requirements that affected the ability of employees to perform their job tasks. They could not impose standards designed to protect children who may be born to employees.

> Congress indicated that the employer may take into account only the woman's ability to get her job done. . . . [T]he decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself. . . . [Title VII] prohibit[s] an employer from discriminating against a woman because of her capacity to become pregnant, unless her reproductive potential prevents her from

performing the duties of her job.[145]

Should the *Johnson Control's* reasoning apply to individuals whose disabilities pose a direct threat to their own health or safety? In *Chevron U.S.A., Inc. v. Echazabal*,[146] the Supreme Court acknowledged the fact that the ADA exception in Section 12113(b) is limited to direct threats to others, but concluded that the EEOC regulation extending a statutory exclusion exclusion to persons posing direct threats to themselves was a reasonable interpretation of the ADA's general qualification standards.[147] To avail themselves of this exception without unduly restricting the employment rights of disabled persons, employers would have to make "an individualized assessment of the individual's present ability to safely perform the essential functions of the job."[148]

Echazabal can be easily distinguished from *Johnson Controls*. *Echazabal* involved an impairment that posed a direct threat to the disabled worker himself, while *Johnson Controls* concerned only the potential children of present workers. Echazabal could not perform his regular job functions without risking harm to himself. The Court thus decided that this direct risk to the employee himself affected his qualification for the job. *Johnson Controls*, on the other hand, did not pertain to any situation that might harm the employee herself – merely the possibility of harm to her future offspring. The *Johnson Controls'* Court thus held that the claimant's employer had no right to limit her employment based on the potential risk to her non-employee children.

The ADA does not expressly define the term "essential functions of the job." It does indicate, however, that "consideration shall be given to the employer's judgment as to what functions of a job are essential."[149] This provision further states that "if an employer has prepared

a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[150] Congress has thus provided employers with substantial latitude with respect to the determination of essential job functions. When firms create job descriptions, they must decide which duties are basic to the positions in question. What functions should candidates be able to perform or learn to perform if they are to occupy these positions? So long as employers define these functions reasonably, their descriptions are entitled to judicial deference. Only where claimants can demonstrate that defined job duties are of a wholly tangential or secondary nature should courts find them non-essential.

Many disabled job candidates have some difficulty performing essential job functions without modifications to the positions they seek. As a result, the ADA makes it unlawful for covered firms to fail to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . ., unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . ."[151] "Reasonable accommodations" may include making facilities accessible, job restructuring, part-time or modified work schedules, reassignment to vacant positions, acquisition or modification of equipment or devices, the provision of qualified readers, and similar arrangements.[152]

Most accommodations are neither extensive nor expensive.[153] The height of the work station may be raised or lowered, or a higher or lower chair may be provided A doorway may be widened to allow access to people with mobility difficulties. Ancillary job tasks may be reassigned to other persons, or disabled employees may be placed in vacant positions they can perform.

Once employers know that applicants or current workers have disabling conditions that limit their ability to perform certain job tasks, they must consider possible accommodations. The ADA does not require employers to adopt the best accommodations, the ones that would have the least impact on disabled individuals, or the ones preferred by those persons.[154] It merely requires covered firms to provide "a reasonable accommodation" that will enable disabled people to perform the essential functions of the jobs in question.[155] If employers fail to offer any accommodations, it is incumbent upon disabled claimants to demonstrate that some accommodation could have been provided.[156] At that point, defendant-employers have three options: (1) they may accept the candidate-proposed accommodation; (2) they may offer that person an alternative accommodation; or (3) they may demonstrate that the suggested accommodation would involve an "undue hardship."[157]

When current employees develop disabling conditions that make it impossible for them to continue in their existing jobs, they may request transfers to other positions they think they can perform. It is clear under the ADA that their employers need not displace other workers to accommodate their transfer desires. Section 12111(9)(B) expressly limits reassignment accommodations to "vacant" positions.[158]

What should employers do when disabled employees request transfers to vacant positions that are being sought by other more senior coworkers who claim to have a right to the positions in question? Such seniority rights may be defined in bargaining agreements negotiated with representative labor organizations, or they may be set forth in plans unilaterally adopted by firms without labor unions. In *Trans World Airlines, Inc. v. Hardison*,[159] the Supreme Court held that the obligation to accommodate the religious beliefs of employees imposed by Section 701(j) of

Title VII[160] does not require employers to violate seniority rights set forth in collective bargaining agreements. In *US Airways, Inc. v. Barnett*,[161] the Supreme Court extended this rule to non-bargained seniority plans. "[I]t would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the [disabled claimant's requested] assignment to prevail."[162]

The Court has thus established a presumption that accommodations that would necessitate exceptions to even unilaterally-adopted employer seniority policies would be considered "unreasonable." This would be true even where the rights created under the employer's system are not legally enforceable.[163] Only where claimants can show that employer-established seniority plans are so changeable that they have not created reasonable seniority expectations in employees may exceptions to those plans be found "reasonable." To accomplish this objective, claimants would have to prove either that the employer has retained the right to change the plan unilaterally and has exercised this prerogative frequently or the program contains so many stated exceptions that it would not be unreasonable to allow another for disabled workers.[164]

When might otherwise reasonable accommodations be considered inappropriate because of the "undue hardship" they would impose on business firms? Although Congress was aware of the fact the Supreme Court in *Hardison* had indicated that any proposed accommodation for employee religious convictions under Title VII would constitute an "undue hardship" if it entailed more than a "de minimis" economic burden,[165] it rejected that narrow approach in the ADA. It chose to create a sliding scale that requires courts to make individualized assessments considering the impact of proposed accommodations on particular firms and facilities.[166] Courts

must evaluate the nature and cost of proposed accommodations measured against the overall financial resources of the facility involved and of the overall covered entity, the type of operation and the number of people employed at the facility in question, and the impact of the suggested accommodation on operations at that facility.

More prosperous firms will be obliged to spend greater amounts of money before proposed accommodations may be found to constitute "undue hardships." While a small company may not have to hire a personal reader for a blind employee, a larger entity may be expected to do so. Employer hardship claims must also consider the actual impact of the suggested accommodation on the facility involved. Are there sufficient workers to allow non-essential job functions to be reassigned to others? Could coworkers assist disabled employees with their performance of particular job tasks? Courts must carefully analyze these types of inquiries to determine whether proposed accommodations would impose undue hardships on specific firms.

Even if ADA claimants are able to demonstrate that they possess physical or mental impairments that are sufficiently limiting to bring them within the judicially-narrowed scope of ADA coverage *and* they establish that, with or without accommodations, they could perform the essential functions of the jobs they seek, they will not necessarily prevail. Unlike Section 503 of the Rehabilitation Act which requires federal contractors to "take affirmative action to employ and advance in employment qualified individuals with disabilities,"[167] the operative section of the ADA merely prohibits discrimination against qualified disabled persons because of their impairments.[168] It is thus clear that the ADA does not require employers to provide disabled job candidates with *preferential treatment* – except to the limited extent covered entities are obliged

to provide disabled people with reasonable accommodations where available.[169] The ADA thus allows employers to make comparative assessments among qualified candidates – even if one or more candidates are disabled – and to prefer the more qualified individuals.[170] In the absence of proof that employers have impermissibly considered the impairments of the disabled candidates, those individuals would be unable to successfully prosecute ADA claims against the firms that selected non-disabled persons they considered more qualified. The Supreme Court's apparent fear that the ADA could, if not judicially constrained, undermine the merit principles underlying the American capitalist system are thus completely unfounded.

V. CONCLUSION

The enactment of the ADA in 1990 seemed to extend broad employment discrimination protection to individuals with disabling conditions or records of impairments, or who are regarded as disabled. Congress recognized that many Americans are actually disabled, while many more persons with non-disabling conditions are adversely affected by misperceptions and ignorant stereotypes regarding impaired people. The Supreme Court apparently believes that the discrimination protections created by the ADA are unduly expansive. It has thus chosen to interpret the applicable ADA provisions in ways that severely restrict statutory coverage. The Court has inexplicably refused to formally acknowledge that working constitutes a major life activity, despite the inclusion of working in EEOC regulations and the fact that Title I of the ADA protects the employment rights of disabled individuals. The Court has further rejected administrative regulations mandating that the impact of medical impairments be determined in their uncorrected or unmitigated state.

Where the ability of disabled claimants to work has been in issue, the Court has required them to prove that their impairments substantially limit their capacity to perform a wide range of jobs, not just the ones they have been performing. Even significantly limited persons have been found non-disabled. The Court has created the *Sutton* paradox: Only severely limited individuals may establish that they are disabled under the Act, and if they succeed, their limitations are likely to render them unqualified for the positions they seek.

The Supreme Court has also narrowed the scope of the "regarded as" prong of the disability definition. It is not sufficient that employers rely upon misperceptions or ignorant stereotypes to disqualify candidates who could perform the requisite job tasks. Adversely affected claimants are only entitled to statutory protection if they can demonstrate that the firms thought their impairments were substantially limiting, even though they were not, or believed that they had conditions that would have been substantially limiting if they actually had those impairments. This interpretation continues to deny employment to qualified disabled people based on the very stereotypes and misperceptions Congress hoped to eradicate through its enactment of the ADA.

The Supreme Court has ignored the fact that many disabled individuals may work effectively with minimal accommodations. It has also forgotten that the employment sections of the ADA do not require employers to prefer impaired candidates over more qualified non-impaired candidates. The operative provisions merely prohibit discrimination because of disabling conditions. Even if more expansive ADA coverage were available, covered firms could continue to hire and retain the most qualified persons.

ENDNOTES

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1. Pub. L. No. 101-336, 104 Stat. 327 (1990).

2. *See* Arlene Mayerson, *The Americans with Disabilities Act – An Historic Overview*, 7 LABOR LAWYER 1 (1991).

3. Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. CIV. RTS.-CIV. LIB. L. REV. 413, 413-14 (1991).

4. 42. U.S.C. § 12101(a)(1).

5. 42 U.S.C. § 12101(a)(2).

6. S. REP. NO. 116, 101 st CONG., 1st SESS. 8 (1989). *See* Burgdorf, *supra* note 3, at 420-25.

7. 42 U.S.C. § 12101(a)(7).

8. *See* S. REP. NO. 116, 101st CONG., 1st SESS. 8 (1989). *See* Burgdorf, *supra* note 3, at 420-26.

9. *See id.* at 7. "[M]ost able-bodied persons mask their true feelings about persons with disabilities. Although nondisabled people claim they do not harbor ill feelings toward the disabled, their behavior reveals they are uncomfortable around, embarrassed by, or afraid of persons with disabilities." Lianne C. Knych, *Note: Assessing the Application of McDonnell*

Douglas to Employment Discrimination Claims Brought Under the Americans with Disabilities Act, 79 MINN. L. REV. 1515, 1523 (1995).

10. *See* 42 U.S.C. § 12102(2).

11. *See* 42 U.S.C. §§ 12141-12150 & 12161-12165.

12. *See* 42 U.S.C. §§ 12181-12189.

13. *See* §§ 12111-12117. Although Section 503 of the Rehabilitation Act of 1973 prohibits employment discrimination against disabled individuals, the scope of protection is limited to firms doing contract business with the federal government. *See* 29 U.S.C. § 793.

14. *See* 42 U.S.C. §§ 12111(2) & (5).

15. 42 U.S.C. § 12112(a).

16. *See* 42 U.S.C. § 12112(b)(5)(A).

17. *See* Knych, *supra*, note 9, at 1529-39. *See generally* Timothy A. Ogden, *Shifting Burdens and the Americans with Disabilities Act: Why McDonnell Douglas Should Apply to the ADA*, 29 IND. L. REV. 179 (1995); Kevin W. Williams, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98 (1997).

18. *See* 42 U.S.C. § 12112(b)(6).

19. *See* 42 U.S.C. § 12112(b)(7).

20. *See* 42 U.S.C. § 12112(d)(2)(A).

21. *See* 42 U.S.C. § 12112(d)(3).

22. *See* 42 U.S.C. § 12112(d)(2)(B).

23. *See* 42 U.S.C. § 12112(d)(4)(B).

24. 42 U.S.C. § 12102(2).

25. *See* 29 U.S.C. § 706(8)(B).

26. *See* Burgdorf, *supra* note 3, at 448-50.

27. *See* S. REP. NO. 116, 101ST CONG., 1ST SESS. 21 (1989); H. REP. NO. 485, 101ST CONG., 2d SESS., pt. 2, 50 (1990). The ADA expressly states that "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title. 42 U.S.C. § 12201(a).

28. *See* 45 C.F.R. § 84.3(j)(2)(i).

29. *See* 29 C.F.R. § 1630.2(h).

30. 45 C.F.R. § 84.3(j)(2)(ii).

31. *See* S. REP. NO. 116, 101st CONG., 1ST SESS. 22 (1989); H. REP. NO 485, 101ST CONG., 2d SESS., pt. 2, 52 (1990).

32. *See* 29 C.F.R. § 1630.2(j).

33. 29 C.F.R. § 1630.2(j).

34. 42 U.S.C. § 12111(8).

35. *See* 42 U.S.C. § 12111(9).

36. 42. U.S.C. § 12111(10).

37. *See* 42 U.S.C. § 12117(a). Regarding the enforcement procedures applicable to Title VII claims, *see* 42 U.S.C. § 2000e-5.

38. 480 U.S. 273 (1987).

39. 29 U.S.C. § 794.

40. When the *Arline* case arose, the Rehabilitation Act covered "handicapped individuals," but

the language has since been changed to cover "individuals with disabilities" to track the language of the ADA.

41. *See* 480 U.S. at 284.

42. *See* 480 U.S. at 283 n. 10, citing 45 C.F.R. § 84.3(j)(2)(ii).

43. 480 U.S. at 283 n. 10, quoting from Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633 (1984).

44. *See* 480 U.S. at 287-88.

45. 480 U.S. at 288, quoting from AMA Brief at 19.

46. *See* 29 U.S.C. § 706(8)(D).

47. Bragdon v. Abbott, 524 U.S. 624 (1998).

48. 524 U.S. at 631.

49. *See* 524 U.S. at 631-32, citing 42 U.S.C. § 12201(a).

50. *See* 524 U.S. at 632-33, citing 45 C.F.R. § 84.3(j)(2)(i).

51. 524 U.S. at 638-39.

52. *See* 524 U.S. at 639-41.

53. *See* 524 U.S. at 647, citing EEOC Interpretive Manual § 902.4(c)(1).

54. 527 U.S. 471 (1999).

55. 527 U.S. at 480, quoting from 29 C.F.R. pt. 1630, App. § 1630.2(j). The Department of Justice had issued a similar regulation. *See* 28 C.F.R. pt. 35, App. A, § 35.104, quoted at *id.*

56. *See* 527 U.S. at 479.

57. 527 U.S. at 482. This language would mean that individuals who take medications or use other mitigating measures that have side effects that cause them to be substantially limited in some relevant way would constitute "disabled" persons under the Act. *See generally* Lauren J.

McGarity, *Note: Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 YALE L.J. 1161 (2000); Richard C. Dunn, *Note: Determining the Intended Beneficiaries of the ADA in the Aftermath of Sutton: Limiting the Application of the Disabling Corrections Corollary*, 43 WM. & MARY L. REV. 1265, 1266-68 (2002).

58. *Id.* "[A] person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limi[t]' a major life activity." 527 U.S. at 483.

59. *See* 527 U.S. at 483.

60. 42 U.S.C. § 12101(a)(1).

61. *See* 527 U.S. at 484-87. "Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings." *Id.* at 487.

62. *See* 527 U.S. at 499-501, quoting from S. REP. NO. 101-116, 23 (1989) and H.R. REP. NO. 101-485, pt. III, 28 (1990).

63. 527 U.S. at 489.

64. *See* 527 U.S. at 492, citing 29 C.F.R. § 1630.2(j).

65. 527 U.S. at 492 (Emphasis added by Court).

66. *See* notes 42 & 43, and accompanying text, *supra*.

67. 527 U.S. at 491, quoting from 29 C.F.R. § 1630.2(j)(3)(i).

68. *See* 527 U.S. at 490-91.

69. *See* 527 U.S. at 493.

70. 527 U.S. 516 (1999).

71. *See* 527 U.S. at 521.

72. *See* 527 U.S. at 523.

73. *See* 527 U.S. at 524-25.

74. 527 U.S. 555 (1999).

75. *See* 527 U.S. at 559.

76. 527 U.S. at 565-66.

77. *See* 527 U.S. at 566.

78. 527 U.S. at 567.

79. 527 U.S. at 568, quoting from 42 U.S.C. § 12113(a).

80. 42 U.S.C. § 12113(b), quoted in 527 U.S. at 569.

81. *See* 527 U.S. at 570-71.

82. *See* 527 U.S. at 574-78.

83. 122 S. Ct. 681 (2002).

84. *See* 122 S. Ct. at 686.

85. *See* 122 S. Ct. at 687.

86. *See* 122 S. Ct. at 688.

87. *See* 122 S. Ct. at 689.

88. 122 S. Ct. at 690.

89. *Id.*, citing 45 C.F.R. § 84.3(j)(2)(ii).

90. *Id.*, quoting from 29 C.F.R. § 1630.2(j).

91. *Id.*, quoting from 29 C.F.R. § 1630.2(j)(2)(i)-(iii).

92. *See* 122 S. Ct. at 692-93.

93. *See* 122 S. Ct. at 693.

94. *Id.*

95. *See* 122 S. Ct. at 694.

96. 122 S. Ct. 2045 (2002).

97. *See* 122 S. Ct. at 2047-48.

98. *See* 122 S. Ct. at 2048, citing 29 C.F.R. § 1630.15(b)(2).

99. *See* 122 S. Ct. at 2048, relying on 42 U.S.C. § 12113(b).

100. *See* 122 S. Ct. at 2049-53.

101. *See* 122 S. Ct. at 2053, quoting from 29 C.F.R. § 1630.2(r).

102. 122 S. Ct. 1516 (2002).

103. *See* 122 S. Ct. at 1519.

104. *See* 122 S. Ct. at 1519-20.

105. *See* 122 S. Ct. at 1520.

106. *See* 122 S. Ct. at 1524.

107. *Id.*

108. *Id.*

109. *See* 122 S. Ct. at 1525.

110. *See* Mark A. Rothstein, Serge A. Martinez & W. Paul McKinney, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 254-55 (2002).

111. *See* Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001).

112. *See* Nancy Montwieler, *EEO Case Filings Said "Leveling Off," But Still a Large Share of Caseload*, Daily Labor Report (BNA) No. 58, at A-1 (Mar. 24, 2000).

113. *See id.*

114. *See Employment Bias Cases in Federal Courts Almost Tripled in Previous Decade, DOJ*

Says, Daily Labor Report (BNA) No. 13, at E-5 (Jan. 20, 2000).

115. 526 U.S. 795 (1999).

116. *See* 526 U.S. at 799-800.

117. *See* 526 U.S. at 803.

118. 526 U.S. at 807.

119. *See* 42 U.S.C. § 12102(2).

120. 29 C.F.R. § 1630.2(h). For an argument in favor of a more expanded list of "major life activities," *see generally* Curtis D. Edmonds, *Snakes and Ladders: Expanding the Definition of "Major Life Activity" in the Americans with Disabilities Act*, 33 TEX. TECH. L. REV. 321 (2002).

121. *See* 527 U.S. at 479.

122. *See* 42 U.S.C. § 12116. *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 525-26 (2000); David W. Lannetti, *Extending Coverage of the Americans with Disabilities (ADA) to Individuals with Attention Deficit-Hyperactivity Disorder: A Demonstration of Inadequate Legislative Guidance*, 15 LAB. LAW. 231, 237-38 (1999).

123. *See* Bagenstos, *supra* note 122, at 505-06.

124. *See* Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 COLO. L. REV. 107, 115 (1997).

125. *See* 29 C.F.R. § 1630.2(j); 28 C.F.R. § 35.104, both quoted in 527 U.S. at 480.

126. *See* Bagenstos, *supra* note 122, at 495-98.

127. *See* Burgdorf, *supra* note 3, at 448.

128. *Id.*

129. Erica Worth Harris, *Controlled Impairments Under the Americans With Disabilities Act: A Search for the Meaning of "Disability,"* 73 WASH. L. REV. 575, 595 (1998).

130. *See id.* at 597.

131. 527 U.S. at 491, quoting from 29 C.F.R. § 1630.2(j)(3)(i).

132. *See* 527 U.S. at 566 n. 12.

133. *See* 122 S. Ct. at 686-87.

134. *See* Sutton, 527 U.S. at 484-87; Williams, 122 S. Ct. at 691, citing 42 U.S.C. § 12101(a)(1).

135. 527 U.S. at 489. *See* Chai R. Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7 LAB. LAW. 11, 16-17 (1991). *See generally* Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N. CAR. L. REV. 901 (2000); Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481 (2002). The applicable EEOC guideline also includes under the "regarded as" prong individuals who have impairments that substantially limit major life activities only as a result of the attitudes of others toward their impairments. *See* 29 C.F.R. § 1630.2(l). *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 638 (1999). It is unclear why individuals covered by this part of the EEOC regulation are not included within the first part for people with non-disabling conditions that are considered substantially limiting by prospective employers.

136. *See* S. REP. NO. 116, 101ST CONG., 1ST SESS. 7 (1989). *See also* Burgdorf, *supra* note 3, at 450.

137. *See* 42 U.S.C. § 12102(2)(C). *See also* Bagenstos, *supra* note 122, at 433.

138. *See* Bagenstos, *supra* note 122, at 446-49, 515-18.

139. This type of "regarded as" analysis is especially important when mental impairments are involved, because of negative societal misperceptions and stereotypes with respect to mental conditions. *See generally* Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271 (2000).

140. *See* 42 U.S.C. § 12112(a).

141. 42 U.S.C. § 12111(8).

142. 42 U.S.C. § 12113(b).

143. 499 U.S. 187 (1991).

144. *See* 42 U.S.C. § 2000e(k), which states that discrimination based upon pregnancy, childbirth, and related medical conditions constitutes discrimination based on gender.

145. 499 U.S. at 205-06.

146. 122 S. Ct. 2045 (2002).

147. *See* 122 S. Ct. at 2049-53.

148. 122 S. Ct. at 2053.

149. 42 U.S.C. § 12111(8).

150. *Id.*

151. 42 U.S.C. § 12112(5)(A). *See generally* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996).

152. *See* 42 U.S.C. § 12111(a).

153. *See* Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I – Workplace Accommodations*, 46 DePAUL L. REV. 877, 902-03 (1997) (majority of accommodations cost less than $500).

154. *See* Ansonia Board of Educ. v. Philbrook, 479 U.S. 60, 68-69 (1986) (construing religious accommodation provision of Title VII); G. William Davenport, *The Americans with Disabilities Act: An Appraisal of the Major Employment-Related Compliance and Litigation Issues*, 43 ALA. L. REV. 307, 322 (1992).

155. *See* 42 U.S.C. § 12112(5)(A).

156. *See* US Airways, Inc. v. Barnett, 122 S. Ct. at 1523.

157. *See id.*

158. *See* 42 U.S.C. § 12111(9)(B).

159. 432 U.S. 63 (1977).

160. 42 U.S.C. § 2000e(j).

161. 122 S. Ct. 1516 (2002).

162. 122 S. Ct. at 1524.

163. *See id.*

164. *See* 122 S. Ct. at 1525.

165. *See* Hardison, 432 U.S. at 84-85.

166. *See* 42 U.S.C. § 12111(10). *See generally* Russell H. Gardner & Carolyn J. Campanella, *The Undue Hardship Defense to the Reasonable Accommodation Requirement of the Americans with Disabilities Act of 1990*, 7 LAB. LAW. 37 (1991).

167. 29 U.S.C. § 793.

168. *See* 42 U.S.C. § 12112(a).

169. *See* Barnett, 122 S. Ct. at 1521, citing H. REP. NO. 485, 101st CONG., 2d SESS., pt. 2, 66 (1990) and S. REP. NO. 116, 1st CONG., 1st SESS. 26-27 (1989) (employer has no "obligation to prefer applicants with disabilities over other applicants"). *See also* C. Geoffrey Weirich,

Reasonable Accommodation Under the Americans with Disabilities Act, 7 LAB. LAW. 27, 28 (1991); Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003 (1997).

170. *See* Bagenstos, *supra* note 122, at 459.