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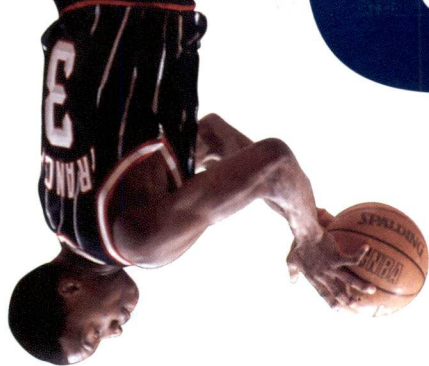
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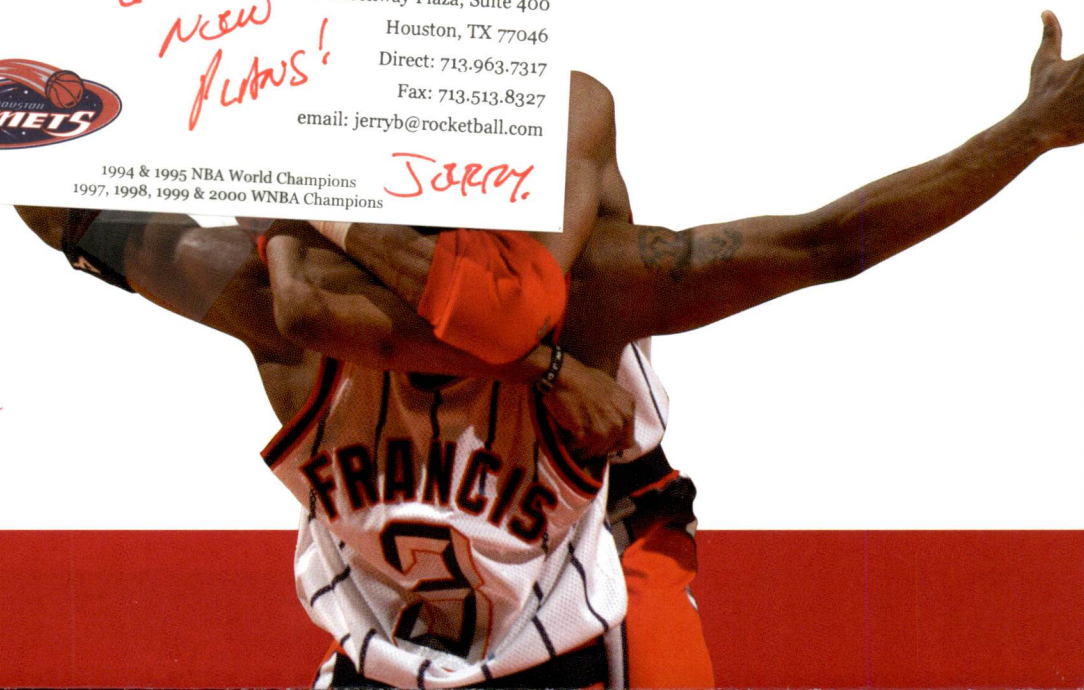
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Tues	11/5	Seattle	Drobnjak
Tues	12/3	San Antonio	Parker
Tues	12/10	Sacramento	Stojakovic/Divac/ Turkoglu
Sat	1/11	Denver	Bateer
Wed	1/15	Phoenix	Tsakalidis
Wed	1/29	Dallas	Nowitzki/Nash/ ZhiZhi
Fri	1/31	Minnesota	Nesterovic
Sun	2/2	Sacramento	Stojakovic/Divac/ Turkoglu
Tues	2/11	Utah	Kirilenko
Fri	2/21	Dallas	Nowitzki/Nash/ ZhiZhi
Wed	3/12	LA Clippers	Olowokandi
Tues	4/15	Memphis	Gasol

*player participation subject to change

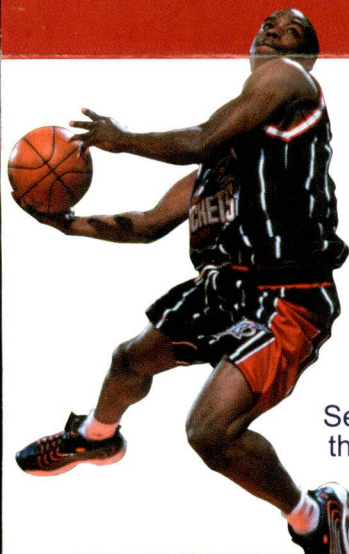
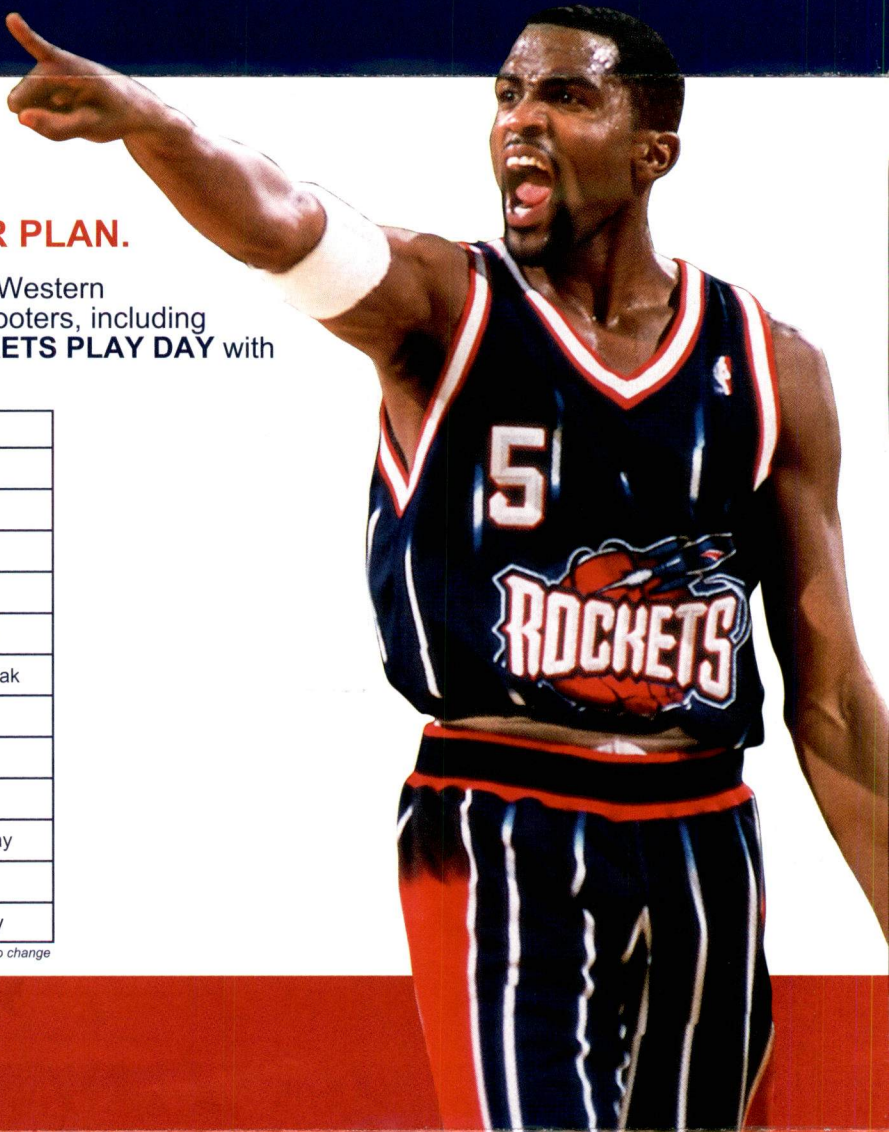
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Day	Date	Opponent	Player*
Sat	11/2	Toronto	Carter
Fri	11/22	Washington	No.23
Sat	12/7	Philadelphia	Iverson
Wed	12/18	Indiana	Miller
Fri	12/27	New York	Houston
Tues	1/7	Minnesota	Szczerbiak
Fri	1/17	LA Lakers	Bryant
Fri	2/14	Miami	Jones
Sun	3/2	San Antonio	Smith
Sun	3/16	Phoenix	Hardaway
Wed	3/26	LA Lakers	Bryant
Sun	4/6	Orlando	McGrady

*player participation subject to change



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See All-Star Steve Francis take on the best point guards in the league in six exciting match-ups, all in the first half of the season.

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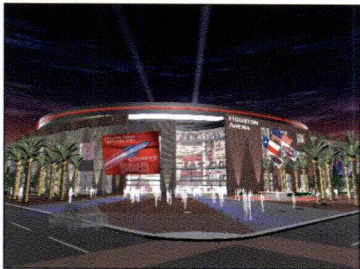
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This six-game schedule brings mini-plans to new heights with Yao Ming, the no. 1 pick of the 2002 NBA Draft, battling Shaq and five other marquee centers.

Day	Date	Opponent	Player*
Sat	11/2	Toronto	Olajuwon
Tues	11/12	Portland	Wallace
Sat	12/14	LA Clippers	Olowokandi
Wed	12/18	Indiana	O'Neal

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\$46.00	\$2,024	\$4,048	\$8,096
\$34.00	\$1,496	\$2,992	\$5,984
\$26.50	\$1,166	\$2,332	\$4,664
\$20.00*	\$880	\$1,760	\$3,520
\$19.50	\$858	\$1,716	\$3,432
\$16.00*	\$704	\$1,408	\$2,816
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- High 5 Club. Season ticket holders participate in home game player introduction ceremonies (selected on a seniority basis)
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Day	Date	Opponent	Day	Date	Opponent
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Thur	10/24	Philadelphia	Fri	1/24	Detroit
Tues	11/5	Seattle	Fri	1/31	Minnesota
Tues	11/12	Portland	Fri	2/14	Miami
Fri	11/22	Washington	Fri	2/21	Dallas
Tues	12/10	Sacramento	Sun	3/2	San Antonio
Fri	12/20	Atlanta	Wed	3/12	LA Clippers
Mon	12/23	Utah	Sun	3/16	Phoenix
Sun	12/29	New Orleans	Wed	3/26	LA Lakers
Sat	1/4	Golden State	Sun	4/6	Orlando
Sat	1/11	Denver	Tues	4/15	Memphis

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Day	Date	Opponent	Day	Date	Opponent
Sun	10/20	Orlando	Wed	1/15	Phoenix
Sat	11/2	Toronto	Fri	1/17	LA Lakers
Sat	11/9	Golden State	Wed	1/29	Dallas
Tues	11/19	Cleveland	Sun	2/2	Sacramento
Tues	12/3	San Antonio	Tues	2/11	Utah
Sat	12/7	Philadelphia	Sat	2/22	Memphis
Sat	12/14	LA Clippers	Sat	3/8	New Jersey
Wed	12/18	Indiana	Fri	3/14	Chicago
Fri	12/27	New York	Sat	3/29	Denver
Tues	12/31	Milwaukee	Tues	4/8	Portland
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USING ESTABLISHED MEDICAL CRITERIA TO DEFINE DISABILITY:
A PROPOSAL TO AMEND THE AMERICANS WITH DISABILITIES ACT

MARK A. ROTHSTEIN
SERGE A. MARTINEZ
W. PAUL MCKINNEY

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MARK A. ROTHSTEIN*

SERGE A. MARTINEZ**

W. PAUL MCKINNEY***

I. INTRODUCTION

The Americans with Disabilities Act of 1990 (ADA)¹ prohibits discrimination in employment,² public services,³ and public accommodations⁴ against individuals with disabilities.⁵ The threshold question, however, of who is an individual with a disability has proven to be more complicated, contentious, and confusing than any of the ADA's drafters ever could have imagined. The law does not prohibit all discrimination based on disability, and it does not prohibit discrimination against all individuals with disabilities. Instead, it prohibits disability-based discrimination against a subset of individuals with disabilities who have "a physical or mental impairment that substantially limits" the individual in one or more major life activities.⁶

The initial problem with the ADA's definition of "individual with a disability" is not that it is too broad or too narrow—only that it is too vague. Congress chose not to list what impairments were covered under the law, perhaps realizing that many common impairments—such as asthma, diabetes, and epilepsy—vary widely in severity. Instead, it adopted a scheme

* Herbert F. Boehl Chair of Law and Medicine and Director, Institute for Bioethics, Health Policy and Law, University of Louisville School of Medicine. Research on this Article was supported by the Kentucky Research Challenge Trust Fund. The authors are indebted to Professor Chai Feldblum for her helpful comments on an earlier draft of the Article. Alexander Hecht, J.D. 2001, University of Houston Law Center, and Dennis Holmgren, J.D. 2002, University of Louisville Louis D. Brandeis School of Law, provided valuable research assistance.

** Professor of Surgery and Ethics, Institute for Bioethics, Health Policy and Law, University of Louisville School of Medicine.

*** V.V. Cooke Professor of Medicine, Chief, Division of General Internal Medicine, University of Louisville School of Medicine.

1. 42 U.S.C. § 12101-12213 (1994).

2. 42 U.S.C. § 12112 (1994).

3. *Id.* § 12132.

4. *Id.* § 12182.

5. *Id.* § 12102(2)(A)-(C).

6. *See id.* § 12102(2)(A).

in which determinations of coverage under the ADA are made on a case-by-case basis, giving consideration to the severity of the impairment and its effect on the individual. The vagueness of the definition of "individual with a disability" has frustrated employers and other parties responsible for complying with ADA requirements. It has also left individuals uncertain of whether they have standing to ask for the reasonable accommodations reserved under the law for individuals with "covered" disabilities.

Perhaps the entities most troubled by the lack of statutory guidance have been the courts. The first decade of ADA case law has produced a series of inconsistent and implausible results exemplified by three Supreme Court decisions in 1999.⁷ Far from providing clarity and guidance, the Supreme Court decisions cut a wide swath through the ADA, undermining its basic intent and erecting frequently insurmountable barriers to the redress of disability discrimination.

Part II of this Article traces the legislative history of the coverage provision of the ADA and of its predecessor statute, the Rehabilitation Act of 1973.⁸ It also explores the conceptual underpinnings of the statutory scheme of attempting to cover only individuals with severe disabilities. Part III analyzes the major cases involving coverage under the ADA, including the trilogy of 1999 Supreme Court cases. It traces the consequences of the Court's decisions as reflected in the subsequent lower court decisions and their devastating effects on individuals with disabilities.

Part IV contains a proposed amendment to the ADA to clarify the definition of "individual with disabilities." Under the amendment, Congress would authorize the Equal Employment Opportunity Commission (EEOC), after notice and comment rulemaking, to publish medical standards for determining when the most common physical and mental impairments are severe enough to be covered under the ADA. The ADA would presumptively cover an individual whose condition meets the criteria; it would presumptively not cover an individual whose condition does not meet the criteria. Either party could rebut the presumption with clear and convincing evidence that, in light of the particular individual's overall medical condition, the impairment was or was not a substantial limitation of a major life activity. This approach provides greater certainty to all parties and saves time and money in litigation.

Part V provides a demonstration of the feasibility and utility of this approach. After selecting several of the impairments most commonly at issue

7. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

8. 29 U.S.C. §§ 701-797b (1994). See 29 U.S.C. §§ 705, 791-94 (1994).

in ADA cases, the Article reviews the medical literature for each condition. It then distills the medical criteria already used in the clinical setting to distinguish mild or moderate medical conditions from ones that constitute a substantial limitation of a major life activity. Only the latter conditions would be presumptively covered under the proposed amendment of the ADA. Besides the practical advantages of the amendment, it is consistent with the original intent of the ADA: prohibiting discrimination against individuals with substantially limiting disabilities without imposing an undue burden on employers, government entities, and providers of public accommodations. Although the Article focuses on employment, the definition of disability applies to all of the titles of the ADA.

II. LEGISLATIVE HISTORY OF THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

A. *Rehabilitation Act*

The Rehabilitation Act of 1973 was the first comprehensive federal law prohibiting disability-based discrimination in employment and other aspects of daily life. Congress laid the groundwork for the Rehabilitation Act in the 1960s when it enacted sweeping civil rights legislation proscribing discrimination on the basis of race, color, religion, sex, national origin,⁹ and age.¹⁰ The purpose of the Rehabilitation Act, as restated in the 1978 amendments, "is to develop and implement, through research, training services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living."¹¹

Three key sections of Title V of the Rehabilitation Act pertain to employment and prohibit discrimination against individuals with disabilities by the federal government (section 501),¹² federal government contractors (section 503),¹³ and recipients of federal financial assistance (section 504).¹⁴ For purposes of Title V of the Rehabilitation Act, an individual with a disability is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as

9. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2000e-17 (1994).

10. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1994).

11. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 122(a), 92 Stat. 2955, 2984.

12. 29 U.S.C. § 791 (1994).

13. *Id.* § 793.

14. *Id.* § 794.

having such an impairment.”¹⁵ “Major life activities” means “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹⁶

The legislative history surrounding the nondiscrimination provisions of the Rehabilitation Act, particularly section 504, reflect more happenstance than deliberation or historical imperative. As related by Richard K. Scotch in his book, *From Good Will to Civil Rights: Transforming Federal Disability Policy*:

As it was initially drafted, the legislation did not include Section 504. Nor was Section 504 suggested at any of the hearings held on the proposed law. Rather, the section was conceived by Senate committee staff members and added to the bill at a relatively late point in the legislative process.

....

Staff members were concerned that, when disabled individuals completed their training in the VR [vocational rehabilitation] system and were ready to enter the workplace, many employers appeared to be reluctant to hire them. Staff members felt that the final goal of the VR program, getting disabled people into the mainstream of society, was being blocked by negative attitudes and discrimination on the part of employers and others.

Someone suggested that language be included in the Rehabilitation Act proscribing discrimination against handicapped people in federally assisted programs. Such a provision would be comparable to the provisions of Title VI of the Civil Rights Act of 1964, and to Title IX of the Educational Amendments of 1972, but would not involve amending those statutes. Roy Millenson of Senator Javits’s staff had been involved in the development of the Education Amendments, and he ran out to his office and brought back language from Title VI. The language was adapted and inserted at the very end of the Rehabilitation Act. In the version of the bill that was ultimately enacted, that provision became Section 504.¹⁷

15. *Id.* § 706(8)(B)(i)-(iii). For a discussion of the history of the definition used in Title V of the Rehabilitation Act, see Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 100-03 (2000).

16. 1 C.F.R. § 457.103(2) (2000).

17. RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL*

Title V of the Rehabilitation Act has been amended several times, making relatively minor changes in the law's coverage. Amendments in 1978¹⁸ and 1988¹⁹ clarified the Rehabilitation Act's coverage of alcoholics, drug abusers, and individuals with contagious diseases. The 1986 amendment changed the term "handicapped individual" to "individual with handicaps."²⁰ In 1992, the term was again changed, this time to "individual with disabilities."²¹ None of these amendments changed the basic statutory scheme of prohibiting discrimination only against individuals with substantially limiting impairments.

In the absence of congressional guidance about the definition of "individual with disabilities" in Title V of the Rehabilitation Act, the courts reached divergent results. Some of the courts held that Title V of the Rehabilitation Act covered relatively minor conditions.²² For example, in *Perez v. Philadelphia Housing Authority*,²³ the district court held that a temporary back sprain was a handicap,²⁴ and therefore the Rehabilitation Act required the employer to provide accommodations such as giving the employee a straight back chair, allowing the employee to use an elevator, and assigning other employees to handle the individual's duties during regular breaks.²⁵

Numerous other cases have not been nearly as sympathetic to plaintiffs, adopting the view that Title V of the Rehabilitation Act applies only to substantially limiting impairments.²⁶ For example, in *Forrisi v. Bowen*,²⁷ the

DISABILITY POLICY 49, 51-52 (1984). See also EDWARD D. BERKOWITZ, *DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED* 212 (1987).

18. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 122(a), 92 Stat. 2955, 2984-85.

19. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9, 102 Stat. 28, 31-32 (1988).

20. Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 103(d)(1), 100 Stat. 1807, 1810.

21. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(p), 106 Stat. 4344, 4355-56.

22. Professor Feldblum argues that this was the prevailing view, and lists many of the cases holding for the plaintiffs. Feldblum, *supra* note 15, at 106-13.

23. 677 F. Supp. 357 (E.D. Pa. 1987), *aff'd*, 841 F.2d 1120 (3d Cir. 1988).

24. *Id.* at 361.

25. *Id.* at 359.

26. For cases holding that the plaintiff did not have a covered handicap under the Rehabilitation Act, see, e.g., *Reeder v. Frank*, 986 F.2d 1428 (10th Cir. 1993), *aff'g* 813 F. Supp. 773 (D. Utah 1992) (speech impediment); *Byrne v. Bd. of Educ.*, 979 F.2d 560, 567 (7th Cir. 1992) (allergy to fungus); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (decreased sensation to heat in two fingers); *de la Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986) (left handedness); *Oesterling v. Walters*, 760 F.2d 859, 861 (8th Cir. 1985) (mild to moderate varicose veins); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985) (strabismus); *Partlow v. Runyon*, 826 F. Supp. 40, 46 (D.N.H. 1993) (chronic back strain); *Paegle v. Dep't of Interior*, 813 F. Supp. 61, 64 (D.D.C. 1993) (temporary back injury); *Santiago v. Temple Univ.*, 739 F. Supp. 974, 979 (E.D. Pa. 1990)

United States Court of Appeals for the Fourth Circuit held that a telephone company employee, whose job required him to climb utility poles, was not a "handicapped individual" under the Rehabilitation Act because he suffered from acrophobia.²⁸ The court reasoned:

The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.²⁹

B. Americans with Disabilities Act

The Rehabilitation Act applies only to a limited number of covered entities, and it provides only limited private remedies for aggrieved individuals.³⁰ Consequently, Congress enacted more sweeping legislation, the Americans with Disabilities Act of 1990.³¹ The ADA's five titles deal with employment (Title I),³² public services (Title II),³³ public accommodations (Title III),³⁴ telecommunications (Title IV),³⁵ and

(intermittent eye inflammation); *Pridemore v. Legal Aid Soc'y*, 625 F. Supp. 1171, 1175 (S.D. Ohio 1985) (borderline cerebral palsy); *Tudymen v. United Air Lines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (muscular physique); *Green v. Union Pac. R.R.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981) (hypertension, obesity, minor osteoarthritis).

27. 794 F.2d 931 (4th Cir. 1986).

28. *Id.* at 933.

29. *Id.* at 934.

30. See LAURA F. ROTHSTEIN, *DISABILITIES AND THE LAW* §§ 1.10-1.14 (2d ed. 1997). Section 501 of the Rehabilitation Act prohibits discrimination against and mandates the hiring of individuals with disabilities by federal agencies. 29 U.S.C. § 791(b) (1994). Section 501 incorporates by reference the same remedies found under the Civil Rights Act of 1964. 34 C.F.R. §§ 100.6-.10, 101.1-.131 (2000). Section 503 prohibits discrimination against and mandates the hiring of individuals with disabilities by federal contractors with over \$10,000 in annual federal contracts. 29 U.S.C. § 793 (2000). Remedies under Section 503 include injunctive relief, withholding progress payments, terminating the contract, and debarring the violator from receiving future government contracts. 41 C.F.R. § 60-741.65-.66 (2000). Finally, Section 504 prohibits discrimination on the basis of disability by recipients of federal financial assistance. 29 U.S.C. § 794 (1994). Like Section 501, the remedies and procedures of the Civil Rights Act of 1964 are incorporated by reference into Section 504.

31. 42 U.S.C. §§ 12101-13 (1994).

32. *Id.* §§ 12111-17.

33. *Id.* §§ 12131-65.

34. *Id.* §§ 12181-89.

35. 47 U.S.C. § 225 (1994) (telecommunications relay services); 47 U.S.C. § 611 (1994) (closed captioning).

miscellaneous issues (Title V).³⁶ Although the ADA is unique in concept and breadth, it draws heavily on the Rehabilitation Act.³⁷ In particular, the ADA incorporates the same definition of "individual with disabilities."³⁸

The ADA's legislative history clarifies what it means to be substantially limited in a major life activity. The Report of the Senate Committee on Labor and Human Resources defines a substantial limitation of one or more major life activities as "the individual's important life activities [that] are restricted as to the condition, manner, or duration under which they can be performed in comparison to other people."³⁹ Nevertheless, neither this report nor any other document from either house of Congress provides any indication that Congress recognized it was adopting a narrow scope of coverage, explanation why it selected this method of limiting coverage, or articulation why it rejected a different or more general type of coverage.⁴⁰ The Rehabilitation Act model was chosen for adoption in the ADA with little debate.

Cases decided under the ADA have consistently approved of the limited coverage approach.⁴¹ Indeed, the courts have been so restrictive in interpreting the statutory definition of an individual with a disability that the limited coverage approach has been extended beyond that intended by Congress. Several examples of restrictive decisions appear in Part III.

C. Statutory Coverage in Perspective

It is valuable to consider the legislative scheme of the disability discrimination laws in the light of other civil rights laws. Title VII of the Civil Rights Act of 1964⁴² prohibits all discrimination on the basis of race, color, religion, sex, and national origin. Although the main purpose of the law was to prohibit discrimination against African Americans,⁴³ Title VII outlaws *any* discrimination on the basis of the five statutorily-proscribed criteria. Thus, the law is violated by race discrimination against a member of any race,⁴⁴ religious discrimination against a member of any religion,⁴⁵ sex

36. 42 U.S.C. §§ 12201-13.

37. *Id.* § 12117(b).

38. Compare 29 U.S.C. § 706(8)(B), with 42 U.S.C. § 12102(2).

39. See S. REP. NO. 101-116, at 22 (1989).

40. See Feldblum, *supra* note 15, at 129-34.

41. See 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.40 (2d ed. 1999).

42. 42 U.S.C. §§ 20003-2000e-17 (1994).

43. See Rep. William M. McCulloch et al., Additional Views on H.R. 7152 (1964), reprinted in 1964 U.S.C.C.A.N. 2487, 2513-17.

44. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973).

45. See *Weiss v. Parker Hannifan Corp.*, 747 F. Supp. 1118, 1126 (D.N.J. 1990).

discrimination against a member of either sex,⁴⁶ and national origin discrimination against an individual of any national origin.⁴⁷ Courts sometimes state that the complainant in a Title VII case must be a member of a "protected class,"⁴⁸ but this is simply incorrect. Title VII prohibits discrimination against *any* individual for a statutorily proscribed reason. By contrast, when Congress enacted the Age Discrimination in Employment Act (ADEA) in 1967, it did not prohibit all age discrimination, but only age discrimination against the "protected class" of individuals aged forty and over.⁴⁹ The reason for the seemingly different approach is that Congress was specifically and exclusively concerned about discrimination against older American workers.⁵⁰

When it enacted disability discrimination laws in 1973 and 1990, Congress used the "protected class" model of the ADEA rather than the comprehensive model of Title VII.⁵¹ It did not prohibit *all* disability discrimination, but only disability discrimination against the "protected class" of individuals with severe disabilities. Individuals with minor or temporary impairments were not covered.⁵² The original version of the ADA, drafted by the National Council on the Handicapped and introduced in 1988, did not use the "protected class" approach, but proposed to prohibit *any* discrimination based on handicap.⁵³ When the business community and the Reagan Administration complained that coverage under this approach was

46. See *Miller v. Weber*, 577 F.2d 75, 76 (8th Cir. 1978).

47. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

48. See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 527 (1993); *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1337 (2d Cir. 1997) (en banc).

49. 29 U.S.C. § 631 (1994). As originally enacted, the law prohibited discrimination in employment against individuals between the ages of forty and sixty-five. In 1978, Congress extended the upper age limit to seventy, and in 1986, Congress removed the upper limit completely. See 1 ROTHSTEIN ET AL., *supra* note 41, § 2.37, at 317.

50. See S. REP. NO. 95-493 (1977), reprinted in 1978 U.S.C.C.A.N. 504; DEVELOPMENTS IN AGING: 1997 AND 1998, S. REP. NO. 106-229, at 83-98 (2000). See also Marley S. Weiss, *Risky Business: Age and Race Discrimination in Capital Redeployment Decisions*, 48 MD. L. REV. 901, 1004-05 (1989).

51. Congress not only prohibited discrimination, but it mandated reasonable accommodation as well. See generally Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

52. See *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 151 (2d Cir. 1998); 29 C.F.R. § 1630.2 (2000) (stating that to constitute a disability under the ADA, an impairment must be significant); 29 C.F.R. Pt. 1630, App. (2000) (explaining that an individual is not substantially limited in a major life activity if an impairment does not amount to a significant restriction when compared to the abilities of the average person). In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Supreme Court limited the applicability of the "regarded as" prong of the definition by requiring that the impairment that the individual is regarded as having would constitute a substantial limitation of a major life activity. *Id.* at 489.

53. See Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 432-33 (1991).

overly broad, subsequent bills adopted the Rehabilitation Act's framework of limited coverage and extended protections only to individuals who have an impairment that substantially limits a major life activity.⁵⁴

There are important policy arguments that could be made in favor of limited coverage. Individuals with severe disabilities have been the victims of pervasive and long-standing discrimination in employment. Individuals with temporary or minor impairments have not been subject to such discrimination, nor have they been subject to prejudicial myths and stereotypes about their employability. If someone with a temporary impairment, such as a common cold or a sprained ankle, were subject to discrimination, the effect of the discrimination would be short-lived and the individual's long-term employability would not suffer. Also, if one employer acted irrationally by discriminating against someone with a minor impairment (e.g., wearing eyeglasses), other employers would not be likely to make such arbitrary decisions. By contrast, before the enactment of the ADA, there was a history of employment discrimination against individuals who use wheelchairs and thus have decreased mobility, who have vision impairments that may require assistive devices, and who have medical impairments that may increase employee health benefit costs.⁵⁵

Congress may have deliberately intended to limit the coverage of the ADA, and it may have had a legitimate reason in choosing to enact a disability discrimination law with limited coverage. Nonetheless, Congress failed to define the ADA's coverage with any degree of specificity. The clarity of the ADEA, prohibiting discrimination against individuals aged forty and over, is impossible to achieve with general statutory language in a law prohibiting discrimination based on numerous types of physical and mental impairments. The limitation of the ADA's coverage to individuals with a physical or mental impairment that substantially limits one or more of the individual's major life activities is simply too vague to provide meaningful guidance to individuals, employers, and courts. Consequently,

54. See NATIONAL COUNCIL ON DISABILITY, *EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT* 82-83 (1997). Professor Chai Feldblum, one of the drafters of the ADA, disagrees with this explanation. In her view, the decision about coverage of the ADA "was arrived at by a small group of individuals, early in the process of drafting the ADA, who made the legal judgment that the existing definition would cover most people along the spectrum of physical and mental impairments, and the political judgment that using any other definition would unnecessarily slow down passage of the bill." Feldblum, *supra* note 15, at 129.

55. Under the ADA, as under the Social Security Act, see 42 U.S.C. § 423(d)(1)(A) (1994), and other laws, the determination of disability is as much a policy question as a question of fact. See Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 413 (2000) (citing Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 853 (1976)).

there has been a series of troublesome issues surrounding the definition of an individual with a disability that have not been satisfactorily resolved. The question of whether an individual's impairment should be considered with or without regard to mitigating measures, discussed in the following section, is one of these issues.

III. CASE LAW INTERPRETING THE DEFINITION OF DISABILITY

A. *Sutton and Mitigating Measures*

1. *Sutton v. United Air Lines*

In 1992, Karen Sutton and Kimberly Hinton, twin sisters with a "life long goal to fly for a major air carrier,"⁵⁶ interviewed with United Air Lines for commercial airline pilot positions. At the interviews United informed them that their uncorrected vision did not meet United's minimum requirements,⁵⁷ and that it would not hire them as pilots on a prestigious international route. The sisters alleged that United violated the ADA by rejecting them on the basis of a disability.⁵⁸ The sisters contended that their impaired vision—when judged in its uncorrected condition—substantially limited them in the major life activity of seeing, and precluded them from such "normal everyday activities ... as driving, watching television, or shopping."⁵⁹ United countered that because the sisters used corrective measures to mitigate their impaired vision, they were not substantially limited in any major life activity.⁶⁰

In an unreported decision, the United States District Court for the District of Colorado held that "far more" than the ability to see without correction is required to trigger coverage under the ADA.⁶¹ Recognizing that the ADA does not define "substantial impairment," "substantially limits," "major life activities," or "being regarded as having an impairment," the court turned to the EEOC Interpretive Guidance on Title I of the ADA.⁶² The court

56. *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 895 (10th Cir. 1997).

57. *Id.* United's requirement was uncorrected vision of 20/100 or better in each eye. Each sister had 20/200 in her right eye, and 20/400 in her left eye. The sisters claimed they were qualified for the pilot positions because, with corrective lenses, their vision was 20/20 or better. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 896.

61. *Sutton v. United Air Lines, Inc.*, CIV. A. No. 96-S-121, 1996 WL 588917, at *3 (D. Colo. Aug. 28, 1996).

62. *Id.* at *2-3.

explained that EEOC Interpretive Guidance⁶³ provided that "the existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."⁶⁴

The court, however, chose to reject the EEOC Interpretive Guidance, instead holding that the sisters did "not allege any activity that they [were] unable to perform that the average person in the general population [could] perform."⁶⁵ The court noted an ostensible public policy behind the ADA: only "individuals who suffer from impairments significantly more severe than those encountered by the average person in everyday life" should be covered by the ADA; not those "who suffer from slight shortcomings that are both minor and widely shared."⁶⁶ The court stated:

To adopt a definition of "disabled" that would include persons whose vision is correctable by eyeglasses or contact lenses would result in an expansion of disability protection beyond the logical scope of the ADA. . . . Under such an expansive reading, the term "disabled" would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect.⁶⁷

In granting United's motion to dismiss for failure to state a claim, the court held that "[e]ven if the Plaintiffs' uncorrected vision would be considered an impairment, a physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA because the statute requires an impairment that substantially limits one or more of the major life activities."⁶⁸

The Tenth Circuit affirmed the decision, joining a minority of courts that viewed the EEOC Interpretive Guidance on mitigating measures as in direct conflict with the ADA.⁶⁹ The court held that "[t]he determination of whether

63. 29 C.F.R. Pt. 1630, App. 31630.2(h)&(j) (1998).

64. *Sutton*, 1996 WL 588917, at *5.

65. *Id.* at *3.

66. *Id.* at *5 (citations omitted).

67. *Id.*

68. *Id.* (citations omitted).

69. Cases that endorse the minority position of ignoring the EEOC Interpretive Guidance include *Gilday v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir. 1997); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 n.3 (5th Cir. 1996) (dictum); *Cline v. Fort Howard Corp.*, 963 F. Supp. 1075, 1080 n.6 (E.D. Okla. 1997); *Gaddy v. Four B Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997); *Moore v. City of Overland Park*, 950 F. Supp. 1081, 1088 (D. Kan. 1996); *Schluter v. Indus. Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994).

In his *Sutton* dissent, Justice Stevens argued for the majority approach of judging impairments without reference to mitigating measures. He cited to the holdings of eight of the nine federal courts of appeals to consider the issue, all of which held that Congress intended to consider disabilities in their

an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual."⁷⁰ The Tenth Circuit also held that while the sisters' unmitigated impairments would be disabilities under the ADA, their vision problems failed to substantially limit a major life activity after taking into consideration their corrective lenses.⁷¹

The Tenth Circuit observed what has become the *Sutton* paradox.⁷² Prospective plaintiffs with potential disabling impairments, like the sisters in *Sutton*, lose under any set of facts. If, even with correction, their vision impairment is so severe that it substantially limits their major life activity of seeing, they are not qualified individuals for an employment position.⁷³ If

unmitigated condition. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 496 (1999) (Stevens, J., dissenting) (citing *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Washington v. HCA Health Servs. of Tex.*, 152 F.3d 464, 470-71 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-30 (7th Cir. 1998); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 859-66 (1st Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-38 (3d Cir. 1997); *Doane v. Omaha*, 115 F.3d 624, 627 (8th Cir. 1997); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996)).

Justice Stevens also referred to three executive agencies that issued regulations or interpretive bulletins construing the ADA. 527 U.S. at 496 (citing 29 C.F.R. Pt. 1630 App. § 1630.2(j) 1998; 28 C.F.R. Pt. 35, App. A, § 35.104 (1998); 49 C.F.R. Pt. 37.3 (1998)). See also REPORT OF THE HOUSE COMMITTEE ON JUDICIARY, H.R. REP. NO. 101-485 III (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451, quoted in 527 U.S. at 500 ("The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."); REPORT OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR, H.R. REP. NO. 101-485 II (1990), reprinted in 1990 U.S.C.C.A.N. 304, 334, quoted in 527 U.S. at 500 ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.").

70. *Sutton*, 130 F.3d at 902.

71. *Id.* at 902-03.

72. This paradox also has been referred to as a "Catch-22." See Deborah Kaplan, *The Definition of Disability: Perspective of the Disability Community*, 3 J. HEALTH CARE L. & POL'Y 352, 361 (2000); Lawrence Postal, *To Be or Not to Be: The ADA Catch-22*, WASH. LAW., July/Aug. 2000, at 28.

73. Paradoxical results are inevitable under a statutory scheme in which only some individuals with disabilities are afforded statutory coverage, especially where, as under the ADA, only individuals with severe disabilities are covered. Thus, under the ADA, an employer lawfully may make the wholly irrational decision to refuse to hire an individual based on a minor or temporary impairment such as a cut finger or a common cold. Yet, an employer violates the ADA if it makes the arguably more rational decision to refuse to hire an individual with AIDS or cancer, assuming the individual is currently capable of performing the job.

One way of conceptualizing the issue is as follows. Imagine impairments on a continuum from the most minor to the most severe. The ADA divides the impairments into three parts along the continuum. On one end are the impairments that are too minor to be covered; on the other end are the impairments that are so severe that the individual is not able to perform the job. Only individuals who have impairments in the middle range—impairments more severe than minor ones, yet not severe enough to have the effect of preventing the individual from performing the job—are subject to the protections of the ADA. Although *Sutton* and its companion cases do not create this structure, by considering impairments in their mitigated state they have the effect of expanding the range of

their vision is correctable, it does not substantially limit their major life activity of seeing, and they are not covered under the ADA. Notwithstanding its recognition of the dilemma, the Tenth Circuit held that the sisters' amended complaint failed to allege sufficient facts to support the conclusion that their uncorrected vision constituted a physical impairment under the ADA. It explained, "[W]e refuse to construe the . . . [ADA] as a handout to those who are in fact capable of working in substantially similar jobs."⁷⁴

The Supreme Court affirmed by a vote of seven-to-two.⁷⁵ In *Sutton* and two companion cases,⁷⁶ the Court held that mitigating measures should be considered in determining whether an individual is disabled under the ADA.⁷⁷ Writing for the seven-member majority, Justice O'Connor opined that the approach of the EEOC Interpretive Guidance—that persons are to be evaluated in their hypothetical uncorrected state—was "an impermissible interpretation of the ADA."⁷⁸ She wrote 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."⁷⁹ She reasoned that because the ADA is phrased in the present verb tense, 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."⁸⁰

Using this interpretation, the Supreme Court stated that individuals with mitigating measures more serious than eyeglasses and contact lenses—for instance, prosthetic limbs, epilepsy and high blood pressure medicine—might still be covered under the ADA.⁸¹ In theory, a plaintiff would simply need to show that he or she is substantially limited in a major life activity.⁸² However, in reality much of the case law that has followed *Sutton* has

impairments considered too minor to be covered. The result is that there are two large ranges of uncovered conditions (those too minor and those too severe) flanking a narrow range of covered conditions that are just severe enough. Such a scheme seems at odds with the statutory intent of the ADA as a comprehensive remedy for the redress of disability-based discrimination.

74. *Sutton*, 130 F.3d at 906 (quoting *Hileman v. City of Dallas, Tex.*, 115 F.3d 352, 354 (5th Cir. 1997)).

75. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494-95 (1999).

76. On June 22, 1999, the Supreme Court also decided *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), and *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999).

77. See *Sutton*, 527 U.S. at 482; *Albertson's, Inc.*, 527 U.S. at 565; *Murphy*, 527 U.S. at 521.

78. *Sutton*, 527 U.S. at 482.

79. *Id.*

80. *Id.* at 482.

81. *Id.* at 488.

82. *Id.*

indicated that it is difficult, if not impossible, to prevail on a "substantially limited" claim after taking mitigating measures into account.⁸³

Further confusing the issues, Justice O'Connor refused to give deference to the EEOC Interpretive Guidance ignoring mitigating measures, while noting that the Tenth Circuit's opinion conflicted with other circuit courts.⁸⁴ She wrote that the EEOC approach would "require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition."⁸⁵ Justice O'Connor reasoned that under the EEOC guidelines, all diabetics would be disabled because "they would be substantially limited in one or more major life activities" if they did not properly supervise their blood sugar and insulin levels.⁸⁶ She explained that "the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and spirit of the ADA."⁸⁷

Justice O'Connor also stated that the EEOC approach "could . . . lead to the anomalous result that . . . courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures."⁸⁸ In addition, she said that the EEOC's approach was inconsistent with Congress's finding that 43 million Americans have physical or mental disabilities:

83. See *infra* Part III.A.4.

84. *Id.* at 477 (citing, e.g., *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-30 (7th Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-38 (3d Cir. 1997)).

85. *Sutton*, 527 U.S. at 483.

86. *Id.* at 483. This assertion is not true from a medical standpoint. Diabetes, like epilepsy, asthma, hypertension, and numerous other common disorders have a wide range of severity. A rule that considered medical impairments in their unmitigated state would not necessarily result in ADA coverage of all of the cases of a disorder. Justice O'Connor was concerned with potential overinclusiveness, but she did not address the issue of underinclusiveness.

87. *Id.* at 483-84.

88. *Sutton*, 527 U.S. at 484. The EEOC approach would permit the consideration of side effects from medications. For instance, the EEOC Interpretive Guidance intends that the determination of qualified individuals with a disability must be made on a "case by case" basis. See 29 C.F.R. Pt. 1630, App. (2000). Also, several of the circuit courts that, prior to *Sutton*, followed the majority approach of deferring to the EEOC Interpretive Guidance have also considered side effects from mitigating measures. See *Washington v. HCA Health Servs. of Tex.*, 152 F.3d 464, 471 (5th Cir. 1998) (only "serious impairments" like diabetes and epilepsy will be assessed in their unmitigated state; permanent corrections will be evaluated based on the mitigated condition); *Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (noting that mitigating measures themselves might cause a substantial limitation). After *Sutton*, EEOC issued new guidance about mitigating measures. 29 C.F.R. § 1630.2(h)-(j) (2000).

[T]he 43 million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not "disabled" within the meaning of the ADA

....

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.⁸⁹

Finally, Justice O'Connor stated that a corrective device alone, such as a prosthetic limb, does not eliminate a disability.⁹⁰ Individuals are still disabled, notwithstanding their corrective device, if those individuals are substantially limited in a major life activity. For instance, an individual who uses a wheelchair may be capable of functioning in society, but is still disabled based on a substantial limitation in the major life activity of walking or running.⁹¹ Alternatively, one who uses high-blood pressure medication may still be "regarded as" disabled by a qualified entity.⁹² "The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting."⁹³

In her concurring opinion, Justice Ginsburg found that the "strongest clues" to Congress's intended range of the ADA's domain is its finding that the 43 million disabled Americans are "a discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."⁹⁴ She found that Congress's declarations conflict with "the enormously embracing definition of disability petitioners urge."⁹⁵ Justice Ginsburg argued that by using the

89. *Sutton*, 527 U.S. at 486-87. Justice O'Connor alluded to a 1986 National Council on Disability Report estimating that there were over 160 million disabled under the "health conditions approach," which looks at all conditions that impair the health or normal functional abilities of an individual. She also cited a National Advisory Eye Council study claiming that over 100 million Americans have visual impairments. *Id.* at 485, 487 (citing NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 10 (1986); NATIONAL ADVISORY EYE COUNCIL, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, VISION RESEARCH: A NATIONAL PLAN: 1999-2003, at 7 (1998)).

90. *Id.* at 488.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 494 (quoting 42 U.S.C. § 12101(a)(7)).

95. *Id.*

phrase "discrete and insular minority," Congress intended to confine ADA coverage to a historically disadvantaged class.⁹⁶

In his dissent, Justice Stevens cited to agency and legislative evidence that Congress intended to consider disabilities in their unmitigated condition.⁹⁷ Reviewing the committee reports on the bill that became the ADA, he stated that it is "abundantly clear" that Congress designed the ADA to cover persons "who could perform all of their major life activities only with the help of ameliorative measures."⁹⁸ He also deferred to the EEOC's Interpretive Guidance: "[T]he uniform agency regulations merely confirm the message conveyed by the text of the Act—at least insofar as it applies to impairments . . . or any condition . . . that is substantially limiting without medication."⁹⁹

The dissent also reached a different conclusion as to the ADA's breadth—whether it reaches 43 or 100 million disabled individuals:

So long as an employer explicitly makes its decision based on an impairment that in some condition is substantially limiting, it matters not under . . . the Act whether that impairment is widely shared or so rare that it is seriously misunderstood. Either way, the individual has an impairment . . . and . . . should be protected against irrational stereotypes and unjustified disparate treatment on that basis.¹⁰⁰

Justice Stevens also reasoned that because only two percent of the population suffers from 20/200 vision or worse, like the sisters in *Sutton*, Congress "obviously intended to include" individuals with this impairment under the ADA.¹⁰¹ Finally, disagreeing with Justice O'Connor's opinion, he contended that failure to factor mitigating measures into the determination of disability would not cause courts and employers to speculate about hypothetical conditions: "Viewing a person in her 'unmitigated' state simply requires examining that individual's abilities in a different state, not the abilities of every person who shares a similar condition. It is just as easy individually to test petitioners' eyesight with their glasses on as with their glasses off."¹⁰²

96. *Id.*

97. *See id.* at 496, 499-503.

98. *Sutton*, 527 U.S. at 499.

99. *Id.* at 502.

100. *Id.* at 507.

101. *Id.* (citation omitted).

102. *Id.* at 509 (footnote omitted).

In his separate dissent, Justice Breyer argued in favor of a statutorily-defined approach to defining disability.¹⁰³ He wrote that the drawing of statutory lines

1) will include within the category of persons authorized to bring suit under the [ADA] some whom Congress may not have wanted to protect (those who wear ordinary eyeglasses), or 2) will exclude from the threshold category those whom Congress certainly did want to protect (those who successfully use corrective devices or medicines, such as hearing aids or prostheses or medicine for epilepsy).¹⁰⁴

Justice Breyer suggested that the EEOC, "through regulation, might draw finer definitional lines, excluding some of those who wear eyeglasses ... thereby cabining the overly broad extension of the statute the majority fears."¹⁰⁵

2. *Albertson's, Inc. v. Kirkingburg*

On the same day it decided *Sutton*, the Supreme Court also issued its opinion in *Albertson's, Inc. v. Kirkingburg*.¹⁰⁶ Hallie Kirkingburg, an experienced truck driver, suffered from amblyopia, an uncorrectable condition that left him with 20/200 vision in his left eye.¹⁰⁷ Pursuant to Department of Transportation (DOT) regulations, Kirkingburg underwent a vision test in August 1990 and was erroneously certified to drive by the examining physician.¹⁰⁸ In December 1991, Kirkingburg took time off from work to recover from an on-the-job injury. Prior to returning to work, in November 1992, Kirkingburg underwent another examination. This time the medical examiner informed Kirkingburg that, due to his impairment, he would need to obtain a DOT waiver in order to be legally qualified to drive.¹⁰⁹ Kirkingburg applied for a DOT waiver, but Albertson's fired him because he did not meet the basic DOT vision standard.¹¹⁰ In 1993, the DOT granted Kirkingburg a waiver, but Albertson's refused to re-hire him.¹¹¹

103. *Id.* at 513 (Breyer, J., dissenting).

104. *Id.* at 513.

105. *Id.* at 514.

106. 527 U.S. 555 (1999).

107. *Id.* at 558-59.

108. *Id.* at 559.

109. *Id.*

110. *Id.* at 560.

111. *Id.*

Kirkingburg sued Albertson's, claiming that his firing violated the ADA.¹¹² The district court granted Albertson's motion for summary judgment, holding that Kirkingburg was not otherwise qualified to perform the job of truck driving.¹¹³ The Ninth Circuit Court of Appeals reversed, concluding that Kirkingburg had presented "uncontroverted evidence" that his vision was extremely monocular, and that "the manner in which he sees differs significantly from the manner in which most people see."¹¹⁴ Addressing the condition of monocular vision on a per se classification, the Ninth Circuit held that the difference in Kirkingburg's vision from the general population was sufficient to establish a disability.¹¹⁵

In his majority opinion, Justice Souter held that "the Ninth Circuit was too quick to find a disability."¹¹⁶ In determining whether Kirkingburg's monocular vision was a disability, the Ninth Circuit failed to consider Kirkingburg's ability to compensate for his impairment.¹¹⁷ Referring to *Sutton*, Justice Souter held that mitigating measures must be taken into account when judging whether an individual possesses a disability: "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."¹¹⁸

Justice Souter held that the determination of disability under the ADA is not a per se, categorical test based on an impairment's name or characteristics.¹¹⁹ Rather, the impairment should be judged on a case-by-case basis of its effect on the individual's major life activity.¹²⁰ The majority held that the Ninth Circuit had failed to properly determine the degree of Kirkingburg's visual loss.¹²¹ It explained: "We 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."¹²²

112. *Id.*

113. *Id.* at 561.

114. *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1232 (9th Cir. 1998) (emphasis omitted).

115. *Id.*

116. *Albertson's*, 527 U.S. at 564.

117. *Id.* at 565.

118. *Id.* at 565-67.

119. *Id.* at 566.

120. *Id.*

121. *Id.* at 566-67.

122. *Id.* at 567.

3. Murphy v. United Parcel Service, Inc.

The third case in the trilogy was *Murphy v. United Parcel Service, Inc.*¹²³ UPS fired Vaughn Murphy, a mechanic whose job requirements included driving commercial vehicles, because his blood pressure exceeded DOT health certification requirements.¹²⁴ Murphy had suffered from high blood pressure since the age of ten.¹²⁵ For over twenty-two years, he had performed, without any trouble, mechanic positions not requiring DOT certification.¹²⁶ Murphy contended that his hypertension limited his ability "to run, eat, . . . breath[e], hear, and see."¹²⁷ Because of his hypertension, Murphy did not lift heavy objects, run to answer the phone, work above his head, or perform heavy work.¹²⁸ At the time UPS hired him, Murphy's blood pressure exceeded DOT requirements, but he was erroneously granted certification.¹²⁹ On October 5, 1994, after discovering the error, UPS fired Murphy.¹³⁰

The Tenth Circuit Court of Appeals affirmed a summary judgment in favor of UPS, holding that Murphy, in his medicated state, was neither substantially limited in a major life activity nor regarded as disabled.¹³¹ Citing to its decision in *Sutton*, the Tenth Circuit held that an individual claiming a disability under the ADA should be assessed with regard to mitigating or corrective measures.¹³² The Tenth Circuit noted that when Murphy was medicated, he "function[ed] normally doing everyday activity that an everyday person does."¹³³ However, Murphy complained that even when medicated enough to meet DOT blood pressure standards he suffered from severe side effects including "stuttering, loss of memory, impotence, lack of sleep, and irritability."¹³⁴

Referring to its holding in *Sutton*, the Supreme Court held that the result of *Murphy* was "clear": when determining whether an individual is disabled, a court must consider any mitigating measures.¹³⁵ Despite the fact that

123. 527 U.S. 516 (1999).

124. *Id.* at 519-20.

125. *Id.* at 519.

126. *Id.* at 524.

127. *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872, 875 (D. Kan. 1996).

128. *Id.*

129. *Murphy*, 527 U.S. at 519-20.

130. *Id.* at 520.

131. *Murphy v. United Parcel Serv.*, No. 96-3380, 1998 WL 105933, at *1 (10th Cir. Mar. 11, 1998).

132. *Id.* at *2.

133. *Id.*

134. *Murphy*, 946 F. Supp. at 976.

135. *Murphy*, 527 U.S. at 521.

Murphy's hypertension medicine did not completely control his condition, and imposed additional negative side effects, the Supreme Court held that Murphy's high blood pressure did not substantially limit him from any major life activity.¹³⁶ Thus, Murphy was not disabled under the ADA.

In his dissent, Justice Stevens stated that Murphy's unmedicated hypertension substantially limited several major life activities.¹³⁷ Justice Stevens emphasized that without medication, Murphy "would likely be hospitalized."¹³⁸ He concluded that "unlike *Sutton*, this scarcely requires us to speculate whether Congress intended the Act to cover individuals with this impairment. Severe hypertension, in my view, easily falls within the ADA's nucleus of covered impairments."¹³⁹

4. Lower Court Decisions Following Sutton

In the wake of *Sutton* and its companion cases, several lower courts have relied on the effects of mitigating measures to hold that plaintiffs failed to satisfy the ADA's definition of disability. For example, in *Spades v. City of Walnut Ridge*,¹⁴⁰ the Eighth Circuit held that because counseling and medication controlled a police officer's depression, his suicidal tendencies were not covered under the ADA. Another court held that a plaintiff who failed to take medication necessary to mitigate an impairment was *not* covered where the condition could be mitigated by medication.¹⁴¹ Similarly, in *Todd v. Academy Corp.*,¹⁴² a federal district court in Texas held that

136. *Id.*

137. *Id.* at 525.

138. *Id.*

139. *Id.*

140. 186 F.3d 897, 900 (8th Cir. 1999).

141. *Tangires v. Johns Hopkins Hosp.*, 79 F. Supp. 2d 587, 596 (D. Md. 2000) (holding that plaintiff who failed to take medication necessary to mitigate an impairment was not covered).

142. 57 F. Supp. 2d 448, 454 (S.D. Tex. 1999). *See* *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 351 (4th Cir. 2001) (holding that mild epilepsy, largely controlled by medication, not covered); *Hein v. All Am. Plywood Co.*, 232 F.3d 482, 487 (6th Cir. 2000) (holding that hypertension treated with medication not covered); *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 960 (8th Cir. 2000) (holding that heart condition treated with medication not covered); *Ivy v. Jones*, 192 F.3d 514, 516 (5th Cir. 1999) (holding that hearing impairment treated with hearing aid not covered); *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999) (holding that asthma treated with medication not covered); *Kramer v. Hickey-Freeman, Inc.*, 142 F. Supp. 2d 555, 559 (S.D.N.Y. 2001) (holding that bipolar disorder treated with medication not covered); *Horwitz v. L. & G. Stickley, Inc.*, 122 F. Supp. 2d 350, 355 (N.D.N.Y. 2000) (same); *Popko v. Pa. State Univ.*, 84 F. Supp. 2d 589, 593 (M.D. Pa. 2000) (holding that successfully treated idiopathic epilepsy not covered); *Lawson v. CSX Transp., Inc.*, 101 F. Supp. 2d 1089, 1106 (S.D. Ind. 1999) (holding that treated diabetes not covered). *But see* *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 439 (7th Cir. 2000) (holding that cane used by employee with neuropathy did not 'automatically' mitigate condition); *Otting v. J.C. Penney Co.*, 223 F.3d 704 (8th Cir. 2000) (holding that epilepsy which remained severe and uncontrolled even when treated with medication was a

epilepsy, when treated with medication, is not a disability under the ADA. The court strictly followed the mitigating measures language from *Sutton*, even though the plaintiff, when under medication, suffered from weekly seizures lasting between five and fifteen seconds.¹⁴³ The court said that the danger this plaintiff posed was "light" because of a phenomenon called the "aura effect," where the employee was aware of the seizure before it occurred and could remove himself from any dangerous employment situation.¹⁴⁴

Following the reasoning of *Kirkingburg*, another court held that mitigating measures include "physiological" measures.¹⁴⁵ In *Ditullio v. Village of Massena*,¹⁴⁶ a federal district court in New York held that a police officer was not disabled under the ADA, even though he was nearly blind in one eye. The court held that because of his excellent vision in his other eye, the officer was not precluded from the major life activity of seeing.¹⁴⁷ Astonishingly, the court held that the officer was not substantially limited in any major life activity, despite the fact that he had a twenty-five percent loss of his overall visual system, a fourteen percent loss of use of his entire body, cloudy vision, and problems with depth perception and light sensitivity.¹⁴⁸ The *Ditullio* court quoted from *Kirkingburg*: "[M]itigating measures must be taken into account in judging whether an individual possessed a disability. 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."¹⁴⁹

Not surprisingly, the aftermath of *Sutton* has been that numerous courts have held a wide range of conditions to be mitigated by a wide range of measures. These measures include hearing aids,¹⁵⁰ inhalers,¹⁵¹ and various medications.¹⁵² The mitigating measures themselves, however, may be the cause of a disability,¹⁵³ such as where medications have disabling side effects¹⁵⁴ or medical appliances limit mobility.¹⁵⁵

covered disability).

143. *Todd*, 57 F. Supp. 2d at 453-54.

144. *Id.* at 453.

145. *Ditullio v. Village of Massena*, 81 F. Supp. 2d 397, 406 (N.D.N.Y. 2000).

146. *Id.* at 407.

147. *Id.* at 406.

148. *Id.* at 403, 407.

149. *Id.* at 406 (quoting *Abertson's v. Kirkingburg*, 527 U.S. 555, 565-66 (1999)).

150. *Ivy v. Jones*, 192 F.3d 514, 516 (5th Cir. 1999).

151. *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999).

152. See cases cited *supra* note 142.

153. See 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).

154. See, e.g., *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 309 (3d Cir. 1999) (lithium taken

5. *Putting Sutton in Perspective*

The Court's decision in *Sutton* has been severely criticized. According to Senator Tom Harkin, chief sponsor of the ADA, "[E]mployers want to have it both ways. They want to argue that a person is too disabled not to do the job, but not disabled enough to be protected by the ADA."¹⁵⁶ Senator Harkin went on to say that *Sutton* and its companion cases

undermined one of the most basic principles of the ADA The definition [of disability] under the statute is intended to provide a broad range of people with disabilities protection against discrimination. These three cases erode that intent and jeopardize basic anti-discrimination protections for millions of Americans.¹⁵⁷

In addition, according to Chai Feldblum, Georgetown University law professor and one of the ADA's drafters, the three cases "illustrated the absurdity and illogic of the situation. After this, the only people who we know have a disability are those who are blind, deaf and in a wheelchair, and those who have HIV."¹⁵⁸

The amicus briefs filed in *Sutton* shed light on the consequences of the case. Several of the amicus briefs requested bright-line guidance for the determination of a disability. For example, the brief of AIDS Action¹⁵⁹ pointed out that under the Rehabilitation Act's guidelines, insulin-controlled diabetes—as well as medicated epilepsy and seizure disorders—were covered as disabilities. The guidelines expressly state that federal nondiscrimination law coverage extends beyond "traditional disabilities" and

for mental impairment caused nausea and cognitive deficits); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1236 (9th Cir. 1999) (medications taken for mental disorder caused impotence among other medical problems).

155. See *Belk v. Southwestern Bell Tel. Co.*, 194 F.3d 946, 950 (8th Cir. 1999) (leg brace used because of polio limited individual's range of motion).

156. Press Release, Tom Harkin, Supreme Court Rulings on ADA Cases (June 22, 1999) (on file with the Drake Law Review), quoted in Stacie E. Barhorst, *What Does Disability Mean: The Americans with Disabilities Act of 1990 in the Aftermath of Sutton*, Murphy and Albertsons, 48 DRAKE L. REV. 137, 170 (1999) [hereinafter *Harkin Press Release*]. Senator Harkin issued this press release in response to the Supreme Court's rulings in *Sutton* and its companion cases. Barhorst, *supra*, at 170. Employers could argue that individuals with disabilities want to have it both ways—to be considered severely impaired and therefore covered by the ADA, but not so impaired that they cannot perform the job with or without reasonable accommodation. The latter scenario, however, is precisely what was contemplated by the ADA.

157. *Harkin Press Release*, *supra* note 156, at 169-70.

158. Barhorst, *supra* note 156, at 170 (quoting David G. Savage, *ADA Umbrella Starting to Close*, A.B.A.J., Aug. 1999, at 44).

159. Brief of Amici Curiae AIDS Action et al. in Support of Petitioners, *Sutton v. United Air Lines, Inc.*, 527 U.S. 516 (1999) (Nos. 97-1943, 97-1992), 1999 WL 88763, at *4.

includes many diseases that are correctable with mitigating measures, "including hearing impairments, epilepsy, multiple sclerosis, cancer, [and] heart disease."¹⁶⁰ Consequently, if the ADA was based on the policies, goals, and history of the Rehabilitation Act,¹⁶¹ Congress must have intended to incorporate a similar interpretation into the ADA.

In support of United Air Lines, the Society for Human Resource Management (SHRM) amicus brief¹⁶² asserted that human resource departments lack the medical expertise to foresee how physical and mental conditions will affect employees in the workplace. The SHRM called for a "clear, simple rule" that would not lead to "conflicting court rulings" and "hopeless confusion" on the part of employers and employees.¹⁶³ Although the SHRM received the result it was asking for—permission to judge potential employees in their unmitigated state—it is not clear that its members have been saved from the "hopeless confusion" decried in its brief.

The brief of the AFL-CIO¹⁶⁴ requested consideration of the "biological level of the state of the individual's physiological systems." The AFL-CIO argued that the level of risk posed by Sutton's disability depended on "medical and aviation expertise, data and careful analysis."¹⁶⁵ The AFL-CIO argued that, according to established medical guidelines, if a disorder materially diminishes an individual's body system, "then it should be considered an 'impairment,' regardless of whether the individual compensates for this worsening or diminishment by corrective measures."¹⁶⁶

The facts in *Sutton* may have influenced the outcome: the Court might not have wanted to tell commercial airlines that they could not establish rigorous vision standards for their pilots. Such a concern would be consistent with numerous lower court decisions, but extremely troubling nonetheless. At this stage of the litigation in *Sutton*, the issue was simply whether the plaintiffs were covered by the ADA—not whether United Air Lines had a legitimate safety reason for excluding them from the positions they sought. Rather than

160. *Id.* at *6.

161. See 42 U.S.C. § 12117(b) (2000) (ordering the development of procedures governing actions based on both the ADA and Rehabilitation Act to both avoid duplication of effort and to prevent imposition of inconsistent or conflicting standards); 29 C.F.R. § 1630.1(c)(1) (2000) (stating that the ADA does not impose lesser standards than those found in the Rehabilitation Act).

162. Brief of Amici Curiae Society for Human Resource Management in Support of Respondents, *Sutton v. United Air Lines, Inc.*, 527 U.S. 516 (1999) (Nos. 97-1943, 97-1992), 1999 WL 160319, at *1-2.

163. *Id.*

164. Brief of Amici Curiae the American Federation of Labor and Congress of Industrial Organizations in Support of the Petitioners, *Sutton*, 527 U.S. 516 (No. 97-1943), 1999 WL 86514, at *2.

165. *Id.* at *11.

166. *Id.* at *14 (quoting *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 898-99 (10th Cir. 1997)).

allowing cases such as *Sutton* to be decided on the merits, numerous courts of appeals have affirmed dismissals or summary judgments for the defendants on the issue of statutory coverage.¹⁶⁷ Many of these cases should be decided on the merits of whether the individual can perform the essential requirements of the job safely and efficiently.¹⁶⁸

The definition of "individual with disabilities" under the ADA is a political question of how many individuals should be entitled to protection against discrimination. The ADA's coverage of only the "protected class" of individuals with severe disabilities is defensible, especially from a political standpoint, based on a desire to eliminate discrimination against individuals historically subject to discrimination. Nevertheless, public policy strongly suggests that as a matter of legislative and judicial construction, all reasonable doubts should be resolved in favor of coverage. This approach simply permits plaintiffs the opportunity to prove that they were discriminated against because of their disability. From an employer's standpoint, there may well be additional costs in defending the merits of employment decisions, but the basic policies of employers need not be changed. Based on the ADA, the overwhelming majority of employers have adopted policies of nondiscrimination on the basis of disability in general—not nondiscrimination on the basis of disability against individuals with disabilities who can survive a motion to dismiss based on lack of coverage under the ADA. Thus, *Sutton* granted employers a litigation advantage, but created a greater loss to plaintiffs and the national policy of nondiscrimination on the basis of disability embodied in the ADA.

167. See *Sotolongo v. New York City Transit Auth.*, 1073, 2000 WL 777958, at *3 (2d Cir. 2000) (unpublished table decision); *Bartell v. Lohiser*, 215 F.3d 550, 553 (6th Cir. 2000); *Murphy v. Village of Hoffman Estates*, 234 F.3d 1273, 2000 WL 1093007, at *5 (7th Cir. 2000) (unpublished table decision); *Moore v. J.B. Hunt Transp., Inc.*, 221 F.3d 944, 947 (7th Cir. 2000); *Wilson v. Bernalillo*, 211 F.3d 1279, 2000 WL 485129, at *5 (10th Cir. 2000) (unpublished table decision).

Undoubtedly, this is one reason why plaintiffs lose over ninety percent of ADA cases in the federal courts. See American Bar Association Commission on Mental and Physical Disability, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL AND PHYSICAL DISABILITY L. REP. 403, 403 (1998); Linda Hamilton Krieger, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 8 (2000) (citing Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999) (citing Ohio State University studies showing that plaintiffs lose ninety-four percent of the time in district court, and that nearly half of the infrequent plaintiffs' victories are reversed on appeal)).

168. For a discussion of proposed revisions to the "direct threat" language of the ADA, see *infra* text accompanying note 161.

B. Other Definitional Issues

The definition of "individual with disabilities" has troubled courts in areas other than the issue of mitigating measures. For example, the courts are divided on the issue of whether an employee who exhibits the minor symptoms of a serious illness is covered under the ADA. The Ninth Circuit held that an employee who took a four-month leave of absence to recover from a psychological impairment caused by bladder cancer surgery did not have a covered disability because the psychological impairment was only temporary.¹⁶⁹ Similarly, the Eleventh Circuit held that the side effects of chemotherapy for lymphoma, including "weakness, dizziness, swelling of the ankles and hands, numbness of the hands, the loss of body hair, and vomiting," were not disabling conditions.¹⁷⁰ In a much more well reasoned opinion, however, the Seventh Circuit held that the intermittent pressure ulcers of a paraplegic employee, which caused her to stay at home for several weeks, were part of her overall disability, and therefore subject to ADA protection.¹⁷¹

The courts also have struggled to decide whether an individual who has recovered from a serious health condition to the point of being able to resume work without restrictions is nonetheless covered under the statute as having a disability. The First Circuit held that a scrap metal salesperson, who had suffered a heart attack and spent seven days in a hospital undergoing angioplasty, might be covered under the ADA despite his subsequent full recovery.¹⁷² In reversing the district court, the First Circuit cited with approval to the EEOC's compliance manual, which provides that an impairment does not have to be permanent to be a disability under the ADA.¹⁷³ According to the court, severe conditions that last more than a few

169. *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996). *See also* *McDonald v. Commonwealth of Pa.*, 62 F.3d 92, 97 (3d Cir. 1995) (holding that employee who requested two months of unpaid leave following abdominal surgery was not covered because disability was of limited duration).

170. *Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 909, 915 (11th Cir. 1996). *See also* *Cook v. Robert G. Waters, Inc.*, 980 F. Supp. 1463, 1469 (M.D. Fla. 1997) (holding that headaches caused by brain tumor not a disability).

171. *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995). *See also* *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996) (holding that intermittent bladder infections were part of employee's overall bladder condition and that there was an issue of fact as to whether that condition constituted a disability).

172. *Katz v. City Metal Co.*, 87 F.3d 26, 32 (1st Cir. 1996). *Contra* *Gerdes v. Swift-Eckrich, Inc.*, 125 F.3d 634, 638 (8th Cir. 1997) (holding that employee who had undergone a coronary angioplasty and continued to have limitations on his ability to work was not disabled).

173. *Katz*, 87 F.3d at 31.

months and are potentially long term may constitute disabilities.¹⁷⁴ In a questionable, contrary decision, the Fifth Circuit held that a woman with breast cancer who underwent a lumpectomy and radiation treatment was not disabled because she was able to return to work and perform her essential duties.¹⁷⁵

The issue of when the ability to work establishes that the plaintiff is an individual with a disability has proven to be a particularly difficult task for the lower courts. According to the EEOC, the "inability to perform a single, particular job does not constitute a substantial limitation [of] the major life activity of 'working.'"¹⁷⁶ Whether an individual is substantially limited in the major life activity of working depends on the "geographical area to which the individual has reasonable access," the number and types of similar jobs from which the individual is disqualified because of the impairment, and the number and types of other jobs from which the individual is disqualified from employment because of the impairment.¹⁷⁷ An individual's inability to perform his or her former job does not necessarily mean that the individual is substantially limited in the major life activity of working.¹⁷⁸ The courts have held that an individual assessment is needed,¹⁷⁹ which often requires the court to compare the plaintiff's ability to work "to the average person having comparable training, skills, and abilities."¹⁸⁰

Finally, in *Toyota Motor Mfg., Inc. v. Williams*,¹⁸¹ an assembly line worker who developed carpal tunnel syndrome from the use of pneumatic tools brought an action under the ADA alleging that her inability to perform manual tasks was a disability for which her employer failed to provide reasonable accommodations. The Supreme Court unanimously held that the plaintiff did not have a disability under the ADA.¹⁸² Justice O'Connor, author of the majority opinion in *Sutton*, used similar reasoning in *Williams*.

174. *Id.* at 32.

175. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996). *Accord* *Madjlessi v. Macy's W., Inc.*, 993 F. Supp. 736, 741 (N.D. Cal. 1997) (breast cancer); *Cannizzaro v. Neiman Marcus, Inc.*, 979 F. Supp. 465, 476 (N.D. Tex. 1997) (brain surgery). *See generally* Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 CAL. L. REV. 399 (2001) (discussing treatment of cancer survivors under the ADA).

176. 29 C.F.R. § 1630.2(j)(3)(i) (2001). *See* *Sorensen v. Univ. of Utah Hosp.*, 194 F.3d 1084, 1088 (10th Cir. 1999).

177. 29 C.F.R. § 1630.2(j)(3)(ii) (2001). *See* *Swain v. Hillsborough County Sch. Bd.*, 146 F.3d 855, 857-58 (11th Cir. 1998).

178. *Boulos v. Roadway Express, Inc.*, 139 F.3d 1147, 1153 (7th Cir. 1998).

179. *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998).

180. *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 783 (3d Cir. 1998) (quoting 29 C.F.R. § 1630.2(j)(3)(i)).

181. 122 S. Ct. 681, 686 (2002).

182. *Id.* at 694.

When it enacted the ADA in 1990, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities." §12101(a)(1). If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher. . . .

We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term.¹⁸³

IV. A PROPOSAL TO AMEND THE AMERICANS WITH DISABILITIES ACT

A. Congressional Options

Any proposal for congressional action to amend the definition of disability under the ADA should be evaluated based on the following criteria: (1) whether it would restore the appropriate level of coverage under the ADA; (2) whether it would provide greater clarity on the standards for coverage; and (3) whether it would be politically feasible.

These criteria may be applied to the three main ways in which Congress could attempt to resolve the problems created by the Supreme Court decision in *Sutton*. First, Congress could legislatively overrule *Sutton* and declare that in determining ADA coverage, courts must consider individuals' impairments in their unmitigated state.¹⁸⁴ This option has the advantage of simplicity and narrowness, and it is clear that the sole purpose of the amendment would be to overrule the Supreme Court's erroneous interpretation of congressional intent.¹⁸⁵ On the other hand, such an amendment would not provide any degree of clarity to employers,

183. *Id.* at 691.

184. In *Dahill v. Police Dep't of Boston*, 748 N.E.2d 956, 963 (Mass. 2001), the court held that under Massachusetts law, disabilities should be considered in their unmitigated condition. The court declined to adopt the approach of *Sutton*. *Id.* at 964.

185. Responding to a series of unpopular decisions during the Supreme Court's 1989 term, Congress enacted the Civil Rights Act of 1991. This legislation amended the ADA by, *inter alia*, providing punitive and compensatory damages in cases of intentional discrimination based on an individual's disability and allowing for a jury trial. See Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 307-08 (1992).

employees, or the lower courts in resolving the numerous other problems in defining who is covered under the ADA.

Second, Congress could amend the ADA to prohibit all discrimination in employment based on disability.¹⁸⁶ This proposal has the advantage of making disability discrimination parallel to the categories of discrimination prohibited by Title VII. It also has the advantage of simplicity. Unfortunately it would require a major rewrite of the ADA and would extend the coverage well beyond the Act's original intended definition of individuals with substantially limiting disabilities. Consequently, this approach is politically infeasible.

Third, Congress could revise the definition of an "individual with disabilities" to add greater clarity, consistency, and predictability without changing the basic approach of limiting coverage to those individuals with substantially limiting disabilities. Congress could amend the ADA to authorize the EEOC, after notice and comment rulemaking, to establish statutory presumptions of coverage. The proposed amendment, its rationale, burden of proof, and analogs in existing laws are discussed in detail below. The advantages of the proposal include the following: (1) it is consistent with the congressional intent of the ADA by covering the class of individuals with substantially limiting disabilities who historically have experienced, and often continue to experience, disability discrimination;¹⁸⁷ (2) it is consistent with the approach already used in several federal and state disability laws; (3) it provides clarity and certainty for a wide range of issues related to ADA coverage; and (4) it is politically feasible because it advances the interests of both employers and employees without changing the basic scheme of the ADA.

B. The Proposed Amendment and Its Rationale

Congress should authorize and direct the EEOC, after notice and comment rulemaking, to publish medical standards for determining disability for the most common physical and mental impairments. An individual whose

186. CAL. GOV'T CODE § 12926.1 (West Supp. 2002) adopts another approach to the definitional issue in at least the following two respects. First, it provides that disabilities should be considered in their unmitigated states. *Id.* § 12926.1(c). Second, unlike the ADA, which requires that a disability constitute a "substantial limitation" of a major life activity, the California law merely requires that the disability constitutes a "limitation" of a major life activity. *Id.* § 12926.1(d).

187. For commentary generally supporting the view of limited coverage of the ADA, see Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001); Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27 (2000).

medical condition met the published criteria would be presumptively covered under the ADA. Failure to meet the criteria would mean that the individual was presumptively *not* covered under the ADA. For many common impairments with a range of severity, the published standards list would include the medical criteria for determining when the condition was severe enough to be covered under the ADA. Although the rulemaking contemplated by the amendment would be new, the use of medical criteria for determining severity of medical conditions and impairments would not. Medical practice guidelines and standard diagnostic and treatment protocols routinely designate the medical criteria for determining when a condition is mild, moderate, or severe. These determinations are crucial in the clinical setting to indicate the appropriate course of treatment. This proposed amendment would merely apply established medical criteria to simplify and clarify the legal issue of coverage under the ADA. In its rulemaking proceedings, the EEOC should consult with the American Medical Association, the various medical specialty colleges, the Institute of Medicine of the National Academy of Sciences, and other appropriate organizations to develop consensus views on the medical criteria for distinguishing a minor impairment from a severe impairment.

Although the EEOC would publish criteria for the most common physical and mental impairments, the regulation's list of covered conditions would be nonexclusive. It is impossible to include every medical condition. Furthermore, the effect of a particular impairment on any particular individual cannot be calculated in the abstract, and it is often necessary to use an individualized determination of the degree of impairment. In addition, two or more moderate medical conditions may combine to create a substantially limiting condition. Thus, the following general rules should apply: (1) conditions not included in the regulation would carry no presumption regarding coverage or noncoverage, and the individual asserting discrimination under the ADA would have the burden of proving by a preponderance of the evidence that his or her impairment constituted a substantial limitation of a major life activity; (2) individuals whose condition fails to satisfy the published criteria can still establish coverage under the ADA by rebutting the presumption of noncoverage with a showing by clear and convincing evidence that their impairment constitutes a substantial limitation of a major life activity; and (3) employers may rebut the presumption of coverage of an individual whose medical condition satisfies the published criteria, by proving by clear and convincing evidence that the impairment does not constitute a substantial limitation of a major life

activity. The heightened burden of proof by clear and convincing evidence¹⁸⁸ required to rebut either presumption is necessary to ensure that challenges to the presumptions are infrequently made and infrequently successful, so that the consistency of the rules is not undermined by routine judicial challenges.

For impairments not covered by the regulation, as well as for individuals and employers contesting the presumption, the key to coverage would still depend on whether the impairment constituted a substantial limitation of a major life activity. This 'substantial limitation of a major life activity' language has proven difficult to apply. Therefore, Congress should also direct the EEOC to engage in additional rulemaking to clarify this term through vocational guidelines. The guidelines, developed with appropriate consultation with medical and rehabilitation specialists, would provide a list for each major life activity¹⁸⁹ detailing when an impairment is substantially limiting. For example, the list might include inability to walk up one flight of stairs without serious shortness of breath, inability to stand or walk without assistance, inability to read or eat or use the telephone without assistive devices.

The current regulation includes "working" as a major life activity.¹⁹⁰ If the reforms urged in the proposal are adopted, working should be removed from the list of major life activities for the following three reasons. First, it is unnecessary. Individuals are substantially limited in their ability to work because of the presence of a physical or mental impairment (or a record of such an impairment or being regarded as having such an impairment). These impairments, as well as their effects on life activities, will be set out in detail in the new regulations.¹⁹¹ Second, clarity is one of the primary goals of the amendments proposed in this Article. A regulation could never set forth all of the criteria under which certain impairments are substantially limiting on a class of jobs. Thus, gaps in the regulations would add to the uncertainty and cost of litigation. Third, new technology increasingly will enable individuals

188. The clear and convincing standard is a heightened evidentiary burden in which a petitioner must show that "'but for constitutional error, no reasonable juror, would have found the petitioner' guilty." See *Schlup v. Delo*, 513 U.S. 298, 301 (1995) (quoting *Sawyer v. Whitely*, 505 U.S. 333, 336 (1992)).

189. The EEOC Interpretive Guidance defines "major life activities" as "those basic activities that the average person in the general population with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. The list is not exhaustive." 29 C.F.R. § Pt. 1630, App. (2000).

190. *Id.*

191. In *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), the Supreme Court limited the usefulness of "working" as an independent major life activity by requiring proof that the individual's impairment restricted the performance of daily activities "central to the most people's . . . lives." *Id.* at 693.

with very debilitating impairments to work productively.¹⁹² Thus, the coverage determinations should focus on the effect of the impairment on the life functions of the individuals and not on their ability to work.

The new rules regarding coverage of physical and mental impairments would not change the ADA's general framework for statutory coverage of (1) individuals with a record of an impairment,¹⁹³ (2) those regarded as having an impairment,¹⁹⁴ and (3) those who associate with individuals with an impairment.¹⁹⁵ The regulation, however, would offer guidance as to whether the impairment at issue satisfied the statutory criteria for disability.¹⁹⁶

The proposed amendment to the ADA would still cover individuals with "stigmatic" conditions. Thus, for example, an individual who was disfigured because of burns, but who was not otherwise limited in any major life activity, would remain covered under the ADA.¹⁹⁷

A major effect of the proposed amendment would be to require more cases to proceed to a factual determination of whether the individual, with or without reasonable accommodation, is able to perform the essential functions of the job safely and effectively. This next step raises the issues of "qualification standards" and the "direct threat" defense, additional areas of controversy under the ADA.

The ADA prohibits discrimination against a "qualified individual with a disability."¹⁹⁸ Thus, it is essential to determine what it means to be "qualified." According to section 101(8), the term means "an individual with

192. The theoretical physicist Stephen Hawking is profoundly impaired, yet able to work because of technological aids. The coverage under the ADA of an individual with comparable impairments should be based on the nature of the impairment and the effect of the impairment rather than on whether the impairment is a substantial limitation on the ability to work.

193. 42 U.S.C. § 12102(2)(B) (1994).

194. *Id.* § 12102(2)(C).

195. *Id.* § 12112(b)(4).

196. Establishing new lists for statutory coverage under the ADA raises the question as to how these lists relate to other criteria for "disability" already established under workers' compensation or Social Security law. In *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999), the Supreme Court held that claims for Social Security Disability Insurance (SSDI) benefits and ADA damages do not inherently conflict because "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side." *Id.* at 802-03. Writing for a unanimous Court, Justice Breyer held that the legal system should not impose a "negative presumption" against ADA and SSDI claims. *Id.* at 802. "[W]e would not apply a special legal presumption permitting someone who has applied for, or received, SSDI benefits to bring an ADA suit only in 'some limited and highly unusual set of circumstances.'" *Id.* at 805 (quoting *Cleveland v. Policy Mgmt. Sys. Corp.*, 120 F.3d 513, 517 (5th Cir. 1997)). Accordingly, the proposed new amendments to the ADA would be separate from, and would not affect, claims for SSDI or workers' compensation benefits.

197. See Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,742 (July 26, 1991); 29 C.F.R. § 1630.2(h)(1) (2001).

198. 42 U.S.C. § 12112(a) (1994).

a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”¹⁹⁹ Section 103(b) provides that “[t]he term ‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”²⁰⁰ Although this language is narrow and does not include harm to the individual employee with a disability, the interpretive regulation of the EEOC is broader.²⁰¹ It defines “direct threat” to include the affected individual, requires these determinations to be made on the basis of reasonable medical judgment, and lists four factors to consider.²⁰² The factors are “[t]he duration of the risk,” “[t]he nature and severity of the potential harm,” “[t]he likelihood that harm will occur,” and “[t]he imminence of the potential harm.”²⁰³

EEOC’s interpretation has received mixed reviews in the courts. Although the Eleventh Circuit agreed with the EEOC that the direct threat defense applies where only the employee is endangered,²⁰⁴ the case with the most detailed discussion of the issue, decided by the Ninth Circuit, disagreed. In *Echazabal v. Chevron USA, Inc.*,²⁰⁵ the employer denied an oil refinery job to the plaintiff, who was diagnosed with asymptomatic, chronic active hepatitis C, because the company believed that exposure to solvents and chemicals at the refinery would damage his liver. In reversing the district court’s granting of summary judgment for the defendant, the Ninth Circuit held that the direct threat defense was not available to the employer because only the plaintiff was at risk from exposure.²⁰⁶

The court relied on the express language of the ADA and its legislative history’s consistent reference to the threat to “others” to reject the notion that the language of section 103(a) contained a drafting error.²⁰⁷ The court further

199. *Id.* § 12111(8).

200. *Id.* § 12113(b).

201. See 29 C.F.R. § 1630.2(r) (2000).

202. *Id.* The EEOC interpretation seems to have corrected a congressional oversight in drafting the ADA, because under the ADA even a reckless or suicidal individual could not be denied employment as long as the individual was able to perform the essential functions of the job. Although there is plausible argument that the EEOC interpretation represents good policy, it is questionable whether the EEOC has the authority to adopt an interpretation that differs so clearly from the language of the ADA, especially in light of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

203. See 29 C.F.R. § 1630.2(r) (2000).

204. See *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996). See also *LaChance v. Duffy’s Draft House, Inc.*, 146 F.3d 832, 835-36 (11th Cir. 1998) (dictum); *EEOC v. Amego, Inc.*, 110 F.3d 135, 146 (1st Cir. 1997) (dictum); *Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (dictum).

205. 226 F.3d 1063, 1065 (9th Cir. 2000), cert. granted, 70 U.S.L.W. 3314 (U.S. Oct. 29, 2001).

206. *Id.* at 1065.

207. *Id.* at 1066-67.

reasoned that Congress's decision not to include threats to one's own safety in the direct threat defense is consistent with the ADA's prohibition against discrimination based on paternalism.²⁰⁸ In addition, the court stated that its interpretation was in accord with the Supreme Court's Title VII cases prohibiting paternalistic employment policies.²⁰⁹ Finally, the court rejected the employer's argument that, notwithstanding the direct threat defense, it could refuse to hire the plaintiff because he was not qualified for the job in that working without posing a threat to one's own health or safety is an "essential function" of the job.²¹⁰

The court appears to have reached the right result using the wrong reasoning. The court observed, "There is no evidence that the health of [the plaintiff's] liver ever affected his ability to do the job."²¹¹ Therefore, even if the defendant could assert a direct threat defense, it could not prove it. The Supreme Court has granted *certiorari* in the case and will decide it during its 2001-2002 term.²¹²

The direct threat defense, regardless of its scope, should apply only when the risk is immediate and severe. The legislative history of the ADA and the EEOC interpretation make it clear that a "direct threat" is difficult to prove. Patronizing assumptions, generalized fears, and speculative or remote risks are insufficient. The cases upholding a direct threat defense have involved public safety positions in fields such as transportation and health care, as well as positions that placed the individual workers in danger.²¹³

An example of a case in which the court rejected a "patronizing assumption" as a direct threat is *Rizzo v. Children's World Learning Centers, Inc.*²¹⁴ Following a parent's complaint that a teacher's aide's hearing impairment might place the children at risk, the school prohibited the aide from driving students in a van.²¹⁵ The Fifth Circuit, in an en banc opinion, held that the employer failed to prove that the employee was a direct threat to

208. *Id.* at 1068.

209. *Id.* (citing *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), and *Dothard v. Rawlinson*, 433 U.S. 321 (1977)).

210. *Id.* at 1070.

211. *Id.* at 1072.

212. *Chevron USA, Inc. v. Echazabal*, 122 S. Ct. 456 (2001).

213. *See, e.g., Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396, 399 (7th Cir. 2000) (affirming summary judgment for employer of heavy machinery operator with sleep apnea); *Kapche v. City of San Antonio*, 176 F.3d 840, 847 (5th Cir. 1999) (holding issue of material fact whether police officer candidate with insulin-dependent diabetes posed direct threat when driving a vehicle); *Estate of Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 407 (6th Cir. 1998) (holding HIV-infected health care worker posed a direct threat).

214. 213 F.3d 209 (5th Cir. 2000) (en banc).

215. *Id.* at 211.

the children.²¹⁶ The court observed that the employee had an "unblemished history" of driving and supervising the children.²¹⁷

The direct threat defense would appear to be a narrower and more demanding subset of the broader defense that the individual lacked the necessary qualifications for the position. In *EEOC v. Exxon Corp.*,²¹⁸ however, the Fifth Circuit adopted a contrary interpretation. The court relied on section 103(a) of the ADA, which provides that qualification standards that "screen out or tend to screen out or otherwise deny a job or a benefit to an individual" must be job-related and consistent with business necessity.²¹⁹ According to the court, "[A]n employer need not proceed under the direct threat provision . . . [in safety-based qualification cases] but rather may defend the standard as a business necessity."²²⁰ The Fifth Circuit explained that the direct threat language only applies to individual risks and not to across-the-board standards.²²¹ This result is questionable, in that a standard, if met, may legally disqualify a group of employees as a business necessity, but may not legally disqualify a single employee as a direct threat. Moreover, the court's reliance on the general language of section 103(a) has the effect of nullifying the specific, direct threat provision, section 103(b).

C. The Use of Medical Criteria Under Other Statutory Schemes

Our proposed amendment envisions a regulatory scheme that departs from the current framework established under the Rehabilitation Act, the ADA, and state disability discrimination laws. Nevertheless, the general approach of using medical criteria to establish broad statutory presumptions is consistent with a large body of federal and state laws, including the Social Security Act and state workers' compensation laws.

1. Social Security Act

The Social Security Act of 1935²²² was one of the key pieces of legislation enacted during the New Deal. Its system of old age and survivors' benefits played a major role in reducing poverty among the nation's elderly

216. *Id.* at 213.

217. *Id.* at 213.

218. 203 F.3d 871 (5th Cir. 2000).

219. *Id.* at 873 (quoting 42 U.S.C. § 12113(a)).

220. *Id.* at 875.

221. *Id.* at 873.

222. 42 U.S.C. §§ 301-1397f (1994).

population.²²³ In 1956, Title XVI of the Social Security Act was added to provide income replacement for qualified workers who become permanently and totally disabled.²²⁴ Since its inception, the program has grown tremendously, and as of 2000, annually pays more than three billion dollars²²⁵ to about four million people disabled workers.²²⁶

The disability determination and appeals process is a massive bureaucracy. In fiscal year 1996, there were nearly two million claims filed,²²⁷ and over 540,000 of the denied claims went to a hearing before an administrative law judge.²²⁸ With such a huge number of cases to resolve, the Department of Health, Education, and Welfare (HEW), now the Department of Health and Human Services (HHS), promulgated a series of regulations to simplify and standardize the process.²²⁹ Two types of regulations are particularly relevant to this discussion.

An important part of determining whether a claimant is permanently and totally disabled is the medical question of the claimant's condition. In 1980, the Secretary of HHS first published a Listing of Impairments,²³⁰ which "describes, for each of the major body systems, impairments that are considered severe enough to prevent an adult from doing any gainful activity."²³¹ The Listing of Impairments is divided into musculoskeletal system, special senses and speech, respiratory system, cardiovascular system, digestive system, genito-urinary system, hemic and lymphatic system, skin, endocrine system, multiple body systems, neurological, mental disorders, neoplastic diseases and malignancies, and immune system.²³² The listings are regularly revised and updated.²³³

Other important regulations interpret the Social Security Act's provision to provide disability benefits only to individuals who are unable "to engage in any substantial gainful activity."²³⁴ Prior to 1978, the Secretary of HHS relied on vocational experts to establish the existence of suitable jobs in the national economy based on the claimant's abilities and limitations as

223. See MERTON C. BERNSTEIN & JOAN BRODSHAUG BERNSTEIN, *SOCIAL SECURITY: THE SYSTEM THAT WORKS* 156 (1988).

224. 42 U.S.C. §§ 401-433 (1994).

225. See *SOCIAL SECURITY: BASIC FACTS*, SSA Publication No. 05-10080, at 5 (Mar. 2000).

226. *Id.*

227. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CON., 1998 GREEN BOOK 48 (Comm. Print 1998).

228. *Id.*

229. See, e.g., 20 C.F.R. Pt. 404(p), App. 1 (2000); 20 C.F.R. Pt. 404(p), App. 2 (2000).

230. 20 C.F.R. Pt. 404(p), App. 1 (2000).

231. 20 C.F.R. § 416.925(a) (2000).

232. 20 C.F.R. Pt. 404(p), App. 1 (2000).

233. *Id.*

234. 42 U.S.C. § 416(i)(1)(A) (1994).

adduced at the hearing. To improve both the uniformity and efficiency of the adjudications, the Secretary promulgated medical-vocational guidelines as part of the 1978 regulations.²³⁵ The regulations contain a detailed grid based on the claimant's age, education, and previous work experience to determine the individual's work capability.²³⁶ In general, older, less educated, and less skilled individuals are more likely to be considered permanently and totally disabled.²³⁷ In *Heckler v. Campbell*,²³⁸ the Supreme Court upheld the medical-vocational guidelines. According to the Court, "This type of general factual issue may be resolved as fairly through rulemaking as by introducing the testimony of vocational experts at each disability hearing."²³⁹

2. Workers' Compensation Laws

Although the workers' compensation law of each state is different, most state systems are similar in structure. They provide for medical expenses and a percentage of lost wages as compensation for workers whose injuries and illnesses occurred during the course and scope of their employment.²⁴⁰ Benefits are based on the nature and duration of the worker's incapacity and are classified as temporary partial, temporary total, permanent partial, and permanent total.²⁴¹ Death benefits also are provided to the heirs of workers who die from work-related injuries and illnesses.²⁴²

In all but a few jurisdictions, by statute, awards for permanent partial disability are based on "scheduled" benefits.²⁴³ Typically, the laws provide that after workers have reached their maximum medical improvement from an injury, the permanent effects of the impairment are based on a published table.²⁴⁴ Statutorily established benefits are awarded for the worker's loss of an arm, hand, thumb, first finger, second finger, third finger, fourth finger, leg, foot, great toe, other toes, one eye, hearing in one ear, and hearing in both ears.²⁴⁵ The purpose of these tables is to regularize and simplify awards

235. 20 C.F.R. § 404.1569 (2000).

236. 20 C.F.R. Pt. 404(p), App. 2 (2000).

237. *Id.*

238. 461 U.S. 458, 468 (1983).

239. *Id.* See also Rachel Schneider, *A Role for the Courts: Treating Physician Evidence in Social Security Determinations*, 3 U. CHI. L. SCH. ROUNDTABLE 391, 394-95 (1996) (noting that the Court found that medical-vocational guidelines protect against arbitrary decision making, and that determining claims on a case-by-case basis would overburden the courts with unnecessary litigation).

240. ARTHUR LARSON, *WORKERS' COMPENSATION LAW* § 1.10 (1984).

241. *Id.* § 80.03.

242. *Id.* § 1.10.

243. *Id.* § 52.

244. *Id.*

245. *Id.* § 52.10.

for each listed condition.²⁴⁶ These provisions have been upheld against a variety of legal challenges. For example, in *Gilleland v. Armstrong Rubber Co.*,²⁴⁷ the claimant asserted that the scheduled injury provisions of the Iowa Workers' Compensation Law violated the equal protection guarantees of the United States and Iowa Constitutions because nonscheduled permanent partial disabilities were compensated by the industrial disability method, which takes into account the loss of earning capacity. The Supreme Court of Iowa rejected the argument and upheld the statute.²⁴⁸ The court held that the law had a rational basis in that it "reduce[d] controversies through certainty of compensation."²⁴⁹

3. Other Federal and State Statutes

a. Black Lung Benefits Act

The Black Lung Benefits Act (BLBA)²⁵⁰ provides another example of Congress's use of medical criteria to establish presumptive categories. Congress enacted the law to compensate American coal miners who contracted pneumoconiosis arising out of their work in coal mines.²⁵¹ Under a section entitled "Claims for Benefits Filed on or Before December 31, 1973," the Act lists explicit medical criteria that create rebuttable or irrebutable presumptions that the miner's pneumoconiosis was employment-related or caused the death or disability.²⁵² For instance, if a miner who suffered from pneumoconiosis was employed for over ten years in a coal mine, the Act establishes a rebuttable presumption that the condition arose out of such employment.²⁵³ The courts have granted broad deference to BLBA enforcement, and it has withstood numerous constitutional attacks.²⁵⁴ In *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*,²⁵⁵ the Supreme Court interpreted the "interim presumption" of eligibility for black lung benefits as requiring that a claimant establish at least one qualifying fact by a

246. *Id.*

247. 524 N.W.2d 404, 406-07 (Iowa 1994).

248. *Id.* at 408.

249. *Id.* at 407.

250. 30 U.S.C. §§ 901-945 (1994).

251. *Id.* § 901(a).

252. *Id.* § 921.

253. *Id.* § 921(c)(1).

254. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 (1976).

255. 484 U.S. 135, 138 (1987).

preponderance of the evidence.²⁵⁶ In order to be eligible for BLBA benefits, potential claimants must prove—usually with medical testimony—that pneumoconiosis caused a miner's death or disability.²⁵⁷ Upon such a showing, a claimant establishes statutory complicated pneumoconiosis and invokes the irrebuttable presumption under the BLBA.²⁵⁸

b. State "Heart and Lung" Laws

Over half the states have enacted "heart and lung" provisions in their workers' compensation laws.²⁵⁹ Heart and lung statutes create "an irrebuttable presumption that any cardiovascular or respiratory impairment suffered by a firefighter [(and depending on the jurisdiction, police officers and other public employees)] is work-related."²⁶⁰ States enacted these statutes as a fringe benefit for firefighters and to solve the causation problem of proving that an impairment is work related where the individuals' work exposed them to many types of gases, vapors, and smoke.²⁶¹ As the Ninth Circuit

256. Under the Department of Labor's interim regulations governing black lung benefit claims filed between July 1, 1973, and April 1, 1980, a claimant was initially presumptively eligible for disability benefits if "the claimant who engaged in coal mine employment for at least 10 years" proved one of the following medical criteria: "(1) a chest X ray establish[ing] the presence pneumoconiosis; (2) ventilatory studies establish[ing] the presence of [any] respiratory or pulmonary disease . . . of a specified severity; (3) blood gas studies demonstrat[ing] . . . an impairment in the transfer of oxygen from the lungs to the blood; or (4) other medical evidence, including the documented opinion of a physician exercising reasonable medical judgment, establish[ing] . . . a totally disabling respiratory impairment." 484 U.S. at 141-42.

257. See *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 816 (6th Cir. 1993). But cf. *Runyon v. E. Coal Corp.*, 229 F.3d 1153, 2000 WL 1140725, at *1 (6th Cir. 2000) (unpublished table decision) (denying petition for review of ALJ decision denying benefits under the BLBA because claimant did not offer expert testimony, and hospital records did not show, that pneumoconiosis, rather than pneumonia, caused a miner's death).

258. *E. Associated Coal Corp. v. Dir., O.W.C.P., United States Dep't of Labor*, 220 F.3d 250, 255 (4th Cir. 2000).

259. See Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940, 952 (1987).

260. *Id.*

261. *Id.* at 952-53. See also *Take v. Comm'r*, 804 F.2d 553 (9th Cir. 1986). In addition to firefighters, heart and lung statutes often include police officers and other public employees. ALA. CODE § 11-43-144 (Supp. 2001) (firefighters); CAL. LAB. CODE §§ 3212, 3212.2, 3212.5 (1989) (police, sheriff's office, district attorney's staff of inspectors or investigators, firefighters, game wardens, corrections employees, state hospital security, youth authority); FLA. STAT. ANN. §§ 112.18, 185.34 (West 2000) (firefighters, police); LA. REV. STAT. ANN. § 33.2581 (West 1988) (firefighters); MD. CODE ANN. LAB. & EMPL. § 9-503 (1999) (police, firefighters); MASS. GEN. LAWS ANN. ch. 32, § 94 (West Supp. 2001) (police, firefighters, corrections officers, crash crews at Logan Airport); MICH. COMP. LAWS ANN. § 418.405 (West 1999) (police, firefighters); MINN. STAT. ANN. § 176.011.15 (West 1993) (police, firefighters, conservation officers, department of natural resources forest officers); MO. REV. STAT. § 87.005 (2000) (firefighters); NEB. REV. STAT. § 18-1723 (1997) (police, firefighters); N.Y. GEN. MUN. LAW § 207-k (McKinney 1999) (police, firefighters); N.D. CENT. CODE § 65-01-15.1 (Supp. 2001) (police, firefighters); OHIO REV. CODE ANN. § 4123.68(W) (West 2001)

explained: "Presumptions provide a shortcut to recovery by weakening the quantum of proof needed to recover. Instead of having to prove the ultimate fact of causation, the worker may prove certain basic facts from which causation will be presumed."²⁶²

c. Medical Standards for Workers

In addition to the federal and state laws establishing legal presumptions based on medical criteria, a variety of other laws utilize medical standards for workers or authorize regulatory bodies to do so. The Occupational Safety and Health Act²⁶³ and the Mine Safety and Health Act²⁶⁴ require medical examinations of employees with exposure to certain toxic substances. In addition, the definition of "serious health condition" under the Family and Medical Leave Act²⁶⁵ is established by medical criteria.²⁶⁶

The Department of Transportation's (DOT) Bureau of Motor Carrier Safety has issued detailed regulations for the physical examination of drivers operating motor vehicles in interstate commerce.²⁶⁷ Successful completion of the examination is a prerequisite to driver certification.²⁶⁸ Physicians are provided with a form and instructions about specific conditions to evaluate.²⁶⁹

The Federal Aviation Administration (FAA) has promulgated similar regulations for airline flight crews.²⁷⁰ Unlike the Motor Carrier examinations, which may be performed by any licensed physician, aviation medical examinations may be performed only by physicians designated by the FAA under the auspices of the Federal Air Surgeon.²⁷¹

The DOT and FAA examinations contemplate a role for physicians that is different from their role in other examinations. Because of concern for public safety, these agencies have adopted detailed procedures and standards that

(police, firefighters); OKLA. STAT. ANN. tit. 11, § 49-110 (West 1994) (firefighters); OR. REV. STAT. § 656.802(4) (West Supp. 1998) (firefighters); S.C. CODE ANN. § 42-11-30 (Law. Co-op. 1985) (firefighters); TENN. CODE ANN. § 7-51-201(a)(1), (b)(1) (1998) (law enforcement officials, firefighters); VT. STAT. ANN. tit. 21, § 601(11)(C), (E) (Supp. 2001) (police, firefighters); WIS. STAT. ANN. § 891.45 (West Supp. 2001) (firefighters).

262. *Take*, 804 F.2d at 557.

263. 29 U.S.C. §§ 651-678 (1994).

264. 30 U.S.C. §§ 801-962 (1994).

265. 29 U.S.C. §§ 2601-2654 (1994); 29 C.F.R. § 825.114 (2001).

266. *See Miller v. AT&T*, 250 F.3d 820, 825 (4th Cir. 2001).

267. 49 C.F.R. § 391.41(b) (2000).

268. 49 C.F.R. § 391.41(a).

269. 49 C.F.R. § 391.43.

270. 14 C.F.R. Pt. 67 (2000).

271. 14 C.F.R. § 67.405.

remove a great deal of the physician's discretion. If the standards are excessively stringent and serve to disqualify individuals who would normally be considered fit, policymakers consider these disqualifications to be an acceptable price to pay for protecting the public.

A number of state laws also require preemployment medical examinations to protect public health and safety. Among the occupations for which a medical examination may be mandated are teachers, school bus drivers, meat and poultry workers, police, firefighters, and transportation workers.²⁷² The laws vary widely in the degree of specificity in the medical standards.

V. PROPOSED MEDICAL CRITERIA FOR DETERMINING COVERAGE UNDER THE ADA

The following section is intended to demonstrate the feasibility of using medical criteria to address the severity of common disabling conditions. It is not intended as a substantive proposal of the actual medical criteria for the various conditions. Such determinations would be the subject of the rulemaking contemplated by the proposed amendment to the ADA.

A. Arthritis

Arthritis, the most commonly reported affliction in the United States, has no known cure. It is a degenerative process manifested by pain, swelling, and deformity of the joints and decreased joint mobility.²⁷³ Occasionally, pain can occur even without loss of motion.²⁷⁴ Any of the movable joints of the body can be involved, but the joints of the hand, wrist, and hip are most noticeable and debilitating.²⁷⁵

Steroids are the main form of treatment, but surgery is considered when joint deformity is incapacitating.²⁷⁶ The long-term use of steroids can result

272. MARK A. ROTHSTEIN, MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS 40 (1989).

273. Daniel J. McCarthy, *Differential Diagnosis of Arthritis: Analysis of Signs and Symptoms*, in ARTHRITIS AND ALLIED CONDITIONS: A TEXTBOOK OF RHEUMATOLOGY 39, 40 (William J. Koopman ed., 2001).

274. Robert H. Haralson III, *Current American Medical Association Techniques for Assessing Musculoskeletal Impairment and Maximum Medical Improvement*, in OCCUPATIONAL MUSCULOSKELETAL DISORDERS: FUNCTION, OUTCOME AND EVIDENCE 685, 694 (Tom G. Mayer et al. eds., 2000).

275. WALTER B. GREENE, ESSENTIALS OF MUSCULOSKELETAL CARE 200, 315 (2d ed. 2001).

276. *Id.* at 52.

in systemic problems, including hypertension, increased levels of cholesterol, and weight gain.²⁷⁷

Depression secondary to inactivity occurs frequently in individuals with arthritis.²⁷⁸ This is most common when individuals no longer can enjoy social and recreational activities.²⁷⁹ Because of the progressive nature of arthritis, individuals afflicted should be considered as having a disability when they have the following limitations:

1. Necessity of special, medically accepted and prescribed mechanical devices; or
2. Necessity of substantial personal assistance for activities of daily living; or
3. Total dependency for any activity.

B. Asthma

Asthma is a reactive airways disease that may be triggered by a variety of stimuli in the environment or by internal causes, such as inflammatory changes of the tracheobronchial tree.²⁸⁰ It is a chronic disorder that causes recurrent and distressing episodes of wheezing, breathlessness, chest tightness, and nighttime or early morning coughing.²⁸¹ Asthma can be difficult to diagnose and differentiate from other respiratory illnesses. Approximately 5 million persons, or seven percent of those under age eighteen, are affected with asthma.²⁸²

Individuals with asthma have symptoms associated with airway obstruction, such as shortness of breath, wheezing, and cardiovascular abnormalities.²⁸³ Risk factors for life-threatening exacerbation of asthma include a history of severe asthma, poorly controlled asthma of any severity, major external allergic precipitators, psychological factors, and the daily use of corticosteroids.²⁸⁴ Prior hospitalization for asthma and a history of use of

277. *Id.*

278. Patricia P. Katz & Edward H. Yelin, *Activity Loss and the Onset of Depressive Symptoms*, 44 *ARTHRITIS & RHEUMATISM* 1194, 1194 (2001).

279. *Id.*

280. E. R. McFadden Jr., *Asthma*, in *HARRISON'S PRINCIPLES OF INTERNAL MEDICINE* 1419, 1419 (Anthony S. Fauci et al. eds., 14th ed. 1998) [hereinafter *HARRISON'S*].

281. *Id.*

282. Elizabeth Jack et al., *Asthma: A Speaker's Kit for Public Health Officials*, available at <http://www.cdc.gov/nceh/airpollution/asthma/speakit/> (visited Nov. 7, 2001).

283. McFadden, *supra* note 280, at 1419.

284. See Patrick A. Hessel et al., *Risk Factors for Death from Asthma*, 83 *ANNALS OF ALLERGY, ASTHMA & IMMUNOLOGY* 362 (1999).

mechanical ventilation for asthma increase the likelihood of future hospitalization.²⁸⁵

In order to target persons with serious conditions, individuals with asthma should be considered as having a disability if they require daily use of corticosteroids in excess of ten milligrams for at least three months or have a history of hospitalization for asthma treatment that included placement of an endotracheal tube and use of mechanical ventilation within the preceding twenty-four months.

C. Bipolar I Mood Disorder

A mood disorder is a primary disorder of an emotional state that is not secondary to some physical or psychological state.²⁸⁶ It is "characterized by a pathologically elevated or depressed mood," or both—a condition that can affect all aspects of a person's life.²⁸⁷

Bipolar I disorder is diagnosed in about one percent of psychiatric disorders.²⁸⁸ The diagnosis is based on a past or present history of a manic episode that may be a single episode or recurrent episodes separated by two months without symptoms.²⁸⁹ In about sixty percent of the cases, a depressive episode comes immediately before or after the manic phase.²⁹⁰

A manic episode can be manifested in several ways, all of which are considered abnormal in the person affected. These manifestations include an elevated or irritated mood, increased distractibility, racing thoughts, inflated self esteem, pressured speech, excessive money spending, and decreased need for sleep.²⁹¹

Medicine has not yet determined the etiology of bipolar disorder. Treatment for the disorder is pharmacotherapy, most commonly with antidepressants.²⁹² Even with treatment, only about eighteen percent of those

285. Department of Veterans Affairs, Veterans Health Administration Clinical Practice Guidelines for Management of COPD or Asthma, available at http://www.va.gov/health/pulmonary/clin_prac (visited Nov. 7, 2001).

286. HAROLD I. KAPLAN & BENJAMIN J. SADACK, SYNOPSIS OF PSYCHIATRY 525 (8th ed. 1998).

287. Victor I. Reus, *Mood Disorders*, in REVIEW OF GENERAL PSYCHIATRY 263, 263 (Howard H. Goldman ed., 2000).

288. HAROLD I. KAPLAN & BENJAMIN J. SADACK, SYNOPSIS OF PSYCHIATRY 525 (8th ed. 1998).

289. *Id.* at 547.

290. P.T. Loosen et al., *Mood Disorders*, in CURRENT DIAGNOSIS & TREATMENT IN PSYCHIATRY 290, 314 (M.H. Ebert et al., eds., 2000).

291. ALEX KOLEVZON & DAPHNE SIMEON, PSYCHIATRY ESSENTIALS: A SYSTEMIC REVIEW 15 (2002).

292. JERALD KAY & ALLAN TASMAN, PSYCHIATRY: BEHAVIORAL SCIENCE AND CLINICAL ESSENTIALS 339 (2000).

with the disorder are well without relapses.²⁹³ Seven percent remain chronically ill, often requiring hospitalization and supervision because of the possibility of causing harm to others.²⁹⁴

Persons afflicted with bipolar I disorder should be considered disabled if they have:

1. Ongoing medical treatment for a confirmed diagnosis of bipolar I disorder; or
2. A history of hospitalization for bipolar I disorder.

D. Chronic Obstructive Pulmonary Disease (COPD)

Chronic Obstructive Pulmonary Disease (COPD) or chronic bronchitis/emphysema is a chronic disabling condition of the lungs, most often due to cigarette smoking²⁹⁵ and resulting in varying proportions of alveolar destruction (emphysema) and bronchiolar fibrosis (obstructive bronchitis).²⁹⁶ Inflammation and eventually loss of functional lung tissue create progressive difficulty with entry of oxygen and removal of carbon dioxide from the blood. An estimated fifteen million Americans are affected with this disease, comprising a spectrum of symptoms ranging from cough, sputum production, dyspnea, and airflow limitation.²⁹⁷ Patients with advanced disease are impaired with primary restrictions on physical activity due to shortness of breath resulting from a low blood oxygen level. They may also suffer from heart disease, especially that involving the right side of the heart, leading to cor pulmonale or failure of the right ventricle.²⁹⁸ Patients with COPD are also at much greater risk for complications and death resulting from respiratory infections such as influenza and pneumonia.²⁹⁹

A variety of oral and inhaled medications may be used to treat symptoms, but for persons with advanced disease and substantial lowering of the blood oxygen content, oxygen may be needed on a frequent or continuous basis.³⁰⁰

293. Michael J. Gitlin et al., *Relapse and Impairment in Bipolar Disorder*, 152 AM. J. PSYCHIATRY 1635, 1639 (1995).

294. *Id.*

295. Greg T. Ferguson & Reuben M. Cherniack, *Current Concepts: Management of Chronic Obstructive Pulmonary Disease*, 328 NEW ENG. J. MED. 1017, 1017 (1993).

296. Sherwood Burge, *Should Inhaled Corticosteroids Be Used in the Long Term Treatment of Chronic Obstructive Pulmonary Disease?*, 61 DRUGS 1535, 1535 (2001).

297. Ferguson & Cherniack, *supra* note 295, at 1017.

298. Eric G. Honig & Roland H. Ingram Jr., *Chronic Bronchitis, Emphysema, and Airways Obstruction*, in HARRISON'S *supra* note 280, at 1451, 1455.

299. *Id.* at 1452.

300. Burge, *supra* note 296, at 1537, 1543.

Long-term oxygen therapy, supplied through the use of external devices, is the only widely accepted ongoing therapy for COPD; while it does not slow disease progression, it does lengthen the lives of hypoxic patients.³⁰¹ Mortality from COPD is reduced in patients with chronic hypoxemia when oxygen is administered for at least twelve hours daily, extending a patient's life span by up to six or seven years.³⁰² The Department of Veterans Affairs standard requirement for the initiation of supplementary oxygen is a partial pressure of oxygen in the peripheral arteries of less than fifty-five millimeters (mm.) of mercury or an arterial oxygen saturation of less than ninety percent.³⁰³

Severe COPD may require the use of oral corticosteroids to control symptoms. While these drugs may be highly effective, they also confer major toxicity that may limit their use.³⁰⁴

Patients with COPD should be considered to have a disability if they:

1. Are on continuous oxygen administration for at least twelve hours a day due to an underlying PaO₂ of less than fifty-five mm. of mercury, or less than sixty mm. with signs of tissue hypoxia, or due to an arterial oxygen saturation of less than ninety percent; or
2. If they require daily use of corticosteroids in excess of ten m.g. for at least three months.

E. Congestive Heart Failure

Congestive heart failure affects approximately five million Americans, and approximately 550,000 individuals develop new onset heart failure each year.³⁰⁵ In 2001, 960,000 patients with heart failure were hospitalized and 287,200 of them died.³⁰⁶ Eighty percent of male and seventy percent of female congestive heart failure patients under the age of sixty-five die within eight years after onset of symptoms.³⁰⁷ Coronary artery disease is the most

301. *Id.* at 1537.

302. Department of Veterans Affairs, VHA Clinical Practice Guidelines for the Management of COPD or Asthma, Outpatient Management of COPD: Long-term Oxygen Therapy, available at http://www.va.gov/health/pulmonary/clin_prac (visited Nov. 7, 2001).

303. *Id.*

304. D.S. Postma et al., *Severe Chronic Airflow Obstruction: Can Corticosteroids Slow Down Progression?*, 67 EUR. J. RESPIRATORY DISEASES 56, 63 (1985).

305. American Heart Association, *Understanding Heart Failure*, available at <http://www.americanheart.org/presenter.jhtml?identifier=1593>.

306. American Stroke Association and American Heart Association, *2002 Heart and Stroke Statistical Update*, available at <http://www.americanheart.org/presenter.jhtml?identifier=1593>.

307. *Id.*

common cause of congestive heart failure.³⁰⁸

The New York Heart Association (NYHA) classification system has been developed to characterize the degree of disability associated with congestive heart failure. NYHA Class I represents asymptomatic individuals; NYHA Class II to IIIa, symptomatic individuals; Class IIIb, a symptomatic individual with recent shortness of breath at rest; and Class IV, individuals having persistent shortness of breath at rest.³⁰⁹

The assessment of functional capacity in patients with congestive heart failure is of critical importance because it measures the direct effect of the condition on the patient's well-being, quality of life, and cognitive function.³¹⁰ Functional capacity is a major predictor of mortality in patients with congestive heart failure.³¹¹ Though laboratory tests can be utilized, asking about the patient's ability to engage in common daily activities can provide an important method of assessing functional capacity.³¹² Determination of tolerance for well-defined activities, such as walking a specified distance on level ground or climbing one to two flights of stairs, is particularly helpful and is frequently substituted for formal laboratory measures.³¹³

Individuals with congestive heart symptoms should be considered as having a disability if they are diagnosed with New York Heart Association Class III or Class IV congestive heart failure.

F. Diabetes Mellitus

Diabetes mellitus is a chronic condition caused by primary failure of the pancreas to secrete insulin or by resistance of peripheral tissues to the action of insulin. A total of 15.7 million Americans, or about six percent of the population, have diabetes, with 5.4 million of them having as-yet undiagnosed disease.³¹⁴ Some 800,000 new cases occur each year.³¹⁵

308. University of Michigan Heart Failure Guideline Team, *Heart Failure—Systolic Dysfunction: Guidelines for Clinical Care*, National Guideline Clearinghouse, Aug. 1999, available at <http://ome.med.umich.edu/pdf/guideline/heart.pdf>.

309. *Id.*

310. Osvaldo P. Almeida & Sérgio Tamai, *Congestive Heart Failure and Cognitive Function Amongst Older Adults*, 59 ARQUIVOS DE NEURO-PSIQUIATRIA 324, 324 (2001).

311. James C. Coyne et al., *Prognostic Importance of Marital Quality for Survival of Congestive Heart Failure*, 88 AM J. CARDIOLOGY 526, 528 (2001); American College of Cardiology & American Heart Association Task Force on Practice Guidelines, *Guidelines for the Evaluation and Management of Heart Failure*, 26 J. AM. C. OF CARDIOLOGY 1376, 1386 (1995).

312. *Id.*

313. *Id.*

314. Centers for Disease Control and Prevention, *National Diabetes Fact Sheet*, Nov. 1, 1998, available at <http://www.cdc.gov/diabetes/pubs/facts98.htm>

Long-term clinical complications of diabetes include the following:

- Heart disease—the most common cause of diabetes-related deaths;
- Stroke—with a risk two to four times higher than in nondiabetics;
- Hypertension—affecting sixty-five percent of diabetics;
- Kidney disease—in which diabetes is the most prevalent cause of end-stage renal disease, leading to about forty percent of new cases;
- Nervous system disease—approximately sixty-five percent of individuals with diabetes have some type of nervous system damage (often including pain or impaired sensation in the feet or hands, slowed digestion, and carpal tunnel syndrome);
- Amputations—diabetes is associated with over half of all U.S. lower limb amputations.³¹⁶

More extensive types of amputations lead to greater physical impairment. Specifically, patients with transtibial amputations have significantly increased disability compared to those with midfoot or toe amputations.³¹⁷ Important precursor lesions that may ultimately result in amputation are chronic foot ulcers. The loss of mobility associated with foot ulcers reduces the ability to perform routine tasks; about half of the affected patients cannot work and the other half experience reduced productivity or delayed career advancement.³¹⁸

Diabetic complications causing severe morbidity and premature mortality appear on average about fifteen to twenty years after the first clinical evidence of hyperglycemia.³¹⁹ For this reason, those with juvenile onset diabetes will most often develop complications at an earlier age than those with adult onset disease. One of the most feared complications is visual impairment. Proliferative retinopathy is a precursor lesion to severe visual

315. *Id.*

316. *Id.*

317. Edgar J.G. Peters et al., *Functional Status of Persons with Diabetes-related Lower-extremity Amputations*, 24 *DIABETES CARE* 1799, 1800-01 (2001).

318. Loretta Vileikyte, *Diabetic Foot Ulcers: A Quality of Life Issue*, 17 *DIABETES METABOLISM RESEARCH REV.* 246, 247 (2001).

319. Daniel W. Foster, *Diabetes Mellitus*, in *HARRISON'S*, *supra* note 280, at 2060, 2074.

loss; about half of the patients with this disorder become blind within five years; the preferred treatment for this disorder is laser photocoagulation.³²⁰

Individuals with diabetes should be considered as having a disability if any of the following apply:

1. Diagnosis of juvenile-onset, insulin-requiring diabetes mellitus; or
2. Adult-onset diabetes mellitus with any of the following:
 - a. Laser treatment for diabetic retinopathy, or
 - b. Chronic ulcerations of the lower extremity, or
 - c. Amputation at the ankle or below for peripheral vascular disease or chronic lower extremity ulcers, or
 - d. Renal failure requiring hemodialysis or kidney transplantation or a Karnofsky Index score of less than seventy.

G. Epilepsy

Epilepsy comprises a spectrum of disorders characterized by recurrent seizures resulting from a chronic underlying process. Epilepsy affects about 2.3 million Americans.³²¹ People of all ages are affected, especially the very young and the elderly. The most severe form of epilepsy is the generalized tonic-clonic seizure, commonly known as a grand mal seizure.³²² This seizure is manifested by "loss of consciousness[,] . . . a sequence of motor events that includes widespread tonic muscle contraction evolving to clonic jerking[,] . . . [generalized] clinical and electroencephalographic manifestations[,] . . . and [post-seizure] metabolic and behavioral suppression."³²³

Persons affected by epilepsy experience a substantially reduced quality of life. Even with therapy, complete control is obtained in only sixty percent of people with tonic-clonic seizures.³²⁴ Anti-epileptic drugs are the most common form of treatment, with surgery being reserved for persons refractive to medical therapy.³²⁵

320. *Id.* at 2075.

321. *Id.*

322. Bruce J. Fisch & Piotr W. Olejniczak, *Generalized Tonic-Clonic Seizures*, in *THE TREATMENT OF EPILEPSY* 369, 369-70 (Elaine Wyllie ed., 3d ed. 2000).

323. *Id.* at 369.

324. *Id.* at 387.

325. *Id.*

A person with epilepsy should be considered as disabled under the ADA if he or she demonstrates:

1. A history of one generalized tonic-clonic seizure; or
2. The individual has been on medication for at least one year for seizure control.

H. Hearing Impairments

After lower back pain, hearing impairment is the second most common physical disability in the United States.³²⁶ In adults, hearing loss represents the third most common self-reported health problem among Americans sixty-five and older, after arthritis and hypertension.³²⁷ It has been estimated that there are over twenty-eight million Americans either deaf or hearing impaired.³²⁸ By 2020, it is expected that the number will be about forty million.³²⁹

In considering hearing loss, there is no clearly accepted decibel threshold or speech discrimination level beyond which a disability is established.³³⁰ At one end of the hearing loss spectrum is the individual with no effective hearing who is a candidate for an implanted electronic device designed to restore the ability to detect sound.³³¹ For such a person to be approved for an implant, the United States Food and Drug Administration requires only that the hearing impairment be so great that it is not correctable by conventional methods of amplification.³³² Disability is not a consideration for candidacy for an implant.

Below this extreme, however, some individuals are disabled by their inability to hear or to understand conversational speech even though the decibel levels of frequencies tested might indicate only a moderate hearing loss, or one less than sixty decibels.³³³ Although amplification can increase the awareness of environmental sounds, it is ineffective for improving the

326. Jack A. Shohet & Thomas Bent, *Hearing Loss: The Invisible Disability*, 104 POSTGRAD. MED. 49 (1998).

327. ROBERT A. DOBIE, MEDICAL-LEGAL EVALUATION OF HEARING LOSS 128 (1993).

328. BARBARA E. WEINSTEIN, GERIATRIC AUDIOLOGY 81 (2000).

329. DOBIE, *supra* note 327, at 87.

330. *Id.*

331. GEORGE T. MENCHER ET AL., AUDIOLOGY AND AUDITORY DYSFUNCTION 250 (1997).

332. John K. Niparko, *Assessment of Cochlear Implant Candidacy*, in COCHLEAR IMPLANTS: PRINCIPLES & PRACTICES 173, 175 (John K. Niparko et al. eds., 2000).

333. Jack Katz & Thomas P. White, *Introduction to the Handicap of Hearing Impairment*, in AURAL REHABILITATION 19, 26 (Raymond H. Hull 3d ed. 1997).

ability to differentiate and understand what is spoken.³³⁴

The quality of sound obtained through amplification is inconsistent among individuals. Often, a person who theoretically should be helped with a hearing aid finds the sounds produced uncomfortable and will not wear the aid, even after making a considerable financial investment in it.³³⁵ Even when individuals with hearing impairment do benefit from amplification, they might not be able to wear a hearing aid on a consistent basis, either because of their work environment, which might be hot or humid, or because of chronic ear infections.

Individuals with moderate to severe hearing loss should be considered disabled if their hearing loss fits into one of the following categories:

1. Unaided pure tone average of 500, 1000, 2000, and 3000 hertz frequencies of 50 decibels or greater in the better hearing ear; or
2. Word understanding of fifty percent or less on open-set monosyllabic testing at fifty decibels in the better hearing ear.

I. Malignancy

The disability of a person with a malignancy is related to both the disease itself and to the treatment. Because untreated malignancies progress to metastasis and eventual death, treatment is essential.³³⁶

As a tumor increases in size or spreads to a different location, the treatment required to control the tumor increases in complexity and the side effects multiply. Those treatments with proven efficacy include surgery, radiation therapy, and chemotherapy.³³⁷ Each has side effects, many chronic or permanent. Surgery can result in chronic pain, disfigurement, or motor or sensory nerve deficits. Radiation burns the skin and deep tissues causing pain and inflammation of mucous membranes. Chemotherapy is toxic and can result in bone marrow depression, loss of hair, and chronic nausea.

When the tumor is large or spreads throughout the body, multimodality treatment is commonly used, wherein two or more treatment modalities are

334. *Id.*

335. Michael M. Popelka et al., *Low Prevalence of Hearing Aid Use Among Older Adults with Hearing Loss: The Epidemiology of Hearing Loss Study*, 46 J. AM. GERIATRICS SOC'Y 1075, 1077 (1998).

336. Leonard Weiss, *Metastasis of Cancer: A Conceptual History from Antiquity to the 1990s*, 19 CANCER & METASTASIS REV. 193, 321 (2000).

337. Emil J. Freireich, *Can We Conquer Cancer in the Twenty-First Century?*, 48 CANCER CHEMOTHERAPY & PHARMACOLOGY (Supp.) (2001), available at <http://link.springer.de/link/service/journals/00280/contents/01/00298/paper/s002800100298ch110.html>.

used together, such as a combination of surgery and chemotherapy. This results in more disabling side effects. In addition to the effects of treatment, the malignancy itself can cause long-term depression³³⁸ and severe bodily fatigue.³³⁹

In cases where no effective treatment is available, or when the burdens of treatment outweigh the benefits, palliative care is given for the comfort of the patient.³⁴⁰

The following persons should be considered as having a disability:

1. Any person who has undergone multimodality treatment within the past three years; or
2. Any person with a diagnosis of metastatic disease; or
3. Any person with recurrent malignancy, except primary malignancy of the skin; or
4. Any person who has received ongoing chemotherapy for over one year; or
5. Any person with a diagnosis of malignancy for which there is no effective standard beneficial therapy.

J. Multiple Sclerosis

Multiple sclerosis (MS) is a disorder that results from inflammation in the central nervous system, causing loss of myelin and scar tissue formation.³⁴¹ MS affects approximately 350,000 Americans.³⁴² Next to trauma, MS is the second leading cause of neurologic disability beginning in early to middle adulthood.³⁴³

The manifestations of MS are quite variable, ranging from a relatively benign illness to a progressively debilitating disease.³⁴⁴ Complications of the disorder affect several body systems and require major adjustments both by

338. J. Rob J. de Leeuw et al., *Predictors of Depression 6 Months to 3 Years After Treatment of Head and Neck Cancer*, 23 *HEAD & NECK* 892, 892 (2001).

339. Charles S. Cleeland, *Cancer-Related Fatigue: New Directions for Research*, 92 *CANCER* (Supp.) 1657, 1657 (2001).

340. David J. Roy & Neil MacDonald, *Ethical Issues in Palliative Care*, in *OXFORD TEXTBOOK OF PALLIATIVE MEDICINE* 97, 114-17 (Derek Doyle et al. eds., 1998).

341. Stephan L. Hauser & Donald E. Goodkin, *Multiple Sclerosis and Other Demyelinating Diseases*, in *HARRISON'S*, *supra* note 280, at 2409, 2409.

342. *Id.*

343. *Id.*

344. *Id.*

patients and their families. Its clinical manifestations are varied. Generally, the first symptoms are limb weakness, blurred vision due to optic neuritis, disturbance of the sensory system, double vision, and incoordination.³⁴⁵

The most widely used measure of neurologic impairment and disability in MS is known as the Kurtzke Expanded Disability Status Scale (EDSS).³⁴⁶ This score, which ranges from zero to ten, represents a composite of pyramidal, cerebellar, brainstem, sensory, bladder/bowel, visual, and mental function subscales.³⁴⁷ Individuals are considered to be moderately disabled if their score is in the 4-6 range.³⁴⁸ Because of the debility due to incontinence, bladder and bowel dysfunction are important independent measures of impairment due to MS.³⁴⁹

Individuals with MS should be considered as having a disability if they have:

1. A Kurtzke EDSS score of greater than or equal to 5.0; or
2. Urinary or fecal incontinence; or
3. Visual impairment qualifying independently for inclusion.

K. Renal Failure

End-stage renal disease (ESRD) or kidney failure due to any of a variety of diseases can result in severe disability and risk of death. Hypertension and diabetes account for almost two-thirds of new cases.³⁵⁰ Mortality in the end-stage renal disease population remains high. At age forty-nine, the expected survival is seven years, as opposed to approximately thirty years for a person

345. *Id.* at 2411.

346. Monica W. Nortvedt et al., *Quality of Life in Multiple Sclerosis: Measuring the Disease Effects More Broadly*, 53 *NEUROLOGY* 1098, 1098 (1999). See also Donald G. Brunet et al., *Measurement of Health-related Quality of Life in Multiple Sclerosis Patients*, 23 *CAN. J. NEUROLOGICAL SCI.* 99, 99 (1996).

347. Stephan L. Hauser & Donald E. Goodkin, *supra* note 343, at 2416.

348. N. Murphy et al., *Quality of Life in Multiple Sclerosis in France, Germany, and the United Kingdom*, 65 *J. NEUROLOGY NEUROSURGERY & PSYCHIATRY* 460, 461 (1998).

349. H. Ford et al., *Health Status and Quality of Life of People with Multiple Sclerosis*, 23 *DISABILITY & REHAB.* 516, 520 (2001); M. W. Nortvedt et al., *Reduced Quality of Life Among Multiple Sclerosis Patients with Sexual Disturbance and Bladder Dysfunction*, 7 *MULTIPLE SCLEROSIS* 231 (2001).

350. NATIONAL INSTITUTES OF HEALTH, *MORBIDITY AND MORTALITY OF DIALYSIS: NIH CONSENSUS STATEMENT* 3 (1993).

of the same age without renal disease;³⁵¹ at age fifty-nine, expected survival is only 4.3 years.³⁵²

Individuals with ESRD also experience a substantially increased morbidity with a greatly reduced quality of life³⁵³ and heightened suffering.³⁵⁴ Complications of ESRD include cardiovascular events, such as congestive heart failure, heart attack, and stroke, which account for about half of the mortality in dialysis patients.³⁵⁵ They are also at high risk for nutritional deficiencies, problems with their vascular access sites, infection (the major cause of death in fifteen to thirty percent of dialysis patients), disorders of calcium and phosphorous metabolism, amyloidosis, and anemia.³⁵⁶ They may also have a variety of additional problems, including falling blood pressure, severe muscle cramps, lower blood oxygen, nausea, seizures, and cardiac arrhythmias.³⁵⁷

Self-assessed physical and mental health of hemodialysis patients is markedly diminished in contrast to that of the general population.³⁵⁸ A variety of scales have been devised to quantify disease severity and functional status in ESRD. The first and most widely used instrument to measure functional status in ESRD is the Karnofsky Index; scores of under seventy points on the modified Karnofsky index indicate significant impairment, with inability to perform important daily life activities.³⁵⁹

Patients who have undergone renal transplantation for ESRD are subject to a variety of complications, including graft rejection, infection, malignancy, and hypertension.³⁶⁰ Given the range and severity of such complications attending the post-surgical period, renal transplant recipients are subject to the need for urgent and unpredictable hospitalization.

351. *Id.* at 4.

352. Friedrich K. Port, *Morbidity and Mortality in Dialysis Patients*, 46 KIDNEY INT'L 1728, 1729 (1994).

353. NATIONAL INSTITUTES OF HEALTH, *supra* note 350, at 4.

354. Birger Hagren et al., *The Haemodialysis Machine as a Lifeline: Experiences of Suffering from End-stage Renal Disease*, 34 J. ADVANCED NURSING 196, 198-201 (2001).

355. NATIONAL INSTITUTES OF HEALTH, *supra* note 350, at 16.

356. *Id.* at 17-22.

357. *Id.* at 22.

358. Sanjeev K. Mittal et al., *Self-assessed Physical and Mental Function of Haemodialysis Patients*, 16 NEPHROLOGY, DIALYSIS & TRANSPLANTATION 1387, 1387 (2001).

359. Fernando Valderrábano et al., *Quality of Life in End-Stage Renal Disease Patients*, 38 AM. J. KIDNEY DISEASES 443, 446 (2001).

360. Charles B. Carpenter & J. Michael Lazarus, *Dialysis and Transplantation in the Treatment of Renal Failure*, in HARRISON'S, *supra* note 280, at 1520, 1524, 1526, 1529.

Individuals with end-stage renal disease should be considered as having a disability if they:

1. Require ongoing hemodialysis; or
2. Renal transplantation; or
3. Have a modified Karnofsky Index score of less than 70 (range 0-100).

L. Vision Impairments

Since 1930, in the United States, the definition of a legally blind individual is one who has a visual acuity of 20/200 or worse in the better eye with best correction, or has a visual field diameter of 20 degrees or less in the widest meridian in the better eye.³⁶¹ However, the functional vision of a person with low vision rather than legal blindness, based solely on corrected visual acuity, can be misleading, as the standard tests do not accurately correlate with visual performance.³⁶²

Low vision is defined as corrected visual acuity between 20/40 and 20/200 in the better eye.³⁶³ In a given population, low vision affects one percent of individuals between the ages of forty-three and fifty-four, but increases to twenty-six percent of individuals over the age of seventy-five.³⁶⁴ Low vision can be compounded by other problems including difficulty with contrast sensitivity, color vision, adaptation to dark and light, and depth perception.³⁶⁵ Also, systemic disorders, such as diabetes, can adversely affect normal vision either intermittently or progressively.³⁶⁶ Consequently, corrective lenses alone do not mitigate all of the problems of low vision, and an assessment of corrected vision is not an accurate indicator of disability.

Another significant problem affecting functional vision is that of diplopia, or double vision, a misalignment of the visual axes in a person with binocular

361. James M. Tielsch, *The Epidemiology of Vision Impairment*, in 1 THE LIGHTHOUSE HANDBOOK ON VISION IMPAIRMENT AND VISION REHABILITATION 5, 6 (Barbara Silverstone et al. eds., 2000) [hereinafter THE LIGHTHOUSE HANDBOOK].

362. *Id.* at 8.

363. *Id.* at 6.

364. Ronald Klein et al., *Changes in Visual Acuity in a Population: The Beaver Dam Eye Study*, 103 J. AM. ACAD. OPHTHALMOLOGY 1169, 1173 (1996).

365. Kent E. Higgins & Ian L. Bailey, *Visual Disorders and Performance of Specific Tasks Requiring Vision*, in THE LIGHTHOUSE HANDBOOK, *supra* note 361, at 287, 287.

366. Brian Leonard & Steve Charles, *Diabetic Retinopathy*, in THE LIGHTHOUSE HANDBOOK, *supra* note 361, at 103.

perception.³⁶⁷ This condition can be the result of congenital imbalance of the muscles of the eyes or secondary to trauma or eye surgery.³⁶⁸ The result is that one object is seen as two, side by side or one higher than the other.³⁶⁹ Although children with this condition readily adapt, adults do not. Unless prisms or surgery can correct the problem, the individual will have constant difficulty focusing.³⁷⁰

The following criteria should be used in defining an individual as having a disability based on visual impairment:

1. Visual acuity of 20/200 or worse in the better eye without correction: or
2. Visual field diameter of 20 degrees or less in the widest meridian in the better eye; or
3. Diplopia that cannot be resolved with corrective prisms or surgery.

VI. CONCLUSION

Employment discrimination laws serve the dual functions of establishing the boundaries of acceptable conduct and providing a means for redress when conduct falls outside of those boundaries. Accordingly, employment discrimination laws take on both symbolic and practical dimensions. They are symbolic in the sense that they codify social norms for personal interactions and provide the impetus for voluntary changes in workplace policies and relationships. To be successful, employment discrimination laws must lead to voluntary changes in conduct in the hiring halls, on the shop floors, and in the boardrooms of the nation. The laws also must provide the structure for courts to mandate changes in conduct when individuals and groups of individuals seek to vindicate their rights through the legal system. In either context, the law must be reasonably clear in establishing the permitted and proscribed conduct, for without such clarity neither voluntary changes nor legally-mandated directives can be implanted.

The Americans with Disabilities Act (ADA) has established an important and noble goal of ending discrimination on the basis of disability. Unfortunately, both the symbolic and practical dimensions of the goal have

367. JOHN A. PRATT-JOHNSON & GERALDINE TILLSON, *MANAGEMENT OF STRABISMUS AND AMBLYOPIA: A PRACTICAL GUIDE* 252 (2d ed. 2001).

368. *Id.* at 253-54.

369. Timothy J. Martin, *Neuro-ophthalmology Examination*, in *TEXTBOOK OF OPHTHALMOLOGY* 123, 124 (Kenneth W. Wright ed., 1997).

370. PRATT-JOHNSON & TILLSON, *supra* note 367, at 252.

been undermined by the failure to create a reasonably clear definition of the crucial term "individual with a disability," which delineates the class of individuals protected by the ADA. Without clarity of definition, both voluntary and legally-imposed changes in the workplace are difficult to achieve. To make matters worse, when the courts adopt restrictive interpretations of coverage they undermine both judicial enforcement and the resolve of employers to comply with the spirit of the ADA.

It would be wrong to place all of the blame on the courts. If courts decided cases such as *Sutton* more in accord with the underlying goals of the ADA, the line separating "covered" from "uncovered" disabling conditions would be moved, but the blurred nature of the line would not change. Despite an understandable reluctance by Congress to amend the ADA, without such action there is a danger that the law will soon have merely modest symbolic value—a statement of principle lacking the specificity needed to sustain changes in conduct.

In our view, a highly promising yet previously unconsidered approach to defining "individual with a disability" under the ADA is to incorporate existing medical criteria into the statutory framework. The ADA should be amended to authorize the EEOC to conduct rulemaking activity to publish medical standards for when the most common disabling conditions satisfy the statutory threshold of a "substantial limitation of a major life activity." The presumptions regarding coverage or noncoverage would provide essential guidance to all parties, thereby ensuring that the statutory goals will be realized.