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Hayes and Mobley: Bridging the Definition of Disability under the Ohio Workers' Compensation Act and the Americans with Disabilities Act of 1990

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HAYES AND *MOBLEY*: BRIDGING THE DEFINITION OF DISABILITY UNDER THE OHIO WORKERS' COMPENSATION ACT AND THE AMERICANS WITH DISABILITIES ACT OF 1990

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I. INTRODUCTION

On June 11, 1997, the Supreme Court of Ohio issued decisions in two cases, *State ex rel. Hayes v. Industrial Commission*[2] and *State ex rel. Mobley v. Industrial Commission*,[3] in accordance with a ten-year-old definition of permanent total disability (hereinafter PTD) under the Ohio Workers' Compensation Act.[4] *Hayes* and *Mobley* applied criteria for PTD articulated in Ohio workers' com-

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[2]679 N.E.2d 295 (Ohio 1997).

[3]679 N.E.2d 300 (Ohio 1997).

[4]102 Ohio Laws 524 (1911). For a brief history of workers' compensation nationwide as well as in Ohio, *see* Note, *The New Intoxication Defense for Ohio Employers*, 35 CLEV. ST. L. REV. 483, 484-87 (1987).

pensation court decisions which could be described as "employee-oriented."[5] Other decisions so characterized had polarized factions in years past. As might be expected, the earlier decisions had been favored by labor organizations as progressive, but bewailed by business groups as excessively costly and detrimental to industry. Legislation had been passed to "fix the system."[6]

It is hardly surprising then, that even as *Hayes* and *Mobley* came before the Ohio Supreme Court, the Ohio Legislature was enacting into law Amended Substitute Senate Bill 45 (hereinafter S.B. 45) to once again reverse the tide of worker-friendly rulings. S.B. 45 contained a provision that would have replaced the legal term "permanent total disability" with "permanent total impairment." This would have been one of the most radical - modifications of the Ohio workers' compensation system wrought by S.B. 45.[7] Had it taken effect,[8] it would have made *Hayes* and *Mobley* the last cases of their kind and reduced the number of injured workers eligible for PTD benefits by no longer looking at the "whole person."[9]

However, in spite of the defeat of S.B. 45, the concept of disability underlying *Hayes* and *Mobley* ultimately extends beyond Ohio workers' compensation law. It requires an in-depth analysis similar to the reasoning needed to establish a disability within the meaning of Title I of the Americans with Disabilities Act of 1990, as amended (hereinafter the ADA).[10] In doing so, it shifts the focus of any legal inquiry from the employee's limitations to his or her skills and abilities.

This case comment will discuss *Hayes* and *Mobley* and the workers' compensation definition of PTD which gave rise to them. The case comment

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[5]Note, *supra* note 4, at 483.

[6]*Id.* at 484.

[7]Other provisions contained in S.B. 45 would have eliminated waiting periods for payment of permanent partial awards where the claimant was being terminated from temporary benefits after reaching a level of permanency; reduced wage loss benefits from the current two hundred (200) weeks to twenty-six (26) weeks; tightened eligibility for compensation for diseases contracted outside the workplace by changing the definition of an "occupational disease"; and reduced the life of a claim from ten years to five years from the date of injury or diagnosis or five years from the last payment of compensation. 1 Ohio Lawyers Weekly 964 (1997).

[8]Issue 2, a referendum to decide whether the new law would go into effect, was not passed in the November 4, 1997, general election. Mark Tatge & Benjamin Morrison, *Overhaul of Workers' Comp. Law Rejected*, PLAIN DEALER, Nov. 5, 1997, at 1A.

[9]*See* 1 Ohio Lawyers Weekly 964 (1997) (quoting Cleveland attorney John M. Gundy, Jr.). Actually, employers have seen the workers' compensation premiums decrease during the last three years, but many did not feel that the change had gone far enough. *Id.* Two years ago, businesses started advocating for a major rewrite of Ohio law to override Ohio Supreme Court rulings which had broadened eligibility for work-related injuries. This resulted in the third significant modification in workers' compensation law in Ohio in four Years. *Id.*

[10]Americans with Disabilities Act, 42 U.S.C. §§ 1201 to 2213 (West 1990).

will also compare and contrast PTD and the ADA definition of disability. Finally, this case comment will suggest that, the outcome of Issue 2 notwithstanding, *Hayes* and *Mobley* can serve as a bridge to a productive partnership between the two statutory schemes.

II. THE DEFINITION OF PTD UNDER OHIO WORKERS' COMPENSATION LAW

A claimant is permanently and totally disabled when he or she is unable to engage in sustained remunerative employment[11] as the result of a work-related injury[12] or an occupational disease.[13] The purpose of permanent and total disability benefits is to compensate a claimant for the impairment of his or her earning capacity.[14]

According to *State ex rel. Stephenson v. Industrial Commission*,[15] in order to determine the degree to which a claimant's ability to work has been impaired and whether the claimant is capable of working at any sustained renumerative employment, the Ohio Industrial Commission[16] is required to examine a broad number of factors.[17] These factors include all evidence in the record, especially

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[11] State *ex rel.* Lawrence v. American Lubricants Co., 533 N.E.2d 344 (Ohio 1988); State *ex rel.* Chrysler Corp. v. Industrial Comm'n, 580 N.E.2d 1082 (Ohio 1991).

A disability is "total" if the claimant is so impaired in body or mind, or both, as to make him or her unfit to work at any substantially renumerative employment. State *ex rel.* Stelzer v. Industrial Comm'n, 28 Ohio Law. Abs. 425 (1938); State *ex rel.* Breidigan v. Industrial Comm'n, 43 N.E.2d 114 (Ohio App. 1942). A disability is "permanent" within the meaning of the Ohio Workers' Compensation Act if it will, with reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom. Logsdon v. Industrial Comm'n, 508, 57 N.E.2d 75 (Ohio 1944); Reed v. Young, 196 N.E.2d 350 (Ohio Ct. C.P. 1963).

[12] A compensable "injury" is any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. OHIO REV. CODE ANN. § 4123.01(C) (Banks-Baldwin 1998).

[13] "Occupational disease" means a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner than the public in general. OHIO REV. CODE ANN. § 4123.68 (Banks-Baldwin 1998).

[14] State *ex rel.* Hartung v. Industrial Comm'n, 560 N.E.2d 196 (Ohio 1990).

[15] State *ex rel.* Stephenson v. Industrial Comm'n, 509 N.E.2d 946, 952 (Ohio 1987).

[16] According to Ohio workers' compensation law, the Industrial Commission has original jurisdiction over claims of permanent total disability. OHIO REV. CODE ANN. § 4121.35 (Banks-Baldwin 1990).

[17] The Ohio Supreme Court ordered the Industrial Commission to adopt a policy manual setting forth guidelines and basis for decision-making for establishing PTD. *See* State *ex rel.* Blake v. Industrial Comm'n, 605 N.E.2d 23 (Ohio 1992). Although this was statutorily mandated by O.R.C. section 4121.32(C)(12) as long as fifteen years ago, the

the doctor's reports and opinions; non-medical evidence, such as the claimant's age, education, work record, psychological or psychiatric factors, if applicable, and sociological factors; and any additional information that might have bearing on the determination of whether a claimant may return to the job market through the utilization of previously-acquired skills, or skills that may be reasonably developed.[18]

When the Ohio Supreme Court decided *State ex rel. Noll v. Industrial Commission*,[19] it prescribed the method by which the Industrial Commission must apply the *Stephenson* standards.[20] All orders of the Industrial Commission which grant or deny benefits to the claimant henceforth must specifically state what evidence has been relied upon, and a brief explanation of the reasoning for the decision has to be given. An Industrial Commission order must make it readily apparent within the four corners of the decision that there is some evidence to support it, because the court would no longer search the record to find "some evidence" to corroborate Industrial Commission orders. Finally, the order must be fact-specific so as to be meaningful upon review. A boilerplate recitation of the *Stephenson* factors would no longer suffice.[21]

Since 1994, the Ohio Supreme Court has had the authority to decide PTD claims. In *State ex rel. Gay v. Mihm, Administrator*,[22] the court announced that it would find individuals to be permanently and totally disabled when there exists "substantial likelihood" that the claimant's medical condition is

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Industrial Commission did not accomplish this until August of 1994, *see* THE INDUSTRIAL COMM'N OF OHIO, PERMANENT TOTAL DISABILITY POLICY MANUAL (1994).

[18]These criteria are commonly referred to as *Stephenson* factors. The *Permanent Total Disability Policy Manual* first classifies and defines the physical demands of work (e.g., sedentary, light work, medium work, heavy work, and very heavy work), then it provides categories for each of the *Stephenson* vocational factors. For example, age is divided into "younger person" "person approaching middle age," "person of middle age," "person closely approaching advanced age," and "person of advanced age"; education includes the categories of illiteracy, marginal education, limited education, and high school education or above; and work experience is divided into unskilled work, semi-skilled work, skilled work, transferability of skills, and previous work experience. THE INDUSTRIAL COMM'N OF OHIO, PERMANENT TOTAL DISABILITY POLICY MANUAL (1994).

[19]State *ex rel.* Noll. v. Industrial Comm'n, 567 N.E.2d 245 (Ohio 1991).

[20]*Id.* at 249.

[21]The medical examination manual of the Ohio Industrial Commission makes a distinction between "impairment" and "disability" which the Noll procedures help to clarify. *See supra* note 18. The manual advises physicians to phrase their opinions in terms of impairment, and indicates that the evaluation of impairment (anatomical or mental loss of function as the result of an allowed injury) is the role of the examining physician. *Id.* The Industrial Commission determines disability by assessing the effect that the medical impairment has upon a claimant's ability to work. Of course, a determination of whether or not a claimant is permanently and totally disabled cannot be made in every case solely on the basis of medical impairment. See 93 O. JUR.3d § 202.

[22]State *ex rel.* Gay v. Mihm, Adm'r, 626 N.E.2d 666 (Ohio 1994).

permanent and total, based upon the evidence in the file, and notwithstanding the decision of the Industrial Commission.[23]

In determinations of PTD, the claimant must receive an award which continues until death in the amount of sixty-six and two-thirds percent (66 2/3%) of his or her average weekly wage. Except as otherwise provided in the statute, the award will be not more than a maximum amount of weekly compensation which is equal to sixty-six and two-thirds percent (66 2/3%) of the statewide average weekly wage. The award may not be less than a minimum amount of weekly compensation which is equal to fifty percent (50%) of the statewide average weekly wage at the time of the injury. In the event it is, the claimant will receive compensation in an amount equal to his or her average weekly wage.[24]

In cases where the weekly workers' compensation amount, when combined with Social Security disability benefits, is less than the statewide average weekly wage, the maximum amount of weekly compensation should be equal to the statewide average weekly wage.[25] Should Social Security disability benefits terminate or be reduced, the workers' compensation award must be recomputed to pay the maximum amount permitted by statute.[26]

III. THE RECENT PTD DECISIONS

A. State ex rel. Hayes v. Industrial Commission[27]

Johny Hayes, a nurse's aide, received five separate injuries during the course of and arising out of her employment with the Youngstown Hospital Association.[28] She applied for PTD compensation on April 11, 1989, and the Industrial Commission approved her application on August 28, 1990.[29] On May 12, 1992, however, the Industrial Commission reconsidered and denied her claim.[30] On August 24, 1992, she filed a complaint in mandamus, which resulted in the issuance of a writ by the appellate court.[31]

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[23] *Id.* at 673.

[24] OHIO REV. CODE ANN. § 4123.58(A) (Banks-Baldwin 1998).

[25] *Id.* § 4123.58(b).

[26] OHIO REV. CODE ANN. § 4123.58(b) (Banks-Baldwin 1998).

[27] State *ex rel.* Hayes v. Industrial Comm'n, 679 N.E.2d 295 (Ohio 1997).

[28] These injuries consisted of a fractured right distal tibia into her ankle joint with effusion of right ankle strain on February 14, 1977 (additional allowance was made for surgical removal of a Baker's cyst on her right knee on August 14, 1978); contusion of the abdomen on August 18, 1980; lumbrosacral sprain, left knee sprain and abdominal muscle strain on May 28, 1981; left foot and ankle injury on July 26, 1982; and low back strain and left ankle strain on May 22, 1984. *Id.* at 296.

[29] *Id.*

[30] *Id.*

[31] *Id.*

On March 4, 1993, the Industrial Commission again denied Hayes' application for PTD.[32] In its order, the Industrial Commission observed that claimant was sixty-two years of age, possessed a tenth grade education, had previously worked as a nurse's aide and bar attendant, and had no special training or vocational skills.[33]

Nevertheless, the order indicated that several medical reports had formed the basis for the decision to deny PTD benefits.[34] These medical reports opined that the claimant's physical restrictions would not prevent her from performing certain sedentary jobs, such as a clerk, check cashier, answering service operator, credit authorizer, or telephone solicitor.[35] The order further found that neither Hayes' age nor her tenth grade education would interfere with her performing or being retrained to perform any of these sedentary jobs.[36] In fact, the Industrial Commission agreed with one medical report which indicated that the claimant's prior work history as a nurse's aide would be an asset in securing a position as an Outpatient Admitting Clerk or Hospital Admitting Clerk.[37]

The Ohio Supreme Court found that the order of the Industrial Commission was flawed. The court reversed the appellate decision and granted a limited writ, ordering the Industrial Commission to vacate its order and proceed in accordance with the court's opinion.[38]

In particular, the Ohio Supreme Court ruled that the Industrial Commission's order provided no insight as to how the various nonmedical disability factors supported the denial of PTD compensation.[39] The order did not explain how the claimant's prior work history as a nurse's aide would offset her other vocational disabilities, or how the skills she had acquired in that capacity would transfer to the job of an admitting clerk.[40] The order did not reveal whether the Industrial Commission regarded Hayes' age and education to be "vocationally favorable or unfavorable."[41]

Finally, the court noted that, regardless of whether claimant's age and education were regarded as assets or barriers to retraining, the order should have considered whether "the *combination* of claimant's age, education, lack of

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[32] *Id.*

[33] *Hayes*, 679 N.E.2d at 296.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Hayes*, 679 N.E.2d at 300.

[39] *Id.* at 298.

[40] *Id.*

[41] *Id.* The Industrial Commission's refusal to refer Hayes to the Rehabilitation Division due to her age makes clarification of this factor especially critical. *Id.*

special training and vocational skills, and severely limited vocational aptitude"[42] would impede her being retrained.[43] The court concluded that the order should have specified how the claimant, in light of all these nonmedical or *Stephenson* factors, is capable of being retrained and returned to the job market.[44]

The Ohio Supreme Court charged the Industrial Commission with the task of correlating the findings in the various medical, specialized vocational, and rehabilitative reports with Hayes' ability to engage in sustained renumerative employment, although it noted that the task was "not an easy one in this case."[45] Alternatively, the Industrial Commission was advised that it could reconsider its conclusion that Hayes was not permanently and totally disabled.[46]

B. State ex rel. Mobley v. Industrial Commission[47]

In October of 1985, Carl Mobley injured his right shoulder while employed as a sheet metal worker for Ohio State University.[48] He was allowed workers' compensation for "right shoulder strain" and "right rotation [sic] cuff tear."[49] At the time of his injury, Mobley was sixty years old and had twenty-two years of experience as a sheet metal worker.[50] The injury resulted in him being unable to raise his arm above his head, and he had been unemployed since that time.[51]

Mobley applied for PTD benefits in April of 1991, based upon his shoulder injury.[52] With his application, he submitted a letter from his cardiologist and evaluations by two orthopedic specialists.[53] The cardiologist indicated that Mobley was permanently and totally disabled. Both orthopedic doctors, however, concluded that the claimant was permanently but not totally disabled and would be able to work at jobs which would not require him to lift his hand over his head. They also thought he might be able to function as a sheet metal worker on a restricted basis.[54]

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[42] *Id.*

[43] *Hayes*, 679 N.E.2d at 298.

[44] *Id.*

[45] *Id.* at 300.

[46] *Id.*

[47] State *ex rel.* Mobley v. Industrial Comm'n, 679 N.E.2d 300 (Ohio 1997).

[48] *Id.* at 302.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Mobley*, 679 N.E.2d at 302.

[53] *Id.*

[54] *Id.*

The Industrial Commission also received reports on Mobley's condition from medical doctors, a commission specialist, and a vocational expert.[55] These last two, in particular, concurred with the other medical opinions as to the extent of claimant's impairment, but disagreed with the assessment that Mobley could engage in sustained remunerative employment.[56] Both of them cited *Stephenson* factors—advanced age, limited education, lack of rehabilitation potential, and lack of transferable skills—in arriving at this conclusion.[57]

Although the Industrial Commission considered Mobley's claim several times during 1992 and 1993, it ultimately denied him PTD benefits due to the medical reports which had omitted *Stephenson* factors in establishing whether he was permanently and totally disabled.[58] Mobley requested reconsideration twice and was denied PTD on both occasions.[59] Thereafter Mobley petitioned for writ in the Court of Appeals of Franklin County and was granted a limited writ to compel further explanation by the Industrial Commission.[60]

On appeal, the Ohio Supreme Court affirmed in part and reversed in part. The court agreed with the appellate court's determination that the medical reports contained some evidence that Mobley was only permanently and partially impaired and was not precluded from performing sustained remunerative employment.[61] In view of this finding, the court concurred that the Industrial Commission had been obligated to explain whether the combination of Mobley's age, work experience, education, and so forth permitted his employment, but had not done so.[62]

Specifically, the Supreme Court of Ohio objected to the order's treatment of claimant's age.[63] The court felt that the order did no more than identify his age.[64] "[W]hile workers' compensation is not payable based solely for the effects of age, a claimant's advanced age . . . may realistically foreclose employment. . . . The [Industrial] [C]ommission must specifically 'discuss age in conjunction with the other aspects of the claimant's individual profile that may lessen or magnify age's effects.'"[65] Consequently, the court ruled that

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[55] *Id.*

[56] *Id.*

[57] *Mobley*, 679 N.E.2d at 302-03. As the vocational expert bluntly stated, "[T]here are no jobs that such a person can perform on a competitive basis." *Id.* at 302.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 303.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 305 (quoting State *ex rel.* Moss, 662 N.E.2d 364, 366 (Ohio 1996)). Like Hayes,

Mobley's motion for PTD be reconsidered with focus placed on his age, since age was "the only *Stephenson* factor with the potential to tip the balance in favor of a PTD award."[66]

However, the Ohio Supreme Court supported the Industrial Commission's order with regard to Mobley's sales experience. The order had found that claimant would be able to secure future employment because he had formerly worked as a salesperson for a locomotive firm.[67] The court upheld the order and refused to overturn it as an abuse of discretion because it was adequately explained and based on some evidence.[68]

IV. DISABILITY WITHIN THE MEANING OF THE ADA

A. From "Impairment" to "Disability"

Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of disability.[69] The ADA protects qualified individuals with disabilities from discrimination in job applications procedures, hiring, promotion and advancement, discharge, compensation, job training, and other terms, conditions, and privileges of employment.[70] In order to receive the protection offered by the ADA, a person must meet the definition of the term "qualified individual with a disability," as defined by the statute and implementing regulations.[71]

Mobley was not referred to the Rehabilitation Division. *Hayes*, 679 N.E.2d at 295-96. Under *Hayes*, the *Mobley* decision does not state that this was explicitly attributed to age. *Mobley*, 679 N.E.2d at 305-06.

[66] *Mobley*, 679 N.E.2d at 306.

[67] The Industrial Commission reasoned that Mobley had acquired interpersonal communication skills from his sales experience, which it considered an asset to future employment. It further believed that the claimant's physical restrictions were consistent with a sales position, which it did not regard as physically demanding. *Id.* at 305.

[68] *Id.* at 306.

[69] 42 U.S.C. §§ 12101-17 (1990).

[70] 42 U.S.C. § 12112(a) (1990).

[71] The ADA also prohibits discrimination against individuals who are not disabled on the basis of a relationship or association with a person with a disability. 42 U.S.C. § 12112(b) (1990); 29 C.F.R. § 1630.8 (1998). Furthermore, the statute proscribes retaliation or coercion against persons because they opposed any action made unlawful, participated in the enforcement process, or encouraged others to exercise their rights secured by the ADA. 42 U.S.C. § 12203 (West 1998); 29 C.F.R. § 1630.12 (1998).

It should be noted that the Ohio workers' compensation statute contains similar language prohibiting retaliation. Ohio Revised Code section 4123.90 provides that no employer shall discharge, demote, reassign, or take any punitive action against an employee because that individual filed a claim or instituted, pursued, or testified in any proceeding under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of the employee's employment with that employer. OHIO REV. CODE ANN. § 4123.90 (Banks-Baldwin 1998).

With respect to an individual, the term "disability" may be defined as a physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment.[72] A person must meet the requirements of at least one of these three criteria in order to be considered an individual with a disability under the statute.[73]

The first prong of the ADA definition covers persons who actually have physical or mental impairments which substantially limit one or more major life activities.[74] The focus of the first prong is on the person, so that a determination may be made as to whether that individual has a substantially limiting impairment.[75] To come within the first definitional prong, a person must establish three elements: (1) that he or she has a physical or mental impairment; (2) that the physical or mental impairment substantially limits; and (3) one or more major life activities.[76]

A diagnosis is required to ascertain whether an individual has an impairment.[77] As with the relationship between impairment-and disability

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[72] 42 U.S.C. § 12102(2); *see also* 29 C.F.R. § 1630.2(g).

[73] 42 U.S.C. § 12102(2) (1990).

[74] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL, §§ 902.7 and 902.8 (1995).

[75] *Id.*

[76] The second and third prongs of the ADA definition apply to persons who usually do not have an impairment which substantially limits a major life activity, but who have a history of, or who at one time had been incorrectly diagnosed as having, a substantially limiting impairment, or who are perceived by others as having a substantially limiting impairment. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g). Although the second prong of the ADA definition (i.e., having a record or history of a physical or mental impairment that substantially limits a major life activity) may include employees who have filed workers' compensation claims, the first definitional prong (actually having a physical or mental impairment that substantially limits one or more major life activities) is the most likely to overlap with PTD under Ohio workers' compensation law. *See, e.g.*, EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL §§ 902.7 and 902.8 (1995).

[77] A physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body system (neurological, musculoskeletal, special sense organs, respiratory and speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine); or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h) (1998). This regulatory definition does not set forth an exclusive list of impairments that are covered by the ADA.

Conversely, the statute and the legislative history specifically exclude certain conditions from being impairments under the ADA. Among these exclusions are homosexuality and bisexuality; environmental, cultural, and economic disadvantages; age; physical characteristics; predisposition to illness or disease; pregnancy; common personality traits, such as poor judgment or poor impulse control; and normal deviations in height, weight, or strength. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 902.2(c)(1995).

pursuant to the Ohio Workers' Compensation Act,[78] a diagnosis alone is insufficient to determine if the person has a disability.[79] An impairment rises to the level of a disability within the meaning of the ADA when it substantially limits one or more major life activities.[80] For purposes of the ADA, "major life activities" include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[81]

In general, an individual is "substantially limited" in a major life activity when she or he is unable to perform the activity or is significantly restricted as to condition, manner, or duration under which she or he can perform the activity, compared to the average person in the general population.[82] Accordingly, a determination of whether an impairment causes or results in substantial limitation should take into account the nature and severity (or extent), the duration, and the permanent or long-term impact of the impairment.[83]

B. The Meaning of "Qualified"

Once it has been determined that a person's medical condition or impairment does indeed rise to the level of a disability within the meaning of the ADA, the individual must show that she or he is qualified for the position in question.[84] Title I of the ADA defines a qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions[85] of the employment

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[78] *See supra* note 21.

[79] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 902.2(b) (1995).

[80] 29 C.F.R. § 1630.2(i) (1998).

[81] *Id.*

[82] *See* 29 C.F.R. § 1630.2(j) (1998); *see, e.g.*, EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 902.4 (1995).

[83] 29 C.F.R. § 1630.2(j). Medical documentation provided by an employee or applicant will naturally influence the determination of whether that person has an impairment, as well as the extent to which the impairment limits any of his or her major life activities. Consequently, it is important that medical judgments be made by doctors and other health professionals who are qualified to diagnose health conditions and health history, impairments and functional limitations, and to recommend medical work restrictions. On the other hand, hiring and placement decisions should be made by employers, who are qualified to match abilities and work restrictions with job requirements and other operational factors. *See* Malcolm D. MacDonald, *The Employer-Physician Relationship under the ADA*, EMPLOYMENT IN THE MAINSTREAM Winter 1997 at 20, 21.

[84] 29 C.F.R. § 1630.3(m) (1998).

[85] The term "essential functions" is explained in the regulations as "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n) (1998). An employer's notion and especially a written job description will constitute evidence of the essential functions of a particular job. 42 U.S.C. § 12111(8) (West 1990). Nevertheless, it should

position that the individual holds or desires."[86] Federal regulations flesh out this definition by indicating that a qualified person should meet "the requisite skill, experience, education and other job-related requirements"[87] established by the employer for the position in question.[88]

When evaluating whether or not a person with a disability is qualified for a specific position, the current credentials that he or she possesses are to be scrutinized.[89] Moreover, regardless of the consideration given to the employer's opinion of what may constitute essential job functions,[90] a detailed analysis of both the job duties and the impact or manifestation of the person's disability should be conducted on a case by case basis.[91]

Persons who satisfy the statutory definition of a "qualified individual with a disability" will be covered by the first prong of disability under the ADA.[92] These persons will have standing to file employment discrimination charges with the United States Equal Employment Opportunity Commission (hereinafter EEOC), the federal agency that enforces the ADA and has authority to promulgate regulations interpreting the law.[93]

To a certain extent, the ADA's in-depth assessment of "qualified" made pursuant to the ADA recalls the thorough interpretation of the *Stephenson* factors necessary to establish PTD under the Ohio Workers' Compensation Act. Indeed, some components of the ADA concept of "qualified," such as education and prior work experience, are identical to the *Stephenson* factors discussed in *Hayes* and *Mobley*.[94] The analytical methodology used in both statutory schemes is quite similar.[95]

A parting of the ways occurs, however, when either the criteria for the ADA definition of disability or the workers' compensation standards for PTD have been met. Whereas a qualified individual with a disability is usually seeking to enter, stay in, or return to the workforce through the exercise of ADA rights,

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always be kept in mind that the term "essential functions" refers solely to the *functions or duties* of a job, and not the *manner* in which they are performed. In actual practice, it is highly recommended that the job be observed by deciding officials, or at least that all workers, nondisabled as well as disabled, who perform the job-be interviewed.

[86] 42 U.S.C. § 12111(8) (West 1990).

[87] 29 C.F.R. § 1630.2(m) (1998).

[88] 29 C.F.R. § 1630.2(q) (1998).

[89] 29 C.F.R. § 1630.2(m).

[90] *See e.g., Hayes*, 679 N.E.2d at 295.

[91] 29 C.F.R. app. §§ i620 2 (m) and (n).

[92] 29 C.F.R. § 1630.2(m).

[93] 29 C.F.R. § 1630 (1998).

[94] *See supra* note 18 and accompanying text.

[95] Both statutory schemes focus on the "whole" person and not on the diagnosis. *See supra* note 21 and accompanying text.

the PTD claimant wants to obtain a disability-related status which will remove him or her from gainful employment permanently. While this divergence may initially seem irreconcilable, synthesis is possible.

V. BRIDGING THE STATUTORY SCHEMES

A. Not Necessarily at Odds

The purpose of the Ohio workers' compensation system is three-fold: (1) to prevent the financial ruin of injured employees; (2) to maintain the dignity of injured employees; and (3) to restore employees to a state of partial wholeness.[96] At common law, employees had the nearly insurmountable task of proving that employers had breached their minimal duty to exercise reasonable care in order to obtain relief for industrial injuries. For their part, employers faced costly litigation and potentially expensive judgments when workers prevailed. Ultimately, both sides achieved a compromise with what has been referred to as an "industrial bargain" designed to benefit everyone involved.[97]

Concerning the objective of PTD, "[i]t is also basic law that the purpose of permanent and total disability benefits is to compensate injured persons for impairment of earning capacity. . . . [T]he Industrial Commission must evaluate the evidence concerning the degree to which the claimant's ability to work has been impaired. . . . Any conclusion with regard to permanent total disability must address the claimant's ability to work."[98]

The meaning of disability[99] pursuant to the ADA reflects the intent of Congress to prohibit the specific forms of discrimination that persons with disabilities encounter on a daily basis. While persons with disabilities often experience the same or similar types of discrimination that confront other protected classes, they may also face unique forms of discrimination based on their disabilities and the effect that their present, past, or perceived conditions have on other persons.[100] The purpose of the ADA is to eliminate the discrimination that confronts individuals with disabilities, including

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[96] *See* Industrial Comm'n v. Drake, 134 N.E. 465 (Ohio 1911).

[97] *See* Note, *supra* note 4, at 484-85. In general, automatic recovery of benefits by employees under workers' compensation meant that they would receive less money, but such compensation would be swift and certain regardless of fault. *Id.*

[98] State *ex rel.* Stephenson v. Industrial Comm'n, 509 N.E.2d 946, 949 (1987) (citation omitted).

[99] The ADA employs the terms "disability" and "individual with a disability" rather than the terms "handicap" and "handicapped person"; the change in phraseology "represents an effort by [Congress] to make use of up-to-date, currently accepted terminology," and does not reflect a change in definition or substance. S. REP. NO. 116 (1989); H.R. REP. NO. 485 pt. 2 at 50-51 (1990). *See also* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 902.1(a) (1995).

[100] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 902.1(a) (1995).

employment-related discrimination. All too often, such bias hampers the employment and career advancement of people who may possess abundant ability to work despite scant opportunity to display or utilize it.[101]

Since the passage of the ADA in 1990, common wisdom has held that it is at odds with state workers' compensation statutes.[102] There are some areas where the ADA may impact on workers' compensation, because some workers' compensation claimants will meet the ADA definition of disability.[103] These areas may include company medical examinations and reporting procedures, return-to-work policies, and exclusive remedy stipulations and agreements in workers' compensation proceedings.[104] Fortunately for injured workers, the EEOC, the federal agency charged with the interpretation and enforcement of

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[101] It is only in the twentieth century, and especially the last fifty years, that the struggle for disability rights has moved forward. S. SHAPIRO, NO PITY 61 (1993). In the early years following World War II, the Paralyzed Veterans of America and the President's Committee on Employment of the Handicapped were formed. *Id.* In the field of medicine, rehabilitation centers were started to assist newly disabled soldiers, and later civilians, in returning to their pre-disability life activities. *Id.* Due to these developments, as well as the black and feminist civil rights movements and the discrediting of the "medical model" of disability, the focus has shifted from segregation of persons with disabilities to ensuring their civil rights. *See id.* at 63; *see generally* H. DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY (1990); K. HULL, THE RIGHTS OF PHYSICALLY HANDICAPPED PEOPLE (1979).

Of course, in spite of these landmark efforts to eliminate both architectural and attitudinal barriers, problems persist. For a recent discussion of the lack of understanding and acceptance. *See* David W. Dunlap, *Architecture in the Age of Accessibility*, N.Y. TIMES, June 1, 1997, at A1.

[102] *See, e.g.*, Dana S. Connell, *The Plaintiff's Two-Sided Mouth: Defeating ADA Claims Based on Inconsistent Positions Taken by the Plaintiff on Other Claims*, 22 EMPL. REL. L.J. 5-30 (1996); Martin Aron & Richard M. DeAgazio, *The Four-Headed Monster: ADA, FMLA. OSHA, and Workers' Compensation*, 46 LAB. L.J. 48-57 (1995); and Scott A. Carlson, *The ADA and the Illinois Workers' Compensation Act: Can Two "Rights" Make a "Wrong"?* 19 S. ILL. L.J. 567-92 (1995). The titles of the above cited journals indicate the negative view taken of the interfacing of the statutory schemes. The actual situation is far from hopeless, though, when one is willing to think through the ramifications of any given medical condition under both statutory schemes. *Compare* Fred Pompeani, *Mental Stress and Ohio Workers' Compensation: When Is a Stress-Related Condition Compensable?* 40 CLEV. ST. L. REV. 35-62 (1992) (discussing mental and emotional stress claims under workers' compensation), *with* Janet Lowder Hamilton, Note, *New Protections for Persons with Mental Illness in the Workplace under the Americans with Disabilities Act of 1990*, 40 CLEV. ST. L. REV. 63-98 (1992) (discussing coverage of persons with mental illness under the ADA).

[103] Some would even assert that employers who were taught that consistent treatment of employees avoided discrimination problems "have had the tables turned" because the ADA requires the opposite approach: each case must be evaluated on its own facts and different treatment may be required. *See* Walworth, Damon & Wilder, *Walking a Fine Line: Managing the Conflicting Obligations of the Americans with Disabilities Act and Workers' Compensation Laws*, 19 EMPLOYEE RELATIONS L.J. 221, 221-22 (Autumn 1993).

[104] *Id.* at 221.

the ADA, has issued extensive guidance on many of these and related matters.[105]

Obviously, not every workers' compensation claimant meets the requirements to be considered a qualified individual with a disability under the ADA. Some have temporary injuries with durations too brief to substantially limit one or more major life activities; others are partially impaired such that substantial limitation does not occur.[106] Employees who are not yet medically released to work or to return to work would probably not satisfy the qualification standards for the employment position in question.[107] Hayes and Mobley would have been placed into this final category only so long as they awaited medical release to return to their jobs or until their conditions stabilized. Ironically, when they made application for PTD benefits under the Ohio Workers' Compensation Act, Hayes and Mobley likely met the ADA definition of disability. Had it been established that both satisfied the ADA requirements to be considered a qualified individual with a disability, they would have been entitled to reasonable accommodations, which might have enabled them to return to work.

The light duty provided for in the Ohio workers' compensation statute and other reasonable accommodations, form the steel girders with which the two statutory schemes can be bridged. Vigorous enforcement of all federal[108] and state[109] anti-discrimination laws will weld the girders securely and overcome

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[105] *See, e.g.*, TECHNICAL ASSISTANCE MANUAL (1992); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (1995); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: WORKERS' COMPENSATION AND THE ADA (1996); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, GUIDANCE ON THE EFFECT OF REPRESENTATIONS MADE IN APPLICATIONS FOR BENEFITS ON THE DETERMINATION OF WHETHER A PERSON IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 (1997); and EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997).

[106] 29 C.F.R. §§ 1630.2(i)-(j) (1998).

[107] 42 U.S.C. § 12111(8) (West 1990).

[108] In addition to the ADA, the EEOC enforces and interprets Title VII of the Civil Rights Act of 1964 (prohibiting employment-related discrimination based on race, sex, color, religion, and national origin); the Equal Pay Act of 1963 (prohibiting wage disparities based on gender); and the Age Discrimination in Employment Act of 1967 (prohibiting discrimination based on age for individuals at least forty years old). Enforcement of this last statute would have been especially important for the claimants in *Hayes* and *Mobley*, whose ages figured prominently in their PTD determinations, although bias due to age was probably more disabling than their respective injuries.

[109] Ohio law also protects all employees from discrimination in employment due to their race, color, religion, sex, national origin, handicap, age or ancestry. OHIO REV. CODE ANN. § 4112.01 (Banks-Baldwin 1998). However, the public policy of Ohio which proscribes discrimination against persons with disabilities does not extend so far as to require an employer to continue the employment of a disabled worker who cannot perform his or her job duties as the result of a work-related injury. Barker v. Dayton

the misperceptions and prejudices of others. Individuals who can engage in sustained renumerative employment will be empowered to return to the job market on a competitive basis, rather than having to apply for PTD.

B. Light Duty under Workers' Compensation

The term "light duty" has characterized a variety of different arrangements made by employers for employees in the workplace.[110] It has generally been used to refer to job duties, whether temporary or permanent, that are physically or mentally less demanding than regular work.[111] Some employers use this term to mean simply excusing an employee from performing those job functions made difficult or impossible to carry out by the worker's impairment.[112] Sometimes certain positions are designated or created as "light duty" because the particular job duties involved are physically or mentally less demanding; in this way, employees who cannot attend to their usual duties may be provided with alternative work. Finally, at some companies, any position that is sedentary or less physically or mentally demanding receives the label "light duty."[113]

Under Ohio workers' compensation law, an employee who has been injured on the job such that he or she cannot return to his or her former position of employment may be paid temporary total compensation.[114] In *State ex rel. Ramirez v. Industrial Commission*,[115] the Ohio Supreme Court ruled that an employee is entitled to be paid temporary total compensation until one of the following three things occurs: the employee has returned to work; the treating physician has made a written statement that the employee is capable of returning to his or her former position of employment; or a temporary disability has become permanent.[116] As a result of this decision, many employers, wishing to reduce the total amount of their workers' compensation liability, have simply offered light duty assignments to their employees.[117] The

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Walther Corp., 564 N.E.2d 738 (Ohio App. 1989); *but see* Kent State Univ. v. Ohio Civil Rights Comm'n, 581 N, E. 2d 1135 (Ohio App. 1989) (holding that an employer must make reasonable accommodations for an employee with a disability absent undue hardship).

[110] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: WORKERS' COMPENSATION AND THE ADA (1996).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] OHIO REV. CODE ANN. § 4123.56.

[115] State *ex rel.* Ramirez v. Industrial Comm'n, 433 N.E.2d 586 (1982).

[116] *Id.* at 633.

[117] A machine operator might be re-assigned to work in a supply storeroom, or a utility worker might be excused from heavy lifting. *See supra* note 110.

same could be done on a long-term or permanent basis in many cases for PTD claimants.[118]

C. Reasonable Accommodation under the ADA

The ADA expressly defines the term "discriminate" to include the failure or refusal to make reasonable accommodations to the known physical or mental limitations of an otherwise-qualified individual with a disability who is an applicant or employee, except in cases where the employer can demonstrate that the accommodation would impose undue hardship on the operation of the business.[119] Denying employment opportunities to such a job applicant or employee also constitutes proscribed behavior, if the denial is based on the need to provide a reasonable accommodation.[120]

While the statute does not actually define the term "reasonable accommodation," it does provide several illustrations-of the term.[121] Clearly, reasonable accommodation is a broader, more varied concept than light duty under workers' compensation discussed above. Thus, light duty would constitute one type of reasonable accommodation pursuant to the ADA.

The EEOC issues regulations to explain and interpret the ADA's requirements concerning reasonable accommodations. In general, the regulations acknowledge three categories of reasonable accommodation: (1) accommodations that are mandated to ensure equal opportunity in the application process; (2) accommodations which enable employees with disabilities to perform the essential functions of the position held or sought; and (3) accommodations which enable workers with disabilities to enjoy and exercise the benefits and privileges of employment on an equal basis with employees who do not have disabilities.[122] The first and second categories of accommodations would have the most significance for transitioning workers from candidates for PTD to qualified individuals with disabilities who can and want to work, because they enable persons with disabilities to obtain and perform jobs.

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[118] *Id.*

[119] 42.U.S.C. § 12112(b)(5)(A) (West 1998).

[120] 42 U.S.C. § 12112(b)(5)(A).

[121] These include making existing facilities accessible; job restructuring; part-time or modified work schedules; reasssignment to a vacant position; appropriate adjustment or modification of examinations, training materials, or policies; and the provision of qualified readers or interpreters. This list is not intended to be exhaustive, but rather to furnish examples of the nature of the employer's obligation. 42 U.S.C. § 12111(9). *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC POLICY GUIDANCE: PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990; SUMMARY OF THE ACT AND RESPONSIBILITIES OF THE EEOC IN ENFORCING THE ACT'S PROHIBITIONS AGAINST DISCRIMINATION ON THE BASIS OF DISABILITY (1990).

[122] 29 C.F.R. app. § 1630.2(o) (1998).

With regard to reasonable accommodations which empower employees to perform their essential job functions, the regulations allow employers considerable leeway in implementing them. "[T]he preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide."[123]

Thus, an employer is not bound to make a requested accommodation if a less costly or less disruptive alternative is available to enable the employee to perform the job. The regulations suggest that the accommodation that is "most appropriate for both the employee and the employer"[124] be selected through an interactive process in which both employer and employee forge a partnership to get the job done.[125]

Many reasonable accommodations can be instituted at little or no cost, and few pose the major expense that some employers fear.[126] For instance, studies conducted at Sears, Roebuck and Co., whose customers represent more than half the households in the United States, show that, for the period from January 1, 1993 to December 31, 1995, the average cost of providing accommodations to employees with disabilities was $45.00.[127] Although Sears is a larger employer than most, its success in transcending compliance with the ADA is

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[123]29 C.F.R. app. § 1630.9 (1998).

[124]*Id.*

[125]Each case should be assessed on its own set of facts. Nevertheless, some guidance is offered by cases decided under the Rehabilitation Act of 1973 (West 1985 & Supp. 1993) (covering only the federal government and recipients of-federal contracts worth $10,000 or more). *See* Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201, 204 (1993).

[126]Lee, *supra* note 125, at 203.

[127]Peter David Blanck, *Sears, Roebuck: Still Transcending Compliance*, EMPLOYMENT IN THE MAINSTREAM 5 (May-June 1996). The most expensive accommodations and devices consisted of the installation of a light-controlled fire alarm system ($400) for a severely hard-of-hearing employee, and the purchase of a wheelchair ($350) for a worker unable to walk distances. *Id.* At the other end of the spectrum were the purchase of Braille and large print keyboard labels ($21.95) for an employee with impaired vision, and the engagement of an interpreter ($25 per hour) to sign for storewide meetings. *Id.* The most numerous category of arrangements, however, involved job modification, job reassignment, furniture placement, provision of flexible schedules or shorter shifts, and careful, repeated instructions—all of which cost nothing ($0)—for employees with a variety of disabilities. *Id.*

due more to its "culture of work force diversity and inclusion"[128] than its financial resources.[129]

One example of a reasonable accommodation provided by Sears may even have benefitted Carl Mobley, the sheet metal worker who was left unable to raise his arm above his head as the result of a work-related injury.[130] The company supplied a lower work space, wide pens and a hand stapler for an employee with limited range of motion and hand movements.[131] No cost was incurred.[132] Assuming that Mobley, with his prior experience in locomotive sales, had been allowed to return to his former employer or been able to find suitable employment elsewhere, such an accommodation might have enabled him to remain in the workforce and to successfully cross the definitional bridge from applicant for PTD under workers' compensation law to a qualified individual with a disability for purposes of the ADA.

VI. CONCLUSION

The *Stephenson* factors which form the basis for the decisions on PTD under Ohio workers' compensation law in *Hayes* and *Mobley* may also play a role in ascertaining whether an individual with a disability is "qualified" and, therefore, entitled to certain rights and protections under the ADA. An injured employee's skills, education, experience, and work history are, indeed, important aspects of the "whole" person and deserve positive treatment whenever possible.

It is quite likely that, when an ADA analysis is conducted, many impaired workers who apply for PTD would be able to engage in sustained renumerative employment, assuming they will be afforded the opportunity to do so. The question is whether the same employers who supported S.B. 45 will be willing to hire, employ, and make reasonable accommodations so that these individuals can return to and remain in the workforce as productive employees.[133]

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[128] *Id.* at 6. *See generally*, R. THOMAS, JR., BEYOND RACE AND GENDER: UNLEASHING THE POWER OF YOUR TOTAL WORK FORCE BY MANAGING DIVERSITY (1991)(noting that affirmative action programs are doomed to fail and the real solution is to transform the roots of the corporate culture to reflect diversity so as to compete and prosper).

[129] Blanck, *supra* note 127, at 5.

[130] State *ex rel.* Mobley v. Industrial Comm'n, 679 N.E.2d 300 (1997). The same could likely be said for Johny Hayes, the injured nurse's aide, with respect to other examples of accommodations mentioned in the article, but the limitations resulting from her injuries are discussed in much less detail. *See* State *ex rel.* Hayes v. Industrial Comm'n, 679 N.E.2d 295 (1997).

[131] Blanck, *supra* note 127, at 6.

[132] *Id.*

[133] If past experience in a similar area, welfare reform, is any gage, the outlook is bleak. Relatively few Greater Cleveland employers have displayed much interest in hiring former welfare recipients. Sandra Livingston & James F. Sweeney, *Calling All Employers as Welfare Reform Approaches, The People Who Do the Hiring are Being Challenged to Offer*

Congress passed the ADA to enable individuals with disabilities to participate fully in all aspects of society, particularly employment. The ADA is grounded in the recognition that equal employment opportunity is the only way that this nation can achieve the goal of economic self-sufficiency for individuals with disabilities, whether or not those disabilities were acquired in work-related circumstances.[134] This fundamental principle—that persons with disabilities who want to work and who are qualified to work must be afforded an equal chance to work—underlies the ADA. Equal opportunity deserves to be considered in any future proposals to reform the workers' compensation system.

Jobs to Former Aid Recipients, PLAIN DEALER, Nov. 9, 1997, at 1H. The author makes one notable exception in the article. Sears, Roebuck and Co., the same employer who has transcended ADA compliance. *Id.*

[134]42 U.S.C. § 12101(a)(8) (West 1998).