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RESTORING REGARD FOR THE "REGARDED AS" PRONG: GIVING EFFECT TO CONGRESSIONAL INTENT

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I. INTRODUCTION

DURING the four years in which the employment provisions of the Americans with Disabilities Act (ADA)¹ have been in effect, no issue has generated more controversy and divergence in judicial interpretation than the definition of disability, a threshold determination in any ADA case. A disturbing trend developing in case law is the narrowing construction of the definition of disability which thereby deprives qualified individuals of the opportunity to prove that they have been discriminated against in violation of the ADA. These rulings often are based on a failure to understand the breadth of the definition of disability as contemplated by Congress and result in misguided public policy that directly contravenes the intent of the ADA. People who want to work and are qualified to work are being denied that opportunity because of arbitrary fears and stereotypes about disability. Ironically, the more likely a plaintiff is able to perform the job, the more likely it is that he or she will be not be seen as disabled enough to be protected by the ADA.² Most astounding is that the decisions that narrowly construe the term disability reward employers for perpetuating exclusionary medical criteria that are unrelated to the ability to perform the job—exactly the opposite of what Congress intended in passing the ADA.

These restrictive judicial interpretations of the ADA reflect, at best, a lack of understanding of the statute and, at worst, a blatant hostility towards the profound goals of the ADA. During the con-

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1. 42 U.S.C. §§ 12101-12213 (1994).

2. See *Leslie v. St. Vincent New Hope, Inc.*, 916 F. Supp. 879, 882 (1996) (stating that plaintiffs are forced "to choose between two horns of a dilemma"). To meet the definition of disability, a plaintiff must elicit all of the ways the impairment is substantially limiting and then, to prove that he or she is qualified, must show all the ways in which he or she is the same as her unimpaired counterpart. See *id.* (recognizing that defendant health care facility tried both to downplay plaintiff's impairments to escape definition of disability and also to emphasize impairment to avoid reasonable accommodation requirement).

gressional hearings concerning the ADA, Congress learned that employers routinely used employment criteria based on physical or mental characteristics to deprive otherwise qualified individuals of the opportunity to work.³ Congress concluded that this exclusion was not only harmful to the self-sufficiency and dignity of the individual, but to society as a whole.⁴ Just as policies that discriminated on the basis of race and sex were to be eradicated by Title VII of the Civil Rights Act of 1964 (Title VII),⁵ so too did Congress seek to remove the vestiges of exclusionary, irrational policies based on physical or mental impairments when it enacted the ADA.⁶

In order to accomplish this goal, Congress realized that the definition of disability must be broad enough to encompass not only those individuals with traditional disabilities, but also those individuals whose impairments were perceived to be disabling. The "perceived as" or "regarded as" prong of the definition of disability is intended to take the attention away from the actual physical or mental limitations of the individual and to focus instead on an ex-

3. See S. REP. NO. 101-116, at 9-10 (1989) (citing testimony of author and enumerating major categories of job discrimination faced by people with disabilities including: use of standards and criteria that have effect of denying opportunities; failure to provide or make available reasonable accommodations; refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism and acceptance by coworkers; placement into dead-end jobs; under-employment and lack of promotion opportunities; and use of application forms and other pre-employment inquiries that inquire about existence of disability rather than about ability to perform essential functions of job). Senate Report 116 also stated:

The requirement that job criteria actually measures the ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear during the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still persuasive today.

Id. at 37.

4. See 42 U.S.C. § 12101(a) (outlining findings on which the ADA is based); S. REP. NO. 101-116, at 16-17 ("The Committee also heard testimony and reviewed reports concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year."); 136 CONG. REC. S10,713 (1990) (statement of Sen. Harkin quoting Attorney General Richard Thornburgh) ("We must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country.").

5. 42 U.S.C. 2000e-2 to -17 (1994); see *Fullilove v. Klutznick*, 448 U.S. 448, 499 (1980) (noting that Congress enacted Title VII to eliminate practices fostering racial stratification of work environment); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring) ("The primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity."); S. REP. NO. 88-872, at 23 (1964) ("The pledge of this Nation is to secure freedom for every individual" and that "that pledge will be furthered by the elimination of [discriminatory] practices.").

6. See, e.g., 42 U.S.C. § 12101(b) (outlining purpose of ADA).

amination of the employer's policies.⁷ Many courts continue, however, to narrowly construe the definition of disability by refusing to allow excluded job applicants to challenge discriminatory policies, thereby condoning arbitrary criteria based on physical or mental impairment.

While several flaws are apparent in the judicial interpretations that narrowly construe the definition of disability, this Article concerns itself with the misunderstanding or total disregard of the "regarded as" prong of the definition of disability. A proper recognition of the purpose of this prong of the disability definition will allow courts to effectuate the public policy goals of the ADA by deterring employers from utilizing outmoded, prejudicial and stereotypic mental or physical job criteria and at the same time assure that employers are able to hire and retain qualified workers.

By passing through the initial threshold requirement of establishing that he or she has a disability under the ADA, a plaintiff has only satisfied one part of a three-part *prima facie* case under the ADA. The plaintiff must also show that he or she is qualified to perform the essential functions of the job and that he or she was excluded from employment because of his or her disability.⁸ The proper approach to this three-part *prima facie* case is to broadly interpret the definition of disability so that a fact-specific inquiry into the individual's qualifications can be pursued. Unfortunately, many courts are refusing to allow an individual to show that he or she is qualified by rejecting the claim at the first stage where the

7. See 29 C.F.R. pt. 1630, app. A § 1630.2(1) (1997) ("If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of 'myth, fear or stereotype' can be drawn.").

Under the ADA, disability is defined as: "(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 impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). In explaining the third prong of the definition, Congress stated that "[the] third prong includes an individual who has a physical or mental impairment that does not substantially limit major life activities, but that is treated by a[n employer] as constituting such a limitation." S. REP. NO. 101-116, at 23; see *id.* at 22 ("It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list."); see also *Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994) (noting that legislative history of ADA supports broad reading of disability definition). The third prong of the definition will hereinafter be referred to as the "regarded as," "perceived as" or "third" prong of the definition of disability.

8. See *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372, 1375 (10th Cir. 1981) (affirming district court decision that physician was qualified despite his disability).

plaintiff must prove that his or her situation is covered by the ADA's definition of disability.

In *School Board v. Arline*,⁹ the United States Supreme Court explained the need for a liberal approach to the coverage question within the context of the Rehabilitation Act of 1973 (Rehabilitation Act),¹⁰ the model for the ADA.¹¹ The Court explained that "[t]he Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of handicapped individual is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief."¹² The Court warned that by excluding an impaired individual from coverage, the individual loses the opportunity to have the condition evaluated in light of medical evidence, making him or her "vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent."¹³

This Article discusses two interrelated flaws in court decisions that are giving rise to the narrow interpretation of the "regarded as" prong of the definition of disability under the ADA. First, many courts are, in effect, requiring plaintiffs to prove actual substantial limitation in order to fall under the "regarded as" prong.¹⁴ This approach nullifies the third prong of the "regarded as" definition. Second, courts are allowing an employer to successfully argue that it did not perceive the plaintiff as substantially limited in working, but instead perceived the employee as unable to meet only the employer's particular stringent medical criteria.¹⁵ Courts are putting the often impossible burden on the plaintiff to show that the defendant perceived the plaintiff to be limited in working beyond the

9. 480 U.S. 273 (1987).

10. 29 U.S.C. § 704 (1994).

11. *Arline*, 480 U.S. at 282-86. In *Arline*, the Court was construing section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 794 (1994). *Arline*, 480 U.S. at 275. The ADA was specifically modeled after the Rehabilitation Act, and Congress intended that section 504 case law be generally applicable to the ADA and specifically to the definition of "disability." See H.R. REP. NO. 101-485, pt. 3, at 27-29 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 449; S. REP. NO. 101-116, at 21; 29 C.F.R. pt. 1630, app. A § 1630.2(g) (1997).

12. *Arline*, 480 U.S. at 284-85.

13. *Id.* at 285.

14. For a discussion of cases requiring the plaintiff to prove an actual substantial limitation under the third prong of the definition of disability, see *infra* notes 16-43 and accompanying text.

15. For a discussion of cases where courts require plaintiffs to prove that they are unable to perform a large range of jobs, see *infra* notes 48-96 and accompanying text.

job involved in the litigation. This antiplaintiff approach turns the ADA on its head by shielding from review employers who use the most discriminatory job criteria.

II. THE "REGARDED AS" DEFINITION OF DISABILITY DOES NOT REQUIRE PROOF OF SUBSTANTIAL LIMITATION

In analyzing third-prong coverage, some courts are requiring in essence that the plaintiff demonstrate a substantial limitation in a major life activity as required by the first prong of the definition of disability.¹⁶ The third prong should be analyzed separately from the first prong in order to give effect to congressional intent to protect individuals who are wrongly considered disabled.

The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title I of the ADA, has set forth three ways that a plaintiff can satisfy the "regarded as" prong of the disability definition:

- (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;
- (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or
- (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.¹⁷

16. See, e.g., *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995) (stating that plaintiff could not demonstrate that he was "regarded as" disabled because he suffered from impairment which did not limit his major life activities); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (rejecting plaintiff's "regarded as" claim because he was not substantially limited in major life activity); *Joyce v. Suffolk County*, 911 F. Supp. 92, 96-98 (E.D.N.Y. 1996) (denying protection under ADA where police officer candidate failed to meet visual acuity standards because perceived impairment did not substantially limit major life activity); *Castorena v. Runyon*, No. 94-1456-PFK, 1994 WL 240762, at *4 (D. Kan. May 23, 1994) (holding that "regarded as" claims require plaintiffs to prove substantial limitation).

17. 29 C.F.R. pt. 1630, app. A § 1630.2(1) (1997); see *Cook v. Rhode Island Dep't of Mental Health, Retardation & Hosps.*, 10 F.3d 17, 24 (1st Cir. 1995) (analyzing third prong of "perceived as" definition of disability in context of obesity discrimination). The EEOC's definition of the "regarded as" prong bears substantial similarity to the "regarded as" prong under the Rehabilitation Act. See 45 C.F.R. § 84.3(j)(2)(iv) (1997) ("'Is regarded as having an impairment' means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the

The broad definition provided by the EEOC was intended to implement a strong congressional intent that individuals be judged on ability and not on the basis of myths, fears and stereotypes about disability. In its explanation of the "regarded as" prong, the EEOC relied on legislative history that expressly prohibits such stereotyping:

An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, costs of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.¹⁸

As the Supreme Court stated in *Arline*, the "regarded as" prong acknowledges that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.¹⁹

The confusion of courts in analyzing the first and third prongs of the definition of disability appears to be caused by the requirement that the plaintiff must show that he or she is perceived to have a substantially limiting impairment. In a case that this author litigated recently, the district court dismissed the case on summary

impairments . . . of this section but is treated by a recipient as having such an impairment."). The EEOC stated that the "regarded as" prong was included in the ADA for the same reasons it was placed in the Rehabilitation Act. See 29 C.F.R. § 1630.2(l) (citing *Arline*, 480 U.S. at 283-84).

18. 29 C.F.R. pt. 1630, app. A § 1630.2(l). The EEOC comments mirror those contained in H.R. REP. NO. 101-485, pt. 3, at 30-31 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 452-53. The EEOC further commented:

[I]f an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

29 C.F.R. pt. 1630, app. A § 1630.2(l).

19. *Arline*, 480 U.S. at 284.

judgment because the plaintiff, who wore a hearing aid, was not substantially limited in a major life activity. This was considered fatal to the "regarded as" claim even though the defendant freely admitted that the reason the plaintiff was not hired was because he wore a hearing aid.

The confluence of the first- and third-prong requirements is perhaps best illustrated by *Welsh v. City of Tulsa*,²⁰ in which the plaintiff, who had decreased nerve sensitivity in two of his fingers and was therefore denied employment, argued that he was "handicapped"²¹ under the Rehabilitation Act because he was perceived by the City of Tulsa as having an impairment that substantially limited his ability to work as a firefighter.²² The United States Court of Appeals for the Tenth Circuit rejected that argument, however, and established a "two-prong test."²³ The court stated, "[t]he definition of a handicapped person has two elements: first, one has, has a record of having, or is regarded as having a physical or mental impairment; and second, that the impairment substantially limits one or more major life activities."²⁴ Unfortunately, this two-prong test, as applied, fails to distinguish between first-prong analysis, which requires a substantial limitation, and the third prong, which requires

20. 977 F.2d 1415 (10th Cir. 1992).

21. Section 504 uses the term "handicapped" while the ADA uses the term "disability." See S. REP. NO. 101-116, at 21 (1989). This not a substantive change, but merely reflects the preferences of the community sought to be protected. See *id.*

22. *Welsh*, 977 F.2d at 1416-17. In *Welsh*, the plaintiff applied for a position as a firefighter with the City of Tulsa. *Id.* at 1416. After an examination by the city's physician, it was determined that the plaintiff suffered from "a minor residual sensory deficit in the ring and little fingers of his right hand." *Id.* In disqualifying the plaintiff, the city's physician reasoned that the plaintiff's decreased sensory perception would pose a potential risk in the event an ember were to drop into the plaintiff's glove. See *id.* The plaintiff then proceeded to obtain the opinions of two other physicians, who both agreed that the plaintiff's impairment would not interfere with his employment as a firefighter. See *id.*

The plaintiff filed suit against the City of Tulsa, alleging that the decision to disqualify him for employment was in violation of the Rehabilitation Act. See *id.* Specifically, the plaintiff alleged that the city perceived him as having a disability that substantially limited his ability to work as a firefighter. See *id.* at 1417. The city conceded that the physician's decision to disqualify the plaintiff was based upon an erroneous application of standards of employment, but argued that the plaintiff was not discriminated against on the basis of a handicap protected under the Rehabilitation Act. See *id.* at 1416. The United States District Court for the Northern District of Oklahoma granted the city's motion for summary judgment, concluding that the city did not regard the plaintiff as having an impairment that substantially limited a major life activity. See *id.* at 1416-17, 1420. The United States Court of Appeals for the Tenth Circuit affirmed. See *id.* at 1420.

23. See *id.* at 1417 (establishing "two-prong test" for determining whether individual is handicapped within meaning of Rehabilitation Act).

24. *Id.*

separate analysis of whether the impairment *as perceived* would constitute a substantial limitation in a major life activity.

The *Welsh* court relied on first-prong precedent, not for the correct proposition that an employer must perceive the plaintiff's impairment as substantially limiting, but for the improper requirement that the perceived impairment must *actually* constitute a substantial limitation. The court misstated the rule applied in earlier "regarded as" cases, asserting that "[t]he relevant question in those cases was whether a physical or mental condition that resulted in the plaintiff's rejection from employment substantially limited one or more major life activities."²⁵ As a basis for this assertion, the *Welsh* court explained that "these cases analyzed the facts to determine whether the plaintiffs' conditions substantially limited a major life activity."²⁶ This claim neglected the fact that in *Daley v. Koch*²⁷ and *Tudyman v. United Airlines*,²⁸ the "regarded as" cases to which the court cited, the courts assessed both first- and third-prong claims.²⁹ To the extent that those decisions addressed *actual* substantial limitations, it was for analysis of first-prong claims, not for analysis under the inaccurate assumption that a third-prong claim requires showing of actual limitation.³⁰

The danger of merging first- and third-prong analyses is reflected in the cases following *Welsh*. In particular, in *Castorena v. Runyon*,³¹ the United States District Court for the District of Kansas explicitly rejected the definition of disability in the regulations and stated that a substantial limitation of major life activities is a requisite element of disability in *all* situations, including each specified type of "regarded as" case.³² A close examination of the three-part

25. *Id.* at 1418.

26. *Id.* at 1419.

27. 892 F.2d 212 (2d Cir. 1989).

28. 608 F. Supp. 739 (C.D. Cal. 1984).

29. *Daley*, 892 F.2d at 215; *Tudyman*, 608 F. Supp. at 746. The court in *Tudyman* did not merge first- and third-prong analyses, but rather addressed each separately finding first that "[p]laintiff has no physical impairment and is not substantially limited in any major life activity" and then stating that "[n]or does defendant perceive plaintiff to have a physical impairment which limits his activities." *Id.*

30. The *Daley* court also stated the correct rule for "regarded as" analysis, explaining: "If appellant had been perceived by the Police Department to be suffering from an impairment which substantially limits a major life activity, whether or not in reality he had no impairment, then he might qualify for relief under the Rehabilitation Act." *Daley*, 892 F.2d at 215.

31. No. 94-1456-PFK, 1994 WL 240762 (D. Kan. May 23, 1994).

32. *See id.* at *7-8 (rejecting definition of disability contained in 29 C.F.R. § 1613.702(e) (1997)). In *Castorena*, the plaintiff contended that she was terminated from her job as a postal worker on the basis of a mental handicap within the

definition of the "regarded as" prong demonstrates an intent to cover situations, such as those occurring in *Welsh* and *Castorena*, in which a single employer overreacts to an otherwise nonlimiting impairment.³³ As the regulations make clear, the following persons are covered under the "regarded as" prong: (1) persons who have an impairment that is not substantially limiting, but that is treated by an employer as such (e.g., the *Welsh* plaintiff); (2) persons who have an impairment that is substantially limiting solely because of widespread prejudice (such as a person with disfiguring scars); and (3) persons who have *no* physical or mental impairment, but are treated as if they were disabled (a person assumed to be HIV positive who is not).³⁴ This broad delineation of perceived disabilities is designed to cover a variety of impairments and employer prejudices. The three distinct categories of disabilities are linked in that they all cover a person who does not have a condition that satisfies the definition of an actual disability, but is treated as having such a disability.³⁵

meaning of the Rehabilitation Act. *Castorena*, 1994 WL 240762, at *3. The plaintiff was diagnosed as a paranoid schizophrenic. *See id.* at *7. In support of her claim, *Castorena* asserted, correctly, that under the third prong of the handicap definition, she was not required to show that her condition actually substantially limited a major life activity. *See id.* at *4. In support of her position, she cited the Supreme Court's then-recent holding in *Arline*. *See id.* Nonetheless, the court injected the "substantially limiting" clause of the first prong into its analysis of plaintiff's claim under the third prong. *See id.* at *7-8. Relying on *Welsh*, the court rejected her claim for protection, declaring that the Tenth Circuit did not interpret *Arline* as mandating elimination of the substantial limitation requirement in all circumstances. *See id.* at *4; *see also* *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (stating that "[r]ead in conjunction with subsection (A), subsection (C) prescribes that a person is considered disabled for purposes of the ADA if that person is 'regarded as having' an impairment that 'substantially limits' a 'major life activit[y],'" thereby neglecting both distinct standard in "regarded as" cases and three different types of perceived disabilities).

33. The three-part definition of the "regarded as" prong adopted by the EEOC is virtually identical to that of the predecessor regulations under section 504 of the Rehabilitation Act. *Compare* 29 C.F.R. § 1630.2(l) (1997) (using similar language to define "is regarded as having an impairment"), *with* 45 C.F.R. § 84.3(j)(2)(iv) (1997). Under section 504 of the Rehabilitation Act:

Is regarded as having an impairment means (A) having a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the [defined] impairments . . . but is treated by a recipient as having such an impairment.

Id.

34. 29 C.F.R. § 1630.2(l)(1)-(3).

35. *See id.*; *Cook v. Rhode Island Dep't of Mental Health, Retardation & Hosps.*, 10 F.3d 17, 22 (1st Cir. 1993) ("It is noteworthy that § 504's perceived disability model can be satisfied whether or not a person actually has a physical or

A brief comparison of the three categories of perceived disabilities highlights their differences. Category 3 disabilities result when a person has no impairment at all, but is treated by an employer as if he or she does.³⁶ Conversely, category 1 and 2 disabilities both involve an actual impairment, but differ in the type of prejudice to which they apply. Category 1 applies where an employer considers the individual's impairment as rendering him or her unable to do the job, despite the fact that the impairment is not so limiting.³⁷ The circumstances of the *Welsh* case exemplify this type of disability.³⁸ In *Welsh*, the plaintiff experienced decreased nerve sensitivity in two of his fingers.³⁹ Although this impairment did not, in fact, limit his ability to perform his daily activities, the city refused to hire him because it believed his minor impairment made him unqualified to serve as a firefighter.⁴⁰ In other words, category 1 applies to cases in which a single employer simply overreacts, treating an impairment as far more limiting than it actually is.

Category 2, however, applies in circumstances where an individual is substantially limited in major life activities, as a result of

mental impairment."); see also Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act and the Americans with Disabilities Act*, 31 CAL. W. L. REV. 41, 43 n.15 (1994) ("Under the perceived disability claim, plaintiffs need not insist that they are actually disabled . . .") (citing Natalie Allon, *The Stigma of Overweight in Everyday Life*, in *PSYCHOLOGICAL ASPECTS OF OBESITY* 130 (Benjamin B. Wolman ed., 1982)).

36. See 29 C.F.R. § 1630.2(l)(3); see also H.R. REP. NO. 101-485, pt. 2, at 53 (1990), reprinted in 1990 U.S.C.A.N. 303, 335-36 ("[F]or example, if an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability."). The United States Court of Appeals for the First Circuit described this rule by way of the following illustration:

[S]uit can be brought against a warehouse operator who refuses to hire all turquoise-eyed applicants solely because he believes that people with such coloring are universally incapable of lifting large crates, notwithstanding that other warehousemen might hire the applicants—or that the recalcitrant firm itself might hire them for other, more sedentary posts.

Cook, 10 F.3d at 25-26.

37. See 29 C.F.R. § 1630.2(l)(1).

38. *Welsh v. City of Tulsa*, 977 F.2d 1415, 1416 (10th Cir. 1992).

39. See *id.* For a further discussion of the facts and holding of *Welsh*, see *supra* notes 20-29 and accompanying text.

40. See *Welsh*, 977 F.2d at 1416. In fact, immediately following his rejection by the City of Tulsa, *Welsh* procured the opinions of two physicians that his impairment would not preclude him from being a firefighter. See *id.* Nonetheless, the City of Tulsa medical examiner felt that *Welsh* was a "potential risk for self-harm . . . if an ember dropped into his glove." *Id.* Because the plaintiff's case was dismissed on the coverage issue, he never had the opportunity to have the medical evidence heard by a trier of fact. See *id.*

widespread attitudinal barriers regarding an impairment.⁴¹ At best, *Welsh* and its progeny can be understood as applying category 2 by requiring that the impairment result is such widespread prejudice as to make the individual unemployable. Requiring the same standard for category 1, however, would render it meaningless. In fact, the cases cited in the legislative history of the ADA adopt an expansive reading of the "regarded as" definition, which requires only that an individual suffer an adverse employment action based on physical or mental criteria, not that the individual experience widespread discrimination in order to be regarded as substantially limited.⁴²

It makes no sense to require an actual limitation in a perceived disability case. Moreover, the plaintiff's abilities should never be used as proof that the employer did not regard the plaintiff as disabled. If the employer refused to hire an individual based on an actual or perceived physical or mental impairment, it must be presumed that the employer regarded the plaintiff as disabled. This is the only approach that promotes the intent of the ADA—to ensure that job criteria based on physical or mental impairments are "job-related." An employer should not be allowed to speak out of both sides of its mouth. The applicant is too impaired to get the job, but not impaired enough to have coverage as "disabled" under the ADA.

In order to guard against this type of loophole, Congress explained that, in determining whether an individual is regarded as disabled, the employer would be judged by its actions, not self-serving statements. As explained in House Report 485:

In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities would be in-

41. See 29 C.F.R. § 1630.2(l)(2). The EEOC regulations depict an example wherein an individual who has an involuntary jerk or facial disfigurement is reassigned to work away from others. See 29 C.F.R. pt. 1630, app. A § 1630.2(l).

42. See H.R. REP. NO. 101-485, pt. 2, at 53-54 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 335-36 (citing *Thornhill v. Marsh*, 866 F.2d 1182, 1183-84 (9th Cir. 1989) and *Doe v. Centinela Hosp.*, No. CV87-2514 PAR, 1988 WL 81776, at *1, 7 (C.D. Cal. June 30, 1988)). Neither *Thornhill* nor *Centinela* required a showing beyond the actions of the defendant employers. *Thornhill*, 866 F.2d at 1184; *Centinela*, 1988 WL 81776, at *7.

ferred and the plaintiff could qualify for coverage under the “regarded as” test.⁴³

This presumption is necessary to assure that a plaintiff who is rejected from a job because of physical or mental criteria is not “vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.”⁴⁴

III. THE SUBSTANTIALLY LIMITED IN WORKING/SINGLE JOB QUAGMIRE

Rejecting the use of the “perceived as” presumption described in the legislative history and the EEOC regulations, courts are requiring plaintiffs to show that the employer’s perception of substantial limitation extends beyond the job for which the plaintiff was rejected.⁴⁵ This requirement is improperly derived from the EEOC regulation, which states that an individual is not substantially limited in working under the first prong if his or her impairment affects only a single, particular job.⁴⁶ The courts are interpreting the single job exception so broadly that any rejection, no matter how broad the implications, can be reduced to a “single job”—namely, the job at issue.⁴⁷ The problems created by a broad interpretation

43. H.R. REP. NO. 101-485, pt. 3, at 30-31, *reprinted in* 1990 U.S.C.C.A.N. 445, 452-53. Likewise, the EEOC regulations conclude that “[i]f the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of ‘myth, fear or stereotype’ can be drawn.” 29 C.F.R. pt. 1630, app. A § 1630.2(1); *see also* 28 C.F.R. pt. 35, app. A § 35.104 (1997) (stating under regulations implementing Title II of ADA that “[i]f a person refused admittance on the basis of a [] . . . perceived physical or mental condition, and the public entity can articulate no legitimate reason for the refusal, a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage” under “regarded as” test); 28 C.F.R. pt. 36, app. § 36.104 (1997) (providing for same inference under section of ADA pertaining to public accommodations).

44. *School Bd. v. Arline*, 480 U.S. 273, 285 (1986); *see* H.R. REP. NO. 101-485, pt. 2, at 53, *reprinted in* 1990 U.S.C.C.A.N. 303, 335 (noting clear articulation of rationale in *Arline* that third prong is designed to protect individuals who have impairments that do not substantially limit their functioning).

45. It is important to note that the analysis of whether an individual is substantially limited in working should be pursued only if he or she is not substantially limited in other life activities. *See* 29 C.F.R. pt. 1630, app. A. § 1630.2(j) (“If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.”).

46. *See* 29 C.F.R. § 1630.2(j)(3)(i) (defining substantially limited in major life activity of working as “significantly restricted in the ability to perform either a class of jobs, or a broad range of jobs in various classes as compared to the average person having comparable training, skill and abilities”).

47. *See Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993) (holding that employer’s exclusion of insulin-dependent diabetic from city bus driving job merely represented “employer’s belief that [the applicant] is unable to perform

of the single-job exception are compounded when applied to the third prong. A plaintiff in a first-prong case has the difficult burden of demonstrating the effect of his or her impairment on other jobs. A plaintiff under the third prong is being required to somehow show that the *employer* perceived the actual or imagined impairment to affect other jobs. A plaintiff can produce evidence of how he or she was treated, not what the employer "perceives."

Moreover, factors suggested by the EEOC as indicative of a substantial limitation in working under the first prong, such as the job criteria of other employers, should not apply when determining coverage under the third prong.⁴⁸ In fact, when applied to the third prong, these factors lead to absurd results. For example, using this criterion, employers may defend a suit under the ADA by proving that other employers do not utilize the same discriminatory criteria as that employed by the defendant and that, therefore, the discriminatory criteria does not constitute a substantial barrier to employment. In other words, the more arbitrary and prejudicial the physical or mental criteria, the more likely the employer will be able to escape review under the ADA. This argument would be un-

one task with an adequate safety margin [and] does not establish per se that the employer regards the [individual] as having a substantial limitation on his ability to work in general," despite the fact that the exclusionary criteria excluded plaintiff from 4,000 city jobs in 138 job classifications); *see also* Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) ("[T]he [EEOC] regulations cannot be interpreted to extend this definition to include working, at the specific job of one's choice."). For a more detailed discussion of the facts and holding of the *Chandler* decision, see *infra* notes 68-83 and accompanying text.

Many courts are requiring the plaintiff to demonstrate an inability to work generally. *See, e.g.*, Bolton v. Scrivner, Inc., 36 F.3d 939, 944 (10th Cir. 1994) (concluding that evidence showing inability to perform certain physical jobs failed to establish inability to work generally because plaintiff failed to show disqualification from class of jobs); Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 723 (2d Cir. 1994) (holding that fact that plaintiff blood bank director could not work in blood bank did not establish evidence that plaintiff was unable to work generally because asthma did not prevent her from working in other areas of hospital); Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992) (finding that plaintiff was not disabled simply because numbness of fingers disqualified him from service as firefighter because he was disqualified from only one job); Maulding v. Sullivan, 961 F.2d 694, 698 (8th Cir. 1992) (holding that chemist was not disabled simply because chemical sensitivity prevented her from doing lab work where there was no evidence that condition prevented her from working in other jobs); Mowat-Chesney v. Children's Hosp., 917 F. Supp. 746, 751 (D. Colo. 1996) (determining that inability to work as lab nurse alone does not establish disability because plaintiff failed to show inability to work generally); Soileau v. Guilford of Me., Inc., 928 F. Supp. 37, 49 (D. Me. 1996) ("If [plaintiff] is in fact capable of performing other jobs, then he is not substantially limited in his ability to work and thus not disabled under the ADA."), *aff'd*, 105 F.3d 12 (1st Cir. 1997).

48. For a discussion of the EEOC's interpretive regulations regarding the factors to consider in determining whether an individual is substantially limited in the major life activity of "working," see *infra* note 65 and accompanying text.

tenable in other areas of civil rights law where proof of other employers' nondiscriminatory job criteria would be used as evidence of the defendant's discrimination.

A. *Background to the Single Job Exception*

The issue of whether an individual who is rejected from a job because of a physical or mental impairment is in fact substantially limited in working or is perceived to be so limited originated in a line of cases under the ADA's predecessor, section 504 of the Rehabilitation Act. The leading Rehabilitation Act case in this area is *E. E. Black, Ltd. v. Marshall*.⁴⁹

In *E. E. Black*, an apprentice carpenter was denied employment when a pre-employment physical revealed a congenital back abnormality, despite the fact that the plaintiff was asymptomatic.⁵⁰ The question addressed by the United States District Court for the District of Hawaii was whether the plaintiff was "handicapped" within the meaning of section 706(8)(B) of the Rehabilitation Act.⁵¹ According to the court, this approach necessitated "a case-by-case determination of whether the impairment or perceived impairment of a rejected, qualified job seeker, constitutes, for that individual, a substantial handicap to employment."⁵² The court evaluated several factors to determine whether an impairment or perceived impairment constitutes a substantial handicap to employment.⁵³ For example, the court considered the number and type of jobs from which the individual was disqualified, as well as the individual's job expectations and training.⁵⁴

49. 497 F. Supp. 1088 (D. Haw. 1980). The Sixth Circuit described *E. E. Black* as the most comprehensive examination of how an individual should prove that he or she is substantially limited in his or her ability to work. See *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1249 (6th Cir. 1985).

50. See *E. E. Black*, 497 F. Supp. at 1091-92.

51. See *id.* at 1090. The Rehabilitation Act used the word "handicapped" instead of disability as in the ADA. The definition, however, has not changed. See H.R. REP. NO. 101-485, pt. 3, at 27-29 (1990), reprinted in U.S.C.C.A.N. 445, 449; S. REP. NO. 101-116, at 21 (1989). The definition used in *E. E. Black* preceded the 1974 amendments to section 504 of the Rehabilitation Act, that set forth the current definition. See 29 U.S.C. § 706(7)(B) (1994); 42 U.S.C. § 12102 (1994). The definition that the *E. E. Black* court interpreted was significantly different. See 29 U.S.C. § 706(8)(B) (defining "handicapped" as any individual who has physical or mental impairment which results in substantial impairment to employment and can benefit from vocational rehabilitation services).

52. *E. E. Black*, 497 F. Supp. at 1100.

53. See *id.* (indicating that court focus is directed to more than impairment, or perceived impairment, itself).

54. See *id.* ("[W]hat is considered a similar job . . . may differ among individuals with similar impairments, depending on their training, education, etc.").

Courts have relied on *E. E. Black* and its progeny for the general proposition that rejection from a single job does not trigger coverage as a person with a disability.⁵⁵ In so doing, many courts have failed to acknowledge the two central concepts of the *E. E. Black* analysis.

First, throughout the *E. E. Black* decision, the court stated that it must be assumed that the disqualifying criterion are used generally by employers. The court expressed that "[i]n evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process."⁵⁶ Thus, the court held that under this analysis, discriminatory policies must be imputed to other employers in a particular field.⁵⁷

Second, *E. E. Black* narrowly defines the single-job exception. As explained by the United States District Court for the Southern District of Indiana in *Leslie v. St. Vincent New Hope, Inc.*,⁵⁸ the example often used in the Rehabilitation Act cases based on *E. E. Black* was as follows: "A person with acrophobia who receives nine offers for employment as an accountant that she could accept, but must turn down a tenth offer because the office is on the thirty-seventh floor, is not deemed disabled."⁵⁹

Thus, an employer should not be able to properly utilize the single-job exception unless there is something truly unique about the job for which the plaintiff was rejected. It was not intended to allow employers to use physical or mental criteria to disqualify applicants from a type of job, such as police work. Moreover, an em-

55. See generally Pieter Bogaards, *The Rehabilitation Act of 1973: Who Is Handicapped Under Federal Law*, 16 U.S.F.L. REV. 653, 671-73 (1982) (criticizing court's interpretation of meaning of substantial limitation).

56. *E. E. Black*, 497 F. Supp. at 1100 (emphasis added). The court in *E. E. Black* underscored the importance of a presumption of common usage of the discriminatory criteria. *Id.* (stating that focus cannot be on specific job criteria or qualification used by particular employer). Otherwise, according to the court, an employer using some "aberrational type of job qualification . . . would be rewarded if his reason for rejecting the applicant were ridiculous enough." *Id.*

57. See *id.*

58. 916 F. Supp. 879 (S.D. Ind. 1996).

59. *Id.* at 883 (citing *E. E. Black*, 497 F. Supp. at 1099). The *E. E. Black* court presented additional examples:

Thus, for example, a worker who was offered a particular job by a company at all of its plants but one, but was denied employment at that plant because of the presence of plant matter to which the employee was allergic, would be covered by the Act. . . . An individual with some type of hearing sensitivity who was denied employment at a location with very loud noise, but was offered positions at other locations, would be covered by the Act.

E. E. Black, 497 F. Supp. at 1099.

ployer should not be able to use the single job exception as a defense simply because other employers do not use the same discriminatory criteria or because the employer claims that it uses particularly stringent standards.

The single-job exception should be particularly narrowly construed in a third-prong, "regarded as" case. The legislative history of the ADA emphasizes the need for broad third-prong coverage in order to ensure that individuals with impairments that are not substantially limiting are not unfairly denied employment. For example, Senate Report 116 specifically includes as an example of third-prong coverage "people who are rejected for a *particular* job for which they apply because of findings of a back anomaly on an X-ray."⁶⁰

Senate Report 116 further supports the position that the "regarded as" prong deserves broad coverage by referencing a Rehabilitation Act case that adopted an expansive view of the "regarded as" prong.⁶¹ The United States Court of Appeals for the Ninth Circuit found that a man with a congenital spine abnormality was covered by the "regarded as" prong because the employer perceived his condition as a disqualifying characteristic for the job at issue in the case *Thornhill v. Marsh*.⁶² Significantly, the *Thornhill* court did not require a showing that the perceived impairment have any impact on jobs beyond the one involved in the case.⁶³

Moreover, House Report 485 confronts this issue directly, stating:

Thus, a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, *whether or not the employer's perception was shared by others in the field* and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.⁶⁴

60. S. REP. NO. 101-116, at 24 (1989) (emphasis added).

61. *Id.* (citing *Thornhill v. Marsh*, 866 F.2d 1182 (9th Cir. 1989)).

62. 866 F.2d 1182, 1183 (9th Cir. 1989).

63. *Id.* at 1183-84. *Thornhill* is also cited in House Report 485. See H.R. REP. NO. 101-485, pt. 2, at 54 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 336 (citing *Thornhill* for proposition that when employer refuses to hire applicant because of fear of negative reaction of others or because of perception that applicant has impairment that prevents applicant from working, applicant is covered under third prong of definition of disability).

64. H.R. REP. NO. 101-485, pt. 3, at 30, reprinted in 1990 U.S.C.C.A.N. 445, 453 (emphasis added); see also 29 C.F.R. pt. 1630, app. A § 1630.2(l) (1997) (using identical language).

The EEOC's attempt to codify the single-job exception in its regulations may have inadvertently further confused the issue. While the EEOC recognizes that the single-job exception should only be used when there is something truly unique about the particular job, the language in the regulations is being used to defeat a wide variety of "regarded as" claims. The difficulty is deciding how the factors outlined by the EEOC to determine if an individual is substantially limited in working under the first prong apply, if at all, to the "regarded as" prong of the definition of disability.⁶⁵

In its explanation of the regulations, the EEOC provides the following examples to explain the single-job exception:

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an indi-

65. See 29 C.F.R. § 1630.2(j)(2), (3) (1997). Section 1630.2(j) of the EEOC Interpretive Guidelines provides in relevant part:

- (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
 - (i) The nature and severity of the impairment;
 - (ii) The duration or expected duration of the impairment; and
 - (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.
- (3) With respect to the major life activity of working—
 - (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.

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

- (ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":
 - (A) The geographical area to which the individual has reasonable access;
 - (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
 - (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id.

vidual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working.

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in the various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.⁶⁶

The examples given by the EEOC weigh in favor of a narrow interpretation of the single-job exception for first-prong coverage. For third-prong coverage, however, the EEOC correctly removes the consideration of other employers' practices, stating that: "An individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability [third prong], *whether or not* the employer's . . . perception[s] were shared by others in the field."⁶⁷

66. *Id.*

67. 29 C.F.R. pt. 1630, app. A § 1630.2(1) (emphasis added).

In these circumstances the EEOC applies the presumption of third-prong coverage unless the "employer can[] articulate a non-discriminatory reason for the employment action."⁶⁸

B. Worst Case Scenarios—Interpreting the Single-Job Requirement

Two cases illustrate the problems associated with recent judicial interpretation of the single-job requirement in perceived disability cases. For example, *Chandler v. City of Dallas*⁶⁹ involved a class action challenging the city's policy that excluded all employees who had insulin-dependent diabetes or various forms of vision impairment from working jobs that involved driving.⁷⁰ The plaintiff representatives were Lyle Chandler and Adolphus Maddox.⁷¹ Chandler had diabetes controlled by insulin.⁷² Maddox had a permanent vision impairment in his left eye that was correctable to no better than 20/40 acuity.⁷³ Using both eyes, however, Maddox retained better than 20/20 vision.⁷⁴ Both plaintiffs had jobs for which driving was incidental and had good driving records and job evaluations.⁷⁵

After the city implemented the program, both Chandler and Maddox were informed that they were no longer qualified for their jobs.⁷⁶ The plaintiffs argued that the exclusionary policy violated the Rehabilitation Act.⁷⁷ The United States District Court for the Northern District of Texas granted judgment in favor of the plain-

68. *Id.*

69. 2 F.3d 1385 (5th Cir. 1993).

70. *Id.* at 1388-89; *Chandler v. City of Dallas*, 958 F.2d 85, 86 (5th Cir. 1992).

71. *See Chandler*, 2 F.3d at 1388.

72. *See id.* at 1389.

73. *See id.*

74. *See id.*; *Chandler v. Dallas*, No. 3:85-CV-2580-R, at 1 (N.D. Tex. filed Sept. 10, 1992) (unpublished opinion).

75. *See Chandler*, 2 F.3d at 1389 n.2 (noting that driving requirements for Chandler's and Maddox's positions had been reduced subsequent to adoption of new driver safety program).

76. *See Chandler v. City of Dallas*, 958 F.2d 85, 87 (5th Cir. 1992). Both plaintiffs were disqualified from driving based on their disabilities. *See Chandler*, 2 F.3d at 1389. Chandler and Maddox applied for different level positions when the city realized, apparently for the first time, that the plaintiffs' current jobs were reclassified as a primary driver positions. *See Chandler*, 958 F.2d at 87. Although Chandler's job became classified as a primary driver position, it required only approximately five hours of driving per week. *See id.* Maddox testified that he had driven 20 hours a week in his position. *See id.*

77. *See Chandler*, 2 F.3d at 1389 (noting that in addition to allegations of Rehabilitation Act violation, plaintiffs' complaint also included claims under Revenue Sharing Act and Texas Commission on Human Rights).

tiffs.⁷⁸ In reversing the district court's judgment for the plaintiffs, the Fifth Circuit ruled that Chandler and Maddox did not have disabilities within the meaning of the Rehabilitation Act under either the first prong or third prong of the definition of handicap.⁷⁹

The Fifth Circuit's decision to dismiss plaintiffs' claims resulted in exactly the situation the Supreme Court had warned against in *Arline*—plaintiffs were judged based on “reflective reactions” to their impairments, with no opportunity to be judged based on “reasoned and medically sound judgments” and were therefore “vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.”⁸⁰

The plaintiffs in *Chandler* were presumed to be unsafe based on their impairments, contrary to evidence of past job performance and with no opportunity to challenge defendant's blanket policy. The Fifth Circuit relied on *Forrisi v. Bowen*⁸¹ and *Jasany v. United States Postal Service*,⁸² both of which narrowly defined the single job exception to justify the exclusion of plaintiffs from all jobs requiring driving—over 138 job classifications involving approximately 4000 job positions.⁸³ The Fifth Circuit expanded the “single particular job for one employer” exemption to include one job function, even if that function excluded plaintiffs from a massive range of types of jobs.⁸⁴

Similarly, in *Bridges v. City of Bossier*,⁸⁵ the Fifth Circuit denied coverage to a fire department applicant who was rejected for a job as a firefighter because he had a mild form of hemophilia.⁸⁶ Bridges was denied employment solely because of his hemophilia and despite evidence that he was currently serving in the National

78. See *id.* (explaining that district court rendered judgment for plaintiffs but failed to make findings of fact and conclusions of law).

79. See *id.* at 1390-91.

80. *School Bd. v. Arline*, 480 U.S. 273, 285 (1987).

81. 794 F.2d 931, 933 (4th Cir. 1986).

82. 755 F.2d 1244, 1249 (6th Cir. 1985).

83. See *Chandler*, 2 F.3d at 1388.

84. *Id.* “An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general.” *Id.* at 1393. In reversing the district court, however, the Fifth Circuit did decide “per se” that the city had not regarded plaintiffs as substantially limited in working. See *id.*; cf. *Cook v. Rhode Island Dep't of Health, Retardation & Hosps.*, 10 F.3d 17, 26 (1st Cir. 1993) (stating that plaintiff makes out perceived disability claim where employer “den[ies] an applicant even a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation that would keep her from qualifying for a broad spectrum of jobs”).

85. 92 F.3d 329 (5th Cir. 1996).

86. *Id.* at 331, 334.

Guard and employed as an emergency medical technician (EMT) without complications from his hemophilia.⁸⁷

The Fifth Circuit affirmed the district court's dismissal of the plaintiff's claim, holding that "disqualification from [a] job [] involving routine exposure to extreme trauma—such as a firefighter—[does not] constitute [] a substantial limitation on the major life activity of working."⁸⁸ Furthermore, the Fifth Circuit reasoned that exclusion from firefighting, EMT and paramedic jobs did not constitute an exclusion from a broad range of jobs in various classes.⁸⁹ Similarly, the court also held that these jobs did not constitute a class of jobs.⁹⁰ Finally, the court specifically rejected the argument that foreclosure from a job in a plaintiff's chosen field was sufficient to establish exclusion from a class of jobs.⁹¹

In deciding which jobs to include as requiring exposure to extreme trauma, the court took an unduly restrictive view and placed an onerous evidentiary burden on the plaintiff.⁹² Despite the fact

87. *See id.* at 331. The plaintiff presented evidence to the district court that he never suffered any severe complications because of his hemophilia. *See id.* Furthermore, the plaintiff alleged that "the City failed to conduct an individualized assessment of his ability to work as a firefighter, acting instead on 'myths, fears and stereotypes' about hemophilia." *Id.* Thus, the plaintiff claimed that "despite the fact that he could . . . perform the job of a firefighter, the City refused to hire him" because the decision makers perceived him to be disabled. *Id.*

88. *Id.* at 334.

89. *See id.* at 335 & n.9 ("Here, it is clear that disqualification from the job of firefighter also acted as a disqualification from the jobs of EMT and paramedic with the City."). The court relied upon 29 C.F.R. § 1630.2(j)(3)(i) (1997), which sets forth the standard for proving an actual substantial limitation in working. *See id.* at 335-36. For the language provided in 29 C.F.R. § 1630(j)(3)(i), see *supra* note 64 and accompanying text.

90. *See Bridges*, 92 F.3d at 335-36 ("[F]irefighting jobs—including firefighters and associated municipal paramedics or EMTs who must also serve as backup firefighters—is too narrow a field to describe a 'class of jobs' under 29 C.F.R. 1630.2(j)(3)(i).").

91. *See id.* at 334-36. The Fifth Circuit rejected the reasoning set forth in *Gupton v. Virginia*, 14 F.3d 203 (4th Cir. 1994) and *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993). *See Bridges*, 92 F.3d at 334-35. *Fitzpatrick* and *Gupton* suggested that exclusion from one's chosen field constitutes a substantial limitation in working. *Gupton*, 14 F.3d at 205; *Fitzpatrick*, 2 F.3d at 1126. Instead, the *Bridges* court adopted the flawed reasoning of the Tenth Circuit in *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992). *Bridges*, 92 F.3d at 335. For a discussion of *Welsh*, see *supra* notes 20-29 and accompanying text.

92. *See Bridges*, 92 F.3d at 333 (discounting *Bridges*' testimony regarding exclusion from class of jobs). The plaintiff listed "the following jobs as involving routine exposure to extreme trauma: law enforcement, military service, EMT, paramedic, construction worker, manufacturing and machinery processing jobs, saw mill employees, quarry workers, and jobs in the iron and steel industry." *Id.* The Fifth Circuit "rul[ed] out most of the jobs listed by *Bridges* because of a lack of record evidence." *Id.* The court refused not only a commonsense approach, but also evidence from an expert safety engineer and the plaintiff's own experi-

that the city required all EMTs and paramedics to be firefighters, thereby precluding plaintiff from all of these jobs as well, the court concluded that plaintiff was not substantially limited in working.⁹³ The court reasoned that because the city had reasons for this rule, the exclusion of EMT and paramedic jobs should not be counted towards the class of job for which the plaintiff was excluded because of his impairment.⁹⁴ Moreover, the court refused to impute the city's "rule-based disqualification from working for it as an EMT and paramedic to other employers."⁹⁵ Hence, the fact that other employers did not have such wide-sweeping exclusions worked in the defendant's favor by resulting in the exclusion of plaintiff from coverage, with no opportunity to challenge defendant's exclusionary rule on the merits. The restrictive interpretation of the definition of disability in *Bridges* undermines the purpose not only of the third prong of the definition of disability, but of the ADA as a whole. By refusing to allow the plaintiff to demonstrate that he was qualified to do the job with or without reasonable accommodation, the Fifth Circuit allowed what Congress sought to forbid—blanket exclusions based on medical criteria that may not be job-related.⁹⁶ The whole purpose of the ADA is to ensure that people with disabilities have the same opportunities as people without disabilities.⁹⁷ It

ence in the National Guard. *Id.* at 334 & 335 n.5. It is questionable from the tone of the decision whether any evidence, no matter how persuasive or far-reaching, would have changed the court's opinion that all of these jobs were still insufficient to be a class of jobs. *See id.* (taking narrow view with respect to class of jobs).

93. *See id.* at 335 n.9.

94. *See id.* The court explained:

The record shows that the rule [requiring all EMTs and paramedics to be firefighters] was implemented for two reasons: the City (1) wants these people to serve as backup firefighters, and (2) believes that the Fair Labor Standards Act allows employers to require firefighters (and EMTs and paramedics) to work 56-hour weeks without overtime pay.

Id.

95. *Id.*

96. *See id.* at 331 (noting plaintiff's argument that "city failed to conduct an individualized assessment of his ability to work as a firefighter"). Notably, the court improperly considered the medical evidence relevant to the qualification issue in deciding whether the city perceived plaintiff to be substantially limited in working. *See id.* at 333 n.4 (considering evidence that plaintiff was at increased risk for excessive bleeding with any trauma). Mixing the two stages of the prima facie case, the court stated that there is "sufficient evidence to sustain the district court's finding of the City's good faith, actual perception that firefighters routinely encounter extreme trauma in their jobs." *Id.*

97. *See, e.g.*, 42 U.S.C. § 12101(a)(8) (1994) ("The nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."). For a further discussion of the purposes of the ADA, see *supra* notes 3-6 and accompanying text.

is impossible to reconcile exclusion from one's chosen field based on potentially outmoded stereotypes about physical or mental impairments with the goals of the ADA.

IV. CONCLUSION

The confusion that reigns in the cases interpreting the "regarded as" prong of the definition of disability, particularly when the issue involves substantial limitation in working, can be eliminated by adopting the simple, straightforward approach Congress intended. The "regarded as" prong is *supposed* to be a catch-all for individuals who do not qualify as disabled according to the first and second prongs of the definition of disability, but have nevertheless been subject to an adverse disability-based employment action.⁹⁸ Courts have wrongly limited coverage to those considered "truly disabled."⁹⁹ The entire thrust of the ADA is that individuals should be judged on their abilities, not their medical status. By dismissing

98. Perhaps the most disturbing trend in case law has been the decisions by lower courts to grant defendants' motions for summary judgment, deciding that the plaintiffs are not disabled as a matter of law. Fortunately, the circuit courts are beginning to vacate such dismissals, recognizing that in most instances the issue of whether the employer regarded the plaintiff to have a disability is a question of fact. See *Johnson v. American Chamber of Commerce Publishers, Inc.*, 108 F.3d 818, 819-20 (7th Cir. 1997) (leaving issue of whether defendant was regarded as having disability for lower court on remand); *Best v. Shell Oil*, 107 F.3d 544, 549 (7th Cir. 1997) ("[A] trier of fact could find that [defendant] perceived [plaintiff] as having a disability that prevented him from working."); *Harris v. H.W. Contracting Co.*, 102 F.3d 516, 524 (11th Cir. 1996) (finding question of fact still exists with respect to "regarded as" prong); *Olson v. General Elec. Astrospace*, 101 F.3d 947, 955 (3d Cir. 1996) ("[I]t is clear that a reasonable fact-finder could infer that [defendant] perceived [plaintiff] to be disabled."); *Holihan v. Lucky Stores*, 87 F.3d 362, 366-67 (9th Cir. 1996) (holding that lower court erred in granting judgment as matter of law because the evidence could support finding that defendant regarded plaintiff as having disability); *Katz v. City Metal Co.*, 87 F.3d 26, 33-34 (1st Cir. 1996) (same); see also *Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1134 (11th Cir. 1996) (finding evidence created genuine issue of material fact with respect to "regarded as" prong); *EEOC v. Joslyn Mfg. Co.*, No. 95 C 4956, 1996 WL 400037, at *7 (N.D. Ill. July 15, 1996) ("[I]n order to survive summary judgment, the [plaintiff] only need raise a genuine issue of fact as to whether [the plaintiff's] perceived impairment substantially limited his ability to work, not actually prove as much.").

99. Cf. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) ("The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps."); *Patrick v. Southern Co. Servs.*, 910 F. Supp 566, 567 (N.D. Ala. 1996) ("The initial story of the ADA has been the attempt of persons to stretch the intent of the ADA with regard to alleged 'disabilities' [T]he truly disabled recognize that such attempted stretches can cause negative reactions to the Act."), *aff'd*, 103 F.3d 149 (11th Cir. 1996); *O'Dell v. Altac Indus.*, No. 94-6180-CV-SJ-6, 1995 WL 611341, at *4 (W.D. Mo. Oct. 16, 1995) (explaining that Congress offered narrow relief to more seriously deprived class of persons when enacting ADA).

claims at the stage where the plaintiffs must prove membership in the protected class, plaintiffs never have the opportunity to have their conditions evaluated in light of objective, current evidence. In cases where a physical or mental criterion has served as a disqualification, the plaintiff must have the opportunity to demonstrate his or her ability. This does not mean that the employer's policy will be automatically invalidated; it simply means that it must be job-related. Utilizing this suggested approach ensures employers' rights to have qualified workers while at the same time protecting individuals' rights to be judged by their abilities.

As stated in the legislative history of the ADA, "an employer may still devise physical and other job criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity."¹⁰⁰ The proper approach, as recognized by the Supreme Court in *Arline*, is to broadly construe the definition of disability to allow evaluation of the employment practice on the basis of "reasonable medical judgment."¹⁰¹ It is unconscionable for courts to allow employers to exclude someone from "his or her chosen profession," hopes and dreams based on unsubstantiated medical criteria. It does violence to the underlying principle of the ADA to conclude that this exclusion is not sufficient to trigger coverage because the person may be able to work elsewhere. The unjustness of this type of reasoning would be evident in other areas of civil rights law.

The narrow interpretations of disability often employ contorted, confused reasoning that results not only in civil rights deprivation, but also in wrong-headed public policy. If a medical condition results in unjustifiable exclusion, the person may have no choice other than to seek public assistance. The particular hostility faced by persons with physical conditions that result from occupational injuries underscores this point.¹⁰² A person who cannot go

100. H.R. REP. NO. 101-485, pt. 2, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338; S. REP. NO. 101-116, at 27 (1989).

101. *School Bd. v. Arline*, 480 U.S. 273, 288 (1987). For a discussion of *Arline*, see *supra* notes 9-13 and accompanying text.

102. See, e.g., *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 758 n.2 (5th Cir. 1996) (finding that climbing was not major life activity because it was not "a basic, necessary function"); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994) (holding that work-related injury preventing employee from performing his job in grocery warehouse was not substantial limitation on major life activity of working); *Dotson v. Electro Wire Prods., Inc.*, 890 F. Supp. 982, 991 (D. Kan. 1995) (holding that plaintiff with impaired hands was not disabled); *McKay v. Toyota Motor Mfg. USA, Inc.*, 878 F. Supp. 1012, 1016 (E.D. Ky. 1995) (stating that plaintiff with carpal tunnel syndrome failed to show limitation in class of jobs and was not disabled under ADA), *aff'd*, 110 F.3d 369 (6th Cir. 1997); *Davoll v. Webb*,

back to work because of an exclusionary physical criterion will stay on benefits and join the ranks of the unemployed.

The ADA, like section 504 of the Rehabilitation Act, was never intended to protect only the "truly disabled."¹⁰³ If the law were to be so narrowly construed, there would be no reason to include the "regarded as" prong in the definition of disability. Instead, Congress's goals were more far-reaching. The facts of many of the cases restricting coverage demonstrate the need for the third prong. As noted by the Supreme Court in *Arline*, "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."¹⁰⁴

One of the plaintiffs in *Chandler* had diabetes, which he controlled through medication.¹⁰⁵ Nevertheless, his employer treated him as a danger.¹⁰⁶ Another plaintiff in *Chandler* had monocular vision, but was able to compensate with his other eye to have normal vision.¹⁰⁷ Nevertheless, the city treated him as unable to drive a car safely.¹⁰⁸ Similarly, the plaintiff in *Bridges* had hemophilia, but

160 F.R.D. 142, 146 (D. Colo. 1995) (holding that police officer who was unable to fire guns or make forcible arrests was not disabled); *Wernick v. Federal Reserve Bank*, No. 93 Civ. 2606, 1995 WL 598973, at *3 (S.D.N.Y. Oct. 10, 1995) (holding that plaintiff was not disabled within meaning of ADA because back condition did not substantially limit plaintiff's ability to walk), *aff'd*, 91 F.3d 379 (2d Cir. 1996); *Lamury v. Boeing Co.*, No. 94-1225-PPK, 1995 WL 643835, at *5 (D. Kan. Oct. 5, 1995) (holding that plaintiff with repetitive motion injury was not disabled); *Czopek v. General Elec.*, No. 93C 7664, 1995 WL 374036, at *2 (N.D. Ill. June 21, 1995) (finding limitation in performing manual tasks does not constitute disability under ADA); *Ross v. Boeing Co.*, No. 93-1428-PFK, 1995 WL 333127, at *4 (D. Kan. May 4, 1995) (stating that plaintiff was not disabled nor unable to do essential functions of his job). In some of these cases, plaintiffs were not severely impaired, yet they were fired or not hired because of their impairment.

In addition, those plaintiffs with occupational injuries who are found disabled are oftentimes so impaired that they are not qualified individuals. *See, e.g.*, *McCullough v. Atlanta Beverage Co.*, 929 F. Supp. 1489, 1499 (N.D. Ga. 1996) (explaining that if employee is unable to perform essential functions of his or her position after reasonable accommodation, employer is under no obligation under ADA to eliminate or reallocate any of essential job functions); *Harden v. Delta Airlines*, 900 F. Supp. 493, 496-97 (S.D. Ga. 1995) (holding employee who claimed he was totally disabled was not entitled to recover for discrimination under ADA because no reasonable accommodation could have been made).

103. For a discussion of the inclusive nature of the ADA, see *supra* note 7 and accompanying text.

104. *Arline*, 480 U.S. at 284.

105. *Chandler v. City of Dallas*, 2 F.3d 1385, 1389 (5th Cir. 1993) (stating that *Chandler* was demoted from position of "primary driver" to that of "electrical repairer"). For a discussion of *Chandler*, see *supra* notes 68-83 and accompanying text.

106. *See Chandler*, 2 F.3d at 1389.

107. *Id.*

108. *See id.*

he did not let his disease stop him from pursuing his dream to be a firefighter.¹⁰⁹ Nevertheless, he was rejected because of his condition.¹¹⁰ Finally, the plaintiff in *Welsh* had a minor sensory deprivation in his fingers, but was precluded by the City of Tulsa from pursuing a career as a firefighter.¹¹¹ Each of these individuals squarely confronted “society’s accumulated myths and fears about disability.”¹¹² Nevertheless, by not allowing the plaintiffs to pursue their claims of disability discrimination, each of the lower courts left them vulnerable to “discrimination on the basis of mythology” and condoned blanket exclusionary policies without requiring evidence that they were necessary for the safe performance of the job.¹¹³

Hypertechnical, often illogical, interpretations of the ADA must give way to a simple, commonsense approach in order to accomplish the goals outlined by Congress. The interests of both our society and the individuals involved will be served by subjecting employment criteria based on physical or mental impairment to the scrutiny contemplated by the ADA.

109. See *Bridges v. City of Bossier*, 92 F.3d 329, 336 (5th Cir. 1996) (declining coverage because disability did not limit plaintiff from broad class of jobs). For a discussion of *Bridges*, see *supra* notes 84-97 and accompanying text.

110. *Bridges*, 92 F.3d at 336.

111. *Welsh v. City of Tulsa*, 977 F.2d 1415, 1417 (10th Cir. 1992) (construing narrowly third-prong coverage under Rehabilitation Act). For a further discussion of *Welsh*, see *supra* notes 20-29 and accompanying text.

112. *School Bd. v. Arline*, 480 U.S. 273, 284 (1987).

113. *Id.* at 285 (stating that without “perceived as” prong of definition of disability, persons with actual or perceived contagious diseases would not have opportunity to have condition evaluated in light of medical evidence, but would be vulnerable to discrimination based on myths, fears and stereotypes).