

**RESCUE THE AMERICANS WITH DISABILITIES ACT FROM RESTRICTIVE
INTERPRETATIONS: ALCOHOLISM AS AN ILLUSTRATION**

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We alcoholics are men and women who have lost the ability to control our drinking. We know that no real alcoholic ever recovers control. All of us felt at times that we were regaining control, but such intervals-- usually brief--were inevitably followed by still less control, which led in time to pitiful and incomprehensible demoralization. We are convinced to a man that alcoholics of our type are in the grip of a progressive illness. Over any considerable period we get worse, never better. We are like men who have lost their legs; they will never grow new ones. ALCOHOLICS ANONYMOUS¹

I. Introduction

The Supreme Court has narrowed the doorway into the protected class for the Americans with Disabilities Act (ADA)² in virtually every employment case.³ Taking their cue from the Supreme Court, the lower courts have been concerned principally with who is “disabled” and thus protected by the ADA.⁴ The answer today is, not many.⁵ The courts generally have been so hostile to ADA plaintiffs that it is difficult now to find a case in which the plaintiff was able to prove that he was disabled.⁶

Congress contemplated that some impairments would always be disabling.⁷ The Supreme Court, however, has so narrowly construed the term “significantly limited in a major life activity,” which defines the protected class, that many impairments formerly considered to be inevitably disabling, such as alcoholism, are no longer protected by the ADA.⁸ Congress referred to alcoholism many times in the legislative history,⁹ and included a specific reference to alcoholism in the statute.¹⁰ For this reason, and because alcoholics tend to be discriminated against because they are not perceived to have a “real illness,”¹¹ I have chosen alcoholism to illustrate the extreme difficulty of proving a disability under the current caselaw.

The ADA was enacted to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹² Today that mandate is not being fulfilled, especially in the employment area.¹³ The ADA was modeled on the Rehabilitation Act of 1973 (the Rehabilitation Act).¹⁴ Although the ADA specifically provides that it should not be construed to apply a lesser standard than that applied under the Rehabilitation Act,¹⁵ employees who sought protection under that Act before the ADA was adopted did not have the problems proving that they were disabled that employees are having today under the ADA.¹⁶ In almost every case involving Title I, the part of the ADA that applies to employment, the Supreme Court has interpreted the ADA so restrictively that one would have to be so impaired that he would generally be unable to work at all.¹⁷ When the Court has dealt with non-employment cases, it has been much more generous, however.¹⁸

The ADA prohibits discrimination against a qualified person with disabilities.¹⁹ To be classified as disabled, a person must 1) have an impairment that substantially limits one or more major life activities; or 2) have a record of such an impairment; or 3) be regarded as having such an impairment.²⁰ Major life activities include such things as seeing, hearing, and taking care of oneself.²¹ In addition to proving a disability, under Title I, the person must be “qualified,” which means that he must be able to perform essential job duties of the position with or without reasonable accommodation.²²

At first blush, it would seem that the ADA itself set up a “catch-22” for employees to qualify for the protected class, by requiring that they be substantially limited in the major life activity, but still able to perform the essential duties of the job.²³ However, it is the courts that have recently created the dilemma by requiring an

employee to be so substantially limited in a major life activity that he will generally be precluded from being able to perform the job.²⁴ The class of disabled people today is limited virtually to people who are completely blind, deaf or in a wheelchair because they are totally limited in a major life activity. Many of them cannot work at all. People with less obvious impairments, such as alcoholism, diabetes, back injuries, and mental illness, who can work, usually are not determined to be sufficiently limited in a major life activity under the Court's narrow interpretations. Because Congress spent considerable time discussing protecting persons with such impairments, it is clear that the ADA was not intended to be restricted to impairments that are totally limiting.²⁵ Congress was particularly concerned about "stereotypic assumptions" that created myths and fears about disabled people.²⁶

Alcoholism is a disability about which stereotypic assumptions are particularly problematic. Alcoholics especially suffer from the "systematic prejudice, stereotypes, and neglect" that were the central concerns of the ADA.²⁷ They are more likely to be discriminated against because they are often not perceived to be suffering from a "real" illness. Alcoholics have also historically been subjected to ridicule and contempt.

Throughout most of recorded history, excessive use of ALCOHOL was viewed as a willful act leading to intoxication and other sinful behaviors. The Bible warns against drunkenness; Islam bans alcohol use entirely. Since the early nineteenth century, the moral perspective has competed with a conceptualization of excessive use of alcohol as a disease or disorder, not necessarily a moral failing.²⁸

Congress obviously assumed that alcoholics would be protected by the ADA because the Act provides that an alcoholic must be able to comply with all employment requirements.²⁹ Nevertheless, under current caselaw, it is difficult to imagine how an

alcoholic could be determined to be disabled and yet still be employable. If an alcoholic is in recovery, his impairment is not significantly affecting any major life activity, under the Court's strict interpretations of those terms.³⁰ Surely, the ADA did not intend that recovering addicts and alcoholics, as well as other people with impairments who are striving to overcome their limitations, such as diabetics,³¹ should not receive the benefit of reasonable accommodations that would allow them to work.³² With regard to alcoholism, as with most other impairments today, if the plaintiff is able to prove that he is disabled, he generally would be so impaired that he would be unable to perform the essential functions of the job. In other words, he would be too impaired to work.³³

A recovering alcoholic or an active alcoholic whose work performance is not affected could argue that he was "perceived as being disabled" or "has a record of disability," as alternative paths to meeting the requirement of having a disability for the purposes of the ADA.³⁴ Although the courts' interpretations likewise make these avenues unlikely,³⁵ if an alcoholic plaintiff were to succeed at this point, under neither path would he likely be entitled to a reasonable accommodation.³⁶

At the present time, most employers believe that they must accommodate an alcoholic and give him leave to go to treatment.³⁷ However, as this article illustrates, courts are not protecting alcoholics under the ADA, which will eventually lead to employers' refusing the accommodation that has saved countless people from becoming totally disabled by this debilitating illness, that is, leave to go to treatment. The threat of losing one's job is a powerful incentive to get sober, and this will no longer be available.³⁸

Obviously, the ADA is asking the wrong question for alcoholism and other similar impairments, such as diabetes and high blood pressure that without proper management are inevitably disabling. With proper treatment and management, under the courts' restrictive interpretations, such impairments are not disabling. The question should be, how do we enable such impaired employees to keep working? Congress clearly intended in enacting the ADA to enable disabled people to work.³⁹ The courts have disconnected the ADA from its intent by construing the protected class so narrowly that people who are managing their illnesses, and who may need the smallest accommodations to do so, are excluded. Inevitably when it becomes common knowledge that alcoholics are not protected by the ADA, they will simply be fired when they need to go treatment.

This result is even more likely because, as one author has pointed out, discrimination against the disabled is rational, that is, it may in fact cost the employer more in time, money and trouble to employ the disabled; whereas other types of discrimination, such as race and sex discrimination, are irrational forms of discrimination and cost the employer nothing to avoid.⁴⁰ Another author has opined that critics of the ADA view it as “in effect work[ing] as a subsidy paid by employers through ‘reasonable accommodation,’ a subsidy likely to be borne disparately within the labor market.”⁴¹ This author points out that this view does not take into account that disability discrimination costs the U.S. billions of dollars and that there are other hidden benefits to employing the disabled.⁴²

This article will examine the disease of alcoholism generally in Section II; the ADA generally in Section III; Supreme Court cases interpreting the ADA and the lower

court cases concerning alcoholism and the ADA in Section IV. These sections will show that judicial interpretations have virtually eliminated alcoholism as a disability, contrary to obvious Congressional intent. While this phenomenon is not limited to alcoholism, it is a useful illustration of the damage judicial activism has caused in this area.

Section V. will analyze and propose a solution that can be accomplished without a change in the legislation. Requiring the plaintiff to prove that he has an impairment that significantly limits a major life activity has become an obstacle for most plaintiffs, but there are two alternatives to entry into the protected class of disabled persons, being regarded as disabled or having a record of a disability. These provisions should be interpreted more generously to prevent people from being discriminated against because of perceived disabilities. People who are regarded as disabled or who have a record of a disability are people who can work, but who are being discriminated against because the employer thinks they cannot do the job. Congress was very clear that this was the type of discrimination that was intended to be most protected.⁴³

Section VI. concludes that once employers discover that their employees with impairments such as alcoholism are no longer protected by the ADA, such employees may be terminated with impunity. The cost of this eventuality is high in economic, as well as human, terms.

II. Alcoholism generally

“Alcoholism is a primary chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is progressive and is often fatal. It is characterized by impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences, and

distortions in thinking, mostly denial. Each of these symptoms may be continuous or periodic.”⁴⁴ There is no cure, and the only known treatment includes complete abstinence.⁴⁵ Alcoholics remain so, whether drinking or not; thus, alcoholics are in either active addiction or in recovery for life.⁴⁶ The rehabilitation process, whether inpatient or outpatient, requires two to four weeks of intensive treatment, followed by three to six months of outpatient care.⁴⁷ In order to prevent relapse after rehabilitation, most alcoholics, especially those in early recovery, require frequent attendance at meetings of Alcoholics Anonymous and/or counseling.⁴⁸ Even then, relapse is not uncommon and must be considered part of the syndrome.⁴⁹

The principal societal belief is that alcoholics have caused their own impairment. While this can be said of many impairments,⁵⁰ such as diabetes and heart disease, society particularly frowns on alcoholics.⁵¹ Because there is a genetic component to alcoholism that has yet to be fully understood,⁵² the idea that alcoholics are responsible for their own impairment must be questioned. Because alcoholics probably have a predisposition to the disease, the only way to avoid its manifestation is to never take the first drink. Because ninety percent of the population of Western countries drink alcohol at some time in their lives,⁵³ generally beginning in their early to mid-teens, alcohol consumption is “an almost ubiquitous phenomenon” in Western society.⁵⁴ Society is blaming the victim in the case of alcoholics, who are simply conforming to the norm in their original consumption of alcohol.⁵⁵ Thus, the stereotypical view of alcoholism as a volitional condition is most likely false.

The stereotypical alcoholic street person is also a false stereotype.⁵⁶ Alcoholics usually have jobs and function moderately well in family settings.⁵⁷ Because they are

able to work, recovering alcoholics generally may need three types of accommodations. The first is a leave of absence to attend residential treatment. The second is some accommodation that allows the employee to attend AA meetings and/or counseling sessions.⁵⁸ I would also venture to suggest a third accommodation, and that is, a second chance if the alcoholic relapses. Because relapse is part of the syndrome,⁵⁹ alcoholics should be given at least one second chance. The line has to be drawn, however, between second chances and multiple chances, which may enable the alcoholic to continue to drink.

Congress expressly referred to alcoholism in the ADA.⁶⁰ The cases under the Rehabilitation Act recognized alcoholism as a per se disability, and the early ADA cases followed suit.⁶¹ Recent cases have uniformly rejected the contention that alcoholism is disabling, however, leaving alcoholism unprotected by the ADA. To understand how this has evolved, I will turn to an explanation of the ADA generally, followed by the pertinent cases.

III. The ADA

A. Statutory provisions.

The ADA is a comprehensive act to protect people with disabilities from discrimination in public services, accommodations and telecommunications, as well as employment.⁶² Title I applies to employment discrimination.⁶³ The ADA essentially follows the law developed under the Rehabilitation Act of 1963,⁶⁴ which applied to federal contractors, the federal government and federal grantees,⁶⁵ as well as the law⁶⁶ developed under Title VII of the Civil Rights Act of 1964.⁶⁷ The ADA's substantive provisions are a combination of those statutory provisions as well.⁶⁸

The coverage is the same as Title VII, that is, the ADA applies to employers with more than fifteen employees.⁶⁹ The protected class consists of any "qualified individual with a disability" who, with or without reasonable accommodation, can perform the essential functions of the job.⁷⁰ Disability means a physical or mental impairment which substantially limits one or more of an individual's major life activities, a record of impairment or being regarded as having such an impairment.⁷¹

Many of the provisions of the ADA were taken from Title VII of the Civil Rights Act of 1964;⁷² however, the discrimination provisions of the ADA are much more specific. The ADA provides, analogously to Title VII, that the employer may not discriminate against qualified persons with disabilities on the basis of disability in job application procedures, hiring, advancement, compensation, training and other terms or conditions of employment.⁷³ The ADA adds specific provisions that prohibit employers from asking questions regarding disabilities in pre-employment procedures⁷⁴ and limit the employer's ability to require pre-employment physicals,⁷⁵ except for drug tests.⁷⁶

The ADA also includes a provision identical to the provision of Title VII that is the basis for disparate impact,⁷⁷ which forbids practices that limit opportunities for the disabled.⁷⁸ In addition, the ADA has language that more expressly codifies the disparate impact theory by forbidding practices that screen out or tend to screen out people with disabilities and practices that have the effect of discriminating, unless they are shown to be justified by business necessity.⁷⁹

Defenses to an ADA claim include allowing the employer to demonstrate that any selection criterion that screens out "an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be

accomplished by reasonable accommodation.”⁸⁰ Although the requirement for reasonable accommodation which does not amount to an undue hardship mirrors the Title VII requirement for religious accommodation,⁸¹ the ADA provides that undue hardship is not to be defined with reference to Title VII.⁸² The ADA does not define reasonable accommodation but rather lists possibilities such as: redesigning facilities to make them accessible; restructuring the work environment, requirements, assignments, schedules, and equipment; and providing readers or interpreters.⁸³ While reasonable accommodation is not specifically defined in the act, the examples given of reasonable accommodations make it clear that a reasonable accommodation can be fairly burdensome.⁸⁴

Undue hardship “means an action requiring significant difficulty or expense” on the part of the employer, when considered in light of a list of factors, including the nature and cost of accommodation and the financial resources of the facility.⁸⁵ The obvious conclusion is that Congress intended that the burden of proving undue hardship would be onerous.⁸⁶

The other defenses to the ADA differ from Title VII. The ADA contains no defense for bona fide seniority systems⁸⁷ or for a bona fide occupational qualification.⁸⁸ Furthermore, unlike Title VII, under the ADA the employer may require “that an individual shall not pose a direct threat to the health or safety” to other persons in the workplace.⁸⁹

Title VII's charge-filing and other enforcement procedures are incorporated into the ADA for the employment provisions of the ADA.⁹⁰ The Civil Rights Act of 1991 amended Title VII and the ADA to provide for compensatory and punitive damages in

intentional discrimination cases.⁹¹ However, the Amendment provides that, if the employer acts in good faith to provide a reasonable accommodation, the employer has a defense to the imposition of damages.⁹²

Although the ADA specifically provides that it shall not be interpreted less generously than its predecessor, the Rehabilitation Act,⁹³ the Supreme Court has not taken this provision very seriously. The Court has substantially narrowed the interpretation of the term “disability” under the ADA in all but one case, and it is not an employment case.⁹⁴

B. Supreme Court Interpretations

1. “[A]n individual with disabilities”

a. *Bragdon v. Abbott*

The Supreme Court’s first foray into the ADA battle in 1998 appeared to signal that it would read the Act expansively. The question in *Bragdon v. Abbott* was whether a healthcare professional had the right to refuse to treat an HIV positive patient in his office.⁹⁵ The Court explained that in order to be protected by the ADA, the plaintiff had to be “an individual with disabilities,” which is defined as having an impairment that substantially limits a major life activity. The Court noted that the definition of disability was derived from the Rehabilitation Act and further noted that the ADA requires that it be construed according to the law and regulations developed under the Rehabilitation Act. Consequently, the Court adopted the definition of impairment developed under regulations under the Rehabilitation Act,⁹⁶ which is a mental or physical condition that affects one or more body systems. The Court found that HIV was an impairment at every

stage because of the immediacy with which the virus infects the blood cells and the severity of the disease.⁹⁷

Having determined that the plaintiff had an impairment, the Court moved on to whether the impairment substantially affected a major life activity. The Court cited the regulations, noting again that the ADA must be construed consistently with the Rehabilitation Act regulations. The ADA regulations, copied from the Rehabilitation Act regulations, provide a representative list of major life activities which include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁹⁸ The Court reasoned that reproduction, the major life activity alleged to be limited in this case, is central to life and should be considered a major life activity.⁹⁹ The Court said that the regulations did not help to determine the meaning of "substantially limited,"¹⁰⁰ but concluded that "substantially limited" does not mean utter inability. The plaintiff was substantially limited because reproduction was dangerous to public health. The Court also bolstered its conclusion that asymptomatic AIDS was a handicap or disability by reference to all the courts and agencies that had so held under the Rehabilitation Act.¹⁰¹ The Court stopped short of holding that AIDS is a per se disability, nor did it hold that the determination of disability would require an individualized inquiry, except by saying that in this case, the plaintiff alleged she was substantially limited in reproduction.¹⁰² The implication was that if reproduction were not at issue, a plaintiff would have to identify another major life activity in which she was substantially limited. The idea that an individualized inquiry would be required in every case originated in the dissent.¹⁰³ The Court made it clear in

the next case that a strict individualized inquiry is necessary to determine whether the plaintiff is disabled and that there are no per se or presumptively disabling impairments.

b. *Sutton v. United Air Lines* and companions

1) *Sutton*

*Sutton v. United Air Lines*¹⁰⁴ involved two sisters who applied for jobs as commercial airline pilots. They were told that they did not meet the minimum requirement for uncorrected eyesight, which was 20/100. The plaintiffs' eyesight was significantly worse than that, although it was corrected to 20/20 with corrective lenses. The first question before the Court was whether the plaintiffs' visual impairment would be viewed in its corrected or uncorrected state to determine whether they were disabled under the ADA.¹⁰⁵

The Court started out by saying that the EEOC had issued regulations defining disability, although no agency had been delegated authority to do so.¹⁰⁶ The conflict was not with regard to the regulations, but with the EEOC guidance interpreting the regulations. The Court noted that the EEOC defined disability, as did the ADA, as “‘A) a physical or mental impairment that substantially limits one or more of such the major life activities of such individual; B) a record of an impairment; or C) being regarded as having such an impairment.’”¹⁰⁷ The plaintiffs alleged first that they were disabled under subsection A), the first prong of the disability test because they suffered from an impairment that substantially limited a major life activity. The EEOC guidance directed that disability should be determined in its uncorrected state.¹⁰⁸ Because the plaintiffs were severely myopic, they clearly would be disabled, if the measure were their

uncorrected state. The Court, however, decided that this guidance conflicted with the plain language of the ADA, and to evaluate persons “in their hypothetical uncorrected state. . . is an impermissible interpretation of the ADA.”¹⁰⁹ The Court reasoned that the statute expressed disability in the present tense, “substantially limits;” and that the inquiry is individualized, so that the question is whether the individual is currently disabled. However, the Court was unduly impressed by the fact that Congress had determined that 43 million people were disabled, and if mitigating measures were not considered, the figure would be much higher.

Thus, the Court concluded that the plaintiffs had an impairment which, in its corrected state did not substantially limit any major life activity.¹¹⁰ The plaintiffs were, thus, not disabled under the first prong of the Act.

The plaintiffs argued alternatively under subsection (C) of the disability test that they were regarded as disabled by the employer. The Court said that there were two possibilities that could arise under this part of the ADA, either the employee has an impairment that is not substantially limiting or the employee has no impairment at all. In either situation, the employer must believe that the impairment is substantially limiting.¹¹¹ The plaintiffs alleged that the employer regarded them as disabled in the major life activity of working.

The Court restricted the category of “working” very narrowly, based on the EEOC regulations.¹¹² Thus, being substantially limited in the major life activity of working, the Court said, requires

at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. Reflecting this requirement, the EEOC uses a specialized definition of the term “substantially limits” when referring to the major life activity of working : “significantly restricted in the ability to perform

either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.”¹¹³

The Court concluded that the plaintiffs were only precluded from one job, that of global airline pilot, so they were not regarded as substantially limited in working.¹¹⁴ The Court expressed reluctance to even regard “working” as a major life activity.

Because the parties accept that the term "major life activities" includes working, we do not determine the validity of the cited regulations. We note, however, that there may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap."¹¹⁵

The Court then “assumed without deciding” that working is a major life activity¹¹⁶ and has continued to do so since.¹¹⁷

2) Implications of *Sutton*

The Court’s refusal to fully accept working as a major life activity is inconsistent with the Court’s acceptance of the identical language in the HEW regulations construing the Rehabilitation Act and cited in *Bragdon v. Abbott* as controlling.¹¹⁸ In addition, there is no question that working represents an activity of central importance to most people’s lives. “Working is a major part of being ‘normal’ in our society.”¹¹⁹ Comparing working to the other life activities that the Court has recognized as “major life activities,” such as “household chores, bathing and brushing one’s teeth,”¹²⁰ as well as reproduction,¹²¹ working must certainly be included from a rational point of view. Furthermore, the agency interpretations, which are binding under the ADA, have always included it.¹²²

The Court did not continue its indulgent interpretation of the ADA begun in *Bragdon* in another important aspect.

The Court in *Sutton* also made it clear that there were no per se disabilities, citing *Bragdon v. Abbott* for the proposition.¹²³ In fact *Bragdon v. Abbott* did not require a strict individualized inquiry, but rather it relied heavily on authority that considered asymptomatic HIV a disability in every case.¹²⁴ The only individualized inquiry was in which major life activity the plaintiff was restricted. She alleged reproduction, but the Court indicated that there could be others, such sexual activity.¹²⁵ The Court was clearly assuming in the *Bragdon* case that HIV would be disabling in every case, although it may affect different major life activities.

Beginning with the *Sutton* case, however, the Court has charted its own course, ignoring legislative history, agency regulations, and guidances, as well as caselaw developed under the Rehabilitation Act. The legislative history is clear that Congress intended that disability be determined in its uncorrected state, and all the agencies interpreting the Act had held so.¹²⁶

The Court took an easy case and made bad law. No one wants the ADA to protect everyone who has to wear glasses. It obviously trivializes the protected class; however, the ramifications of *Sutton* go far beyond the population of people wearing corrective lenses. The Court has been criticized for placing so much reliance on the number of disabled people cited by Congress, a figure that was posited to be inclusive, rather than exclusive, of disability.¹²⁷ Why did the Supreme Court exalt the figure cited by Congress of 43 million disabled people over the much more important Congressionally expressed remedial objectives of the ADA?

The *Sutton* dissenters had the better view:

We must draw a statutory line that either (1) will include within the category of persons authorized to bring suit under the Americans with Disabilities Act of 1990 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). Faced with this dilemma, the statute's language, structure, basic purposes, and history require us to choose the former statutory line, as Justice STEVENS (whose opinion I join) well explains. I would add that, if the more generous choice of threshold led to too many lawsuits that ultimately proved without merit or otherwise drew too much time and attention away from those whom Congress clearly sought to protect, there is a remedy.¹²⁸

As the dissent explained, the Act was not supposed to weed people out in the first instance. It would not require that airlines hire people who pose a danger, rather the Act requires that employers justify their employment requirements.¹²⁹

3) Companion case

Had the Court used one of the companion cases¹³⁰ to *Sutton*, *Albertson's Inc. v. Kirkingburg*,¹³¹ to express its unauthorized interpretation of the ADA, it would have been more obvious that clearly intended beneficiaries of the ADA would lose protection. In the *Kirkingburg* case, the plaintiff suffered from amblyopia, which is uncorrectable, so that he could really only see out of one eye.¹³² *Kirkingburg* was erroneously hired because the employer required that all drivers meet the Department of Transportation requirements, and he could not.¹³³ He drove for over a year before the mistake was discovered, and he was fired. *Kirkingburg* obtained a waiver of the requirement from the Department of Transportation, but the employer would not accept it and refused to re-hire him.¹³⁴ The question before the Court was whether the employer was justified in relying

on the DOT requirements, which a unanimous Court answered in the affirmative because the DOT waiver program was experimental and not designed to certify safe drivers.¹³⁵

The pernicious part of the opinion was the Court's unscrupulous chastisement of the lower court for so easily finding that Kirkingburg was disabled in the first place.¹³⁶ The Court said that the lower court had made three missteps in its finding that Kirkingburg was disabled.¹³⁷

First, the Court said that although amblyopia is an impairment and "seeing" is a major life activity, a person with that impairment is not necessarily substantially limited in seeing. The lower court had in fact said that "the manner in which [Kirkingburg] sees differs significantly from the manner in which most people see' because, '*[t]o put it in its simplest terms [he] sees using only one eye; most people see using two.*'"¹³⁸ The Court characterized this determination as the lower court's appearing to be "willing to settle for a mere difference."¹³⁹ This clearly contradicts the lower court's holding in this regard and ups the bar for the finding of "significantly limited" in a major life activity.

Secondly, the Court found fault with the lower court's view that it was irrelevant whether the plaintiff had made subconscious compensation for his monocular vision. The Court reiterated from *Sutton* that mitigating measures, even if produced by the body and not by artificial aids, must be taken into account.¹⁴⁰

Finally, the Court said that the lower court did not pay sufficient heed to the requirement of an individualized inquiry. The Court said "[s]ome impairments may invariably cause a substantial limitation of a major life activity . . . , we cannot say that monocularity does."¹⁴¹ Again, it should be noted that the lower court clearly said that Kirkingburg could essentially see out of only one eye. It is incredible that the Supreme

Court should require more. The Court did ultimately concede that monocular vision would ordinarily be disabling, but its analysis is nevertheless very troubling.¹⁴² The Court was clearly requiring much more than was generally required under prior law to show that a person was substantially limited in a major life activity, but the Court was not finished in this regard, as the next case demonstrates.

c. *Toyota Motor Mfg. v. Williams*

The Court returned to defining “substantially limited” in a “major life activity” in *Toyota Motor Mfg. v. Williams*.¹⁴³ The plaintiff’s use of pneumatic tools while working for the defendant caused her to suffer from carpal tunnel syndrome and tendonitis. She was placed on permanent work restrictions that precluded, among other things, lifting more than 20 pounds, using vibratory tools, engaging in repetitive flexion of her wrists or elbows or performing overhead work. She was accommodated in a job that did not require any of this; however, extra duties were added to the job that she could not perform, and she was ultimately discharged.¹⁴⁴ It seems clear that she was disabled, but she had a problem identifying the major life activity that would allow her to prove that she was disabled.

She started out arguing that her impairment substantially limited her in the major life activities of performing manual tasks, housework, gardening, playing with her children, lifting, and working. She also argued that she had a record of a substantially limiting impairment and that she was regarded as having such an impairment. The District Court decided that playing with her children, gardening and doing housework were not major life activities, and she did not appeal that decision. She did appeal the decision that she was not substantially limited in lifting, working and performing manual

tasks.¹⁴⁵ The Sixth Circuit reversed the finding that she was not substantially limited in her ability to perform manual tasks. The court said that she had shown a class of manual activities that she could not perform at work. The court then cited a range of activities that she could not perform, not just in her job, but in various related jobs, such as assembly line jobs, manual product handling jobs, manual building trade jobs that require gripping tools and repetitive work with hands and arms extended over the shoulder for any extended periods.¹⁴⁶

The Supreme Court limited its consideration to the manual tasks holding and said that the lower court had erred in assessing whether she was disabled by looking at what work she could perform, instead of whether she could take care of her personal hygiene and carry out personal or household chores. The Court proceeded to define major life activities as those that are of central importance to daily life. “That these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA.” The Court again cited for this proposition the reference to 43 million disabled persons in the preamble to the Act¹⁴⁷ that the Court had cited in *Sutton*.¹⁴⁸ The Court said that to be significantly limited in a major life activity, an impairment “must *prevent or severely restrict* the person from performing activities that are of central importance to most people lives.”¹⁴⁹ Occupation-specific tasks are not necessarily of central importance to most peoples’ lives, while “household chores, bathing and brushing one’s teeth” are.¹⁵⁰ The Court said that the plaintiff had said she could still perform all these activities, but had difficulty sweeping, had to occasionally have help in dressing, and could not play with her children or drive for long periods. The

Court said she was not so “severely” restricted in activities that are of central importance to most people’s lives to amount to a manual task disability.¹⁵¹

Having again severely restricted plaintiffs in their ability to prove that they were disabled in employment cases, the Court proceeded to decide several cases that do not deal with the definition of disability. These cases, however, do illustrate the point that the Court has been hostile to employees in its interpretation of the ADA.

2. Other cases decided under Title I that expand the employer’s ability to defeat an ADA claim

In *Chevron v. Echazabal*, the Supreme Court looked at the meaning of the “direct threat” defense.¹⁵² The act defines discrimination as, among other things, using “qualification standards ... that screen out or tend to screen out an individual with a disability” unless the qualification standard is job-related and consistent with business necessity.¹⁵³ The Act further provides that an employer may have a qualification standard that “an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”¹⁵⁴ The defendant had rejected the plaintiff based on a liver condition that the defendant’s physicians said would be exacerbated by contact with toxins in the refinery where the plaintiff worked.

The EEOC regulations “allowed an employer to screen out a potential worker with a disability not only for risks that he would pose to others in the workplace but for risks on the job to his own health or safety as well.”¹⁵⁵ The Supreme Court determined that the EEOC’s interpretation of the Act was reasonable. The Court did not find persuasive the legislative history of the Act that indicated Congress’ concern for

paternalism in enacting the Act or the plain language of the statute, that the direct threat defense was limited to a direct threat to others.¹⁵⁶ As in *Sutton*, the Court approved of the EEOC's interpretation when it restricted the protected class.¹⁵⁷

In another defeat for a plaintiff, in *Raytheon v. Hernandez*,¹⁵⁸ the Supreme Court applied its interpretation of the defense of "legitimate non-discriminatory reason" to the ADA to find for the defendant. In the *Raytheon* case, the plaintiff had been discharged for violating work rules by testing positive for drugs. Two years later, he applied again and was refused hire. The defendant said at first it was because of the plaintiff's past drug use, but ultimately decided to interpose the defense of a neutral policy that precluded rehiring anyone who had been discharged for misconduct.¹⁵⁹ The Court said that this was a legitimate non-discriminatory reason.¹⁶⁰

Legitimate, non-discriminatory reason was developed by the Court as a defense to intentional discrimination, disparate treatment, cases under Title VII;¹⁶¹ however, it may not be an appropriate defense to all disparate treatment cases under the ADA. Any reason that is not based on the plaintiff's protected status is a legitimate non-discriminatory reason under Title VII.¹⁶² The ADA, however, provides that the employer may not have a policy that screens out people with the plaintiff's disability unless the policy is justified by business necessity.¹⁶³ Because the no-rehire policy screens out people with the plaintiff's disability, the employer should have been required to justify it, even in a disparate treatment case. However, the Court has now put the burden on the plaintiff to show that the defendant's use of the policy was not a legitimate nondiscriminatory reason.¹⁶⁴

The Court criticized the court of appeals for conflating the two theories of disparate treatment and disparate impact in determining that a neutral policy is not a legitimate nondiscriminatory reason, if it has a disparate impact on the protected class.¹⁶⁵ The Supreme Court is actually the court doing the conflating by treating disparate treatment under Title VII and disparate treatment under the ADA the same. Under Title VII, the defendant discriminates if he treats a member of a protected class differently from a member of another class. Under the ADA, the defendant may be guilty of discrimination if he *doesn't* treat disabled people differently from non-disabled people.¹⁶⁶ The employer must offer reasonable accommodation to disabled people.¹⁶⁷ In addition, the non-discrimination requirement of the ADA requires that the employer not maintain policies that screen out disabled people.¹⁶⁸ The Court determined that the latter defense is implicated only in a disparate impact case.¹⁶⁹ This contradicts the decision in *Chevron v. Echazabal*, in which the Court allowed the defendant to interpose the business necessity defense, which is the defense to a disparate impact case, in a case that involved disparate treatment.¹⁷⁰

Having severely restricted the plaintiff's ability to prove discrimination under the employment provisions of the ADA, the Court turned to a delineation of "reasonable accommodation without undue hardship." The Court's entry into this area was in a non-employment case.

3. Cases interpreting reasonable accommodation

In *PGA Tour, Inc. v. Martin*¹⁷¹ a professional golfer asked for an exemption from the rule that players must walk instead of use a golf cart in certain

situations. The plaintiff had a degenerative circulatory disorder that had atrophied his right leg so that he could no longer walk the golf course. The defendant contended that exempting the plaintiff from the rule prohibiting the use of golf carts would fundamentally alter the nature of the competition.¹⁷²

Title III of the ADA applies to public accommodations and has somewhat different language from Title I that applies to employment. Title III defines as discrimination the failure to make reasonable modifications unless making such reasonable modifications would fundamentally alter the nature of the “goods, services, facilities, privileges, advantages or accommodation.”¹⁷³ However, since fundamental alteration is a type of undue hardship,¹⁷⁴ the case has implications for what a reasonable accommodation without an undue hardship is under Title I, as well.

The Court said that the use of golf carts is not inconsistent with the fundamental character of the game, citing their ubiquitous use on golf courses and the rules of golf followed by most golfers that did not refer to use of carts in describing the object of the game.¹⁷⁵ The defendant contended that “the walking rule is ‘outcome determinative’ because fatigue may adversely affect performance.”¹⁷⁶ The Supreme Court did not agree, but even assuming this to be the case, the Court said that the ADA requires an individual inquiry into whether the accommodation is reasonable in a particular case. Because the plaintiff suffers greater fatigue than normal, the purpose of the walking rule would not be compromised. Thus, modifying a “peripheral rule” would not fundamentally alter the game.¹⁷⁷

Having distributed largesse once again in a non-employment case defining Title III’s analogue to undue hardship, the Supreme Court proceeded to interpret the Act

narrowly in its first reasonable accommodation/undue hardship employment case under the ADA. In *US Airways, Inc. v. Barnett*,¹⁷⁸ the Supreme Court addressed the terms “reasonable accommodation” and “undue hardship” for the first time under the ADA. The plaintiff’s request for an accommodation required overriding the employer’s seniority system. The Court decided that overriding the seniority system would not be a reasonable accommodation in the usual case.¹⁷⁹ In reaching this decision, the Court provided insight, not only into the nature of reasonable accommodation, but also into the burden of proving reasonable accommodation and undue hardship.

With regard to the burden of proving reasonable accommodation and undue hardship, the Court rejected the plaintiff’s argument that he need only prove that an accommodation is effective. The Court said that an effective accommodation is not necessarily reasonable for the business.¹⁸⁰ Thus, the employee bears the burden of proving that an accommodation was reasonable, meaning feasible for the employer in the usual case. Once the plaintiff has met this burden, the employer must prove that the accommodation is an undue hardship in the particular case. In the *Barnett* case, then, the Court said that a violation of the seniority system would not be a reasonable accommodation in the usual case, so the employee would have to show special circumstances in order to prevail on its burden of showing reasonable accommodation.¹⁸¹

In other words, the employee bears the burden of proving not only that he is disabled but that he can perform the essential duties of the job with or without reasonable accommodation, and also that the accommodation is not unreasonable and not an undue hardship “in the usual case.” The employer bears no burden of proof unless he has to show that the accommodation is an undue hardship in this particular case.

The net effect of the Court's cases detailed above, in addition to the restrictive interpretation of reasonable accommodation and legitimate nondiscriminatory reason, is to limit the protected class to employees who are almost totally restricted in a major life activity, which has to important to the everyday life of most people. Thus, it is difficult to see who, other than persons who are totally unable to see, hear, or walk, will be included in the protected class. People with less restricting impairments, such as alcoholism, are now rarely able to prove that they are disabled.¹⁸²

IV. Alcoholism under the ADA

Because of the restrictive interpretation of "individual with a disability," few if any alcoholics could be considered to be disabled under the ADA and consequently would not be entitled to the mildest of accommodations to maintain their sobriety. The alcoholic may be put in the bind of being unable to maintain his sobriety without time to go to Alcoholics Anonymous meetings or counseling. If he relapses, he will be fired because he is not able to measure up to the requirements of the job. Under the ADA, the question for alcoholics is 1) whether they are disabled; 2) if they are disabled, whether they are entitled to reasonable accommodation; and 3) if so, what would be a reasonable accommodation?

The first problem for purposes of the ADA is, whether an alcoholic, active or recovering, can ever prove that he is disabled and thus be entitled to any of the accommodations necessary to secure and maintain his sobriety? In order to prove that he is disabled, a plaintiff must prove that he has an impairment that substantially limits a

major life activity and that he can perform the essential duties of the job with or without reasonable accommodation.¹⁸³

A. Alcoholism and Drug Addiction under the ADA generally

The first question is whether an alcoholic has an impairment. The Regulations define impairment as a physiological disorder or condition, as well as a mental or psychological disorder.¹⁸⁴ Alcoholism is considered both a physical and psychological impairment, as discussed above.¹⁸⁵ Although scientists disagree as to the exact nature of the impairment, all agree that it is an impairment of some kind, as recognized by Congress¹⁸⁶ and the Rehabilitation Act.¹⁸⁷ As noted, the ADA must provide no less than the protection afforded by the Rehabilitation Act.

In the ADA, Congress distinguished drug addicts from alcoholics and excluded active drug addicts from the protection of the Act, as well as employees and applicants who are currently using illegal drugs.¹⁸⁸ However, the protection of the Act is reinstated if the drug addict has “successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;” “is participating in a supervised rehabilitation program and is no longer engaging in such use;” or “is erroneously regarded as engaging in such use, but is not engaging in such use.”¹⁸⁹

The employer may forbid the use of alcohol and drugs on the premises and impose the same job requirements on alcoholics and drug addicts as required of other employees, even if unsatisfactory performance is related to the drug use or alcoholism of such employee.¹⁹⁰ The ADA also allows employers to institute drug testing to ensure that a drug addict is no longer using drugs.¹⁹¹

For purposes of this article, I will treat recovering alcoholics and recovering drug addicts the same because both are theoretically protected by the ADA. Again, the ADA also protects active alcoholics, but not active drug addicts.¹⁹²

The next question in deciding whether the alcoholic, active or recovering, is disabled is whether his impairment substantially limits him in a major life activity.¹⁹³ With regard to the question of whether he has an impairment, Congress and the lower courts have always assumed that alcoholism is an impairment, and, until recently, a *per se* disability. The Supreme Court has not always been so generous.

B. Cases on Alcoholism

1. Supreme Court cases

The Supreme Court has not dealt with cases under the ADA that involve alcoholism, although it did decide a case involving a drug addict, as discussed earlier, in which the Court did not reach the issue of drug addiction.¹⁹⁴ In addition, as discussed below, the Court has decided one case involving alcoholism under the Rehabilitation Act.¹⁹⁵ Other than that, the Court has decided only one other case involving alcoholism, and as in all of these cases, the Court has been less than charitable toward alcoholics and addicts.

*Powell v. Texas*¹⁹⁶ involved whether an alcoholic could be criminally sanctioned for public drunkenness. The Court opined in this 1968 opinion that an alcoholic was better off in jail than out on the street intoxicated.

[F]acilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country. [footnote omitted] It would be tragic to return large numbers of helpless, sometimes dangerous and frequently

unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides.¹⁹⁷

This opinion reflects many of the stereotypes the ADA was designed to ameliorate. Also, it could be argued that the Court's cabined 1968 view of alcoholics and the disease of alcoholism might have changed with more advanced medical understanding of alcoholism as a disease.¹⁹⁸ However, several years later, in a case decided under the Rehabilitation Act, the Supreme Court did not treat alcoholism more indulgently.

In 1988, in *Traynor v. Turnage*,¹⁹⁹ the question before the Court was whether, in enacting the Rehabilitation Act, Congress was rejecting the position it had taken a year earlier under the law relating to veterans, which denominated primary alcoholism as "willful misconduct" for which the plaintiffs could lose their benefits. Under the Veterans Administration Act, the V.A. conclusively presumed that primary alcoholism, as opposed to alcoholism that is secondary to mental illness, was "willful." The plaintiff contended that this conclusive presumption was inconsistent with the Rehabilitation Act's requirement that mandates an individualized inquiry. In denying their benefits, the plaintiffs argued that the V.A. was acting based on "generalized determinations that lack any substantial basis."²⁰⁰ Even though the Court concluded that it did not have to decide whether alcoholism is a disease beyond the victim's control, the Court nevertheless commented gratuitously that there was:

"a substantial body of medical literature that even contests the proposition that alcoholism is a disease, much less that it is a disease for which the victim bears no responsibility." [citation omitted] Indeed, even among many who consider alcoholism a "disease" to which its victims are genetically predisposed, the consumption of alcohol is not regarded as wholly involuntary.²⁰¹

The Court ultimately concluded that for purposes of veteran's benefits only, the Rehabilitation Act does not mandate an individualized inquiry of the factors contributing to primary alcoholism because Congress and the V.A. have reasonably determined that no such factors exist.²⁰²

Despite the fact that the Supreme Court had taken positions hostile to alcoholism as a disease for purposes of the criminal law and Veterans' Administration law, the Court has not rejected alcoholism as a disease under the Rehabilitation Act and the ADA. Indeed, virtually all lower courts accepted alcoholism as a disability under the Rehabilitation Act.²⁰³ The lower courts' position was carried over into early ADA cases, as well.²⁰⁴

2. Lower court cases on alcoholism under the ADA

Buckley v. Consolidated Edison Co. of New York, Inc.,²⁰⁵ decided prior to the Court's unfavorable interpretations of the ADA, discussed above,²⁰⁶ demonstrates how the ADA was supposed to work in the context of alcoholism. The plaintiff was a recovering alcoholic and drug addict, who was required to give a urine sample for drug testing. Because he had a medical condition known as neurogenic bladder, he was unable to provide the required sample in the time allowed and was fired. He conceded that this condition was not a disability, but argued that his drug and alcohol addiction was. The court agreed. Although he could not show that he was currently substantially limited in a major life activity, the court found that he had a record of a disability.

We, moreover, have previously held that "substance abuse is a 'handicap' for purposes of the Rehabilitation Act," [citation omitted.] And this is highly relevant since the ADA states that "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply

a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 [citation omitted] or the regulations issued by Federal agencies pursuant to such title. [citation omitted]. . . . Furthermore, the legislative history of the ADA also indicates that the law was intended to apply to recovering addicts. The committee reports state that the term "physical or mental impairment" includes, *inter alia*, "drug addiction[] and alcoholism." [citations omitted]²⁰⁷

The plaintiff also had to prove that his addiction substantially limited one or more major life activities in the past to prove that he had a record of a disability. The court did not elaborate but concluded that, having shown that he had a record of having an addiction, it could be assumed that he had met this prong.²⁰⁸ The court ultimately decided that the company was discriminating against recovering addicts who had the plaintiff's bladder condition because they were required to give a urine sample more frequently. Other people who were not recovering addicts but who had the same bladder condition were not required to give a urine sample with such frequency. While it would be an undue hardship for the company to test the plaintiff less frequently because this would endanger its drug-free workplace status, the company could easily accommodate the plaintiff by giving him more time to produce the sample.²⁰⁹

The court's analysis in *Buckley* illustrates the way the ADA was working, and was supposed to work, in such a case, but after the Supreme Court's unfavorable spate of decisions interpreting the ADA,²¹⁰ the cases dealing with alcoholism are almost uniformly holding that the alcoholic plaintiff was unable to prove that he was disabled.²¹¹

Although the plaintiff has three ways of claiming protection of the ADA, the alcoholic plaintiff is currently succeeding in none of these possibilities. As discussed below, to be a member of the protected class, the plaintiff must prove that he has an

impairment that substantially limits a major life activity or that he was regarded by the employer as having such an impairment or that he has a record of such an impairment.

a. Whether the plaintiff is in the protected class

1) Whether the plaintiff has an impairment that substantially limits a major life activity

After *Sutton*, the courts no longer hold that alcoholism is a per se disability.²¹²

The trend toward determining that alcoholism is not a disability, however, began prior to the *Sutton* case, as some courts began to restrictively interpret the meaning of disability.²¹³ In a pre-*Sutton* case, *Burch v. Coca Cola Co.*,²¹⁴ the court said that alcoholism is not a per se disability²¹⁵ and required the plaintiff to show that his alcoholism significantly limited a major life activity. The plaintiff said that drinking affected his ability to sleep, think, walk and talk. The court said that his inability to perform these functions was temporary and no different from anyone who overindulges in alcohol. Although his alcoholism was permanent, the effects he referred to were not. The court said that the plaintiff produced no evidence of permanent alteration of gait, ability to speak properly, long-term insomnia or memory impairment when sober. He admitted that his work was not affected and that he never drank during working hours.²¹⁶

After *Sutton*, virtually all courts now generally find that alcoholics are not significantly limited in any major life activity under the Supreme Court's restrictive interpretation of that term.²¹⁷ Alcoholics, especially those in recovery, have difficulty identifying a major life activity in which they are currently significantly limited. The most likely major life activity in which alcoholics may claim to be limited in performing is working, which carries its own baggage, as discussed above.²¹⁸

The EEOC defines a major life activity as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and

working.”²¹⁹ The regulations indicate that the list is not exhaustive,²²⁰ and that generally “‘major life activities’ are those basic activities that the average person in the general population can perform with little or no difficulty.”²²¹ A person is “substantially limited in a major life activity if he is unable to perform or is “significantly restricted as . . . to the condition, manner, or duration under which the average person in the general population can perform” that activity.²²²

*Bailey v. Georgia-Pacific Corp.*²²³ is a good example of the difficulty of proving that alcoholism is a disability. In the *Bailey* case, the plaintiff was an active alcoholic whose attempts at recovery had been unsuccessful. Despite this fact, he had generally been able to fulfill his job duties. The plaintiff was eventually jailed for driving under the influence and asked the defendant to allow him to work on a work-release program. The plaintiff contended that he was entitled to this as a reasonable accommodation. The defendant declined and terminated the plaintiff for excessive leave.²²⁴

The court decided that the plaintiff was not disabled, even though there is no question but that alcoholism is “an impairment” under the ADA. However, the court said that, although alcoholism is not excluded from the ADA, it is treated differently, noting the requirement that alcoholics be held to the same standards as other employees and that they can be required to not be under the influence at work.²²⁵ The court said that generally alcoholism is not recognized as a per se disability under the Act, so that the plaintiff must make an individualized showing.²²⁶

The plaintiff contended that he was substantially limited in working, but the court said that he did not show that he was unable to perform a broad range of jobs. To prove that he was substantially limited in working, he would have to show that he could not

“perform either a *class of jobs* or a *broad range of jobs in various classes* as compared to the average person having comparable training, skills and abilities.”²²⁷ The court noted that the Supreme Court’s decision in *Sutton v. United Air Lines*²²⁸ cast doubt on whether working should be considered a major life activity.²²⁹ The court said that proof that one is so limited must relate to the relevant geographic area; the numbers and types of jobs in the area from which the plaintiff is foreclosed; and the types of training, skills and abilities the jobs require.²³⁰ The plaintiff showed only that he had difficulty performing his job, and even that showing was weak because he was usually able to perform. The fact that he was incarcerated and unable to perform was short term and not a substantial limitation.²³¹

Similarly in *Boerst v. General Mills Operations, Inc.*,²³² the plaintiff, a recovering alcoholic, suffered from anxiety, fatigue, difficulty sleeping, and an inability to concentrate.²³³ The court held that he was not disabled. The court said that sleeping and working are major life activities, but that concentrating and maintaining stamina are not. The court said that he had to show that either he could not perform a major life activity that an average person could perform or that his performance was significantly restricted.²³⁴ The court opined that the inability to work more than eight hours a day was not enough to show disability, nor did this show that he could not perform a wide range of jobs. With regard to sleeping, the plaintiff showed that he slept only from *two to four* hours a night. The court said that this was *not sufficient* to show that he was substantially limited in his ability to sleep.²³⁵

McKay v. Town and Country Cadillac, Inc.,²³⁶ illustrates another plaintiff’s unsuccessful attempt to identify a substantial limitation in a major life activity. The

plaintiff argued that he had produced substantial evidence that his alcoholism had a devastating effect on his family relations and social life. He could not ever for the rest of his life go to any social event where alcohol was being served. This limited his ability to develop social relationships and family relationships. The court accepted that the ability to interact with others does constitute a major life activity, although other courts have held that it does not.²³⁷ However, the court said that the plaintiff was not substantially limited in his ability to interact with others in any event just because he could not attend social events where alcohol is served. The court said that a mere alteration in lifestyle does not constitute a substantial limitation. The question was whether the plaintiff was “‘significantly restricted as to the condition, manner, or duration under which he performed family or social functions as compared to the condition, manner or duration under which the average person in the general population can perform family or social functioning.’”²³⁸

Alcoholic plaintiffs, indeed most plaintiffs,²³⁹ have been unsuccessful in proving that they are disabled because they are unable to prove that they are sufficiently limited in a major life activity. The usual problem with alcoholics is that even in recovery, they may be perceived by employers as unable to perform. Thus, the plaintiff should be able to proceed under the second prong of the ADA, that the plaintiff was “‘regarded as” disabled. Again, the restrictive interpretation of “‘significantly limited in a major life activity”” virtually eliminates this possibility also.

2) Whether the plaintiff was regarded as disabled

One of the principal concerns of the ADA was discrimination based on myths and stereotypes surrounding disabilities. For this reason, Congress prohibited discrimination against persons who are regarded as disabled, even if they are not.²⁴⁰ The Court in *Sutton* recognized only two possibilities for the plaintiff who is trying to prove that he was regarded as disabled: Either the employee has an impairment that is not substantially limiting, or the employee has no impairment at all.²⁴¹ In either situation, the Court said, the employer must believe that the impairment is substantially limiting in a major life activity.²⁴² There is a third possibility cited in the regulations²⁴³ that the Court did not cite, and that is that the plaintiff is substantially limited in a major life activity because of the attitude of others to his impairment.²⁴⁴ This regulation was included among those that interpret the Rehabilitation Act, which were validated for purposes of the ADA.²⁴⁵

Although the language of the statute applies the substantial limitation of a major life activity to all three prongs,²⁴⁶ nevertheless, the “regarded as” prong should focus primarily on how the plaintiff is treated and not on the nature of the substantial limitation.²⁴⁷ As noted, however, most courts require the plaintiff to prove not just that the employer acted based on stereotypes or misconceptions, but on the belief that the plaintiff is substantially limited in a major life activity.²⁴⁸

Consequently, as under the actual disability prong of the disability definition, plaintiffs proceeding under “regarded as” prong are also being stymied by the requirement that they must be perceived as substantially limited in a major life activity. For example, in *Bailey v. Georgia-Pacific Corp.*²⁴⁹ after the court rejected the plaintiff’s

contention that he was actually disabled, as discussed above,²⁵⁰ the plaintiff argued that he should be considered disabled under the alternative provisions of the ADA.²⁵¹ With regard to whether he was regarded as disabled, the court noted that the Supreme Court had provided that there were two ways of being regarded as disabled.²⁵² Under neither of these was the plaintiff disabled because under the major life activity of working, the employer did not believe that he was disabled in performing anything but his own job.²⁵³

What immediately appears obvious is that an employer would not be concerned with whether the employee could perform anything but his own job. If this is the test, the employer would not be concerned with whether the employee could not care for himself or anything else, so this avenue into the protected class would never function. *Nielson v. Moroni Feed Co.*²⁵⁴ is a good example. The plaintiff was the president of the company and was ousted for misconduct. He alleged that he was erroneously perceived as being addicted to drugs.²⁵⁵ However, the court said, being erroneously regarded as using drugs illegally is considered a disability only if the plaintiff is perceived to be sufficiently impaired to substantially limit a major life activity.²⁵⁶ The plaintiff failed to produce evidence of anyone perceiving him as being limited in a major life activity. The plaintiff's contention was that the company thought his alleged drug use was severe enough to prevent his being able to perform his duties as company president. The court said that this was insufficient to render him substantially limited in his ability to work because it is only one job and not a range of jobs.²⁵⁷ The court said the plaintiff must also show that the employer regarded him as unable to perform in a broad range of jobs, not just the job he held. The court also cited authority for the proposition that requiring that

the employer believe that the employee cannot perform a broad range of jobs has virtually eliminated the “regarded as” claim.²⁵⁸

The Supreme Court in *Sutton* cited with approval the EEOC’s definition of the major life activity of working as requiring that the employee could not do a broad range of jobs,²⁵⁹ even though the Court was skeptical about working being considered a major life activity.²⁶⁰ What the Court did not note was that the EEOC had indicated in its guidance that the evidence needed to prove substantial limitation in working should not be onerous.²⁶¹ In addition, the guidance provides that one rejected from a job because of “myths, fears, and stereotypes” would be covered by this prong regardless of whether others shared this view or not.²⁶² Clearly, the employer’s belief of whether the employee was able to perform a wide range of jobs or not would be less relevant under the EEOC’s guidance.

*Shiplett v. National Railroad Passenger Corp.*²⁶³ is an example of how “regarded as” should work. The plaintiff had been prescribed a highly addictive prescription drug for a sleep disorder.²⁶⁴ The plaintiff contended that the employer regarded him as disabled. The court said that the plaintiff had not specified what major life activities the defendant regarded the plaintiff as substantially limited in performing, so it assumed that the defendant regarded the plaintiff as substantially limited in performing his job as a train engineer.²⁶⁵ The court said that several circuits had held that the employer does not necessarily perceive the employee as being disabled simply because he cannot perform a particular job.²⁶⁶ The court decided that a broad range of jobs was involved in this case, however, because if the defendant perceived the plaintiff as unable to perform the engineer job, then he would be unable to perform a wide range of safety sensitive jobs.²⁶⁷

Many courts interpret “broad range of jobs” to even require the plaintiff to seek work outside his profession. For example, in *Zenor v. El Paso Healthcare System, Ltd.*,²⁶⁸ the plaintiff pharmacist was fired after he went into treatment for drug addiction. The plaintiff argued that he was regarded as a drug addict. The only feasible major life activity in which he could argue he was substantially limited was working, and he could only show that his employer believed that he could not be a pharmacist. The court said that a broad range of jobs was required, not just the inability to perform in his desired field, citing similar cases.²⁶⁹

Unless the courts are willing to interpret the term “substantially limited in a major life activity” more generously, that leaves only the last possibility for claiming protection, “having a record of a disability.” Even here, the same problem arises; the plaintiff cannot prove that he has a record of being substantially limited in a major life activity.

3) Whether the plaintiff has a record of having a disability

The intent of the “having a record of a disability” prong was to protect one from discrimination who has a history of a disability or who has been misclassified as disabled.²⁷⁰ This should be an easier route for alcoholics, who usually have a record of a disability. However, because having a record of a disability is not defined in the Act, and the Court has not clarified its meaning under the ADA, the EEOC regulations and guidances, along with caselaw must be referenced. The EEOC provides that “having a record of” can mean a history of disability or it can mean an actual documented record, such as medical, educational or employment records.²⁷¹ Again, however, the plaintiff has to prove that he has a record of a substantially limiting impairment. Because the Court

requires such stringent proof that the plaintiff is substantially limited in a major life activity, plaintiffs are having difficulty proving this prong as well.

In *Bailey v. Georgia-Pacific Corp.*,²⁷² for example, discussed above, the court said, with regard to the recovering alcoholic plaintiff, that “having a record of a disability” is supposed to protect those who have recovered or are recovering from substantially limiting impairments from discrimination based on their medical history. Although the plaintiff had a record of an impairment, the court found that he could not show that he had a record of an impairment that substantially limited him in a major life activity, such as working.²⁷³

In a case decided before *Sutton, Burch v. Coca Cola Co.*,²⁷⁴ also discussed earlier,²⁷⁵ the court said that the fact that the alcoholic plaintiff had been hospitalized would be considered in whether he had a record of a disability, but that the hospital stay was of insufficient duration to qualify the plaintiff as having a record of a disability.²⁷⁶ This decision is contrary to the Supreme Court’s decision in *School Board of Nassau County v. Arline*,²⁷⁷ in which the Court said that the plaintiff had a record of a disability because she had been hospitalized.²⁷⁸ *Arline* was decided under the Rehabilitation Act and is precedent for the ADA.²⁷⁹

Even if the plaintiff could show that he was substantially limited in a major life activity, he still has an additional obstacle to overcome to join the protected class: whether he could perform the essential duties of the job.

4) Whether the plaintiff is unable to perform the essential functions of the job and the conflict with the major life activity of working

Title I, which applies to employment, poses additional problems for plaintiffs. Title I requires, in addition to being disabled, that one still be able to perform the essential duties of the job. Because of the stringent requirements the Court has imposed on proving that a person is disabled, Title I probably protects very few people: The courts require that the plaintiff be so impaired to prove that he is disabled, it is unlikely that he can perform the essential duties of the job.

As the court said in one case,²⁸⁰ it was “assuming without deciding” that working is a major life activity because of the conceptual difficulties of the analysis. The problem, the court said, is that to prove that he is disabled, the plaintiff must prove that he is substantially limited in his ability to work; however, once the plaintiff shows that his ability to work is substantially limited, then he probably cannot prove that he is qualified for the job.²⁸¹ In other words, in order to prove that he is qualified for the job, the plaintiff has to prove that his alcoholism does not interfere with his job, which then contradicts his being substantially limited in the major life activity of working, the most likely major life activity the alcoholic plaintiff can claim to be substantially limited in performing.

Even if plaintiffs can prove that they are substantially limited in a major life activity other than working, courts often find that the plaintiff could not perform the essential functions of the job.²⁸² Several courts have said that showing up to work as scheduled is an essential function of the job, for example.²⁸³ In one case, because the plaintiff was in jail for driving while intoxicated, he could not show up for work.²⁸⁴ He

was terminated for excessive unauthorized absence, which is allowed by the ADA, which requires the employee to measure up to the employer's standards.²⁸⁵ Thus, an alcoholic employee has an even more difficult proof problem because he can be held to the same performance standards as other employees.²⁸⁶ If he is unable to perform his job because of his disability, he can be discharged for failing to meet the employer's performance standards.²⁸⁷ Because of this provision, most courts effectively relieve the employer of its obligation to reasonably accommodate.²⁸⁸

Alcoholic plaintiffs often engage in unacceptable behavior, which can serve as the impetus for getting them into treatment. Because employers are not required to reasonably accommodate such behavior, the alcoholic plaintiff can be fired without providing him the generally acceptable reasonable accommodation of leave to go to treatment.

b. Discharge for reasons related to disability and holding plaintiff to same standards

1) Bad conduct

Although alcoholic plaintiffs' unacceptable behavior is usually related to their illness, the courts disconnect the behavior from the illness and attribute the employers' action to the behavior and not to the plaintiffs' alcoholism.²⁸⁹ Early ADA and Rehabilitation Act cases, such as *Teahan v. Metro-North Commuter R.R. Co.*,²⁹⁰ generally held that discharge for misconduct caused by the plaintiff's alcoholism was based on a factor closely related to the plaintiff's disability, so that firing him for the misconduct was the equivalent of firing him for his disability. The court said it is like a plaintiff whose limp causes him to make a thump when he walks, and the employer firing

him for making the thumping noise.²⁹¹ Later cases such as *Maddox v. University of Tennessee*,²⁹² took a different view. In the *Maddox* case, the court approved the firing of a football coach for driving while intoxicated, which the plaintiff alleged was causally connected to his alcoholism. The Sixth Circuit held there that there is a distinction between discharging someone for misconduct and discharging someone for his disability. Otherwise the employer would have to accommodate the plaintiff's behavior, considered unacceptable in other employees, because of the plaintiff's disability. By 2001, the courts were virtually unanimous in allowing employers to fire employees for misconduct, even if related to the employee's disability.²⁹³ These decisions ignore the holding in *School Board of Nassau County v. Arline*,²⁹⁴ in which the Supreme Court said that it is impermissible to distinguish between the effects of a disease and the disease itself.

Nevertheless, because the ADA requires alcoholics and drug addicts to meet the same performance standards as other employees, the effects of disease can be taken into account, if the employee is unable to measure up to the employer's standards.²⁹⁵ In *Nielson v. Moroni Feed Co.*,²⁹⁶ the court said

One area, however, where the ADA and the Rehabilitation Act [footnote omitted] recognize a dichotomy between a disability and disability-caused misconduct is where the disability is related to alcoholism or illegal drug use.

. . . .

The reason this dichotomy exists is simple: both the ADA and the Rehabilitation Act clearly contemplate removing from statutory protection unsatisfactory conduct caused by alcoholism and illegal drug use.

Specifically, the ADA states that a covered entity

may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity hold other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee. . . .²⁹⁷

Thus, employers may fire the employee who is in possession of drugs,²⁹⁸ under the influence at work,²⁹⁹ excessively absent,³⁰⁰ or driving under the influence.³⁰¹ In addition, employers may fire employees for legal consequences suffered from drinking³⁰² and for various acts of misconduct caused by drinking.³⁰³

These holdings have had further effect. Courts used to say that other disabilities are not treated the same way as alcoholism, so that misconduct caused by other disabilities should not be cause for discipline.³⁰⁴ Nevertheless, the treatment accorded alcoholism in this regard has spilled over into other disabilities, and misconduct is cause for discipline, even if caused by the plaintiff's disability other than alcoholism.³⁰⁵

Another difference between alcoholism and other disabilities is that the employer may impose additional requirements on alcoholic employees who have sought leave to go to treatment. Many employers require employees to sign agreements that they will seek no further accommodation; that this is their last chance.³⁰⁶

2) Violation of last chance agreement

*Nelson v. Williams Field Services Co.*³⁰⁷ is typical of the last chance agreement cases.³⁰⁸ The defendant encouraged employees who thought they had an alcohol or drug problem to come forward and seek help. The plaintiff was concerned about his alcohol consumption, so he was given time off for treatment if he would sign an agreement that he would refrain from consuming alcohol and drugs for the duration of his employment and submit to periodic testing.³⁰⁹ Three years after his return to work, the plaintiff was

arrested on his own time while driving under the influence of alcohol. The district court found that the plaintiff had been terminated for violating the agreement not to consume alcohol or drugs for the duration of his employment, not because he was an alcoholic.³¹⁰

In fact, the plaintiff was discharged for violating an agreement that he was forced to enter into in exchange for leave to get help for his impairment, which has generally been recognized as a reasonable accommodation.³¹¹ The agreement made him liable to discharge for activities that occurred off the job for which other employees would not have been discharged. Thus, he was treated differently because of his disability, a classic example of discrimination.³¹² The plaintiff made this argument in *Longen v. Waterous Co.*,³¹³ when he was discharged for violating a last chance agreement. The court rejected his argument that he had been discriminated against because the last chance agreement was not imposed on other employees. He also argued that he had been discriminated against by being subject to termination for any use of mood altering chemicals, even if not in the workplace, when the employer's rule only proscribed use of drugs in the workplace. The court said that the plaintiff agreed to these further restrictions in the last chance agreement.³¹⁴

In another case, *Nauseda v. Tootsie Roll Industries, Inc.*,³¹⁵ the plaintiff was required to take a breathalyzer test every day after he returned from treatment for alcoholism. When the plaintiff registered positive on the test, he was fired.³¹⁶ In response to the contention that requiring him to take a breathalyzer test was discriminatory, the court said that it was a rather generous accommodation. Rather than firing him, the company allowed him to return to work if he would take the test. It was reasonable for the company to want some assurance that the plaintiff was not under the

influence because it would affect the safety of the workers who had to work with heavy equipment. As the court said, “[a]lcoholism is very difficult to overcome . . . [g]enerally, one does not undergo treatment for alcoholism and become immediately cured, which is clear from [the plaintiff’s] own long history of treatment.”³¹⁷ This is exactly why the plaintiff needs more than one chance to get into recovery. Requiring him to sign a last chance agreement when he has only had one chance to get into recovery consigns many alcoholics to job-loss because relapse is characteristic of the disease. A reasonable accommodation should include some tolerance for relapse, and employees should not be discriminated against because they obtained a reasonable accommodation to go to treatment.³¹⁸

c. Whether the plaintiff is entitled to a reasonable accommodation

The issue of reasonable accommodation is complicated by several factors. If the alcoholic is considered disabled because he is regarded as such or has a record of being disabled, he may not be entitled to a reasonable accommodation.³¹⁹ Several courts have held that if the plaintiff is not in fact disabled, but is being discriminated against because of his record of a disability or because the employer regards him as disabled, the plaintiff does not need an accommodation.³²⁰ The clear language of the Act does not distinguish among three prongs of the disability definition in requiring reasonable accommodation; thus, reasonable accommodation should be required for all three prongs, not just in the case of actual disability.³²¹ An alcoholic has an impairment but is generally unable to prove that it is substantially limiting. Thus, if he is perceived by his employer as so substantially limited that he cannot do the job, he should be entitled to a reasonable

accommodation to fulfill the purposes of the ADA and to enable him to be a productive worker.³²²

If he is entitled to a reasonable accommodation, there are two factors that must be considered with regard to alcoholics: One is that reasonable accommodation must be limited so that it does not enable an alcoholic to continue drinking.³²³ However, an alcoholic should be sufficiently accommodated to enable him to get into recovery and stay in recovery by attending counseling and Alcoholics Anonymous meetings.³²⁴ He should also be given a second chance if he relapses and not be summarily discharged for one slip.³²⁵

Before the Court's narrowing of the definition of disability, beginning in 1999, the lower courts uniformly held that alcoholism was a disability,³²⁶ however, even then, alcoholics were rarely successful in getting a reasonable accommodation beyond time off to go to treatment.³²⁷ The reason for this was the provision of the ADA that allows employers to impose the same job requirements on alcoholics and drug addicts as required of other employees, even if unsatisfactory performance is related to the drug use or alcoholism of such employee.³²⁸

In addition, the plaintiff may be allowed only one treatment. In *Evans v. Federal Express Corp.*,³²⁹ for example, the court said that the plaintiff had already been reasonably accommodated by being given a leave to go to treatment for cocaine addiction, so that her second request for leave was not a reasonable accommodation. The plaintiff said that she would be qualified, if allowed the second leave. The court said that generally the employer cannot refuse the accommodation and then fire the plaintiff because of inadequate performance. One consideration is likelihood of success, and the

court said that the company could consider a second treatment not likely to succeed because the first one did not succeed. Also the court said that treatments for addiction are “notoriously chancy.”³³⁰ Even though the plaintiff was currently sober, the company could rely on what it knew at the time. The court said that even if the company sometimes gave multiple leaves, it was not required to and that the EEOC does not require multiple leave for treatment for addiction.³³¹ The Court also said that even “in a more sympathetic setting—a treatment for cluster migraines” the court did not require multiple leaves.³³²

For any manifestations of the plaintiff’s illness, there is virtual universal agreement that the employer does not have to accommodate such things as excessive absenteeism.³³³ The refusal of courts to give alcoholics a second chance ignores the fact that relapse is a symptom of the illness and frequently occurs. The courts, however, balance the two concerns of not enabling the alcoholic to continue drinking and providing reasonable accommodation to get into recovery by refusing to give the alcoholic a second chance, which is often what he needs to get into recovery. It is in giving multiple chances that the employer would be enabling the alcoholic; failing to give a second chance ignores the reality of the situation.³³⁴ However, most alcoholic employees are no longer entitled to any accommodation under the ADA, even to go to treatment, because effectively they are no longer covered by the ADA.

V. Analysis and Proposed Solution

Under the Court’s recent decisions, is an alcoholic, active or recovering, ever disabled? The impairment must significantly limit him in a major life activity. Because

this is an individualized inquiry, each active alcoholic must prove the major life activities in which he is limited. Many active alcoholics have difficulty sleeping, working, driving, performing manual tasks, or taking care of themselves.³³⁵ They may have an assortment of physical illnesses.³³⁶ However, as noted above, most active alcoholics are functional and able to work,³³⁷ so they may not be able to prove that they are “sufficiently limited” in any “major life activity,” under the Court’s restrictive interpretation of those terms.³³⁸ The irony of the Court’s decisions is that only a relatively non-functional active alcoholic could possibly prove that he is presently disabled and entitled to reasonable accommodation that could allow him to continue to drink, assuming he could perform the duties of the job with accommodation. If he does get into recovery, he almost certainly loses the protection of the Act.

After the *Sutton* case, the Court must measure a disability in its corrected state. Thus, the question then becomes, is a recovering alcoholic ever disabled and entitled to reasonable accommodation? The impairment has to be presently impairing a major life activity, so the unmitigated state of the impairment is not relevant in determining whether the employee is presently impaired.³³⁹ The only life activity that the impairment in its mitigated state significantly limits in every case is drinking alcohol.³⁴⁰ Because the Court has restrictively interpreted major life activity to be an activity that is of central importance to most people’s lives,³⁴¹ drinking would likely not be a major life activity. The people to whom drinking is of central importance are alcoholics, so it is unlikely that a recovering alcoholic is significantly limited in a major life activity.

If a recovering alcoholic relapses, he can be fired for one or both of two reasons. First, if he engages in bad behavior connected to his relapse, he can be fired because he

can be held to the same standards as other employees. Second, in exchange for the reasonable accommodation of going to treatment, the alcoholic may have been forced to sign a last chance agreement in which he agrees to more stringent oversight than other employees. Thus, whether he violates a work rule or not, he can be discharged merely for relapsing.

Can the employer fire an employee simply because he is an alcoholic, if he has an impairment that does not significantly limit a major life activity? Under the first prong of the disability definition, the employee is not presently disabled. He cannot claim this protection of the Act, so the answer is yes. This is hardly what Congress intended.

Can such an alcoholic prove that he has a record of a disability? Even here, the courts have not been generous. If he has been hospitalized for only a short time for his illness, many courts hold that he does not have a sufficient record of a disability.³⁴² In addition, he must prove that he has a record of being substantially limited in a major life activity, which is also unlikely, except on the case of very poorly functioning alcoholics.

If his employer fires him because he does not think an alcoholic can perform the job, can the employee show that he has been regarded as disabled? Even if the employer believes that the alcoholic employee cannot do the job because of his alcoholism, the employee will still have to show that he is regarded as unable to perform in a range of jobs.³⁴³ As another author has suggested, there is a statutory directive to view “regarded as” from the employer’s perspective. “The important role of stigma . . . suggests that an individual should also be protected under the ‘regarded as’ prong when he experiences discrimination on the basis of an (actual, past, or perceived) impairment that is ‘regarded’ by society in general as substantially limiting.”³⁴⁴

Even if the employee proves that he is regarded as disabled or has a record of a disability, he may not be entitled to a reasonable accommodation,³⁴⁵ so if he needs an accommodation to attend AA and/or therapy to stay sober, he is out of luck. Thus, he may be unable to maintain his sobriety and will inevitably become worse.

Using alcoholism as an example, it can be seen that the Supreme Court's decisions have effectively eliminated from the application of the ADA at least one disability that Congress expressly intended to protect. Obviously there are other conditions that the courts have decided are not legally disabling, although thought before to be so in every case, such as cancer.³⁴⁶

The Court's decisions limit the protected class to people who are traditionally disabled, such as people who are blind, deaf or unable to walk, because they are totally limited in a major life activity. People with less obvious impairments, such as alcoholism, diabetes, back injuries, and mental illness generally may not be limited in a major life activity under the Court's narrow interpretation of that term. Nevertheless, these impairments cause these individuals to be substantially limited in life activities that may not be recognized because the courts do not think that such activities are central to a normal person's daily life.³⁴⁷

The unintended result of the Court's decisions in the case of alcoholism is to provide protection only to some functional, but still very sick, active alcoholics who should be encouraged to enter recovery. Once they are in recovery, they lose protection of the ADA and become subject to discipline or discharge, if they have to have the smallest accommodation to remain sober. If they are unable to maintain their sobriety, they can be discharged for not measuring up to the employment requirements or for

violating a last chance agreement. Surely this is not the result that Congress intended or that society would consider desirable. In its zeal to limit the coverage the ADA, the Supreme Court is limiting the employment protection of the Act to people who cannot, or in the case of some active alcoholics, should not, be working.

Why have the courts interpreted the ADA so strictly that plaintiffs suing for employment discrimination under the ADA have to be so disabled that they probably cannot work anyway?³⁴⁸ One can only speculate. One obvious possibility is that the Court is generally hostile to employment discrimination cases.³⁴⁹

With regard to the ADA, there are some additional considerations. There are two problems with regard to the conception of the statute. One problem involves the structure of the Act, and the other involves the origin of this statute. With regard to the structure of the Act, the ADA uses the same definition of disability for all categories of coverage, that the person is substantially limited in his ability to perform a major life activity.³⁵⁰

Logically, protecting the rights of people who are seeking employment or trying to maintain employment involves different considerations from protecting rights of people denied access to public accommodations. It can be argued that people who are denied access to public accommodations are more likely to be more impaired than people who are able to work. The Supreme Court has not been entirely consistent in this area and has indicated that it is reluctant to designate “working” as a major life activity,³⁵¹ even though the Court has said that “reproduction” is.³⁵² This somewhat schizoid treatment is reflected in the two cases decided discussed earlier under the ADA’s titles that govern areas other than employment. In both of these cases, the Court was very generous in its interpretation of the Act.³⁵³ This may be some evidence of the Court’s hostility to

employment discrimination cases.³⁵⁴ To be more gracious, the problem may be that the ADA contains a conceptual problem, which requires disability to be viewed more, rather than less, stringently for the purposes of employment than disability for other purposes. The goal of Title I was to enable disabled people to work,³⁵⁵ not to put them in the dilemma of proving that they are sufficiently impaired to be disabled but still able to perform the essential duties of the job; in other words, that they are almost, but not quite, too sick to work. However, the Act as written and interpreted allows that outcome.

The other problem is with regard to the origin of the ADA. The ADA's predecessor, the Rehabilitation Act, applied only to the federal government itself or to entities that consented to enter into a relationship with the federal government, federal grantees and federal contractors, all of whom were benefiting from the relationship.³⁵⁶ One can only speculate that courts are limiting the ability of plaintiffs to proceed with a case out of fear of allowing juries to hear these sympathetic cases or to require the employer to prove undue hardship, which, according to the statute, could be onerous.³⁵⁷ This reluctance may be due to the fact that, as opposed to the Rehabilitation Act, the defendant is not getting anything in exchange for making a reasonable accommodation that could be substantially burdensome.³⁵⁸

In addition, as discussed above,³⁵⁹ some provisions of the Rehabilitation Act required federal contractors and the federal government to take affirmative action to employ the handicapped, as disabled people were termed then.³⁶⁰ There was a concern that the employer would have to employ people who could not perform the job, so the definition of one who is currently handicapped was intended to be stricter than for one who is discriminated against because he has a record of a disability or because he is

regarded as disabled.³⁶¹ When the ADA was drafted, it simply used the Rehabilitation Act definitions, even though affirmative action was not required by any provision of the ADA. Nevertheless, the courts did not interpret the Rehabilitation Act as strictly as the courts have been interpreting the ADA, despite Congress' express prohibition that the ADA should not be interpreted less generously than the Rehabilitation Act.³⁶² Judicial activism is, and has been, cutting in more than one direction lately.³⁶³ As one author concluded, after an empirical study on ADA litigation,

[t]he most sobering hypothesis that emerges from this data is that the enactment of the ADA may have greatly harmed plaintiffs' prospects under a related disability statute—the Rehabilitation Act of 1973. On the effective date of ADA Title I, Rehabilitation Act plaintiffs in employment discrimination cases were faring twice as successfully as would ADA plaintiffs, over the next decade.³⁶⁴

The solution is for the courts to recognize their obligation to follow the express intent of Congress and interpret the ADA as generously as they did the Rehabilitation Act. How can this be accomplished at this point in time with the Supreme Court having boxed itself into a corner, so that few people are included in the protected class for employment purposes? Without a legislative solution,³⁶⁵ which seems unlikely, the solution is to interpret the “regarded as” and “having a record of” provisions as Congress intended.³⁶⁶ In both, the employer assumes that the person cannot do the job because either he has a record of a disability or because the employer regards him as being disabled. If courts follow the intent of Congress, these provisions should be interpreted more generously to prevent persons from being discriminated against because of perceived disabilities. These are people who can work, but who are being discriminated against because the employer thinks they cannot perform the job. Under the *Sutton* case, the Court adopted the EEOC's definition of “working” as a major life activity, which

requires that the plaintiff be unable to perform a range of jobs.³⁶⁷ In the context of perceived disabilities, the definition works better than it would under the actual disability prong because there is no conflict with the employee being qualified to do the job, as there may be if the employee is claiming to be actually disabled. If the employer believes that the employee cannot do his job and deals with him accordingly, then the employee should be considered substantially limited in the major life activity of working.³⁶⁸ As the court in *Shiplett v. National Railroad Passenger Corp.*³⁶⁹ said, if the employer believed that the employee could not be a train engineer, then he would be perceived as unable to do a number of safety sensitive jobs.³⁷⁰ In other words if the employer believes the employee cannot do the job, then the employer would also believe that the employee could not do other similar jobs.³⁷¹ That should be enough to satisfy the Court's requirement that the employee be perceived as unable to perform a range of jobs.³⁷²

The question then arises, should people who are not actually disabled, but who are only regarded as or who have a record of a disability be entitled to reasonable accommodation?³⁷³ The answer should be a qualified yes. While it may sound counterintuitive that a person who is not actually disabled would need a reasonable accommodation, there is no such limitation in the statute. Reasonable accommodation applies to all three prongs of the disability definition. Once the person qualifies for the protected class, the employer must reasonably accommodate any known physical or mental limitations.³⁷⁴ With the courts' restrictive interpretation of who is disabled, reasonable accommodation becomes especially important. This is particularly true in the case of people who are only able to work because they are using mitigating measures or require mitigating measures that may necessitate a reasonable accommodation, such as an

alcoholic who may require some time off to attend treatment, AA and/or counseling or a diabetic who needs breaks to check his glucose levels.³⁷⁵

If reasonable accommodation were required for people who are only perceived as disabled or who have a record of a disability, the accommodations would in most cases not have to be as burdensome as accommodations for those who are actually disabled. This solution would relieve the courts of their fear that the employer would be severely burdened by reasonable accommodation because these accommodations should generally not be burdensome or the person could not be working.

VI. Conclusion

There is another obvious consideration. Everything should not have to be justified in terms of economic efficiency. The anti-discrimination acts did take into account the morality of discrimination in forbidding it. Foreclosing disabled people from employment, even if it is justified in terms of economic efficiency, cannot be justified in terms of morality. Furthermore, “[t]here is a price—a cost—for securing more important remedial and social objectives.”³⁷⁶

The courts have restricted the class of persons protected by the ADA to an unconscionably small number. To rehabilitate the ADA, the courts must protect those employees who can now be discriminated against with impunity because employers believe incorrectly that their impairment prevents them from doing the job. Until a legislative solution is feasible, the courts must accord the ADA its rightful place as a protector of impaired people who are not in fact too sick to work, but who can now legally be treated as if they were.

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¹ ALCOHOLICS ANONYMOUS 30 (3D ED. 1976).

² 42 U.S.C. §§ 12101-12213 (2000). The ADA was directed at a broad spectrum of discrimination against people with disabilities, not just in employment, but in public services, accommodations and telecommunications. JOEL W. FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION* 793 (5TH ED. 2001)

³ See *infra* Section IV.B.1.

⁴ See *infra* Section IV.B.2; Samuel R. Bagenstros, *The Supreme Court, The Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923 (2004).

⁵ See Eliza Kaiser, *The Americans with Disabilities Act: An Unfulfilled Promise for Employment Discrimination Plaintiffs*, 6 U. OF PENN. J. OF LAB. & EMPL. 735, 750 (2004). Employers prevail in over 90% of the cases. “In construing and applying Title I of the ADA, courts have defied congressional intent and limited the scope of the ADA to a very narrow class of plaintiffs.” *Id.*; Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001)(hereinafter “Winning”); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L.L. REV. 99, 161 (1999)(hereinafter “Windfall”). See Sarah Shaw, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments*, 90 CAL. L. REV. 1981, n.2 (2002) for a collection of law reviews that discuss this issue.

⁶ See *infra* Section IV.B.2.; note 239; Colker, *supra* note 5.

⁷ See Susan Stefan, *Delusions of Rights: Americans with Disabilities*, 52 ALA. L. REV. 271, 302 (2000).

⁸ See *infra* discussion accompanying note 239.

⁹ There were many references to alcoholism in the legislative history. After much debate, it is clear that Congress intended to protect alcoholics, especially those in recovery. See, e.g., STAFF OF H.R. COMM. ON EDUCATION AND LABOR, 136TH CONG., *REPORT ON AMERICANS WITH DISABILITIES ACT 120*, 689 (1990):

[T]he issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. . . . While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on the question and recognizes the application of section 504 to active alcoholics and drug addicts present sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug

addiction and alcoholism are “physical or mental impairments” within meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and the drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he without authority to exclude those conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department’s long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

Also *id.* at 120 (“It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments The term includes, however, such conditions, diseases, and infections as: . . . drug addiction, and alcoholism.”)

S. Rep. No. 101-116, at 106 (1989) (“[i]t is intended that rehabilitated alcoholics and drug users will be protected by the law.”);

Americans with Disabilities Act: Hearing before the House Committee on Small Business, 135th Cong. 39-41, 62 (1990) (Statement of Rep. Delay, Member, House Committee on Small Business) (“The intent of the ADA is to protect the disabled. The bill now covers more than 900 known disabilities. This broad application includes drug addicts, alcoholics, people with contagious diseases and individuals with “voluntary” conditions such as being overweight.”)

135 Cong. Rec. S11922-02, 77 (1989) (“Let me just say in conclusion to this that section 504, which has been on the books since 1973, applies to many employers. We have not had troubles with either the coverage of alcoholism or drug addiction under that law”)

101 Cong. Rec. Sen. S10701, S10800 (1989) (“It is important to emphasize that we continue to protect applicants and employees who have overcome or are successfully being treated for drug or alcohol problems. Retaining these crucial protections for persons who have recovered or are in treatment is consistent with our national drug strategy and our longstanding commitment to supporting the treatment of those with drug and alcohol problems and working to ensure the full reintegration of former drug and alcohol abusers into the working world.”)

101 Cong. Rec. H2277, H2316 (1990) (“Those that are former drug addicts and alcoholics, even though they may be reformed, cannot be discriminated against. They are considered disabled.”)

101 Cong. Rec. H2410, H2443 (1990)

The bill excludes from protection individuals who are current drug users and it removes protections for current drug users under the Rehabilitation Act. However, the bill explicitly retains protections for recovered persons, individuals who have successfully completed treatment, and persons currently in drug or alcohol treatment, who are not using drugs illegally. The bill also protects persons who are erroneously regarded as current illegal users of drugs This bill strikes a delicate balance. It recognizes the need to protect employers, workers, and the public from persons whose current illegal drug use impairs their ability to perform a job and whose employment could result in serious harm to the lives or property of others. At the same time, the bill recognizes that treatment for those in the grips of substance abuse is not only the compassionate thing to do but an essential component or a comprehensive attack on drugs. Treatment can save the lives of individual abusers, and it can also return them to productive roles in society, which strengthens our families, our communities, our economy, and ability to meet competitive challenges in the growing international marketplace. By providing protections against discrimination for recovered substance abusers and those in treatment or recovery who are no longer engaged in illegal drug use, the bill provides an incentive for treatment.

¹⁰ 42 U.S.C. § 12114 (2000).

¹¹ See ROSALYN CARSON-DEWITT, M.D., *ENCYCLOPEDIA OF DRUGS, ALCOHOL & ADDICTIVE BEHAVIOR* 398 (2D ED. 1995).

¹² ADA preamble. 42 U.S.C. § 12101(b)(1) (2000).

¹³ Employment rates for impaired people have actually declined since the ADA was enacted. See Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1809 (2005).

¹⁴ 29 U.S.C. §§ 705(2), 791, 793, 794, 794(a) (2000)

¹⁵ 42 U.S.C. § 12201(a). The Rehabilitation Act still applies, but its standards are the ADA. See Robert L. Burgdorf, Jr., “*Substantially Limited*” *Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 428-30, (1997) for a discussion of the provisions of the Rehabilitation Act.

¹⁶ See Susan Stefan, *supra*, note 7, at 271. “Defendants in Section 504 [of the Rehabilitation Act] cases rarely contested the issue of whether a plaintiff was handicapped under the Act [footnote omitted] . . . Plaintiffs were found to be disabled under the Rehabilitation Act with conditions nearly identical to those presently being found by courts to not constitute disabilities under the ADA” *Id.* See also Colker, *A Windfall for Defendants*, *supra* note 5, at 160; Kaiser, *supra* note 5, at 735.

¹⁷ See *infra* Section III.B.

¹⁸ See e.g., *Bragdon v. Abbott*, 524 U.S. 624 (1998) and *PGA Tour, Inc. v. Martin*, 532 U.S.661 (2001). See Waterstone, *supra* note 13, at 1838-42 for a discussion of non-employment cases in which the plaintiff was treated more favorably than in employment cases.

¹⁹ 42 U.S.C. § 12112(6)(2000).

²⁰ 42 U.S.C. § 12102(2)(2000).

²¹ See *Bragdon*, 524 U.S. at 638-39 (citing 45 CFR § 84.3(j)(2)(ii) (1997); 28 CFR § 41.31(b)(2) (1997)).

²² 42 U.S.C. § 12112(a)(2000). Under the ADA, the employer must provide the reasonable accommodation unless to do so would be an undue hardship. 42 U.S.C. § 12112(b)(5)(A)(2000).

²³ See *Burgdorf*, *supra* note 15, at 425-26.

²⁴ See *infra* Section IV.B.

²⁵ See Cheryl L. Anderson, “*Deserving Disabilities*”: *Why the Definition of Disability under the Americans with Disabilities Act Should be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L.REV. 83, 95 (2000).

²⁶ 42 U.S.C. § 12101(a)(7) (2000). See Samuel R. Bagenstros, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 496 (2000). “The statutory ‘disability’ category should embrace those actual, past, and perceived impairments that subject people to systematic disadvantages in society. And the concept of stigma should play an important evidentiary role.” *Id.* at 445. The author suggests that such impairments as HIV and epilepsy should be always be considered disabilities because of their stigmatizing effect, and that the agencies that administer the Act should be able to identify such impairments. *Id.* at 527. Alcoholism should be included in such a list.

²⁷ See Bagenstros *supra* note 26, at 426. Even physicians have negative views about alcoholics. Physicians often see alcoholism as a problem of willpower or conduct because of the lack of attention paid to the disease in medical schools. See Thomas R. Hobbs, Ph.D., M.D., *Managing alcoholism as a disease*, Physician’s News Digest, (Feb. 1998).

²⁸ See CARSON-DEWITT *supra* note 11, at 398.

²⁹ 42 U.S.C. § 12114 (c)(4) provides in part as follows:

(c) Authority of covered entity

A covered entity--

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements

established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory

performance or behavior is related to the drug use or alcoholism of such employee. . . .

³⁰ See *infra* Section IV.B.2.a.1). Even if he is in active addiction, courts more often than not find that even then there is no significant impairment of a major life activity. *Id.*

³¹ See David Olsky, *Let Them Eat Cake: Diabetes and the Americans with Disabilities Act After Sutton*, 52 STANFORD L. REV. 1829, 1847-48 (2000).

³² In the case of alcoholics, these accommodations would include leave to go to treatment, AA meetings and/or counseling, and a second chance in the event of relapse. See *infra* Section IV.B.2.c.

³³ Cases usually end today with the court deciding that the plaintiff is not disabled, so whether he could perform the duties of the job generally does not arise. See *infra* Section IV.B.2.a.2)-3).

³⁴ 42 U.S.C. § 12102(2).

³⁵ See *infra* IV. C. 2. a. 2)-3).

³⁶ See *infra* Section IV. C. 2. c.

³⁷ As indeed they must under the Family Medical Leave Act, 29 U.S.C. § 2611-2615 (2000) but not under the ADA. FMLA covers fewer employers than the ADA. 29 U.S.C. § 2611 to 42 U.S.C. § 12111. The fact that intended beneficiaries of the ADA are protected by another statute is not a satisfactory solution.

³⁸ ALCOHOLICS ANONYMOUS *supra* note 1, at 141-42..

³⁹ Congress was concerned about the high unemployment rate among the disabled, which according to one survey was 39%. See Olsky, *supra* note 31, at 1841.

⁴⁰ See Bagenstros, *supra* note 4, at 946-47. See Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 238-40 (1990) in which the author discusses occasions when it may be economically rational to engage in prohibited classification of employees by protected class which are nevertheless prohibited by law.

⁴¹ See Anderson, *supra* note 25, at 119-120.

⁴² *Id.* at 119-20.

⁴³ See Arlene Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 592 (1997). In addition, the author notes that the Supreme Court recognized that “the ‘regarded as’ prong acknowledges that society’s accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.” *Id.* (citing *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987)).

⁴⁴ Journal of the American Medical Association, Joint Committee of the National Council on Alcoholism and Drug Dependence and the American Society of Addiction Medicine. (1992) There are some dissident views regarding the disease concept of alcoholism. See CARSON-DEWITT *supra* note .11.

⁴⁵ See BENJAMIN J. SADOCK & VIRGINIA A. SADOCK, 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 969 (7TH ED. 1999)

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.* .

⁴⁹ See *id.* “[R]ecovery is a process of trial and error; patients use slips when they occur to identify high-risk [for relapse] situations and to develop more appropriate coping techniques.” *Id.*

⁵⁰ Smoking contributes to heart disease, as does being overweight. Obesity is also an important factor in the development of diabetes. See Russell Blaylock, HEALTH AND NUTRICIAN SECRETS THAT CAN SAVE YOUR LIFE 181, 220, 287-88 (2002).

⁵¹ See, e.g., Hobbs *supra* note 27. However, these attitudes may be changing. “A recent Gallup poll found that almost 90 percent of Americans believe that alcoholism is a disease.” *Id.*

⁵² See *id.* at 958-59.

One finding supporting the genetic conclusion is the threefold to fourfold in creased risk for severe alcoholic problems in *close relatives of alcoholic persons*. . . . The rate of similarity or concordance for severe alcohol-related problems is significantly higher in identical twins of alcoholic individuals than in fraternal twins in most studies. The adoption-type studies have all revealed a significantly enhanced risk for alcoholism the off-spring of alcoholic parents, even when the children have been separated from their biological parents close to birth and raised without any knowledge of the problems within the biological family.

Id.
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[Thirty] percent or more of drinkers develop temporary alcohol-related life problems. Severe, repetitive alcohol-related life impairment (i.e. alcohol dependence) is observed at some time during the lives of approximately 10 percent of men and 3 to 5 percent of women, with an additional 5 to 10 percent of each sex developing persistent but less intense alcohol-related life problems that are diagnosed as abuse. Because high levels of alcohol intake can cause diverse medical and psychiatric problems, it has been estimated that 20 to 35 percent of people seeking help from a health care provider have alcohol abuse or dependence. Thus, alcohol-related problems are very common in society.

Id. at 954.

⁵⁴ *Id.* at 958.

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The common perception of alcohol and drug addiction as self-inflicted conditions accounts in large part for the social stigma that attaches to them. . . . The perception is largely unjust; addiction is a disease with a documented biological mechanism. Tendencies toward addiction may also have a genetic component, which further undercuts the idea of voluntariness. . . . [T]he instinct to blame the addict seems particularly arbitrary and unfair. . . . The underlying hypocrisy behind the blame-the-addict approach is most apparent with respect to alcohol, a product that is used openly and without shame by most adult Americans. The stigma of addiction thus does not attach merely to the behaviors giving rise to the

illness, but to the illness itself. The alcoholic is viewed in some way as weak—that is, not capable of “handling” a substance that so many others have the ability to enjoy casually.

Sonja B. Starr, *Simple Fairness: Ending Discrimination in Health Insurance Coverage of Addiction Treatment*, 111 YALE L.J. 2321, 2335-2337 (2002).

⁵⁶ *Id.* “[T]he stereotypical alcoholic person who is a homeless bum is very much the exception rather than the rule, representing only 5 percent of all persons with severe, recurring alcohol-related difficulties.” *Id.* at 954.

⁵⁷ *Id.*

⁵⁸ Alcoholics may be better off asking for a reasonable accommodation under Title VII. Ironically, reasonable accommodation under the religion provisions of Title VII was specifically referred to in the ADA as not sufficiently generous to use as an analogy for reasonable accommodation under the ADA. *See infra* note 85. However, because of the difficulties of proving a case under the ADA, an alcoholic plaintiff might be better off asking for an accommodation to attend AA meetings under Title VII. While AA is a spiritual, not a religious program, ALCOHOLICS ANONYMOUS, *supra* note at 44-57. its belief in a power greater than oneself would qualify it as a religion under Title VII. *See* C.F.R. § 1605.1 (2006) (religious practices include “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”)

⁵⁹ *See supra* text accompanying note 49.

⁶⁰ 42 U.S.C. § 12114 (2000).

⁶¹ *See infra* notes 203-04.

⁶² 42 U.S.C. § 12101.

⁶³ *Id.*

⁶⁴ 29 U.S.C. §§ 705(2), 791, 793, 794, 794(a) (2000).

⁶⁵ *See* Alex Long, *State Anti-Discrimination Law As a Model for Amending the Americans with Disabilities Act*, 65 U. OF PITT. L. REV. 597, 607-610 (2004).

⁶⁶ *See id.* at 604; FRIEDMAN & STRICKLER *supra* note 2, at 793.

⁶⁷ 42 U.S.C. § 2000(e) et seq.

⁶⁸ *See* FRIEDMAN & STRICKLER, *supra* note 2, at 793 (5TH ED. 2001).

⁶⁹ *Compare* 42 U.S.C. 2000e (b) (2000) *with* ADA 42 U.S.C. § 12111(5).

⁷⁰ 42 U.S.C. § 12102(8). The section provides as follows:

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

⁷¹ 42 U.S.C. § 12111(2) (2000). The provision reads as follows:

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

⁷² 42 U.S.C. § 2000e.

⁷³ Compare 42 U.S.C. 2000e 2(a) with 42 U.S.C. § 12111(a).

⁷⁴ 42 U.S.C. § 12112 (d)(2)(2000).

⁷⁵ 42 U.S.C. § 12112(d)(3)(2000). A pre-employment physical examination may only be conducted after the employer has made an offer of employment and only if all employees are required to take a physical. The provision imposes other restrictions on how the information is used.

⁷⁶ 42 U.S.C. § 12114(d)(2000) provides that a drug test "to determine illegal use of drugs is not a medical examination."

⁷⁷ 42 U.S.C. § 2000e-2(a)(2)(2000).

⁷⁸ 42 U.S.C. § 12112 (b) (1)(2000).

⁷⁹ 42 U.S.C. § 12112 (b) (6)(2000).

⁸⁰ 42 U.S.C. § 12113 (a)(2000).

⁸¹ 42 U.S.C. § 2000e-1.

⁸² The Court has interpreted the reasonable accommodation requirement for religion to be minimal. *See infra* note 85.

⁸³ 42 U.S.C. § 12111(9).

⁸⁴ *Id.*

The term "reasonable accommodation" may include—

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

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

Id.

⁸⁵ 42 U.S.C. § 12111(10). (B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--
(i) the nature and cost of the accommodation needed under this chapter;
(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons

employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Also in common with Title VII, the ADA has a defense for a religious employer in hiring persons of a particular religion. *Compare* 42 U.S.C. § 12113 (c) *with* Title VII.

Compare 42 U.S.C. § 12113 (c) *with* 42 U.S.C. § 2000e-2(e).

⁸⁵ 42 U.S.C. § 2000e (2000) Title VII also has a requirement that the employer reasonably accommodate the religious practices of employees. 42 U.S.C. § 2000e-2(e). The requirement for reasonable accommodation under the ADA, however, was intended to be more difficult to achieve. *See* *US Airways v. Barnett*, 535 U.S. 391, 422 (2002) (Ginsberg, J. dissenting) for a discussion of the difference in interpretation. “The legislative history also specifically rules out the majority’s reliance on *Trans World Airlines, Inc. v. Hardison*” (citing “H.R. Rep. No. 101-485, pt. 2, at 68, U.S. Code Cong. & Admin. News 1990, pp. 303, 350 (‘The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison* are not applicable to this legislation.’); S. Rep. No. 101-116, at 35 (same).” *Id.* *TWA v. Hardison*, 432 U.S. 63 (1977) is a Title VII case interpreting reasonable accommodation under that statute. The dissent in *US Airways* went on to say that the “House Report singles out *Hardison’s* equation of ‘undue hardship’ and anything more than a ‘de minimus [sic] cost’ as being inapplicable to the ADA.” *Id.* at n.2.

⁸⁷ The Supreme Court has nevertheless interpreted the ADA to provide a bona fide seniority defense in *U.S. Airways v. Barnett*, 535 U.S. 391 (2002).

⁸⁸ 42 U.S.C. § 2000-e-2(e) (1988); 42 U.S.C. § 2000e-2(h) (1988). The BFOQ defense under Title VII only applies to sex, religious and national origin discrimination. § 42 U.S.C. § 2000e-2(e) (1988). Race discrimination cannot be defended as a BFOQ. *See* *Harris v. Offshore Services, Inc.*, 510 U.S. 17, 25 (1993) (J. Ginsburg concurring).

There are other defenses under Title VII that are not contained in the ADA as well, such as action taken pursuant to a merit system or a system which measures quantity or quality of production or a professionally developed test. 42 U.S.C. § 2000e-2(h) (1988).

⁸⁹ 42 U.S.C. § 12113(b). In addition, an employer may refuse to employ one with certain infectious diseases in food handling occupations. 42 U.S.C. § 12113(d).

⁹⁰ 42 U.S.C. § 12209 (5) Enforcement of employment rights

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any employee of an instrumentality of the Congress

who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

The ADA also provides as follows:

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

⁹¹ 42 U.S.C § 1981a (2000) provides in pertinent part as follows:

(a) Right of recovery

(1) Civil rights

....

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with

Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section--

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means--

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection

⁹² 42 U.S.C. 1981a(3).

⁹³ 42 U.S.C. § 12201(a) provides:

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

⁹⁴ See *PGA Tour, Inc. v. Martin*, 532 U.S.661 (2001) and *Bragdon v. Abbott*, 524 U.S. 624 (1998).

⁹⁵ 524 U.S. 624 (1998)(the case involved a dentist who offered to treat the patient in a hospital, but not in his office).

⁹⁶ The regulations referred to were promulgated by the HEW because this was a public accommodation case, not an employment case. 524 U.S. at 632. The EEOC regulations in this regard are identical. See 29 C.F.R. § 1630.2(h).

The Court quoted the regs and commented as follows:

“(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
“(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 45 CFR § 84.3(j)(2)(i) (1997).

In issuing these regulations, HEW decided against including a list of disorders constituting physical or mental impairments, out of concern that any specific enumeration might not be comprehensive. 42 Fed.Reg. 22685 (1977), reprinted in 45 CFR pt. 84, App. A, p. 334 (1997). The commentary accompanying the regulations, however, contains a representative list of disorders and conditions constituting physical impairments, including “such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and ... drug addiction and alcoholism.” *Ibid.*

524 U.S. at 632-33.

⁹⁷ 524 U.S. 633-634.

⁹⁸ 524 U.S. at 638-39 (citing 45 CFR § 84.3(j)(2)(ii) (1997); 28 CFR § 41.31(b)(2) (1997)) The dissent disagreed that reproduction is a major life activity, but agreed that this list is incorporated by reference into the ADA. 524 U.S. at 659 (Rehnquist, J., dissenting).

⁹⁹ 524 U.S. at 639.

¹⁰⁰ The EEOC regulations have a definition of substantially limited, however. 29 C.F.R. § 1630.2(j)(ii) (2000).

¹⁰¹ 524 U.S. 642-645. The Court said:

We find the uniformity of the administrative and judicial precedent construing the definition significant. When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well. See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 580-581, 98 S.Ct. 866, 869-870, 55 L.Ed.2d 40 (1978). The uniform body of administrative and judicial precedent confirms the conclusion we reach today as the most faithful way to effect the congressional design.

¹⁰² The ADA also requires that in order to be covered by the ADA, the person not pose a direct threat. The Court ultimately decided that whether the plaintiff posed a direct threat must be decided based on objective reasonableness, not the health care professional's subjective judgment. To make this determination, the Court remanded for more conclusive evidence. *Bragdon*, 524 U.S. at 649.

¹⁰³ 524 U.S. at 657 (Rehnquist, J., concurring in the judgment in part and dissenting in part); 524 U.S. at 664-65 (O'Connor, J., concurring in the judgment in part and dissenting in part.) In *Sutton v. United Air Lines*, 527 U.S. 471, 483 (1999), the Court cited *Bragdon* to support its adoption of a strict individualized test:

The definition of disability also requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the "major life activities of such individual." § 12102(2). Thus, whether a person has a disability under the ADA is an individualized inquiry. See *Bragdon v. Abbott*, 524 U.S. 624, 641-642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (declining to consider whether HIV infection is a *per se* disability under the ADA).

¹⁰⁴ 527 U.S. 471 (1999).

¹⁰⁵ 527 U.S. at 477-78. For an interesting view on how the Court crafted the decision, see Mark C. Rahdert, *Airline's Ghost: Some Notes on Working as a Major Life Activity under the ADA*, 9 TEMPLE POL. & C.R. L. REV. 303 (2000).

¹⁰⁶ 527 U.S. at 481. This statement seems to contradict *Bragdon v. Abbott*, in which the Court noted that the Act required it to construe the ADA according to the HEW regulations defining disability. See *supra* discussion accompanying note 96. See Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC's "Disability" Regulations under the ADA*, WAKE FOREST L. REV. 177 (2004) for a good discussion of the issue of the deference owed to the EEOC regulations under the ADA.

¹⁰⁷ 527 U.S. at 478 (citing § 12102(2))

¹⁰⁸ 527 U.S. at 481.

¹⁰⁹ *Id.*

¹¹⁰ 527 U.S. at 482-83. The Court made this determination by using three provisions of the ADA:

[1] The Act defines a "disability" as "a physical or mental impairment that *substantially limits* one or more of the major life activities" of an individual. § 12102(2)(A) (emphasis added). Because the phrase "substantially limits" appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently--not potentially or hypothetically--substantially limited in order to demonstrate a disability. A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently "substantially limits" a major life activity.

[2] The definition of disability also requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the "major life activities of such individual." . . . The agency guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA. The agency approach would often 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.

. . . .

[3] Congress found that "some 43 million Americans have one or more physical or mental disabilities" . . . 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. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures.

Id.

¹¹¹ 527 U.S. at 489. It should be noted that the Court had said earlier that the EEOC did not have authority to issue the regulations. *Id.* at 481. At this point, the guidance suited the Court's purpose, so it was assumed without deciding that they were valid. *Id.* at 492-93.

¹¹² 527 U.S. at 481.

¹¹³ *Id.* (citing § 1630.2(j)(3)(i)). The Court further noted:

The EEOC further identifies several factors that courts should consider when determining whether an individual is substantially limited in the major life activity of working, including the geographical area to which the individual has reasonable access, and "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified." §§ 1630.2(j)(3)(ii)(A), (B). To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

527 U.S. at 491-92.

¹¹⁴ 527 U.S. at 493.

¹¹⁵ 527 U.S. at 492.

¹¹⁶ *Id.*

¹¹⁷ See *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 200 (2002).

¹¹⁸ See *supra* text accompanying note 96. In addition, “working” was also included in the list of major life activities from the Senate and House Committee reports on the ADA. See Burgdorf, *supra* note 15, at 439.

¹¹⁹ Bagenstros, *supra* note 26, at 505. Working is “a means of proving yourself worthy in your own eyes and in the eyes of others’ People who cannot work because of their impairments are therefore likely to experience prejudice and neglect.” *Id.* at 506.

¹²⁰ *Toyota*, 534 U.S. at 202.

¹²¹ *Bragdon v. Abbott*, 524 U.S. 624 (1998).

¹²² “The ADA expressly incorporates the regulations the Executive Branch had previously promulgated to implement the Rehabilitation Act of 1973. [citing, *inter alia*, 42 U.S.C. section 12201(a) (1994)] Even if the regulations promulgated under the ADA were not themselves entitled to deference, therefore, the Court has made clear that the substantively identical regulations promulgated under the Rehabilitation act would nonetheless provide a floor below which the ADA’s coverage could not drop.” Bagenstros, *supra* note 26, at 409-10.

¹²³ “The definition of disability also requires that disabilities be evaluated “with respect to an individual” and be determined based on whether an impairment substantially limits the “major life activities of such individual.” § 12102(2). Thus, whether a person has a disability under the ADA is an individualized inquiry. See *Bragdon v. Abbott*, 524 U.S. 624, 641-642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (declining to consider whether HIV infection is a *per se* disability under the ADA).” 527 U.S. at 483.

¹²⁴ See *supra* discussion accompanying notes 101-103.

¹²⁵ *Bragdon*, 524 U.S. at 642.

¹²⁶ 527 U.S. at 495-513 (Stevens, J., dissenting).

¹²⁷ 527 U.S. at 482-83. “The Court majority can be criticized for overrelying on an estimate of the number of people with disabilities, an estimate whose validity was questioned by its own sources. [footnote omitted] Congress’s reference to 43 million individuals with disabilities should be seen as a signal of inclusion, not exclusion.” Anderson, *supra* note 25, at 107. In addition, the 43 million figure was derived from sources that define disability differently from the Rehabilitation Act and the ADA. See Lisa Eichhorn, *Applying The ADA To Mitigating Measures Cases: A Case of Statutory Evils*, 31 ARIZ. ST. L.J. 1071, 1113 (1999).

¹²⁸ 527 U.S. at 513-14 (Breyer, J., dissenting).

¹²⁹ 527 U.S. at 503-04.

¹³⁰ The third case decided along with *Sutton* was *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) in which the court affirmed the lower court that the plaintiff was not disabled by hypertension because of mitigating measures. In addition, the Court reiterated the holding in *Sutton* that to be “regarded as disabled” in the major life activity of working, the plaintiff would have be foreclosed from a range of jobs. In this case, the plaintiff was regarded as unable to perform a mechanics’ job that also required driving a commercial vehicle, but he could perform other mechanic’s jobs.

¹³¹ 527 U.S. 555 (1999).

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- ¹³² 527 U.S. at 558-559.
- ¹³³ The Act allows employers to rely on governmental requirements. *See infra* note 191.
- ¹³⁴ 527 U.S. at 560.
- ¹³⁵ 527 U.S. at 558-59.
- ¹³⁶ 527 U.S. at 575-76.
- ¹³⁷ 527 U.S. at 564-67.
- ¹³⁸ 527 U.S. at 564 [emphasis added] (citing *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998)). The Supreme Court said that the lower court had cited the EEOC definition of "substantially limits" which requires a "significant restriction as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 527 U.S. at 563-64 (citing 29 C.F.R. § 1630.2(j)(ii)). The lower court had also said that "Kirkingburg's inability to see out of one eye affects his peripheral visions and his depth perception. Although his brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensate for his disability, the manner in which he sees differs significantly from the manner in which most people see." 143 F.3d at 1232.
- ¹³⁹ 527 U.S. at 565.
- ¹⁴⁰ 527 U.S. at 565-66.
- ¹⁴¹ 527 U.S. at 566. The Court said "That category, as we understand it, may embrace a group whose members vary by the degree of visual acuity in the weaker eye, the age at which they suffered their vision loss, the extent of their compensating adjustments in visual techniques, and the ultimate scope of the restrictions on their visual abilities. These variables are not the stuff of a *per se* rule. While monocularly inevitably leads to some loss of horizontal field of vision and depth perception, [footnote omitted] consequences the Ninth Circuit mentioned, [citation omitted] the court did not identify the degree of loss suffered by Kirkingburg, nor are we aware of any evidence in the record specifying the extent of his visual restrictions. 527 U.S. at 566-67.
- ¹⁴² 527 U.S. at 567.
- ¹⁴³ 534 U.S. 184 (2002).
- ¹⁴⁴ 534 U.S. at 187-190. The parties disagree about how this came about. The plaintiff alleges that she was forced to continue doing the duties that caused her condition to worsen. The defendant contends that she started missing work and was fired for poor attendance. 534 U.S. at 189-90.
- ¹⁴⁵ 534 U.S. at 191.
- ¹⁴⁶ 534 U.S. at 192. The Court expressed no opinion on whether working, lifting, and other life activities preserved for appeal below were major life activities.
- ¹⁴⁷ 534 U.S. at 197. *See supra* note 127.
- ¹⁴⁸ *Sutton*, 527 U.S. at 481.
- ¹⁴⁹ *Toyota*, 534 U.S. at 198 [emphasis added].
- ¹⁵⁰ 534 U.S. at 202.
- ¹⁵¹ *Id.* *See supra* discussion accompanying note 89. See Curtis D. Edmonds, *Snakes and Ladders: Expanding the Definition of "Major Life Activity" in the Americans with Disabilities Act*, 33 TEXAS TECH L. REV. 321, 325 (2002), for a good discussion of how

restrictively the courts are interpreting major life activity and Eichhorn *supra* note 106 for a discussion of the how the Court's failure to defer properly to EEOC regulations and guidelines caused it to adopt a much more restrictive view of "substantially limited."

¹⁵² 536 U.S. 73 (2002)

¹⁵³ 42 U.S.C. § 12113(a).

¹⁵⁴ 42 U.S.C. §12113(b).

¹⁵⁵ 536 U.S. at 78-79.

¹⁵⁶ 536 U.S. at 79-87. See Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1417-18 (1999) and Bagenstros, *supra* note 4, at 933 for discussions of the disability movement's concern regarding paternalism.

¹⁵⁷ Compare the Court's treatment of the EEOC's regulations with regard to working in *Sutton*, 527 U.S. at 492 with the Court's treatment of the EEOC guidances with regard to mitigating measures *Sutton*, 527 U.S. at 482-83.

¹⁵⁸ 540 U.S. 44 (2003).

¹⁵⁹ 540 U.S. at 54-55.

¹⁶⁰ *Id.*

¹⁶¹ *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Legitimate non-discriminatory reason is a judicially-created defense to a disparate treatment case that the Court developed under Title VII. Because Congress provided little guidance for analyzing a circumstantial evidence case of disparate treatment under Title VII, See Judith J. Johnson, *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the Reasonable Factors Other than Age" Defense and the Disparate Impact Theory*, 55 HASTINGS L. REV. (2004), the Court developed the legitimate nondiscriminatory reason defense as the model of proof for disparate treatment in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In establishing a prima facie case, the plaintiff must show that 1) he was a member of a protected class; 2) he applied and was qualified for a position for which the employer was seeking applicants; 3) despite his qualifications, he was rejected; and 4) the employer continued to seek applicants with the plaintiff's qualifications. *Id.* at 802. Once the employer produces evidence of a legitimate non-discriminatory reason, the plaintiff bears the burden of persuading the court that the reason given by the employer was not the true reason for the employer's action, but rather was a pretext for discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514-15 (1993). In that case, the Court said that the trier of fact may resolve the ultimate issue of discrimination vel non based on its disbelief of the employer's reason for its action, but that such disbelief does not necessarily satisfy the plaintiff's ultimate burden of proving discrimination. *Id.* The plaintiff must prove not only that the employer's reasons were untrue, but that they were a pretext for discrimination. *Id.* at 514-15.

¹⁶² *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993).

¹⁶³ See *supra* discussion accompanying notes 77-79.

¹⁶⁴ The lower court was correct in holding that because the no re-hire policy screened out former drug addicts, who are protected under the act, the no-hire policy could not be a legitimate non-discriminatory reason. 536 U.S. at 518. The Supreme Court reiterated its previously stated conclusion that legitimate non-discriminatory reason means any reason

that does not discriminate on its face; thus a neutral policy will always serve as a defense. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (a case decided under the Age Discrimination in Employment Act, in which the Court noted that a legitimate nondiscriminatory reason or a “factor other than age” can be any reason, regardless of how improper or illegal, as long as it does not violate the particular act under which the plaintiff is suing. *Id.* at 610-11.) The defendant’s neutral policy in the *Raytheon* case was thus a legitimate non-discriminatory reason that the plaintiff must prove is a pretext for discrimination. *Raytheon*, 540 U.S. at 520.

¹⁶⁵ 536 U.S. at 519. The district court had characterized the plaintiff’s attack on the employer’s employment policy as based on the disparate impact theory and foreclosed the argument because of timeliness. In fact, the defendant had not interposed the neutral employment policy as the reason for its action until later in discovery, at which time the court would not allow the plaintiff to amend the complaint and allege disparate impact. *Id.* at 517. The Supreme Court developed the disparate impact theory under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to preclude the use of neutral practices and procedures that disproportionately impact the protected class. *Id.* at 430. Such practices can be defended if the defendant can prove that they are job-related and consistent with business necessity. See Johnson, *supra* note 161, at 1410 for a discussion of disparate impact under Title VII. Unlike the model of proof for disparate treatment, however, the model of proof for disparate impact is codified in the ADA. 42 U.S.C. § 12112(b)(6)(2000).

On remand, the court decided that there was enough for a jury to believe that the employer was discriminating based on the plaintiff’s alcoholism and not because of a neutral policy. *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564 (2004).

¹⁶⁶ See Michelle T. Friedland, *Not Disabled Enough: The ADA’s “Major Life Activity” Definition of Disability*, 52 STAN. L. REV. 171, 173-76 (1999)

¹⁶⁷ 42 U.S.C. § 12102(8)(2000).

¹⁶⁸ 42 U.S.C. § 12112(b)(6)(2000).

¹⁶⁹ This is a fairly critical limitation because the employer bears the burden of justifying his employment policies. The Court seems to indicate that the employer only bears this burden, if the case is classified as a disparate impact case. If, as here, the plaintiff contends that he was discriminated against because of his disability, and the defendant contends that he used a neutral employment policy, the burden of persuasion should not remain on the plaintiff to prove that the policy is a pretext for discrimination, rather the burden should shift to the defendant to defend the policy. It should be noted that in *Chevron v. Echazabel*, 536 U.S. 73 (2002), the Court did not limit to a charge of disparate impact the defense of proving that the employee posed a direct threat. For a discussion of this case, see text accompanying notes 152-57.

What should the plaintiff have done in this case? He could have amended his complaint, if he had known in time that the defendant was relying on a neutral policy. If he had relied on alternate theories and his case had been characterized as disparate impact, he would have lost his right to recover damages, which are available only in disparate treatment cases. See *supra* note 91. Traveling only under the disparate treatment theory, the plaintiff would have lost, if the employer had shown that the policy was not a pretext for discrimination, even though the employer is expressly foreclosed by

the ADA from having such a policy. On remand, the lower court decided that there was a genuine issue of material fact as to whether the plaintiff was discriminated against on the basis of his addiction. *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564, 568-69 (2004).

¹⁷⁰ 536 U.S. 73 (2002).

¹⁷¹ 532 U.S. 661 (2001).

¹⁷² 532 U.S. at 666-671.

¹⁷³ 532 U.S. at 682.

¹⁷⁴ *See Waterstone, supra* note 13, at 1841. In *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979), the Supreme Court said that making a fundamental alteration is an undue hardship. Also, the EEOC guidance provides that “[u]ndue hardship” refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would *fundamentally alter the nature of the business or operation.*” 29 CFR 1630.2(p) (2006)(emphasis added).

¹⁷⁵ 532 U.S. at 683-85.

¹⁷⁶ 532 U.S. at 688.

¹⁷⁷ 532 U.S. at 690. The dissent is interesting:

If one assumes, however, that the PGA TOUR has some legal obligation to play classic, Platonic golf. . . . then we as Justices must confront what is indeed an awesome responsibility. . . . It has been rendered the solemn duty of the Supreme Court of the United States . . . to decide What is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question . . . : Is someone riding around a golf course from shot to shot *really* a golfer?

Either out of humility or out of self respect (one or the other) the Court should decline to answer this incredibly difficult or incredibly silly question.

532 U.S. at 700 (Scalia, J., dissenting).

¹⁷⁸ 535 U.S. 391 (2002).

¹⁷⁹ The Court said that whether collectively bargained or unilaterally imposed by the employer, seniority systems provide “important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment.” The Court said lastly that the most important consideration was that if the employer were to have to justify its seniority system in the usual case that that in itself would undermine employee expectations. The Court did leave open the possibility that if the seniority system was not administered in such a way as to raise employee expectations, then there could be special circumstances in which a violation of the seniority system would be a reasonable accommodation. 535 U. S. at 404-05.

The case had a promising beginning; the Court began by rejecting the employer’s argument that a reasonable accommodation does not require the employer to provide

preferential treatment to a disabled employee. The Court said that the Act does require that a disabled employee be treated preferentially to be able to perform; thus, the employer may be required to make exceptions to neutral rules for a disabled employee, and such exemptions are not per se unreasonable accommodations. 535 U.S. at 397-98. The Court, however, singled out a seniority system for special treatment. The Court said that in the usual case, overriding the seniority system would not be a reasonable accommodation. The Court cited several bases for its decision. First, the Court cited *Trans World Airlines, Inc. v. Hardison* 432 U.S. 63 (1977) for the proposition that under Title VII, an exemption from a seniority system is never a reasonable accommodation. However, as the dissent points out, Title VII contains the express defense of bona fide seniority system, while the ADA chose not to include such a defense. Furthermore, as the dissent notes that the legislative history makes it clear that the *Hardison* was not to serve as precedent for undue hardship under the ADA. 535 U.S. at 421-423 (Souter, J., dissenting). As further justification for its decision, the Court then cited lower court holdings under the Rehabilitation Act and the ADA that collectively bargained seniority systems could not be overridden to provide a reasonable accommodation. 535 U.S. at 404. As the dissent also points out, this ignores legislative history to the contrary, that seniority systems would only be a factor in whether the accommodation was reasonable. *Id.* at 421.

¹⁸⁰ 535 U.S. at 399-401.

¹⁸¹ 535 U. S. at 402-403.

¹⁸² *See infra* Section IV.B.2.

¹⁸³ 42 U.S.C. § 12102(2)(2000).

¹⁸⁴ The regulations referred to were promulgated by the HEW because this was a public accommodation case, not an employment case. *Bragdon v. Abbott*, 524 U.S. at 632. The EEOC regulations in this regard are identical. *See supra* note 96. The Court in *Bragdon* quoted the regulations and commented as follows:

“(A) any physiological disorder or condition, any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

“(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 45 CFR § 84.3(j)(2)(i) (1997).

In issuing these regulations, HEW decided against including a list of disorders constituting physical or mental impairments, out of concern that any specific enumeration might not be comprehensive. 42 Fed.Reg. 22685 (1977), reprinted in 45 CFR pt. 84, App. A, p. 334 (1997). The commentary accompanying the regulations, however, contains a representative list of disorders and conditions constituting physical impairments, including “such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy,

muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and ... drug addiction and alcoholism." *Ibid.*

524 U.S. at 632-33.

¹⁸⁵ See Hobbs *supra* note 27.

¹⁸⁶ Congress included specific provisions in the ADA regarding alcohol and drug addicts. See *supra* note 29 and *infra* note 188. From these provisions, it can be seen that Congress was assuming that alcoholics and drug addicts would be covered and made special provisions for them, clearly wanting to protect those who were in recovery.

¹⁸⁷ See *infra* notes 203-04.

¹⁸⁸ See Reese John Henderson, Jr., *Addiction as Disability: The Protection of Alcoholics and Drug Addicts under the Americans with Disabilities Act of 1990*, 44 VANDERBILT L. REV. 713 (1991) for a discussion of the origin of the distinction.

The definition of disability excludes one who is currently using illegal drugs. 42 U.S.C. §12114 provides as follows:

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who--

- (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- (3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity--

- (1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
- (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
- (3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that--

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to--

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

¹⁸⁹ 42 U.S.C. §12114(b)(2000). The courts are being hard on the addict in this regard also. For example, in *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001), the plaintiff was convicted of driving under the influence of intoxicants and required to participate in a treatment program. Her employer fired her for her absence during the treatment program. The court said that she was not entitled to the safe harbor provision of the ADA that extends protection to employees who are participating in a treatment and are no longer using drugs. The court held the provision only applies to employees who have refrained from using drugs for a significant period of time. Thus, under this interpretation, the safe harbor provision will never apply.

¹⁹⁰ 42 U.S.C. §12113(c)(2000).

¹⁹¹ The ADA allows drug testing of applicants, which is not forbidden as a medical examination. Furthermore, the ADA provides that Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

There are other provisions regarding compliance with various other federal laws and regulations.

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that--

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of

employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).
42 U.S.C. § 12114(c).

Furthermore, the Act provides:

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to--

- (1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and
- (2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

42 U.S.C. §12113(c).

¹⁹² Illegal drug users face different problems under the ADA. For example in *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977 (3d Cir. 1998), the plaintiff was fired for misconduct relating to his drug use. He was determined to be a current user of illegal drugs at the time of his discharge. While he was treatment for the drug use, he gave the company a written statement regarding his drug use. The company fired him when it learned in the statement that he had used illegal drugs. The court said that the company could fire him for drug-related conduct, and that his participation in the treatment program did not protect him because he was an illegal drug user at the time of the misconduct. The court noted that “current user” includes people whose abstinence is longer than the plaintiff’s three weeks. The court cited cases that the plaintiff is a current user even if abstinent for one year. 160 F.3d at 980 n.2.

In *Nielson v. Moroni Feed Co.*, 162 F.3d 604 (10th Cir. 1998), the plaintiff was the president of the company and was terminated for misconduct. He alleged that he was erroneously perceived as being addicted to legal drugs. 162 F.3d at 606. The Board of Directors told him that they thought he had a drug problem and that he was going into homes to steal drugs. He was evaluated and was determined to be a drug addict. The Board discharged him for trespassing into private homes. The court said that the mere status of being an illegal drug user may be protected, but the protection is not extended to one currently using drugs. If an addict has used drugs in the weeks or months prior to his discharge, he is a current user and not protected unless he has successfully completed a drug rehabilitation program and or is participating in such a program and is no longer using illegal drugs or if he is erroneously regarded as using illegal drugs. 162 F.3d at 609-610. However, being erroneously regarded as using illegal drugs is only considered a disability if it substantially limits a major life activity. 162 F.3d at 611. The plaintiff failed to produce evidence of anyone perceiving him as being limited in a major life

activity. The plaintiff's contention is that the company thought his alleged drug use was severe enough to prevent his being able to perform his duties as company president. The court said that this is insufficient to render him substantially limited in his ability to work because it is only one job and not a range of jobs. 162 F.3d at 611-12. In any event, he was not discharged because of his perceived addiction, but because of his unexplained trespass into peoples' houses. 162 F.3d at 612. It was clear, the court said, that he was discharged for his misconduct and not because the company thought he was a drug addict. 162 F.3d at 613.

In *Zenor v. El Paso Healthcare System, Ltd.*, 176 F.3d 847 (5th Cir. 1999), the plaintiff pharmacist was fired after he went into treatment for drug addiction. First, the court said that the plaintiff was a current user of illegal drugs because he was informed of the decision to fire him five weeks after he went into treatment, citing cases that held that six weeks (citing *McDaniel v. Baptist Medical Center*, 877 F. Supp. 321 (S.D. Miss. 1995)); and three weeks (citing *Shafer v. Preston Memorial Hospital Corp.*, 107 F.3d 274, 278 (4th Cir. 1997)) amounted to current use. 176 F.3d at 856-57. He was not entitled to the protection of the safe harbor provision because he had not completed a treatment program and had not been drug-free for a significant period of time. 176 F.3d at 857.

Furthermore, he was not qualified to perform his job because his drug addiction would undermine the integrity of the hospital pharmacy. The hospital was entitled to consider the relapse rate for cocaine users, which is high, in its assessment of whether he was qualified. 176 F.3d at 858. As an alternative ground, the court said that he was not disabled under the ADA in any event. The plaintiff argued that he was regarded as a drug addict. The court said that he had to show that he regarded as being substantially limited in a major life activity. The only available major life activity was working, and he could only show that employer believed that he could not be a pharmacist. The court said that a broad range of jobs was required, not just the inability to perform in the his desired field, citing similar cases: *Deas v. River West, L.P.*, 152 F.3d 471 (1998) (plaintiff could not work as Addiction Technician because of her seizure disorder); *Bridges*, 92 F.3d at 335 (plaintiff's hemophilia prevented him from performing as a firefighter). 176 F.3d at 860.

¹⁹³ 42 U.S.C. § 12111(2) (2000). See *supra* note 71 for the full text of this provision.

¹⁹⁴ As discussed earlier, in *Raytheon v. Hernandez*, 540 U.S. 44 (2003), the Court said that the plaintiff did not show that the employer's reason for refusing to rehire him, that he had engaged in misconduct, was a pretext. 540 U.S. at 53-54.

¹⁹⁵ *Traynor v. Turnage*, 485 U.S. 535 (1988). See discussion *infra* notes 199-204.

¹⁹⁶ 392 U.S. 514 (1968).

¹⁹⁷ 392 U.S. at 528.

¹⁹⁸ See *supra* Section II. Commenting on the disease concept of alcoholism, the Court noted:

[T]he inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in this field states that the major difficulty in articulating a "disease concept of alcoholism" is that "alcoholism has too many definitions and disease has practically none." [footnote omitted] This same author concludes that "a disease is what the

medical profession recognizes as such.” [footnotes omitted] In other words, there is widespread agreement today that “alcoholism” is a “disease,” for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement ends. Debate rages within the medical profession as to whether “alcoholism” is a separate “disease” in any meaningful biochemical, physiological or psychological sense, or whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders. [footnote omitted].

³⁹² U.S. at 522.

¹⁹⁹ 485 U.S. 535 (1988).

²⁰⁰ 485 U.S. at 550.

²⁰¹ *Id.*

²⁰² 485 U.S. at 551.

²⁰³ *See, e.g., Duda v. Board of Educ.*, 133 F.3d 1054, 1059 n.10 (7th Cir. 1998) (assuming alcoholism is a disability).

In *Leary v. Dalton*, 58 F.3d 748 (1st Cir. 1995), the court said it is well settled that alcoholism is a disability under the Rehabilitation Act. *Id.* at 752 (citing *Cook v. Dept of Mental Health*, 10 F.3d 17, 24 (1st Cir. 1993); *Little v. FBI* 1 F. 3d 255, 257 (4th Cir. 1993); *Fuller v. Frank*, 916 F. 2d 558, 561 (9th Cir. 1990); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1186 (9th Cir. 2001). *See also Maddox v. University of Tennessee*, 62 F.3d 843, 846 (6th Cir. 1995) (assuming without deciding that alcoholism is a disability under the Rehabilitation Act).

²⁰⁴ In *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996), the court said “it is well-established that alcoholism meets the definition of a disability.” *Id.* at 1105.

In *Renaud v. Wyoming Dept. of Family Services*, 203 F.3d 723 (10th Cir. 2000) in which the court held that alcoholism is a disability under the ADA and the Rehabilitation Act, the court noted that

Our determination that alcoholism is a disability under the Rehabilitation Act may be relevant to a determination of whether alcoholism is a disability under the ADA. [citation omitted] "Congress adopted the definition of [the] term ['disability'] from the Rehabilitation Act definition of the term 'individual with handicaps.' By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA." [citation omitted]

Several circuits have held that alcoholism is a disability under the ADA. *See, e.g., Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1180 (6th Cir.1997); *Buckley v. Consolidated Edison Co. of New York*, 127 F.3d 270, 273 (2d Cir.1997), *vacated en banc on other grounds*, 155 F.3d 150 (2d Cir.1998); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 n. 5 (8th

Cir.1997); *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1105 (Fed.Cir.1996); *cf. Despears v. Milwaukee County*, 63 F.3d 635, 635 (7th Cir.1995) (noting that the parties did not deny that alcoholism is a disability under the ADA). Whether alcoholism is a disability *per se* may raise additional issues. *See Burch v. Coca-Cola Co.*, 119 F.3d 305, 316-17 (5th Cir.1997) (holding that alcoholism is not a *per se* disability under the ADA and evidence that alcoholics, in general, are impaired is inadequate to show the substantial limitation of one or more major life activities), *cert. denied*, 522 U.S. 1084, 118 S.Ct. 871, 139 L.Ed.2d 768 (1998); *see also Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 686 n. 4 (8th Cir.1998) (citing *Burch* and requiring that a plaintiff show impairment of a major life activity), *cert. denied*, 526 U.S. 1004, 119 S.Ct. 1141, 143 L.Ed.2d 209 (1999); *Buckley*, 127 F.3d at 274 (citing *Burch* and requiring the plaintiff to demonstrate both "that he was actually addicted ... and that this addiction substantially limited one or more of his major life activities").

203 F.3d. at 730 n.2 and n3.

²⁰⁵ 127 F.3d 270 (2d Cir. 1997).

²⁰⁶ *See supra* Section III. B..

²⁰⁷ 127 F.3d at 273.

The reports also make clear that "[i]n removing protection for persons who currently use illegal drugs, the Committee does not intend to affect coverage for individuals who have a past drug problem or are erroneously perceived as having a current drug problem." [citation omitted] Finally, the Equal Opportunity Employment Commission's Americans With Disabilities Act, Title I Technical Assistance Manual ("EEOC Manual") states that "[p]ersons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past drug addiction. [citation omitted]."

Id.

²⁰⁸ 127 F.3d at 274.

²⁰⁹ 127 F.3d at 274-75.

²¹⁰ *See supra* Section IV.B.1.

²¹¹ Again, alcoholism is just an example, the ADA does not function as it should with regard to many impairments, previously considered to be *per se* disabilities. *See, e.g.*, cases cited *infra* note 239; Olsky, *supra* note 31.

²¹² *See, e.g.*, *Nelson v. Williams Field Services Co.*, 216 F.3d 1088 (Table), 2000 WL 743684 (10th Cir. 2000) (Unpublished).

²¹³ *See Catherine J. Lancot, Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of 'Disability' Undermines the ADA*, 42 VILL. L. REV. 327 (1997).

²¹⁴ 119 F.3d 305 (5th Cir. 1997).

²¹⁵ 119 F.3d at 315.

²¹⁶ *Id.* at 316 n.9.

²¹⁷ *See, e.g.,* Nauseda v. Tootsie Roll Industries, Inc., 2003 WL 1873519 (N.D. Ill. 2003)(in which the court said that the plaintiff was not substantially limited in such major life activities as sleeping and communicating.)

²¹⁸ *See supra* discussion accompanying notes 112-17.

²¹⁹ 29 CFR 1630.2(h)(2)(i) (2006).

²²⁰ Indeed the Supreme Court has indicated such, in its determination that reproduction is a major life activity. *See* Bryan P. Stephenson, *I'm So Lonesome I Could Cry. . . .But Could I Sue? Whether Interacting with Others Is a Major Life Activity Under the ADA*, 31 PEPPERDINE L. REV. 2004 for a discussion of various life activities the courts have held to be major or not.

²²¹ 29 CFR § 1630.2(j)(3)(i) (2006).

²²² *Id.*

²²³ 306 F. 3d 1162 (1st Cir. 2002).

²²⁴ *Id.* at 1164-65.

²²⁵ *Id.* at 1167 n.4.

²²⁶ *Id.* at 1167-68.

²²⁷ *Id.* at 1168 (quoting EEOC guidelines).

²²⁸ 527 U.S. 471 (1999).

²²⁹ *Bailey*, 229 F.3d. at 1168 n.5.

²³⁰ *Id.* at 1168 (citing the EEOC guidelines).

²³¹ *Id.* at 1169.

²³² 25 Fed. Appx. 403 (6th Cir. 2002) (unpublished).

²³³ The plaintiff was concerned that all this would cause him to relapse into active alcoholism. *Id.* at 403. He was excused from overtime and allowed to work no more than eight hours a day. When the employer required that he work more than eight hours a day, he filed a complaint. *Id.* at 405.

²³⁴ *Id.* at 407. He was unable to show that he was substantially limited in working because he did not make this showing with regard to a broad range of jobs. *Id.* Finally, he testified that taking an antidepressant had pretty much solved his problems, so since mitigating measures must be considered in determining whether one if disabled, he was not. *Id.*

²³⁵ *Id.*

²³⁶ 2002 WL 1285065 (N.D. Ill. 2002) (unpublished).

²³⁷ 2002 WL at *4 (citing *Solieau v. Guilford of Maine, Inc.*, 958 F. Supp. 37 (D. Me. 1996); *cf. Rowles v. Automated Production Systems, Inc.*, 92 F. Supp. 2d 424 (M.D. Pa. 2000) in which life style changes were sufficient to be substantially limiting.

²³⁸ 2002 WL at *4. The plaintiff also contended that the court ignored evidence that it said was not presented. That his recovery support groups required his absence from his family for 4-5 hours a day in early recovery. Added to his work requirement, this left no time for his family. He also alleged that he had no time to form friendships. The plaintiff also alleged substantial limitation in ability to care for himself because he has to limit his intake of food to food that does not contain alcohol. He also contended that he was

substantially limited in his ability to reproduce for fear of passing on the disease. Even if there were a genetic link which the plaintiff did not prove, the plaintiff did not present sufficient evidence that he is not substantially limited in reproduction. 2002 WL at *13. The plaintiff had two children born after he established his pattern of alcohol abuse. In any event, the court said, the decision not to reproduce cannot turn on personal choice. 2002 WL at *15.

²³⁹ Since the Court's restrictive interpretation of disability, all plaintiffs have had problems proving that they were substantially limited in a major life activity. For example, in *Waldrip v. General Electric Co.*, 325 F.3d 652 (5th Cir. 2003), the plaintiff had chronic pancreatitis and was allegedly fired when his employer saw the warning on his medication that he should not work around heavy machinery when taking it. The court said that he did not prove he was disabled. The plaintiff said that the disorder, which can cause bleeding, tissue death and even pancreatic cancer, substantially limits his ability to eat and digest. The court was willing to concede that eating is a major life activity, but that the plaintiff did not produce evidence that he was substantially limited in his ability to eat. 652 F.3d at 654-55. The court then cited other similar cases in which it had found that the plaintiff was not substantially limited in a major life activity.

The court cited the following cases in which plaintiffs were not substantially limited in their ability to work, beginning with cancer and its treatment not limiting the ability to work. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996). In addition, the court added the following:

See, e.g., Blanks v. Southwestern Bell Communications, Inc., 310 F.3d 398, 401 (5th Cir.2002) (holding HIV not a substantial limit on major life activity of reproduction); *Dupre v. Charter Behavioral Health Sys., Inc.*, 242 F.3d 610, 614 (5th Cir.2001) (holding back injury not a substantial limit on major life activities of sitting, standing, or working); *Talk*, 165 F.3d at 1025 (holding deformed leg not a substantial limit on major life activities of walking or working); *Still*, 120 F.3d at 52 (holding monocular vision not a substantial limit on major life activity of working); *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir.1996) (holding asbestosis not a substantial limit on major life activity of breathing); *Dutcher*, 53 F.3d at 727 (holding permanent arm injury not a substantial limit on major life activity of working).

Id. at 656 n5.

It is little wonder that defendants are currently winning 90% of the cases. Colker, *Winning and Losing*, *supra* note 5, at 240..

²⁴⁰ *See* Mayerson *supra* note 43, at 592. *See* Thomas Simmons, *Working With the ADA's "Regarded as" Definition of a Disability*, 5 TEX. F. ON C.L. & C.R. 27 (2000) for a good discussion of the origin and interpretation of the "regarded as" prong.

²⁴¹ *Sutton v. United Airlines*, 527 U.S. 471 (1999).

²⁴² *Sutton*, 527 U.S. at 489.

²⁴³ The EEOC took these regulations directly from the regulations issued by HEW under the Rehabilitation Act. See Burgdorf, *supra* note 15, at 434-35. The Supreme Court has recognized the authority of the regulations issued by HEW. *Id.*

²⁴⁴ See ????? for a discussion of this omission, in which the author asserts that Congress intended for the “regarded as” prong to be interpreted expansively.

²⁴⁵ *Id.*

²⁴⁶ See Eichhorn, *supra* note 156, at 1432-33.

²⁴⁷ See Burgdorf *supra* note 15, at 435.

²⁴⁸ See Mayerson, *supra* note 43, at 591.

²⁴⁹ 306 F. 3d 1162 (1st Cir. 2002).

²⁵⁰ See *supra* text accompanying notes 223-31.

²⁵¹ *Bailey*, 306 F.3d at 1169.

²⁵² See *supra* text accompanying note 111 for a discussion of *Sutton* in this regard.

²⁵³ *Id.* Similarly, in *Burch v. Coca Cola Co.*, 119 F.3d 305 (1997), also discussed above, the plaintiff alternatively argued that he was “regarded as disabled.” The court said “One is regarded as having a substantially limiting impairment if the individual (1) has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting only because of the attitudes of others toward such an impairment; or (3) has no impairment at all but is regarded by the employer as having a substantially limiting impairment.” *Id.* at 322 (citing *Bridges v. City of Bossier*, 92 F.3d 329, 332 (5th Cir. 1996)). There was no evidence that the employer regarded him as substantially limited in a broad range of jobs, as required. While the employer may have been concerned about his inappropriate behavior, there was no evidence that this was regarded as substantially limiting. In addition, there was no evidence that the employer discredited letters from his doctors that he would be able to refrain from such behavior. However, even if the employer regarded his alcoholism as an impediment, there was no showing that the employer regarded him as significantly limited in his ability to perform an entire class of jobs, just his job as an area service manager with responsibility for 20 employees. *Id.* at 322-23.

²⁵⁴ 162 F.3d 604 (10th Cir. 1998).

²⁵⁵ 162 F.3d at 606. The Board of Directors told him that they thought he had a drug problem and that he was going into homes to steal drugs. He was evaluated and was determined to be a drug addict. The Board discharged him for trespassing into private homes.

²⁵⁶ 162 F.3d at 611.

²⁵⁷ 162 F.3d at 611-12. In any event, he was not discharged because of his perceived addiction, but because of his unexplained trespass into peoples’ houses. 162 F.3d at 612. It was clear that he was discharged for his misconduct and not because the company thought he was a drug addict. 162 F.3d at 613.

²⁵⁸ 358 F.3d at 118 n.4. (citing McGowan, 35 Ga. L. Rev. 27, 123 (2000); Center and Imperato, 14 Stan. L. & Pol’y Rev. 321, 328 (2003)).

²⁵⁹ 29 CFR § 1630.2(j)(3)(i) (2006), which provides that:

(3) With respect to the major life activity of working—

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.

The ability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working:

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of “working”:

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs);

and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of that impairment (broad range of jobs in various classes).

²⁶⁰ *Sutton v. United Airlines*, 527 U.S. 471 (1999).

²⁶¹ *See Burgdorf supra* note 15, at 454 (citing Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 35,728 (1991)).

²⁶² *Id.* (citing 29 C.F.R. pt. § 1630, app. A 1630.2 (j)).

²⁶³ 182 F.3d 918 (6th Cir. 1999) 1999 WL 435169 (unpublished).

²⁶⁴ 1999 WL 435169 *1.

²⁶⁵ *Id.* at *7.

²⁶⁶ *Id.* at *8. (citing *Byrne v. Bd. of Educ.*, 979 F.2d 560, 567 (7th Cir. 1992); *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986)).

²⁶⁷ *Id.* at *8. (The court ultimately held that the plaintiff was a direct threat to safety and thus unqualified).

In *Avery v. Omaha Public Power District*, 187 F.3d 640 (8th Cir. 1999), the court said that after *Sutton*, to prove that he is regarded as disabled, the plaintiff must show more than that the employer regarded him as an alcoholic and a security risk so that he could not do a range of security sensitive jobs. The plaintiff would have to show the number and types of jobs the employer thought he would be unable to perform. *Id.* at *1-2.

²⁶⁸ 176 F.3d 847 (5th Cir. 1999).

Similarly, in *Overstreet v. Calvert County Health Dept.*, 187 F. Supp. 2d 567 (D. Md. 2002), the defendant argued that being an addiction counselor is not a broad enough range of jobs to qualify the plaintiff as regarded as disabled. The court did not reach this issue because it held that the plaintiff was not constructively discharged. It did bring up the interesting question of whether she qualified to be an addiction counselor if she was still drinking.

²⁶⁹ *Deas v. River West, L.P.*, 152 F.3d 471 (1998)(plaintiff could not work as Addiction Technician because of her seizure disorder); *Bridges v. City of Bossier*, 92 F.3d 329, 335 (plaintiff's hemophilia prevented him from performing as a firefighter). *Zenor*, 176 F.3d at 860.

²⁷⁰ Justin S. Gilbert, *Prior History, Present Discrimination, and the ADA's "Record of" Disability*, 31 U. OF MEMPHIS L. REV. 659, 661 (2001).

²⁷¹ *Id.* at 661-62.

²⁷² 306 F. 3d 1162 (1st Cir. 2002).

²⁷³ *Id.* at 1169.

²⁷⁴ 119 F.3d 305 (1997).

²⁷⁵ *See supra* discussion accompanying notes .

²⁷⁶ *Id.* at 317.

²⁷⁷ 480 U.S. 273 (1987).

²⁷⁸ *Id.* at 281.

²⁷⁹ *See supra* text accompanying note 15.

²⁸⁰ *Sullivan v. Neiman Marcus Group*, 358 F.3d 110 (1st Cir. 2004).

²⁸¹ 358 F.3d at 115.

²⁸² *See, e.g., Altman v. New York City Health and Hospitals Corp.*, 100 F.3d 1054 (2d Cir. 1996) (the court held that the plaintiff was not qualified to serve as Chief of Medicine because of his inability to stay sober and his conduct that endangered patients and the hospital when he was drinking).

²⁸³ *See, e.g., Smith v. Davis*, 248 F.3d 249 (3rd Cir. 2001) (An employee who does come to work on a regular basis is "not qualified" even if caused by his alcoholism, and the employer is not required to accommodate his excessive absenteeism.); *Leary v. Dalton*, 58 F.3d 748 (1st Cir. 1995);

²⁸⁴ *Leary v. Dalton*, 58 F.3d 748.

²⁸⁵ *Id.* at 753.

²⁸⁶ 42 U.S.C. § 12114(c)(2000). *See supra* note 29 for text of section.

²⁸⁷ *See, e.g., Sullivan v. Neiman Marcus Group*, 358 F.3d 110, 115-116 (1st Cir. 2004).

²⁸⁸ *See, e.g., Leary*, 58 F.3d at 753.

²⁸⁹ *See, e.g., Renaud v. Wyoming Dept. of Family Services*, 203 F.3d 723 (10th Cir. 2000), in which the court said that alcoholism is a disability under the ADA and the Rehabilitation Act, but firing for misconduct is not firing for disability.

²⁹⁰ 951 F.2d 511 (2d Cir. 1991)

²⁹¹ 951 F.2d. at 516.

²⁹² 62 F.3d 843 (6th Cir. 1995).

²⁹³ *See, e.g., Pernice v. Chicago*, 237 F.3d 783 (7th Cir. 2001) (court cited the virtual unanimity of the circuits on the issue that employers are allowed to fire employees for misconduct, even if it is related to their disability.); *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662 (7th Cir. 2000)(court held that defendant fired plaintiff not because it perceived her as an alcoholic but because she was under the influence of alcohol on the job, for which any employee would be fired); *Adamczyk v. Chief of Police of Baltimore County*, 134 F.3d 362 (4th Cir. 1998) (Plaintiff could be fired for egregious conduct, even if related to alcoholism.); *Nielson v. Moroni Feed Co.*, 162 F.3d 604 (10th Cir. 1998), (plaintiff company president was ousted for misconduct. The Board of Directors told him

that they thought he had a drug problem and that he was going into homes to steal drugs. He was evaluated and was determined to be a drug addict. The Board discharged him for trespassing into private homes); *Burch v. Coca Cola Co.*, 119 F.3d 305 (5th Cir. 1997), (the court cited a number of other cases in which firing for misconduct is not firing for alcoholism. *Id.* at 319 n.14); *Walker v. Consolidated Biscuit Co.*, 11 F.3d 1481 (6th Cir. 1997) (employee fired for being under the influence of alcohol at work, not because he was an alcoholic.); *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996) (employee fired for making threats against other employees while in treatment for alcoholism.); *Leary v. Dalton*, 58 F.3d 748 (1st Cir. 1995), (the court said that alcoholism is a disability under the Rehabilitation Act, but that the plaintiff could not perform the essential functions of the job. One of the functions of the job was showing up to work as scheduled. Because the plaintiff was in jail for driving while intoxicated, he could show up for work. He was terminated for excessive unauthorized absence.).

²⁹⁴ 480 U.S. 273 (1987).

²⁹⁵ 42 U.S.C. §12114 (c) (2000).

²⁹⁶ 162 F.3d 604 (10th Cir. 1998)

²⁹⁷ 162 F.3d at 608-09.

²⁹⁸ *See, e.g., Pernice v. Chicago*, 237 F.3d 783 (7th Cir. 2001).

²⁹⁹ *See, e.g., Bekker v. Humana Health Plan, Inc.*, 229 F. 3d 662 (7th Cir. 2000). In this case, the plaintiff was a physician in the defendant's hospital. Based on reports that employees had smelled alcohol on the plaintiff's breath, she had been evaluated as having a possible alcohol problem. She submitted to drug testing for a year and was allowed to resume social drinking. Shortly thereafter there were reports that she smelled of alcohol. She agreed to resume drug testing, but the hospital declined and required her to go into treatment. When she refused, they fired her. The plaintiff contended that she had been fired because she was perceived as an alcoholic. The hospital contended that she was fired for being under the influence of alcohol on the job which endangered her patients, not because she was perceived as an alcoholic. However, the person who carried out the actual termination admitted that he fired the plaintiff because he believed that she was an alcoholic and refused treatment. She was also fired because she presented a safety risk to her patients and a business risk to the hospital because patients would not want to see a physician who smelled of alcohol. 229 F.3d at 666.

³⁰⁰ *See, e.g., Fogle v. Ispat Inland, Inc.*, 32 Fed. Appx. 155 (7th Cir. 2002) (plaintiff fired for excessive absenteeism, not drug addiction); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001) (Plaintiff was convicted of driving under the influence of intoxicants and required to participate in a treatment program. Her employer fired her for her absence during the treatment program. The court said that she could be held to the same performance standards as other employees.).

³⁰¹ *See, e.g., Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995) (decision to drive is not due to alcoholism but bad conduct, for which the plaintiff was terminated. The court said that the plaintiff's alcoholism was not the sole cause of his drunk driving; he had to make a decision to drive while drunk.)

³⁰² *See, e.g., Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001) (Plaintiff was convicted of driving under the influence of intoxicants and required to participate in a treatment program. Her employer fired her for her absence during the treatment program.

The court said that she could be held to the same performance standards as other employees.); *Arbogast v. Alcoa Building Products*, 165 F.3d 31 (7th Cir. 1998) (Plaintiff, unable to attend training classes because he had lost his drivers license after his third DUI, asked for transportation as a reasonable accommodation, which was refused. The court said he was not discriminated against because of his alcoholism, but rather his bad behavior and that he could not show that other similarly situated employees were treated differently.); *Ibarra v. Sunset Scavenger Co.*, 2003 WL 21244096 (N.D. Cal. 2003) (Plaintiff truckdriver was suspended for crashing a company vehicle while driving drunk. He was subsequently terminated because he was unable to regain his driver's license after the incident within the six months required under the collective bargaining agreement. The court said that the ADA does not require accommodation and expressly authorizes employers to hold alcoholic employees to the same standards as other employees.); *LaBrucherie v. The Regents of the University of California*, 1995 U.S. Dist. Lexis 12763 (N.D. Cal. 1995)(unpublished)(fired for absence from work due to incarceration for DUI).

³⁰³ See, e.g., *Martin v. Barnesville Exempted Village School Dist. Bd. of Ed.*, 209 F.3d 931 (6th Cir. 2000) (The plaintiff was not hired as a school driver because of a prior incident in which he had been caught drinking on the job. The court said that whether the employer perceived him as an alcoholic or not, it could refuse to hire him because of his prior bad conduct.) *Livingstone v. U.S. Postal Service*, 168 F.3d 490, 1998 WL 791828 (6th Cir. 1998) (unpublished). (Even if plaintiff was dismissed because of his intoxication, the fact that he arrived at work unable to perform his duties and threatened the safety of others was sufficient to support his discharge. Even if his misconduct was related to alcoholism, he could be legitimately discharged for the misbehavior. 1998 WL 791828 at **6; *Newland v. Dalton*, 81 F.3d 304 (9th Cir. 1996) (discharge for firing assault rifle in a bar).

In a twist on misconduct cases, in *Brennan v. New York City Police Dept.*, 141 F.3d 1151 (Table) 1998 WL 51284 (2nd Cir. 1998), the plaintiff was a policeman, who at the time of his alleged forced resignation, was a recovering alcoholic. However, before he got into recovery, he had consumed alcohol and fallen asleep on a public transport. When he awoke, he was disoriented and left his gun in a bag on the subway. It was never recovered. He said that falling asleep was not the result of his consumption of alcohol, but because he had worked a long shift. 1998 WL 51284 at *1. After another incident, he went into a treatment program. After treatment, he was placed on restricted duty and later resigned because he was not returned to active duty. The plaintiff complained that he was forced to resign because of his alcoholism. 1998 WL 51284 at *2. The court said that it was not disputed that the plaintiff was protected by the ADA because he was a person who had a record of a disability as an alcoholic. However, the court said that he was not otherwise qualified because of his carelessness in losing the gun. Because the plaintiff himself said he had not lost the gun as a consequence of his alcoholism, the court said that he was not forced to resign because of his alcoholism. The court further said that a reasonable accommodation would be inappropriate because he himself did not attribute his carelessness to his disability. 1998 WL 51284 at *3.

The current consensus with regard to misconduct related to a disability is expressed in *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995), in which the plaintiff was discharged for driving under the influence, as follows:

To impose liability under the Americans with Disabilities Act or the Rehabilitation Act in such circumstances would indirectly but unmistakably undermine the laws that regulate dangerous behavior. It would give alcoholics and other diseased or disabled persons a privilege to avoid some of the normal sanctions for criminal activity. It would say to an alcoholic: We know it is more difficult for you to avoid committing the crime of drunk driving than it is for healthy people, and therefore we will lighten the sanction by letting you keep your job in circumstances where anyone else who engaged in the same criminal behavior would lose it.

The refusal to excuse, or even alleviate the punishment of, the disabled person who commits a crime under the influence as it were of his disability yet not compelled by it and so not excused by it in the eyes of the criminal law is not "discrimination" against the disabled; it is a refusal to discriminate in their favor. It is true that the Americans with Disabilities Act and the Rehabilitation Act require the employer to make a reasonable accommodation of an employee's disability, but we do not think it is a reasonably required accommodation to overlook infractions of law.

We can imagine a slightly different case in which *Despears* would stand on firmer ground. Suppose when he was hired by the medical facility he told his employer, "I dare not drive because of my alcoholism, and therefore I ask you to excuse me from having to have a driver's license to be a maintenance worker, since driving is not an essential part of the job." That would be a request for an accommodation, rather than a request to be excused from a consequence of criminal activity.

Id. at 636. The court said that the decision to drive is not due to alcoholism but bad conduct, for which the plaintiff was terminated. The court said that the plaintiff's alcoholism was not the sole cause of his drunk driving; he had to make a decision to drive while drunk.

³⁰⁴ *Id.* at 636.

³⁰⁵ See, e.g., *Brohm v. JH Properties*, 149 F.3d 517 (6th Cir. 1998), in which the court analogized the plaintiff anesthesiologist's sleeping during surgical procedures caused by sleep apnea to cases in which the plaintiff was fired for misconduct caused by his alcoholism. The court noted that in *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511 (2d Cir. 1991), the court said that a termination for excessive absenteeism caused by the plaintiff's alcoholism was discrimination based solely on disability because it was based on a factor closely related to the plaintiff's disability. The court said it is like a plaintiff whose limp causes him to make a thump when he walks, and the employer firing

him for making the thumping noise. 951 F.2d. at 516. However, the court in the instant case repudiated that analysis and said that firing someone for misconduct caused by their disability is not firing them because of their disability. The court referred to its decision in *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995) in which the court had approved the firing of a football coach for driving while intoxicated which the plaintiff alleged was causally connected to his alcoholism. The Sixth Circuit had held there that there is a distinction between discharging someone for misconduct and discharging someone for his disability. Otherwise the employer would have to accommodate behavior considered unacceptable in other employees because of the plaintiff's disability. In the instant case, the plaintiff had alleviated the effects the sleep apnea and was nevertheless fired from the job. 149 F.3d at 522. See Kelly Cahill Timmons, *Accommodating Misconduct Under The Americans With Disabilities Act*, 57 FLA. L. REV. 187 (2005) for a discussion of misconduct and disabilities other than alcoholism.

Similarly in *Gasper v. Perry*, 155 F.3d 558 (4th Cir. 1998), the court said that an employer may discharge an employee for misconduct, even if the misconduct is related to the plaintiff's disability. In this case, the plaintiff had difficulty relating to people because of catastrophic injuries received in an accident.

In a particularly harsh and inexplicable case, *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997), the court said that the employer may prefer a non-disabled employee over a disabled employee who does not perform as well, even if his less able performance is due to his disability. The plaintiff had been out of work because of a heart attack, so he was rated low on quantity of work performed. The court said he was not fired because of his disability; he was fired as a consequence of his disability. 128 F.3d at 1197.

³⁰⁶ See *infra* note 308.

³⁰⁷ 216 F.3d 1088 (Table) 2000 WL 743684 (10th Cir. 2000) (unpublished).

³⁰⁸

Numerous courts in other circuits have similarly held that violation of return to work agreements or Last Chance Agreements constitute legitimate, non-discriminatory reasons for terminating employees. See *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1181-85 (6th Cir.1997) (employer did not violate the ADA in discharging an alcoholic employee who failed to comply with his Last Chance Agreement, which conditioned his employment on counseling and periodic testing for substance abuse); *Hinnershitz v. Ortep of Pa., Inc.*, No. 97 Civ. 7148, 1998 WL 962096, at *6 (E.D.Pa. Dec.22, 1998), *aff'd*, 203 F.3d 817 (3^d Cir.1999) (defendant articulated a legitimate, non-discriminatory reason for the plaintiff's discharge where the plaintiff breached his return to work agreement); *Nanopoulos v. Lukens Steel Co.*, No. 96 Civ. 6483, 1997 WL 438463, at *4 (E.D.Pa. July 29, 1997), *aff'd*, 156 F.3d 1225 (3^d Cir.1998) (where the defendant has advanced valid, non-discriminatory reasons for firing the plaintiff, namely, his violation of his Last Chance Agreement, no rational jury could find discrimination); *Golson v. Runyon*, 812 F.Supp. 558, 561 (E.D.Pa.1993) (holding that the plaintiff was fired because she breached her Last Chance Agreement, not because she was an alcoholic); *Brock v.*

Lucky Stores, No. 98 Civ. 4758, 2000 WL 288395, at *6 (N.D.Cal. Mar.14, 2000), *aff'd*, 23 Fed. Appx. 709, 2001 WL 1458014 (9th Cir.2001) (the plaintiff's failure to strictly comply with a return to work agreement was a legitimate, non-discriminatory reason for terminating the plaintiff); *Lottinger v. Shell Oil Co.*, 143 F.Supp.2d 743, 767-68 (S.D.Tex.2001) (no discrimination where the plaintiff had received an opportunity to obtain treatment and subsequently violated a return to work agreement); *McKey v. Occidental Chem. Corp.*, 956 F.Supp. 1313, 1319 (S.D.Tex.1997) (the defendants' termination of the plaintiff for failing to honor the terms and conditions of his return to work agreement was a legitimate reason for termination of his employment).

Mayo v. Columbia University, 2003 WL 1824628 **6 n7 (S.D. N.Y. 2003) (unpublished).

³⁰⁹ 2000 WL 743684 *2.

³¹⁰ *Id.* at *3.

³¹¹ Cite

³¹² See Friedland *supra* note, 166, at 173.

³¹³ 347 F.3d 685 (8th Cir. 2003)

³¹⁴ 347 F.3d at 688-89.

³¹⁵ 2003 WL 1873519.

³¹⁶ 2003 WL 1873519 at *2-3.

³¹⁷ 2003 WL 1873519 at *4. Similarly, in *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180 (6th Cir. 1997), the court said that the plaintiff was fired for violating the last chance agreement, not for his alcoholism. He had signed the last chance agreement earlier after testing positive for alcohol and going into treatment. He also agreed to drug tests as a condition of being allowed to continue to work. At the time he tested positive, he was not under the influence nor had he used alcohol on the job, which was the prohibited conduct. The court said even though employees not subject to a last chance agreement would not have fired, it was permissible to fire the plaintiff for testing positive in violation of the last chance agreement. The last chance agreement was an accommodation to the plaintiff rather than firing him earlier.

In *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), the plaintiff was discovered drinking on the job and offered an opportunity to go to treatment. She turned it down and was fired. The court said that the company perceived her as an alcoholic, so she qualified as disabled under the ADA. In addition, the court said that she had raised a genuine issue of material fact that she was fired because the company perceived that she was an alcoholic and should go to treatment. There was no proof regarding the validity of the rule that she had violated and that there were other employees who drove company vehicles after consuming alcohol. In addition, the company claimed that offering her treatment was a reasonable accommodation. However, there was insufficient proof that the plaintiff was an alcoholic and in need of accommodation.

³¹⁸ See *supra* discussion accompanying notes 48-49.

³¹⁹ See Lawrence D. Rosenthal, *Reasonable Accommodations for Individuals Regarded As Having Disabilities under the Americans with Disabilities Act? Why “No” Should Not Be the Answer*” 36 SETON HALL L. REV. 895, 896-898; Friedland *supra* note 166, at 186. See, e.g., *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999). “The prevailing view in the federal appellate courts is that a ‘regarded as’ plaintiff is not entitled to a reasonable accommodation under the ADA. Friedman & Strickler, *supra* note 2, at 195 (supp. 2005).

³²⁰ See *id.*

³²¹ See Rosenthal *supra* note 319, at 899. The author cites other reasons why reasonable accommodation should apply to all three prongs of disability definition, including “the remedial purposes behind the ADA, furtherance of some of the ADA’s most important goals, the idea that employers should not benefit by creating and following stereotypes the ADA was meant to eliminate, the Supreme Court’s decision in *School Board of Nassau County v. Arline*, [citation omitted], and the legislative history behind the ‘regarded as’ prong of the ADA.” *Id.* at 959-60. The author also discusses the arguments against applying reasonable accommodation to situations in which the plaintiff does not have an actual disability. *Id.* at 905-19.

³²² See generally *id.* at 962-63. As the author notes if the employee has no impairment, then he does not need a reasonable accommodation. If, however, he has an impairment and needs a reasonable accommodation to perform the job, the ADA’s plain language and remedial purposes require that he should have it. *Id.* at 966-67.

³²³ *LaBrucherie v. Regents of the University of California*, 119 F.3d 6, 1997 WL 398689 at **1 (9th Cir. 1997) (citing *Fuller v. Frank*, 916 F.3d 558, 561 (9th Cir. 1990).

³²⁴ In *Turner v. Fleming Companies, Inc.*, 173 F.3d 430, 1999 WL 68580 (6th Cir. 1999) (unpublished), the court said that the plaintiff had been offered a reasonable accommodation and could not hold out for the accommodation he preferred. The employer may choose the cheaper of two effective accommodations.

³²⁵ See *infra* Section IV.B.2.b.2).

³²⁶ See *supra* notes 203-04.

³²⁷ See, e.g., *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996) (the court said “it is well-established that alcoholism meets the definition of a disability.” *Id.* at 1105. The question was whether the defendant was required to offer the plaintiff a “fresh start” as a reasonable accommodation and that his pre-treatment discipline would be rescinded. The court said that offering the plaintiff a leave to go to treatment and light duty afterwards was a sufficient accommodation; that the defendant can choose the less expensive or easier to implement between two reasonable accommodations that are effective. 95 F. 3d at 1107.

³²⁸ See, e.g. *Leary v. Dalton*, 58 F.3d 748, 753 (1st Cir. 1995).

³²⁹ 133 F.3d 137 (1st Cir. 1998). See In *Fuller v. Frank*, 916 F.3d 558 (9th Cir. 1990), the court said that continued accommodation for an alcoholic would just enable him to drink. The plaintiff had received at least three leaves for treatment before he was discharged, and this was sufficient reasonable accommodation.

³³⁰ 133 F. 3d at (citing *Whitlock v. Donovan*, 598 F. Supp. 126, 134 (D.D.C. 1986).

³³¹ 133 F.3d at (citing *Schmidt v Safeway*, 864 F. Supp. 991 (D. Or. 1994).

³³² 133 F.3d at (citing *Kimbro v. Atlantic Richfield Co.*, 889 F. 2d 869, 879 n.10 (9th Cir. 1989)).

³³³ *See Smith v. Davis*, 248 F.3d 249 (3rd Cir. 2001) (employer not required to accommodate employee's excessive absenteeism because he is an alcoholic.). *See supra* cases cited in text accompanying notes (other bad conduct cases).

³³⁴ Alcoholics are not without some recourse, if the employer is covered by the Family and Medical Leave Act, the alcoholic can get unpaid leave to go to treatment. 29 USCS § 2612 (2000) *See, e.g., Sloop v. ABTCO, Inc.*, 178 F.3d 1285 (4th Cir. 1999) (FMLA requires a leave of absence for treatment of substance abuse, but not if the leave is occasioned by the plaintiff's continuing to drink rather than go to treatment.)

³³⁵ *See generally* Starr *supra* note 55, at 2327-29.

³³⁶ *Id.*

³³⁷ *See supra* text accompanying notes 56-58.

³³⁸ *See infra* Section IV.B.2.a.1).

³³⁹ As discussed later, he might be determined to have a record of a disability or be regarded as disabled, but he probably would not be entitled to reasonable accommodation under either of these provisions. *See infra* Section IV.B.2.c.

³⁴⁰ Because this is an individualized inquiry, some alcoholics could be limited in major life activities because of physical consequences of the drinking, such as heart disease, but this would be an impairment in and of itself.

³⁴¹ *See supra* text accompanying notes 149-50.

³⁴² *See supra* text accompanying notes 272-76.

³⁴³ *See supra* text accompanying notes 112-17.

³⁴⁴ Bagenstros, *supra* note 26, at 448.

³⁴⁵ *See supra* section IV.B.2.c.

³⁴⁶ *See supra* note 239 for cases involving other impairments that courts have determined are not disabilities. *See Eichhorn supra* note 106, at 203-15 for cases applying "substantially limited" to hold that persons who are blind in one eye, missing fingers, and had an arm amputated are not disabled.

³⁴⁷ *See Edmonds, supra* note 151, at 325. The author discussed other life activities that should be added to the list, such as driving, digesting food, eliminating waste products, or exercising.

³⁴⁸ The courts have been very restrictive in their interpretation of the ADA in other areas relating to alcoholism as well. For example, in *EEOC v. Exxon Corp.*, 203 F3d 871 (5th Cir. 2000), in response to the Exxon Valdes accident in which an alcoholic employee caused a serious accident, the company implemented a policy that removes employees who have undergone treatment for substance abuse from certain safety sensitive little-supervised positions. In response to the policy, the company demoted employees who had been in recovery for decades, among others. The EEOC alleged that the qualification standard has a disparate impact on persons with the disability of addiction. The company justified the policy promoting safety in jobs where the employees' potential relapse is not monitored, as well as furthering environmental protection and prevention of tort liability and good corporate citizenship. The EEOC moved for summary judgment to require Exxon to defend the policy by showing direct threat rather than business necessity. The EEOC contended that all safety-based qualifications must be defended under the direct

threat provision of the statute. The court disagreed, holding that the direct threat provision is for application to individuals who may pose a direct threat and not for policies that deal with general safety requirements. 203 F.3d at 873-74. The court further noted that in order to determine whether the policy is justified by business necessity, “the court should thus consider the magnitude of a failure in assessing whether the rate of recidivism among recovering substance abusers constitutes a safety risk sufficient for business necessity.” 203 F.3d at 875. “In short, the probability of the occurrence of discounted by the magnitude of its consequences.” *Id.*

³⁴⁹ See Bagenstros *supra* note 4, at 944; Harold S. Lewis, 11 ST. LOUIS U. PUB. L. REV. 1 (1992). See also, Jeb Rubenfield, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002). For a more optimistic view of the Supreme Court’s attitude toward Title VII, see Harold S. Lewis, 49 ST. LOUIS U. L.J. 1081 (2005), in which the author opines that the Supreme Court is interpreting Title VII more broadly after the 1991 Civil Rights Act after years of unfavorable interpretations. However, Some authors have opined that the Court is treating the ADA even less favorably than other anti-discrimination acts. See Bagenstros, *supra* note 4, at 944. Compare Colker, *Winning and Losing*, *supra* note 5 (in which the author concludes that defendants are winning 90% of the time in employment cases) with Waterstone, *supra* note 13, at 1826-32 (in which the author shows that plaintiffs are doing substantially better in non-employment cases. The author concludes that courts are more troubled by opening up employment opportunities to disabled people than they are by opening public accommodations to disabled people.). Plaintiffs have been more successful in the Supreme Court in non-employment cases. See *id.* at 1838-1842. “[I]n nearly every Title II and III case before it, the Supreme Court has expanded rather than narrowed the ADA.

³⁵⁰ *Bragdon v. Abbott*, 524 U.S. 624 (1998). See Eichhorn, *supra* note 156, at 1427.

³⁵¹ See, e.g. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

³⁵¹ See *Sutton*, 527 U.S. 471. As noted, the Supreme Court has noted this reluctance, despite the fact the working was found to be a major life activity in *Arline* and cited as such in the HEW regulations. Congress clearly intended *Arline*’s view of disability to govern the ADA. See Rahdert *supra* note 105, at 321-29.

³⁵² *Bragdon v. Abbott*, 524 U.S. 624 (1998).

³⁵³ See *supra* Sections III.B.1.a. and text accompanying notes 171-177.)

³⁵⁴ See Kaiser, *supra* note 5, at 753-54. Another reason for the treatment the Court has accorded Title I of the ADA has been posited, and that is that the Court believes the disability discrimination may be defended as rational, while other forms of discrimination may not be. See Bagenstros, *supra* note 4. Cf. Anderson, *supra* note 25, at 119 (Critics of the ADA view it as “in effect work[ing] as a subsidy paid by employers through ‘reasonable accommodation,’ a subsidy likely to be borne disparately within the labor market.” *Id.* at 119-20.)

³⁵⁵ Congress was concerned about the high unemployment rate among the disabled, which according to one survey was 39%. See Olsky, *supra* note 31, at 1841.

³⁵⁶ Other authors have reached the same conclusion. See Colker, *A Windfall for Defendants*, *supra* note 5, at 160. In addition, the definition of disability that was borrowed from the Rehabilitation Act was for the purpose of limiting persons as whom

the employer would have to take affirmative action. See Waterstone *supra* note 13, at 1849; Friedland *supra* note 166, at 183-84 (citing Burgdorf, *supra* note 15, at 432.

³⁵⁷ 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) in which the author explores the re-distributive nature of the ADA. “The ‘unfunded mandate’ quality of the obligation was magnified by the undefined scope of the ensuing responsibility to accommodate.” *Id.* at 317-318. “[U]ntil Congress confronts the disjunction of fitting a statute with such wealth-redistributive aspects into a context of ‘but for,’ Title VII-like discrimination . . . the Court’s narrowing of the definition of ‘disabled’ may prove the easiest and most effective way for the Court to limit the seemingly unfathomable potential sweep of ADA claims.” *Id.* at 357-58; Long, *supra* note 55, at 622.

Another author suggests another possible impetus for limiting the protected class, citing the large number of disability claims filed. Stephen F. Beforr, *The Story of Sutton v. United Air Lines, Inc.: Narrowing the Reach of the Americans with Disabilities Act*, EMPLOYMENT DISCRIMINATION STORIES 329, 332-33 (2006 Joel Friedman, editor).

³⁵⁸ Other authors share the same view. See Colker, *A Windfall for Defendants*, *supra* note 5, at 161. See Issacharoff & Nelson, *supra* note 357 for a discussion regarding the re-distributive nature of the ADA. “The ‘unfunded mandate’ quality of the obligation was magnified by the undefined scope of the ensuing responsibility to accommodate.” *Id.* at 317-318.

³⁵⁹ See *supra* text accompanying notes 64-65.

³⁶⁰ Section 504 does not require federal grantors to take affirmative action, see Burgdorf, *supra* note 15, at 418-19, and the ADA was based on this provision of the Rehabilitation Act. *Id.* at 476.

³⁶¹ See Friedland *supra* note, 166, at 184-86; Burgdorf *supra* note 15, at 432-33.

³⁶² 42 U.S.C. § 12201(a).

³⁶³ See Rubenfield, *supra* note 349 for a further discussion.

³⁶⁴ Colker, *Winning and Losing*, *supra* note 5, at 278.

³⁶⁵ See Long, *supra* note 55, at 623-47 for a review of the proposed legislative solutions. See Mark A. Rothstein, Serge A. Martinez, and W. Paul McKinney, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243 (2002) (amend the ADA to allow the EEOC to publish medical standards for determining who is disabled); Anderson, *supra* note 25; Eichhorn, *supra* note 156, at 1405 (1999) (“The current definition, which relies on notions of ‘substantial limits’ ‘major life activities,’ has proved not only unworkable, but often harmful to the Act’s purposes. It should be replaced with a definition based simply upon mental or physical impairment. Under such a definition if a defendant bases a decision upon a plaintiff’s actual mental or physical impairment-or a plaintiff’s record of such an impairment, or a perceived impairment [footnote omitted] –and has no legitimate reason to do so, then the defendant is liable for disability discrimination.” *Id.* at 1473.)

³⁶⁶ “Congress included the ‘regarded as’ provision in the Rehabilitation Act (and now the ADA) precisely to protect people disadvantaged because of ‘society’s accumulated myths and fears about disability and disease.’” Bagenstros, *supra* note 26, at 448 (citing *School Board v. Arline*, 480 U.S. 273 (1987)).

³⁶⁷ *Sutton*, 527 U.S. at 493.

³⁶⁸ “If ‘working’ is properly treated as a major life activity because the inability to work is likely to be stigmatizing and lead to systematic disadvantage, the test for substantial limitation should reflect that

function. An individual can experience stigma without being entirely unable to work. Even if one can find a variety of jobs (as nearly all people can if they are willing to set their sights low enough), significant underemployment can itself be disheartening, disadvantaging, and stigmatizing.” Bagenstros, *supra* note 26, at 507-08.

³⁶⁹ 182 F.3d 918 (6th Cir. 1999) 1999 WL 435169 (unpublished).

³⁷⁰ *Id.* at *8.

³⁷¹ See Burgdorf *supra* note 15, at 467 (citing *Cook v. Rhode Island*, 10 F.3d 17 (1st Cir. 1993), in which the court found that the jury could infer that the plaintiff was perceived as being unable to perform a wide range of jobs if refused one job).

³⁷² This is supported by the EEOC regulations in this regard, the number and types of job requirement “is not intended to be an onerous evidentiary showing.” 29 C.F.R. § 1630.2(j).

³⁷³ Courts have decided both ways. See Timothy J. McFarlin, *If They Ask for a Stool. . . Recognizing Reasonable Accommodation for Employees “Regarded As” Disabled*, 49 ST. LOUIS U. L.J. 927 (2005) .

³⁷⁴ 42 U.S.C. § 12112(b)(5)(A)(2000). *Cf.* Friedland *supra* note 166, at 186.

³⁷⁵ See Margaret C. McGrath, *Insulin-Dependent Diabetics and Access to Treatment in the Failure of the Americans With Disabilities Act to Provide Protection*, 37 J. MARSHALL L. REV. 957 (2004) for problems posed by recent decisions for diabetics who are not limited in a major life activity if they take their insulin, but they often need reasonable accommodation to be able to work.

³⁷⁶ Kaminshine, *supra* note 40, at 231-32. For example, customer preference is not a defense in discrimination cases, despite profitability. *Id.* at 232. “[D]iscrimination, at least in the short term, is not always economically irrational. According to economists, an employer might find forbidden criteria attractive, even if only crudely predictive of productivity needs, because they are relatively convenient and cheap to administer.” *Id.* at 239. BFOQ under both the ADEA and Title VII require the employer to suffer some economic detriment rather than use a facially discriminatory policy. *Id.* at 243-45. Similarly, the ADEA forbids mandatory retirement at any age for most jobs. See Johnson, *supra* note 161, at n.305.