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The Americans with Disabilities Act of 1990: Improving Judicial Determinations of Whether an Individual is Substantially Limited

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On July 26, 1990, President George Bush signed the Americans With Disabilities Act of 1990 (ADA).[1] One of the ADA's stated purposes is to "provide a clear and comprehensive national mandate for the *elimination* of discrimination against individuals with disabilities."[2] The ADA seeks to eliminate discrimination against disabled persons by granting them status as a protected class for purposes of employment,[3] transportation,[4] public accommodations,[5] and telecommunications services.[6] Due to its multi-title structure, the ADA will take effect between July 26, 1991 and July 26, 1992.

Whether a disability exists will be a threshold issue in every action brought under the ADA.[7] Under the ADA, an individual is considered disabled,[8] and therefore a member of the protected class, if the individual satisfies one of three tests. The "current" test requires a plaintiff to show that she has a physical or mental impairment that currently *substantially limits* her performance of some major life activity, such as car-

1. Pub. L. No. 101-336, 134 Lab. Rel. Rep. (BNA) No. 11 (extra ed. July 16, 1990) (to be reported at 104 Stat. 327 (1990)) [hereinafter ADA].

2. ADA, *supra* note 1, § 2(b)(1) (emphasis added). Not only is the ADA's purpose broad and remedial, but also it is designed to provide clear and ascertainable standards to which parties may look in addressing discrimination against persons with disabilities. *Id.* § 2(b)(2). Legal commentators have called the ADA "a comprehensive piece of civil rights legislation that will establish far-reaching, and at times costly, obligations." Fagin, McAvoy & Dorman, *New Federal Legislation Creates Challenges, Benefits for Business*, NAT'L L.J., Sept. 3, 1990, at 18.

3. ADA, *supra* note 1, §§ 101-108 (Title I).

4. *Id.* §§ 201-246 (Title II).

5. *Id.* §§ 301-310 (Title III).

6. *Id.* §§ 401-402 (Title IV).

7. The ADA protects only those persons who prove that they are disabled. *See infra* note 37.

8. The ADA defines "disability" with respect to an individual as follows:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

ADA, *supra* note 1, § 3(2).

ing for one's self, performing manual tasks, learning and working.[9] The "record of" test requires a plaintiff to show that she was at one time so limited.[10] The "regarded as" test requires the plaintiff to show that a party covered by the ADA either perceives or treats her as being so limited.[11] Determining whether the ADA protects an individual thus depends in large part on the definition of "substantially limits."[12] Unfortunately, this phrase is neither defined in the statute[13] nor susceptible to a simple common sense definition.[14] Additionally,

9. Non-discrimination on the Basis of Handicap Guidelines, 45 C.F.R. § 84.3(j)(2)(ii) (1989). The regulations also list other life activities: walking, seeing, hearing, breathing, speaking. *Id.* The Department of Health & Human Services, then Health, Education & Welfare, promulgated the regulations to effectuate the Federal Rehabilitation Act of 1973, including the definition of "individual with handicaps." These life activities likely will be part of the ADA.

10. ADA, *supra* note 1, § 3(2)(B). For a previous explication of the "record of" test, see 45 C.F.R. § 84.3(j)(2)(iii) (1989).

11. ADA, *supra* note 1, § (3)(2)(C). For an explication of the intricacies of this test, see 45 C.F.R. § 84.3(j)(2)(iv) (1989).

12. Although this Note does not focus on employment suits under the ADA, such suits will be a major part of litigation under the ADA. In suits arising in the employment context, a plaintiff's ability to show that she is a "qualified individual with a disability," will determine whether she can gain protection under the ADA. ADA, *supra* note 1, § 102(a). A person will be considered a "qualified individual with a disability" if she can show that with or without reasonable accommodation, she can perform the essential functions of the employment position at issue. *Id.* § 101(8). Discussion of "reasonable accommodation" is beyond the scope of this Note; the ADA states the relevant principle in §§ 101(9)(A)-(B).

13. *See infra* Part I. A.

14. The wide variety of impairments alone makes it difficult to define "substantially limits" using common meanings. At issue here is the distinction between "classic" and "non-classic" impairments. Individuals with conditions like paraplegia, total blindness, deafness, severe cerebral palsy, Down's Syndrome, amputation of limbs, and cancer testified at the hearings of the congressional committees considering the ADA. S. REP. NO. 116, 101st Cong., 1st Sess. 4-5 (1989). These conditions can be described as classic impairments, those that come to mind when a person is asked to think of a disability.

Additionally, the permanent and total effects that usually result from such impairments mean that they likely are considered impairments that "substantially limit" a major life activity, no matter how that phrase is interpreted. Thus, such impairments are prototypical statutory disabilities. For example, some impairments seem to fit clearly under the definition's "current" test: total blindness, deafness, paralysis. Others clearly fit under the "record of" test: cancer, heart disease, existing records of mental retardation. Still others clearly fit under the "regarded as" test: a person with a limp or tic who is perceived to have severe cerebral palsy. Indeed, these are conditions present in cases under the Federal Rehabilitation Act in which parties have stipulated that the plaintiff is handicapped. For examples of such stipulations see *infra* note 59 and accompanying text.

Although Congress may primarily have contemplated classic impairments

existing federal law fails to provide a clear definition.[15]

This Note attempts to provide guidance to courts that will face the question of whether an individual is "substantially limited in a major life activity" and thus disabled within the meaning of the ADA. Part I examines the ADA's text and legislative history. Part II considers the meaning given the phrase under the Federal Rehabilitation Act of 1973 (FRA).[16] Because the FRA is the source of the ADA's definition of disability, it may provide important insight on the meaning of the phrase in the ADA. Part III proposes a standard and a set of factors for determining whether a given impairment has the requisite severity to be considered "substantially limiting." Part III then demonstrates how this proposed analytical method will aid courts' determinations of disability under the ADA, particularly under the major life activity of "working."

I. "SUBSTANTIALLY LIMITS" AND THE ADA

A. TEXT OF THE ADA

The text of the ADA provides little guidance for determining the meaning of "substantially limits." It merely defines the term "disability" and states that the definition applies throughout the Act.[17] The legislation does refer to specific conditions and impairments, but, with one exception,[18] does so only to expressly exclude them from consideration as disabilities.[19] Be-

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when passing the ADA, other impairments exist that initially do not seem the same as the above conditions. Depression, war trauma syndrome, dyslexia, obesity, blindness in one eye, ruptured disks, etc. are conditions that can be termed "non-classic" impairments. Unlike classic impairments, these conditions do not intuitively suggest that an individual is disabled.

The more an individual's impairment moves away from classic impairments, the more standards of severity and methods of analysis are needed to determine whether an impairment "substantially limits" a major life activity. Without such standards and analysis, there is a greater risk that the ADA supporters' desired breadth and uniformity will not occur.

15. *See infra* Part II.

16. 29 U.S.C. §§ 701-795 (1988). Like the ADA, the FRA was designed to provide employment opportunities to disabled persons. *See infra* notes 38-40 and accompanying text.

17. *See supra* note 8 and accompanying text (providing the definition).

18. The ADA expressly provides that persons who have successfully completed rehabilitation from drug use, are participating in a supervised drug rehabilitation program and are not engaging in illegal drug use, or are erroneously regarded as engaging in illegal drug use, cannot be excluded from consideration as an individual with a disability. ADA, *supra* note 1, § 510(b)(1)-(3).

19. Homosexuality and bisexuality are not considered to be impairments.

cause the statute does not provide a rationale for excluding the conditions, the list of exclusions does not assist courts trying to interpret what Congress intended to *include* as a disability. In addition, the legislative history does not indicate *why* the conditions were excluded, nor how these excluded conditions pertain to any element of the definition.[20]

B. LEGISLATIVE HISTORY

The legislative history of the ADA, unlike its express language, does provide some guidance on Congress's meaning of the phrase "substantially limits." Congress adopted the definition of disability from the earlier FRA.[21] Nevertheless, there was no consensus on the meaning of the definition in the ADA.

For example, congressional floor debate evidences disagreement on what the definition meant and whom it would cover.[22]

Id. § 511(a). The ADA also provides that "disability" does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not arising from physical impairments, or other sexual behavior disorders, *id.* § 511(b)(1); compulsive gambling, kleptomania, or pyromania, *id.* § 511(b)(2); or psychoactive substance use disorders resulting from current use of drugs, *id.* § 511(b)(3). It is unclear if Congress considered the excluded conditions to lie outside the purposes of the ADA. The rest of the ADA is silent on the issue of who is or is not disabled, except to say that nothing in the ADA, "shall be construed to apply a lesser standard than the standards applied under Title V of the . . . [FRA] . . . or the regulations issued by Federal agencies pursuant to such Title." *Id.* § 501(a).

20. *See supra* note 19.

21. S. REP. NO. 116, *supra* note 14, at 21 ("the definition of the term 'disability' is comparable to" the FRA definition).

22. In the Senate, opponents and supporters disagreed over the parameters of the definition. Senator Helms, an opponent of the ADA, engaged Senator Harkin, the sponsor of the ADA, in a colloquy over various disorders that would or would not be included in the ADA. 135 CONG. REC. S10,765 (daily ed. Sept. 7, 1989). Helms implied that the definition was very loose and would be an endless source of litigation. *Id.*; *see also* 135 CONG. REC. S10,742 (daily ed. Sept. 7, 1989) (statement of Senator Pryor) (unless the definition is tightened, the ADA might create a "lawyer's mecca"); 135 CONG. REC. S10,772 (daily ed. Sept. 7, 1989) (statements of Senators Armstrong and Helms) (the definition is "broad" and "vague").

Commentators also have disagreed on the meaning of the definition. *See* Haines, E.E. Black, Ltd. v. Marshall: *A Penetrating Interpretation of "Handicapped Individual" for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 LOY. L.A.L. REV. 527, 530 (1983) (arguing that despite administrative regulations explaining the definition, ambiguities remain); Comment, *The Rehabilitation Act of 1973: Who is Handicapped Under Federal Law*, 16 U.S.F. L. REV. 653, 675-76 (1982) [hereinafter Comment, *Rehabilitation Act of 1973*] (arguing that "substantial" is synonymous with "actual" or "real"); Comment, *What's a Handicap Anyway? Analyzing Handicap Claims Under the Rehabilitation*

In the House of Representatives, supporters of the ADA considered the definition to be both clear and consistent with the purposes of the ADA. Representative Bartlett, manager of the ADA in the House, expressly stated that the definition comported with the broad purposes of the ADA because it mandated a "functional" analysis, not a medical conclusion.[23] Opponents of the ADA, in contrast, found the lack of specificity regarding impairments to be troubling. To them, the definition's broad scope would result in the definition being "a fertile hunting ground for litigious people in our society to expand the definition."[24]

The reports of the relevant congressional committees provide considerably more certainty as to the meaning of "substantially limits."[25] The report of the Senate Committee on Labor and Human Resources,[26] the committee responsible for developing the structure of the ADA, most clearly indicates the boundaries of "substantially limits" for purposes of the ADA.[27] The report states that an impairment does not constitute a disability unless its "severity is such that it results in a 'substantial limitation of one or more major life activities.' "[28] The report

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Act of 1973 and Analogous State Statutes, 22 WILLAMETTE L. REV. 529, 542 (1986) [hereinafter Comment, *Handicap*] (stating that "substantial limitation" is the most evasive term within the definition of handicapped individual). *But see* Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 408 (1984) (arguing that "[s]ince . . . [1978] . . . there has been little controversy concerning the class of persons protected by [the FRA]").

23. 136 CONG. REC. H1920 (daily ed. May 1, 1990). In fact, the managers of the ADA refused efforts to outline any objective list of conditions that would constitute a disability. *See id.* at H1920-21.

24. 136 CONG. REC. H4612-13 (daily ed. July 12, 1990) (statement of Representative Dannemeyer).

25. Courts generally give committee reports greater weight than floor debates, so the uncertainty in the floor debate is overshadowed. W. ESKRIDGE & P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 709-10 (1988) (stating this principle and discussing the difficulties inherent in using committee reports to ascertain legislative intent).

26. S. REP. NO. 116, *supra* note 14.

27. Initially, the committee emphasized that when analyzing impairments, the focus should be on the impairment's *effects* on the individual with the impairment, not on the impairment's qualities. *Id.* at 22-23.

28. *Id.* at 22. The committee used the example of a paraplegic. That person would "have a substantial difficulty" in the major life activity of walking. *Id.* The effects of the paraplegia, by definition, would result in an inability to walk, thus being a severe enough restriction on walking to qualify as a substantial limitation.

suggests that the committee focused on an impairment's *effects* on an individual's life activities.

The report also notes that substantially limiting impairments cannot be "minor" or "trivial."[29] Rather, the impairments must restrict an individual's major life activity as to the "*conditions, manner, or duration* under which [the activities] can be performed in comparison to *most people*."[30] To illustrate what it meant by this phrase, the committee used an example: Suppose a person could walk for ten miles continuously, but could not walk the eleventh mile without pain. According to the committee, such a person is not substantially limited in walking because "*most people*" would be unable to walk eleven miles without experiencing some discomfort.[31] Thus, according to the key congressional committee, courts should determine whether an individual is "substantially limited" by analyzing the extent to which an impairment limits the individual as measured against the abilities of most unimpaired persons. In addition, analysis of an impairment's effects should focus on three ways in which an impairment limits a person's activities: the manner, conditions, and duration of partaking in a given activity.[32]

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29. *Id.* at 23. The committee's example of a minor impairment was an infected finger.

30. *Id.* (emphasis added).

31. *Id.*

32. The report concluded that the definition's "current" test — "a physical or mental impairment that substantially limits one or more major life activities," ADA, *supra* note 1, § 3(2)(A) — should cover only impairments that currently limit a person's activities. S. REP. NO. 116, *supra* note 14, at 23. The "record of" test — "[an individual who has] a record of such an impairment," ADA, *supra* note 1, § 3(2)(B) — should cover individuals who were at one time limited to a degree that would satisfy the definition's "current" test, even though they have recovered from the impairment and would therefore not qualify under the "current" test. S. REP. NO. 116, *supra* note 14, at 23. This definition also should cover individuals who were misclassified as having an impairment of the requisite severity. *Id.*

As examples of disabilities falling under the "record of" test, the committee included persons with histories of emotional or mental illness, cancer, heart disease, and people misclassified as being mentally retarded. *Id.* In addition, the Supreme Court has concluded that hospitalization is sufficient to prove disability under the "record of" test. School Board of Nassau County v. Arline, 480 U.S. 273, 281 (1987). Although the ADA is silent on the issue, plaintiffs likely will attempt to use the Supreme Court's conclusion to establish that hospitalization alone is sufficient for an individual to be considered disabled under the ADA.

Finally, the committee's report indicates that the "regarded as" test — "[an individual who is] regarded as having an impairment," ADA, *supra* note 1, § 3(2)(C) — is intended to include only those persons who are substantially

The House Committee on the Judiciary was the only other congressional committee to consider the definition of disability in any detail. Its report[33] was similar to the report of the Senate Committee on Labor and Human Resources,[34] except that it focused specifically on disability in the employment context. The report initially suggested a broad view of disability, indicating that an impaired person who faces discrimination in discrete employment situations may be substantially limited in the major life activity of working.[35] Other comments, however, seem to limit this statement's broad sweep. For example, the report described a person limited in her ability to perform a particular job due to the unique circumstances of the job site or the materials used.[36] In that situation, the person may not qualify as substantially limited in the major life activity of working.[37] Thus, the ADA's text and legislative history are ambiguous about the meaning of "substantially limits."

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limited in the minds of others as a result of being perceived to have a substantially limiting impairment, are treated as if they had such an impairment, or have such an impairment only as a result of other people's attitudes. S. REP. NO. 116, *supra* note 14, at 23-24. *See* H.R. REP. NO. 485, 101st Cong., 2d Sess. 30 (1990) (perception of others is a key element to the test; an individual's perception of her own impairments is not important). The committee stated that this test would be most relevant to persons with "stigmatic conditions." S. REP. NO. 116, *supra* note 14, at 24. Although the committee did not define "stigmatic conditions," it gave as an example a severe burn victim who faces discrimination because of scarring. *Id.* In addition, the misclassification element in the "record of" test is limited to misclassifications that occurred in the past. Any misclassification that is currently in place would be synonymous with being "regarded as having" a substantially limiting impairment, thereby mandating that the individual be covered under the definition's third test.

The committee gave two other examples. The first was a person rejected for a job because an x-ray reveals a back abnormality, even though the individual does not evidence any symptoms of a back ailment. S. REP. NO. 116, *supra* note 14, at 24. This example mirrors the facts of E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1091-92 (D. Haw. 1980). *See infra* text accompanying notes 72-75. The second example was a person who wears a hearing aid, even if the person is able to compensate for impaired hearing by lip reading and the hearing aid. S. REP. NO. 116, *supra* note 14, at 23.

33. H.R. REP. NO. 485, *supra* note 32.
34. *See supra* text accompanying notes 26-32.
35. H.R. REP. NO. 485, *supra* note 32, at 30.
36. *Id.* at 29.
37. *Id.* This statement is little more than a truism.

II. "SUBSTANTIALLY LIMITS" UNDER THE FEDERAL REHABILITATION ACT

A. THE FEDERAL REHABILITATION ACT

Congress passed the FRA to give handicapped persons the opportunity to participate in the workforce,[38] specifically in job and training opportunities.[39] The FRA's cornerstone is its prohibition of using handicap as a basis for employment decisions.[40] The cornerstone's dimensions are the range of persons found to be handicapped under the FRA. These dimensions are defined by those persons who fit within the FRA's definition of "an individual with handicaps."[41] A person may be considered an "individual with handicaps"[42] if she has a physical or mental impairment that substantially limits her performance of some

38. The FRA applies to the federal government, 42 U.S.C. § 791 (1988), as well as to all organizations receiving federal funds. *Id.* § 794. Thus, the relevant workforce excludes the vast majority of private sector employers and employees who are not within the ambit of the federal government.

39. *See* 29 U.S.C. §§ 793-94 (1988).

40. S. REP. NO. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6390. Following from this goal, the FRA prohibits any covered entity from discriminating against a person with handicaps with regard to both employment and job training opportunities. 29 U.S.C. § 794 (1988). Legislative history indicates that Congress passed the FRA believing that the prohibition against handicap discrimination would further a broad government policy against discrimination, a policy that is stated in § 674 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1988), relating to race, color, and national origin. *See* S. REP. NO. 1297, *supra*, at 6389-90 (comparing definition of "handicap" with race and sex discrimination); *see also Hearings on S. 2345 Before Subcomm. on the Handicapped of the Senate Comm. of Labor and Human Resources*, 100th Cong., 2d Sess. 19 (1988) [hereinafter *Hearings*] (statement of Senator Kennedy).

41. The FRA has used various sections and terminology to define the class of individuals that the FRA protects. When the current definition was adopted in 1974, Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (codified in scattered sections of 29 U.S.C.), the definition was in 29 U.S.C. § 706(6) and read "handicapped individual." In 1978, the definition was redesignated as 29 U.S.C. § 706(7)(B). Act of Nov. 6, 1978, Pub. L. 95-602, title I § 122(a)(4)-(8), 92 Stat. 2984, 2985. Finally in 1986, Congress substituted "individual with handicaps" for "handicapped individual," and redesignated the definition as 29 U.S.C. § 706(8)(B). Act of Oct. 21, 1986, Pub. L. 99-506, title I § 103(c)(1), 100 Stat. 1809-1811. All references to "handicap" refer to "individual with handicaps" as stated in § 706(8)(B).

42. Under the FRA, an "individual with handicaps" is an individual who has a "physical or mental impairment which substantially limits one or more . . . major life activities, . . . has a record of such an impairment, or . . . is regarded as having such an impairment." 29 U.S.C. § 706(8)(B) (1988). *See supra* note 8 (defining "disability" under the ADA); *supra* text accompanying notes 9-11 (discussing the three tests under the ADA).

major life activity,[43] if she was at one time so limited,[44] or if a party covered by the FRA perceives her to be so limited.[45]

B. THE RELEVANCE OF THE FRA TO DECISIONS UNDER THE ADA

The FRA's definition is critical to determinations of disability under the ADA. The FRA marked the beginning of a national movement toward fully integrating disabled individuals into American society.[46] Because of the FRA's prominence, Congress must have considered both the language of the FRA and subsequent case law interpreting the FRA, in drafting the ADA.[47] The fact that in the ADA Congress adopted the FRA's definition of "individual with handicaps" verbatim supports this assertion.[48] Further, the ADA specifically links itself with the

43. Specific life activities listed in the regulations include caring for one's self, performing manual tasks, learning and working. 45 C.F.R. § 84.3(j)(2)(ii) (1989).

44. *Id.* § 84.3(j)(2)(iii).

45. *Id.* § 84.3(j)(2)(iv).

46. S. REP. NO. 1297, *supra* note 40, at 6388.

47. In enacting the ADA, Congress presumably was aware of both the FRA and the interpretations given to the definition of "individual with handicaps." *See* Lorillard v. Pons, 434 U.S. 575, 580 (1978) (when Congress incorporates language *in haec verba*, it can be presumed that Congress had an awareness of the previous statute and interpretations of it). *But see* W. ESKRIDGE & P. FRICKEY, *supra* note 25, at 786-87 (stating that differing historical and political contexts, as well as compromises during passage of the earlier statute, may diminish the value of viewing other statutes as aids in interpretation).

48. ADA, *supra* note 1, at § 3(2). The FRA's definition of "individual with handicaps" is contained in 29 U.S.C. § 706(8)(B) (1988). The two definitions differ only in that § 3(2) of the ADA is labelled "disability," and § 706(8)(B) of the FRA is labelled "individual with handicaps." The difference in language reflects Congress's desire to track more closely "currently accepted terminology." S. REP. NO. 116, *supra* note 14, at 21.

The ADA's definition of disability also is comparable to the definition of "handicap" contained in another federal statute. The Fair Housing Act's definition, 42 U.S.C. § 3602(h) (1988), was taken verbatim from the FRA's definition of "individual with handicaps" and reflects Congress's intent to use the same definition and concepts from that well-established law. H.R. REP. NO. 711, 100th Cong., 2d Sess. 17, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2173, 2178.

Sections 3602(h)(1)-(3) of the Fair Housing Act, which elucidate each of the definition's three subsections, are taken from the regulations promulgated by the Department of Health & Human Services. *See* 45 C.F.R. § 84.3(j)(2)(i)-(iv) (1989). When passing the ADA, Congress apparently chose *not* to make the Department's regulations part of the definition. Nonetheless, legislative history indicates that Congress intended that Health & Human Services analy-

FRA,[49] stating that both the FRA and case law interpreting it should guide interpretation and enforcement of the ADA.[50]

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sis of "individual with handicaps" apply to the definition of "disability" included in the ADA. S. REP. NO. 116, *supra* note 14, at 21.

Congress also indicated that the ADA's definition of "disability" would adopt the Department of Housing & Urban Development's analysis of the Fair Housing Act's definition of "handicap." S. REP. NO. 116, *supra* note 14, at 21; 24 C.F.R. § 100.201, subch. A, app. A (1990). Because the definition analyzed by the Department of Housing & Urban Development was taken verbatim from the FRA and because there is more judicial experience with the language in the FRA, the primary focus here will be on the FRA and Health, Education & Welfare's analysis of § 706(8)(B).

49. *See* ADA, *supra* note 1, § 107 (Title I, Employment Title) ("The agencies with enforcement authority for actions which allege employment discrimination under this title and under the [FRA] shall . . . ensure that administrative complaints filed under this title and under the [FRA] are dealt with in a manner that . . . prevents imposition of *inconsistent or conflicting standards* for the *same requirements* under this title and the [FRA].") (emphasis added); ADA, *supra* note 1, § 204 (Title II, Public Services Title) (all regulations under subtitle A, "Prohibition Against Discrimination," shall be consistent with Health & Human Services regulations promulgated pursuant to § 504 of the FRA (codified at 29 U.S.C. § 794 (1988)).

50. ADA, *supra* note 1, § 501(a) ("nothing in this Act will be construed to apply a lesser standard than the standards applied under title V of [the FRA]"). This Note focuses on the definition that specifically applies to Title V of the FRA. 29 U.S.C. § 794 (1988). In addition, while discussing their beliefs underlying the ADA definition's "regarded as" test, various congressional committee reports expressly refer to decisions interpreting the FRA, most notably School Board of Nassau County v. Arline, 480 U.S. 273 (1987). *See, e.g.*, S. REP. NO. 116, *supra* note 14, at 23-24.

Furthermore, it is likely that an ADA plaintiff will have a threshold question similar to that of an FRA plaintiff. In order to begin enforcement under the FRA, a plaintiff must prove a prima facie case of discrimination. The steps of a prima facie case are that plaintiff:

1) . . . is a "handicapped individual" under the Act,
2) . . . is "otherwise qualified" for the position sought,
3) . . . was excluded from the position sought solely by reason of his handicap, and
4) the [employing] program or activity in question receives federal financial assistance.

Strathie v. Department of Transp., 716 F.2d 227, 230 (3d Cir. 1983). All plaintiffs seeking to gain protection under the FRA face the threshold question whether they are an "individual with handicaps." Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986); de la Torres v. Bolger, 781 F.2d 1134, 1135 (5th Cir. 1986) (per curiam); Jasany v. United States Postal Serv., 755 F.2d 1244, 1248 (6th Cir. 1985); *see also* O'Connor, *Defining "Handicap" for Purposes of Employment Discrimination*, 30 ARIZ. L. REV. 633, 637 (1988) (courts struggle to decide whether plaintiff qualifies as an "individual with handicaps").

It is likely that actions brought under the ADA will use a different set of elements for proving a prima facie case of discrimination. Because the ADA is considered to ensure civil rights that Congress has guaranteed to other groups, ADA, *supra* note 1, § 2(a)(4); S. REP. NO. 116, *supra* note 14, at 19 (statement of Attorney General Thornburgh), there is direct connection between the ADA and rights codified in Title VII of the Civil Rights Act of 1964, 42 U.S.C.

Thus, an examination of the legislative history and judicial review of the FRA may provide important clues to the meaning of the phrase "substantially limits" in the ADA.

C. TEXT AND LEGISLATIVE HISTORY OF THE FRA

Although "substantially limits" is the critical phrase in the FRA's definition of "individual with handicaps,"[51] neither the statute nor relevant regulations aid in its interpretation. The text of the FRA is silent on the meaning of "substantially limits." In addition, although administrative regulations have attempted to clarify other terms contained in the definition, federal agencies have not ventured an interpretation of "substantially limits."[52]

The legislative history surrounding the definition[53] is also contradictory. For example, one committee report stated that Congress wanted a broad enough definition of "handicapped" to

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§§ 2000e - j (1988). *See* H. REP. NO. 485, *supra* note 32, at 27, 31 (stating that the ADA, Title I, dealing with employment, borrows much of its procedural framework from Title VII elements). Thus, a prima facie case under the ADA will probably parallel a prima facie case of intentional discrimination under Title VII. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The essential elements of a intentional discrimination claim under Title VII are that plaintiff:

(i) . . . belongs to a racial minority;
(ii) . . . applied and was qualified for a job for which the employer was seeking applicants;
(iii) . . . despite his qualifications, he was rejected; and
(iv) . . . after his rejection, the position remained open and employer continued to seek applicants from persons — [not in protected class] — of complainant's qualifications.

Id. For cases brought under the ADA, then, the plaintiff can be found a "member of the protected class" only if she shows that she is "disabled." Thus, although prima facie cases under the FRA and ADA will likely differ, both prima facie cases demand that the plaintiff show that she is disabled.

51. Haines, *supra* note 22, at 530; Comment, *Handicap*, *supra* note 22, at 535.

52. Health & Human Services' regulations analyze and develop "physical impairment," 45 C.F.R. § 84.3(j)(2)(i)(A) (1989), "mental impairment," *id.* § 84.3(j)(2)(i)(B), "major life activities," *id.* § 84.3(j)(2)(ii), "record of such an impairment," *id.* § 84.3(j)(2)(iii), and "regarded as having [such] an impairment," *id.* § 84.3(j)(2)(iv). Health & Human Services' regulations also expressly state that the Department did not provide further analysis of "substantially limits" because it did not believe that such an analysis was possible at that time. *Id.* pt. 84, app. A, at 346. The Department of Labor has defined "substantially limits," 41 C.F.R. § 60-741.2 (1990), but that definition only applies to § 503 of the FRA, 29 U.S.C. § 793 (1988), mandating the establishment of affirmative action programs. It does not apply to employment discrimination addressed in § 504 of the FRA. 29 U.S.C. § 794 (1988).

53. 29 U.S.C. § 706(8)(B) (1988).

encompass the FRA's purposes.[54] Despite this language, the final definition emphasizes a uniform standard,[55] one which does not seem to mandate broad coverage. Rather, it only mandates that a "handicapped person" have an impairment that, at the time in question, substantially limited a major life activity.[56] Moreover, the definition's subjective nature allows courts to apply narrower interpretations than Congress may have intended. In fact, Congress commanded courts to interpret the definition so that every person found to be handicapped had an impairment that was, at the time in question, a substantial limit on some major aspect of their lives.[57]

Perhaps unsurprisingly, courts have not been able to agree on the parameters of "substantially limits."[58] Nor have they arrived at a uniform method of analysis for determining when an impairment "substantially limits" a major life activity under the FRA. Indeed, judicial decisions under the FRA have generally lacked substantive analysis of "substantially limits."

D. JUDICIAL TREATMENT OF THE FRA

Despite the ambiguity in the phrase and the lack of legislative history, some courts have easily determined whether a plaintiff is an "individual with handicaps." In some cases, the

54. The Senate Committee on Labor and Public Welfare, S. REP. NO. 1297, *supra* note 40, at 6388, stated that Congress's intent was that "handicapped individual" not be narrowly limited, but be broad enough to prevent discrimination against all handicapped people.

55. By restricting handicapping impairments to those that substantially limit individuals, the definition's three-part test seems to establish some uniform minimum level of restriction that must be met by all persons found handicapped under the FRA. What this minimum level is, however, has not been defined.

56. S. REP. NO. 1297, *supra* note 40, at 6389. The definition allows for the substantially limiting impairment to be current, part of an individual's past, or exist only in the mind of a covered entity. In its report, the only one issued on the 1974 amendments to the FRA, the Senate Committee on Labor and Public Welfare stressed that all three subsections of the definition depended on a determination that the impairment at issue was substantially limiting in some way. *Id.*; *see also* School Bd. of Nassau County v. Arline, 480 U.S. 273, 283 n.10 (1987).

57. S. REP. NO. 1297, *supra* note 40, at 6389.

58. For a comprehensive list of the various conditions argued to be handicaps, see Frierson, *Determining Coverage Under the Handicapped Employment Laws*, 40 LAB. L.J. 630 *passim* (1989); Larson, *What Disabilities are Protected Under the Rehabilitation Act of 1973?*, 37 LAB. L.J. 752, 754 (1986); Annotation, *Who is "Individual With Handicaps" Under Rehabilitation Act of 1973 (29 U.S.C.S. §§ 701 et seq.)*, 97 A.L.R. FED. 40, 51-89 (1990) (providing comprehensive listing of impairments alleged to be "handicaps").

parties have stipulated that the plaintiff is handicapped.[59] In others, the courts have quickly concluded that the plaintiff is not handicapped,[60] such as when the plaintiff's alleged handicap was left-handedness.

The judicial task is considerably more difficult, however, when cases present uncertain facts or non-classic impairments.[61] Based on the statutory language and legislative history, one might expect courts to examine whether the alleged impairment in some way "substantially limits" one or more of the plaintiff's major life activities. Courts, however, often have not followed this approach. Some courts have dealt with the issue largely in conclusory terms, merely stating that the plaintiff is[62] or is not[63] an individual with handicaps, without

59. Hall v. United States Postal Serv., 857 F.2d 1073, 1078 (6th Cir. 1988) (hip, foot, and back injuries prevented plaintiff from doing all of the walking, lifting, and bending required of a mail carrier); Bonner v. Lewis, 857 F.2d 559, 563 (9th Cir. 1988) (plaintiff was deaf, mute, and visually impaired); Brennan v. Stewart, 834 F.2d 1248, 1260 (5th Cir. 1988) (plaintiff was blind); Doe *ex rel* Gonzales v. Maher, 793 F.2d 1470, 1476 (9th Cir. 1986) (emotionally disturbed child with aggressive tendencies); Stutts v. Freeman, 694 F.2d 666, 668 (11th Cir. 1983) (dyslexic plaintiff who could not read beyond the "most elementary level"); Davis v. Meese, 692 F. Supp. 505, 517 (E.D. Pa. 1988) (plaintiff with diabetes); Conlon v. City of Long Beach, 676 F. Supp. 1289, 1293 (E.D.N.Y. 1987) (plaintiff confined to a wheelchair).

60. de la Torres v. Bolger, 781 F.2d 1134, 1138 (5th Cir. 1986) (per curiam) (left-handed plaintiff had no "impairment," as left-handedness is a physical characteristic and not an impairment); Hayes v. Proviso Area Retarded Citizens, Inc., No. 87-C9254 (N.D. Ill. Oct. 30, 1987) (WESTLAW, Federal Cases database, DCT file) (plaintiff's current use of alcohol expressly excluded him from coverage under the FRA).

61. *See supra* note 14 (discussing non-classic impairments).

62. *See* Harrison v. Marsh, 691 F. Supp. 1223, 1230 (W.D. Mo. 1988); Perez v. Philadelphia Hous. Auth., 677 F. Supp. 357, 360-61 (E.D. Pa. 1987); Kohl *ex rel.* Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226, 1236 (W.D. Mo. 1987), *rev'd on other grounds*, 865 F.2d 930 (8th Cir.), *cert. denied*, 110 S. Ct. 239 (1989); Mahoney v. Ortiz, 645 F. Supp. 22, 24 (S.D.N.Y. 1986); Traynor v. Walters, 606 F. Supp. 391, 400 (S.D.N.Y. 1985), *rev'd* 791 F.2d 226 (2d Cir. 1986), *rev'd sub nom.* Traynor v. Turnage, 485 U.S. 535 (1988).

In *Marsh*, the court properly concluded that plaintiff, who had lost substantial portions of the muscle in her shoulder, arm and chest as a result of a mastectomy, was handicapped. 691 F. Supp. at 1229. The court concluded, however, that it could rely totally on the first prong of the definition of individual with handicaps to find the presence of a handicap. *Id.* at 1230. *See* 29 U.S.C. § 706(8)(B)(i) (1988). The court stated:

> [I]t cannot be seriously disputed that [plaintiff's] impairment affected her ability to work. That is self-evident. Work is clearly among one's major life activities. *Ergo*, even if one assumes, *arguendo*, that [plaintiff's] condition impairs only her ability to work, then she nonetheless clearly qualifies as handicapped within the meaning of the Act.

691 F. Supp. at 1230 (citations omitted) (emphasis in original).

The court's analysis is flawed in that it failed to consider whether the im-

employing an analytic method for determining whether an individual is handicapped.[64] These decisions suggest that courts consider some substantial limitation on a major life activity to be either inherent in or absent from the plaintiff's impairment.

Even when courts have examined the relevant statutory language they have continued to treat the issues as self-determining. In *Santiago v. Temple University*,[65] for example, the plaintiff suffered an eye injury that caused the partial loss of vision in one eye, while the vision in his other eye was unaffected.[66] The court noted that plaintiff could be found handicapped only if this impairment substantially limited his ability to perform in the workplace.[67] Although the court stated the

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pairment *substantially* limited the plaintiff's ability to work. That the impairment affected her ability to work is immaterial. Unless the impairment substantially limits the ability to work, the plaintiff should be excluded from coverage.

63. Diaz v. United States Postal Serv., 658 F. Supp. 484, 492 (E.D. Cal. 1987) (concluding even if Diaz's low back pain were found to be an impairment, seven brief absences over a two-year span were not enough to prove that he was substantially limited in his ability to work, especially when Diaz effectively performed mail carrier duties while at work).

64. A case that exemplifies a complete failure to conduct any sort of analysis is Alderson v. Postmaster Gen. of United States, 598 F. Supp. 49 (W.D. Okla. 1984). Alderson injured his knee while delivering mail. *Id.* at 52. The court concluded that Alderson had not sufficiently proven that his knee injury was an impairment that substantially limited his ability to work. *Id.* at 53-54. As a result, the court found Alderson not handicapped under the FRA. *Id.* In reaching its conclusion, the court simply traced the factual development of Alderson's recovery, but made no effort to discuss its analysis or the rationale for its decision.

Additionally, the court concluded that at no time had the post office's management "regarded" Alderson as being substantially limited in his ability to work. *Id.* at 54. To buttress this conclusion, the court traced the factual record of management's actions during Alderson's recovery. *Id.* The court again failed to give any reasoning that explained *why* the facts of the case warranted its conclusion that Alderson was not substantially limited as a result of the perceptions of or treatment by his superiors.

The court concluded that no postal management person had "perceived [Alderson] at any time to be handicapped in any sense of that term." *Id.* This conclusion seems to indicate that if management had perceived Alderson as handicapped, he would be a "handicapped person" under the FRA. This statement is a clear tautology. Because it failed to adhere to proper language, it is difficult to determine whether the court was confused about the standard for finding a perceived handicap under the definition's "regarded as" test. If the court had stated the equation properly, it would have said that if management had perceived Alderson to be substantially limited in his ability to work, he would be a "handicapped person."

65. 739 F. Supp. 974 (E.D. Pa. 1990).

66. *Id.* at 978.

67. *Id.*

proper test, the court made no attempt to apply it to the facts. Rather, the court summarily concluded that the plaintiff's condition did not qualify as a handicap.[68] Finally, the court found that the plaintiff's recurrent eye inflammation, which limited his ability to attend work regularly, was also not a handicapping impairment. The court reasoned that a contrary finding would violate Congress's intent,[69] but failed to cite any authority for this assertion.

1. The *Black* decision

Unlike poorly reasoned decisions such as *Santiago*, the court in *E.E. Black, Ltd. v. Marshall*[70] articulated a set of factors and a method of analysis for determining whether a plaintiff's impairment is sufficient to qualify the plaintiff as an "individual with handicaps" under the FRA.[71] By doing so, *Black* represents the most comprehensive effort to articulate a formula for determining whether an impairment constitutes a substantial limitation on a major life activity under the FRA.

In *Black*, the plaintiff contractor sought to reverse a Department of Labor finding that the contractor had discrimi-

68. *Id.* The court stated that "plaintiff's condition is not of the type which so interferes with his ability to perform in the workplace that it requires accommodation . . . . " *Id.* The court then added another ground for its holding, one which also failed to provide any guidance as to the analytical foundations for its decision: "Moreover, as defendants have correctly argued, there is no case law holding that partial vision loss in one eye is a handicap [under] the Act." *Id.* The *Santiago* decision stands directly opposed to the decision in Holly v. City of Naperville, 603 F. Supp. 220, 229 (N.D. Ill. 1985), where it was undisputed that the plaintiff, who was blind in one eye, was handicapped. That two courts could reach opposite conclusions for the same impairment indicates that problems exist in judicial treatment of "substantially limits."

69. *Santiago*, 739 F. Supp. at 979. The court asserted that under Santiago's theory, it would have to find all chronic illnesses that prevent an employee from working on a regular basis to be handicaps under the FRA. *Id.* The court concluded that such a finding clearly would be inconsistent with Congressional intent under the FRA. *Id.* The court does not state the source of its Congressional intent.

Given the lack of any authority for the court's conclusions, the decision has little value for understanding the parameters of "substantially limits." Moreover, the court's decision seems misguided. Recurring eye inflammation that *results* from an eye injury and which prevents an individual from meeting any regular work schedule is an impairment which substantially limits that individual's major life activity of working. *See infra* Part III. C.

70. 497 F. Supp. 1088 (D. Haw. 1980). For commentaries on the *Black* decision, see Haines, *supra* note 22; Comment, *Rehabilitation Act of 1973*, *supra* note 22; Comment, *Handicap*, *supra* note 22.

71. *See infra* notes 83-85 and accompanying text.

nated against the complainant on the basis of a handicap.[72] The complainant had been rejected for a carpenter's assistant position.[73] The contractor rejected the applicant after an x-ray revealed a latent, asymptomatic back abnormality.[74] There was no evidence that the abnormality actually impaired the applicant's ability to perform, but the examining physician told the contractor that the applicant was a poor risk for heavy labor.[75] The court held that the applicant was "substantially limited" in the major life activity of "working."[76]

In determining the meaning of "substantially limits," the *Black* court took a middle ground between only requiring a person to produce one instance in which the impairment resulted in disqualification from a particular employment opportunity and requiring a person to show that an impairment results in complete disqualification from employment. On the one hand, the *Black* court found that a person is not "substantially" limited in working simply because an impairment resulted in a person being rejected from a particular job.[77] Noting that Congress chose to use a limiting adjective — "substantially" — in the definition of "individual with handicaps,"[78] the court reasoned that Congress intended a plaintiff to show more than that he "[was] capable of performing a particular job, and [was] rejected for that particular job because of a real or perceived impairment."[79] On the other hand, the court noted that a person need not show that his impairment affected his em-

72. 497 F. Supp. at 1093.

73. *Id.* at 1091.

74. *Id.*

75. *Id.*

76. *Id.* at 1102.

77. *Id.* at 1099. This finding had been the basis for the Assistant Secretary of Labor's reversal of the initial determination of the complaint. *See infra* note 80 and accompanying text. The Secretary concluded that the FRA did not require a complainant to show that her impairment impeded activities relevant to many or most jobs. 497 F. Supp. at 1094. Rather, the Secretary concluded that the FRA covers every individual who has an impairment that is a current bar to employment of his or her choice, provided only that the individual is currently capable of performing the job. *Id.*

78. 497 F. Supp. at 1099.

79. *Id.* The court reached this conclusion, despite stating that Congress intended the coverage of the FRA to be broad in scope. *Id.* at 1102. To illustrate its belief that the FRA does not cover persons who have been rejected from only one job, the court suggested that the lesser standard would mean that a person who was offered a job at 10 of 11 plants, but was not offered a position at the eleventh because of an allergy to a material at the plant, would be covered by the FRA. *Id.* at 1099. *But see* H.R. REP. NO. 485, *supra* note 32, at 29 (discussing the same scenario and indicating that, depending on the se-

ployability generally — that is, his ability to be employed at all.[80] If a person were disqualified from employment in his chosen field, he should be considered substantially limited in the activity of working.[81]

After stating that "substantially limits" required a showing of more than one rejection from a single employment opportunity,[82] the *Black* court articulated a definition of substantial limitation in the employment context:[83] disqualification from a given occupation in the geographic area reasonably accessible to the individual.[84] To determine the extent of a person's disqualification the court would have to do an ad hoc analysis, focusing on the impairment's effect on the individual's ability to work in his chosen field.[85]

Although the *Black* decision is limited to the major life activity of working,[86] the court's approach has wider application. Its analysis resulted in a formula that focused on an impairment's effects on a person's *individual* situation. Further, the formula is composed of multiple, discrete factors capable of being factually established.[87] Despite the problems inherent in

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verity of the impairment's effect, being rejected from one job might be a substantial limitation).

80. 497 F. Supp. at 1099. This finding had been the basis for the administrative law judge's decision denying the complainant's cause of action against Black. *Id.* at 1094. The A.L.J. concluded that Congress had intended the FRA to apply only to people with most disabling impairments. *Id.* at 1093. Because the applicant had not shown that his perceived impairment limited his ability to work in any but a few jobs, his ability to work was not "substantially" limited. *Id.*

81. *Id.* at 1099.

82. *Id.*

83. In *Black*, the limitation on employment is based upon the court's focus on *occupations* from which an individual is disqualified. This focus simply is not analogous to life activities such as walking or hearing. *See infra* Part III. C.

84. 497 F. Supp. at 1101 (if an individual is disqualified from the same or similar jobs offered by employers throughout the area to which he has reasonable access, then the court would have to consider his current impairment, past impairment or perceived impairment as substantially limiting his ability to work).

85. *Id.* at 1100 (holding that the requisite determination must involve a "*case-by-case* determination of whether the impairment or perceived impairment of a rejected, qualified job seeker, constitutes, for that *individual*, a substantial [limitation on the major life activity of working]" (emphasis added)).

86. *See supra* note 83.

87. The *Black* factors were: (1) the number and types of jobs from which the impaired individual is disqualified, based on criteria assumed to be in use generally, such that all employers offering the same or similar jobs would use the same requirement or screening process; (2) the geographical area to which the applicant has reasonable access — the smaller the number of employers in

the *Black* court's definition of "substantially limits,"[88] the method of analysis is a distinct improvement over courts that failed to conduct any analysis. Moreover, the *Black* court's focus on *effects* and discernible factors can be transferred to future cases involving other major life activities.

2. Post-*Black* decisions

In the years following *Black*, several courts have used its formula to interpret "substantially limits."[89] Although most courts using the *Black* analysis have concluded that the plaintiff was not handicapped,[90] at least one court using the *Black*

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the area, the more that one rejection could foreclose the plaintiff's chosen field; and (3) the individual's own job expectations and training. 497 F. Supp. at 1101.

88. *See infra* Part III. C.

89. The *Black* decision also became part of the ADA's legislative history. Although the House committee report, H.R. REP. NO. 485, *supra* note 32, does not refer to the decision, the example illustrating its argument, *supra* text accompanying note 36, is similar to the *Black* court's reasoning. *See supra* text accompanying notes 77-85 (discussing the *Black* decision). The committee's example is a painter who is rejected from consideration for a painting job because of his mild allergy to a paint that his employer uses, but that is not generally used by the field in which the painter works. H.R. REP. NO. 485, *supra* note 32, at 29. Such a person would not be substantially limited in working, presumably because he could go to another employer who does not use the specific paint. The committee goes on to aver that the same painter, who has a severe allergy to the paint — with resulting skin disease or seizures — would, by virtue of the resulting condition, be substantially limited by the severity of the allergy's effects. *Id.*

90. Most courts facing the issue have held that an individual who has been rejected or terminated from only one job is not substantially limited in the major life activity of working. Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (the regulations issued to effectuate the FRA cannot be interpreted to define life activity of working as "working at the specific job of one's choice"); Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1986) (an employer "regards" the applicant as substantially limited only if the employer believes that the applicant is foreclosed from the desired category of employment (citing *Black*, 497 F. Supp. at 1099)); Jasany v. United States Postal Serv., 755 F.2d 1244, 1250 & n.6 (6th Cir. 1985) (error for trial court to conclude that a person whose strabismus (cross-eyes) precluded him from only one job was substantially limited in activity of working); Fuqua v. Unisys Corp., 716 F. Supp. 1201, 1205-06 (D. Minn. 1989) (federal court interpreted state law taken verbatim from FRA and concluded that being disqualified from only one position was not a substantial limitation on activity of working); Fields v. Lyng, 705 F. Supp. 1134, 1136 (D. Md. 1988) (an impairment that interferes with one job or only a narrow range of jobs is not substantially limiting, but one that generally forecloses a category of work may be a substantial limitation), *aff'd mem.*, 888 F.2d 1385 (4th Cir. 1989); Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328, 1343 (S.D. Tex. 1987) (plaintiff's knee problem, although an impairment, was one that was shown to limit only one job activity; as a result, plaintiff's impairment was less than a substantial limitation on his ability to work), *aff'd mem.*, 863 F.2d 881

formula has found that the plaintiff was handicapped.[91]

Some post-*Black* courts also have been asked to decide whether the plaintiff was handicapped under the FRA because an employer "regarded" the employee as being substantially limited.[92] Courts facing this claim have extended the *Black* rule,[93] generally holding that an individual is not "regarded as having an impairment" simply because one employer rejected an individual from a single position.[94]

E. CURRENT STATUS OF "SUBSTANTIALLY LIMITS" UNDER THE FRA

Courts disagree about the degree to which an impairment must limit a major life activity before it is "substantially" limit-

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(5th Cir. 1988); Tudyman v. United Airlines, 608 F. Supp. 739, 745 (C.D. Cal. 1984) (failure to qualify for a single job because of some impairment does not constitute being limited in a major life activity, because major life activity of working does not include working at the specific job of one's choice; nor does it demand being excluded from all employment).

91. Carty v. Carlin, 623 F. Supp. 1181 (D. Md. 1985). In *Carty*, the plaintiff suffered from a hernia and had a record of a heart attack and a nervous breakdown. *Id.* at 1183. The court reasoned that even if a person has an impairment, she still must show that the impairment "substantially limit[s] one or more of such person's major life activities." *Id.* at 1184. After listing the three factors articulated in the *Black* decision, see *supra* note 87, the court concluded that the plaintiff had not stated that his laborer/custodian position was the only position from which his impairment disqualified him. *Carty*, 623 F. Supp. at 1185. Because the decision arose on a motion for summary judgment, the court, in looking at the evidence in a light most favorable to plaintiff, could not state that plaintiff was not handicapped under the FRA. *Id.*

In Coley v. Secretary of Army, 689 F. Supp. 519 (D. Md. 1987), the court did not refer to the *Black* rule, but found Coley handicapped because his osteoarthritis precluded him from any jobs involving physical labor or outdoor work. *Id.* at 520-21. This included any cook position, the occupation for which Coley was trained. *Id.* In deciding that Coley's impairment disqualified him from all occupations involving certain tasks, *Coley* impliedly followed the *Black* rule.

92. 29 U.S.C. § 706(8)(B)(3) (1988). This is the definition's "regarded as" test, which allows a plaintiff to be considered handicapped under the FRA if the plaintiff can show that the defendant perceived the plaintiff to be or treated the plaintiff as if he were substantially limited in a major life activity.

93. *See supra* note 83.

94. *Forrisi*, 794 F.2d at 935 (an employee is regarded as handicapped if the employer believes that the employee's impairment forecloses *generally* the type of employment involved); *Fuqua*, 716 F. Supp. at 1207 (an employer regards an individual as handicapped by finding the employee's impairment to foreclose *generally* the category of desired employment) (quoting *Forrisi* 794 F.2d at 935); *Tudyman*, 608 F. Supp. at 746 (because the failure to qualify for a single job does not constitute a limitation on a major life activity, refusing to hire someone for a single job does not, by itself, constitute perceiving the plaintiff as substantially limited).

ing.[95] The lack of a coherent framework for determining the necessary degree of impairment causes the confusion in this area. The *Black* formula,[96] although useful, is limited to cases

95. There is little case law from the Supreme Court on this issue, although the Court's decision in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), has been heralded as greatly expanding the reach of the FRA. *See* Frierson, *supra* note 58, at 640; O'Connor, *supra* note 50, at 648. In *Arline*, the Court held that the plaintiff school teacher's "record of" tuberculosis established her as an individual with handicaps. 480 U.S. at 289. The primary effect of the *Arline* decision, however, resulted from the Court's holding that individuals with contagious diseases could not be excluded from the FRA's protection. Although specifically refusing to decide the issue of AIDS, *id.* at 282 n.7, the Court nonetheless issued a very significant decision noting Congress had not specifically addressed AIDS during passage of the FRA. *Hearings*, *supra* note 40, at 19 (statement of Senator Kennedy).

In addition, the Court's discussion of the legislative history surrounding the FRA's definition provides an argument for finding an individual handicapped under the definition's "regarded as" test. *See supra* note 8 (listing "regarded as" test). Finally, the Court may have extended the definition's "record of" test — "having a record of such an impairment" — by concluding that the plaintiff's hospitalization for tuberculosis was sufficient proof that her life activities were substantially limited. *Arline*, 480 U.S. at 281. It is not clear from the opinion, however, whether hospitalization is itself sufficient to constitute a substantial limitation on a major life activity, or whether hospitalization must be of a certain type or duration.

The *Arline* decision does not, however, aid understanding of what "substantially limits" means. In fact, the Court did not discuss when an individual would be substantially limited under either the "record of" or "regarded as" tests. The Court limited its discussion to the purposes behind the "regarded as" test, stating: "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 284. Thus, *Arline* seems only to say that an individual need not be actually impaired in order to be considered an "individual with handicaps." This statement, however, was already a recognized part of the FRA. *See* 45 C.F.R. § 84.3(j)(2)(iv) (1989).

Finally, the *Arline* decision had a direct impact on the ADA. Individuals with contagious diseases are within the provisions of the ADA provided that they prove themselves to have a disability. ADA, *supra* note 1, § 103(d)(2). Congress enacted an amendment to the ADA, however, which provides a compromise between concerns for public safety and the civil rights of food handlers who may have contagious diseases. *Id.* Nonetheless, it seems clear that in amending the ADA, *Arline's* concern about "myths and fears" was in Congress's thoughts:

> This amendment appropriately carries out both the letter and the spirit of . . . the ADA. Instead of allowing *false perceptions* to determine whether an employee may remain in a particular job, this provision ensures that valid public health guidelines, rather than false perceptions, will determine the protection afforded under this title.

Conference Report to Accompany S. 933, 134 Lab. Rel. Rep. (BNA) No. 11 (supp.) at S-32 (July 16, 1990) (emphasis added) (officially published in edited form, with quoted material omitted, as H.R. CONF. REP. NO. 558, 101st Cong., 2d Sess. (1990)).

96. *See supra* notes 84-85, 87 (discussing method of analysis).

dealing with the major life activity of working. Subsequent courts, when faced with determining whether an individual is substantially limited in other major life activities, have not discussed or devised similar analyses.[97] Further, few commentators have addressed the issue.[98]

Because the class of persons that the ADA protects cannot be objectively determined,[99] courts will bear primary responsibility for delimiting the definition of "disability" under the ADA. As a result of similarities in purpose and language, as well as the likely identity of parties and issues, courts will look to the FRA when interpreting the ADA. Although the FRA may provide some guidance to courts, under the ADA its usefulness is limited. The statute's ambiguity, combined with the lack of a method for analyzing the extent to which an impairment limits an individual, demonstrates the shortcomings of the FRA in determining the meaning of "substantially limits" under the ADA. Nevertheless, a manageable test is needed.[100]

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97. When deciding employment cases, most post-*Black* courts have simply applied the *Black* analysis. *See supra* notes 84-85 (discussing the analysis).

98. An earlier work, Comment, *Rehabilitation Act of 1973*, *supra* note 22, at 675, provides the only extensive treatment of the phrase. That comment argues that "substantially" should be interpreted as meaning "actual" or "real," a thing that possesses substance. *Id.* Reasoning from this view, the comment concludes that a plaintiff need only show that a limitation *exists* to satisfy the substantially limits standard. *Id.* at 680. This conclusion cannot be squared with the conclusion in *Black*, 497 F. Supp. at 1099, or with Congress's stated intent in enacting the ADA. *See* S. REP. NO. 116, *supra* note 14, at 22; *supra* Part I. B.

99. Unlike the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1988), and the Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (1988), which have *objective* categories of protected classes — race, gender, national origin, and age, respectively — the ADA contains a *subjective* definition of "disability." Under the ADA, the judge must determine whether the plaintiff has established that her impairment "substantially limits" her ability to partake in one of her major life activities. Thus, although inclusion in the protected class is equally important under Title VII and the ADA, the subjective nature of the ADA's definition makes determining inclusion under it considerably more difficult. *See supra* note 23 (noting Congress's refusal to make the definition objective).

100. The ADA's legislative history indicates a continuing confusion about how to apply the definition. For example, in the Senate committee report, S. REP. NO. 116, *supra* note 14, at 24, a back abnormality and hearing loss were examples of the "regarded as" test. *See supra* note 32 (Senate committee's explanation of the definition).

The two examples do little to determine Congress's intent, but for different reasons. For the back abnormality to be a disability, the abnormality must be regarded as substantially limiting some activity. According to the rule articulated in *Black*, *see supra* note 84 and accompanying text, such a showing — for the major life activity of working — demands that the individual show

Part III proposes a framework by which courts can determine whether a person is substantially limited in a major life activity and therefore disabled under the ADA.

III. PROPOSED METHOD OF DETERMINING "DISABILITY"

A. "SUBSTANTIALLY LIMITS" FOR PURPOSES OF DEFINING "DISABILITY"

1. A Standard of Severity for "Substantially Limits"

Courts should find an individual substantially limited only upon a showing that he is more limited in a major life activity than are *most* people performing that activity.[101] This standard is consistent with legislative history and the purposes that motivated the ADA's passage: that persons who are truly disabled be protected from discrimination.[102]

The Senate committee report uses the phrase "most people."[103] When so used as an adjective, "most" is commonly defined as "the majority of."[104] Therefore, the phrase "most people" is most reasonably interpreted to mean that the individual is restricted to a greater degree than the *majority* of people. The Committee likely would not have used "most" if it

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more than that one employer regarded the individual as substantially limited. 497 F. Supp. at 1099. The example fails to make clear how the mere existence of a back abnormality fits in with Congress's conception of "substantially limited."

In using the example of a person with a hearing aid, the committee muddies waters it had earlier made clear. In the comments regarding the definition's "current" test, the committee stated that the presence of a statutory disability should be determined "without regard to the availability of mitigating measures, such as . . . auxiliary aids." S. REP. NO. 116, *supra* note 14, at 23. Accordingly, unless her hearing is not substantially limited, a person with a hearing impairment would be disabled by the impairment alone. Other people's perceptions about the hearing aid should be relevant only if the person's hearing is not sufficiently restricted to qualify under the "current" test. *Accord* H.R. REP. NO. 485, *supra* note 32, at 29.

By intimating that the presence of a hearing aid can result in disabled status, Congress is glossing over the question that should be central to the definition: is the impairment at issue one which for the individual constitutes a substantial limitation on a major life activity? If it is, then other people's perceptions are immaterial. The "regarded as" test, then, applies only to those persons who have an impairment that would not satisfy either the "current" test or the "record of" test.

101. S. REP. NO. 116, *supra* note 14, at 23.

102. *See supra* note 2 and accompanying text.

103. S. REP. NO. 116, *supra* note 14, at 23.

104. WEBSTER'S NEW COLLEGIATE DICTIONARY 774 (9th ed. 1987) [hereinafter WEBSTER'S].

had meant a comparison group of a smaller percentage. The Senate committee's example of the person who could not walk eleven miles without discomfort strengthens this conclusion.[105] Because the *majority of* people cannot walk eleven miles without some discomfort, a person who cannot do so is not substantially limited in the major life activity of walking.

This "majority of" standard will provide courts with a reliable threshold for both classic and non-classic impairments.[106] It will protect truly disabled people and adhere to legislative intent that courts should not consider minor and trivial impairments as disabilities.[107] At the same time, the "majority of" standard will not place an excessive burden on a plaintiff attempting to gain the ADA's protection. In cases where the severity of the impairment is not self-evident, courts may need to require an impaired plaintiff to establish that her impairment restricts her to a greater degree than the majority of people who do not have the impairment. In most cases, a plaintiff can attempt to prove the requisite level of severity with expert medical testimony about the specific life activity.[108]

Non-classic impairments especially need the consistent application of this standard, primarily because their effects are not immediately obvious.[109] For example, obesity is a medical condition that exists when a person is twenty percent or more over her ideal body weight.[110] The effects of obesity, however,

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105. *See supra* text accompanying note 31.

106. *See supra* note 14 (discussing the differences between classic and non-classic impairments and the problems that arise when determining whether impairments in the latter category are disabilities).

107. *See supra* note 29.

108. For most major life activities, such as walking, it should be possible to provide non-expert testimony establishing the extent to which the majority of non-impaired people can walk, as well as testimony establishing whether the plaintiff can participate in the activity of walking to a similar degree.

109. *See supra* note 14 (defining "non-classic" impairment).

110. MERCK MANUAL OF DIAGNOSIS AND THERAPY 950 (15th ed. 1987). The 20% standard is considered to be arbitrary. *Id.* In addition, obesity can be further classified: mild (20-40% over weight); moderate (41-100% over weight); severe (greater than 100% over weight). *Id.* Of these categories, 90.5% of all obese women are considered to be mildly obese, 9% are considered to be moderately obese, and 0.5% are considered to be severely obese. *Id.* at 953. These statistics point directly to the need to examine the effects of the disability, not its arbitrary definition.

The existence of three categories of obesity indicates that obesity will have differential effects on people's lives. Although a court easily may find a person 150% over his ideal weight disabled under this Note's proposal, it does not follow that a person 35% over his ideal body weight is equally limited in any major life activity. As such, although both people would be "obese," only

can vary. Thus, the mere existence of obesity should not result in a finding that a person is disabled. Rather, the court should require an obese plaintiff to show that the effects of obesity result in restrictions on her major life activities that are more severe than those faced by the majority of non-obese people.[111]

Although the standard is fact-specific and will not, at least initially, achieve a high level of predictability, it will ensure that all courts apply a uniform standard focusing on an impairment's effects. The current state of the law has little chance of ever establishing predictability or uniformity. Given the definition's ad hoc focus, this iterative and uniform approach may never result in strict predictability, but it will result in a coherent body of decisions faithful to the statute's language and legislative history. In addition, the ADA's definition seems to accept some unpredictability: it revolves around an impairment's effects on an individual's life, rather than on some mechanical test.[112]

2. A Factor Analysis for Substantially Limited

In addition to a majority standard of severity, courts should apply a multi-factor analysis that focuses on determining whether a given impairment's effects restrict the *manner*, *conditions*, or *duration*[113] of a person's ability to engage in a major life activity. Using these factors is consistent with the approach

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one of them would be truly "disabled." Under existing law, however, a court could fail to examine the effects of obesity on the obese person's activities, and hence, might fail to remain faithful to the purpose of the ADA.

111. For example, if obesity is so severe that it causes the need for artificial supports to walk, that person is restricted in his ability to walk in comparison to the majority of non-obese people. Therefore, this person is "substantially limited" in the major life activity of walking.

112. The ADA defines disability as, "with respect to an *individual* . . . [an] impairment that substantially limits . . . such *individual*." ADA, *supra* note 1, § 3(2) (emphasis added). The two references to an individual underscore the ad hoc and fact-specific nature of determining disability.

113. The duration element raises another issue: impairments that are of a limited duration or transitory. Federal disability law should not cover individuals with impairments that are limited in duration. Most courts facing the issue under the FRA have held that they are not. *See, e.g.*, Evans v. City of Dallas, 861 F.2d 846, 852, 853 n.39 (5th Cir. 1988) (noting that Congress nowhere stated an intent to cover such impairments); Stevens v. Stubbs, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) (citing decisions that deny coverage for transitory conditions). This conclusion is supported by congressional testimony, *see supra* note 14 and accompanying text, and by commentators. *See* Comment, *Handicap*, *supra* note 22, at 540 (arguing that impairments must be "immutable" — safely ameliorated only over a long period of time — in order to be considered handicaps).

articulated in the Senate committee report.[114] Further, these factors properly focus on the fact that impairments are disabling because they restrict, in some substantial way, an individual's ability to live.

Although the committee report does not indicate specific definitions for either "conditions," "manner," or "duration," the committee likely intended the normal and usual meaning of the terms.[115] Thus, "conditions" probably relates to the elements that surround the activity and are necessary for its occurrence.[116] Following from the above distinction, courts should regard "conditions" as the elements that must be present in order to conduct an activity. To illustrate, imagine a person with depression or leukemia who cannot satisfy her basic life needs without constant assistance. In this situation, the impairment's effects restrict the "conditions" under which the leukemia victim is able to engage in the major life activity of "caring for one's self."[117] In other words, another person's assistance is a necessary element for the occurrence of personal care. Because the majority of unimpaired people do not depend on others to take care of themselves, the leukemia victim is substantially limited in the major life activity of caring for herself.

"Manner," in turn, probably denotes the procedure of conducting the activity itself,[118] or how the individual must go about partaking in the major life activity. In contrast to "conditions," which focuses on an activity's requisite elements, "manner" focuses on the general process by which the activity is conducted. For example, consider a person with dyslexia who is unable to read and write and therefore can learn only by oral instruction and recitation. Because his learning process cannot include reading and writing, the process by which he can learn is more restricted than the process by which most non-dyslexic people learn. As a result, he is substantially limited in the major life activity of learning.[119]

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114. *See supra* text accompanying note 30.

115. W. ESKRIDGE & P. FRICKEY, *supra* note 25, at 642-43 (discussing canons of statutory interpretation and stating that ordinary meanings of words should apply unless the statute deals with a technical or specialized subject).

116. WEBSTER'S, *supra* note 104, at 273.

117. 45 C.F.R. § 84.3(j)(2)(ii) (1989).

118. WEBSTER'S, *supra* note 104, at 975.

119. For non-classic impairments, which often vary in degree, courts should assess the actual ways in which an individual is restricted in performing the given activity. For example, people with dyslexia may have difficulty reading beyond a certain level, but that limitation may not be more restrictive than the level beyond which the majority of non-dyslexic people can read.

Finally, "duration" probably indicates the length of time in which a person can partake in a life activity. For example, a person with emphysema may only be able to breathe on her own for a few minutes. Because the length of time in which she can breathe on her own is more restricted than the time period during which most people without emphysema can breathe on their own, she is substantially limited in the activity of breathing.

B. APPLYING THE PROPOSED ANALYSIS TO DETERMINE "DISABILITY"

Under the ADA, an individual can be found disabled by satisfying one of three tests. The "current" test requires a showing that an impairment substantially limits a major life activity. The "record of" test requires a showing that an impairment was at one time so limiting or was misclassified as so limiting. The "regarded as" test requires a showing that a party covered under the ADA either perceives or treats an individual's impairment as being so limiting.[120]

1. The "Current" Test

The first part of the ADA's definition of disability inquires whether the person is currently substantially limited.[121] In applying the proposed analysis to the "current" test, a court should find that an individual is disabled only if the individual is *currently* restricted as to the duration, conditions, or manner in which she can partake in a given activity in comparison to most people. The proposed standard focuses both on how the impairment currently manifests itself in restrictions on a person's activities, as well as on the severity of those restrictions.

Applying the proposed analysis will lead to results that support the purposes of the ADA. For example, in *Grube v. Bethlehem Area School District*,[122] the plaintiff, a high school student with one kidney, sought to enjoin school officials from preventing him from playing football.[123] The court found the

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Thus, courts should not conclude, for example, that a graduate student with dyslexia is disabled merely because she is dyslexic.

120. *See supra* notes 9-11.

121. *See supra* note 8 (providing the definition of disability under the ADA).

122. 550 F. Supp. 418 (E.D. Pa. 1982).

123. *Id.* at 419. The officials had refused to let Grube play because they believed football would endanger his health. *Id.* In granting the temporary injunction allowing him to play, the court ruled that Grube had shown that he

student handicapped under the FRA, apparently assuming that having only one kidney was itself a handicapping condition. The facts of the case show that this assumption was wrong. The plaintiff was a vigorous, athletically-inclined high school student whose only physical problem was the absence of his right kidney.[124] Further, the plaintiff's remaining kidney was "healthy and fully compensate[d] for the one he lost."[125]

Had the court followed the proposed standard of severity and focused on the *effects* of the underlying condition instead of on the condition itself, it would have properly concluded that the plaintiff was not handicapped under the "current" test.[126] The impairment did not restrict the plaintiff's major life activities more severely as compared to most people.[127] By focusing on an impairment's effects, courts will not use the ADA improperly to protect a person simply because he has overcome some adversity. Rather, the ADA will be used as intended: to protect adversity only when it rises to the level of a "substantial limitation."

2. The "Record Of" Test

To show disability, a plaintiff may use not only the "current" test, but in the alternative may show a "record of" a substantially limiting impairment at some time in the past.[128] Under the "record of" test, courts should find a person disabled if at any time in the past the person suffered from an impairment that restricted them to the degree required under the "current" test,[129] or if the person was misclassified as being so restricted.[130] In other words, courts must determine whether, if the impairment's effects were currently manifested, the

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likely would prevail on the merits of his FRA claim of discrimination based upon handicap. *Id.* at 424.

124. *Id.* at 419.

125. *Id.*

126. *See supra* Part III. B. 1.

127. Arguably, school officials treated the plaintiff as restricted in comparison to most people as to the conditions under which he could participate in high school sports. This treatment brings the plaintiff under the ADA's "regarded as" test. There is nothing in the decision, however, to indicate that the court conducted this type of analysis.

128. *See supra* note 10.

129. Legislative history indicates that Congress intended this test to cover individuals who have recovered from some substantially limiting impairment, such as cancer or emotional illness. *See supra* note 32 and accompanying text.

130. *Id.*

claimed restriction would be considered a disability under the "current" test.

Using the proposed analysis, a plaintiff must do more than merely allege that she has a record of an impairment, even if that impairment resulted in hospitalization.[131] Admission to a hospital does not inherently require a finding of disability. For example, if a plaintiff claims that her documented case of chronic depression establishes a sufficient record, a court following the proposed analysis must also require the plaintiff to show that the depression at one time restricted the conditions, manner, or duration of partaking in life activities as compared to most people.[132] A record of hospitalization could sufficiently prove the disability, but only if the record produces evidence which meets the proposed standard.[133]

3. The "Regarded As" Test

The definition's "regarded as" test requires a plaintiff to show that a party covered by the ADA either perceives or

131. Applying the proposed standard to this test brings up the Supreme Court's holding in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), to wit, that hospitalization is sufficient to establish a handicap under this prong. *Id.* at 281. Under the proposal in this Note, the Supreme Court's holding can be reconciled with the ADA's definition of disability only if the hospitalization resulting from the impairment substantially limited one of the plaintiff's major life activities (i.e., the hospitalization restricted the duration, manner, or conditions under which the person partook in a major life activity, in comparison to most people).

132. Mental illnesses rarely have been litigated under the FRA. As mental illnesses achieve increased legitimacy, plaintiffs increasingly may use records of such impairments to gain protection under the ADA, especially as people begin to receive effective treatment for mental illness, thereby enabling them to prevent the illness from manifesting itself. The absence of current manifestations likely will remove the "current" test from consideration, place the locus on any past manifestations and trigger the records of mental illness as potential proof of disability. *See generally* D. Larson, *Mental Impairments and the Rehabilitation Act of 1973*, 48 LA. L. REV. 841 (1988) (examining whether an asserted mental disorder should be regarded as a statutory impairment for purposes of the FRA).

The impetus to recognize the effects of mental illness should not blind courts to the fact that reliable standards are needed for deciding whether a given mental illness results in a disability. If courts do not follow established standards, their efforts may sacrifice the remedial purposes behind the ADA.

133. For any court deciding whether a record of admission establishes a disability, the duration and circumstances of the admission are extremely relevant factors. For example, short-term hospitalization for observation may not result in a record of a substantial limitation, but long-term hospitalization in intensive care for a heart attack or cancer most likely would.

treats her as being so limited.[134] The impaired person must show that she was treated as if she was substantially limited, perceived to be so limited, or is so limited only as a result of perception, ignorance or prejudice.[135] In other words, the plaintiff must prove that a covered entity's perceptions or treatment resulted in a restriction severe enough to be considered a substantially limiting impairment under the "current" test.

Although the focus of the "regarded as" test differs from the other tests,[136] the proposed analysis may be effectively applied. In fact, the analysis will more forcefully ground the test in the purposes behind its creation.[137] Further, it will provide a more stable foundation for deciding cases under the "regarded as" test. *Kohl v. Woodhaven Learning Center*,[138] decided under the FRA, is an example of a decision in which the proposed analysis can better explain the result. In *Kohl*, a child with hepatitis was denied access to public learning programs. The court found that the child was handicapped under the "regarded as" test.[139] In addition, although holding that the hepatitis did not physically impair the child,[140] the court nevertheless found him handicapped under the "current" and "record of" tests of the FRA's definition.[141]

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134. ADA, *supra* note 1, § 3(2)(C).

135. 45 C.F.R. § 84.3(j)(2)(iv) (1989).

136. The "regarded as" test focuses on the perceptions of the covered entity, not on those of the impaired person. *See supra* note 32 and accompanying text. It is curious that in the Department of Health, Education & Welfare regulations analyzing "regarded as having such an impairment," the word "such" is deleted from the regulations, leaving only "regarded as having an impairment." 45 C.F.R., § 84.3(j)(2)(iv) (1989). Given the connection between all three subsections, it is perhaps error to assume that one can be found handicapped under the "regarded as" test without a showing that the resulting impairment substantially limited a major life activity. *But see* Comment, *Rehabilitation Act of 1973*, *supra* note 22, at 676 (stating that "Congress expressly excluded the term *substantial* from consideration in any case where the individual has been regarded as having an impairment") (emphasis added).

137. Congress enacted the ADA to provide protection to individuals who have restricting impairments. The "regarded as" test was designed to address restrictions that exist because of other people's perceptions, prejudices, and ignorance. The ADA covers both de facto and de jure restrictions, but that does not mean that the ADA should cover impaired individuals regardless of any actual or perceived restriction. *See supra* note 32 (discussing, *inter alia*, the statements in relevant legislative history about the ADA definition's "regarded as" test).

138. 672 F. Supp. 1226 (W.D. Mo.), *rev'd on other grounds*, 865 F.2d 930 (8th Cir. 1987), *cert. denied*, 110 S. Ct. 239 (1989).

139. *Id.* at 1236.

140. *Id.* at 1234.

141. *Id.* at 1236.

The *Kohl* court's second finding is illogical. If the plaintiff was not physically impaired by the hepatitis,[142] the court could not logically conclude that the plaintiff nonetheless was substantially limited under the "current" and "record of" tests.[143] Such a holding demonstrates that the *Kohl* court failed to analyze the severity of the effects that the hepatitis had on the plaintiff.

Moreover, although the court found that the plaintiff was handicapped under the "regarded as" test, it provided little analysis in its opinion.[144] The analysis proposed in this Note, however, can better explain the decision. Applying this Note's analysis, the plaintiff child would fall under the definition's "regarded as" test if he were denied access to a learning program or isolated from all other students as a result of officials' inaccurate belief that his hepatitis was contagious. If this were the case, school officials' beliefs about the impairment would have restricted the conditions under which he would "learn"[145] compared to the majority of students without hepatitis, thereby substantially limiting him in the activity of learning.

C. PROPOSED ANALYSIS AND THE MAJOR LIFE ACTIVITY OF WORKING

The proposed analysis will be most useful for courts deciding whether a given impairment results in a substantial limitation on the individual's major life activity of "working."[146] In

142. *Id.* at 1234.

143. *See supra* text accompanying note 32 (discussing the "regarded as" test). For a glimpse into the Supreme Court's view of handicaps based on the "regarded as" test, see School Board of Nassau County v. Arline, 480 U.S. 273, 282-84 (1987). Applying the proposed analysis, a child who has infectious hepatitis but is asymptomatic would not fall under the definition's first test, as the hepatitis would not *currently* affect the duration, conditions, or manner of participation in any major life activity. Nor would the disease result in coverage under the second test, as there would be no record of such limitation.

144. The court reasoned that Kohl was handicapped under the FRA because officials believed that his hepatitis posed a threat to other persons within the school, and that this belief was the basis for denying Kohl admission. *Kohl*, 672 F. Supp. at 1236. The court concluded that Kohl's ability to learn and work was "substantially limited" as a result of officials' attitudes. *Id.* The unanswered question is how the denial to one facility would so restrict Kohl's learning and working activities so as to constitute a substantial limitation.

145. Most students are educated together with other students. At the least, the inability to interact with other students would certainly restrict the manner under which the infected student would develop social skills. Although no court has specifically decided a case such as this, these skills are also "learning."

146. Working is perhaps the most problematic life activity because only

employment cases, courts are now likely to use the analysis found in *E.E. Black, Ltd. v. Marshall*.[147] In *Black*, the court held that a person was substantially limited in the major life activity of working if that person's impairment generally disqualified him from a given category of employment.[148]

The *Black* court concluded that a person is substantially limited in working if that person's impairments result in an inability to work in a certain category of jobs. The focus on a category of jobs shifts attention away from the purpose of the ADA — placing disabled persons on an equal footing with nondisabled persons generally, not for specific occupations.

Courts using this Note's proposed analysis will decide whether a person is substantially limited in working in a manner more consistent with the purposes of the ADA than the rule in *Black*. The legislative history of the ADA suggests that courts should focus on the effects of an impairment on an individual's ability to partake in life activities.[149] Thus, when considering the major life activity of working, courts should not assume that the life activity of working is as narrow as one oc-

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plaintiffs who do not qualify under any of the other life activities likely will use it. For example, if a person with obesity shows that she is substantially limited in walking or breathing, the court will find her disabled regardless of any restrictions the impairment places on her ability to work. It is only if she is not so limited in walking that she may focus on her ability to work.

Congress did not specifically define "working" in either the FRA or ADA nor has any agency acting pursuant to congressional authority defined it. Jasany v. United States Postal Serv., 775 F.2d 1244, 1248 n.2 (6th Cir. 1985). Additionally, only one federal agency has stated a concept helpful for defining "working" for purposes of the ADA. The Department of Labor issued guidelines pursuant to § 503 of the FRA, which mandate that federal agencies develop affirmative action plans for employing handicapped people. 29 U.S.C. § 793(a) (1988). In those guidelines, "substantially limited" is defined as the ability to "secure, retain, and advance in employment." 41 C.F.R. § 60-741.2 app. A (1990). Although that definition of "substantially limited" is not applicable to other life activities, it could be applied to "working" as a life activity. This applicability, however, has not been utilized. Courts rarely have referred to this definition of substantially limited when interpreting § 504 of the FRA, 29 U.S.C. § 794 (1988), the provision applicable to employment discrimination and on which the ADA is based. *See* de la Torres v. Bolger, 781 F.2d 1134, 1136 (5th Cir. 1986) (discussing how courts dealing with *discrimination* claims are not bound by these guidelines); E.E. Black, Ltd., v. Marshall, 497 F. Supp. 1088, 1091 (D. Haw. 1980).

147. 497 F. Supp. at 1088. *See supra* notes 77-85 and accompanying text.

148. 497 F. Supp. at 1099. Later courts deciding the issue under the FRA have followed the *Black* rule. *See supra* notes 90-91, 94 (discussing *Black's* progeny).

149. *See supra* text accompanying note 27.

cupational category.[150] The *Black* rule improperly focused on restrictions an impairment places on a person's ability to perform certain tasks that are part of some specific occupation, as opposed to part of the general activity of working.[151] Unlike the *Black* rule, the proposed analysis encourages courts to consider the severity of an impairment's effects on an individual's ability to perform the general activity of working. The major life activity of working includes more than specific duties contained in any given job description. Like walking and performing manual tasks, working involves tasks, goals and duties that must be performed regardless of the specific occupation that a person holds.[152]

150. Moreover, legislative history suggests that a person could be found disabled under the ADA even though that person was rejected from only one job. H.R. REP. NO. 485, *supra* note 32, at 29 (person with severe allergy to paint, which results in seizures, could be substantially limited in activity of working). The proposed analysis can most effectively explain the committee's example. Applying the analysis, the painter is not substantially limited in working if the effects of the mild allergy are such that the duration, conditions, and manner under which the mildly allergic painter can work are not so restricted in relation to the majority of painters who do not have the allergy. Alternatively, the seizures and sores suffered by the painter with the severe allergy would prevent him from working with the paint at all, thereby severely restricting the conditions under which he could work compared with people who are not allergic to the paint. Thus, he would be substantially limited in his ability to work.

If one applies something other than an effects-based standard to distinguish the two scenarios, as for example the *Black* rule, *supra* text accompanying note 85, Congress's reasoning seems inconsistent. The presence of a paint peculiar to a certain job site does not limit the severely allergic painter any more than the mildly allergic painter, if that paint is not generally used in the area in which the painter could work. If this were so, both painters could apply for work at any other site that does not use that paint. Thus, the committee's example is reasonable only if the focus is on the impairment's effects on one's ability to work.

151. The *Black* court stated that it would eviscerate the FRA to demand complete unemployability in order to prove *substantially* limited in the major life activity of working. 497 F. Supp. at 1099. Neither did the court accept the proposition that a plaintiff could show she was substantially limited in the major life activity of working by a failure to obtain one job. This would cause the FRA to go beyond its purposes and any reasonable definition of "substantial." *Id.*

152. There is no reason why a plaintiff should have to be rejected from more than one job in order to seek protection under the ADA. Although the *Black* court was correct in stating that Congress meant something by using the word substantially, *see supra* text accompanying note 77, it does not follow that Congress intended "substantially limited in the major life activity of working" to mean disqualification from a category of jobs. This is especially so if that conclusion required an impaired person to face the trauma of multiple rejections before qualifying under the ADA. Every other major life activity focuses on the ability of impaired individuals to participate in major life activi-

Under the proposed analysis, if an impairment restricts the manner, duration, or conditions under which an individual can partake in the activity of work[153] in comparison to the majority of people, then the court should consider the individual substantially limited in the major life activity of working. Obtaining protection under the ADA thus does not depend on how many jobs the person has been denied or on how many employers have rejected her.[154]

The *Santiago v. Temple University*[155] facts illustrate how the proposed analysis improves the current law. Santiago was virtually blind in one eye.[156] He also suffered chronic and recurring eye inflammation, which mandated that he remain at home until the inflammation could be reduced.[157] The court found that he was not handicapped under the FRA,[158] but did not indicate any specific reason for ruling as it did. If the court had followed the *Black* rule, it most likely would have concluded that Santiago was not disabled. His impairment had re-

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ties compared to the performance of that activity by non-impaired persons. The proposed analysis in this Note maintains a consistent standard of proof.

153. This Note proposes that when "working" is the major life activity at issue, "working" should be analyzed at the same level of generality as the other enumerated major life activities and should be composed of such factors as a person's ability to perform on a regular basis, learn new skills, and advance in skill and position if the person desires. This view is akin to the Department of Labor's definition in 41 C.F.R. § 60-741.2 (1990). Working is not defined in the texts of the ADA or FRA, but the above conception is most similar to the levels of generality that the other major life activities establish. In addition, although the general essence of walking or hearing may be easier to grasp than that of working or even taking care of oneself, the essence of working is as general. The foregoing description of working respects this conception.

154. It is possible that the *Black* rule, *supra* text accompanying note 85, may not be functionally different from the approach advocated in this Note. Recurring eye infections could result in an inability to regularly attend work. As with the applicant in *Black*, a person with such a condition would most likely be disqualified from employment in his chosen field. The essential difference between the two approaches is that the *Black* rule focuses on the specific occupation. This approach is difficult to square with Congress's intent that "substantially" be measured in reference to most people, not most occupations. The two approaches to "working" might be reconciled, however, if the majority standard in the proposed analysis compares the alleged restriction's severity to restrictions suffered by the majority of unimpaired people in a given occupation within a given field.

155. 739 F. Supp. 974 (E.D. Pa. 1990). For a more detailed discussion of the holding in *Santiago*, see *supra* notes 65-69 and accompanying text.

156. 739 F. Supp. at 977.

157. *Id.*

158. *Id.* at 978.

sulted in removal from only one job, and he did not show that his impairment disqualified him from any specific occupation.

Under the proposed analysis, the court should have found Santiago disabled. Regardless of any occupational qualifications, regular attendance at work is part of the major life activity of working for the majority of employed people. Regardless of his specific job and the tasks associated with that job, Santiago was unable to attend work on a regular basis. In reality then, the impairment restricted the duration and conditions under which he could work. Santiago's inability to attend work on a regular basis resulted in a substantial limitation on the activity of working. Therefore, a court applying the proposed analysis would consider Santiago to be a member of the ADA's protected class. Contrary to the *Black* rule, but consistent with the purposes of the ADA, the court could find Santiago disabled regardless of any proof that the impairment restricted his ability to work in a given occupation.

CONCLUSION

The ADA will have a tremendous impact on the ways in which American society encounters and relates to disabled persons.[159] The importance of the legislation necessitates careful consideration of who the legislation protects.[160] The language of the ADA is ambiguous as to the breadth of the protected class, and existing federal law provides insufficient guidance on this issue. As a result, courts faced with applying the ADA need a reliable method for reaching conclusions on who is disabled.

This Note suggests a systematic method for courts to use in determining whether a plaintiff is disabled under the ADA.

159. The ADA should be its own statute, and not merely a continuation of the FRA. Although courts can examine decisions under the FRA for guidance in making determinations about coverage, they should feel free to ignore holdings that seem ill-founded or clothed in mystery. The ADA's legislative history provides courts with new points of focus for determining when an impairment is substantially limiting and therefore disabling. By pursuing those points, courts can assure that the ADA is not a de facto amendment of the FRA, and that the ADA's broad and just purposes are fulfilled.

160. The proposed analysis can help develop a uniform approach to judicial determinations of disability, thereby aiding in the growth of decisional law regarding disability. Finally, the proposal will contribute to the conversation among scholars, advocates, and citizens concerning the status of disability law in the United States. This conversation will both aid in the elimination of discrimination on the basis of disability and facilitate equitable integration of disabled persons into American society.

The method consists of a proposed standard of severity and three different measures of restriction. Using the majority of people as the standard for gauging the severity of any restrictions resulting from an impairment provides a reliable standard consistent with society's notion of disabilities. In addition, examining the manner, duration and conditions under which an individual can partake in a given activity will ensure that courts consistently focus on the multiple and diverse effects that can result from an impairment — effects that limit a person's ability to live without significant restrictions.

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