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ACCOMMODATING VULNERABILITIES TO ENVIRONMENTAL TOBACCO SMOKE: A PRISM FOR UNDERSTANDING THE ADA

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I. INTRODUCTION 1
II. BACKGROUND ON ETS 4
III. INTRODUCTION TO THE ADA 8
IV. ETS AND SMOKING: THE STATUTE AND THE CASE LAW 11
V. POTENTIAL PLAINTIFFS: INDIVIDUALS WITH DISABILITIES 11
 A. *Title III Cases* 16
 B. *Title I Cases* 19
 C. *Analysis of the Applications of the ADA to ETS* 21
 D. *Who are the Truly Disabled?* 22
VI. THE COST OF ACCOMMODATION 31
VII. CONCLUSION 35

I. INTRODUCTION

Environmental tobacco smoke ("ETS") is the "second-hand" smoke produced by cigarettes. Recent evidence suggests that ETS presents a broad-reaching public health risk.⁴ For some individuals, however, ETS presents an especially acute threat. These individuals, many of whom have pre-existing respiratory or cardiac disabilities, find that significant exposure to ETS precludes them from continuing to work or participate fully in public life.⁵

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⁴For a fuller discussion, see *infra* Part II.

⁵Barbara Chilmonczyk, *Association Between Exposure to Environmental Tobacco Smoke and Exacerbations of Asthma in Children*, 328 NEW ENG. J. MED. 1665-69 (1993); Stanton A.

The danger of ETS could potentially be limited by federal legislation. In June 1997 negotiators representing state attorneys generals who had sued tobacco companies, tobacco manufacturers and lawyers representing class action plaintiffs signed a "Proposed Resolution" of their lawsuits which would require federal legislation.⁶ Title IV of this proposal would, if implemented, restrict smoking to ventilated areas of public buildings regularly entered by 10 or more individuals at least one day per week.⁷ The proposal, however, would create an exemption for restaurants (other than fast food restaurants), bars, private clubs, hotel guestrooms, casinos, bingo parlors, tobacco merchants, and prisons. To date, the fate of this proposal is uncertain.⁸ Moreover, even if some form of the proposal is enacted, it may follow the settlement in not providing any private right of action to enforce the restrictions on public smoking.⁹ Similarly, the proposal fails to provide any protection for individuals harmed by tobacco in the various buildings exempt from the restriction. As a result, whether or not some form of the settlement ultimately becomes law, individuals who are significantly harmed by ETS may still look to other federal remedies.¹⁰ Chief among them is the Americans with Disabilities Act ("ADA").¹¹

In recent years, several individuals have used the ADA to challenge smoking policies of their employers or public accommodations. In effect, these individuals have claimed that the refusal to prohibit or limit smoking constitutes a refusal to provide a "reasonable accommodation" necessary to permit them to fully participate in a public accommodation or place of employment. Although these cases have sometimes failed due to their particular facts,¹² several courts have agreed that ETS-related claims may be

Glantz, & William W. Parmley, *Passive Smoke and Heart Disease: Mechanisms and Risk*, 273 JAMA 1047 (1995).

⁶*Proposed Resolution*, June 20, 1997 (On file with authors and available on the Internet) <<http://stic.neu.edu/settlement/6-20-settle.htm>>. The settlement proposal pending in the U.S. Senate has recently been rejected by the tobacco industry. However, Congress continues to explore possible legislative responses.

⁷*Id.* at 30.

⁸David E. Rosenbaum, *Tobacco Road: Path Toward Legislation Appears Unclear*, N.Y. TIMES, Apr. 19, 1998, at A15. Several bills, with varying terms, have been introduced to implement the proposal. *See, e.g.*, S. 1414, 105th Cong. 2d Sess. (1997); S. 1492, 105th Cong. 2d Sess. (1997).

⁹*See Proposed Resolution* at 30-31. In general the settlement provided for enforcement by the federal government and state and local agencies. No provision was made for individual enforcement. *See id.* at 26.

¹⁰The ETS provisions of the proposal would not have preempted the enforcement of other federal laws. *Id.* at 31.

¹¹42 U.S.C. § 12101-12213 (1997).

¹²Cases that have not succeeded include: *Emery v. Caravan of Dreams*, 879 F. Supp. 640 (N.D. Tex.), *aff'd sub nom*, *Emery v. Dreams Spirits, Inc.*, 85 F.3d 622 (5th Cir. 1995)

actionable under the Act.¹³ No court has disagreed. A recent jury verdict in which a severely asthmatic prison guard, who claimed to have required more than twenty emergency room treatments post-ETS exposure in the workplace, was awarded \$420,300 and reinstatement suggests that the ADA's promise in this area may indeed be fulfilled.¹⁴

Judicial acceptance of ETS-related ADA claims should not be surprising. A relatively straightforward reading of the ADA, and its history and regulations, makes clear that in certain instances the refusal to alter smoking policies, just like the refusal to alter any other policy that prohibits individuals with disabilities from working or fully participating in a public accommodation, may be discriminatory.¹⁵ Nevertheless, the use of the ADA to challenge smoking policies raises important questions about the breadth and meaning of the ADA. For some advocates of disability rights, the use of the ADA for such cases may seem an unwarranted extension of the ADA. These advocates fear that such a use may weaken the Act's potential to prohibit "real discrimination" against individuals with traditional disabilities.¹⁶ On the other side of the debate, employers and managers of public accommodations may fear that the

(mem.); *Harmer v. Virginia Elec. and Power Co.*, 831 F. Supp. 1300 (E.D. Va. 1993).

¹³*Homeyer v. Stanley Tulchin Assocs.*, 91 F.3d 959 (7th Cir. 1996); *Muller v. Costello*, 1996 U.S. Dist. LEXIS 5239 (N.D. N.Y. April 16, 1996); *Staron v. McDonald's Corp.*, 51 F.3d 353 (2d Cir. 1995).

This article addresses persons who may suffer a disability by exposure to ETS as distinct from any claim made by a person suffering from any tobacco caused disease or disability resulting from the claimant's own smoking conduct.

¹⁴*Associated Press, Fired Prison Guard Awarded \$420,3000*, THE BUFFALO NEWS, Oct. 19, 1997, at 12A.

¹⁵See generally, Mark A. Gottlieb, et al., *Second-Hand Smoke and the ADA: Ensuring Access for Persons with Breathing and Heart Disorders*, 13 ST. LOUIS U. PUB. L. REV. 635 (1994); Wendy E. Parmet, et al., *The Physician's Role in Helping Smoke-Sensitive Patients to Use the Americans with Disabilities Act to Secure Smoke-Free WorkPlaces and Public Spaces*, 276 JAMA 909 (1996).

¹⁶Sara D. Watson, for example, discussed how some members of the disability community have insisted upon a separation of traditional disabilities from illnesses, the result being that the disability movement "has ignored the many people whose disabilities do have medical implications—such as those with heart disease, cancer, and arthritis." Sara D. Watson, *The Evolution of a Social Movement*, 3 CORNELL J.L & PUB. POLY, 254, 257 (1994). The desire to separate disability from illness stems from many reasons including the desire to disprove the stereotypes of individuals with disabilities as ill and dependent. *Id.* at 257. Another reason involves the rejection of the medical model of disability through which medical practitioners exercised significant control (often in quite harsh ways) over the lives of individuals with disabilities. See Jonathan Drimmer, *Cripples Overcomers and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1347-48 (1993). Undoubtedly, some advocates for individuals with disabilities may also fear that the extension of the concept of disability to nontraditional disabilities will engender just the type of backlash described in text accompanying notes 17 and 134-36 *infra*. The problem, of course, is that by denying the disability status of some disabilities, the very real needs of some individuals with disabilities are being ignored. See Watson at 257.

application of the ADA to ETS-related claims threatens to "open the floodgates" to judicial review of many employment or business policies.¹⁷

This Article explores the use of the ADA to challenge smoking policies and the fears and questions that such a use raises. We argue that a careful appreciation of the ADA's application to ETS-related claims should temper the worries of both those who see such claims as trivializing the ADA and those who worry that such claims may impose enormous burdens on American businesses. Rather, we suggest that the ADA in this instance, as in others, provides a limited but critical vehicle for ensuring that individuals with disabilities may fully participate in public life. We suggest further that the issues raised by the application of the ADA to ETS provides a useful vehicle for reconsidering the meaning and impact of the ADA and dispelling some of the myths that have surrounded its advent.

II. BACKGROUND ON ETS

The dangers of cigarette smoking have long been well established. The risks that cigarette smoke, an environmental pollutant containing over 4,000 chemicals,¹⁸ poses to nonsmokers, however, have only recently been well documented. In 1986, then Surgeon General C. Everett Koop released a report on passive smoking and health, which concluded, among other things, that ETS causes lung cancer as well as a host of other respiratory problems in nonsmokers.¹⁹ The report further found that the simple separation of smokers and nonsmokers within the same airspace does not eliminate the risks posed by ETS.²⁰

The evidence establishing the dangers of ETS was more fully reviewed in the 1993 US Environmental Protection Agency (EPA) report on the respiratory effects of ETS, *Respiratory Effects of Passive Smoking: Lung Cancer and Other Disorders*.²¹ Summarizing the scientific literature through 1992, the report concluded that involuntary smoking leads to the death of 3,000 non-smoking

¹⁷Similar points have been made about other types of claims brought under the ADA. See Fred Pelka, *Attack of the Morally Challenged: Congress Goes After the Disabled*, 5 ON THE ISSUES 36 (1996).

¹⁸U.S. Environmental Protection Agency, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. Washington, D.C. at 3-1, 1992. USEPA document EPA/600/6-90/006F.

¹⁹U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Smoking: a Report of the Surgeon General*. U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Health Promotion and Education, Office on Smoking and Health, Rockville, Md. 1986. Publication No. DHHS(CDC)87-8398.

²⁰*Id.*

²¹U.S. Environmental Protection Agency, *supra* note 18. The tobacco industry challenges the EPA's findings and has sought a retraction of the Report in *Flue-Cured Tobacco Cooperative Stabilization Corp. v. United States Envtl. Protection Agency*, 1995 U.S. Dist. LEXIS 7521 (M.D.N.C. May 23, 1995).

Americans each year by lung cancer.²² Based on this finding, the EPA declared ETS to be a Group A (or known human) carcinogen for which there is no safe level of exposure. Other important conclusions were that:

ETS causes as many as 300,000 lower respiratory tract infections in infants each year resulting in as many as 15,000 hospitalizations;

ETS causes fluid buildup in the middle ear, the most common cause of hospitalization and surgery for American children; and

ETS exacerbates and may in fact help to cause new cases of asthma.²³

Although ETS poses a generalized health risk to all individuals exposed to it, its impact may be especially severe for some individuals with particular disabilities. For example, individuals prone to asthma may be highly vulnerable to the effects of ETS.

Asthma is a disorder triggered by a number of events, including exposure to allergens, sneezing, physical activity (running, etc.), or other causes which create stress on the respiratory system to increase air intake.²⁴ Once triggered, asthma restricts air intake by inflaming the bronchial tubes, thus narrowing the passages through which the air must travel. In some instances, attacks may be triggered by exposure to cigarette smoke.²⁵

Much of the research on asthma and ETS examines the effects on the four million children in the U.S. with asthma.²⁶ The 1992 EPA report reviewed ten studies published after 1986 (when the Surgeon General's report found no "consistent relationship" between ETS exposure and asthma).²⁷ The EPA found that the newer evidence revealed an association and suggested the possibility of a causal link between ETS exposure and asthma in children.²⁸ A recently published meta-analysis of studies examining ETS and asthma estimated that somewhere between 307,000 and 522,000 cases of asthma among children under 15 years old are attributable to ETS exposure.²⁹

Studies have also found a relationship between ETS and adult asthma. A recent Swiss study found that non-smoking adults exposed to ETS at work or home were at higher risk for physician-diagnosed asthma. The study also

²²U.S. Environmental Protection Agency, *supra* note 18, at 1-1.

²³*Id.*

²⁴*Asthma: Asthma Triggers*, American Lung Association at 2, Chicago, Ill. (1996).

²⁵Chilmonczyk, *supra* note 5, at 1665-69.

²⁶*See* U.S. Environmental Protection Agency, *supra* note 18.

²⁷*Id.*

²⁸*See, e.g.,* Joan Cunningham, et al., *Environmental Tobacco Smoke, Wheezing, and Asthma in Children in 24 Communities*, 153(1) AM. J RESPIR. CRIT. CARE MED. 218-24 (1996); Joseph R. DiFranza & Robert Lew, *Morbidity and Mortality in Children Associated with the Use of Tobacco Products by Other People*, 97 PEDIATRICS 560 (1996).

²⁹DiFranza & Lew, *supra* note 28, at 560.

suggested a dose-dependent increase in asthma symptoms related to hours of ETS exposure.³⁰

In both adults and children ETS exposure can aggravate asthma in two ways. First, long term exposure can trigger bronchial hyperreactivity, which means that exposure to certain airborne substances results in decreased lung performance. Second, a short exposure to ETS can result in an almost immediate decrease in lung function of similar magnitude.³¹ Either way, exposure to ETS can result in a serious health risk and prevent an individual from engaging in his or her normal life activities.

Individuals with other respiratory disabilities face similar ETS-related risks. Chronic obstructive pulmonary disease (COPD), covers a group of diseases which have symptoms including chronic cough and expectoration, shortness of breath, and progressive reduction in lung function. Two of the more common diseases to fall under the COPD designation are emphysema and chronic bronchitis.³² COPD is often caused by active smoking.³³ For former smokers with COPD, ETS can exacerbate the condition, decrease lung function and make it difficult for such individuals to work.³⁴

Studies have examined the effect of ETS on pulmonary function in adults and found that exposure results in a significant drop in lung function.³⁵ These studies reported a drop in forced expiratory flow, forced expiratory volume, and vital capacity. This means that ETS exposure can reduce one's ability to inhale, exhale, and hold air in the lungs. ADA claims brought by persons with COPD would likely focus on this decrease in pulmonary function as they already suffer from permanently diminished lung capacity.

Less well known respiratory conditions can also make an individual especially sensitive to ETS. Individuals with systemic lupus erythematosus³⁶

³⁰Philippe Leuenberger, *Passive Smoking Exposure in Adults and Chronic Respiratory Symptoms*, 150 AM. J. RESPIR. CRIT. CARE MED. 1221-28 (1994).

³¹Anne Knight & Anthony B.X. Breslin, *Passive Cigarette Smoking and Patients With Asthma*, 142 MED. J. AUSTL. 194-95 (1995).

³²Chronic Obstructive Pulmonary Disease, 177-178 (Rev. Ed., 1992); Mosby Medical Encyclopedia, *Chronic Obstructive Pulmonary Disease*, Penguin Books, USA (1992).

³³American Thoracic Society, *Cigarette Smoking and Health* 153 AM. J. RESPIR. CRIT. CARE MED. 861-65 (1996).

³⁴James R. White & Herman F. Froeb, *Small Airways Dysfunction in Non-Smokers Chronically Exposed to Tobacco Smoke*, 302 NEW ENG. J. MED. 720-23 (1980).

³⁵Maria A. Masi, et al., *Environmental Exposure to Tobacco Smoke and Lung Function in Young Adults*, 138 AM. REV. RESPIR. DISEASES 296-99 (1988). See also, Mohammed-Reza Masjedi, et al., *Effects of Passive Smoking on the Pulmonary Function of Adults*, 45 THORAX 27-31 (1990).

³⁶See, e.g., Andrew P. Andonopoulos et. al. *Pulmonary Function of Non-Smoking Patients with Systemic Lupus Erythematosus*, 94 CHEST 312 (1988); Michael M. Ward &

and cystic fibrosis³⁷ suffer from diminished lung capacity, and thereby particular vulnerability to ETS. Individuals with multiple chemical sensitivity³⁸ and some persons with severe allergies, may also be vulnerable.³⁹

While the harm that ETS causes those with respiratory problems appears most obvious, ETS is actually thought to affect far more people with heart disease. Recent studies provide evidence to support the link between ETS exposure and heart disease.⁴⁰ A paper in the *Journal of the American Medical Association* estimates the number of deaths from heart disease caused by ETS exposure at roughly 30,000 to 60,000 people per year in the United States.⁴¹ About three times that many people suffer non-fatal heart episodes due to ETS exposure.⁴² ETS exposure is also suspected to further limit the activities of some angina sufferers.⁴³

Whether an individual has angina, some other form of coronary disease, or a respiratory disability, the impact of ETS is severe. For these persons, ETS presents not merely a hypothetical long-term risk, but a very concrete and imminent health danger. For them, independence and full participation in the workforce and the activities of public life require the reduction or removal of ETS. To achieve this goal, some of these individuals have turned to the ADA.

Stephanie Studenski, *Clinical Prognostic Factors in Lupus Nephritis*, 152 ARCHIVES INTERNAL MED. 2082 (1992).

³⁷D.J. Shale, *Cystic Fibrosis Introduction*, 45 THORAX 880 (1990); Lucille Lester, et al., *DELTA F508 Genotype Does Not Predict Disease Severity in an Ethnically Diverse Cystic Fibrosis Population*, 93 PEDIATRICS 114-18 (1994).

³⁸Multiple chemical sensitivity (MCS) is a condition, the origin of which is not entirely known, which is thought by some to be caused by a one-time or extended exposure to sensitizing toxic chemical agents. Adverse symptoms are brought on by subsequent exposure to various chemical substances at exposure levels so low that, for most people, they are considered harmless. ETS, which contains thousands of toxic chemicals, adversely affects most individuals suffering from MCS. L. Charrair, General Deputy Assistant Secretary for Fair Housing and Equal Opportunity, US Department of Housing and Urban Development: Technical Guidance Memorandum 91-3: Multiple Sensitivity Disorder; June 6, 1991. The authors appreciate the advice and comments regarding MCS provided by Susan Clarke (ENHALE, an MCS support organization in Massachusetts) and Nicholas Ashford (Professor of Technology and Policy, Mass. Inst. of Technology).

³⁹K.F. Keller & R.J. Doyle, *A Mechanism for Tobacco Smoke-Induced Allergy*, 57 J. ALLERGY CLIN. IMMUNOL. 278 (1976).

⁴⁰Glantz & Parmley, *supra* note 5, at 1047-53.

⁴¹*Id.*

⁴²Kyle Steenland, *Passive Smoking and the Risk of Heart Disease*, 267 JAMA 94-99 (1992).

⁴³Jadranka Mustajbegovic & Eugenija Zuskin, *Passive smoking —(Un)recognized Effects on the Respiratory System*, 115 LIECNICKI VJESNIK 179-84 (1993).

III. INTRODUCTION TO THE ADA

The 1990 enactment of the ADA⁴⁴ was accompanied by much fanfare and promise. Heralded by President Bush, as well as its proponents, as a declaration of independence for individuals with disabilities,⁴⁵ the Act was the culmination of a long struggle by people with disabilities for a far-reaching antidiscrimination law.⁴⁶ Although an earlier federal law, Sec. 504 of the Rehabilitation Act of 1973, prohibited discrimination against individuals with disabilities, it applied only to recipients of federal financial assistance.⁴⁷ The ADA extended the prohibition to state and local governments,⁴⁸ and to much of the private sector.

If the ADA had any single goal, it was inclusion.⁴⁹ The Act's preamble states that "historically, society has tended to isolate and segregate individuals with disabilities . . ." ⁵⁰ By prohibiting discrimination, it was hoped, individuals with disabilities would be able to achieve "full participation, independent living, and economic self-sufficiency . . ." ⁵¹

In order to realize those goals, the ADA borrowed a purposefully open-ended definition of disability from the Rehabilitation Act.⁵² This definition applies even to individuals who do not have traditional, or visible, disabilities.⁵³ Indeed, the drafters of the bill opined that some 43 million Americans would qualify as having a disability.⁵⁴

⁴⁴Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1990)).

⁴⁵Terry Wilson, *Independence Day for People with Disabilities*, CHI. TRIB., July 27, 1990, at 1.

⁴⁶See Drimmer, *supra* note 16, at 1376-97.

⁴⁷29 U.S.C. § 794 (1995).

⁴⁸42 U.S.C. § 12132 (1996).

⁴⁹See, e.g., H.R. Rep. No. 101-485, 101st Cong., 2d Sess. 23 (1990) ("The Purpose of the Americans With Disabilities Act (ADA) . . . is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life.").

⁵⁰42 U.S.C. § 12101(a)(2) (1996).

⁵¹42 U.S.C. § 12101(a)(8) (1996). For a discussion and critique of this utilitarian vision, see Drimmer, *supra* note 16, at 1400-02.

⁵²See *infra* Part V.

⁵³Chai R. Felblum, *Employment Protections, in THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE* at 81, 85 (Jane West ed. 1991).

⁵⁴42 U.S.C. 12101 § (a)(1) (1996).

The ADA is also broad in its scope. Title I of the Act applies to most workplaces.⁵⁵ State and local governments are covered by Title II.⁵⁶ Title III deals with public accommodations,⁵⁷ which are defined comprehensively to include most services and facilities operating in interstate commerce. The Act specifies that the term shall include inns, hotels, restaurants, motion picture houses, sales or rental establishments, offices of accountants, lawyers, or health care providers, museums, libraries, parks, places of education and many other facilities which service the public.⁵⁸ Only the airline and the housing industries appear not to be covered. Discrimination against individuals in those sectors of the economy forms the subject of other laws.⁵⁹

The ADA also employs a complex and comprehensive definition of "discrimination."⁶⁰ The Act does not simply prohibit invidious treatment against individuals with disabilities. It recognizes that often individuals with disabilities are excluded from jobs and public accommodations not by intentional acts of discrimination, but by the unthinking use of criteria and standards that tend to disparately disadvantage those who have disabilities.⁶¹ As a result, the Act prohibits some forms of disparate impact discrimination.⁶² The employment provisions prohibit employers from "utilizing standards, criteria, or methods of administration—(A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control."⁶³

⁵⁵42 U.S.C. § 12111 (1996). The Act does not apply to workplaces with less than 15 workers, the United States, Indian tribes, or bona fide private membership clubs exempt from federal income taxation. 42 U.S.C. § 12111(5) (1996).

⁵⁶42 U.S.C. § 12131 (1996).

⁵⁷42 U.S.C. § 12181 (1996).

⁵⁸42 U.S.C. § 12181 (1996). The definition of "public accommodations," includes 12 distinct entity of categories. The statute provides examples of the types of entities that would fall within each category and makes clear that its examples are illustrative only and do not exhaust the list of possible entities within each category.

⁵⁹Discrimination in housing is prohibited by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (1996). Discrimination in air traffic is prohibited by the Air Carriers Fair Access Act, 49 U.S.C. § 1301, note 1374 (1996). Much of the analysis in this article may be applicable to these statutes.

⁶⁰See 42 U.S.C. § 12112(b) (1996) and 42 U.S.C. § 12182 (1996). See also Wendy E. Parmet, *Discrimination and Disability: The Challenges of the ADA*, 18 LAW MED. & HEALTH CARE, 331, 332 (1990).

⁶¹Sen. Rep. 101-485, 101st Cong., 2d Sess. 58059 (1990); Parmet, *supra* note 60, at 336. See also *Alexander v. Choate*, 469 U.S. 287 (1985) (Rehabilitation Act case discussing the nature of discrimination against individuals with disabilities).

⁶²See *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995); David Orentlicher, *Destructuring Disability: Rationing of Health Care and Unfair Discrimination Against the Sick*, 31 HARV. C.R.-C.L. L. REV. 49, 57 (1996).

⁶³42 U.S.C. § 12112(b)(3) (1996).

Qualification standards or selection criteria "that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities . . ." is prohibited unless such criteria can be "shown to be job-related for the position in question and [are] consistent with business necessity."⁶⁴ Similarly, public accommodations may not impose eligibility criteria:

that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.⁶⁵

The ADA takes an additional important step toward opening the doors for individuals with disabilities. Recognizing that the exclusion of individuals with disabilities sometimes results from the interplay between the physical or mental impairments experienced by these individuals and the way the environment has been constructed, the ADA builds upon law decided under the Rehabilitation Act and requires that employers provide "reasonable accommodations," and that public accommodations provide "reasonable modifications."⁶⁶ Thus, employers and supervisors of public accommodations must do more than cease applying criteria that have the intended or unintended effect of excluding individuals with disabilities. They must also be willing to rethink how they organize and structure their workplace or public accommodation and make "reasonable" changes that will enable individuals with disabilities to take full advantage of the job or public facility.⁶⁷ Importantly, neither employers nor public accommodations need to alter their structure radically.⁶⁸ They need not accommodate every individual with a disability.⁶⁹ The ADA recognizes that some individuals with a disability will not be able to participate fully in some activities. But, if an individual with a disability could participate fully if a modest, reasonable accommodation were made, then the employer or public accommodation will be under an obligation

⁶⁴42 U.S.C. § 12112(b)(6) (1996).

⁶⁵42 U.S.C. § 12182(b)(2)(A)(i) (1996).

⁶⁶42 U.S.C. § 12112(b)(5)(A) (1996); 42 U.S.C. § 12182(b)(2)(A)(ii) (1996).

⁶⁷For a discussion of the concept of "reasonable accommodations," see Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV C.R.-C.L. L. REV. 413, 460-63 (1991); Orentlicher, *supra* note 62 at 65-71.

⁶⁸Sen. Rep. 101-485, *supra* note 61, at 64. For a fuller discussion of this point, see *infra* Part V(B).

⁶⁹For a fuller discussion of this point, see *infra* notes 119-32 and accompanying text.

to make it.⁷⁰ This requirement, properly followed, will often obligate employers or public accommodations to alter their smoking policies.

IV. ETS AND SMOKING: THE STATUTE AND THE CASE LAW

The use of the ADA to challenge certain smoking policies is neither exceptional nor in contradiction to the goals and policies underlying the ADA. A rather simple application of the statute's plain language should result in a determination that in some circumstances particular smoking policies unlawfully discriminate against individuals with disabilities. That conclusion, however, may strike many as a troubling extension of the concept of disability rights, casting doubt upon the very breadth and vision of the ADA. Below, we explain why that is not so.

We begin this section by discussing the ADA's definition of disability and applying it to the plaintiffs who may bring ETS-related claims. Next we review the application of the ADA to first, places of public accommodation and second, workplaces.⁷¹ In the section that follows, we consider the criticisms that the application of the ADA to ETS may face, and we explain why such an application may be feared by members of both the disability-rights movement and entities who are required to comply with its mandates. We suggest that the application of ETS to the ADA presents an invitation to reconsider the meaning of the ADA and its wide-reaching but, ultimately, quite limited demand, for "reasonable accommodations."

V. POTENTIAL PLAINTIFFS: INDIVIDUALS WITH DISABILITIES

Although ETS causes wide-spread harm and many individuals may find it offensive, not everyone may successfully challenge ETS policies under the ADA. Only individuals who have a disability within the meaning of the Act may claim its protections.

Under the Act, an individual has a disability if she or he has "(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) [is] re-

⁷⁰E.g., *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995) (if accommodations are both efficacious and proportional to costs, employer has duty to accommodate paraplegic state employee); *Howell v. Michelin Tire Corp.*, 860 F. Supp. 1488 (M. D. Ala. 1994) (it is reasonable to reassign disabled employee to vacant position if employee is qualified); *Mayberry v. Von Valtier*, 843 F. Supp. 1160 (E.D. Mich. 1994) (denying physician's motion for summary judgment based on a claim that there was no Rehabilitation Act violation where physician could not afford the cost of an interpreter necessary to treat patient); *Perez v. Phil. Housing Auth.*, 677 F. Supp. 357 (E.D. Pa 1987) (person with severe lumbosacral sacroiliac sprain was a handicapped person under the Rehabilitation Act).

⁷¹We do not separately consider the applicability of Title II to ETS-related claims. The analysis of Title II claims, however, should substantially parallel the analysis of the Rehabilitation Act and Title I claims.

garded as having such an impairment."⁷² In most instances, individuals bringing ETS-related claims will be those who fall within subsection (A)—they will claim that they have a "physical or mental impairment" that "substantially limits" a "major life activity."⁷³

The regulations promulgated by the EEOC under Title I,⁷⁴ and the Department of Justice under Title III,⁷⁵ define a physical impairment broadly to include "[a]ny 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."⁷⁶ Impairments to the respiratory or cardiac systems thereby constitute "physical impairments." Accordingly, some individuals who are at particular risk from exposure to ETS⁷⁷ will be found to have physical impairments within the meaning of the statute.

The more difficult requirement for most plaintiffs under the ADA has been the need to establish that the physical impairment "substantially limits" a "major life activity."⁷⁸ The regulations state that in order for a major life activity to be substantially limited, the individual must be "unable to perform a major life activity that the average person in the general population can perform."⁷⁹ The courts have generally insisted that the limitation be "significant."⁸⁰ Moreover, "short term" limitations do not qualify.⁸¹ If an individual has his or her breathing capacity substantially reduced due to an acute episode of influenza, that individual would not be found to have a disability. However, intermittent limitations may qualify.⁸² There is controversy over whether the impact of medication should be considered when determining whether an impairment substantially limits a major life activity. The EEOC takes the position that the ameliorative effects of a medication should not be consid-

⁷²42 U.S.C. § 12102(2) (1996).

⁷³One can also imagine a case arising under subsection [c]. An individual could be sufficiently effected by ETS so that others perceive her to be unable to engage in a major life activity, even though she actually does not experience such a restriction.

⁷⁴29 C.F.R. § 1630.2(h)(i) (1996).

⁷⁵28 C.F.R. § 36.101 (1997).

⁷⁶29 CFR § 1630.2(h)(1) (1997); 28 C.F.R. § 36.104(1)(i) (1997).

⁷⁷See *supra* Part II.

⁷⁸29 CFR § 1630.2(i)-(j) (1997); 28 C.F.R. § 36.104.

⁷⁹29 CFR § 1630.2(j)(i) (1997).

⁸⁰*Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995).

⁸¹EEOC Definition of the Term "Disability," EEOC Directives Transmittal, §§ 902.2(b) 1995 DLR. 51 d30(March 16, 1995)(hereinafter "EEOC").

⁸²*Id.* at § 920.4(d).

ered.⁸³ Several federal courts have adopted this view.⁸⁴ From this perspective, an individual with severe asthma who would have trouble breathing were it not for his or her medication may well be considered to have a disability even though the individual's breathing is substantially aided by the medication. Other federal courts ask whether the major life activity is significantly limited even when medication is used.⁸⁵ Pursuant to this restrictive line of authority, only individuals with illnesses that are not adequately controlled by medication would be found to have a disability.

Individuals who wish to challenge smoking policies under the ADA may argue that their physical impairment substantially limits two different types of "major life" activities. First, and most clearly, they may point to activities in which they experience substantial limitations *even in the absence of second-hand smoke*. Most obviously, some litigants with significant respiratory impairments, such as those caused by COPD or asthma, may claim that their ability to breathe, or even to walk, is substantially and frequently limited by their physical impairment.⁸⁶ Because both breathing and walking are explicitly listed in the Regulations as "major life activities,"⁸⁷ individuals who suffer substantial limitations in these activities should have the easiest time convincing courts that they have disabilities within the meaning of the ADA. For example, in *Bell v. Elmhurst Chicago Stone*,⁸⁸ the court rejected the defendant's motion to dismiss the plaintiff's ADA claim because the defendant did not contest that the plaintiff's asthma substantially limited his ability to breathe.⁸⁹ In such cases, the individual would be claiming a disability completely apart from exposure to ETS.⁹⁰

The more problematic case is presented by the individual who claims that his or her ability to engage in a major life activity is substantially limited due to ETS exposure. This may occur in one of two ways. First, a plaintiff may claim that although he or she has a physical impairment that exists separately from ETS (such as asthma), the major life activity that is substantially limited is limited precisely due to the effects of the particular smoking policy at question.

⁸³*Id.* at § 920.5; Sen Rep. No. 101-485, *supra* note 61, at 52.

⁸⁴*E.g.*, *Harris v. H. & W. Contracting Co.*, 102 F.3d 516, 520 (11th Cir. 1996); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996).

⁸⁵*E.g.*, *Ellison v. Software Spectrum*, 85 F.3d 187, 191 n.3 (5th Cir. 1996); *Wilking v. County of Ramsey*, 1997 U.S. Dist. LEXIS 17849, *15 (D. Minn. Nov. 6, 1997); *Gaddy v. Four B. Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997).

⁸⁶*E.g.*, *Heather K. v. City of Mallard*, 887 F. Supp. 1249 (N.D. Iowa 1995) (accepting that a child with respiratory and cardiac conditions that make it difficult for her to breathe is entitled to a TRO against the city's outdoor burning policy under the ADA).

⁸⁷29 CFR § 1630.2(i) (1997); 36 CFR 406.103 (1997).

⁸⁸919 F. Supp. 308 (N.D. Ill. 1996).

⁸⁹*Id.* at 309. *Accord* *Geuss v. Difizer*, 971 F. Supp. 164, 170 (E.D. Pa. 1996).

⁹⁰*Homeyer*, 91 F.3d at 959.

In other words, the individual may claim that she is substantially limited in her ability to work precisely because her place of employment contains ETS. Alternatively, an individual may claim that a sensitivity to ETS constitutes the physical impairment that underlies the disability. In these cases, an individual is effectively claiming that an allergy or sensitivity to ETS is the very physical impairment upon which he or she is relying.

Courts have not been very sympathetic to either scenario. In a series of cases, courts have found that plaintiffs who do not allege a substantial limitation of any major life activity except the particular activity (usually a job) in question are not disabled.⁹¹ For example, in *Forrisi v. Bowen*,⁹² the Fourth Circuit held that a utility systems repairer with acrophobia, who could not work on the utility lines, was not disabled because the only limitation he experienced due to his impairment was the inability to hold that precise job. Because Forrisi could not show that his impairment would undermine his ability to hold other jobs, he was not an individual with a disability. Citing that holding, the Second Circuit has stated, the major life activity in question "cannot be interpreted . . . to include working at the specific job of one's choice."⁹³

So too, individuals with asthma or other impairments who have only claimed that their impairment limits their ability to work in one particular workplace (and do not allege that they experience a substantial limitation of another major life activity, such as walking or breathing) are unlikely to be found to have a disability. For example, in *Heilweil v. Mount Sinai Hospital*⁹⁴ the plaintiff was an asthmatic who served as an administrator of a blood bank. According to the complaint, the ventilation system at her place of employment made her asthma much worse. The question before the court was whether she had a handicap within the meaning of the Rehabilitation Act. According to the court, there was little doubt that the plaintiff had a physical impairment because asthma "is a physiological disorder or condition that affects the respiratory system."⁹⁵ Plaintiff was unable to establish that her asthma significantly limited a major life activity because it did not appear to inhibit her ability to breathe or function generally outside of work. Nor could she show that her asthma would cause her problems in any workplace other than the one

⁹¹The leading case claiming this proposition is *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986)(Rehabilitation case concerning acrophobia). See also *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995); *Byrne v. Board of Educ.*, 979 F.2d 560 (7th Cir. 1991)(plaintiff with an allergy to a fungus at the workplace is not disabled).

⁹²794 F.2d 931 (4th Cir. 1986).

⁹³*Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989)(Rehabilitation Act case) (citing *Tudymann v. United Airlines*, 608 F. Supp. 739, 745 (C.D.Cal. 1984)). See also 29 C.F.R. 1630.2(3)(i) (1997) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.")

⁹⁴32 F.3d 718 (2d Cir. 1994).

⁹⁵*Id.* at 723.

at issue.⁹⁶ The court found that she was not protected by the Act because there was no reason to believe that she could not find work elsewhere.⁹⁷

Importantly, the question of whether an individual's impairment affects his or her ability to work generally or merely in the single workplace at issue is a question of fact and should not be readily assumed by a judge. Thus, in *Homeyer v. Stanley Tulchin Associates, Inc.*,⁹⁸ the district court had dismissed plaintiff's ETS-related claim on the theory that her rhinitis and sinusitis would not interfere with her ability to find employment in other workplaces. The Court of Appeals reversed stating that the determination of whether an impairment substantially limits the plaintiff's ability to work "is a factual determination, and is therefore not the type of finding that is generally appropriately made on a motion to dismiss."⁹⁹ The court added that the answer would depend upon evidence of "the employment market, the plaintiff's job capabilities, as well as the details of the nature and extent of the plaintiff's impairment."¹⁰⁰

Closely related to cases such as *Forrisi* and *Heilweil*, which deal with limitations upon working in a single workplace, are cases concerning individuals whose very impairment is a sensitivity to ETS or other environmental pollutants. In these cases, plaintiffs have claimed an allergy or sensitivity to a particular pollutant at the workplace as their impairment. Courts have found that such persons have not experienced a sufficiently generalized limitation on a major life activity.¹⁰¹ In *Gupton v. Commonwealth of Virginia*,¹⁰² for example, the plaintiff claimed that she had an allergy to tobacco smoke that prevented her from working in the particular smoke-filled workplace at issue. Relying on *Forrisi*, the court dismissed her claim because she had "presented no evidence that her allergy foreclosed her generally from obtaining jobs in her field."¹⁰³

⁹⁶*Id.* at 723-24.

⁹⁷A similar analysis was applied in *Rayha v. United Parcel Serv., Inc.*, 940 F. Supp. 1066, 1067 (S.D. Tex. 1996); *Mobley v. Board of Regents*, 924 F. Supp. 1179, 1186 (S.D. Ga. 1996).

⁹⁸91 F.3d 959 (7th Cir. 1996).

⁹⁹*Id.* at 962.

¹⁰⁰*Id.* at 963.

¹⁰¹It is possible to imagine a case in which an individual was allergic to ETS or another occupational pollutant, and became so ill as a result that she could not work without accommodation anywhere. The cases litigated thus far, however, have not made such a claim.

¹⁰²14 F.3d 203 (4th Cir. 1994).

¹⁰³*Id.* at 205. See also *Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718 (2d Cir. 1994) (plaintiff was not disabled because poor ventilation at her workplace made her asthma substantially worse); *Karpel v. Inova Health Sys.*, 1997 WL 38137 (E.D. Va. 1997) (sensitivity to smoke is not a disability); *Huffman v. Ace Elec. Co., Inc.*, 1994 WL 583113 (D.C. Kan. 1994) (plaintiff who claimed sensitivity to unknown industrial irritants at one particular job does not have a substantial limitation of the major life activity of working).

These cases suggest that, in some instances, the very prevalence of workplace smoking bans will make it difficult for plaintiffs to prevail. If most workplaces in a plaintiffs' geographical area and line of work are smoke-free, and if the plaintiff relies solely on the theory that she suffers a limitation of the major life activity of working (as distinct from another life activity), the very fact that more workplaces are limiting smoking will place plaintiffs in Gupton's dilemma. This is not to say, however, that a plaintiff can never establish a disability by relying upon an ETS-based limitation on the major life activity of work. The possibility that sensitivity to ETS itself, or to other environmental pollutants, can sometimes qualify as a disability under the ADA should not be ignored. As the commentary to the EEOC regulations makes clear, "the determination as to whether allergies to cigarette smoke, or allergies or sensitivities characterized as environmental illness are disabilities covered by the regulation [defining disability] must be made using the same case-by-case analysis that is applied to other physical or mental impairments."¹⁰⁴ This admonition was followed by the court in *Whillock v. Delta Air Lines, Inc.*,¹⁰⁵ when it refused to grant defendant's motion based on the assertion that a plaintiff with multiple chemical sensitivities could not be disabled as a matter of law. Rather, the court stressed the issue of disability. The question of whether such an impairment substantially affects a major life activity is ultimately a question of fact. Nevertheless, those with acute sensitivity to ETS who can show that that impairment actually limits their ability to engage in a major life activity in more than a singular environment, should be entitled to the protections of the ADA.

A. Title III Claims

Once it is determined that an individual has a disability within the meaning of the ADA, the application of the statute to ETS-policies in public accommodations is surprisingly simple. *Staron v. McDonald's Corp.*¹⁰⁶ is illustrative.

The plaintiffs in *Staron* were adults and children with systemic lupus and asthma. They sued McDonald's and Burger King, claiming that the refusal of the fast-food chains to prohibit smoking on the premises constituted a refusal to provide them with "reasonable modifications" as required by the ADA.¹⁰⁷ The district court dismissed the complaint, finding that a smoking ban would not be a "reasonable modification."¹⁰⁸ The plaintiffs appealed to the United States Court of Appeals for the Second Circuit.

¹⁰⁴28 C.F.R. Pt. 35, App. A.

¹⁰⁵926 F. Supp. 1555 (N.D. Ga. 1995).

¹⁰⁶51 F.3d 353 (2d Cir. 1995).

¹⁰⁷42 U.S.C. § 12182(b)(2)(A)(ii) (1997).

¹⁰⁸51 F.3d at 355.

Writing for the court, which reversed the dismissal, Judge Walker noted that neither the ADA nor the cases interpreting it "articulate a precise test for determining whether a particular modification is 'reasonable.'"¹⁰⁹ Nevertheless, the court stated, "the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it."¹¹⁰ Under some circumstances, the court suggested, a complete ban on smoking might not be necessary for the plaintiff's healthful enjoyment of the accommodation's services. Thus, some individuals may not be able to show that the amount of ETS to which they are exposed in a particular public accommodation actually interferes with their ability to participate in or patronize the establishment. This seems particularly likely to occur in establishments, such as convenience stores or dry cleaners, where patrons generally spend only brief periods of time.¹¹¹ Individuals with less severe sensitivities may not be able to demonstrate that they require the elimination of smoke in such venues. Other individuals with more severe sensitivities, may require the complete absence of ETS to even enter an establishment.

Of course, as the *Staron* court realized, the question of whether a change in smoking policy constitutes a "reasonable modification" depends also upon the availability of alternative modifications. In some circumstances the segregation of smoking to a particular building, floor, or even area that is separately ventilated, might suffice to ensure that the plaintiff can use the facilities equally.¹¹² In other circumstances only the abolition of smoking in the facility will enable the plaintiff to patronize it equally. Once again, resolution of such issues is highly fact-dependent. It must be noted, however, that the segregation of the individual with a disability (such as by creating one small no-smoking area) will generally be an inappropriate response. As the very goal of the ADA is the inclusion of individuals with disabilities, the statute prohibits a defendant from providing an individual with a disability a benefit "that is different or separate from that provided to other individual, unless such action is necessary to provide the individual" with the service in question.¹¹³ The Act further states

¹⁰⁹*Id.*

¹¹⁰*Id.* at 356, *citing* *D'Amico v. New York State Bd. of Law Examiners*, 13 F. Supp. 217, 221-22 (W.D.N.Y. 1993).

¹¹¹Employees, on the other hand, do spend a considerable amount of time in such establishments. It may well be that while the elimination of ETS would not be a reasonable modification necessary to afford equal services to patrons with a disability, it would be a reasonable accommodation necessary to prevent discrimination against an employee with a disability.

¹¹²The separate ventilation must be real. The Surgeon General, for example, has concluded that mere separation of smokers and non-smokers within an air-space does not reduce the rates of ETS. *See supra* note 19.

¹¹³42 U.S.C. § 12182(b)(1)(A)(iii) (1997).

that goods and service "shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual."¹¹⁴ The segregation of the individual with a disability will not suffice.

A final factor to be considered in determining whether a change in smoking policy is "reasonable," is the financial burden it places on the public accommodation. In *Staron* the court noted that some public accommodations might find a smoking ban to be so financially burdensome as to be unreasonable.¹¹⁵ However, the court accepted the suggestion that because McDonald's had voluntarily banned smoking in some of its facilities, a fact-finder could conclude that a smoking ban was a modification that McDonald's could undertake with "little or no cost."¹¹⁶

The *Staron* court further noted that there was nothing in the ADA precluding the possibility that a ban on smoking might constitute, in some circumstances, a "reasonable modification" of a public accommodation. While section 501(b) of the Act states that the ADA shall not be read to afford smokers with any right or claim to smoke, it does not prevent individuals with disabilities from requesting the elimination of smoking as a reasonable accommodation.¹¹⁷ To the contrary, according to the court, Sec. 501(b) makes it clear that the Act may indeed allow "the prohibition of, or the imposition of restrictions on, smoking . . . in places of public accommodation . . ."¹¹⁸

However, Title III of the ADA permits a defendant to reject even a reasonable modification if it would "fundamentally alter" the public accommodation. In *Emery v. Caravan of Dreams, Inc.*,¹¹⁹ the court found that a smoking ban would fundamentally alter a night club because the defendant's president testified that "banning smoking would have a major economic impact and would result in major national bands not choosing to perform at Caravan of Dreams."¹²⁰

¹¹⁴42 U.S.C. § 12182(b)(1)(B) (1997).

¹¹⁵51 F.3d at 356.

¹¹⁶*Id.* at 358.

¹¹⁷42 U.S.C. § 12201(b) (1997).

¹¹⁸51 F.3d at 357 (quoting 42 U.S.C. § 12201(b).) (1997).

¹¹⁹879 F. Supp. 640 (N.D. Tex. 1995). The plaintiff relied primarily on the argument that smoking in the night club constituted a "criterion" for admission which discriminated against her in violation of Section 302(b)(2)(A)(i) of the ADA. The court rejected that contention, noting that it stretched the meaning of the word "criterion" to envision it as encompassing the presence of smoke. Instead, the court reasoned, plaintiff's complaint should have been brought under Sec. 302(b)(2)(A)(ii), which requires public accommodations to provide "reasonable modifications." Not having structured the case in that fashion, however, plaintiff did not present evidence rebutting the defendant's contention that a smoking ban would constitute a "fundamental alteration" of the facility within the meaning of 302(b)(2)(A)(ii).

¹²⁰879 F. Supp. at 644.

The plaintiff in that case, however, did not attempt to introduce any evidence to the contrary.¹²¹ Given the number of establishments that have either banned or limited smoking successfully,¹²² it seems unlikely that many establishments other than bars or night clubs could follow the Caravan of Dreams in persuading a court that a change in their smoking policy would constitute a fundamental alteration. Thus, in most cases in which an individual with a disability can show that a change in a public accommodation's smoking policy would be necessary for that individual to participate in or enjoy the accommodation's services, and the change in policy would not be unduly costly or disruptive to the facility, a plain reading of Title III of the ADA should result in a finding that the requested policy change constitutes a "reasonable modification," required by the statute.

B. Title I Cases

Title I of the ADA prohibits discrimination in the workplace. It employs the same definition of disability as is used in Title III, and in many ways, a case under Title I parallels one brought under Title III. It is, however, worth noting some distinctions between the two.

In order for a plaintiff to prevail on a claim under Title I, he or she must not only have a disability, but must also be "qualified" for the job or position in question.¹²³ The statute defines a "qualified individual with a disability" as one who "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."¹²⁴ The inquiry is not whether the individual can perform the job as it currently exists, but whether the individual can perform the "essential functions" of the job if reasonable accommodations are provided.¹²⁵

Undoubtedly, some individuals who need a smoke-free work environment might remain unqualified to work even if such accommodations were provided. Thus, in *Pletten v. Merit Systems Protection Board*,¹²⁶ the court found that an asthmatic was not qualified to work because his asthma was so severe that no reasonable accommodation could suffice to allow him to work.¹²⁷

¹²¹*Id.*

¹²²Stanton A. Glantz & Lisa R. A. Smith, *The Effect of Ordinances Requiring Smoke-Free Restaurants on Restaurant Sales*, 87 AM. J. PUB. HEALTH 1081 (1994).

¹²³42 U.S.C. § 12112(a) (1996). Title III does not make such a demand upon the plaintiff.

¹²⁴42 U.S.C. § 12111(8) (1996).

¹²⁵For a discussion of this requirement see Burgdorf, *supra* note 67 at 457-58.

¹²⁶908 F.2d 973 (6th Cir. 1990) (mem.) (Rehabilitation Act case); for full text of the opinion see 1990 U.S. App. LEXIS 11900 (July 13, 1990).

¹²⁷Plaintiff's work required him to travel throughout an army base. The court found that the plaintiff was not qualified because the entire army base would have to be smoke-free in order for the asthma to be under control. This case thus illustrates the close inter-relationship between the question of whether an individual is "qualified" for

Similarly, some individuals with severe respiratory or cardiac conditions would not be able to work at particular jobs even in the absence of ETS.¹²⁸

If, however, an individual could perform the essential functions of the job with a reasonable accommodation, then the individual is qualified for the position within the meaning of the Act. According to the EEOC, reasonable accommodations include: "Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of the job."¹²⁹ The EEOC Regulations further provide that reasonable accommodations include "Making existing facilities used by employees readily accessible to and usable by individuals with disabilities."¹³⁰ As in the case of Title III claims, the concept of reasonable accommodation implicitly requires a finding that the accommodation is in fact necessary to enable the employee to perform the job successfully. If the presence of ETS actually posed no specific harm to an individual with a disability (consider the case of a blind women who was simply annoyed by ETS but had no physical impairment that placed her at special risk for ETS), elimination of ETS would not be a "reasonable accommodation." Conversely, the elimination of ETS might easily be a reasonable accommodation for an employee who requires oxygen and could not safely work in the presence of smoking. The determination of what constitutes a reasonable accommodation is highly fact-specific. The ultimate conclusion depends significantly on both the needs of the plaintiff and the circumstances of the defendant.

Even if an accommodation is reasonable, the employer still need not institute it if it would "impose an undue hardship on the operation of the business of such covered entity."¹³¹ In determining whether an accommodation creates an "undue hardship," courts are required to consider:

- (i) the nature and cost of the accommodation needed . . . ; (ii) the overall financial resources of the facility or facilities involved in the provision

a position and whether an accommodation requested is "reasonable." See Burgdorf, *supra* note 67 at 458. *Accord* Suttles v. United States Postal Serv., 927 F. Supp. 990, 1007 (S.D. Tex. 1996).

¹²⁸See also Whillock v. Delta Air Lines, 926 F. Supp. 1555 (N.D. Ga. 1995) (plaintiff with multiple chemical sensitivity is not qualified to work because she could not perform the essential functions of her job even with reasonable accommodations). Thus, Title I requires an individual to have an impairment severe enough to substantially limit a major life activity but one that is not so severe as to prevent the individual from being qualified for the job with the addition of reasonable accommodations. The result is paradoxical: individuals with very mild respiratory or cardiac conditions will not be found to be disabled while those with extremely severe conditions may be unqualified to work.

¹²⁹29 C.F.R. § 1630.2(o)(1) (1997).

¹³⁰29 C.F.R. § 1630.2(o)(2)(i) (1997).

¹³¹42 U.S.C. § 12112(b)(5)(A) (1997).

of the reasonable accommodation; the number of persons employed by 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.¹³²

This inquiry is exceptionally fact-specific. Different employers will be required to make different types and different degrees of accommodation. Nevertheless, given the fact that many employers have successfully banned or limited smoking,¹³³ it is difficult to imagine many circumstances under which a modification of smoking policies would be found to constitute an "undue hardship".

C. Analysis of the Application of the ADA to ETS

Although the application of the ADA to ETS-related claims is straightforward, it will no doubt prove to be controversial, as the implementation of the ADA more generally has been. Since its enactment, the ADA has been widely criticized on several accounts.¹³⁴ Two common criticisms seem particularly applicable to ETS-related claims. The first suggests that the ADA is helping the "wrong" persons: that those people who are "truly disabled" are not being significantly helped, while others, without "real" disabilities, are benefiting from the Act.¹³⁵ The second common criticism contends that the ADA imposes excessive costs on both employers and businesses.¹³⁶ These critiques, as they may be applied to ETS-cases, will be discussed in turn.

¹³²42 U.S.C. Sec. 12111(10)(B).

¹³³While no formal comprehensive surveys of employer smoking restrictions have been conducted, there appears to be a growing number of employers which have instituted either company-wide or location specific smoking restrictions. IBM, Scott Paper, Motorola, McDonalds, the U.S. Postal Service, and Walmart are among the many thousands of employers who have restricted smoking in the workplace voluntarily. See also U.S. Dept. of Health and Human Services, *The 1992 Survey of Worksite Health Promotion Activities*, 83634 US Government Printing Office 342 (1992).

¹³⁴For a discussion of the criticism leveled at the ADA, see Pelka, *supra* note 17 at 36; *Development in the Law: Employment Discrimination*, 109 HARV. L. REV. 1571, 1615-22 (1996).

¹³⁵Pelka, *supra* note 17, at 38. For an example of such criticism, see *Disabilities Act is Handicapped When it is too Broadly Applied*, OMAHA WORLD HERALD, (Aug. 7, 1995) at 6.

¹³⁶Another common criticism, applicable to all ADA cases, is that the ADA is flooding the courts with litigation. In fact, in its first five years, the ADA resulted in only about

D. Who are the Truly Disabled?

All ETS-related ADA claims challenge our notion of disability. Almost always the plaintiffs who bring these claims lack readily apparent or traditional disabilities. These persons are not blind, they do not use wheelchairs, nor are they hearing impaired. Instead, they claim to live with conditions that are not only invisible, but surprisingly common.¹³⁷ They have asthma, allergies, or other respiratory or cardiac conditions shared by millions of Americans. The physical impairments these individuals suffer do not readily separate them from the rest of society. As a result, their assertions of disability make many uncomfortable. Why do these people need "special protections?" Why do they need them more than anyone else? If they receive protection, will that somehow undermine society's willingness to provide civil rights protections to those other people with disabilities, the ones with "true disabilities?"

The fear that the ADA is being misused by the "not-truly-disabled," was clearly expressed in a recent ABC News story on the ADA. Introducing the report, pointedly titled "Getting in on the Act," host Barbara Walters stated,

We begin with a story that may make you feel good, at least in the beginning, because it concerns a law designed to help millions of people, probably someone you know, but wait until you see how that law is being outrageously abused. You will find it hard to believe. If you're overweight, or oversexed, or drug-addicted, do you deserve special treatment? . . . [E]very law benefits someone. Unfortunately, it isn't always the people who truly deserve it.¹³⁸

The report went on to claim that the ADA was not only confusing, but was protecting alcoholics, drug-addicts, "lazy people, or incompetent people, or men with odd sexual compulsions."¹³⁹ While ETS-related claims were not mentioned in the story, they no doubt could have been: after all, they are seldom brought by people with traditional disabilities. The individuals who bring ETS-related claims can easily be caricatured as whiners who complain excessively about an environmental pollutant that is annoying, even dangerous, but not disabling, to many.

Such criticism of the ADA in general, and ETS-related claims in particular, relies upon several premises that require further examination. First, the criticism assumes that the ADA was meant to protect only some discrete groups of individuals with "true disabilities." Implicitly that group is assumed to be relatively small, significantly disabled, and easily distinguished from the

650 court cases, hardly a flood considering that this is a comprehensive nation-wide statute. See *Development in the Law*, *supra* note 134, at 1617-18.

¹³⁷ American Lung Association, *Lung Disease Data 1994*, American Lung Association, 1740 Broadway, New York, NY, at 6-8; American Heart Association, *Heart and Stroke Facts: 1995 Statistical Supplement*, American Heart Association, Dallas, Tex, at 2.

¹³⁸ ABC News 20/20 Transcript 1629 (July 19, 1996).

¹³⁹ *Id.*

nondisabled population.¹⁴⁰ Second, the attack suggests that the ADA is being "abused" by claims of whiners and complainers, who "really aren't disabled," and don't really require or deserve civil rights protections. The criticism assumes a clear dichotomy between the "truly disabled," and the "clearly undeserving."

Reliance upon such a dichotomy violates not only the clear language of the ADA and its legislative history, but also any thoughtful understanding of the nature of disability. Indeed, one of the most profound and important premises of the ADA, and also the prior Rehabilitation Act, as well as other disability-rights statutes,¹⁴¹ is the plasticity and malleability of the concept of disability.

Under both the ADA and the Rehabilitation Act there is no simple all-inclusive list of specified categories of disability. The ADA's definition of disability derives from a 1974 amendment to the Rehabilitation Act¹⁴² which was enacted precisely to broaden the definition of "handicap," the term then in use,¹⁴³ to ensure that it was not understood narrowly as existing only in relation to employment.¹⁴⁴ The Conference Report discussion of the 1974 Amendment reveals that the term disability was not to be confined to a limited set of conditions. The Report states:

Clause (A) in the new definition eliminates any reference to employment and makes the definition applicable to the provision of Federally-assisted services and programs. Clause (B) is intended to make clearer that the coverage of sections 503 and 504 extends to persons who have recovered-in whole or in part-from a handicapping condition, such as a mental or neurological illness, a heart attack, or cancer and to persons who were classified as handicapped (for example, as mentally ill or mentally retarded) but who may be discriminated against or otherwise be in need of the protection of sections 503 or 504.

¹⁴⁰See, e.g., OMAHA WORLD HERALD, *supra* note 135, at 6 (arguing that the concept of disability has been "absurdly distorted" and should be limited to "easily verifiable disabilities like blindness and paralysis).

¹⁴¹See, e.g., Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491 (1995), see also the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (1995).

¹⁴²Pub. L. No. 93-516 (1974).

¹⁴³The ADA substituted the term "disability," for "handicap," in recognition of the fact that "Many individuals with disabilities, and organizations representing such individuals object to the use of such terms as 'handicapped person' or the 'handicapped.'" HR Rep. 101-485, House Committee on Education and Labor at U.S.C.C.A.N. 1990, vol. 4 at 333. The Rehabilitation Act was amended in 1992 to adopt the term "disability," in lieu of "handicap." Pub L. 102-564, 106 Stat. 4344 (1993).

¹⁴⁴1974 U.S.C.C.A.N. at 6388-8389.

Clause (C) in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped. . . .¹⁴⁵

The Congressional report specifically noted that the term "handicap" could be applied to conditions which did not significantly limit one's ability to work, and that the term could include such nontraditional disabilities as cancer and heart disease. From the very start of the federal effort to enforce the civil rights of individuals with disabilities, Congress understood that the Rehabilitation Act would be applied to individuals with invisible disabilities that are not commonly thought of as disabilities.

Congress also understood that by enacting subsections (B) and (C) of the definition, the law would apply even to those individuals who lack actual impairments which significantly limit any major life activity as long as the individuals have a record of such impairments or are wrongly perceived as having such impairments.¹⁴⁶ The determination of whether an individual had a handicap within the meaning of Section 504 could not be made simplistically. Rather, in certain cases, the question of whether an individual had a disability would depend upon the subjective understanding of the defendant. It is evident that Congress never intended this legislation to protect only certain groups of "deserving people," because the answer to the question "who was deserving" depended upon the context.

The Rehabilitation Act's definition reflected a sophisticated understanding that while physical and mental impairments could be judged abstractly, apart from the social context in which they arise, disability itself could not be abstractly ascertained. Rather, disability exists because of the interaction between an individual's physical and/or mental state and the social context in which the person operates.¹⁴⁷

In an era before driving, night-blindness might not have been disabling. Today, it may be. Similarly, in an era in which most labor is manual, mild arthritis might be disabling. In the absence of social stigma, facial disfigurements do not constitute disabilities. In the presence of stigma, the disability they cause may be profound.¹⁴⁸ Thus, the conditions which constitute disabilities cannot be specified or categorized because not only do the biological causes of physical and mental impairments change (consider the

¹⁴⁵*Id.* at 6389.

¹⁴⁶*Id.*

¹⁴⁷See, e.g., Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination* in PERSPECTIVES ON DISABILITY 37 (Mark Nagler ed., 2d ed. 1993).

¹⁴⁸See *Americans With Disabilities Act of 1989: Hearings Before the Committee on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong., 1st Sess., S.933 (1989) (Statement of Rep. Coelho) (discussing discrimination due to a disfigurement). *But see* *Christian v. St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1053 (7th Cir. 1997) (suggesting that a "revolting" disfigurement would not be a disability even if the individual was discriminated because of it).

demise of the polio virus and the rise of HIV), but the social conditions in which people experience these impairments vary. The determination of disability, therefore, must inevitably be made on a case-by-case basis because the physiological and social conditions which people experience are usually different.¹⁴⁹

In the years following the enactment of the 1974 amendments, the federal courts reinforced this understanding of Section 504's definition of disability. Although their interpretations were not wholly consistent, the courts understood early on that Section 504 did not apply solely to a limited set of conditions. Before the enactment of the ADA, the courts determined that, at least under certain circumstances, individuals with conditions as varied as angina,¹⁵⁰ asbestos-caused disease,¹⁵¹ AIDS,¹⁵² and tuberculosis¹⁵³ all had disabilities within the meaning of the Rehabilitation Act.

If there was any touchstone to the judicial determination of whether an individual had a disability within the meaning of the Rehabilitation Act, it was the recognition that the Act did not create any finite set of disabilities. The question, therefore, was not whether the plaintiff's particular condition fell outside preordained parameters of the Act, but rather, whether his or her physical or mental impairment substantially limited performance of any major life activities, or whether the individual had a record of, or was perceived as having, such an impairment.

The Supreme Court most fully considered the issue in the critical 1987 case of *School Board v. Arline*.¹⁵⁴ The question before that Court was whether the Rehabilitation Act could be applied to protect a school teacher with tuberculosis. While determining that a contagious disease could constitute a

¹⁴⁹This is not to say that in the particular context of late twentieth century America, certain physiological or mental conditions will not almost always, if not always, significantly impair an individual's major life activities so as to constitute a disability. Thus, many courts have concluded that HIV disease is, at least for now, invariably a disability. E.g. *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir.), cert. granted, 118 S. Ct. 554 (1997). But see *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156 (4th Cir. 1997) (finding that asymptomatic HIV is not an impairment). Similarly, in our society, an individual who requires a wheel-chair to be mobile will always be found to have a disability. However, not all disabilities are as readily apparent. Even relatively minor physiological conditions can cause a disability if in a particular culture they trigger sufficient stigma and the "perception" of disability. Thus if a particular culture believed that individuals with hay fever were contagious with a deadly disease, such individuals should be disabled within the meaning of the ADA. See *School Bd. v. Arline*, 480 U.S. 273, 284-85 (1987) (discussing the fears and myths associated with contagiousness).

¹⁵⁰See *Cook v. United States*, 688 F.2d 669 (9th Cir. 1982).

¹⁵¹*Fynes v. Weinberger*, 677 F. Supp. 315 (E.D. Pa. 1985).

¹⁵²*Chalk v. United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988).

¹⁵³*School Board v. Arline*, 480 U.S. 273 (1987).

¹⁵⁴*Id.*

disability,¹⁵⁵ the Supreme Court reasserted the breadth of Section 504's definition of disability. The Court stated that the term must be given "a broad definition, one not limited to so-called 'traditional handicaps.'"¹⁵⁶ The Court added:

By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments.¹⁵⁷

Arline's understanding of what constitutes a handicap was quickly adopted by the Congress. Shortly after the decision was rendered, the Rehabilitation Act was amended to make it clear that a recipient of federal financial assistance, in such circumstances, could discriminate only against an individual with "a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job."¹⁵⁸ Thus Congress accepted *Arline's* determination that individuals with nontraditional disabilities, more specifically contagious diseases, could be considered to have a disability. At the same time Congress amended the Act to ensure that employees need not be retained on the job when they constitute a direct threat to the health or safety of others.

In enacting the ADA, Congress chose to adopt the Rehabilitation Act's broad definition of disability as it had come to be defined by the courts and administrative agencies.¹⁵⁹ The legislative history of the Act makes crystal clear that Congress assumed that *Arline* would be followed and that such nontraditional disabilities as HIV-infection would be found to be disabilities

¹⁵⁵*Id.* at 281.

¹⁵⁶*Id.* at 280 n.5.

¹⁵⁷*Id.* at 284-85 (notes omitted).

¹⁵⁸Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 12 Stat. 31 (1988).

¹⁵⁹H.R. REP. NO. 101-485 (II), Report of the Committee on Education and Labor, 101 St. Cong., 2d Sess. (1990) reprinted in 1990 U.S.C.C.A.N. 332.

under the new Act.¹⁶⁰ The House Committee on the Judiciary further explained that the Rehabilitation Act's definition was employed because "it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may develop in the future, as they have since the definition was first established in 1973."¹⁶¹

Congressional concern with the breadth of the ADA's definition of disability and its applicability to numerous nontraditional disabilities led Congress, in Title V of the Act, to specifically exclude certain conditions from coverage. Title V specifies that the term disability shall not apply to "homosexuality, transvestitism, transsexualism, pedophilia,"¹⁶² and a list of other specified conditions which Congress excluded from civil rights protections. Thus, rather than applying the Act to only a limited set of traditional disabilities, Congress adopted a broad, flexible definition of disability which was then limited by the specific exclusion of a few conditions that Congress found to be "unworthy."¹⁶³

This rejection of a limited set of categorical disabilities establishes that there is nothing inappropriate or abusive in the claim that certain individuals with respiratory or cardiac conditions have a disability within the meaning of the Act. The fact that their disability may be invisible, and may not be of the sort that most people picture when they hear the term "disability," does not mean that the statute applies less to them than to anyone else. The question for individuals with such invisible disabilities, as for all individuals who claim the ADA's protection, is whether their physical or mental impairment *significantly limits* a major life activity, or whether they have a record of impairment, or are misperceived as having an impairment that would create a significant limitation.

Demonstrating the affirmative answer to such questions is not at all easy. While the ADA's definition of disability may be broad, it is not unbounded. The statute limits its scope not by establishing any categorical set of disabilities, but by requiring that individuals who seek its protection demonstrate that a major life activity be "significantly" limited.

The courts have read this "significant limitation" requirement strenuously. Critics who argue that the ADA is being readily abused by mere whiners or complainers overlook the substantial body of decisional law interpreting the "substantial limitation" requirement.

¹⁶⁰*Id.*

¹⁶¹H.R. REP. NO. 101-485(III), Committee on the Judiciary, *reprinted in* 1990 U.S.C.C.A.N. 450.

¹⁶²42 U.S.C. § 12211 (1997).

¹⁶³The political and moral decision to exclude certain unpopular conditions from coverage is highly questionable. The point here, however, is simply to note that Congress adopted a broad definition of disability that goes beyond traditional disabilities to often include cases of respiratory and cardiac conditions. Those conditions that Congress did not want covered by the Act were explicitly excluded from coverage.

The most important restriction on the substantial limitation requirement derives from the *Forrisi* case discussed above.¹⁶⁴ In rejecting the claim of the utility system's repairer with acrophobia, the court noted that:

It would debase this high purpose [of the Rehabilitation Act] if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.¹⁶⁵

The court further stated that an individual could not claim to be disabled under the "regarded as having an impairment" prong of the definition merely because the employer found the plaintiff incapable of doing a particular job. Rather, "[t]he statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved."¹⁶⁶

Forrisi's reasoning has been widely followed by other courts,¹⁶⁷ the result being that plaintiffs cannot easily prevail on a disability claim merely by alleging an inability to work in a particular workplace. The impairment that the plaintiff experiences, or is mistakenly believed to experience, must be far more general in its impact. Only those individuals who experience a significant limitation broadly are found to be protected by the ADA. For example, in the ETS-context, an individual who claims that she cannot work in a particular workplace because the ETS there bothers her will not likely be found to have a disability. Only those plaintiffs who experience a significant impairment of a major life activity outside of that workplace, such as those who generally have difficulty breathing, or those who are so sensitive to ETS that they have difficulty working or functioning in many environments, (or those who are wrongfully perceived to have such difficulties), will be protected. While such individuals may not have a traditional disability, the courts are, in effect, requiring that their disability be as limiting and as pervasive in its impact as

¹⁶⁴794 F.2d at 934. See also text accompanying notes 91-103, *supra*.

¹⁶⁵*Id.* at 933.

¹⁶⁶*Id.* at 934.

¹⁶⁷*E.g.*, *Byrne v. Board of Educ.*, 979 F.2d 560 (7th Cir. 1992)(allergy to fungus is not a disability when an if the individual is limited in her ability to work in only one workplace); *Welsh v. Tulsa*, 977 F.2d 1415 (10th Cir. 1992)(decreased sensation in two fingers does not render a fire fighting applicant a handicapped person under the Rehabilitation Act where the inability effected only one job); *Maulding v. Sullivan*, 961 F.2d 694 (8th Cir. 1992)(chemical sensitivity is not a disability if it only limits the plaintiff's ability to work in one particular workplace); *Daley v. Koch*, 892 F.2d 212 (2d Cir. 1989)(police officer candidate not handicapped under Rehabilitation Act where mental condition did not substantially impair a major life activity).

are most traditional disabilities. As a consequence, the concept of disability is neither degraded nor trivialized by recognizing such individuals as having a disability.

The ability of individuals, with or without traditional disabilities, to prevail in employment-related claims is further restricted by Title I's requirement that the individual be "qualified" for the job in question.¹⁶⁸ While the Act states that the determination of whether an individual is qualified is to be based on an analysis of whether the individual can meet the "essential functions" of the job "with or without reasonable accommodation,"¹⁶⁹ the courts here too have made clear that disability claims cannot be easily won. Everyone who wants a job but cannot hold it cannot prevail. The courts have read the requirement that the plaintiff be "qualified" for the position strictly, and with significant deference to the employer.

Similarly, although Title III of the ADA does not explicitly contain a "qualification requirement," it does state that a modification requested need not be provided if it would "fundamentally alter" the service in question.¹⁷⁰ In many ways, this limitation on the requirement to provide reasonable modifications parallels Title I's "qualification" requirement and serves to limit the degree to which the ADA requires defendants to alter their programs or establishments to meet the needs of persons with disabilities.¹⁷¹

Strict judicial interpretation of the "qualification" requirement, as well as the fundamental alteration defense, stems back to the Supreme Court's initial foray into disability-rights jurisprudence in *Southeastern Community College v. Davis*.¹⁷² That Rehabilitation Act case concerned a nursing student with a significant hearing impairment who sought admission into a clinical training program. In rejecting her claim, the Supreme Court stated that "legitimate physical qualifications may be essential to participating in particular programs."¹⁷³ The Court added further that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."¹⁷⁴

¹⁶⁸42 U.S.C. § 12112(a) (1997).

¹⁶⁹42 U.S.C. § 12112(B) (1997).

¹⁷⁰42 U.S.C. § 12182(b)(2)(A)(ii) (1997).

¹⁷¹There is a major difference between the qualification requirement of Title I and the fundamental alteration provision of Title III. Structurally, the qualification requirement appears as part of a plaintiff's *prima facie* case. In Title III, however, a plaintiff need not prove that he or she is qualified. Rather, it appears that the defendant must prove that an otherwise reasonable modification is not required because it would create a fundamental alteration of the public accommodation in question. See Wendy E. Parmet, *Title III: Reimagining the Public World*, in *THE AMERICANS WITH DISABILITIES ACT 123*, 127-28 (Lawrence Gostin & Henry Beyer eds., 1991).

¹⁷²442 U.S. 397 (1979).

¹⁷³*Id.* at 407.

¹⁷⁴*Id.* at 406.

Subsequent case law,¹⁷⁵ and the explicit language of the ADA, modified *Davis* to make clear that an individual would be qualified for a position if he or she could meet all the essential requirements of the job with reasonable accommodations. Nevertheless, courts have remained deferential to employers. As one federal court noted "Courts are prohibited from requiring a fundamental alteration in a defendant's program to accommodate a handicapped individual."¹⁷⁶

The requirement that plaintiffs meet the essential functions of the job has proven particularly troubling to plaintiffs whose disability or chronic illness causes substantial absenteeism.¹⁷⁷ This may often be the case for individuals with respiratory or cardiac disabilities. For example, in *Tyndall v. National Education Centers*,¹⁷⁸ the plaintiff was an instructor with lupus erythematosus, who missed several days of work due to her illness. In finding for the employer, the court stated, "a regular and reliable level of attendance is a necessary element of most jobs. An employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."¹⁷⁹

As a result of such reasoning, many of the individuals who have chronic illnesses severe enough in their impact to constitute disabilities will also find that they are not "qualified" for work within the meaning of the ADA. Individuals with lung cancer, cystic fibrosis, or COPD may well find that although their impairment limits their major life activities substantially enough to establish them as having a disability, it also results in absenteeism or other limitations in their ability to perform essential functions of the job.

In short, contrary to the claims of critics, it is difficult for an individual without a traditional disability to prevail on a frivolous ADA suit. Rather, the Scylla and Charybdis of "disability" and "qualification," ensure that the statute protects only a relatively small class of individuals:¹⁸⁰ those with impairments significant enough to limit generally and substantially their major life activities

¹⁷⁵See *School Bd. v. Arline*, 480 U.S. 273, 287 n.17(1987); *Alexander v. Choate*, 469 U.S. 287 (1985).

¹⁷⁶*Pandazides v. Virginia Bd. of Educ.*, 804 F. Supp. 794 (E.D. Va. 1992)(Rehabilitation Act case brought by a teacher).

¹⁷⁷See Audrey E. Smith, *The Presence Is an Essential Function Myth: The ADA'S Trapdoor for the Chronically Ill*, 19 SEATTLE U. L. REV. 163 (1995).

¹⁷⁸31 F.3d 209 (4th Cir. 1994).

¹⁷⁹*Id.* at 213 (citations omitted). See also *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994)(employee with absenteeism due to ear disability was not qualified).

¹⁸⁰Of course, others can bring a lawsuit. The possibility that an individual who is not protected by a statute can sue under that statute hardly constitutes a valid criticism of the statute. Individuals can falsely bring contract, tort, or constitutional claims. We would hardly say that such a possibility constitutes a valid justification for limiting those legal theories.

without compromising their ability, with reasonable modifications, to perform the essential functions of a job.¹⁸¹

As a result of these requirements and rigorous judicial scrutiny, the vast majority of individuals who are bothered or annoyed by ETS have no realistic prospect of prevailing on such a claim. Instead, an individual needs to have a substantial limitation of a major life activity, but one that is neither so severe as to render the individual unqualified to work or so profound as to require a fundamental alteration of the public accommodation in question. Individuals with minor sensitivities to ETS will not be disabled. Individuals who have respiratory or cardiac problems so severe that they cannot work or participate in public life even with reasonable accommodations will not be entitled to relief. Only those whose condition falls somewhere in the middle of a continuum of severity will prevail. Allowing their claims can hardly open any floodgate or undermine the concept of disability. Instead, it recognizes that disabilities come in a variety of forms. Only those individuals who have a significant enough impairment to limit generally their major life activities but, with simple changes in the status quo, can indeed meet the requirements of a job or participate in a program, should be accommodated and be given the chance to lead whole and independent lives. To see fully why that is so, one other issue needs first to be explored: the concept of reasonable accommodation.

VI. THE COST OF ACCOMMODATION

Many critics of the ADA argue that the law imposes excessive and onerous costs on employers and businesses.¹⁸² Of particular concern to the critics is the Act's broad requirement that employers provide "reasonable accommodations," and businesses "reasonable modifications" to permit inclusion of individuals with disabilities.¹⁸³ According to ADA critic Brian Doherty, "ADA demands from America's businesses and local governments are heroic and often fabulously expensive efforts to achieve social goals that could be well approximated in other ways, and whose costs, mandated by government, ought not weigh entirely on individuals."¹⁸⁴ Defendants in ETS-related cases have echoed those concerns. In the trial in *Emery v. Caravan of Dreams, Inc.*, for example, the defendant's president testified that a ban on

¹⁸¹No qualification requirement is actually a predicate for filing suit against a public accommodation.

¹⁸²See 109 HARV. L. REV. 1602, 1618-19 (1996) and sources cited therein at note 3; Brian Doherty, *Disabilities Act: Source of Unreasonable Accommodations*, THE SAN DIEGO UNION-TRIBUNE July 16, 1995, at G-1 ("ADA demands from America's businesses and local governments are heroic and often fabulously expensive efforts to achieve social goals that could be well approximated in other ways. . .").

¹⁸³E.g., Remarks of Rep. Maiselle Dolan Shortley, Debate, House Proceedings and Debates of P.L. 101-3336, May 15, 1990.

¹⁸⁴Doherty, *supra*, note 182, at G-1.

smoking would result in some bands refusing to appear at the night club, with the result being a significant disruption of business.¹⁸⁵

In reality, however, studies have shown that most accommodations required by the ADA are not particularly costly. Peter Blanck's study of the implementation of the ADA at Sears, Roebuck and Co., for example, concluded that between January 1, 1993 and December 31, 1995, the average cost of a workplace accommodation was only \$45.¹⁸⁶ Moreover, many accommodations proved to increase the productivity of all employees, not only those with disabilities.¹⁸⁷ Given the generally harmful effect of ETS on the health and productivity of all workers,¹⁸⁸ it would appear especially likely that modifications of smoking policy would actually lead to economic benefits for many businesses.¹⁸⁹ The fact that numerous businesses have chosen on their own accord to prohibit or limit smoking suggests that the costs of modifying smoking policies are not at all onerous for most enterprises.¹⁹⁰

More importantly, the "excessive cost" argument, in the ETS-context, as elsewhere, overlooks both the explicit language of the statute and regulations, plus the judicial opinions that have interpreted them. Importantly, the ADA does not require all modifications or accommodations that an individual with a disability would need in order to participate in a workplace or public accommodation. The statute only mandates those alterations that are "reasonable." Further, an employer need not provide even a reasonable accommodation if it would create an "undue hardship."¹⁹¹ Nor is an employer required to modify the "essential functions" of the job.¹⁹² Similarly, a public accommodation need not provide a reasonable modification if it would result in a "fundamental alteration" of the operation.¹⁹³

¹⁸⁵879 F. Supp. 640, 644 (N.D. Tex. 1995).

¹⁸⁶Peter David Blanck, *Communicating the Americans with Disabilities Act: Transcending Compliance: 1996 Follow-up Report on Sears, Roebuck, and Co.*, 1996, The Annenberg Washington Program, 1996, at 18.

¹⁸⁷*Id.*

¹⁸⁸59 Fed. Reg. 15968, 16010 (1994) (to be codified at 29 C.F.R. Pts. 1910, 1915, 1926, and 1928) (proposed September 16, 1994).

¹⁸⁹See, e.g., David H. Mudarri, *The Costs and Benefits of Smoking Restrictions: An Assessment of the Smoke-Free Environment Act of 1993 (H.R. 3434)*, Washington, DC, Indoor Air Provision, Office of Air and Radiation, Environmental Protection Agency (1994).

¹⁹⁰Staron, 51 F.3d at 358.

¹⁹¹42 U.S.C. § 12112(b)(5)(A) (1997).

¹⁹²42 U.S.C. § 12111(8) (1997); See, e.g., *Larkins v. CIBA Vision Corp.*, 858 F. Supp 1572, 1583 (N.D. Ga. 1994) (employer need not eliminate essential functions of the job; here the requirement that a customer service representative answer telephone calls); *Bolton v. Scrivner, Inc.*, 836 F. Supp. 783, 788 n. 4 (W.D. Okla. 1993), *aff'd*, 36 F.3d 939 (10th Cir. 1994) (employer need not modify actual duties of the job).

¹⁹³42 U.S.C. § 12182(b)(2)(A)(ii) (1997).

In applying these terms, the courts have generally been extremely sensitive to defendants' concerns not only about clearly documented costs but also about more general disruptions to the employer's right to run the workplace as he or she sees fit.¹⁹⁴ Many courts, for example, have rejected claims for job reassignment or transfer, finding that they would impose too much disruption on an employer. For example, in *Carter v. Tisch*,¹⁹⁵ the plaintiff was an asthmatic custodian who experienced asthma attacks due to his occupational exposure to dust. In order to avoid the dust, he requested reassignment to a permanent light duty position. Rejecting his contention that reassignment constituted a "reasonable accommodation," the court noted that "[t]he case law is clear that, if a handicapped employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment."¹⁹⁶ In effect, the court deferred to the employer's underlying discretion to make work assignment decisions. Only the most modest intrusions on that right would have been sanctioned by the court.

Courts have also been very deferential to employer concerns about health or safety risks. In *Huber v. Howard County*¹⁹⁷ the plaintiff was a recruit firefighter with asthma. He requested, as an accommodation, the ability to use his inhaler during exercises. The court rejected the claim because of the defendant's contention that the inhaler constituted a safety hazard if placed near open flames or exposed to high temperatures. This contention was accepted with a relative paucity of evidence. The court was simply willing to defer to the employer's presumed superior knowledge and implicit right to determine workplace conditions. Similar deference is also evident in the many court cases that have upheld the right of a health care institution to dismiss or reassign a health care worker who is HIV-positive.¹⁹⁸ Despite the extremely low risk posed by such workers, cited by one court as between 1/200,000, to 1 in 2 million,¹⁹⁹ the courts have generally given considerable deference to the knowledge of the institution.

Judicial reluctance to impose any but the most modest of "reasonable accommodations" becomes especially apparent when reviewing ETS claims. For most employers or businesses, the prohibition of smoking or its limitation

¹⁹⁴Some critics have charged that the undue burden standard is so favorable to employers as to render the ADA ineffective. See Drimmer, *supra* note 16.

¹⁹⁵822 F.2d 465 (4th Cir. 1987).

¹⁹⁶*Id.* at 467. See also *Magel v. Federal Reserve Bank*, 776 F. Supp. 200 (E.D. Pa. 1991)(employer not required to create new job that would allow asthmatic employee to work 8 months a year and not during the winter).

¹⁹⁷849 F. Supp. 407 (D.Md. 1994).

¹⁹⁸See, e.g., *Doe v. University of Md. Med. Sys.*, 50 F.3d 1261 (4th Cir. 1995); *Bradley v. University of Tex.*, 3 F.3d 922 (5th Cir. 1993) and *Scoles v. Mercy Hosp.*, 887 F. Supp. 765 (D.C. Pa. 1994).

¹⁹⁹*Scoles v. Mercy Hosp.*, 887 F. Supp. 765 (D.C. Pa. 1994).

to isolated, well-ventilated areas would impose little or no cost.²⁰⁰ However, when plaintiffs have required or requested more far-reaching modifications pertaining to smoking policies, they have often met judicial rejection. *Harmer v. Virginia Electric & Power Co.*,²⁰¹ is illustrative. The plaintiff there suffered from a pulmonary disability. In response to several requests by Harmer to prohibit smoking, his employer, Virginia Power, announced that smoking would be banned in all its facilities, except in specially constructed smoking rooms. Virginia Power asserted that this policy was designed to maintain employee morale, and prevent the potential loss of productivity from employees who smoke. Harmer, nevertheless, continued to press for a total ban on smoking. In rejecting his contention that a total prohibition constituted a reasonable accommodation, the court stated that, "Harmer is not entitled to absolute accommodation under the ADA because he can perform the essential functions of his position with the reasonable accommodations made by Virginia Power. . . ." ²⁰² Because Harmer could not show that he required the total elimination of smoke from the building, his request was not reasonable. Interestingly, the court made this ruling without making any finding that a total prohibition would actually impose substantial or indeed any actual costs on Virginia Power.²⁰³

*Vickers v. Veterans Administration*²⁰⁴ was a similar case. In that case the Veterans Administration attempted to accommodate the plaintiff's disability by removing smoking from his office space and increasing the room's ventilation. The plaintiff, however, requested that smoking be totally eliminated from the "Supply Service" in which he worked. The court rejected that request as going too far, finding that his employer had already provided

²⁰⁰While costs can be as small as those necessary for placing adequate signage throughout the worksite, employers may want to ease the transition to a smoke-free workplace by making smoking cessation programs available to employees, providing educational information about the benefits of and need for a smoke-free workplace, or even hiring a policy consultant. See Dana Farber Cancer Institute, "Guide to Workplace Tobacco Control," Massachusetts Tobacco Control Program, Massachusetts Department of Public Health, Boston, Mass. (1993). OSHA has estimated that the cost to make virtually all workplaces in the country smoke-free would vary between \$0 and \$68 million for the first year depending on whether separately ventilated designated smoking areas are to be provided to smokers. See 59 FED. REG. 15968, 16013 (1994) (to be codified at 29 C.F.R. Pts. 1910, 1915, 1926, and 1928) (proposed September 16, 1994).

²⁰¹831 F. Supp. 1300 (E.D. Va. 1993).

²⁰²*Id.* at 1306.

²⁰³It should be noted, however, that this was a Rehabilitation Act case. The Rehabilitation Act does not explicitly state that an employer can defend a claim for reasonable accommodations by showing that the requested accommodation would create an undue hardship. That language is exclusive to the ADA. In the context of the Rehabilitation Act, the court must engage in a more generalized inquiry as to whether a requested accommodation is "reasonable."

²⁰⁴549 F. Supp. 85 (W.D. Wash. 1982).

him with sufficient reasonable accommodations.²⁰⁵ As in *Harmer*, the court presupposed that an employer has an implicit right to put in place whatever policies it chooses to implement except when modifications are absolutely necessary to permit an employee with a disability to continue working. Thus, even if an accommodation will not cost the employer anything but its "right to decide," the courts will not require that the accommodation be made unless the plaintiff can show that it is necessary.

Not surprisingly, when employers can actually present testimony showing that a change in smoking policy will cause economic pain, courts have been receptive to the defendants' concerns. Thus, in *Emery v. Caravan of Dreams*,²⁰⁶ noted above, the court found for the defendant based on the undisputed testimony that the prohibition of smoking in the night club would reduce the willingness of some bands to perform there.²⁰⁷ Of course, in many instances courts will be unable to find that a change in smoking policy will have economically deleterious effects. As the court noted in *Staron*,²⁰⁸ the fact that a business has previously chosen to prohibit smoking, and has done so successfully, undermines the assumption that a smoking ban will have adverse economic consequences for many businesses. But in those instances in which significant economic consequences can be demonstrated, or when a plaintiff cannot demonstrate to the court's satisfaction that a requested accommodation is actually necessary, a court is likely to defer to the defendant.

In short, the ADA imposes neither the heroic nor the onerous burdens that its critics decry.²⁰⁹ Rather, as the ETS cases suggest, the ADA requires only that employers and public accommodations make relatively modest accommodations, where they can be shown to be actually necessary to permit an individual with a disability to work or participate in civic life.

VII. CONCLUSION

ETS-related ADA cases provide a prism for thinking about the ADA and the rights of individuals with disabilities. On the one hand, the ETS cases demonstrate the unusual breadth of the statute. The ADA applies not only to a few people with a few limited disabilities, but to a far broader class, in an infinite set of situations.

On the other hand, the ETS cases demonstrate why the breadth of the ADA need not be feared. While the ADA employs a broad, open-ended definition of

²⁰⁵See also *Gupton v. Commonwealth*, 14 F.3d, 203 (4th Cir. 1994); *Pletten v. MSPB*, 908 F.2d 973 (6th Cir. 1990)(mem.). *Pletten* is more fully discussed *supra* notes 126-27 and accompanying text.

²⁰⁶879 F. Supp. 640 (N.D. Tex. 1995).

²⁰⁷*Id.* at 644.

²⁰⁸51 F.3d 353 (2d Cir. 1995).

²⁰⁹This is not to say that employers or businesses need not bear any costs. Some accommodations will create costs for defendants. The point here only is that the costs are often less than claimed, and often as in the case of ETS, non-existent.

disability, its demands upon plaintiffs are high. Only those who experience, or have a record of impairment, or are misperceived as having impairments that interfere generally with their major life activities are protected. Those individuals whose impairments are so significant that they cannot, even with reasonable modifications, perform the essential functions of a job, or participate in a public accommodation without its fundamental alteration, will not be entitled to relief. Moreover, when individuals with disabilities have asked for burdensome modifications to accommodate their vulnerability to ETS, the courts have usually rejected their pleas. Indeed, what a review of the ETS cases demonstrate is the extraordinary modesty (and low cost) of most accommodations necessary to enable individuals with ETS-related disabilities to work or participate in public accommodations. Only when the court has been fully satisfied that the modification is reasonable and would not add significant (never mind undue) costs upon a defendant, has a plaintiff been allowed to proceed.

Critics of the ADA nevertheless mock its breadth and fear its impact. They suggest that if the concept of disability is not confined to a few discrete conditions, and reasonable modifications are not limited to a few narrow accommodations, the burdens on the economy will be vast. The ETS-cases teach a very different lesson.

There is no reason to unnaturally confine the concept of disability. Disability, as a legal concept, is but an endpoint in a continuum of vulnerabilities resulting from the relationship between our physiological beings and the environment in which we live. Although the law relies upon a stark division between those with disabilities and those without (only those with statutory disabilities have their rights fully protected by the statute),²¹⁰ the reality is more complex. All individuals will face different limitations on their major life activities at different points in their lives.²¹¹

Some aspects of our socially constructed environment interfere with the lives of only a few individuals with uncommon conditions. Other aspects of our environment interfere with the ability of many individuals to go about their life activities in a healthful and productive manner. ETS falls within the latter category. All individuals are harmed by ETS,²¹² some more than others.

Rather than fearing this continuum, and artificially constricting the application of the ADA, the ETS-cases provide the rationale for adopting the

²¹⁰The ADA also protects individuals who are discriminated against because they are associated with someone with a disability. See 42 U.S.C. § 12112(b)(4)(1997); 42 U.S.C. § 12182(b)(1)(E)(1997).

²¹¹It may be the fear of this very fact, that all mortal beings are biologically vulnerable, that creates the "existential anxiety" which underlies the desire to isolate, stigmatize, and discriminate against individuals with disabilities. Hahn, *supra* note 147, at 41. Thus, insecurity about one's own disabilities may explain the desire to limit the concept of disability to a few discrete categories, thereby insisting upon a stark, but unrealistic, separation between people with disabilities and the rest of the population.

²¹²See *supra* Part II.

opposite approach. When an individual with a vulnerability to ETS severe enough to require an accommodation prevails in obtaining a modification of an entity's smoking policy, all the other individuals who use the workspace or public accommodation are benefited. It is precisely because disability (as a human condition rather than a legal category) exists in a continuum that the benefits obtained by ADA-required reasonable modifications often extend to many more than those who would qualify as plaintiffs in a lawsuit.²¹³ Precisely because there can be no stark boundary between a successful ETS plaintiff and the rest of the world, the victories they win bring far wider benefits than are generally recognized.

It is important to recall that the wide scope of the ADA is tempered by the limitations of its demands. The ADA does not require that all changes that are necessary to enable an individual with a disability work or participate in public life be carried out. An employer need not employ a worker with COPD who is absent 50% of the time, or even 20% of the time. All the ADA asks is that if with small changes, that worker can do the job productively, she be given the opportunity to do so. If banning smoking from the interior of her workplace constitutes the difference between her productivity and her inability to work and be independent, then surely the scale tips in favor of segregating the ETS. The simplicity of the demand suggests that it is one that should not be feared by anyone.

In short, the ADA-ETS cases demonstrate both why there can be no finite set of disabilities, or modifications, and why there should not be. If the ultimate goal of the ADA, or more broadly our disability rights law, is the inclusion and independence of individuals with disabilities, then we must be willing to assess continuously how the social world interacts with the needs and impairments of different individuals. In doing so, the demands are not and cannot be heroic. We do not live in Utopia and our laws cannot mandate such conditions. Our laws cannot repeal the realities of the market. Businesses cannot assume all costs and stay in business. The social environment cannot be completely changed to ensure that all individuals will be able to participate in all public activities or succeed at all jobs.²¹⁴ But in many cases, as is often true with ETS,

²¹³A similar point could be made about many other modifications and alterations of policies that have occurred as a result of an awareness of the needs of individuals with disabilities. For example, ramps and curb cuts have been added to benefit individuals with disabilities. Such modifications benefit far more people, from parents pushing strollers to individuals suffering from temporary physical impairments (such as sprained ankles). These impairments may not qualify as a legal disability, and yet surely constitute a physical impairment that affects the ability to engage in major life activities. Similarly, a law school may well find that academic support services, put in place to accommodate students with learning disabilities, benefit many more students than those who can be diagnostically determined to have a learning disability.

²¹⁴For a discussion of the fact that full inclusion of some individuals with disabilities may indeed be costly and may raise issues of distributive justice, see David Wasserman, *Disability, Discrimination and Fairness*, 13 REP. FROM THE INST. FOR PHIL. & PUB. POL'Y. 7 (Winter 1993).

relatively simple and surprisingly inexpensive modifications can make a world of difference. Far from violating the "core intent" of the ADA, recognizing cases, such as those involving ETS, helps to fulfill the Act's central goal: the inclusion and independence of those who might otherwise be excluded.