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The ADA in Turmoil: Judicial Dissonance, The Supreme Court's Response, and the Future of Disability Discrimination Law

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The Americans with Disabilities Act (ADA)[1] was enacted in 1990 with considerable fanfare and support. A broad-based coalition of supporters testified in favor of the legislation before committee hearings[2] and both houses of Congress passed the legislation by wide margins.[3] President George Bush, in signing the ADA into law, described the new statute as "an historic opportunity"[4] representing "the full flowering of our democratic principles."[5]

The ADA's joyous birth contrasts sharply with that of Title VII,[6] its older antidiscrimination law sibling. Congress, in 1964, adopted Title VII, which bans discrimination based on race, color, religion, sex and national origin, only after a long and acrimonious debate.[7] The tenor of the debate is perhaps best illus-

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1 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

2 *See* H.R. REP. NO. 101-485, pt. II, at 25-28, *reprinted in* 1990 U.S.C.C.A.N. 303, 306-10.

3 The House of Representatives passed the ADA by a vote of 403-20, while the Senate did so by a margin of 76-8. H.R. 2273, 101st Cong., 2 Cong. Index (CCH) ¶ 35,035 (1989-90); S. 933, 101st Cong., 2 Cong. Index (CCH) ¶ 21,021 (1989-90).

4 Statement by President George Bush on Signing the Americans with Disabilities Act of 1990, PUB. PAPERS 1070 (July 26, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601, 602.

5 *Id.* 1990 U.S.C.C.A.N. 601.

6 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994).

7 For a discussion of Title VII's legislative history, *see* W. PEPPER & F. KENNEDY,

trated by the last minute amendment offered by an opponent of the bill adding "sex" to the list of protected classifications in an apparently satirical attempt to make the legislation unacceptable to the majority of legislators.[8]

Why was there such a difference in the circumstances surrounding the enactment of these two statutes? One explanation is that the ADA was widely viewed at the time of its adoption as a mere extension of existing antidiscrimination law to a group suffering from obvious disadvantages.[9] Attorney General Thornburgh testified before a House Subcommittee that passage of the ADA was needed to fill an existing gap in federal civil rights laws.[10] This gap, he explained, could be filled by extending protection against discrimination to persons with disabilities.[11]

Viewed in this light, the enactment of the ADA was both an easy and an understandable step for Congress to take. This step was thought to be relatively easy because the ADA built upon well-established principles of antidiscrimination law.[12] Congress had created the basic framework of American antidiscrimination law twenty-six years earlier with the adoption of Title VII. This framework was further refined by the enactment of the Age Discrimination in Employment Act (ADEA) in 1967[13] and in thousands of court decisions interpreting these two statutes. In addition, many of the ADA's substantive provisions were lifted directly from the Rehabilitation Act of 1973[14] which prohibits disability-based discrimination by federal employers, contractors, and grant recipients. In his signing speech, President Bush un-

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SEX DISCRIMINATION IN EMPLOYMENT (1981); Vass, *Title VII: Legislative History*, 7 BOST. C. IND. & COMM. L. REV. 431 (1966).

[8] *See* Pepper & Kennedy, *supra* note 7, at 17-18; Vass, *supra* note 7, at 441.

[9] *See, e.g.*, H.R. REP. NO. 101-485, pt. II, at 40, *reprinted in* 1990 U.S.C.C.A.N. 303, 322, and pt. III, at 26, *reprinted in* 1990 U.S.C.C.A.N. 445, 449. *See also* G. PHELAN & J. ATHERTON, DISABILITY DISCRIMINATION IN THE WORKPLACE § 1.07 (1997) (stating that "[t]wenty-six years after the Civil Rights Act of 1964, our nation has conferred upon people with disabilities the same protections afforded other minorities and women.").

[10] H.R. REP. NO. 101-485, pt. II, at 48, *reprinted in* 1990 U.S.C.C.A.N. 303, 330.

[11] *Id.*

[12] *See, e.g.*, G. PHELAN & J. ATHERTON, *supra* note 9, § 1.06 (explaining that the "basic framework of the Americans with Disabilities Act of 1990 extends the scope of coverage of the 1964 Civil Rights Act to persons with disabilities and incorporates the principles of nondiscrimination established in section 504 of the Rehabilitation Act of 1973").

[13] The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1994).

[14] 29 U.S.C. § 791-96 (1994).

derscored the anticipated ease of implementing the ADA by noting that the new statute incorporates the already "existing language and standards [of] the Rehabilitation Act."[15]

The "findings and purposes" section[16] of the ADA similarly illustrates that the statute's adoption was an understandable step in terms of fundamental fairness. In that section, Congress found that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem"[17] and that the disabled, as a group consisting of some forty-three million Americans,[18] are "severely disadvantaged" in the workplace and elsewhere.[19] But, unlike individuals protected by Title VII and the ADEA, "individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."[20] Accordingly, a central purpose of the ADA is to provide a "national mandate for the elimination of discrimination against individuals with disabilities."[21]

Thus, Congress' broad-based support for the ADA reflected the anticipated ease and fairness of extending antidiscrimination protection to the disabled. As stated in a House Committee Report, "the Americans with Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964."[22]

Somewhere between Capitol Hill and the federal courthouse, however, the joyous noise of the ADA's adoption turned into a wail of frustration. Some of the frustration results from the deluge of litigation that the ADA has spawned. From the ADA's effective date in 1992 through the end of September 1998, plaintiffs have filed more than 108,000 charges of claimed ADA violations with the Equal Employment Opportunity Commission

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[15] Signing Statement, 1990, PUB. PAPERS 1070 (July 26, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601.

[16] 42 U.S.C. § 12101 (1994).

[17] *Id.* § 12101(a)(2).

[18] *Id.* § 12101(a)(1).

[19] *Id.* § 12101(a)(6).

[20] *Id.* § 12101(a)(4).

[21] *Id.* § 12101(b)(1).

[22] H.R. REP. NO. 101-485, pt. III, at 26, *reprinted in* 1990 U.S.C.C.A.N. 445, 449. *See also* Signing Statement of President Bush, PUB. PAPERS 1070 (July 26, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601, 602 (noting that the adoption of the ADA signals "the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life").

(EEOC).[23] These claims are crowding federal court dockets and are testing the patience of the federal judiciary charged with managing the caseload. This frustration is illustrated by the following comments made by a federal district court judge for the District of Western Arkansas:

> The court advised that the ADA as it was being interpreted had the potential of being the greatest generator of litigation ever, and that the court doubted whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety worker's compensation claim into a federal case. [footnote omitted]
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> . . . .
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> The court doubts that the ultimate result of this law will be to provide substantial assistance to persons for whom it was obviously intended, and that one of the primary beneficiaries of it will be trial lawyers who will ingeniously manipulate such ambiguities to consistently broaden its coverage so that federal courts may become mired in employment injury cases, becoming little more than glorified worker's compensation referees.[24]

Even more frustrating, however, is the federal judiciary's reaction on a substantive level. The judicial response to a large number of issues arising under the ADA has been startlingly diverse. On issue after issue, the circuit courts of appeal are split and/or are in disagreement with the EEOC. These disagreements go to some fundamental concepts under the ADA, such as who is a protected "individual with a disability" and which party bears the burden of establishing the availability of a reasonable accommodation. This wide divergence of opinion illustrates some very different viewpoints concerning the purposes and objectives of the ADA. It also results in an unpredictable legal landscape where employers and employees are unsure of their rights and obligations.

The ADA in the Workplace class at the University of Minnesota Law School studied the judiciary's interpretation of the ADA during Spring semester 1998. Through a series of research papers and presentations, the class identified the most hotly debated issues under the ADA during 1997 and 1998. In this Arti-

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[23] Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges 1992-FY 1998, (last modified Feb. 12, 1997) <http://www.eeoc.gov/status/ADAS>.

[24] Pedigo v. P.A.M. Transp., 891 F. Supp. 482, 485-86 (W.D. Ark. 1994), *rev'd*, 60 F.3d 1300 (8th Cir. 1995).

cle, we build on that work and focus on the ten most significant issues. Significance is based upon considerations of overall policy importance and the extent of judicial disagreement. Seven of these issues remain in dispute as of the time of this Article's publication, with the Supreme Court having addressed the other three issues in decisions issued during its two most recent terms.

These issues, along with the case law and agency guidance that have addressed them, provide a valuable point of reference on at least two levels. First, on a substantive level, this information provides a vivid snapshot of the most dramatic legal battles being waged under the ADA. The resolution of these issues undoubtedly will define the future substantive core of American disability discrimination law. Second, these materials provide a laboratory sample for analysis on a systemic level. By examining this set of information, insight is gained into the reasons for the wide divergence of judicial opinion and what this portends for the future of the ADA.

Added to the mix are the Supreme Court's initial set of decisions construing the ADA. During the October 1997 and October 1998 terms, the Court decided a total of six cases arising under the ADA.[25] Three of these decisions,[26] each of which address one of our set of ten disputed issues, are particularly significant. Whether these decisions signal a path out of the current maze of judicial disagreement, however, is far from clear.

Part I of this Article provides an overview of the ADA's employment provisions and its regulatory structure. Part II discusses each of the ten disputed issues with reference to the ADA's text, the EEOC's interpretation, and the conflicting judicial decisions. Part III uses this set of issues to ascertain the reasons for the existing widespread judicial dissonance in construing the ADA. Finally, Part IV considers the importance of this phenomenon for the future interpretation of the ADA, with particu-

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[25] Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999); Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998); Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 624 (1998).

[26] The Supreme Court's first decision interpreting the ADA was *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), which ruled that the ADA is applicable in the context of state prisons. The *Bragdon* decision is the Court's second ADA case, but the first to construe the scope of a covered "disability," and also the first to have an impact on the application of the ADA to the workplace.

lar reference to the impact of the Supreme Court's first attempts at interpreting the ADA.

I
ADA OVERVIEW

The ADA is codified under five separate titles. The key subpart generally, as well as for purposes of this article, is Title I which prohibits disability discrimination in employment.[27] Title II bans discrimination on the basis of disability in programs and services provided by state and local government entities,[28] while Title III does the same for public accommodations provided by private entities.[29] Title V contains various miscellaneous provisions, including special rules for insurance providers.[30]

In addition to the statute itself, the ADA's regulatory scheme is bolstered by a number of interpretive provisions promulgated by two administrative agencies. The ADA delegates regulatory[31] and enforcement[32] authority over Title I to the Equal Employment Opportunity Commission. The EEOC has promulgated several interpretive guides including formal regulations,[33] interpretive guidance,[34] and a technical assistance manual.[35] The Department of Justice (DOJ) has issued regulations and other guidance with respect to Titles II and III.[36] As the ADA was modeled on the Rehabilitation Act of 1973, courts also look for guidance to regulations and decisions interpreting that statute.[37]

Title I of the ADA applies to all employers with fifteen or more employees, other than the federal government and private

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[27] 42 U.S.C. §§ 12111-12117 (1994).

[28] *Id.* §§ 12131-12150.

[29] *Id.* §§ 12181-12189.

[30] *Id.* §§ 12201-12213. Title IV covers telecommunications relay services for the hearing-impaired and the speech-impaired. Title IV is codified at 47 U.S.C. § 225.

[31] *Id.* § 12116 (directing the EEOC to issue regulations under Title I).

[32] *Id.* § 12117(a).

[33] 29 C.F.R. §§ 1630.1-.16 (1998).

[34] 29 C.F.R. app. §§ 1630.1-.16 (1998).

[35] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT (1992).

[36] *See, e.g.*, 28 C.F.R. §§ 35.104-.178 (Title II regulations) (1998); 28 C.F.R. §§ 36.104-.505 (1998) (Title III regulations).

[37] *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624 (1998); Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996); Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).

membership clubs.[38] The ADA went into effect for employers with 25 or more employees on July 26, 1992.[39] Employers with fifteen or more employees became subject to the statute two years later.[40]

A. The Plaintiff's Prima Facie Case

The heart of Title I is its prohibition against discrimination. The statute provides that: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."[41] This provision underscores the basic paradox of Title I. In order to have standing to assert an employment-related ADA claim, a plaintiff must be "disabled," yet "qualified."[42] Thus, to make out a prima facie case under the ADA, an applicant or employee must establish that he or she is disabled, qualified, and has suffered an adverse employment action because of his or her disability.[43]

1. Definition of "Disability"

In defining a covered "disability," the ADA borrows the Rehabilitation Act's three-prong definition of a "handicapped individual."[44] An individual is disabled if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[45] Alternatively, a quali-

[38] 42 U.S.C. § 12111(5) (1994). In addition to employers, Title I also applies to employment agencies, labor organizations and joint labor-management committees. *Id.* § 12111(2).

[39] *Id.*

[40] *Id.*

[41] 42 U.S.C. § 12112(a) (1994).

[42] Some courts have described the tension between these two requirements as creating a "catch 22" situation for plaintiffs. *See, e.g.*, Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1408, n.6 (5th Cir. 1983) ("The 'Catch 22' implicit in virtually all section 504 actions is particularly evident in this case . . . . Ms. Doe was required to prove her handicap for jurisdictional purposes, but simultaneously required to prove that she was not so handicapped as to be unqualified to perform her job.").

[43] *See, e.g.*, Webb v. Mercy Hosp., 102 F.3d 958, 959-60 (8th Cir. 1996); Katz v. City Metal Co., 87 F.3d 26, 30 (1st Cir. 1996).

[44] *See* Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988). *See also* Bragdon v. Abbott, 524 U.S. 624 (1998) (explaining that "the ADA's definition of disability is drawn almost verbatim" from the Rehabilitation Act).

[45] 42 U.S.C. § 12102(2)(A) (1994).

fying disability exists if an individual has either a "record" of such an impairment or is "regarded as" having such an impairment.[46] Accordingly, the ADA provides protection not only to those individuals who are actually disabled, but also to those who are treated as if they are disabled. As explained by the Supreme Court in a Rehabilitation Act decision, this broader notion of disability reflects the fact "that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[47]

Beyond the definition of "disability," the ADA provides little guidance as to when a condition rises to the level of a covered disability. For example, the statute does not define key terms used in the definition of disability, such as what constitutes an "impairment" or a "major life activity." This task was left for the EEOC.

EEOC regulations[48] provide a definition for both of these terms. The regulations define a "physical or mental impairment" as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
> (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[49]

The regulations define "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[50]

The regulations also provide guidance as to when an impairment "substantially limits" a major life activity. The regulations state that such a limitation may occur in either of two circumstances. First, an impairment is substantially limiting if it renders an individual "unable to perform a major life activity that the

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[46] *Id.* § 12102(2)(B)-(C).

[47] School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

[48] Agency regulations, of course, are not binding. Yet, as one of the agencies charged with enforcing the ADA, its regulations are entitled to deference. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

[49] 29 C.F.R. § 1630.2(h) (1998).

[50] *Id.* § 1630.2(i).

average person in the general population can perform."[51] Second, an individual is substantially limited if he or she is "significantly restricted as to the condition manner or duration" of performing a major life activity as compared to the average person in the general population.[52]

2. *Definition of "Qualified"*

The ADA provides protection only to those disabled individuals who are "qualified." The statute defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[53] As this definition suggests, a determination as to whether an individual is qualified may involve two separate, but related, factual inquiries. The first inquiry is whether the individual can perform the "essential functions" of the job in question. Once again, the regulations, rather than the statute, provide the definition of this term. The regulations state that "essential functions" are the "fundamental job duties" of the position, but not those functions that are merely "marginal" in nature.[54] The regulations then suggest a number of factors that should be considered in determining whether a job function is essential or only marginal.[55]

If the answer to this first question is in the affirmative, then the individual is "qualified" and protected by the ADA. If the answer is in the negative, a second inquiry is necessary. The ADA expressly provides that an individual's qualifications are to be ascertained "with or without reasonable accommodation."[56] An employer has an affirmative obligation to provide a reasonable accommodation if the accommodation will enable an applicant or employee to be capable of performing essential job functions. Put another way, an employer engages in discriminatory conduct if it fails to make reasonable accommodations to the known

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[51] *Id.* § 1630.2(j)(1)(i).

[52] *Id.* § 1630.2(j)(1)(ii).

[53] 42 U.S.C. § 12111(8) (1994).

[54] 29 C.F.R. § 1630.2(n)(1) (1998).

[55] *See id.* § 1630.2(n)(2) (suggesting, for example, that a function may be considered essential if it is highly specialized in nature, if only a limited number of employees are available to perform that function, or if the reason the position exists is to perform that function).

[56] 42 U.S.C. § 12111(8).

physical or mental limitations of an otherwise qualified individual with a disability.[57]

The ADA contains an illustrative definition of the term "reasonable accommodation." The statute states that a "reasonable accommodation" may include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[58]

The regulations state that it may be necessary for an employer to engage in an "informal interactive process" with an applicant or employee in order to identify limitations resulting from a disability and "potential reasonable accommodations that could overcome those limitations."[59]

3. *Causation*

The ADA prohibits an employer from taking an adverse employment action with respect to a qualified individual with a disability only if the action was taken "because of the disability of such individual."[60] Courts interpreting the ADA frequently borrow Title VII's *McDonnell Douglas* causation standard to determine if a plaintiff has made out a prima facie case of discrimination.[61] Under this approach, a plaintiff can meet his or her initial burden of establishing a causative link between his or her disability and an adverse employment action by means of circumstantial as well as by direct evidence.[62] As one federal court has noted, the causation step is less significant in disability cases than in other types of discrimination cases, because employers in the former context are more likely to admit that their decision was disability-related, but argue, instead, that the disabling con-

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[57] *Id.* § 12112(b)(5)(A).

[58] *Id.* § 12111(9).

[59] 29 C.F.R. § 1630.2(o)(3).

[60] 42 U.S.C. § 12112(a) (1994).

[61] *See, e.g.*, Christopher v. Adam's Mark Hotels, 137 F.3d 1069, 1072 (8th Cir. 1998); Katz v. City Metal Co., 87 F.3d 26, 30 n.2 (1st Cir. 1996).

[62] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

dition rendered the plaintiff unqualified.[63]

B. Defenses

An employer may assert three potential defenses to an ADA claim. First, the ADA states that an employer need not provide an accommodation to an individual with a disability if the accommodation would impose an "undue hardship" on that employer.[64] The undue hardship defense is available even with respect to an accommodation that is otherwise reasonable and which would enable a disabled individual to perform the essential functions of the job. The ADA defines an "undue hardship" as "an action requiring significant difficulty or expense."[65] The statute describes the undue hardship defense as a floating concept that varies with the nature and cost of the proposed accommodation, the impact of the proposed accommodation upon the operation of the facility, and the overall resources of both the facility in question and the employer in general.[66]

The ADA further provides that an employer is protected in the use of qualification standards and selection criteria, even those that disproportionately screen out individuals with disabilities, so long as the standard or criteria is "job-related and consistent with business necessity."[67] The statute explicitly states that such qualification standards "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[68] The ADA defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[69] The regulations extend the direct threat notion to encompass the potential of harm to oneself as well as to others.[70]

Finally, an employer may avoid liability under the ADA by refuting the causation element of the plaintiff's prima facie case. Under the *McDonnell Douglas* shifting burden of proof formula

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[63] Barth v. Gelb, 2 F.3d 1180, 1185-86 (D.C. Cir. 1993) (discussing application of the *McDonnell Douglas* test in the context of a Rehabilitation Act case).

[64] 42 U.S.C. § 12112(b)(5)(A).

[65] *Id.* § 12111(10)(A) (1994).

[66] *Id.* § 12111(10)(B).

[67] *Id.* § 12113(a). This provision appears to codify the "business necessity" defense to a claim of disparate impact discrimination as recognized under Title VII by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[68] 42 U.S.C. § 12113(b).

[69] *Id.* § 12111(3).

[70] 29 C.F.R. § 1630.2(r) (1998).

borrowed from Title VII,[71] once a plaintiff establishes a prima facie case of discrimination, the burden of producing evidence shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions.[72] If successful, the employer will prevail unless the plaintiff can show that the employer's stated reason is pretextual and that discrimination was the true motivating factor.[73]

C. *Enforcement and Remedies*

The ADA expressly incorporates Title VII's enforcement procedures and remedies as its own.[74] Under that scheme, a plaintiff must file a charge with the EEOC before proceeding to litigation.[75] An ADA claimant has the right to a jury trial on claims of intentional discrimination.[76] A court may award a successful claimant a broad array of relief including injunctive relief, back pay, reinstatment, attorneys' fees, compensatory damages, and punitive damages.[77] Title VII caps the latter two items of damages on a sliding scale based on the size of the particular employer.[78]

II

TEN DISPUTED ISSUES

This section examines the ten most hotly disputed issues under the ADA during the 1997 to 1998 period on a substantive level. We first lay out the relevant statutory text and EEOC interpretation for each issue. The conflicting judicial decisions are then discussed and analyzed.

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[71] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). The Supreme Court further refined the *McDonnell Douglas* formula in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

[72] *See, e.g.*, Christopher v. Adam's Mark Hotels, 137 F.3d 1069, 1072 (8th Cir. 1998) (applying the *McDonnell Douglas* test in an ADA case).

[73] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).

[74] 42 U.S.C. § 12117(a) (1994).

[75] *Id.* § 2000e-5 (1994).

[76] *Id.* § 1981a(c) (1994).

[77] *See* 42 U.S.C. § 2000e-5(g)(1) (authorizing injunctive relief, back pay and reinstatment); *id.* § 2000e-5(g)(2)(B)(i) (authorizing attorneys' fees); *id.* § 1981a(b) (authorizing compensatory and punitive damages).

[78] *Id.* § 1981a(b)(3)(A)-(D). An employer will not be liable for compensatory or punitive damages if it demonstrates that it made good faith efforts to provide the plaintiff with a reasonable accommodation. *Id.* § 1981a(a)(3).

Issue 1: Should a court consider mitigating measures in determining whether an ADA plaintiff is substantially limited?

Text: The ADA defines a covered "disability" as a mental or physical impairment that substantially limits a major life activity.[79] An individual also is considered to be disabled if he or she has a record of having such an impairment or is regarded as having such an impairment.[80] The text of the ADA is silent about whether mitigating measures should be considered when determining whether an individual is substantially limited.

EEOC Position: The EEOC interpretive guidance suggests that mitigating measures should not be considered as lessening any substantial limitation originally arising out of a disability.[81] Instead, a case-by-case evaluation is recommended, without regard to the ameliorating effect of medicines, or prosthetic and assistive devices.[82]

Case Law: Many courts have ignored the guidance of the EEOC, instead choosing to evaluate the limitations that a plaintiff confronts only after considering the impact of mitigating measures. In *Gilday v. Mecosta County*,[83] for example, plaintiff was a non-insulin dependent diabetic who had difficulties in the workplace, such as getting along with people, when he departed from his medical regimen of medication, exercise, and proper diet. A majority of the Sixth Circuit Court of Appeals panel analyzed plaintiff's limitations in light of his medical regimen, thereby disregarding the EEOC guidance.[84] Nevertheless, the court reversed the lower court's grant of summary judgment for the employer, finding a question of fact as to whether the plaintiff may be substantially limited even with the mitigating measures.[85]

The First Circuit took the opposite approach in ruling that a diabetic applicant's status under the ADA should be based on his underlying medical condition without regard to the ameliorative

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[79] 42 U.S.C. § 12102(2) (1994).

[80] *Id.*

[81] 29 C.F.R. app. § 1630.2(j) (1998).

[82] *Id.*

[83] 124 F.3d 760 (6th Cir. 1997).

[84] The panel in *Gilday* issued three separate opinions. Two of those opinions declined to defer to the EEOC guidance. *See id.* 124 F.3d at 766 (Kennedy, J. opinion); 124 F.3d at 768 (Guy, J. opinion).

[85] All three members of the *Gilday* panel agreed with this conclusion. 124 F.3d 761, 765 (Moore, J. opinion); *id.* at 766, 768 (Kennedy, J. opinion); *id.* at 768 (Guy, J. opinion).

effects of insulin treatment.[86] The court found that the EEOC guidance is consistent with the legislative history of the ADA in which House and Senate Committee reports explicitly state that impairments should be assessed without considering the impact of mitigating measures.[87] The First Circuit also found the guidelines consistent with the broad remedial purpose of the statute to protect all disabled individuals and to eradicate discrimination based on stereotypical assumptions.[88] A number of other courts agree with this interpretation.[89]

The resolution of this issue hinges, in large part, on the amount of deference that should be given to the EEOC guidance. Many of the decisions adopting the EEOC's suggested approach stress that the EEOC's guidelines should be followed so long as they represent a permissible construction of the statute.[90] The two-judge panel majority in *Gilday* disagreed with this approach but for different reasons. One judge disregarded the guidance because he thought that the interpretation was inconsistent with the statute and impermissibly lowered the standard of protection for individuals who use mitigating measures.[91] The other judge believed that the guidance established a blanket rule that violated the case-by-case approach advocated in the statute.[92] The most commonly voiced arguments against adopting the EEOC approach are that the guidance conflicts with the ADA by reading the "substantially limiting" requirement out of the statute,[93] and

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[86] Arnold v. United Parcel Serv. Inc., 136 F.3d 854 (1st Cir. 1998).

[87] *Id.* at 859-60 (citing to H.R. REP. NO. 101-485, pt. III, at 28 (1989) and S. REP. NO. 101-116, at 23 (1989)).

[88] 136 F.3d at 861-62.

[89] *See, e.g.*, Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997) (epilepsy controlled by medication); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997) (vision impairment mitigated by glasses); Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996) (Graves disease controlled by medication); Wilson v. Pennsylvania State Police Dep't., 964 F. Supp. 898 (E.D. Penn. 1997) (vision impairment mitigated by glasses); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022 (W.D. Va. 1997) (hearing impairment mitigated by hearing aid).

[90] *Arnold*, 136 F.3d at 864 (giving the guidance "some deference," as long as it is a permissible construction of the statute); *Harris*, 102 F.3d at 521 (stating that an agency interpretation should be followed if it is a permissible construction of a silent or ambiguous statute); *Wilson*, 964 F. Supp. at 904 (giving the same credence to the interpretive guidance as to other guidelines because they were subject to the same notice and comment procedures).

[91] *Gilday*, 124 F.3d at 767 (Kennedy, J. opinion).

[92] *Id.* at 768 (Guy, J. opinion).

[93] *See, e.g.*, Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993) (stating that the guidance approach would compel disability per se status); Coghlan v. H.J. Heinz, Co., 851 F. Supp. 808 (N.D. Tex. 1994) (stating that the guidance approach would

that the guidance approach creates a "slippery slope" that will make the ADA's coverage far broader than ever intended.[94]

In a September 1998 decision, the Fifth Circuit staked out a middle position on this issue. The Fifth Circuit, in *Washington v. HCA Health Services of Texas, Inc.*, ruled that "only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history—diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state."[95] The court initially opined that the most reasonable reading of the ADA would be to take mitigating measures into account. However, the court deferred to the opposite reading of the statute contained in the EEOC's guidelines and the legislative history and adopted a standard which blends the two positions together. The court held that in order for impairments to be considered in an unmitigated state, "[t]he impairments must be serious in common parlance, and they must require that the individual use mitigating measures on a frequent basis, that is, he must put on his prosthesis every morning or take his medication with some continuing regularity."[96] Adopting a case-by-case mode of analysis, the *Washington* court concluded that "[s]ome conditions, such as diabetes, will clearly have to be considered *without* regard to mitigating measures; [while] others, such as hip replacements, will have to be evaluated *with* regard to mitigating measures."[97]

Supreme Court Resolution: The Supreme Court resolved this circuit split in June 1999 by affirming the Tenth Circuit in *Sutton v. United Air Lines, Inc.*[98] In a 7-2 decision, the *Sutton* majority held that the determination of whether an individual is "substantially limited" in a major life activity and thereby "disabled" for purposes of the ADA should be made with reference to both the

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compel disability per se status and render meaningless the ADA's requirement of a "substantial limitation").

[94] *See, e.g.*, Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997) (explicitly rejecting the guidance and voicing a concern about the slippery slope that would be created if people who could see without impairment while wearing glasses were protected under the ADA); Testerman v. Chrysler Corp., 1997 WL 820934 (D. Del. 1997) (rejecting the guidance and noting that the ADA was intended only to protect individuals with severe disabilities).

[95] 152 F.3d 464, 470 (5th Cir. 1998).

[96] *Id.* at 470.

[97] *Id.* at 471 (emphasis in original).

[98] 119 S. Ct. 2139 (1999). The *Sutton* decision is discussed in more detail *infra* at notes 405-438 and accompanying text.

positive and negative effects of mitigating measures.[99] The Court rejected the contrary recommendations of the agency guidelines as "an impermissible interpretation of the ADA."[100]

Issue 2: Is asymptomatic HIV a disability under the ADA?

Text: An individual is disabled for purposes of the ADA only if he or she is "substantially limited" in a major life activity.[101] The ADA does not define or describe what is meant by the phrase "major life activity."

Agency Position and Legislative History: Both the EEOC and the DOJ consider HIV-positive status a per se disability.[102] The legislative history of the ADA also indicates that Congress intended the ADA to protect persons with asymptomatic HIV.[103] The EEOC's interpretive guidance on Title I describes "major life activities" as "those basic activities that the average person in the general population can perform with little or no difficulty."[104]

Case Law: Under the Rehabilitation Act, courts uniformly ruled that asymptomatic HIV was a disability.[105] Since new medical treatments have slowed the advance of HIV to full-blown AIDS, this assumption has been more frequently challenged.[106] Most courts still find that HIV constitutes an impairment,[107] although at least one has found that asymptomatic HIV, by definition, is not an impairment because of the absence of any currently impairing attributes.[108] Most courts disagree with the agency interpretations and find that HIV is not a disability per se.[109] Some, however, find that HIV-positive status is a disability per se, thus avoiding the difficult individual fact

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[99] *Sutton*, 119 S. Ct. at 2146.

[100] *Id.*

[101] 42 U.S.C. § 12102(2) (1994).

[102] 29 C.F.R. app. § 1630.2(j) (1998) (EEOC); 29 C.F.R. § 36.104 (1998) (DOJ).

[103] *See* H.R. Rep. No. 101-485, pt. II, at 51 (1989); S. Rep. No. 101-116 at 22 (1989).

[104] 29 C.F.R. app. § 1630.2(i).

[105] *See, e.g.*, Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990); Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524 (M.D. Fla. 1987); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987).

[106] *See generally* Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 1 (1997).

[107] *See, e.g.*, Abbott v. Bragdon, 107 F.3d 934, 939 (1st Cir.), *cert. granted in part*, 118 S. Ct. 554 (1997); Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994).

[108] *See* Runnebaum v. NationsBank of Md., 123 F.3d 156 (4th Cir. 1997).

[109] *See, e.g.*, *Id*; Ennis v. National Ass'n of Bus. and Educ. Radio, 53 F.3d 55 (4th Cir. 1995); Cortes v. McDonald's Corp., 955 F. Supp. 541 (E.D. N.C. 1996).

determinations.[110]

The real battleground in this debate lies in whether HIV substantially limits a major life activity. In *Runnebaum v. NationsBank of Maryland*,[111] the Fourth Circuit Court of Appeals, sitting *en banc*, found that procreation and intimate sexual relations are not major life activities. The court further held that the plaintiff was not substantially limited in those activities because HIV infection does not physically prevent an individual from engaging in sex or from having biological children. The *Runnebaum* court found that the effects of the disease simply may persuade a person to *choose* not to have sex or procreate.[112] Many courts agree that reproduction is not a major life activity.[113]

Other courts have found differently. In *Abbott v. Bragdon*,[114] for example, the First Circuit Court of Appeals found that reproduction constitutes a major life activity because of its "singular importance to those who engage in it, both in terms of its significance in their lives and in terms of its relation to their day-to-day existence."[115] The court in *Abbott* also found that the risk of transmitting the HIV virus to one's child results in a substantial limitation on the exercise of reproductive activities.[116]

Supreme Court Resolution: The Supreme Court, in *Bragdon v. Abbott*,[117] resolved this dispute by affirming the First Circuit's disability finding in a 5-4 decision issued in June 1998. In a majority opinion written by Justice Kennedy, the Court ruled that an individual with asymptomatic HIV infection satisfied all three elements of the ADA's disability definition. The *Bragdon* Court first found that HIV qualified as a physiological impairment from

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[110] *See* Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994); Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990); D.B. v. Bloom, 896 F. Supp. 166 (D. N.J. 1995); United States v. Morvant, 843 F. Supp. 1092 (E.D. La. 1994).

[111] 123 F.3d 156 (4th Cir. 1997).

[112] *Id.* at 171-72.

[113] *See, e.g.*, Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996); *Cortes*, 955 F. Supp. 541; Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

[114] 107 F.3d 934 (1st Cir.), *cert. granted in part*, 118 S. Ct. 554 (1997).

[115] *Id.* at 941; *accord* Pacourek v. Inland Steel Co., 916 F. Supp. 797 (N.D. Ill. 1996); Erickson v. Board of Governors of State Colleges, 911 F. Supp. 316 (N.D. Ill. 1995); Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310 (E.D. Pa. 1994).

[116] *Abbott*, 107 F.3d at 942 (finding that an HIV-positive pregnant woman faces a 25% risk of transmitting the virus to her child without AZT therapy, and an 8% risk with such therapy).

[117] 524 U.S. 624 (1998).

the moment of infection because of its "constant and detrimental effect on the infected person's hemic and lymphatic systems."[118] The majority then agreed with the First Circuit that reproduction should be considered a major life activity because of its comparative importance to the human life process.[119] Finally, the Court found that the plaintiff's ability to reproduce was substantially limited because of a significant risk of transmitting the HIV virus to both her sexual partner and child.[120]

Issue 3: When is someone substantially limited due to a restriction on lifting and/or working?

Text: The ADA states that a person is disabled if he or she is "substantially limited" in one of the "major life activities" of such individual.[121] The statute does not define or describe either of these terms.

EEOC Position: EEOC regulations contain a nonexhaustive list of major life activities that includes "working," but not "lifting."[122] The EEOC interpretive guidance includes both "lifting" and "working" on its list of illustrative major life activities.[123] The guidance further states that a court should only consider limitations on the major life activity of working if an individual is not substantially limited in any other major life activity.[124]

The regulations provide that an individual is "substantially limited" if he or she either is unable to perform a major life activity or is significantly restricted as to the condition, manner, or duration of performing such an activity when compared to the average person in the general population.[125] Also, an individual is "substantially limited" in terms of working only when restricted from a class of jobs or a broad range of jobs in various classes.[126]

Case Law: The Sixth Circuit Court of Appeal's decision in *McKay v. Toyota Motor Manufacturing*[127] is illustrative of how some courts are treating this issue. In *McKay*, the plaintiff was restricted from lifting more than twenty pounds due to her carpal tunnel syndrome. She was also restricted in terms of making re-

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118 *Id.* at 636.
119 *Id.* at 637-38.
120 *Id.* at 639-40.
121 42 U.S.C. § 12102(2) (1994).
122 29 C.F.R. § 1630.2(i) (1998).
123 *Id.* app. § 1630.2(i).
124 *Id.* § 1631.2(j).
125 *Id.* § 1630.2(j)(1)(i) and (ii).
126 *Id.* § 1630.2(j)(3)(i).
127 110 F.3d 369 (6th Cir. 1997).

petitive motions and in using vibrating tools.[128] The majority opinion did not analyze whether the plaintiff was substantially limited in the major life activity of lifting, as the regulations suggest, but instead focused solely on whether she was substantially limited in the major life activity of working. From the facts on the record, the duration, manner, and condition of McKay's injuries seem to have met the regulation's standards for a substantially limiting restriction on both lifting and working.[129] Expert witnesses also testified that McKay was restricted in her ability to perform two full classes of jobs.[130] Nonetheless, the court found that the plaintiff was disqualified from only a narrow range of jobs, those involving repetitive motion or lifting more than ten pounds, and was therefore not protected under the ADA.[131]

Courts increasingly are recognizing "lifting" as a major life activity for purposes of the ADA.[132] Most courts, however, do not treat lifting restrictions as a per se disability, but instead implement a case-by-case approach of individualized assessment.[133] These courts generally agree that lifting restrictions similar to McKay's are not substantially limiting.[134] The Tenth Circuit, however, disagreed and held that a lifting restriction of fifteen pounds raised a question of fact precluding a grant of summary judgment for the employer.[135] Some trends are discernable when viewing these cases as a whole. First, courts generally will find an employee to be disabled if he or she cannot lift objects weighing as little as ten pounds. In contrast, courts generally will find that an employee is not substantially limited if he or she is subject to a

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[128] *Id.* at 371.

[129] *See id.* at 376-79 (Hillman, J., dissenting).

[130] *See id.* at 375 (Hillman, J., dissenting).

[131] *Id.* at 373.

[132] *See, e.g.*, Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170 (10th Cir. 1996); Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996).

[133] *See, e.g.*, Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346 (4th Cir. 1996); Panzullo v. Modell's P.A. Inc., 968 F. Supp. 1022 (E.D. Pa. 1997).

[134] *See, e.g.*, Thompson v. Holy Family Hosp., 121 F.3d 537 (9th Cir. 1997) (holding that a 25 pound restriction did not substantially limit the plaintiff's ability to lift); Helfter v. United Parcel Serv., 115 F.3d 613 (8th Cir. 1997) (holding that the inability of plaintiff to lift greater than ten pounds frequently did not substantially limit her ability to perform any major life activity); *Williams*, 101 F.3d 346 (finding that a 25 pound restriction is not disabling); Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311 (8th Cir. 1996) (holding that a 25 pound lifting limitation did not constitute a significant restriction on the plaintiff's major life activities); *see also* Ray v. Glidden Co., 85 F.3d 227 (4th Cir. 1996) (concluding that plaintiff who was restricted from "heavy lifting" was not substantially limited).

[135] Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170 (10th Cir. 1996).

lifting restriction of twenty-five or more pounds. While the status of lifting restrictions in between these two figures is subject to debate, courts increasingly appear reluctant to treat such individuals as disabled.

Whether a court will find that a lifting restriction substantially limits the major life activity of working depends on how the court defines the class of jobs from which the plaintiff is precluded. In *McKay*, the court easily could have found that the plaintiff was precluded from a class of jobs rather than a few positions.[136] By narrowly describing the type of jobs at issue, the *McKay* court reached the opposite conclusion. Uncertainty over the weight of the EEOC regulations and a lack of clear guidance from the courts has led to considerable unpredictability in terms of determining when an employee is substantially limited in the major life activity of working.

Issue 4: How recent must "current drug use" be in order for an addict to be unprotected under the ADA?

Text: While drug addiction is a disabling condition,[137] the ADA provides that an individual is not "qualified" if he or she is "currently engaging in the illegal use of drugs."[138] The ADA provides a "safe harbor" for recovering addicts that protects individuals who have successfully completed or are participating in a supervised drug rehabilitation program and are no longer engaging in the illegal use of drugs.[139] These provisions are not clear about when drug use is to be considered "current" or what effect the safe harbor provision has when a current or recent drug user enters a rehabilitation program.

EEOC Position: The EEOC's Interpretive Guidance states that an employee illegally using drugs during the weeks or months prior to discharge is a "current" illegal drug user excluded from statutory protection.[140] The EEOC's guidance does

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136 110 F.3d 369, 374-82 (Hillman, J., dissenting); *cf.* Cochrum v. Old Ben Coal Co., 102 F.3d 908 (7th Cir. 1996) (lifting, pulling and pushing restrictions disqualified plaintiff from broad range of jobs); Webb v. Garelick Mfg., 94 F.3d 484 (8th Cir. 1996) (holding that heavy duty jobs constitute a class of jobs); Lowry v. Cabletron Sys., Inc., 973 F. Supp. 77 (D.N.H. 1997) (holding that plaintiff with carpal tunnel syndrome and other joint problems was substantially limited from a class of jobs).

137 *See generally* 42 U.S.C. § 12114(b) (1994); 29 C.F.R. app. § 1630.3 (1998). *See also* Shafer v. Preston Meml. Hosp., 107 F.3d 274, 277 (4th Cir. 1997).

138 42 U.S.C. § 12114(a).

139 *Id.* § 12114(b).

140 29 C.F.R. app. § 1630.3.

not suggest a specific time frame for determining when past use of illegal drugs is to be considered "current."

Case Law: A number of courts have held that illegal drug use in the recent past is "current" and disqualifies that individual from ADA protection. In *Shafer v. Preston Memorial Hospital*,[141] the Fourth Circuit Court of Appeals held that an employee who illegally used drugs in a periodic fashion during the weeks and months prior to discharge was a "current" user for purposes of the ADA. The court considered the ADA's legislative history, citing a Conference Committee Report stating that the term "currently engaging" is "intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current."[142] The court held that "current" means a "periodic or ongoing activity. . . that has not yet permanently ended."[143]

The *Shafer* court also concluded that an employee cannot escape discharge simply by entering a rehabilitation program prior to being fired. The employer in *Shafer* had placed the plaintiff on administrative leave while investigating allegations that she had been using drugs while on duty. The plaintiff then entered a rehabilitation program shortly before the employer terminated her employment. The *Shafer* court held that the safe harbor provision does not permit an employee to escape the consequences of her current drug use simply by entering a treatment program.[144] While most courts that have considered this issue agree with this conclusion,[145] an open question remains as to whether the safe harbor provision protects an employee who, without engaging in misconduct, voluntarily identifies his or her addiction and enters treatment.[146]

Courts have been reluctant to establish a bright line standard for determining when recent drug use is considered "current"

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[141] 107 F.3d 274 (4th Cir. 1997).

[142] *Id.* at 279 (citing H.R. Conf. Rep. No. 101-596, at 64).

[143] *Id.* at 278.

[144] *Id.*

[145] *See, e.g.*, Wormley v. Arkla, Inc., 871 F. Supp. 1079 (E.D. Ark. 1994).

[146] *Compare* Grimes v. United States Postal Serv., 872 F. Supp. 668, 675 (W.D. Mo. 1994), *aff'd*, 74 F.3d 1243 (8th Cir. 1996) (suggesting a distinction in the situation where an individual voluntarily identifies her addiction and enters treatment from the situation where an individual enters treatment only after her employer discovers the employee's illegal drug use) *with* Zenor v. El Paso Health Care Sys., 176 F.3d 847, 858 (1999) (ruling that a voluntary entry into treatment does not automatically "propel" an employer into the protection of the safe harbor provision).

and disqualifying. A number of courts have ruled that drug use three to seven weeks in the past constitutes "current" use.[147] On the other hand, two courts in non-ADA contexts have ruled that individuals who have been free of drug use for periods of nine months[148] or one year[149] are not disqualified because of current use.

Issue 5: Is a person who claims to be "totally disabled" for purposes of receiving disability benefits estopped from bringing an ADA claim?

Text(s): The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability."[150] A person is a "qualified individual with a disability" if he or she can perform the essential functions of the employment position in question with or without reasonable accommodation.[151] In order for a claimant to be eligible to receive social security disability benefits, he or she must be unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment."[152]

EEOC Position: The EEOC recommends that estoppel apply only when a claimant's representations in applying for disability benefits are explicitly contradictory to his or her status as a "qualified" individual under the ADA.[153] The EEOC emphasizes that a claimant may be eligible for disability benefits and still be a qualified individual for purposes of the ADA, noting the different standards used by the Social Security Act (SSA) and the ADA.[154] The EEOC Notice provides a list of factors used to determine whether estoppel is appropriate in a particular case,

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147 *See* Salley v. Circuit City Stores, No. CIV 96-6368, 1997 WL 701302 (E.D. Pa. Oct. 29, 1997) (holding that drug use three weeks prior to discharge was "current"); Baustian v. Louisiana, 910 F. Supp. 274 (E.D. La. 1996) (seven weeks); McDaniel v. Mississippi Baptist Med. Ctr., 877 F. Supp. 321 (S.D. Miss. 1996) (six weeks); Wormley v. Arkla, Inc., 871 F. Supp. 1079 (E.D. Ark. 1994) (one month); *see also* Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995) (drug use during the weeks and months prior to discharge found to be "current").

148 Wallace v. Veterans Admin., 683 F. Supp. 758 (D. Kan. 1988) (deciding issue of qualifications under Rehabilitation Act).

149 United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992) (deciding issue of current use under similar provision in the Fair Housing Act).

150 42 U.S.C. § 12112(a) (1994).

151 *Id.* § 12111(8).

152 *Id.* § 423(d)(1)(A).

153 *EEOC Notice #915.002* (last modified Feb. 12, 1997) <http://www.eeoc.gov/docs/qidreps.txt>.

154 *Id.*

including the relevant definitions under the two statutes, the specific content of the representations made, when the representations were made, and whether the claimant asked the employer for a reasonable accommodation.[155]

Case Law: Some courts have held that an individual who claims to be totally disabled when applying for social security disability benefits, or some other disability benefit program, is judicially estopped per se from bringing an ADA claim.[156] These courts conclude that an individual who makes such a claim cannot possibly be a "qualified" individual for purposes of the ADA.[157] The application of judicial estoppel in this context serves the goal of judicial integrity by barring ADA claims from employees who have formally admitted their inability to engage in substantial gainful employment.[158]

Most recent decisions have disagreed with this per se approach. The D.C. Circuit held in *Swanks v. Washington Metropolitan Area Transit Authority*,[159] that the receipt of SSA benefits does not automatically preclude a claim under the ADA. The court emphasized that the five-step inquiry that the SSA uses in determining whether an individual is disabled for purposes of receiving benefits does not consider whether the claimant can perform work if afforded a reasonable accommodation.[160] Because the ADA considers the possibility of reasonable accommodation in determining whether a person is a "qualified individual," a plaintiff claiming disability for SSA purposes may still be a qualified individual for ADA purposes. Most courts now follow the reasoning of *Swanks* and decline to apply a per se ban on plaintiffs who have received or applied for disability benefits.[161]

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[155] *Id.*

[156] *See, e.g.*, McNemar v. Disney Store, Inc., 91 F.3d 610 (3d Cir. 1996); Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597 (9th Cir. 1996); DeGuiseppe v. Village of Bellwood, 68 F.3d 187 (7th Cir. 1995). The Seventh and Ninth Circuits have since abandoned the per se approach to the estoppel issue in subsequent decisions. *See infra* note 161. While the *McNemar* decision remains good law in the Third Circuit, a more recent decision has questioned the wisdom of the per se approach and raises the possibility that the Third Circuit will revisit this issue in the future. *See* Krouse v. American Sterilizer Co., 126 F.3d 494 (3d Cir. 1997).

[157] *See McNemar*, 91 F.3d at 617-18.

[158] Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 517 (5th Cir. 1997).

[159] 116 F.3d 582 (D.C. Cir. 1997).

[160] *Id.* at 585.

[161] *See, e.g.*, Johnson v. Oregon, 141 F.3d 1361 (9th Cir. 1998); Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376 (6th Cir. 1998); McCreary v. Libbey-Owens Ford Co., 132 F.3d 1159 (7th Cir. 1997); Talvera v. School Bd. of Palm Beach County, 129 F.3d

Under the *Swanks* approach, the impact of prior representations made by individuals applying for disability benefits will be scrutinized on a case-by-case basis for inconsistency. While an individual's representation that he or she is "totally disabled" on a benefit application form does not automatically preclude a subsequent ADA claim, statements asserting that a claimant is unable to perform the essential functions of the job, even with a reasonable accommodation, will support an employer's motion for summary judgment in a subsequent ADA case.[162]

The Fifth and Eighth Circuits staked out a middle position on this issue. In *Cleveland v. Policy Management Systems Corp.*,[163] for example, the Fifth Circuit held that a plaintiff who represents on a disability benefits application that she is "totally disabled," creates a rebuttable presumption that judicial estoppel will apply. The Eighth Circuit similarly has ruled that such prior representations will bar an ADA claim unless the plaintiff can produce "strong countervailing evidence" to overcome those earlier statements.[164]

Supreme Court Resolution: On May 24, 1999, the Supreme Court issued a unanimous decision reversing the Fifth Circuit's determination in the *Cleveland* case.[165] The Court held that a claim of disability discrimination under the ADA and a claim for disability benefits under the SSA are not inherently incompatible.[166] As such, the Court stated that it was inappropriate for courts to use a "special negative presumption" in assessing the ADA claim of an individual who had applied for or received disability benefits.[167] Instead, the Court explained, an ADA plaintiff can survive a motion for summary judgment based on prior statements made when applying for disability benefits if he or she offers a sufficient explanation of why, despite the prior statements, he or she is nonetheless able to perform the essential

1214 (11th Cir. 1997); D'Aprile v. Fleet Services Corp., 92 F.3d 1 (1st Cir. 1996); Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277 (S.D.N.Y. 1996).

[162] *See, e.g.*, Kennedy v. Applause, Inc., 90 F.3d 1477, 1479-81 (9th Cir. 1996).

[163] 120 F.3d 513 (5th Cir. 1997); *see also* McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558 (5th Cir. 1998).

[164] Moore v. Payless Shoe Source, Inc., 139 F.3d 1210, 1213 (8th Cir. 1998); Dush v. Appleton Elec. Co., 124 F.3d 957, 963 (8th Cir. 1997).

[165] Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597 (1999). The *Cleveland* decision is discussed in more detail *infra* at notes 392-404 and accompanying text.

[166] *Cleveland*, 119 S. Ct. at 2602-03.

[167] *Id.* at 1602.

functions of the job, with or without reasonable accommodation.[168]

Issue 6: Who has the burden of proving the existence or nonexistence of a direct threat in a situation where the absence of causing harm also is a qualification standard?

Text: The ADA defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[169] The ADA states that, in order to meet qualification standards, an individual may be required not to pose a direct threat to the health or safety of other individuals in the workplace.[170] The statute goes on to say that the employer may use this standard as a defense to a charge of discrimination.[171] This section of the statute appears under a heading entitled "Defenses."[172] The ADA does not state which party bears the burden of proof on the direct threat issue.

EEOC Position: The EEOC interpretative guidance appears to place the burden of establishing the existence of a direct threat upon the employer.[173] The EEOC also takes the position that a direct threat may include a significant risk of substantial harm to oneself, as well as to others.[174]

Case Law: In *School Board of Nassau County v. Arline*,[175] the Supreme Court concluded that it is the plaintiff who must show that his or her condition does not pose a direct threat to others. The *Arline* case arose under section 504 of the Rehabilitation Act, which, in its implementing regulations, defines a "qualified individual" as expressly including a person who does not endanger the health and safety of that individual or others.[176]

It is not clear whether the ADA follows the Rehabilitation Act approach or charts a different course. The ADA's listing of the direct threat concept in the section entitled "Defenses" arguably implies that the employer bears the burden of demonstrating that the plaintiff poses a direct threat of harm. The legislative history of the statute, however, supports a reading that it is the plaintiff's

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168 *Id.* at 1604.
169 42 U.S.C. § 12111(3) (1994).
170 *Id.* § 12113(b).
171 *Id.* § 12113(a).
172 *See id.* § 12113.
173 29 C.F.R. app. § 1630.2(r) (1998).
174 *Id.*
175 480 U.S. 273 (1987).
176 29 C.F.R. § 1614.203(6) (1998).

burden, as part of the prima facie case, to show that his or her condition would not pose a direct threat of significant harm.[177]

In a recent decision under the ADA, *EEOC v. Amego, Inc.*,[178] the First Circuit followed the Rehabilitation Act approach in spite of the different statutory formulation. The plaintiff in *Amego* was a health care worker whose essential job functions included overseeing and administering the dispensation of medications to patients. The plaintiff twice attempted suicide by overdosing on medications, and her supervisors became concerned about her ability to dispense medications in a safe manner.[179] The court held that when "essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others."[180] Other courts have agreed with this interpretation.[181]

Some courts have chosen to follow the EEOC interpretation and treat the direct threat issue as an affirmative defense that must be proven by the employer.[182] One court explained that "Congress imposed this burden on employers because of a concern that safety standards are often based on stereotypes and used by employers to rationalize discrimination."[183]

A 1999 decision by the Fifth Circuit, *Rizzo v. Children's World Learning Centers (Rizzo II)*,[184] appears to blend these two positions. In that case, the panel majority held that while an employee generally bears the burden to show that he or she is not a direct threat as part of the prima facie case, the burden of persuasion shifts to the employer in cases where the employer has imposed safety requirements that tend to screen out individuals with disabilities.[185] The dissent in that case argues, however, that "the exception swallows the rule" under such a test since safety

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[177] *See* H.R. REP. NO. 101-485, pt. 2, at 55 (1990), *reprinted in* U.S.C.C.A.N. 337.

[178] 110 F.3d 135 (1st Cir. 1997).

[179] *Id.* at 138-41.

[180] *Id.* at 144.

[181] *See* Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995); Altman v. New York City Health & Hosps. Corp., 903 F. Supp. 503 (S.D.N.Y. 1995).

[182] *See* Rizzo v. Children's World Learning Ctrs. Inc., 84 F.3d 758 (5th Cir. 1996); EEOC v. Exxon, 967 F. Supp. 208 (N.D. Tex. 1997); *see also* Bragdon v. Abbott, 524 U.S. 624 (1998) (placing burden of persuasion on defendant in a non-employment case arising under Title III of the ADA).

[183] *Exxon*, 967 F. Supp. at 210.

[184] 173 F.3d 254 (5th Cir. 1999).

[185] *Id.* at 259.

standards are necessarily implicated whenever the direct threat issue is raised.[186]

Issue 7: Who has the burden of establishing the availability of a reasonable accommodation?

Text: The ADA does not expressly address which party bears the burden of establishing the existence and feasibility of a reasonable accommodation. The statute, however, does state that an employer acts with discrimination if it fails to make reasonable accommodations to the known limitations of a disabled individual unless the employer can show that the accommodation would impose an undue hardship.[187] This language arguably suggests that employers bear the burden of proving inability to accommodate as part of the undue hardship affirmative defense. On the other hand, in order to be "qualified" to bring a claim under the ADA, an employee must show that he or she can perform the essential job functions with or without reasonable accommodation.[188] This language arguably suggests that employees have the burden to show the availability of a reasonable accommodation that will enable them to perform essential job functions.

EEOC Position: The EEOC interpretive guidance states that the appropriate reasonable accommodation is best determined through a "flexible, interactive process" involving both the employer and the employee.[189] The guidance recommends that employers (1) analyze the particular job at issue; (2) consult with the disabled individual to ascertain how job-related limitations could be overcome; (3) determine, in consultation with the disabled individual, potential accommodations and the effectiveness of each; and (4) consider the preference of the individual in selecting and implementing the accommodation most appropriate for both the employee and the employer.[190]

Case Law: Courts have been all over the map in allocating the burden of proof with respect to reasonable accommodation. Many early Rehabilitation Act cases placed the burden entirely on the employer to demonstrate that a reasonable accommodation is not possible.[191] Under the ADA, at least two circuits have

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[186] *Id.* at 272 (Wiener, J., dissenting).
[187] 42 U.S.C. § 12112(b)(5)(A) (1994).
[188] *Id.* § 12111(8).
[189] 29 C.F.R. app. § 1630.9 (1998).
[190] *Id.*
[191] *See, e.g.*, Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985);

adopted the opposite approach and placed the burden of proof entirely on the employee.[192] The Eleventh Circuit Court of Appeals, in a 1997 decision, held that an employer is not liable for failing to make an accommodation unless the employee identifies the accommodation, establishes that it will enable the employee to perform the essential functions of the job, and proves that the accommodation is reasonable in nature.[193]

A growing number of circuits are now charting a middle course by adopting burden of proof formulations that are either split, shared, or both. The Second Circuit, for example, splits the burden of proof between employees and employers.[194] The employee bears the burden of both production and persuasion to show that he or she is qualified for the position in question. To meet this burden, the employee must identify a possible accommodation and show that it will enable him or her to perform the essential functions of the position.[195] The employee bears only a burden of production, however, on the question of whether such accommodation is reasonable. Under the Second Circuit's approach, the employer has the ultimate burden of persuasion to establish that the proposed accommodation is unreasonable.[196]

The Seventh Circuit has adopted a shared burden approach that endorses the interactive process envisioned by the EEOC. According to the Seventh Circuit, the responsibility for failing to identify a reasonable accommodation should be assigned to the party responsible for the breakdown of the interactive process, a decision that must be made on a case-by-case basis.[197] Therefore, the disabled individual must provide information about the disability and the limitations it imposes, while the employer must provide the work-related information necessary to determine the feasibility of an appropriate reasonable accommodation.[198]

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981).

192 Willis v. Conopco, Inc., 108 F.3d 282 (11th Cir. 1997); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173 (6th Cir. 1996); *see also* Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993) (adopting a similar approach under the Rehabilitation Act).

193 *Willis*, 108 F.3d at 284-85.

194 Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131 (2d Cir. 1995). Although this case arose under the Rehabilitation Act, the court expressly noted that the result would be the same under the ADA. *Id.* at 138.

195 *Id.* at 137-38.

196 *Id.* at 138.

197 Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130 (7th Cir. 1996).

198 *Id.* at 1136.

Finally, the Third Circuit, through its disposition of two cases,[199] appears to have adopted an approach where the parties both share and split the burden of proof. Under this approach, both the employee and the employer must make reasonable efforts to identify a possible reasonable accommodation. After this stage, the burden shifts twice, with the employee first having the burden to show that the accommodation will enable him or her to perform the essential job functions, and the employer then having the burden to show that the accommodation is unreasonable.[200]

Issue 8: Must an employer reassign a disabled employee to a vacant position for which the employee is qualified if the employee cannot perform the essential functions of his or her current position even with a reasonable accommodation?

Text: An employee is a "qualified individual with a disability" for purposes of the ADA if he or she is able to perform the essential functions of a position with or without reasonable accommodation.[201] The ADA specifically lists "reassignment to a vacant position" as an example of a reasonable accommodation that an employer may be required to provide.[202] The statute, however, does not expressly state whether a person who seeks reassignment must be able to perform the essential functions of his or her former job or whether it is enough that he or she will be able to perform the essential functions of the desired position. The ultimate question involves whether an employee's status of being "qualified" is measured before or after the reassignment.

EEOC Position: The EEOC interpretive guidance suggests that an employer has a duty to reassign an employee to a vacant position for which he or she is qualified "if there are no accommodations that would enable the employee to remain in the[ir] current position."[203] The guidelines state that "[i]n general, reassignment should [only occur] when accommodation within the individual's current position would pose an undue hardship."[204]

Case Law: Prior to its 1992 amendments,[205] the Rehabilitation

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199 Gaul v. Lucent Techs., 134 F.3d 576 (3d Cir. 1998); Mengine v. Runyon, 114 F.3d 415 (3d Cir. 1997).

200 *Mengine*, 114 F.3d at 420.

201 42 U.S.C. § 12111(8) (1994).

202 *Id.* § 12111(9)(B).

203 29 C.F.R. app. § 1630.2(o) (1998).

204 *Id.*

205 Rehabilitation Act Pub. L. No. 102-569, Title I, § 102(p)32, 106 Stat. 4360,

Act did not list reassignment to a vacant position as a reasonable accommodation.[206] Accordingly, cases interpreting the pre-amendment Rehabilitation Act concluded that employers were not required to reassign a disabled employee, who could not perform the essential functions of his or her current position, to another vacant position unless such a transfer was consistent with the employer's existing personnel policies.[207]

Some courts have continued to apply the Rehabilitation Act rule under the ADA. In *Smith v. Midland Brake, Inc.*,[208] the Tenth Circuit held that the ADA does not obligate an employer to reassign an employee who cannot perform the essential functions of his or her current job.[209] In *Smith*, the plaintiff suffered from chronic dermatitis. After a ten-month leave of absence, the employer discharged the employee because it could not accommodate his skin sensitivity in the employee's current light assembler position. The employee sued, claiming that the employer should have reassigned him to a different position that would not aggravate his skin condition. The court ruled for the employer, interpreting the EEOC guidelines as adopting reassignment as an accommodation only "when accommodating him in his current position is possible, but difficult for his employer."[210] The court noted that the ADA is not designed to require employers to accommodate every disabled employee, only those who are "qualified individuals" capable of performing their current jobs in spite of their disabilities.[211] While *Smith* has been overturned by a June 1999 en banc ruling,[212] other courts continue to adhere to this position.[213]

4428. The 1992 amendments attempted to harmonize interpretation of the non-affirmative action provisions of the Rehabilitation Act with the new ADA. The Rehabilitation Act now states that "[t]he standards used to determine when this section has been violated in a complaint alleging non-affirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990." *Id.* § 791(g).

206 *See* 29 U.S.C. § 791-794e (1994).

207 *See, e.g.*, Bradley v. University of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922 (5th Cir. 1993); Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987); Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985); *see also* School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n. 19 (1987).

208 138 F.3d 1304 (10th Cir. 1998).

209 *See* Myers v. Hose, 50 F.3d 278 (4th Cir. 1995); Lang v. City of Maplewood, 574 N.W.2d 451 (Minn. App. 1998).

210 *Smith*, 138 F.3d at 1308.

211 *Id.* at 1309.

212 Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999).

213 *See* Myers v. Hose, 50 F.3d 278 (4th Cir. 1995); Martin v. Lockheed Martin

Other decisions have reached the opposite conclusion and found that the ADA compels a different result with respect to reassignment than did the pre-1992 Rehabilitation Act. The First, Third, Seventh, and Eighth Circuit Courts of Appeal have ruled that reassignment to a vacant position is a reasonable accommodation required under the ADA so long as the employee is qualified to perform the essential job functions of the position to which he or she is reassigned.[214] These decisions interpret the phrase "qualified individual with a disability" as referring to a person who can perform the essential functions of the position that he or she either currently holds or desires by means of a reassignment.[215] The Seventh Circuit, in *Gile v. United Airlines, Inc.*, surveyed the case law on this issue and dismissed those agreeing with the earlier *Smith* decision as "mistakenly rely[ing] upon preamendment Rehabilitation Act cases."[216]

A more recent Seventh Circuit decision, while agreeing with the holding of *Gile*, has cautioned that an employer's reassignment duty is not unlimited. In *Dalton v. Subaru-Isuzu Automotive, Inc.*,[217] the court opined that an employer would not be required to reassign an employee to a vacant position when such a transfer would violate a legitimate, nondiscriminatory policy of that employer. The *Dalton* court cited to a number of examples of such policies, including those denying transfers to employees who are under- or over-qualified or where an employer has adopted a policy of not retaining employees who warrant a demotion.[218]

The District of Columbia Circuit, in October 1998, narrowly adopted the majority position in a 7-4 en banc decision. The ma-

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Missiles & Space, No. C96-4620 FMS 1998 WL 303089 (N.D. Cal. 1998); Cheatwood v. Roanoke Indus., 891 F. Supp. 1528 (D. Ala. 1995); Lang v. City of Maplewood, 574 N.W.2d 451 (Minn. App. 1998).

[214] Feliciano v. Rhode Island, 160 F.3d 780 (1st Cir. 1998); Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996); Shiring v. Runyon, 90 F.3d 827 (3d. Cir. 1996) (deciding issue under amended Rehabilitation Act language); Benson v. Northwest Airlines Inc., 62 F.3d 1108 (8th Cir. 1995). The Fifth Circuit arguably has adopted this approach as well. *See* Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995) (describing reassignment to a vacant position as a reasonable accommodation, but rejecting it under the circumstances of the case because it would give a part-time employee priority over a full-time employee in violation of the city charter).

[215] *Gile*, 95 F.3d at 497-98.

[216] *Id.* at 498.

[217] 141 F.3d 667 (7th Cir. 1998).

[218] *See id.* at 678.

jority opinion in *Aka v. Washington Hospital Center*[219] expressly disagreed with the Fifth Circuit's reasoning in *Smith* and held that reassignment to a vacant position is a reasonable accommodation so long as the disabled employee "can perform the essential functions of the employment position to which she seeks reassignment."[220] The majority also rejected the contention voiced in two dissenting opinions[221] that an employer satisfies its accommodation duty simply by allowing a disabled employee to compete on equal terms with nondisabled employees for a vacant position.[222] According to one of the dissenting opinions, the majority's reading of the ADA inappropriately provides disabled employees a "hiring preference" over more qualified, non-disabled applicants.[223]

A related issue that is emerging concerns whether an employer must prefer a qualified disabled employee in filling a vacancy over a better qualified, nondisabled, employee or applicant. Although numerous courts have stated that the ADA does not impose an affirmative action requirement,[224] it is not clear what this means in practice. Some decisions suggest that an employer satisfies its accommodation duty simply by allowing a disabled employee to compete on equal terms with nondisabled employees for a vacant position.[225] At the opposite extreme, some courts suggest that a disabled employee is entitled to a desired reassignment so long as the employee is minimally qualified for the position and the reassignment does not otherwise impose an undue hardship.[226] Still other courts, in between, suggest that an

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219 156 F.3d 1284 (D.C. Cir. 1998).

220 *Id.* at 1301.

221 *Id.* at 1311 (Henderson, J. dissenting); *Id.* at 1315 (Silberman, J. dissenting).

222 *Id.* at 1304-05.

223 *Id.* at 1311 (Henderson, J. dissenting).

224 *See, e.g.*, Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 384-85 (2d Cir. 1996) (stating that the employer "did not have an affirmative duty to provide Wernick with a job for which she was qualified; the [employer] only had an obligation to treat her in the same manner that it treated other similarly qualified candidates."); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) ("we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given a priority in hiring or reassignment over those who are not disabled").

225 *See, e.g.*, Daugherty v. City of El Paso, 56 F.3d 695, 699-700 (5th Cir. 1995); Thompson v. Dot Foods, Inc., 5 F. Supp. 2d 622 (C.D. Ill. 1998). *See also* Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1311 (D.C. Cir. 1998) (Henderson, J., dissenting), 156 F.3d at 1315 (Silberman, J., dissenting).

226 *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999). *See also* Wood v. County of Alameda, No. C941557 TEH 1995 WL 705139 (N.D. Cal.

employer must do "something more" than just permitting a disabled employee to post for openings, without specifying exactly what is required.[227]

Issue 9: Does the ADA require an employer to reassign a disabled employee to a vacant position as a reasonable accommodation when such a transfer would violate the seniority provisions of a collective bargaining agreement?

Text: Employers have a duty under the ADA to make reasonable accommodations to the known limitations of an otherwise qualified individual with a disability unless such accommodation would impose an undue hardship.[228] The ADA lists reassignment to a vacant position as an example of a possible reasonable accommodation.[229] The ADA also prohibits contractual arrangements which have the effect of discriminating against a qualified disabled individual.[230] Neither the ADA nor the National Labor Relations Act (NLRA)[231] expressly address how a conflict between a reassignment accommodation under the ADA and a seniority provision of a collective bargaining agreement negotiated under the NLRA should be resolved.

EEOC Position: The EEOC, in both its interpretive guidance[232] and the Technical Assistance Manual,[233] suggests that the terms of a collective bargaining agreement may be relevant in determining whether an accommodation would impose an "undue hardship." In an amicus brief filed in *Eckles v. Consolidated Rail Corp.*,[234] the EEOC proposed a balancing approach in which the terms of a collective bargaining agreement would serve as one relevant factor. This position finds support in the legislative history which indicates that collective bargaining agreement provisions are relevant but not determinative on the reassign-

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1995) ("[a]llowing the plaintiff to compete for jobs open to the public is no accommodation at all").

227 *See, e.g.*, Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1998) ("the word 'reassign' must mean more than allowing an employee to apply for a job on the same basis as anyone else. . . . the core word 'assign' implies some active effort on the part of the employer").

228 42 U.S.C. § 12112(b)(5)(A) (1994).

229 *Id.* § 12111(9)(B).

230 *Id.* § 12112(b)(2).

231 29 U.S.C. § 151 *et seq*.

232 29 C.F.R. § 1630.15(d) (1998).

233 Equal Employment Opportunity Commission, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act §§ 3.9 and 7.11 (1992).

234 94 F.3d 1041, 1051 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1318 (1997).

ment issue.[235]

Case Law: As with the preceding issue, the courts are struggling to determine whether the ADA retains or alters the approach taken under the pre-1992 Rehabilitation Act. Cases interpreting that statute uniformly held that an employer did need not to reassign a disabled employee when such action would violate the seniority provisions of a labor contract.[236] That conclusion, however, was based, in part, on the fact that the older Rehabilitation Act did not list reassignment to a vacant position as a reasonable accommodation.

The majority of courts that have considered this issue under the ADA adhere to the former Rehabilitation Act interpretation.[237] The leading case, the Seventh Circuit's decision in *Eckles*,[238] adopted a per se rule that an employer is not required to violate a seniority system agreed upon in a collective bargaining agreement in order to reassign a disabled employee as a reasonable accommodation. In reaching this conclusion, the court stressed the relative advantage of a predictable, bright-line "no bumping required" rule.[239] The court also emphasized that its conclusion was limited to collectively bargained seniority rights as they had a "pre-existing special status in the law" that Congress had shown no intent to alter in enacting the ADA.[240]

At least two court decisions have rejected the per se approach in favor of a balancing one.[241] In *Aka v. Washington Hospital Center*,[242] a panel of the District of Columbia Circuit reviewed the statutory language, legislative history, and EEOC interpretations and concluded that all three are inconsistent with the per se

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235 H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990).

236 *See, e.g.*, Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989); Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987); Daubert v. United States Postal Serv., 733 F.2d 1367 (10th Cir. 1984).

237 *See, e.g.*, Kralik v. Durbin, 130 F.3d 76 (3d. Cir. 1997); Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997); Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1318 (1997); Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995); Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995).

238 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 520 U.S. 1146 (1997).

239 *Id.* at 1051.

240 *Id.* at 1051-52.

241 Aka v. Washington Hosp. Ctr., 116 F.3d 876 (D.C. Cir. 1997), *reh'g en banc granted and judgment vacated*, 124 F.3d 1302 (D.C. Cir. 1997); Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393 (E.D. Tex. 1995).

242 116 F.3d 876 (D.C. Cir. 1997), *reh'g en banc granted and judgment vacated*, 124 F.3d 1302 (D.C. Cir. 1997).

approach of *Eckles*.[243] The court instead adopted a balancing standard that weighs the need for an accommodation with the degree of hardship imposed by the infringement on seniority rights.[244] This balance, the court noted, should be based on the particular circumstances of each case with a potential "continuum" of results.[245] The *Aka* decision subsequently was vacated[246] and then reversed on other grounds in an *en banc* decision.[247]

This conflict in statutory rights also arises in the context of labor arbitration. Not surprisingly, most,[248] but not all,[249] labor arbitrators have chosen to give preference to the seniority provisions in a labor agreement over the accommodation requirement of the ADA.

Issue 10: Does an employer and/or an insurance provider violate the ADA in providing disability insurance that distinguishes between mentally and physically disabled individuals in terms of their eligibility for disability benefits?

Saving the best for last, this topic really consists of three unsettled sub-issues. Each is discussed below.

A. Does a fully disabled former employee have standing to sue his or her ex-employer under Title I of the ADA?

Text: In order to have standing to challenge an employer-provided disability insurance policy as discriminatory under the ADA, a plaintiff must be a "qualified individual with a disability."[250] The ADA, in Title I, defines a "qualified individual with a disability" as a person who can perform the essential functions of his or her position with or without reasonable accommodation.[251]

EEOC Position: Neither the EEOC regulations nor the inter-

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[243] *Id.* at 895-96.

[244] *Id.* at 896.

[245] *Id.*

[246] *Reh'g en banc granted and judgment vacated*, 124 F.3d 1302 (D.C. Cir. 1997).

[247] 156 F.3d 1284 (D.C. Cir. 1998).

[248] *See, e.g.*, Alcoa Building Products, 104 Lab. Arb. Rep. (BNA) 364 (1995) (Cerone, Arb); Olin Corp., 103 Lab. Arb. Rep. (BNA) 481 (1994) (Helburn, Arb).

[249] *See* City of Dearborn Heights, 101 Lab. Arb. Rep. (BNA) 809 (1993) (Kanner, Arb.) (using balancing approach to uphold reassignment of disabled employee rather than senior employee preferred by labor agreement).

[250] *See* Martinson v. Kinney Shoe Corp., 104 F.3d 683 (4th Cir. 1997).

[251] 42 U.S.C. § 12111(8) (1994).

pretive guidance address this issue. In litigation, the EEOC has taken the following position:

> [T]he relevant "employment position" in any case involving post-employment fringe benefits, is the position actually occupied by plaintiff, that of benefit recipient, and that as long as the plaintiff satisfies any non-discriminatory eligibility criteria for receipt of benefits, he is a "qualified individual" within the meaning of the ADA.[252]

According to the EEOC, a former employee has standing to sue under the ADA so long as he or she is qualified to receive benefits.

Case Law: A number of courts have held that a former employee who is fully disabled and receiving disability benefits lacks standing to bring suit under Title I of the ADA.[253] According to these courts, the former employee is not a "qualified individual with a disability" because he or she no longer can perform the essential functions of the former job.[254] Since only fully disabled individuals qualify for disability benefits in the first place, this interpretation has been criticized as effectively preventing any benefits recipient from ever challenging an employer's provision of disability benefits on grounds of discrimination.[255]

As noted above, the EEOC attempts to avoid this result by asserting that the relevant "employment position" for which a plaintiff may be a "qualified individual" is that of a benefits recipient.[256] This approach goes to the opposite extreme and automatically confers standing on a former employee who is a beneficiary under a disability benefit policy. The Seventh Circuit has criticized the EEOC interpretation on the grounds that an "employment position" necessarily refers to a job, not simply the task of collecting benefit checks.[257] Thus far, no court has adopted the EEOC position.

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252 Leonard v. Israel Discount Bank of N.Y., No. 95 Civ. 6964 (CLB) 1996 WL 634860, at *3 (S.D.N.Y. Sept. 24, 1996).

253 Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321 (W.D. Tenn. 1995), *aff'd in part and rev'd in part*, 99 F.3d 181 (6th Cir. 1996), *reh'g en banc granted, judgment vacated*, 107 F.3d 359 (6th Cir. 1997), *reh'g en banc*, 121 F.3d 1006 (6th Cir. 1997); EEOC v. CNA Ins. Co., 96 F.3d 1039 (7th Cir. 1996); Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523 (11th Cir. 1996).

254 *Parker*, 875 F.Supp. at 1325-26, and 99 F.3d at 186; EEOC v. CNA Ins. Co., 96 F.3d at 1043-45.

255 *See* Lewis v. Aetna Life Ins., 982 F. Supp. 1158, 1162-63 (E.D. Va. 1997).

256 *See supra* note 252 and accompanying text.

257 EEOC v. CNA Ins. Co., 96 F.3d at 1043-44.

A recent decision of the Third Circuit, *Ford v. Schering-Plough Corp.*,[258] sanctioned the result sought by the EEOC, but on different grounds. The *Ford* court borrowed from a 1997 Supreme Court decision that authorized former employees to bring suit under Title VII for post-employment retaliation.[259] The Third Circuit extended this principle to the ADA and held that former employees may sue their former employer with respect to disability-based discrimination in the provision of post-employment benefits.[260]

Some courts have opted for an interpretation in between the extremes of the above approaches. In *Lewis v. Aetna Life Insurance Co.*,[261] the district court for the Eastern District of Virginia held that the standing issue should be determined with reference to the plaintiff's status at the time that he or she was offered the allegedly discriminatory disability insurance plan. In that case, the court ruled that an employee who was partially disabled yet qualified to perform the duties of the job, at the time that he was offered the disability plan, had a vested right to challenge the plan even though fully disabled at the time of bringing suit.[262] The *Lewis* court left open the question of whether a nondisabled person would have the same vested right. Another district court decision refused to dismiss a former employee's challenge to a disability plan, but held that the claim was only viable for the period before the plaintiff became fully disabled.[263]

B. May the former employee bring suit against the insurance provider under Title III as a public accommodation?

Text: The ADA, in Title III states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[264] Among those entities listed as a public accommodation for purposes of Title III is an "insur-

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[258] 145 F.3d 601 (3d Cir. 1998).

[259] *See* Robinson v. Shell Oil, 519 U.S. 337 (1997).

[260] *Ford*, 145 F.3d at 607-08.

[261] 982 F. Supp. 1158 (E.D. Va. 1997).

[262] *Id.* at 1162-63.

[263] Esfahani v. Medical College of Pa., 919 F. Supp. 832 (E.D. Pa. 1996).

[264] 42 U.S.C. § 12182(a) (1994).

ance office."[265] In addition, Title IV of the ADA contains a safe harbor provision that insulates insurance providers from liability when "[u]nderwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law."[266]

DOJ Regulations: The Department of Justice has adopted regulations interpreting Title III of the ADA. These regulations define a "place of public accommodation" as a "facility operated by a private entity."[267] The regulations then go on to define a "facility" as "all or any portion of buildings, structures, sites."[268] The DOJ Technical Assistance manual states that "[i]nsurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer."[269]

Case Law: An individual may bring an action against an insurance provider under Title III only if the disability insurance policy is a good or service provided by a place of public accommodation.[270] Some courts have held that the term "public accommodation" encompasses only *physical* places and structures.[271] They base this conclusion on the fact that the entities listed as "public accommodations" in the statute are primarily physical places open to public access.[272] The Sixth Circuit, in *Parker v. Metropolitan Life Insurance Co.*,[273] while admitting that an "insurance office" is a place of public accommodation, ruled that an employee who obtained a disability plan through her employer did not have a necessary physical nexus with an insurance office.[274] That court further held that Title III only regulates the accessibility to a place of public accommodation and not the contents of those goods and services offered by the

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265 *Id.* § 12181(7)(F).

266 *Id.* § 12201(c).

267 28 C.F.R. § 36.104 (1998).

268 *Id.*

269 Department of Justice, AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL, § III-3.11000.

270 *See* 42 U.S.C. § 12182(a) (1994).

271 Ford v. Schering-Plough Corp., 145 F.3d 601, 612 (3d Cir. 1998); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1008 (6th Cir. 1997); Pappas v. Bethesda Hosp. Ass'n., 861 F. Supp. 616, 619-20 (S.D. Ohio 1994).

272 *See, e.g.*, *Ford*, 145 F.3d at 612; *Parker*, 121 F.3d at 1014.

273 121 F.3d 1006 (6th Cir. 1997).

274 *Id.* at 1010-11, 1014.

public accommodation.[275]

Several other courts have concluded that Title III does reach the sale or provision of insurance policies and have allowed actions against insurers to go forward on that basis.[276] These courts do not require a physical nexus between a plaintiff and an insurance office, arguing that such a holding would lead to the absurd result that those people entering an office would be protected while those people who merely transact business over the phone would not.[277] Some of these courts rely, in part, on the fact that neither the statute nor the regulations expressly limit covered public accommodations to physical places.[278] Finally, some of these courts also find that the inclusion of the safe harbor provision regarding insurance providers illustrates that the ADA was intended to cover the contents of insurance plans and not just access to insurance offices.[279]

C. Do Distinctions Between Mental and Physical Disabilities Constitute Discrimination Within the Meaning of the ADA?

Text: The ADA states that no covered entity shall discriminate against a qualified individual with a disability with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[280] The ADA's discrimination ban extends to contractual arrangements which have the effect of subjecting an employer's disabled employees to discrimination.[281] Finally, while the ADA expressly preserves the right of insurance providers to underwrite, classify or administer risks, they may not do so as a "subterfuge" to evade the anti-discrimination purposes of the statute.[282]

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[275] *Id.* at 1012.

[276] *See, e.g.*, Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994); Winslow v. IDS Life Ins. Co., 29 F. Supp. 557 (D. Minn. 1998); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158 (E.D. Va. 1997); World Ins. Co. v. Branch, 966 F. Supp. 1203 (N.D. Ga. 1997); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316 (C.D. Cal. 1996).

[277] *See, e.g.*, *Carparts Distribution Ctr., Inc.*, 37 F.3d at 19; *Lewis*, 982 F. Supp. at 1164-65.

[278] *See, e.g.*, *Lewis*, 982 F. Supp. at 1164.

[279] *See, e.g.*, *Carparts Distribution Ctr., Inc.*, 37 F.3d at 20.

[280] 42 U.S.C. § 12112(a) (1994).

[281] *Id.* § 12112(b)(2).

[282] *Id.* § 12201(c).

EEOC/DOJ Position: The EEOC regulations state that the ADA bars discrimination on the basis of disability with regard to fringe benefits whether or not administered by the employer.[283] The DOJ's Technical Assistance Manual suggests that the underwriting and classification of risks in insurance policies must be supported by sound actuarial principles.[284]

Case Law: In *Lewis v. Aetna Life Insurance Co.*,[285] the district court for the Eastern District of Virginia held that the ADA prohibits disability insurance policies from providing different benefit levels for mental as opposed to physical disabilities unless the distinction in treatment is grounded in sound actuarial data. In reaching this conclusion, the *Lewis* court relied, in part, on other decisions finding insurance plan distinctions unlawful that have the effect of either denying coverage[286] or providing inferior coverage[287] on the basis of a particular disability in the absence of actuarial justification. The court stressed the fact that the discrimination is between individuals with different disabilities, as opposed to discrimination between disabled and nondisabled persons, is of no importance so long as the discrimination occurs because of an individual's particular disability status.[288] In a subsequent opinion following a bench trial, the *Lewis* court concluded that the disability plan in question was invalid because the distinction in benefit coverage was not justified by actuarial data.[289] In a June 1999 decision, the Fourth Circuit Court of Appeals reversed, holding that "the ADA does not require a long-term disability plan . . . to provide the same level of benefits for mental and physical disabilities."[290]

The majority of the courts that have addressed this issue agree with the Fourth Circuit.[291] The Sixth Circuit's decision in *Parker*

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283 29 C.F.R. § 1630.4(f) (1998).

284 Department of Justice, AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL, § III-3.11000.

285 982 F. Supp. 1158 (E.D. Va. 1997).

286 *See, e.g.*, Cloutier v. Prudential Ins. Co., 964 F. Supp. 299 (N.D. Cal. 1997); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422 (D. N.H. 1996).

287 World Ins. Co. v. Branch, 966 F. Supp. 1203 (N.D. Ga. 1997).

288 *Lewis*, 982 F. Supp. at 1168-69.

289 Lewis v. Aetna Life Ins. Co., 7 F. Supp.2d 743 (E.D. Va. 1998).

290 Lewis v. Kmart Corp., 180 F.3d 166, 172 (4th Cir. 1999).

291 *See, e.g.*, Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997); EEOC v. CNA Ins Co., 96 F.3d 1039 (7th Cir. 1996); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996); Modderno v. King, 82 F.3d 1059 (D.C. Cir. 1996) (interpreting the Rehabilitation Act).

v. Metropolitan Life Insurance Co.[292] is the leading case of those denying liability. In *Parker*, the court stated that "the ADA does not mandate equality between individuals with different disabilities. Rather, the ADA [only] prohibits discrimination between the disabled and the non-disabled."[293] The *Parker* court explained that disability plans with benefit levels that differentiate between those with mental and physical disabilities do not offend the ADA because all employees subject to such a policy, whether disabled or non-disabled, receive the same access to the plan.[294]

The Third Circuit, in *Ford v. Schering-Plough Corp.*,[295] agreed with *Parker* and pointed to two pieces of legislative history in support of that conclusion. First, the *Ford* court cited to a pre-enactment Senate report[296] taking the position that the proposed legislation, while requiring that individuals with disabilities must have equal access to health insurance coverage, would not require identical benefit levels for all disabling conditions.[297] The *Ford* decision also looked to Congress' defeat of an amendment to the Health Insurance Portability and Accountability Act of 1996[298] which would have mandated parity in insurance coverage for mental and physical illnesses.[299] As the *Ford* court noted, "[s]uch an amendment would have been unnecessary altogether if the ADA already required such parity."[300]

III

Sources of Judicial Dissonance

The preceding section illustrates a profound degree of judicial disagreement in interpreting the ADA. At first blush, this phenomenon may be seen as surprising given the ease of implementation predicted by President Bush in his signing statement.[301] This section attempts to ascertain the causes of this divergent judicial construction. In undertaking this task, the discordant set of cases reviewed above offer a valuable frame of reference and

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[292] 121 F.3d 1006 (6th Cir. 1997).
[293] *Id.* at 1015.
[294] *Id.* at 1015-16.
[295] 145 F.3d 601 (3d Cir. 1998).
[296] S. Rep. No. 101-116, at 29 (1989).
[297] *Ford*, 145 F.3d at 610.
[298] Pub. L. No. 104-191, 110 Stat. 1936 (1996).
[299] *Ford*, 145 F.3d at 610.
[300] *Id.*
[301] *See supra* note 15 and accompanying text.

provide evidence as to a number of forces at work. A review of these factors reveals that the current state of judicial dissonance should be anything but surprising.

A. The ADA is More Complicated than Title VII and the ADEA

The conventional wisdom at the time of the ADA's adoption was that the statute merely served to extend existing antidiscrimination principles to individuals with disabilities.[302] As a House Committee Report summarized, the ADA "completes the circle . . . with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964."[303]

In hindsight, however, it is obvious that this assumption was a significant oversimplification. The ADA and Title VII are not identical. The ADA incorporates a more complicated antidiscrimination formula than does Title VII or the ADEA, a difference which necessarily compels greater judicial oversight.

Title VII and the ADEA both use a relatively simple formula in banning discrimination. Using the language of Title VII to illustrate, the formula goes as follows: "It shall be an unlawful employment practice for an employer to . . . discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin[.]"[304] Although matters of proof may be complicated under these two statutes, the legal principle is clear and straightforward. Discrimination "because of" a listed trait is unlawful.

The ADA's ban on disability-based discrimination is considerably more complicated. Paraphrasing four different portions of the statue,[305] the ADA's antidiscrimination formula can be stated as follows:

> No employer shall discriminate against a *qualified* individual with a *disability* because of the disability of such individual who, with or without *reasonable accommodation*, can perform the essential functions of the employment position, unless the

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302 *See supra* notes 9-11 and accompanying text.

303 H.R. REP. NO. 101-485, pt. III, at 26, *reprinted in* U.S.C.C.A.N. 445, 449 (1990).

304 42 U.S.C. § 2000e-2(a). The ADEA uses similar language in banning discrimination because of age. 29 U.S.C. § 623(a)(1) ("It shall be unlawful for an employer to . . . discriminate against any individual . . . because of such individual's age").

305 *See* 42 U.S.C. §§ 12112(a), 12111(8), 12112(b)(5)(A), 12113(b) (1994).

> accommodation would impose an *undue hardship* on the operation of the business of that employer, or unless such individual would pose a *direct threat* to the health or safety of others.

The ADA's formula is clearly longer and contains more twists and turns. More importantly, in addition to the core "because of" prohibition, the ADA uses five terms, highlighted above, that are not found in either Title VII or the ADEA.

The more complicated ADA formula necessarily requires a greater degree of judicial interpretation. Our set of disputed issues bears out this relationship. All ten of the issues discussed in the preceding section turn on a construction of one or more of the five extra components of the ADA's formula.

The "disability" issue has proven to be particularly troublesome. Fully one-half of our disputed issues involve this subject. Under the ADA, an employee is protected only if he or she meets the statute's definition of disability.[306] A plaintiff has standing under the ADA only if he or she is a member of the class of individuals who have an impairment that substantially limits a major life activity.

This standing requirement is a substantial departure from Title VII's framework. Title VII does not impose any class membership standing requirement. That statute protects members of all races, as well as both women and men.[307] Title VII bans discrimination "because of" an individual's race or gender, but does not require that a person be of any particular race or gender in order to be protected. The fact that Title VII claims are asserted more frequently by women and minorities is a function of society's social and economic forces, rather than the dictates of Title VII itself.

The ADA is very different. Only individuals who meet the statute's definition of "disability" are protected. This inevitably means that the courts will be called upon to determine who meets this initial standing requirement.

In this regard, the ADA is more closely related to the ADEA. The ADEA also protects only a specific class of employees, namely those who are 40 years of age or older.[308] The standing

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[306] *See* 42 U.S.C. § 12112(a) (1994). The term "disability" is defined in § 12102(2).

[307] *See* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 423-24 (1997).

[308] 29 U.S.C. § 631(a) (1994).

issue under the ADEA, however, does not pose a difficult fact question. The ADEA adopts a bright-line age standard which is easy to ascertain. In contrast, the ADA's class standing requirement necessitates a difficult, case-by-case factual inquiry.

The reasonable accommodation/undue hardship portions of the formula also necessitate extensive judicial construction. This is a two-step process in which the reasonableness of an accommodation must be weighed against its burdensomeness.[309] This inquiry is fact specific with respect to each employer, taking into account individual resources and type of operation.[310] Thus, an accommodation that may be reasonable for a large employer may pose an undue burden for a smaller employer.[311]

While the ADA's formula is more complicated than that of either Title VII or the ADEA, it is substantially similar to that of the Rehabilitation Act. Given this similarity, one may ask why almost two decades of experience under the Rehabilitation Act did not remove much of the uncertainty that currently surrounds the ADA.

Our sample provides some clues. One answer is that the ADA is not a carbon copy of the Rehabilitation Act. While using the Rehabilitation Act as a model, Congress deviated from the model in a number of respects, such as listing reassignment to a vacant position as a reasonable accommodation,[312] including the direct threat notion in the section entitled "defenses,"[313] and explicitly disqualifying current users of illegal drugs.[314] Accordingly, at least four of our disputed issues turn, in part, on statutory language that differs from that in the Rehabilitation Act. Of the remaining six issues, all but one, the disability status of an individual with asymptomatic HIV, concern a question that was not authoritatively resolved under the Rehabilitation Act. The narrower reach of the Rehabilitation Act, apparently, did not generate the body of case law necessary to determine many of the issues now plaguing the courts of appeal under the ADA.

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309 *See generally* 42 U.S.C. § 12112(b)(5)(A) (1994).

310 *See* § 12111(10).

311 *Compare* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995) (undue hardship defense not available to state employer with large resources) *with* Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993) (overseas assignment preference for diabetic employee would impose an undue hardship on employer given the small size of its workforce).

312 42 U.S.C. § 12111(9) (1994).

313 *Id.* § 12113(b).

314 *Id.* § 12114(a).

In sum, courts are now facing a litigation explosion under the ADA because that statute uses an antidiscrimination formula that is complicated and still in an early stage of development. While this may explain the sheer volume of litigation, it is just the first step in understanding the extent of judicial dissonance.

B. Lack of Statutory Detail

In spite of the complicated formula, the ADA provides only minimal guidance as to how that formula should be implemented. The statute bans disability discrimination in a broad, sweeping outline, but leaves the details to the EEOC and the courts.

This lack of statutory detail contributes to judicial dissonance in two readily apparent ways. First, it creates uncertainty and invites litigation. Second, the ADA's broad outline provides the courts with a large zone of discretion to interpret the statutory language as they see fit.

The definition of "disability" again provides a good illustration. The ADA defines a covered "disability" as including "a physical or mental impairment that substantially limits one or more of the major life activities . . . ."[315] The scope of this definition necessarily depends on the meaning attributed to each of its three subparts. That is, in order to determine whether a particular condition is a covered disability, the terms "impairment," "major life activity," and "substantially limits" must be defined. The ADA, however, neither defines nor describes any of these three terms. Not surprisingly, much of the battle in terms of the first three issues discussed in the preceding section involves a debate as to how these three terms should be construed.

The ADA fails to elaborate on many other key concepts as well. The following list of undefined or undescribed terms was compiled just from our set of disputed issues:

—how recent is "current" drug use;
—what are "essential job functions;"
—which party bears the burden of proving the existence of a "direct threat" or a "reasonable accommodation;"
—how should "qualified" be defined for purposes of reassignment and the post-employment receipt of benefits;
—what are "public accommodations;" and
—when is an insurance plan a "subterfuge" to evade the purpose of the ADA?

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[315] 42 U.S.C. § 12102(2) (1994).

In essence, Congress, in enacting the ADA, announced its opposition to disability discrimination, but provided only minimal guidance in describing the type of conduct to which it was opposed. The end result is a large delegation of authority to the EEOC and the courts, and a significant contributing factor to the current divergence of judicial opinion.

C. Lack of Agency Deference

A potentially limiting factor with respect to the scope of judicial discretion under the ADA is the interpretive pronouncements of the administrative agencies charged with enforcing the statute. The EEOC and the DOJ have attempted to fill some of the gaps left by Congress through issuing formal regulations and a variety of other interpretive publications.[316] Taken together, these interpretive guides are quite detailed and state positions with respect to virtually all of the ten issues discussed above.

One might expect that these guides would help to reduce the impact of Congress' lack of clarity and detail. As the agencies charged with enforcing the ADA, their interpretation of the statute generally is entitled to great deference.[317] The Supreme Court has held that where a statute is silent or ambiguous, a reviewing court should adhere to an agency's regulatory interpretation if based on a permissible construction of the statute.[318]

Nonetheless, the courts are all over the board in terms of the amount of deference given to agency guidance. Some courts give the regulatory interpretations great weight and adopt agency recommendations.[319] Other courts reject or minimize the impact of EEOC and DOJ interpretations.[320] The most frequently invoked method used by such courts is to find that consideration of agency interpretations is unnecessary because of the unambigu-

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316 *See supra* notes 33-36 and accompanying text.

317 *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

318 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

319 *See, e.g.*, Gilday v. Mecosta County, 124 F.3d 761, 763-64 (6th Cir. 1997) (Moore, J., opinion); Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996).

320 *See, e.g.*, Coghlan v. H.J. Heinz Co., 841 F. Supp. 808, 812 (N.D. Tex. 1994) (noting that the EEOC interpretive guidance is not legislative in nature and that they "simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties").

ous text of the statute.[321] Relying on this textual approach, appellate courts have rejected EEOC advice on such issues as the impact of mitigating measures,[322] the burden of proving a direct threat of harm,[323] and the qualification standard for post-employment benefit recipients.[324]

It is not clear why so many courts refuse to give deference to agency opinions. Some courts, focusing on the EEOC's interpretive guidance, note that they are entitled to less deference than formal regulations because they are not promulgated pursuant to delegated legislative authority or following notice and comment procedures.[325] Even here it is well-settled that such interpretations are entitled to at least some degree of deference.[326]

Other, less technical factors may be at work. The lack of deference simply may be a convenient way for a court to implement its own views as to the proper construction of an unclear, yet overarching, statute. Another possible explanation is that some courts may view the agency guidance as slanted. In this regard, it is interesting to note that in every instance in which the EEOC has taken a position on one of our set of ten issues, it has done so in a manner favorable to a plaintiff's perspective. This suggests that some courts discount the EEOC's positions as those of a pro-employee advocate instead of a neutral agency authority.

In any event, courts that decline to give deference to agency guidance remove yet another potential obstacle to an unfettered construction of the ADA. Without statutory or agency directives to limit judicial discretion, almost any reading of the ADA becomes defensible.

D. Significant Policy Choices

The wide divergence in the judicial interpretation of the ADA reflects more than a mere opportunity to exercise judicial discretion. It also reflects a wide range of opinions about the goals and

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321 *See, e.g.*, *Gilday*, 124 F.3d at 766-67 (Kennedy, J., concurring in part and dissenting in part); *Coghlan*, 841 F. Supp. at 812.

322 *Gilday*, 124 F.3d at 766 (Kennedy, J., concurring in part and dissenting in part).

323 EEOC v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997).

324 EEOC v. CNA Ins. Co., 96 F.3d 1039 (7th Cir. 1996).

325 *See, e.g.*, Washington v. HCA Health Services, Inc., 152 F.3d 464, 469-70 (5th Cir. 1998).

326 *See generally* Batterton v. Francis, 432 U.S. 416 (1977); *Washington*, 152 F.3d at 470.

purposes of the ADA. Faced with the significant social and economic issues implicated by the ADA, judges have a powerful incentive to exercise their discretion in a manner consistent with their own set of beliefs.

The definition of "disability" once again provides a good point of reference. The ADA prohibits discrimination in employment with respect to individuals who fit within the "disability" definition.[327] For those individuals who meet this definition, the ADA represents a giant leap forward in the extension of basic civil rights protection. On the other hand, the ADA and its complicated antidiscrimination formula imposes considerable constraints on the resources and flexibility of American employers.

The overall impact of the ADA depends, in large part, on how many individuals are considered disabled for purposes of ADA coverage. In the findings and purposes section of the ADA, Congress estimated that the law would apply to 43,000,000 Americans.[328] In reality, the reach of the ADA depends upon how broadly the "disability" definition is construed. Our set of disputed issues illustrate that the potential exists for either a drastic expansion or a drastic contraction in the number of individuals meeting that definition. If the definition of disability extends to individuals with vision problems controlled by eyeglasses, 15 pound lifting restrictions, a genetic predisposition to cancer, and depression lessened by Prozac, the ADA will protect far more than forty-three million Americans. If, however, individuals with diabetes, carpal tunnel syndrome, and cancer in remission are not deemed disabled, the numbers protected by the ADA will be far less than estimated.

Judges faced with these choices in summary judgment motions must decide between two powerful policy arguments. Employers persuasively argue that a finding of disability status will extend ADA protection to individuals who really do not currently suffer from substantial limitations on their daily activities. Representatives of the disabled correctly argue that omitting such individuals from the ADA's protection will permit employers to act on stereotypes and preconceptions. If these judges have few restraints on their discretion, they will likely decide the issue based upon which of these two arguments best resonates with their own personal beliefs.

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[327] 42 U.S.C. § 12102(2)(A) (1994).

[328] *Id.* § 12101(a)(1).

The reasonable accommodation requirement provides another example of a significant policy choice. Under the ADA, an employee's qualifications for the job are to be ascertained "with or without reasonable accommodation."[329] An employer acts with discrimination if it fails to make reasonable accommodations for an otherwise qualified applicant or employee.[330] This reasonable accommodation duty is a concept alien to most antidiscrimination claims brought under Title VII or the ADA.[331] An employer has no duty under Title VII to provide any form of remedial assistance to a female or minority employee who cannot perform essential job duties.[332] Viewed in this light, the ADA's reasonable accommodation requirement is, in essence, a form of affirmative action for disabled individuals. It requires employers to take certain steps, short of an undue hardship, to assist disabled applicants and employees who otherwise fall short of required job performance capabilities. Under Title VII, even voluntary affirmative action steps have been criticized,[333] hotly debated,[334] and, under some circumstances, found to be unlawful.[335] The ADA, in contrast, makes at least some such steps mandatory.

Given the controversial nature of affirmative action, it is not surprising that courts have adopted vastly different notions of what the reasonable accommodation duty entails. At least three

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[329] *Id.* § 12111(8).

[330] *Id.* § 12112(b)(5)(A).

[331] A limited duty of reasonable accommodation arises under these two statutes only with respect to religion, which is a protected trait under Title VII. That statute, similar to the ADA, provides that an employer must reasonably accommodate the religious observances and practices of its employees up to the point of undue hardship. *See* 42 U.S.C. § 2000e(j) (1994). The reasonable accommodation duty for religious observances, however, is much more limited than that mandated by the ADA. The Supreme Court has ruled that an employer need not incur more than a de minimus hardship in providing an accommodation for religious purposes. *See* TWA, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

[332] *See* 42 U.S.C. § 2000e-2(j) ("Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group.").

[333] *See, e.g.*, Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839 (1996); Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993 (1993).

[334] *See* Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893 (1994) (summarizing and critiquing the ongoing affirmative action debate).

[335] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

circuit courts have ruled that an employer must accommodate an employee who can no longer perform his or her current job by means of a preferential reassignment to a vacant position that the employee can perform.[336] Other circuits have taken the contrary view that an employer need not reassign an employee who is no longer capable of performing his or her current position.[337] As one of these latter courts explained, to impose such a duty would go beyond the ADA's antidiscrimination purpose to impermissibly require preferential treatment.[338]

A third example concerns the status of mental or psychiatric disabilities. The ADA clearly covers mental as well as physical impairments.[339] EEOC regulations define the term "mental impairment" as including "any mental or psychological disorder, such as . . . emotional or mental illness."[340] The EEOC has issued an enforcement guidance with respect to psychiatric disabilities that lists major depression, bipolar disorder, anxiety disorders, schizophrenia, and personality disorders as examples of covered mental impairments.[341] That guidance goes on to suggest that these impairments are disabling if they substantially limit a major life activity such as learning, thinking, concentrating, interacting with others, caring for oneself, sleeping, or working.[342]

Despite these statutory and regulatory guidelines, courts have not been receptive to most mental disability claims. A survey of 1997 federal court decisions shows that the vast majority of claims based on alleged mental impairments are rejected.[343] Courts are particularly prone to dismiss these claims at the sum-

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336 Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996); Shiring v. Runyon, 90 F.3d 827 (3rd Cir. 1996); Benson v. Northwest Airlines Inc., 62 F.3d 1108 (8th Cir. 1995).

337 Smith v. Midland Brake, Inc., 138 F.3d 1304 (10th Cir. 1998); Myers v. Hose, 50 F.3d 278 (4th Cir. 1995).

338 *Smith*, 138 F.3d at 1309; *see also* Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) ("we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled").

339 42 U.S.C. § 12102(2)(A) (1994).

340 29 C.F.R. § 1630.2(h)(2) (1998).

341 *See EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities*, 8 FAIR EMPL. PRAC. MANUAL (BNA) 405:7461, 7462 (1999).

342 *Id.* at 7463.

343 Michael Higgins, *No Sudden Impact: Courts Rejecting Mental Disability Claims Despite the EEOC Guidelines Intended to Protect Mentally Ill*, 83 A.B.A.J. 24 (Nov. 1997) (showing that employers prevailed in 32 out of 37 court decisions involving mental disability claims that were published between April and August 1997).

mary judgment stage on grounds that the asserted impairment does not rise to the level of a protected disability.[344]

Possible explanations for the restrictive treatment of mental disabilities again reflect important societal concerns. First, mental disabilities are invisible in nature. Unlike most physical impairments, employers often have little tangible evidence as to the existence and/or severity of psychiatric problems.[345] Second, society long has been biased against individuals with mental disorders.[346] While physical impairments may provoke sympathy, mental impairments are associated with societal stigma.[347] Thus, court decisions dismissing mental disability claims may reflect, in part, the notion that mental disorders are less worthy of legal protection. Finally, it is difficult to untangle behavior caused by unprotected personality traits from behavior caused by protected mental disabilities. This concern is noted by Walter Olson, the author of the best selling book, *The Excuse Factory*:

> Few laws have done as much as the Americans with Disabilities Act to make a note from your doctor something you can take to the bank. Much ADA discussion has proceeded as if mental and emotional disorders were as easily and objectively diagnosed as chicken pox. For some "classic" mental illnesses there is indeed fair consensus regarding diagnosis and treatment, but the bounds of many others are almost entirely a function of line-drawing by psychiatric professionals. "If you look at [the diagnostic manual]," Yale professor Jay Katz has conceded, "you can classify all of us under one rubric or another of mental disorder."[348]

Many share Mr. Olson's concern that the ADA should not be read to saddle employers with workers who are forgetful, confrontational, or habitually late; no matter what the reason for

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[344] *Id.* (showing that employers succeeded in 26 out of 30 motions to dismiss mental disability claims at the trial court level during the survey period).

[345] *See* Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 350 (1997).

[346] *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 461 (1985) (Marshall, J., dissenting) ("the mentally retarded have been subject to a 'lengthy and tragic history,' of segregation and discrimination that can only be called grotesque."); *see also* Peggy R. Mastroianni & Carol R. Miaskoff, *Coverage of Psychiatric Disorders under the Americans with Disabilities Act*, 42 VILL. L. REV. 723 (1997).

[347] Mark Clements, *What We Say About Mental Illness*, PARADE MAGAZINE, Oct. 31, 1993, at 4-5 (discussing results of a poll in which 70% of those responding said that there was a stigma attached to an individual admitting to having a mental illness).

[348] Walter Olson, THE EXCUSE FACTORY 134 (1997).

such behavior. This concern also may underlie some court decisions denying mental disability claims, such as those decisions rejecting the EEOC viewpoint that the "ability to get along with others" is a protected major life activity.[349]

In these and other ways, competing visions with respect to the goals and purposes of the ADA add fuel to the fire of judicial dissonance. Is the ADA simply a nondiscrimination statute that protects individuals with severe physical impairments from discrimination? Or does the statute impose affirmative obligations on employers to avoid making prejudicial employment decisions with respect to individuals with significant or potentially significant impairments, including those with performance problems resulting from mental disorders?

E. Individualized Inquiry

A final source of judicial dissonance is the individualized inquiry used to determine ADA claims. Federal courts repeatedly have declined to recognize particular conditions as disabilities per se.[350] These courts, instead, engage in a particularized factual inquiry into each individual claimant's physical or mental limitations, with disability status determined by the extent of each person's limitations.[351]

Courts also take an individualized approach to the reasonable accommodation/undue hardship tandem of issues. This is particularly true with respect to the undue hardship phase which the statute itself describes as a floating standard depending upon each employer's type of operation and resources.[352]

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[349] *See, e.g.*, Soileau v. Guilford of Maine, Inc., 105 F.3d 12 (1st Cir. 1997) (rejecting such a major life activity as an amorphous and unworkable concept); Weiler v. Household Finance Corp., 101 F.3d 519 (7th Cir. 1996) (rejecting disability status based upon an employee's ability to get along with a particular supervisor).

[350] *See, e.g.*, Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993); McKey v. Occidental Chem. Corp., 956 F. Supp. 1313, 1317 (S.D. Tex. 1997). The EEOC interpretive guidance apparently suggests that some impairments, such as HIV infection, should be treated as disabilities per se because they are "inherently substantially limiting." *See* 29 C.F.R. app. § 1630.2(j) (1998).

[351] *See, e.g.*, Homeyer v. Stanley Tulchin Assoc., Inc., 91 F.3d 959, 962 (7th Cir. 1996); Katz v. City Metal Co., 87 F.3d 26, 32 (1st Cir. 1996); Ennis v. National Ass'n of Bus. and Educ. Radio, 53 F.3d 55, 59-60 (4th Cir. 1995).

[352] 42 U.S.C. § 12111(10) (1994). The reasonable accommodation phase tends to have more of a generalized focus (i.e., is this accommodation a reasonable one for most employers) while the undue hardship phase tends to have more of an individualized focus (i.e., does the accommodation pose an undue hardship for this particular employer). Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993). Even the reasonable ac-

This ad hoc approach to decisionmaking contributes to a divergence in judicial opinion in a number of ways. First, the individualized approach is less predictable than one which recognizes certain per se disabilities and, second, it necessarily fosters more litigation. As noted with respect to the ADA's complicated antidiscrimination formula,[353] increased litigation provides more opportunities for divergent judicial viewpoints.

The individualized inquiry approach also is not conducive to the creation of precedent.[354] Thus courts have a larger zone of discretion in deciding each individual case. This phenomenon is most noticeable with respect to cases examining the major life activity of "working." The regulations provide that an individual is substantially limited in the major life activity of working if he or she is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs.[355] The regulations further state, in contrast, that the inability to perform a single, particular job is not a substantial limitation.[356] Courts, under this standard, have considerable leeway to find that an individual is either disabled or not disabled depending on how the disqualified grouping of jobs is described.

This result is aptly illustrated by the Sixth Circuit's decision in *McKay v. Toyota Motor Manufacturing, U.S.A., Inc.*,[357] a case involving an assembly-line worker with carpal tunnel syndrome accompanied with lifting and repetitive motion restrictions. The majority opinion in *McKay* found the plaintiff not to be disabled because she was unable to perform "only the narrow range of assembly line manufacturing jobs that require repetitive motion or frequent lifting."[358] The dissent reviewed the same evidence and concluded that the plaintiff was disabled because she was dis-

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commodation phase, however, has an individualized component in terms of seeking to link the disabled individual's limitations with an accommodation that will enable the performance of essential functions. *See* 29 C.F.R. app. § 1630.2(o) (1998). Some courts, moreover, view the reasonable accommodation issue as incorporating a cost/benefit analysis which necessarily takes individual circumstances into account. *See* Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538 (7th Cir. 1995).

353 *See supra* notes 302-14 and accompanying text.

354 *See* Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 332-33 (1997).

355 29 C.F.R. § 1630.2(j)(3)(i) (1998).

356 *Id.*

357 110 F.3d 369 (6th Cir. 1997). The *McKay* decision is discussed *supra* at notes 127-34 and accompanying text.

358 *Id.* at 373.

qualified from all heavy duty jobs, as well as all medium duty jobs and many light and sedentary jobs that require repetitive motion.[359] Whether an individual is disabled because of a limitation on the activity of working, apparently, is in the eyes of the beholder.

One other major impact flows from the individualized inquiry approach. Because each ad hoc determination requires a detailed factual analysis, this approach makes each ADA case a likely candidate for a lengthy jury trial. This is hardly a welcome prospect for a judiciary that already is beset with a deluge of ADA cases.[360] The desire to curb a burgeoning jury trial caseload may be part of the explanation for a growing tendency among the federal trial courts to dispose of cases at the summary judgment stage.[361] A review of the decisions discussed with respect to our set of ten issues shows case after case in which the courts have granted and upheld rulings to dismiss ADA claims as a matter of law. A recent study by the American Bar Association, showing that employers have prevailed in ninety-two percent of all court rulings involving ADA claims, bears out this trend.[362] The most common justification for achieving such a result is a stringent interpretation of the "disability"[363] and "reasonable accommodation"[364] concepts. If an individual plaintiff is not disabled or cannot possibly be afforded an accommodation that is reasonable, a jury trial on the merits is unnecessary.

F. Summary

Once the above factors are taken into account, the current divergence in the judicial interpretation of the ADA is not surprising. The ADA's complicated antidiscrimination formula, implemented through an individualized mode of analysis, inevitably leads to a crush of litigation. The lack of statutory detail as well as skepticism over the EEOC's role heighten the judiciary's ability to exercise discretion in resolving these cases. Finally, the

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[359] *Id.* at 374-78 (Hillman, J. dissenting).

[360] *See supra* note 23 and accompanying text.

[361] *See* Lanctot, *supra* note 354, at 332.

[362] Reported in 158 LRR (BNA) 257 (1998).

[363] *See, e.g.*, Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156 (4th Cir. 1997); McKay v. Toyota Motor Mfg, U.S.A., Inc., 110 F.3d 369 (6th Cir. 1997). *See also* Lanctot, *supra* note 354, at 329-33; *id.* at 270.

[364] *See, e.g.*, Smith v. Midland Brake, Inc., 138 F.3d 1304 (10th Cir. 1998); Myers v. Hose, 50 F.3d 278 (4th Cir. 1995).

courts, confronted with the crucial policy choices posed by the ADA and a growing tide of litigation, have powerful incentives to construe the ADA in ways quite differently than envisioned by agency guidelines.

IV

The Supreme Court Weighs In

It is not unusual for a new statute to spawn issues needing judicial resolution. Over time, however, the appellate courts generally resolve the more pivotal, policy-driven issues arising under a new statute and turn their attention to more routine issues of statutory enforcement and interstitial interpretation.

The ADA, at least thus far, has been slow to follow this evolutionary course. The Court's response to these initial cases may provide some insight into whether the judicial dissonance phenomenon will continue or whether a greater consensus will emerge.

During its last two terms, the Supreme Court has decided six cases under the ADA. Some of these decisions are of the landmark variety, others are less significant and/or companion cases.[365] Three of these decisions, each of which address one of our set of ten disputed issues, are particularly significant for our purposes. This section summarizes each of these three decisions and then analyzes their likely impact on the judicial dissonance phenomenon.

A. The Cases

1. Bragdon v. Abbott[366]

The *Bragdon v. Abbott* decision arose under Title III of the

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[365] This Article will not discuss the three "lesser" decisions which do not address highly contested issues of first impression concerning the workplace. *See* Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999) (holding that monocular vision is not a per se disability, but must be assessed on a case-by-case basis taking into account mitigating measures such as the brain's ability to compensate for loss of vision in one eye); Murphy v. United Parcel Service, 119 S. Ct. 2133 (1999) (holding that determination of whether an individual's impairment substantially limits a major life activity should be made with reference to mitigating measures, and that an employee who could not obtain Department of Transportation certification to drive commercial vehicles because of high blood pressure was not substantially limited in the major life activity of working); Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) (holding that Title II of the ADA applies in the context of state prisons).

[366] 524 U.S. 624 (1998).

ADA.[367] The plaintiff, Sidney Abbott, was infected with HIV, but the disease had not yet progressed to the symptomatic phase. In 1994, Ms. Abbott visited the office of Dr. Randon Bragdon for a dental appointment. Dr. Bragdon conducted the examination and discovered a cavity in one of Abbott's teeth. Bragdon informed Abbott that he had a policy against filling cavities of patients with HIV in an office setting. He offered to treat Abbott at a hospital which would entail added expense for Abbott.[368]

Abbott brought suit claiming that Bragdon's actions violated Title III of the ADA by denying Abbott equal access to a place of public accommodation. Bragdon denied liability on two grounds. First, Bragdon contended that Abbott was not a protected individual with a disability under the ADA. Second, Bragdon maintained that treating Abbott in his office would pose a direct threat to the health and safety of others. The district court[369] and the First Circuit Court of Appeals[370] ruled for Abbott on both issues as a matter of law.

a. Disability

As noted above,[371] a five-member majority of the Supreme Court affirmed the First Circuit's determination that Abbott was disabled for purposes of the ADA. The majority opinion authored by Justice Kennedy ruled that Abbott's HIV status, even at the asymptomatic stage, substantially limited the major life activity of reproduction.[372]

In support of its conclusion that reproduction is a major life activity under the ADA, the majority stressed the importance of reproduction as "central to the life process itself."[373] In doing so, the majority opinion rejected the dissent's argument that major life activities only include those actions that are "repetitively performed and essential in the day-to-day existence of a normal

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[367] Although arising from a Title III claim of discrimination lodged against a public accommodation, the *Bragdon* decision clearly has important implications for Title I claims grounded in the employment context. Both the "disability" and "direct threat" terms construed in *Bragdon* are defined similarly for Title I and Title III purposes.

[368] *Bragdon*, 524 U.S. at 629.

[369] Abbott v. Bragdon, 912 F. Supp. 580 (D. Me. 1995).

[370] Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997).

[371] The *Bragdon* decision also is discussed *supra* at notes 114-20 and accompanying text.

[372] *Bragdon*, 524 U.S. at 641, 646.

[373] *Id.* at 638.

functioning individual."[374] The Court, instead, agreed with the First Circuit's reasoning that "the plain meaning of the word 'major' denotes comparative importance, and suggests that the touchstone for determining an activity's inclusion under the statutory rubric is its significance."[375]

The majority opinion also found that the risk of transmitting the virus through sexual intercourse and childbirth substantially limited Abbott's ability to engage in reproductive activities. Even though new medications can lower the risk of transmission, the Court stated that "[i]t cannot be said as a matter of law that an 8% risk of transmitting a dread[ed] and fatal disease to one's child does not represent a substantial limitation on reproduction."[376] The dissenting opinion of Chief Justice Rehnquist, in contrast, asserted that Abbott's decision not to engage in reproductive acts was a voluntary choice rather than the result of an actual limitation on her ability to do so.[377]

The majority opinion also noted that its conclusion was supported by a consistent course of agency interpretation promulgated both before and after enactment of the ADA.[378] The administrative and judicial precedent under the Rehabilitation Act, upon which the ADA was modeled, had uniformly found statutory coverage for persons with asymptomatic HIV.[379] The regulatory agencies charged with enforcing the ADA, in this case both the EEOC and the DOJ, similarly have construed individuals infected with HIV to be disabled.[380] The Court stressed that these agency interpretations are entitled to deference.[381]

b. Direct Threat

On the second issue, the majority opinion held that "[t]he existence, or nonexistence, of a significant [health or safety] risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence."[382] In

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[374] *Id.* at 660 (Rehnquist, C.J., dissenting).
[375] *Id.* at 638.
[376] *Id.* at 641.
[377] *Id.* at 661 (Rehnquist, C.J., dissenting).
[378] *Bragdon*, 524 U.S. at 642-48.
[379] *Id.* at 642-46.
[380] *Id.* at 643-46.
[381] *Id.* at 641.
[382] *Id.* at 649.

making this objective determination, the Court explained, the views of public health authorities should receive special weight and authority.[383] The Court found that Bragdon failed to present any objective evidence "showing that treating [Abbott] in a hospital would be safer or more efficient in preventing HIV transmission than treatment in a well-equipped dental office."[384] The Court, nonetheless, vacated and remanded this issue on the grounds that the First Circuit did not cite sufficient material in the record to determine, as a matter of law, that Abbott's HIV infection posed no direct threat to the health and safety of others.[385]

The *Bragdon* decision is a clear, albeit narrow, victory for those advocating a broader reading of the ADA.[386] However, the *Bragdon* decision may be as significant for what it did not decide as for what it did. The *Bragdon* Court declined to rule on whether HIV infection is a per se disability under the ADA.[387] This may prove to be a major omission both because of the ongoing debate over whether any per se disabilities exist under the ADA and because of the possibility that some individuals with

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383 *Id.* at 650. Chief Justice Rehnquist's dissent finds no basis to give the opinions of public health authorities this degree of deference in cases of litigation between two private parties. *See id.* at 663 (Rehnquist, C.J., dissenting).

384 *Bragdon*, 524 U.S. at 651.

385 *Id.* at 650-54.

386 The dissent in *Bragdon* reads the majority opinion as potentially more expansive if "taken to its logical extreme." *Bragdon*, 524 U.S. at 661 (Rehnquist, C.J., dissenting). In discussing the meaning of the "substantially limits" requirement, the dissent warns of the possible impact of the majority's approach:

> But the ADA's definition of a disability is met only if the alleged impairment substantially 'limits' (present tense) a major life activity. 42 U.S.C. § 12102(20)(A). Asymptomatic HIV does not presently limit respondent's ability to perform any of the tasks necessary to bear or raise a child. Respondent's argument, taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease 'disabled' here and now because of some possible future effects.

Id. This reading of the majority opinion appears to be overstated. The *Bragdon* majority found Abbott to be disabled, not because of the possible future effects of HIV, but because of the present limitation on her ability to engage in reproductive activities. *Bragdon*, at 637-42. Thus, a genetic marker or other indicator of a future impairment poses a situation clearly distinguishable from *Bragdon* unless it also entails a substantial present limitation on a major life activity, such as the ability to reproduce. In any event, the *Sutton* decision, discussed *infra* at notes 404-38 and accompanying text, makes it clear that disability status is to be determined with reference to an individual's present status, rather than with reference to an individual's hypothetical or even anticipated status. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146-47 (1999).

387 *Bragdon*, 524 U.S. at 641.

HIV infection may not qualify as disabled for ADA purposes. This latter possibility arises from the Court's statement, in the paragraph summarizing its disability conclusion, that "testimony from [Abbott] that her HIV infection controlled her decision not to have a child is unchallenged" and must be accepted as true.[388] One possible interpretation of this comment is that the Court views HIV as a substantial limitation on reproduction, and hence a covered disability, only for individuals who otherwise would desire to procreate. The dissent clearly adopts this position.[389] If this reading is accurate, it could have the anomalous effect that many members of the demographic group most heavily impacted by HIV—gay men—may have no standing under the ADA if they cannot establish a preexisting interest in reproduction.

2. Cleveland v. Policy Management Systems Corporation[390]

After suffering a stroke in January 1994, Carolyn Cleveland applied for Social Security Disability Insurance (SSDI) benefits claiming that she was "disabled" and "unable to work."[391] The Social Security Administration (SSA) denied Cleveland's claim in July 1994, shortly after her condition improved and she returned to work.[392] Cleveland's employer, Policy Management Systems Corporation, fired her later that same month.[393] Cleveland then requested the SSA to reconsider her SSDI application, and in September 1995, she was awarded benefits retroactive to the day of her stroke.[394] Also in September, she brought suit under the ADA alleging that her employer had discriminated against her by not reasonably accommodating her disability.[395]

The district court granted summary judgment to the employer finding that Cleveland had conceded that she was totally disabled by virtue of applying for and receiving SSDI benefits, and was now estopped from claiming that she could perform the essential functions of her job. The Fifth Circuit affirmed, ruling that the

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388 *Id.* at 640-43.

389 *Id.* at 657-60 (Rehnquist, C.J., dissenting) (noting that the ADA requires that the major life activity at issue must be one for that particular individual, and that the record contained no evidence that Abbott, absent HIV infection, had planned to have children).

390 119 S. Ct. 1597 (1999).

391 *Cleveland*, 119 S. Ct. at 1600.

392 *Id.*

393 *Id.*

394 *Id.*

395 *Id.*

receipt of SSDI benefits creates a rebuttable presumption that the recipient is judicially estopped from asserting that he or she is a qualified individual with a disability under the ADA.[396] The Supreme Court reversed in a unanimous decision.

The Supreme Court first looked at the respective definitions of disability under the two statutes. The court noted that representation of total disability in applying for SSDI benefits differs from a purely factual statement in that it "implies a context-related legal conclusion" of being disabled for purposes of the SSA.[397] The Court concluded that despite the apparent conflict that arises from the language of the two statutes, "the two claims do not inherently conflict to the point where courts should apply a special negative presumption . . . because there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side."[398]

The Court explained that the ADA's definition of a "qualified individual with a disability" includes someone who can perform the essential functions of a job with reasonable accommodation.[399] The SSA, in contrast, does not take into account the possibility of reasonable accommodation. Therefore, an ADA claim in which a plaintiff may be able to perform a job with reasonable accommodation may be consistent with an SSDI claim of disability.[400]

The *Cleveland* Court also identified other situations in which ADA and SSDI claims may coexist consistently. The Court pointed out that the five-step inquiry under the SSA inevitably simplifies a person's situation, "eliminating consideration of many differences potentially relevant to an individual's ability to perform a particular job."[401] The Court also noted that the SSA sometimes grants benefits to individuals who are working and that a claimant's condition can change such that a person's statement at the time of filling out an application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision for ADA purposes.[402]

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396 Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 518-19 (5th Cir. 1997).

397 *Cleveland*, 119 S. Ct. at 1601.

398 *Id.* at 1602.

399 *Id.*

400 *Id.*

401 *Id.* at 1603.

402 *Id.* The Court also compared an individual's applying for relief under both

The Court acknowledged that in some circumstances an earlier SSDI claim could conflict with an ADA claim thereby making summary judgment appropriate. The Court held that to defeat summary judgment in such a case, a plaintiff's explanation concerning the prior statement must be sufficient to warrant a reasonable juror's conclusion that the plaintiff could perform the essential functions of the job with or without reasonable accommodation.[403]

3. Sutton v. United Air Lines, Inc.[404]

The *Sutton* decision is the most far-reaching of the three cases. Petitioners Karen Sutton and Kimberly Hinton are twin sisters who both suffer from severe myopia. Each has uncorrected visual acuity of 20/200 in one eye and 20/400 in the other, but with corrective lenses their vision improves to 20/20 or better.[405] In 1992, both sisters applied for employment with United Air Lines (United) as commercial airline pilots. United rejected both sisters because they did not meet minimum, uncorrected vision requirements.[406] Petitioners brought suit under the ADA, alleging that they fit within the protected class of individuals with a "disability" because of their respective vision impairments or, alternatively, because they are regarded as having a substantially limiting impairment.

The district court dismissed the complaint concluding that the twin sisters were not disabled and the Tenth Circuit Court of Appeals affirmed.[407] Both courts ruled that the sisters were not substantially limited in any major life activity when their impairments were considered in their corrected states. The two courts also found that the plaintiffs were not regarded as having disabling impairments. The Supreme Court affirmed in a 7-2 decision, with Justice O'Connor authoring the majority opinion. The Court initially noted that both the EEOC and the DOJ have issued guidelines recommending that the question of whether a person is disabled should be assessed without regard to mitigat-

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statutes to making alternative arguments, noting that if an individual has merely applied for, but not been awarded, SSDI benefits, any inconsistency in the theory of claims is the kind normally tolerated by our legal system. *Id.*

[403] *Id.* at 1604.

[404] 119 S.Ct. 2139 (1999).

[405] *Id.* at 2143.

[406] *Id.*

[407] *See* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997).

ing measures.[408] While the Court suggested that the ADA did not delegate authority to any administrative agency to interpret the statute's "disability" definition, the Court declined to address what deference is due those guidelines.[409]

a. Actual Disability

Turning to the merits, the Court found that the agencies' approach of evaluating a person's disability status in his or her uncorrected state is "an impermissible interpretation of the ADA."[410] The court stated:

> [I]t is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.[411]

Concluding that the ADA's text could not be read otherwise, the majority opinion saw no reason to look to the ADA's legislative history for further guidance.[412]

The Court stated that three separate provisions of the ADA support this conclusion. First, the Court looked at the definition of a covered "disability" which uses the phrase "substantially limits" in the present indicative verb form.[413] According to the majority, this temporal benchmark indicates that a person must be "presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[414] The Court reasoned that a person whose impairment is corrected by mitigating measures does not have an impairment that *presently* substantially limits a major life activity, and therefore should not be considered disabled under the Act.[415]

The Court secondly stressed the importance of making an individualized inquiry with respect to each person making an ADA claim. The Court opined that the instruction from Guidance to judge everyone in an uncorrected state would impermissibly cre-

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408 *Sutton*, 119 S. Ct. at 2145-46.
409 *Id.*
410 *Id.* at 2146.
411 *Id.*
412 *Id.*
413 *Id.*
414 *Id.*
415 *Id.* at 2146-47.

ate a system in which persons would be treated as members of a group rather than as individuals.[416]

Finally, the Court placed great weight on the Congressional findings set out in the ADA's preamble to the effect that the Act would protect "some 43,000,000 Americans."[417] The Court explained that this figure would be much higher if all persons with corrected conditions were covered by the statute. The Court concluded that "the 43 million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA."[418]

In spite of rejecting the agency guidance, the court clarified that it did not mean that the use of a corrective device by an individual would automatically mean that he or she was not disabled. The Court stressed that one has a disability if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity.[419] Under the facts of this case, however, the Court agreed with the Tenth Circuit that the petitioners did not state a claim that they were substantially limited in any major life activity under the first prong of the "disability" definition.[420]

b. Regarded as Disabled

The Supreme Court also rejected the petitioner's alternative contention that they were protected under the ADA because they were "regarded as" disabled. The *Sutton* majority explained that an individual may fall within this third prong of the statutory "disability" definition in either of two ways: "(1) a covered entity mistakenly believes that a person has a physical impairment that

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416 *Id.* at 2147. The court also reasoned that the EEOC and DOJ approach was incorrect because it would not allow the courts or employers to consider negative side effects resulting from the use of mitigating measures. *Id.*

417 *See id.* at 2147-48 (discussing Congressional findings set out in 42 U.S.C. § 12101(a)(1)).

418 *Id.*

419 *Id.* at 2149.

420 *Id.* Justice Ginsburg concurred in the conclusion that the first prong of the disability definition does not reach individuals with correctable impairments. *Id.* at 2152 (Ginsburg, J., concurring). She found important support for this result in the fact that Congress described the intended class of those protected by the ADA as a "discrete and insular minority" consisting of approximately 43 million people. *Id.* (citing to 42 U.S.C. § 12101 (a)(1),(7)). She explained that this is a telling indication of Congress' intent to restrict the ADA's coverage to a "confined, and historically disadvantaged, class." *Id.* at 2152.

substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."[421] In either situation, the impairment, as perceived, must be one that substantially limits one or more major life activities.[422]

Applying this standard to the *Sutton* facts, the Court ruled that the mere allegation that an employer has a vision requirement does not establish that the employer regarded the petitioners as substantially limited in the major life activity of working. The Court noted that an employer may adopt hiring qualifications under the ADA and, in so doing, may prefer some physical characteristic or medical conditions, that do not rise to the level of a disabling impairment, over others.[423] Further, while questioning the logic of EEOC regulations that recognize "working" as a major life activity for purposes of the ADA,[424] the Court stated that this fact scenario, in any event, did not support a claim that the employer regarded them as having an impairment that substantially limited their ability to work in either a class of jobs or a broad range of jobs as the regulations require.[425] At best, the employer only regarded them as unable to perform the single job of a global airline pilot.[426]

c. *The Dissenting Opinions*

Justice Stevens[427] and Justice Breyer both authored dissenting opinions.[428] Both agreed with the EEOC and DOJ guidance in-

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421 *Sutton*, 119 S. Ct. 2139, 2144 (1999).

422 *Id.*

423 *Id.* at 2150.

424 *Id.* at 2151 (The Court stated "[b]ecause the parties accept that the term 'major life activities' includes working, we do not determine the validity of the cited regulations. We note, however, that there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.") (citation omitted).

425 *Id.* at 2151 (citing 29 C.F.R. § 1630.2(j)(3)(i)).

426 *Sutton*, 119 s. Ct. 2139, 2151 (1999). The court also noted that it is not enough to say that if the physical criteria of a single employer were imputed to all similar employers, one then would be regarded as substantially limited in the major life activity of working. *Id.* at 2152.

427 *Id.* at 2152 (Stevens, J., dissenting). Justice Breyer joined in the dissent authored by Justice Stevens.

428 *Id.* at 2161 (Breyer, J., dissenting).

structing courts to consider the issue of disability status without taking mitigating measures into consideration.

Justice Stevens noted that if the ADA were only concerned with a person's present capabilities, many serious impairments would not be covered by the ADA.[429] He offered the example of an individual who has lost a limb, but who, with a prosthetic device, can perform major life activities. According to Justice Stevens, if an employer refuses to hire such a person because of stereotypical assumptions concerning the impairment, the employer has discriminated against that person in a manner that Congress intended to prohibit.[430] Justice Stevens said that his reading of the statute avoids the "counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations."[431]

Justice Stevens further asserted that his interpretation was supported by the relevant legislative history. He pointed out that both the House and Senate reports on the bill that became the ADA clearly indicate that a person's disability status should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.[432]

In general, Justice Stevens advocates a less arduous construction of the ADA's standing requirement than the majority, thereby allowing more plaintiffs to get past the threshold question of whether they are members of the ADA's protected class. He contended that this would make the interpretation of ADA closer to Title VII and the ADEA, which do not impose rigid standing requirements.[433] According to Justice Stevens, this approach more appropriately focuses on whether an affected employee is genuinely qualified to perform the job or whether that

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[429] *Id.* at 2153-54.

[430] *Id.* at 2154. *See also id.* at 2159 ("Congress enacted the ADA in part because such individuals [with impairments such as prosthetic limbs or epilepsy] are not ordinarily substantially limited in their mitigated condition, but rather are often the victims of 'stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.'") (quoting 42 U.S.C. § 12101(a)(7)).

[431] *Id.* at 2154 (Stevens, J., dissenting).

[432] *Sutton*, 119 S. Ct. at 2154-55. Justice Stevens also gave weight to the fact that all three of the executive agencies charged with implementing the Act came to the conclusion that the presence of a disability should turn on an individual's uncorrected state. *Id.* at 2155-56.

[433] *See id.* at 2156.

person poses an undue safety risk.[434]

Justice Breyer also filed a separate dissent. His main purpose in doing so apparently was to express his opinion that the EEOC appropriately does have authority to issue regulations concerning the meaning of the "disability" definition contained in the ADA.[435] While the ADA only authorizes the EEOC to adopt regulations to carry out the employment provisions of Title I, Justice Breyer indicated his belief that the EEOC has the authority to interpret the definition of "disability" which appears in the statute's preamble so long as such elaboration is necessary in order to carry out the substantive provisions of Title I.[436] Justice Breyer reasoned that Congress would not have wanted to deny the EEOC the power to issue such a regulation, at least where it is consistent with the statutory definition and other relevant interpretations.[437]

B. Impact on the Judicial Dissonance Phenomenon

The three decisions summarized above resolve three out of our ten disputed issues. While this reduces the amount of dissonance in our sample set, the question remains whether these decisions will lead to a greater degree of judicial consensus in addressing ADA issues more generally. This subsection revisits the sources of judicial dissonance in light of these decisions.[438]

1. Lack of Statutory Detail

The three decisions arguably serve to reduce the impact of the ADA's imprecise statutory language in two different ways. First, the cases resolve three thorny interpretive issues while adding some useful gloss on the sparse ADA text. *Bragdon* and *Sutton*

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[434] *Id.* at 2156-57.

[435] Justice Breyer also expressed his agreement with Justice Stevens concerning the mitigating measures issue. He stated that when faced with the choice of either including some people that Congress may not have intended to protect or excluding some of those whom Congress certainly did want to protect, the statute's language, structure, purpose, and history favor the first option. *See id.* at 2161 (Breyer, J., dissenting).

[436] *Id.* *See* 42 U.S.C. § 12116 (authorizing the EEOC to issue regulations to carry out "this subchapter," referring to the employment subchapter).

[437] *Id.* at 2161 (Breyer, J., dissenting).

[438] The three decisions had no apparent impact on two of these sources. The ADA's more complicated antidiscrimination formula and the significance of the unresolved ADA policy issues were not altered by these cases. These two factors, accordingly, will not be reviewed in this subsection except to note that they will continue to provide an impetus for divergent judicial viewpoints.

provide some guidance in determining who is encompassed within the protected class of individuals with a "disability." The *Cleveland* decision similarly clarifies the interplay between the ADA and the Social Security Act.

These decisions, however, likely will not bring much clarity beyond the specific issues resolved. Take, for example, the Court's construction of the "substantial limits" prong of the disability definition in *Bragdon* and *Sutton*, probably the ADA provision most closely scrutinized in these cases. The *Bragdon* court ruled that the "substantially limits" requirement does not mean that an individual must be wholly incapable of performing a major life activity,[439] while the Court in *Sutton* ruled that the degree of limitation should be ascertained after considering the impact of mitigating measures.[440] While these are useful and important pieces of information, they do not shed any light on how any of the remaining disputed issues in our subset should be resolved. Moreover, since these rulings push in opposite directions, they do not signal an obvious expansion or contraction of the statutory language.

On another level, the *Bragdon* Court indicated that judicial and administrative precedent under the Rehabilitation Act should be followed in interpeting the ADA.[441] The *Bragdon* Court found it significant that every federal court decision prior to the ADA's enactment concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of a covered handicap.[442] Agency interpretations of the Rehabilitation Act consistently reached similar conclusions.[443] This Rehabilitation Act precedent is important, the Court noted, because the ADA's definition of disability "is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973."[444] The Court, accordingly, summarized the impact of Rehabilitation Act precedent as follows:

> We find the uniformity of the administrative and judicial

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

440 *Sutton*, 119 S. Ct. at 2146.

441 *Bragdon*, 524 U.S. at 641-46.

442 *Id.* at 644.

443 *Id.* at 642-46.

444 *Id.* at 631. The *Bragdon* Court also noted that the ADA itself states that, except as otherwise provided, nothing in the ADA shall be construed to apply a lesser standard than the standards applied under the Rehabilitation Act. *Id.* *See* 42 U.S.C. § 12201(a) (1994).

> precedent construing the definition [under the Rehabilitation Act] significant. When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well. [citations omitted]. The uniform body of administrative and judicial precedent confirms the conclusion we reach today as the most faithful way to effect the congressional design.[445]

At first blush, the *Bragdon* Court's admonition to give Rehabilitation Act precedent virtual stare decisis effect would appear to add considerable flesh to the bare bones of the ADA. This impact, however, is limited by two factors discussed above.[446] First, the ADA is not simply a broader reenactment of the Rehabilitation Act. Congress, while using the Rehabilitation Act as a model, deviated from that statute's language in a number of significant respects. Second, most of the key issues currently in dispute under the ADA were never determined authoritatively under the Rehabilitation Act. Of our set of ten issues, only the asymptomatic HIV issue had been clearly resolved prior to the enactment of the ADA. As a result, the recognition of Rehabilitation Act precedent for ADA purposes is likely to have only a modest effect in terms of reducing the divergence in judicial construction of the ADA.

2. *Lack of Agency Deference*

The *Bragdon* and *Sutton* decisions took very different approaches to the topic of agency deference. While the majority opinion in *Bragdon* broadly deferred to agency interpretations of the ADA concerning the disabling nature of HIV infection, the *Sutton* majority explicitly rejected agency guidelines with respect to the impact of mitigating measures.

The *Bragdon* decision contains a strong endorsement of the relevant administrative agency guidance. The Court stated that its conclusion that asymptomatic HIV is a covered disability was "further reinforced" by guidance issued by the EEOC with respect to Title I of the ADA and by the DOJ with respect to Title III.[447] The majority opinion explained that, as agencies directed by Congress to issue implementing regulations and to provide

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[445] *Bragdon*, 524 U.S. at 645 (1998).

[446] *See supra* notes 312-14 and accompanying text.

[447] *Bragdon*, 524 U.S. at 644-48.

technical assistance concerning the ADA, their "views are entitled to deference."[448]

The Court's favorable review of agency interpretation, of course, is not a new development in the law. The Court's well-known *Chevron* doctrine, announced in 1984, holds that a reviewing court should adhere to an agency's regulatory interpretation where a statute is silent or ambiguous and the interpretation is based on a permissible construction of the statute.[449] The *Bragdon* Court simply invoked the *Chevron* doctrine in stating that the views of the administrative agencies charged with interpreting and enforcing the ADA "are entitled to deference."[450]

Bragdon, at least in a pre-*Sutton* world, offered hope of a way out of the judicial dissonance thicket. The EEOC and the DOJ have adopted interpretative positions with respect to the vast majority of currently contested issues under the ADA. If the *Bragdon* decision truly represented a directive by the Supreme Court to follow administrative agency guidance whenever feasible, the current din of judicial confusion soon will be on the wane.

This would be a positive development. The generally liberal interpretation provided by the two agencies conforms to Congress' fundamental purpose of enacting the ADA in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[451] In contrast, the current pattern of judicial unrest results in considerable uncertainty for those subject to ADA regulation. This uncertainty, in turn, generates increased administrative costs in terms of legal advice and litigation.

Perhaps most importantly, no alternative solution appears imminent. Decisive congressional action in adding detail to the ADA is unlikely, leaving repeated Supreme Court intervention as the only other option. The two available paths seem clear: courts will either follow *Bragdon* and defer to agency guidance or continue on a long and arduous path of judicial dissonance.

The Court appears to have chosen the latter course in its more recent *Sutton* decision. In that decision, the majority opinion written by Justice O'Connor firmly rejected the agencies' reading

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[448] *Id.* at 646.

[449] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

[450] *Bragdon*, 524 U.S. at 646.

[451] 42 U.S.C. § 12101(b)(1) (1994).

of the ADA. The *Sutton* majority noted that both the EEOC and the DOJ had issued guidelines indicating that the determination of whether an individual is substantially limited in a major life activity should be made without considering the impact of mitigating measures.[452] Finding this interpretation to be inconsistent with three separate provisions of the statute,[453] the Court dismissed the guidelines as "an impermissible interpretation of the ADA."[454]

Beyond directly rejecting the agencies' views with respect to the mitigating measures issue, the *Sutton* opinion also raised two other warning flags concerning the status of agency guidance under the ADA. First, the *Sutton* Court suggested that agency promulgations concerning the definition of a covered "disability" may not be legally authorized. While recognizing that Congress authorized three different agencies to issue regulations concerning those portions of the ADA that they are entrusted to administer, the Court stated: "No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA, see §§ 12101-12102, which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term 'disability.'"[455] Because neither party challenged the validity of the agency regulations (or apparently the interpretive guidance), the Court concluded that it need not decide how much deference they were due.[456]

More narrowly, the *Sutton* opinion casts doubt on the validity of the EEOC's regulations as to when an individual has standing under the ADA because of a substantial limitation on the major life activity of "working." In this regard, the Court stated:

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

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452 *Sutton*, 119 S. Ct. at 2145-46.

453 The three provisions relied upon by the *Sutton* majority are discussed *supra* at notes 413-18 and accompanying text.

454 *Sutton*, 119 S. Ct. at 2146.

455 *Id.* at 2145.

456 *Id.* at 2145-46.

clusion itself is by reason of handicap."[457]

The Court concluded that plaintiffs had not established that the employer regarded them as substantially limited in their ability to work, even "[a]ssuming without deciding that working is a major life activity and that the EEOC regulations . . . are reasonable."[458]

The *Sutton* decision appears to have significantly retracted the pro-deference message of *Bragdon*. Prior to *Bragdon*, as noted above,[459] the lower courts frequently disregarded agency guidance on the grounds that the statute clearly expressed itself in a manner differently than as construed by the administrative agencies. The *Bragdon* decision appeared to signal a pro-deference direction, and some courts, such as the Fifth Circuit in *Washington v. HCA Health Services of Texas, Inc.*,[460] began to defer to plausible agency guidance even while noting that they would have reached a different conclusion on their own. The *Sutton* Court's rejection of agency guidance, however, will surely drown out *Bragdon*'s earlier pro-deference admonition. Here, actions speak louder than words and the Court in *Sutton* essentially replicated the pre-*Bragdon* practice of judicial nondeference when a different reading of the ADA's sparse text lends itself to a more desirable result.

The *Sutton* decision goes even further, however, by suggesting, without deciding, that the EEOC's regulations concerning "disability" and "working" may be invalid. These suggestions provide even more reasons for courts to ignore agency guidance. By raising questions that it does not decide, the Court inevitably creates more confusion for lower courts which must now debate both whether agency guidance was validly adopted and whether it stakes out a reasonable position.

The *Bragdon* Court's message of agency deference provided the best hope for overcoming the problem of judicial dissonance in the near futue. The *Sutton* decision, unfortunately, not only rejected this path, but adds still more fuel to the fire of judicial dissonance.

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457 *Id.* at 2151.

458 *Id.* at 2151-52.

459 *See supra* notes 320-24 and accompanying text.

460 152 F.3d 464, 470 (5th Cir. 1998). The *Washington* decision is discussed *supra* at notes 95-97 and accompanying text.

3. *Individualized Inquiry*

Perhaps the only point on which all three opinions agree is that the analysis of discrimination claims under the ADA requires an individualized inquiry.[461] In *Bragdon*, Justice Kennedy's opinion declined to resolve Abbott's argument that HIV infection is a per se disability.[462] The Court stated that it "need not address" that question in light of its ruling that Abbott, herself, met the definition of an individual with a disability.[463] In *Cleveland*, the Court rejected the notion that a declaration of disability status for purposes of Social Security benefits automatically precludes the declarant from simultaneously claiming to be a qualified individual under the ADA.[464] The Court, instead, adopted an approach that focuses on that individual's explanation of the particular circumstances surrounding the two assertions.[465] The *Sutton* opinion contains the strongest endorsement of the individualized inquiry approach. In rejecting agency guidance with respect to the impact of mitigating measures, the Court stated: "The definition of disability also requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual' § 12102(2). Thus, whether a person has a disability under the ADA is an individualized inquiry."[466] The Court concluded that the guidelines approach was inconsistent with such an individualized inquiry because it "would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals."[467]

As discussed above,[468] the individualized inquiry approach feeds the judicial dissonance phenomenon by fostering increased litigation and deterring the accumulation of precedent. The

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[461] The Supreme Court also endorsed an individualized inquiry approach in *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999). In that case, the Court overturned an appeals court determination that monocular vision is a per se disability, complaining that "the Court of Appeals did not pay much heed to the statutory obligation to determine the existence of disabilities on a case-by-case basis." *Id.* at 2169.

[462] *Bragdon*, 524 U.S. at 642.

[463] *Id.* The *Bragdon* dissent clearly embraced a case-by-case approach. *See id.* at 648 (Rehnquist, C.J., dissenting) (stating that "[i]t is important to note that whether respondent has a disability covered by the ADA is an individualized inquiry.").

[464] *Cleveland*, 119 S. Ct. at 1603.

[465] *Id.* at 1603-04.

[466] *Sutton*, 119 S. Ct. at 2147.

[467] *Id.*

[468] *See supra* notes 350-64 and accompanying text.

strong preference exhibited by the Court for this case-by-case approach, accordingly, is not likely to lead toward a greater judicial consensus in construing the ADA.

In determining whether the policy benefits of this approach outweigh the costs of continued dissonance, it is important to remember that the individualized inquiry approach operates at two different stages of an ADA case.[469] As in *Bragdon* and *Sutton*, an individualized inquiry is used by courts in determining the threshold question of whether an individual has a "disability." Courts also use an individualized focus in the subsequent stage of determining whether a claimant is a "qualified" individual who, with or without reasonable accommodation, can perform the essential functions of the job, as in the *Cleveland* context.

The individualized inquiry approach makes considerable sense in the latter context. At the "qualified" stage of an ADA case, an individualized inquiry properly focuses on the objective capabilities of each individual claimant rather than on presumed group stereotypes.[470] Thus, an individualized inquiry at this stage serves a purpose similar to the *McDonnell Douglas* test under Title VII in terms of providing a framework for isolating legitimate and illegitimate reasons for employment decisions.[471]

The individualized inquiry approach makes less sense, however, at the earlier stage of determining whether an individual is disabled and has standing to pursue an ADA claim. At this stage, a certain degree of predictability is preferable. Both employees and employers would benefit from knowing what types of impairments are covered by the ADA. An individualized focus as to standing in each and every case is not conducive to that end.

This drawback is illustrated in the *Sutton* Court's discussion of diabetes and the need for an individualized standing inquiry. The Court correctly noted that under the guidelines approach of disregarding mitigating measures, "courts would almost certainly

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469 *See supra* notes 351-52 and accompanying text.

470 This, of course, is a key objective of the ADA. *See* 42 U.S.C. §§ 12101(a)(7) (finding that individuals with disabilities have been subject to unequal treatment "based on characteristics . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals"), and 12101(b)(1) (articulating as a purpose of the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

471 *See supra* notes 61-62 and accompanying text.

find all diabetics to be disabled."[472] Under *Sutton's* more individualized mode of analysis, in contrast, ADA coverage will extend only to those diabetics who are significantly limited even with a constant regimen of monitoring blood sugar levels and insulin therapy.[473]

The *Sutton* Court views this more individualized focus as beneficial. We disagree. Under the guidelines approach, diabetes is a disability. This result is predictable and comports with the undisputed legislative history.[474] Under the approach adopted in *Sutton*, it is not known who is covered by the statute without continual resort to litigation.

An individualized inquiry at the "disability" stage, moreover, does not serve the same anti-discrimination purposes as at the "qualified" stage. Indeed, the individualized approach at the earlier stage frequently results in claimants never getting to the stage at which qualifications are assessed.[475] Thus, under *Sutton*, an employer is free to rely on stereotypical assumptions in refusing to hire or promote an individual whose diabetes is under control because of medication. An employer is prohibited only from discriminating with respect to those few diabetics for whom medication does little or no good. The use of an individualized inquiry in this context overly accentuates the ADA's unique standing requirement[476] and results in a perilously thin zone of individuals who are both "disabled" and yet "qualified."[477]

The *Bragdon* and *Sutton* decisions also suggest that the individualized inquiry approach may encompass two difficult subjective components when invoked at the "disability" stage. The

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[472] *Sutton*, 119 S. Ct. at 2147.

[473] *Id.* at 2149.

[474] *See* H.R. REP. NO. 101-485(II), at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 ("persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication").

[475] *See supra* notes 360-64 and accompanying text.

[476] *See Sutton*, 119 S. Ct. at 2156-57 (Stevens, J., dissenting) (explaining that the mitigating measures issue only impacts the issue of standing and, even under the guidelines approach, leaves employers free to demand that covered employees are qualified to perform the job).

[477] As Arlene Mayerson, directing attorney of the Disability Rights Education and Defense Fund, commented with regard to *Sutton*, "[i]t doesn't make any sense to consider ADA plaintiffs in their corrected state if employers rejected them because of uncorrected conditions." 17 *Human Resources Report* 761 (BNA, July 19, 1999).

Bragdon decision, as discussed above,[478] can be read as necessitating an inquiry into the subjective inclinations of some plaintiffs in order to determine disability status. The *Bragdon* dissent stressed that whether an activity is a major life activity is a subjective inquiry with respect to each individual claimant.[479] The *Bragdon* majority responded by noting that the record established that reproduction was a major life activity for Abbott.[480] One possible meaning of this exchange is that the disability determination for individuals with asymptomatic HIV is dependent upon whether each particular claimant would otherwise desire to procreate. If this reading is accurate, then, it suggests that certain activities may constitute a "major life activity" only if they are subjectively important to that particular individual. Such a standard would require an individualized inquiry of the most difficult kind—one that attempts retroactively to ascertain an individual's subjective intent. It also could result in the anomaly that two individuals with the same degree of impairment are treated differently in terms of their respective disability status. If the Court has adopted this standard, and we certainly hope that it has not, then the *Bragdon* decision only adds to the confusion.

The *Sutton* decision requires courts to probe the minds of employers in ascertaining the reach of the third prong of the "disability" definition. Under that prong, an individual is disabled if an employer "regards" that individual as having an impairment that substantially limits one or more life activites of that individual.[481] The Court in *Sutton* ruled that an individual is "regarded as" disabled if an employer mistakenly believes that a person's nonlimiting impairment substantially limits one or more major life activities.[482] On the other hand, the *Sutton* opinion explained that an individual is not "regarded as" disabled simply because an employer believes that a person's nonlimiting impairment precludes him or her from adequately performing the job at issue.[483] The crucial distinction, then, is the employer's subjective perception.

Once again, this subjective inquiry may mean that two individuals who are similarly situated in terms of impairment could be

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[478] *See supra* notes 387-89 and accompanying text.
[479] *Bragdon*, 524 U.S. 657-60 (Rehnquist, C.J., dissenting).
[480] *Id.* at 2206-07.
[481] 42 U.S.C. § 12102(2)(C) (1994).
[482] *Sutton*, 119 S. Ct. at 2152.
[483] *Id.*

treated disparately for ADA standing purposes. Take the situation of Karen Sutton and her twin sister Kimberly Hinton. Each sister has uncorrected visual acuity of 20/200 or worse that is correctable with corrective lenses to 20/20 vision.[484] Let's assume that United Air Lines decides not to hire Karen because it perceives her eyesight impairment as interfering with her ability to perform adequately as a global airline pilot. Let's also assume that United Air Lines decides not to hire Kimberly because it perceives her eyesight impairment as interfering with her ability to perform a broad range of jobs including that of a global airline pilot. Under the reasoning of the *Sutton* majority, Kimberly has standing as an individual with a disability, while Karen does not.

As noted in Justice Steven's dissenting opinion, Congress apparently intended that impairments should be viewed in their unmitigated state under prong one of the "disability" definition because of the difficulty of ascertaining an employer's subjective intent under prong three.[485] By rejecting this viewpoint, the Court in *Sutton* unwisely amplified the importance of this difficult prong three inquiry.

The use of an individualized inquiry approach at the "disability" stage, accordingly, is prone to considerable mischief. As an objective inquiry, the individualized focus inhibits predictability and unreasonably shrinks the class of individuals with legal protection from employment decisions based on sterotypical assumptions. *Bragdon* and *Sutton* compound the problem by adding two additional subjective components to this inquiry. By expanding the role of an individualized inquiry beyond its reasonable policy limitations, the Supreme Court has provided impetus for yet more judicial dissonance.

4. Additional Considerations

Three other aspects of these decisions further suggest that the judicial dissonance phenomenon will continue for many years to come. First, the three decisions fail to signal a direction in which the lower courts should head in interpeting the ADA. *Bragdon* and *Cleveland* represent a broadening of employee rights, while *Sutton* is a resounding pro-employer victory. In pure mathematical terms, this may suggest somewhat of a pro-employee tilt. In reality, however, the opposite is more likely true as *Sutton* is

484 *Id.* at 2143.

485 *See id.* at 2155 n.2 (Stevens, J., dissenting).

both the most far-reaching and the most recent of these decisions. In any event, these decisions push in different directions and the lower courts likely will follow suit.

Second, these cases reveal very pronounced differences in how the individual justices view the ADA. In both *Bragdon* and *Sutton*, the majority and dissenting opinions depict a wide conceptual gulf. The tenor of the opinions suggest that much is at stake and that the battle lines are just being drawn. In this regard, these decisions tend to mirror the judicial dissonance phenomenon rather than resolve it.

Finally, the likely continuance of the judicial dissonance phenomenon is further illustrated by the fact that more new issues have arisen during the past year than those which the Supreme Court has resolved. During the most recent Spring 1999 version of the ADA in the Workplace course, we added four new issues on which the circuit courts of appeal currently are divided.[486] As with the original ten issues, the divergence of judicial perspective on these issues is deep and intractable.

Conclusion

The ADA is in turmoil. More to the point, the courts are in turmoil over the ADA. At stake is a crush of litigation and the future direction of the ADA. The Supreme Court, in its first major decisions under the statute, has failed to chart a course that will lead to a broader uniformity of interpretation. If anything,

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[486] The four new issues are as follows:

(1) Is an employer liable under the ADA for failing to engage in an interactive process to ascertain the existence and feasibility of a reasonable accommodation? *Compare* Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996) (yes), *with* Barnett v. U.S. Air, Inc., 157 F.3d 744 (9th Cir. 1998) (no).

(2) In determining whether an individual is qualified for ADA purposes, should regular and predictable attendance be presumed to constitute an essential job function? *Compare* Jackson v. Veterans Admin., 22 F.3d 277 (11th Cir. 1994) (yes), *with* Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998) (no).

(3) Must a job applicant be disabled in order to challenge an employer's practice of making impermissible pre-employment inquiries? *Compare* Armstrong v. Turner Indus., 950 F. Supp. 162 (M.D. La. 1996), *aff'd on other grounds*, 141 F.3d 554 (5th Cir. 1998) (yes), *with* Griffin v. Steeltek, Inc., 160 F.3d 591 (10th Cir. 1998) (no).

(4) Does the Eleventh Amendment to the United States Constitution bar an ADA claim against a state in federal court? *Compare* Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (yes), *with* Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998) (no).

the Court's three major decisions provide still more opportunities for the lower courts to head off in a dizzying variety of directions. Before we lose our way in this dense legal thicket, the Court should back up and rediscover the road map that it laid out in the *Bragdon* decision. By revisiting *Bragdon*'s lesson of deferring to administrative agency guidance, the judiciary can chart a path out of confusion and toward consensus.