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# Comparative Evidence or Common Experience: When Does "Substantial Limitation" Require Proof Under the Americans with Disabilities Act?

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# Comparative Evidence or Common Experience: When Does "Substantial Limitation" Require Proof Under the Americans with Disabilities Act?

## **Keywords**

Americans with Disabilities Act (ADA), Comparative Evidence, "Substantial Limitation", Disabilities Act

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**COMPARATIVE EVIDENCE OR COMMON  
EXPERIENCE: WHEN DOES “SUBSTANTIAL  
LIMITATION” REQUIRE SUBSTANTIAL  
PROOF UNDER THE AMERICANS WITH  
DISABILITIES ACT?**

CHERYL L. ANDERSON\*

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#### INTRODUCTION

To those familiar with disability discrimination law, the basic standard is well-rehearsed: in order to establish the existence of a disability under the Americans with Disabilities Act ("ADA"), the plaintiff must prove that she has an impairment that substantially limits a major life activity.<sup>1</sup> "Substantially limits" is a stringent threshold, with courts (including the United States Supreme Court) insisting that only a narrow set of deserving cases qualify for protection.<sup>2</sup> Each case requires an individualized determination of whether the disability threshold is met.<sup>3</sup> The case reporters are replete with opinions finding the plaintiff failed to meet the substantial limitation threshold.<sup>4</sup>

But one aspect of this standard has been largely ignored by both scholars and, it would seem, ADA plaintiffs' counsel. The ADA regulations define substantial limitation by comparison to "the average person in the general population."<sup>5</sup> While a lot of attention

1. 42 U.S.C. § 12102(2) (2000).

2. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196–97 (2002) (reasoning that the use of the term "substantial" indicates an impairment that interferes in a minor way will not qualify as a disability); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–83 (1999) (interpreting the ADA to exclude protection of individuals whose impairments can be controlled by medication or other mitigating measures).

3. *Sutton*, 527 U.S. at 483.

4. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 119 & nn.107–12, 120–26 (1999) (finding that courts are deciding ADA cases on summary judgment because the plaintiff has failed to prove, among other issues, that the impairment at issue substantially limits a major life activity).

5. 29 C.F.R. § 1630.2(j)(1) (2007).

has been paid to the concept of “substantial,” considerably less has been paid to the concept of the “average person.” Most academic commentary on the ADA glosses over the “average person” requirement entirely.<sup>6</sup> A number of court decisions suggest plaintiffs’ counsel have done the same, only to have their clients’ cases dismissed for failure to present sufficient evidence.<sup>7</sup>

In many of those cases, plaintiffs were required to present comparative evidence to establish how the average person is able to perform the relevant major life activity and how the plaintiff’s ability varies from that average.<sup>8</sup> There is another line of cases, however, in which courts determine that “average person” comparative evidence is not required; the finders of fact can instead rely on “common sense and their own life experience” to determine if the plaintiff’s impairment is substantially limiting.<sup>9</sup> Courts characterize the disabilities in the latter cases as plain “on their face.”<sup>10</sup>

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6. See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 147–54 (2000) (criticizing a decade of court interpretation of “substantially limits” without any discussion of the “average person” standard). The difficulties of comparing an individual to an average person have recently been raised in the context of learning disability ADA claims. See Sara N. Barker, *A False Sense of Security: Is Protection for Employees with Learning Disabilities Under the Americans with Disabilities Act Merely an Illusion?*, 9 U. PA. J. LAB. & EMP. L. 325, 340 (2007) (reasoning that individuals with learning disabilities are disadvantaged by the comparison to the “average person” because they may statistically have average to superior intelligence and the substantial limitation inquiry does not look at the discrepancy between their ability and achievement).

7. See *infra* Part III.C.1 (detailing various decisions that rule as a matter of law that certain lifting restrictions are not substantial when the plaintiff does not present comparative evidence of the average person’s lifting ability).

8. See, e.g., *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1240–41 (10th Cir. 2001) (dismissing the plaintiff’s claim because he failed to produce evidence comparing his restricted lifting ability to the lifting ability of the general population); see also *infra* Part III.C.1 (describing the lack of a clear standard for the applicability of comparative evidence).

9. See, e.g., *Hayes v. United Parcel Serv., Inc.*, 17 F. App’x 317, 321 (6th Cir. 2001) (allowing finder of fact to use “[c]ommon sense and life experiences” to determine if plaintiff was “significantly restricted as compared to the average person”); *Lowe v. Angelo’s Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996) (finding that “lifting is a major life activity” and that evidence comparing the plaintiff’s ability to lift with that of an average person was unnecessary to survive a motion for summary judgment); see also *infra* Part III.B (presenting cases where courts have not required comparative evidence).

10. See *Lusk*, 238 F.3d at 1240 (noting that comparative evidence is not necessary to defeat “a motion for summary judgment where the impairment appears substantially limiting on its face”); see also *infra* Part III.B (positing that there is little question that an impairment is substantially limiting in cases where courts rely on common sense and life experiences).

The best illustrations of this evidentiary dichotomy are the cases involving impairment of basic motor skills, such as lifting.<sup>11</sup> Plaintiffs who have “simple” lifting restrictions (generally, lifting weight limits related to a back injury) have had a more difficult time with the evidentiary standards than others whose similar lifting restrictions are related to other conditions (such as a non-functioning limb).<sup>12</sup> Although sometimes couched in factual terms of the plaintiff presenting inadequate comparative evidence, courts go even further in lifting cases to rule that certain weight limitations are not substantial as a matter of law.<sup>13</sup> In these cases, the “average person” standard is used more as a means to an end rather than as a well-grounded substantive standard.<sup>14</sup> No consistent doctrine emerges as to when the plaintiff can expect common sense to carry the day and when the plaintiff needs to present comparative evidence. Plaintiffs may find themselves uncertain whether they can rely on their own or other lay testimony (such as a family member), whether simply supplementing their testimony with that of a treating medical or rehabilitation expert will be sufficient, or whether more detailed scientific proof of “average” is required.<sup>15</sup>

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11. Perhaps this is because lifting restrictions are most commonly tied to back impairments, which made up the second most common specific impairment alleged in Equal Employment Opportunity Commission (“EEOC”) filings in 2006 and the most common specific impairment alleged overall from 1997-2006. See EEOC, ADA Charge Data by Impairments/Bases-Receipts, <http://www.eeoc.gov/stats/ada-receipts.html> (last visited Oct. 21, 2007) (stating that “Orthopedic and Structural Impairments of the Back” accounted for 12.8% of impairments alleged from 1996-2006).

12. See *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 23 (1st Cir. 2002) (finding prior cases dismissing lifting disability claims inapposite because “[a] missing hand is a more profound impairment than a simple inability to lift objects over a certain weight”).

13. See *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (holding as a matter of law that a twenty-five pound lifting restriction is not substantially limiting on the “ability to lift, work, or perform any other major life activity” compared to an average person’s ability); see also *Velarde v. Associated Reg’l & Univ. Pathologists*, 61 F. App’x 627, 630 (10th Cir. 2003) (suggesting “there is a threshold of severity of impairment”); *infra* Part III.C.1 (contending that some courts rely on generalized conclusions about certain impairments instead of using individualized assessment).

14. Professor Chai R. Feldblum has suggested that the substantial limitation analysis in general “often seem[s] to depend more on the court’s belief in the *merits* of the plaintiff’s underlying claim than on the specific effects of the plaintiff’s impairment on his or her life.” Feldblum, *supra* note 6, at 150. She posits that courts first developed their restrictive views in response to cases with flawed merits and then were forced to apply that precedent even to meritorious claims. *Id.* at 151. In the cases discussed in this Article, courts have in effect increased the difficulty of proving substantial limitation by imposing additional evidentiary burdens, suggesting that the judicial bias indeed relates to the comparative importance of the underlying impairment as much as to the merits of the individual’s need for accommodation.

15. One law review article suggests that the lack of success plaintiffs have had in summary judgment cases can be attributed to plaintiff’s lawyers’ failure to develop

Another issue is that, instead of comparing the plaintiff's abilities to the full range of an average person's abilities, some courts have narrowed the inquiry to whether very basic tasks *cannot* be performed, such as lifting laundry baskets and brushing teeth.<sup>16</sup> This comes from a misapplication of the standard the Supreme Court articulated in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*<sup>17</sup> for determining what tasks make up the categorical major life activity of "performing manual tasks."<sup>18</sup> The Court held in *Toyota* that in order for a person to be substantially limited in the major life activity of performing manual tasks, the plaintiff must exhibit more than limitations experienced in the workplace.<sup>19</sup> Rather, the plaintiff must show substantial impairment of all activities "central to daily life," including performing "household chores, bathing, and brushing one's teeth."<sup>20</sup> Some courts have generalized this to judge the substantiality of all impairments, even discrete tasks like lifting.<sup>21</sup> This potentially creates a catch-all "tooth brushing inability" threshold of severity that substitutes for the average person comparison.

Courts have expressed distaste for becoming "glorified worker's compensation referees."<sup>22</sup> At the same time, whether they are generalizing *Toyota* or insisting on evidence of average capability, they seem to be pushing ADA plaintiffs toward presenting functional capacity evidence similar to that used to make other types of impairment determinations. Unfortunately, however, the most common assessment models used in vocational evaluation such as the *Dictionary of Occupational Titles* ("DOT")<sup>23</sup> and Occupational

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adequate factual records. See Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are so many ADA Plaintiffs Losing Summary Judgment Motions, and Would they Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 517-18 (2000) (maintaining that plaintiff's attorneys mistakenly assume their client's asserted limitations are enough to survive a motion for summary judgment; however, evidence is needed to put the plaintiff's limitations in context).

16. See *infra* Part III.C.2.b (describing a judicial trend requiring plaintiffs to present evidence that the impairment causes an inability to do basic daily tasks outside of the work setting).

17. 534 U.S. 184 (2002).

18. *Id.* at 198 (requiring the plaintiff to show limitation in a broad range of daily activities in order to prove a limitation in the major life activity of performing manual tasks); see *infra* Part III.C.2.b (discussing the significance that this decision has had on evaluating other major life activities).

19. 534 U.S. at 200-01.

20. *Id.* at 197, 202.

21. See *infra* notes 202-218 and accompanying text (detailing the application of the "central to daily life" requirement to lifting impairments).

22. *Pedigo v. P.A.M. Transp., Inc.*, 891 F. Supp. 482, 485-86 (W.D. Ark. 1994), *vacated on other grounds*, 60 F.3d 1300 (8th Cir. 1995).

23. See generally EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES (4th ed. 1991) [hereinafter DOT], available at <http://www.o>

Information Network Resource Center (“O\*NET”),<sup>24</sup> and those used in medicine such as the American Medical Association’s *Guides to the Evaluation of Permanent Impairment* (“AMA Guides”),<sup>25</sup> are both more individual-focused than average-focused and more work task-focused than daily life task-focused. Courts may, therefore, be wielding the summary judgment weapon against plaintiffs for failure to produce evidence that does not exist beyond common life experience and would not significantly help the fact finder.

Although the ADA’s regulations attempt to spell out a criteria-based definition, “substantial limitation” is ultimately a subjective standard.<sup>26</sup> As Professor Ani B. Satz has recently noted, it is subject to “social influences on what one recognizes as significant life activities and a ‘substantial limit[ation]’ of those activities.”<sup>27</sup> A judgment call must be made regarding what is different enough to be a significant deviation from average human experience. At present, courts are too willing to assume that they should make that judgment call. They should recognize that the fact finder is in a better position to make that call, without demanding unnecessary expert comparative evidence.

Such an approach is more consistent with the rejection of the medical (expert) model of disability in favor of the civil rights model. Demanding expert testimony in ADA cases before the jury is allowed to determine the substantiality of limitation perpetuates the medical model’s focus on “individual [medical] pathology [instead of] externally-imposed barriers that limit a person’s access to all

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alj.dol.gov/libdot.htm (last visited Sept. 26, 2007) (classifying occupations and providing task descriptions to facilitate job placement).

24. See generally Occupational Information Network Resource Center, <http://www.onetcenter.org/> (last visited Oct. 22, 2007) [hereinafter O\*NET] (providing occupational information and career exploration resources).

25. See generally AM. MED. ASS’N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (Linda Cocchiarella & Gunnar B.J. Andersson eds., 5th ed. 2001) [hereinafter AMA GUIDES] (providing extensive medical criteria to assess an individual’s impairment).

26. If working is the major life activity at issue, arguably, the standard is less subjective because the regulations incorporate at least some demographic standards into the determination of substantial limitation. See 29 C.F.R. § 1630.2(j)(3)(i) (2007) (stipulating that the complainant’s ability to work is to be compared to an individual with “comparable training, skills and abilities”); *id.* § 1630(j)(3)(ii) (including geographical data concerning job availability in the factors that may be considered). Yet, a subjective component remains in the degree of exclusion from job opportunities that is significant enough to be considered substantial.

27. Ani B. Satz, *A Jurisprudence of Dysfunction: On the Role of “Normal Species Functioning” in Disability Analysis*, 6 YALE J. HEALTH POL’Y L. & ETHICS 221, 252 (2006) (alteration in original).



segments of society.”<sup>28</sup> Moreover, demanding specific comparative evidence in all but the most obvious disability cases leads to unnecessary reliance on expert testimony (and concomitantly dooms plaintiffs who have not developed that expert comparative evidence) without a corresponding increase in accuracy of determination.<sup>29</sup> As this Article discusses, there may be significant issues with expert comparative evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>30</sup>

While much can be said about courts’ overly burdensome evidentiary standards, plaintiffs’ attorneys and medical and vocational evaluators also need to be more proactive. If the current return-to-work evaluation regime does not produce evidence sufficient to satisfy courts that the plaintiff’s limitations are substantial, then a new, more ADA-centric evaluation regime needs to be developed.

Part II of this Article considers the ADA’s requirement that limitations of major life activities be substantial as compared to the “average person’s” abilities. The Equal Employment Opportunity Commission (“EEOC”) regulations explicitly articulate a comparison to an average person, but also suggest that this comparison does not require a great deal of precision. Using lifting cases as a lens, Part III then looks at how courts have been approaching the evidentiary standards for showing substantial limitation. Next, Part IV looks at certain assessment models used by medical and vocational experts, specifically the *DOT*, *O\*NET*, and the *AMA Guides*. While some helpful information can be gleaned from these evaluation devices, they do not necessarily lead to the kind of comparisons that courts seem to be demanding of plaintiffs. Further, as noted, the nature of the evidence raises some interesting *Daubert* issues.

Finally, in Part V, the Article suggests that courts are pushing ADA cases in a direction that results in over-reliance on expert testimony.

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28. See Deirdre M. Smith, *Who Says You’re Disabled? The Role of Medical Evidence in the ADA Definition of Disability*, 82 TULANE L. REV. 1 (forthcoming 2007) (manuscript at 3–4), available at <http://ssrn.com/abstract=979090>.

29. See *EEOC v. Rockwell Int’l Corp.*, 243 F.3d 1012, 1021 (7th Cir. 2001) (Wood, J., dissenting) (questioning what is “gained by having vocational experts routinely appear in ADA cases” when the issue in question is one that can be determined with generalized information). From a law and economics perspective, one might question the efficacy of imposing the direct cost of producing expert testimony considering it is unlikely to decrease the error costs of an erroneous determination. Cf. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 448 (1973) (articulating a goal of legal procedure as “minimiz[ing] the sum of error costs and of the direct costs”).

30. 509 U.S. 579, 593–94 (1993) (articulating the standard for the admissibility of expert scientific testimony); see *infra* Part IV.C (explaining the issues that can arise when presenting expert testimony to establish a substantial limitation).

Jury common sense should be used most frequently to evaluate the evidence presented in ADA cases. If common sense does not prevail, however, plaintiffs' counsel in conjunction with medical and vocational experts need to use the "average person" standard proactively, which may be one way to decrease the number of ADA cases dismissed on summary judgment.

#### I. THE ADA REQUIRES AN INDIVIDUALIZED ASSESSMENT OF DISABILITY AS COMPARED TO AN "AVERAGE" PERSON

In order to proceed under the ADA, the plaintiff must first meet the threshold requirement that she have a disability.<sup>31</sup> This determination must result from an individualized assessment of the plaintiff's impairment and the restrictions that arise from that impairment.<sup>32</sup> As set out in the EEOC's regulations, the general benchmark for whether restrictions substantially limit a major life activity is the "average person in the general population."<sup>33</sup> As this Part will establish, at least under the legislative history of and interpretive guidance to the statute, this "average" person is not based on a scientifically precise calculation, which would presumably need to be supplied by an expert witness, but rather on commonly understood human capabilities.

"Disability" is a term of art under the ADA. The statute defines the term to mean "with respect to an individual (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."<sup>34</sup> EEOC regulations further define each of these component parts.<sup>35</sup> Most

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31. See 42 U.S.C. § 12112(a) (2000) (prohibiting discrimination against "a qualified individual with a disability"); *id.* § 12102(2) (defining the term "disability").

32. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999) (reasoning that "whether a person has a disability under the ADA is an individualized inquiry").

33. 29 C.F.R. § 1630.2(j)(1)(ii) (2007). The regulations provide a more specific benchmark for claims involving "the major life activity of working," requiring comparison not to the average person but to a person of "comparable training, skills and abilities." *Id.* § 1630.2(j)(3)(i).

34. 42 U.S.C. § 12102(2).

35. 29 C.F.R. § 1630.2(h)-(j). "Physical or mental impairment" is defined broadly to include any physiological disorder or condition that affects one or more body systems such as neurological, musculoskeletal, or cardiovascular, or a mental or psychological disorder such as mental retardation or emotional or mental illness. *Id.* § 1630.2(h). "Major [l]ife [a]ctivities" are defined to include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 1630.2(i). The EEOC's authority to issue regulations defining the generally applicable provisions of the ADA, as opposed to the employment provisions of Title I, is an open question. See *Sutton*, 527 U.S. at 479 (suggesting, without deciding, that the EEOC might not have been given such authority).

pertinently, “substantially limits” is defined by comparison to the “average” person:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.<sup>36</sup>

The regulations then list three general factors to consider in making this determination: “(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.”<sup>37</sup>

The regulations’ reference to the “average person in the general population” is similar to what was articulated in the House Report addressing ADA legislation, which distinguished between “substantial” and “trivial” impairments as follows:

A person with minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.<sup>38</sup>

The House Report gives the following example: “A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.”<sup>39</sup> This is the extent to which “average” is considered in the legislative history of the ADA. The non-scientific language in the legislative history suggests that a finding of substantial limitation can be based on a common sense understanding of what is different from most people’s

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36. 29 C.F.R. § 1630.2(j)(1). The regulations establish two sets of factors for evaluating the limitation at issue, one set of general factors and one set more specific to the major life activity of working. *Id.* § 1630.2(j)(2)–(3).

37. *Id.* § 1630.2(j)(2).

38. H.R. REP. NO. 101-485, pt. 2, at 52 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 334.

39. *Id.*

experience. It certainly does not suggest that Congress had an exacting standard in mind.

Nor is there any support for an exacting standard in the Rehabilitation Act, whose section 504 regulations were used as a model for the ADA's statutory definition of disability.<sup>40</sup> In fact, those regulations did not specifically define "substantially limited."<sup>41</sup> As Professor Chai Feldblum, one of the drafters of the ADA, notes, very few Rehabilitation Act cases had raised issue as to what was substantial, and the ADA's drafters did not anticipate that their use of the same three prong definition of disability would result in the demanding standards courts have imposed on plaintiffs to prove their impairments are substantially limiting.<sup>42</sup>

Accordingly, nothing in the Act's history suggests that expert testimony generally would be required on the issue of average and the degree to which the individual varies from that average. Consistent with that, neither the EEOC's Title I regulations nor the EEOC's interpretive materials require such testimony, except perhaps in cases involving the major life activity of working.<sup>43</sup> Rather, they

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40. Feldblum, *supra* note 6, at 92.

41. See 34 C.F.R. § 104.3 (2007) (referring to, but failing to expressly define, the term substantial limitation when defining other terms used in section 504 of the Rehabilitation Act); see also Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (July 26, 1991) (codified at 29 C.F.R. pt. 1630) (noting that Congress directed that the ADA regulations be modeled upon 34 C.F.R. pt. 104 and that the EEOC regulations "define[] terms not previously defined in [those] regulations . . . such as 'substantially limits'"). The Department of Labor's ("DOL") section 504 regulations, which apply to entities receiving federal financial assistance from the DOL, define "substantially limits," but only by reference to employability:

*Substantially limits* means the degree that the impairment affects an individual becoming a beneficiary of a program or activity receiving Federal financial assistance or affects an individual's employability. A handicapped individual who is likely to experience difficulty in securing or retaining benefits or in securing, or retaining, or advancing in employment could be considered substantially limited.

29 C.F.R. § 32.3 (2006).

42. Feldblum, *supra* note 6, at 92-94.

43. Nothing in the Title I regulations addresses what "average person in the general population" means. See 29 C.F.R. § 1630 (2007) (defining many terms but not elaborating an average person standard). The guidance does, however, set out some additional evidentiary standards for the major life activity of working. See *infra* notes 49-50 and accompanying text (elaborating on the guidance provided for establishing a work impairment). Additional sources of interpretive guidance, likewise, fail to establish exacting scientific standards. See generally EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT (1992) [hereinafter TECHNICAL ASSISTANCE MANUAL] (providing guidance intended to assist the public with applying ADA standards); EEOC, EEOC COMPLIANCE MANUAL § 902 (1995) [hereinafter COMPLIANCE MANUAL], available at <http://www.eeoc.gov/policy/docs/902cm.html> (offering guidance to EEOC field investigators who are determining whether and how to proceed with an ADA charge).

suggest that individualized evidence of the plaintiff's restrictions should usually be sufficient to make a determination, such that most cases will be resolved by reference to some kind of commonly understood average.<sup>44</sup>

For example, Section 902 of the *EEOC Compliance Manual* ("Compliance Manual") focuses on gathering information from the charging party and his doctor, family, friends, and rehabilitation and other counselors about the individual's impairment and its impact on the individual's life.<sup>45</sup> The enforcement guidance specific to psychiatric disabilities takes a similar approach, explicitly stating that "[e]xpert testimony about substantial limitation is not necessarily required."<sup>46</sup> The examples used in these sources demonstrate that conclusions can be drawn directly from the nature of the plaintiff's restrictions. The *Interpretive Guidance on Title I of the Americans with Disabilities Act* ("Interpretive Guidance") uses the example of a person "who, because of an impairment, can only walk for very brief periods of time" to illustrate a significant restriction compared to the average person.<sup>47</sup> Similarly, the *Compliance Manual's* examples draw contrasts

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44. When the interpretive appendix to 29 C.F.R. § 1630.2(j) was first published, it specifically provided that "the term 'average person' is not intended to imply a precise mathematical 'average.'" 56 Fed. Reg. 35,726-01 (July 26, 1991) (codified at 29 C.F.R. pt 1630 app. 1630.2(j)). After the Supreme Court's decision in *Sutton v. United Airlines, Inc.* 527 U.S. 471 (1999), the EEOC amended the Appendix to remove text it characterized as "address[ing] mitigating measures used by persons with impairments." 65 Fed. Reg. 36,327 (June 8, 2000). Although that sentence arguably had no direct relationship to mitigating measures, it was at the end of a paragraph right after two examples that were superseded by the *Sutton* ruling, and the paragraph was amended to remove all of that text. 56 Fed. Reg. 35726-01 (July 26, 1991) (codified at 29 C.F.R. pt 1630 app. 1630.2(j)).

45. COMPLIANCE MANUAL, *supra* note 43, § 902.4(c)(1). According to the *Compliance Manual*, "a good starting point for determining the extent to which a physical or mental impairment limits any of the charging party's major life activities" is the medical documentation submitted by the charging party. *Id.* The *Compliance Manual* accordingly suggests that investigators should request the charging party provide copies of any medical statements that describe the party's restrictions. *Id.* The guidance cautions investigators not to stop there:

[I]t is essential that the investigator obtain a statement in which the charging party describes the nature of his/her condition and explains how the condition limits his/her performance of major life activities. In addition, the investigator should obtain statements from other persons who have direct knowledge of the individual's restrictions. For example, persons such as friends and family members, supervisors, rehabilitation counselors, and occupational or physical therapists may be able to describe the restrictions that the individual's impairment places on the individual. Further, the investigator's own observations of the charging party may supply or confirm information about the charging party's restrictions.

*Id.*

46. EEOC, ENFORCEMENT GUIDANCE: THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES 6 (1997), available at <http://www.eeoc.gov/policy/docs/psych.html>.

47. 29 C.F.R. § 1630.2(j).

based on common understanding of a significant restriction compared to the average person:

*Example 1:* [Charging Party (“CP”)] has a mild form of Type II, non-insulin-dependent diabetes. She does not need to take insulin or other medication, and her physician has placed no significant restrictions on her activities. Instead, her physician simply has advised CP to maintain a well balanced diet and to reduce her consumption of foods that are high in sugar or starch. Although diabetes often substantially limits an individual’s major life activities, CP’s diabetes does not substantially limit any of her major life activities. It has only a moderate effect on what she eats, and it does not restrict her in any other way.

*Example 2:* Same as Example 1, above, except CP’s condition requires CP to follow a strict regimen. She must adhere to a stringent diet, eat meals on a regular schedule, and ensure a proper balance between her caloric intake and her level of physical activity. A change of routine, such as a high-calorie meal or unexpected strenuous exercise, could result in blood-sugar levels that are dangerously high or low. CP’s condition significantly restricts how she functions in her day-to-day life. CP, therefore, has an impairment (diabetes) that substantially limits one or more of her major life activities.<sup>48</sup>

Neither example looks to specific comparative evidence, nor any expert opinion beyond that of the individual’s treating physician.

The guidance moves somewhat toward requiring expert comparative testimony for the major life activity of working. The *Interpretive Guidance* outlines some types of comparative evidence that might be used, while at the same time indicating the absence of a required “onerous evidentiary showing.” “[T]he terms [‘number and types of jobs,’ in the regulatory definition,] only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., ‘few,’ ‘many,’ ‘most’) from which an individual would be excluded because of an impairment.”<sup>49</sup> The *Compliance Manual* adds that when it is clear that a person is excluded from a class of jobs or broad range of jobs in various classes, only minimal evidence of job demographics is required.<sup>50</sup>

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48. COMPLIANCE MANUAL, *supra* note 43, § 902.4(c)(1).

49. 29 C.F.R. § 1630.2(j). Although not explicit, the reference to “recognized occupational classifications” suggests the use of the *DOT* or its successor, O\*NET. *Id.*; see *DOT*, *supra* note 23, at xvii (explaining *DOT*’s classification system, which groups jobs into “occupations”).

50. COMPLIANCE MANUAL, *supra* note 43, § 902.4(c)(3).

To the extent there is guidance on the issue from the EEOC, therefore, “average” is not so much a concept of scientific precision as it is something of common understanding, supplemented by the plaintiff’s medical record or, in the case of working, general demographic evidence. If the plaintiff can address limitation in working by showing exclusion from “‘few,’ ‘many,’ [or] ‘most’” jobs in a class, precision is obviously not required.<sup>51</sup>

Perhaps for related reasons, although the Supreme Court has now addressed several cases defining “substantial limitation,” none of them dwell on the concept of “average.” The Court has emphasized that substantial means more than merely different,<sup>52</sup> but has also suggested that the ADA’s individualized inquiry focuses on the *individual’s* experience. In *Albertson’s, Inc. v. Kirkingburg*,<sup>53</sup> the Court considered what evidence a person with monocular vision would need to present in order to show substantial limitation. While the Court rejected finding monocular vision a disability *per se*, it nonetheless emphasized that it did not expect ADA plaintiffs to have “an onerous burden in trying to show that they are disabled.”<sup>54</sup> The Court framed the needed evidence as relating to the individual’s “own experience, as in loss of depth perception and visual field.”<sup>55</sup> The Court apparently believed that such testimony of the plaintiff would be sufficient in most cases to persuade the trier of fact that the vision limitation was substantial.<sup>56</sup>

When the legislative history and regulations are taken together with cases like *Kirkingburg*, plaintiffs should not need expert testimony to raise a question of fact on substantial limitation in most cases, beyond perhaps that of their treating physician addressing the specific nature of the impairment<sup>57</sup> and, in working cases, a vocational

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51. 29 C.F.R. § 1630.2(j).

52. See *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 564–65 (1999) (reversing the lower court’s decision and stating that “[b]y transforming ‘significant restriction’ into ‘difference,’ the court undercut the fundamental statutory requirement”).

53. 527 U.S. 555 (1999).

54. *Id.* at 566–67.

55. *Id.* at 567.

56. The Court also noted that it had “brief[ly] examin[ed] . . . some of the medical literature” which left it “sharing the Government’s judgment that people with monocular vision ‘ordinarily’ will meet the Act’s definition of disability.” *Id.* This appears to be related primarily to identifying monocular vision as a physical impairment, because the Court immediately went on to state its holding that the plaintiff must offer evidence that proves the extent of their own experience with the impairment. See *id.* (suggesting that evidence about the individual’s experience, for example, loss in depth perception, could demonstrate substantial limitation).

57. The suggestion that plaintiffs in ADA cases should present medical testimony regarding their impairments is not without criticism. Professor Deirdre Smith argues that courts are too demanding in requiring that plaintiffs present medical evidence

evaluator addressing the categories of jobs from which the plaintiffs are excluded.<sup>58</sup> For some lower courts, however, the “not onerous” part of the equation has been lost, even in cases alleging vision impairment similar to that in *Kirkingburg*.<sup>59</sup>

Much of the problem can be traced to another Supreme Court decision, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.<sup>60</sup> In

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to “corroborate” the fact of their disability. See Smith, *supra* note 28, at 27 (“Judges’ insistence on the presence of expert medical testimony in the record is based upon improper reasoning and imposes an unwarranted and inappropriate burden on ADA plaintiffs.”). She reasons that this perpetuates the plaintiff in the role of patient, gives purchase to skepticism of individuals with disabilities as malingerers, and reinforces false notions of the objectivity of medicine. *Id.* at 66, 68. To the extent Smith argues courts often require more evidence than necessary to establish the basis for an impairment claim, there is no disagreement between her position and that advocated in this Article. In some cases, however, medical testimony may assist the trier of fact in understanding the nature of an impairment. For example, conditions that affect internal bodily functions might require some degree of technical explanation. In all cases, nonetheless, the focus should be on the extent to which the impairment limits the activities of the individual, which is generally something individuals should be able to establish through their own testimony.

58. The Eleventh Circuit has said that while expert vocational evidence would be instructive, it is not required to prove substantial limitation in working. *Mullins v. Crowell*, 228 F.3d 1305, 1314 n.18 (11th Cir. 2000).

59. See, e.g., *EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794, 803 (9th Cir. 2002) (holding that two individuals with monocular vision were not substantially limited in the major life activity of seeing because they did not present sufficient evidence of activities in their daily life that they were unable to do because of their vision impairment). Some courts have made working disability cases into a numbers game—the plaintiff must present specific evidence of the number of jobs available in the local job market and the number from which they are excluded. See *Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1115–16 (D.C. Cir. 2001) (reversing jury verdict in plaintiff’s favor because plaintiff did not produce evidence of the number and types of jobs in the local market from which he was excluded, thus failing to prove that the total number of jobs that remained available to him was “sufficiently low that he [wa]s effectively precluded from working in the class or range” of jobs at issue); *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 675 (7th Cir. 1998) (accepting plaintiff’s expert affidavit after it was supplemented to narrow job availability statistics from entire country to local county level); see also *Taylor v. Fed. Express Corp.*, 429 F.3d 461, 462–64 (4th Cir. 2005) (finding that the plaintiff failed to create an issue of fact on his substantial limitation in working where, although he showed he was precluded from 1,871 of 3,281 job titles [(fifty-seven percent)] for which he was qualified in the DOT, he could still perform over 1410 job titles, which represented over 130,000 jobs, in the metropolitan region where he resided). But see *EEOC v. Rockwell Int’l Corp.*, 243 F.3d 1012, 1017–18 (7th Cir. 2001) (rejecting the notion that plaintiffs must calculate the exact percentage of jobs from which they are excluded, but requiring at least some specific evidence of local labor market demographics). Some courts go so far as to say that the degree of exclusion must be at least fifty percent. See *Smith v. Quickrete Co.*, 204 F. Supp. 2d 1003, 1009 (W.D. Ky. 2002) (interpreting Sixth Circuit law to require the plaintiff be foreclosed from a majority of employment options available to a person with similar education and skill). In effect, to prove substantial deviation from “average,” plaintiffs in these courts must prove that they are half as able to work as a similar person of their education and training. See *Heimann v. Roadway Express, Inc.*, 228 F. Supp. 2d 886, 902 (N.D. Ill. 2002) (finding twenty-five percent reduction in available jobs was not a substantial limitation in the major life activity of working).

60. 534 U.S. 184 (2002).



*Toyota*, the Court held that an individual who claims substantial limitation in the major life activity of performing manual tasks must show that he is limited in tasks central to daily living, not just work-related manual tasks.<sup>61</sup> The plaintiff in *Toyota* alleged that she was limited in performing manual tasks by carpal tunnel syndrome.<sup>62</sup> Her impairment prevented her from repetitive work requiring her to raise her hands and arms at or above shoulder level for extended periods of time.<sup>63</sup> The Supreme Court sent the case back to the court of appeals to consider her ability to do other manual tasks it characterized as central to daily living, such as “household chores, bathing, and brushing [her] teeth.”<sup>64</sup> The Court found that the lower court focused too narrowly on the plaintiff’s work-related tasks.<sup>65</sup>

It is questionable whether *Toyota*’s “tasks central to daily living” standard applies beyond defining categorical major life activities like performing manual tasks. As will be discussed more fully in Part III.C.2.b, the fact that a task is “central to daily living” arguably establishes only whether the task is a major life activity, and is not part of the substantiality of limitation analysis.<sup>66</sup> Because “performing manual tasks” is not a discrete activity in and of itself, it was not clear before *Toyota* what that major life activity entailed.

“Manual tasks” refers to a group of activities, such as “working,” whereas other major life activities, including breathing, seeing, hearing, and arguably lifting are, for want of a better term, discrete tasks.<sup>67</sup> That those discrete tasks are considered major life activities answers the question of whether they are activities central to daily life.<sup>68</sup> Where there is a subset of tasks that make up the major life activity, however, additional definition of that activity’s parameters is required.<sup>69</sup> This is what the Court articulated in *Toyota*. The Court

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61. See *id.* at 198 (noting that, in addition to restricting the individual’s daily activities, “[t]he impairment’s impact must also be permanent or long term”).

62. *Id.* at 187-88.

63. *Id.* at 201.

64. *Id.* at 202.

65. See *id.* at 201 (“There is also no support in the Act, our previous opinions, or the regulations for the [c]ourt of [a]ppeals’ idea that the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace.”).

66. *Infra* notes 221–244 and accompanying text.

67. See Samuel A. Marcossou, *Of Square Pegs and Round Holes: The Supreme Court’s Ongoing “Title VII-ization of the Americans with Disabilities Act,”* 8 J. GENDER RACE & JUST. 361, 377 (2004) (suggesting a further distinction can be made between “collective categories” and “a single, discrete activity”).

68. See *Toyota*, 534 U.S. at 197 (explaining that because “major,” as used in “major life activities,” means important, “[m]ajor life activities’ thus refers to those activities that are of central importance to daily life”).

69. See, e.g., *id.* (highlighting the importance of this distinction and assessing its implications in terms of the major life activity of performing manual tasks).

held that a broad-based limitation on performing manual tasks was necessary in order for that major life activity to be, in effect, major in the same sense as walking, breathing, seeing and hearing.<sup>70</sup>

That these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act. When it enacted the ADA in 1990, Congress found that “some 43,000,000 Americans have one or more physical or mental disabilities.” If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher.<sup>71</sup>

Although the Court in *Toyota* was addressing only the definition of the major life activity of performing manual tasks, courts have cited the Supreme Court’s “demanding standard” language to support a generally restrictive interpretation of the ADA, including what evidence the plaintiff needs to show to prove substantial limitation of other major life activities.<sup>72</sup> Depending on the case, plaintiffs may find that they must present more specific evidence to establish “average” than the regulations and cases like *Kirkingburg* might lead them to believe. As the next Part discusses, only disabilities deemed “plain on their face” are likely to avoid the comparative evidence requirement.<sup>73</sup>

## II. WHEN IS COMPARATIVE EVIDENCE REQUIRED AND WHEN IS COMMON SENSE ENOUGH?

When considering whether the limitations on a plaintiff’s major life activity are substantial, some courts have required evidence explicitly outlining what is “average” and how the plaintiff deviates from that standard.<sup>74</sup> Other courts have suggested that the common

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70. *See id.* (“If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as a major life activity, then together they must do so.”).

71. *Id.* (internal citations omitted).

72. *See infra* Part III (assessing courts’ varying evidential requirements and concluding that the requirement should depend on the jury’s ability to comprehend the impairment).

73. *See infra* Part III.B (discussing the lower evidentiary standard that plaintiffs enjoy in “plain on its face” cases).

74. *See, e.g.,* *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1241 (10th Cir. 2001) (explaining that the plaintiff’s evidence failed to prove that his impairment substantially limited his ability to lift as required, in part, because he did not “present any comparative evidence as to the general population’s lifting capabilities”); *see also* *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1206 (8th Cir. 1997) (defining a person with substantial limitations on a major life activity as “an individual unable to

sense and life experience of the fact finder are sufficient to make the determination at least in some cases, and the plaintiff need only present enough evidence to alert the jury to the individualized nature of her limitations.<sup>75</sup> How the line is drawn between those cases where comparative evidence is required and those where common sense and life experience is enough is not clear.

When the disability appears obvious to the court, not surprisingly, that court is more likely to conclude that no particular comparative evidence is required. In these cases, the limitation may be described as substantial “on its face,” thereby creating an issue of fact as to the plaintiff’s disability.<sup>76</sup> While it is questionable to argue that detailed comparative evidence should be required in all cases,<sup>77</sup> the substantive reason for requiring detailed proof in one case but not another should be reasonably capable of advance determination so as to avoid summary dismissal for failure to provide a sufficient evidentiary record. At present, as will be discussed below, the controlling factor appears to be a judicial disdain of the significance of certain types of limitations. There has also been a tendency to engage in bottom line thinking, focusing on the outcome (i.e., the plaintiff can accomplish certain benchmarks) rather than the process of achieving that outcome (which may be more challenging to a person with a disability).<sup>78</sup>

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perform a basic function that the average person in the general population can perform”).

75. See *Lowe v. Angelo’s Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996) (finding the plaintiff’s evidence regarding her experience with multiple sclerosis was sufficient on summary judgment to prove substantial limitation in her ability to lift and no additional “average person” lifting capability evidence was required); *Whitfield v. Pathmark Stores, Inc.*, 39 F. Supp. 2d 434, 438–39 (D. Del. 1999) (finding that the plaintiff’s individualized evidence that her impairments were permanent was sufficient to allow a jury to make an average person comparison without specific evidence on that issue).

76. See *Ward v. Wal-Mart Stores, Inc.*, 140 F. Supp. 2d 1220, 1225 (D.N.M. 2001) (finding the plaintiff’s reaching and lifting impairment “substantially limiting on its face” and comparative evidence therefore unnecessary because a material issue of fact had been created).

77. See *EEOC v. Rockwell Int’l Corp.*, 243 F.3d 1012, 1021 (7th Cir. 2001) (Wood, J., dissenting) (suggesting that “nothing [is] gained by having vocational experts routinely appear in ADA cases solely for the purpose of testifying that a broad range of jobs require the ability to lift 30 pounds, or the ability to perform repetitive motions”); cf. Feldblum, *supra* note 6, at 154 (characterizing the judiciary’s approach of subjecting every ADA plaintiff to an individualized assessment of whether her impairment is sufficiently limiting as “unfortunate”).

78. See *Nealy v. Patterson Dental Supply, Inc.*, No. 04-3287, 2005 WL 3132182, at \*4 (S.D. Tex. Nov. 22, 2005) (finding that “[i]ndividuals such as Plaintiff who can complete the tasks of daily living by relying on healthy limbs or otherwise compensating for their injuries are not substantially limited in major life activities”). The Supreme Court’s ruling in the mitigating measures cases lends itself to this sort of bottom line thinking, by requiring that the individualized assessment of the

The best case illustrations are those in which the major life activity at issue is a basic motor skill like lifting.<sup>79</sup> Lifting case decisions reflect a paucity of comparative evidence. In some cases, courts dismiss the claim simply because the plaintiff failed to present evidence of average ability.<sup>80</sup> In others, courts make substantive assumptions about the significance of what the plaintiff can and cannot do, regardless of whether the court has comparative evidence on which to base that assumption.<sup>81</sup> For example, courts have been developing a rule that “mere” lifting restrictions cannot qualify as a disability, except in the most extreme cases.<sup>82</sup>

Evaluating the lifting cases leads to two conflicting propositions. On the one hand, plaintiffs should develop more expert comparative

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plaintiff's disability be conducted after application of any such mitigating measures. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999) (concluding that “disability under the Act is to be determined with reference to corrective measures”). The Court also suggested, however, that the negative side effects of a corrective measure might make an impairment substantially limiting. *Id.* at 484. Finding that a plaintiff does not have a disability because she is able to “complete” tasks ignores the fact that the EEOC’s regulations find substantiality of limitation can be found not only when an individual is totally foreclosed from an activity, but also when it is significantly more difficult for the individual to accomplish it. *See* 29 C.F.R. § 1630.2(j)(1)(i)–(ii) (2007) (defining “substantially limits”); *see also* *Emory v. Astrazeneca Pharm. LP*, 401 F.3d 174, 180–81 (3d Cir. 2005) (finding lower court’s “focus on what [the plaintiff] has managed to achieve misse[d] the mark,” and that the significant difficulty with which the plaintiff completed tasks should have been considered).

79. Some might question the significance of cases involving lifting restrictions, on a theory that such impairments are not all that important among the spectrum of disabilities that the ADA potentially covers. *See Mays v. Principi*, 301 F.3d 866, 869–70 (7th Cir. 2002) (suggesting that claim was not significant because it involved only a back injury that impaired the plaintiff’s lifting abilities). To the contrary, because lifting is such a basic human activity, like all of the basic motor functions, it provides a strong lens through which to view the evidentiary burdens imposed under the ADA. As this Article will argue, it demonstrates how juries are best suited to evaluate the substantiality of such limitations because the jury reflects a pool of common life experience against which to judge impact.

80. *See, e.g., Bristol v. Bd. of County Comm’rs*, 281 F.3d 1148, 1161 n.4 (10th Cir. 2002) (finding plaintiff “pointed to no evidence of how much the average person can lift” and therefore fact finder could not make the comparison required by the ADA).

81. *See, e.g., Smith v. Quikrete Co., Inc.*, 204 F. Supp. 2d 1003, 1008 (W.D. Ky. 2002) (holding that a lifting restriction of twenty-five pounds does not limit an activity of central importance in daily life).

82. *See Olds v. United Parcel Serv., Inc.*, 127 F. App’x 779, 782 (6th Cir. 2005) (asserting that “the general rule in this circuit is that a weight restriction alone is not considered a disability under the ADA”); *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 23 (1st Cir. 2002) (distinguishing prior lifting cases finding no disability because the plaintiff’s impairment, a missing hand, was “a more profound impairment than a simple inability to lift objects over a certain weight”); *Law v. City of Scottsdale*, No. 98-6335, 2000 WL 799742, at \*4 (6th Cir. June 15, 2000) (asserting that “[f]ederal case law supports that a maximum weight restriction is not a disability as defined by the ADA”); *see also Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 2002) (finding a twenty-five pound lifting restriction not substantial as a matter of law).

evidence in an attempt to head off summary judgment dismissals based on the court's erroneous assumptions about average lifting ability.<sup>83</sup> On the other hand, what is "average" in regard to a basic motor skill like lifting is something inherently a matter of common sense and life experience.<sup>84</sup> Not unlike the evidentiary standards for "reasonable person" in tort cases, the specificity of the evidence should depend on how necessary it is for a jury to understand the nature of the impairment and its effect.

This Part first examines when comparative evidence has been required and when plaintiffs have been allowed to rely on the fact finder's common sense as to what is average and whether the plaintiff sufficiently deviates from that definition.<sup>85</sup> The major life activity of lifting is then examined in some detail, because it starkly illustrates the difficulties plaintiffs have with courts' demands for comparative evidence.<sup>86</sup> This Part then concludes by suggesting that the specificity of the required evidence should depend on how readily a lay jury can understand the nature of the plaintiff's impairment.<sup>87</sup> In some cases, this requires plaintiffs to present more evidence and in other cases, requires courts to recognize that the plaintiff's claim is sufficient to support a common sense determination of substantiality.

#### A. *Requiring Comparative Evidence in Every Case*

An Eleventh Circuit case is the primary source for the rule that a plaintiff who fails to present comparative evidence in any case is vulnerable to summary judgment dismissal. In *Maynard v. Pneumatic Products Corp. (Maynard I)*,<sup>88</sup> the Eleventh Circuit initially held that the plaintiff's ADA walking disability claim should be dismissed because the plaintiff failed to produce evidence of the walking ability of the average person in the general population.<sup>89</sup>

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83. See *supra* note 74 and accompanying text (explaining that courts sometimes require evidence comparing the plaintiff's capacities with those of an "average" person).

84. See *supra* note 75 and accompanying text (indicating that certain courts have found evidence of a plaintiff's individual limitations sufficient for the jury to make a determination based on common sense and life experience).

85. See *infra* Part III.A–B (distinguishing courts' varying approaches with regard to comparative evidence and "plain on its face" cases, where certain courts require only evidence about the plaintiff's individualized limitations).

86. See *infra* Part III.C (analyzing lifting cases and their implications for "lifting" as a major life activity).

87. See *infra* Part III.C.3 (suggesting that a jury can understand basic motor functions through common life experience, and that additional evidence is only necessary where the jury requires explanation of a more complicated condition).

88. 233 F.3d 1344 (11th Cir. 2000), *vacated on other grounds*, 256 F.3d 1259 (2001).

89. See *id.* at 1347–48 ("Maynard ignores a crucial element of the disability-prong of the *prima facie* case: he must demonstrate that he is significantly restricted in the

Maynard alleged that he was unable to walk more than forty to fifty yards without stopping because of a herniated disc.<sup>90</sup> There was apparently little dispute about the impairment itself.<sup>91</sup> Maynard argued that the nature of the limitation was enough to create a fact issue for the jury on substantiality.<sup>92</sup> The court of appeals insisted that the ADA first required the plaintiff to produce evidence of the abilities of an average person in the population.<sup>93</sup> Without that evidence, the court held that the plaintiff failed to make a prima facie case of disability discrimination. The court explained:

The simple proposition we clarify today—that plaintiffs must present comparator evidence to demonstrate their substantial limitations—has been largely overlooked in ADA cases. We take pains to highlight this obvious and crucial element in a plaintiff's prima facie case because a review of ADA caselaw demonstrates that plaintiffs are continually failing to present this necessary evidence.<sup>94</sup>

The court of appeals further criticized other courts for “seemingly tak[ing] judicial notice of the capabilities of the ‘average person in the general population.’”<sup>95</sup> In support, the court cited from a law review article that urged plaintiffs’ lawyers to beef up their presentation of the prima facie case.<sup>96</sup> The Eleventh Circuit took the article’s advice and transformed it into a rule:

We instead endorse the proposition that, “[t]o establish that an impairment substantially limits a major life activity such as sitting, standing, or walking, *an ADA plaintiff must not merely provide evidence of her own limitations . . . . The first key is to develop comparative evidence.* Who, then, is the relevant comparator? The EEOC regulations provide that it is ‘the average person in the general population.’”<sup>97</sup>

Finally, the Eleventh Circuit suggested that this comparative evidence need not be reinvented for every case.<sup>98</sup> Rather, case law,

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performance of a major life activity ‘as compared to . . . the average person.’”) (omission in original).

90. *Id.* at 1345.

91. *See id.* at 1345, 1347 (describing Maynard’s impairment and explaining that his employer knew about his condition).

92. *See id.* at 1349 (rejecting Maynard’s suggestion that the jury determine whether his impairment constituted a substantial limitation).

93. *See id.* at 1348–49 (citing more than ten cases for this proposition, highlighting its importance in ADA cases, and criticizing courts that do not require such evidence).

94. *Id.* at 1349.

95. *Id.*

96. *See id.* (citing Van Detta & Gallipeau, *supra* note 15, at 518).

97. *Id.*

98. *See id.* at 1350 (explaining that where such evidence has already been established, for instance in case law, the plaintiff will not be required to reintroduce comparative evidence).

regulations, and the EEOC's interpretive guidance could all serve as sources for determining the degree of deviation from average.<sup>99</sup> Only when "the necessary comparator evidence is not readily drawn from such a source" would the plaintiff have to independently develop comparative evidence.<sup>100</sup>

The Eleventh Circuit subsequently reconsidered *sua sponte* its decision in *Maynard* and vacated it, dismissing the plaintiff's claim instead solely on procedural grounds.<sup>101</sup> One member of the panel changed her mind and dissented not only from the procedural dismissal but also the original decision requiring comparative evidence as part of the *prima facie* case.<sup>102</sup> She now found the decision to dismiss for lack of comparative evidence "simply wrong," and instead would have held that "[t]he jury's good common sense and life experiences gave them sufficient ability to determine that Maynard's impairment" substantially limited a major life activity as compared to the average person.<sup>103</sup>

The status of *Maynard's* mandatory comparative evidence requirement is therefore unclear. Before the circuit vacated the decision, at least one Florida federal district court cited it authoritatively.<sup>104</sup> Subsequently, another court suggested the panel purposefully side-stepped the issue on reconsideration because it desired to disavow its prior decision.<sup>105</sup> Given that the third member

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99. *See id.* (indicating that a court could apply comparative evidence established in these sources to a plaintiff's individualized condition).

100. *Id.*

101. *See* *Maynard v. Pneumatic Prods. Corp. (Maynard II)*, 256 F.3d 1259, 1261, 1264 (11th Cir. 2001) (affirming the district court's grant of judgment as a matter of law in Pneumatic's favor because Maynard did not prove that he timely filed a discrimination charge with the EEOC). The court specifically noted that because it was deciding the case on procedural grounds, it was not addressing any alternative grounds for dismissal. *Id.* at 1264.

102. *See id.* at 1266 (Fletcher, J., dissenting) (finding that Maynard's condition was so obviously substantially limiting that the court erred in requiring comparative evidence).

103. *Id.* The Eleventh Circuit sidestepped the *prima facie* case issue when it reconsidered *Maynard*, leaving the circuit somewhat unclear as to whether comparative evidence is in fact mandatory in every case. *See id.* at 1264 (explaining that the court's finding on the timeliness issue alone sufficed to decide the case). A case decided in between the two *Maynard* opinions relied on the court's initial decision to dismiss a plaintiff's ADA claim because the plaintiff "failed to provide any evidence whatsoever of how well the general population performs any major life activities in questions [*sic*] with respect to either his claims for learning disabilities or obesity." *West v. Town of Jupiter Island*, 146 F. Supp. 2d 1293, 1301 (S.D. Fla. 2001).

104. *See West*, 146 F. Supp. 2d at 1301 (citing *Maynard I*, 233 F.3d 1344 (11th Cir. 2000), for proposition that "an ADA plaintiff must present 'some evidence of how well the average person in the general population performs the major life activity in question'").

105. *See Crutcher v. Mobile Hous. Bd.*, No. 04-0499, 2005 WL 2675207, at \*10 (S.D. Ala. Oct. 20, 2005) (suggesting that "*Maynard II* took pains to affirm the lower

of the *Maynard* panel dissented explicitly to disavow the comparative evidence ruling,<sup>106</sup> however, this interpretation seems unlikely. Another recent Florida federal district court concluded comparative evidence “is not necessary where a reasonable jury could base its decision on its own life experiences.”<sup>107</sup>

Until the Eleventh Circuit explicitly considers the position it took in *Maynard*, the issue remains open in that circuit. At present, no other circuit has pronounced a similar universal requirement. There is, however, a tendency in at least some cases to treat comparative evidence as mandatory, at least where the evidence of disability is not “plain on its face.”<sup>108</sup> This case-by-case approach is discussed in the next section.

*B. Allowing the Fact Finder to Use Common Sense and Life Experience but only in some Cases*

Rather than requiring comparative evidence as part of every prima facie case, most courts to consider the issue require it only where the disability is not plain “on its face.”<sup>109</sup> In the “plain on its face” cases, the plaintiff need only present testimony regarding the limitations he has individually experienced in order to get beyond the prima facie stage.<sup>110</sup> The fact finder is permitted to rely on “common sense and

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court’s ruling on timeliness grounds so as to sidestep the issue of whether the plaintiff met the disability threshold”).

106. *Maynard II*, 256 F.3d at 1266 (Fletcher, J., dissenting).

107. *Reis v. Universal City Dev. Partners, Ltd.*, 442 F. Supp. 2d 1238, 1246 n.6 (M.D. Fla. 2006) (noting that while comparative evidence is not necessary, in that case it would have been useful for plaintiff in order to show her limitations regarding temperature exposure due to a congenital heart condition were substantial compared to average).

108. See *infra* Part III.B (providing case law examples of comparative evidence requirements where a plaintiff’s disability is not plain on its face).

109. See *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1240–41 (10th Cir. 2001) (concluding that “comparative evidence is not required as a matter of law . . . where the impairment appears substantially limiting on its face”); *Crutcher*, 2005 WL 2675207, at \*11 (concluding that the plaintiff’s impairment appeared “substantially limiting on its face,” so no comparative evidence was required).

110. See, e.g., *EEOC v. Sears, Roebuck & Co. (Keane II)*, 417 F.3d 789, 802 (7th Cir. 2005) (listing the plaintiff’s walking limitations and finding that a “jury could conclude, based on this evidence and its own life experience,” that the plaintiff suffered a substantial limitation relevant to an “average” person); *EEOC v. Yellow Freight Sys., Inc.*, No. 98 CIV. 2270, 2002 WL 31011859, at \*15 (S.D.N.Y. Sept. 9, 2002) (disagreeing with *Maynard II*’s finding that a jury can never determine without comparative evidence whether a certain impairment is substantially limiting); *EEOC v. Valu Merchandisers Co.*, No. 01-2224, 2002 WL 1932533, at \*5–6 (D. Kan. Aug. 9, 2002) (finding that “the facts presented regarding the nature, severity and duration of Kennedy’s impairment could lead a reasonable jury to conclude that Kennedy was, in fact, permanently and substantially limited in the major life activity of lifting”); *Ward v. Wal-Mart Stores, Inc.*, 140 F. Supp. 2d 1220, 1225 (D.N.M. 2001) (concluding that an impairment preventing the plaintiff from reaching above his



life experiences” to determine if the plaintiff’s limitations are substantial.<sup>111</sup> Where the disability is less obvious, however, courts find a lack of substantial limitation as a matter of law if there is no comparative evidence because the plaintiffs failed to convince the court that their impairments deviate sufficiently from some “average” norm.<sup>112</sup> In these cases, comparative evidence becomes, in practical effect, mandatory.

For example, the Seventh Circuit in *EEOC v. Sears, Roebuck & Co. (Keane II)*<sup>113</sup> allowed a case to go to the jury on testimony from the plaintiff, Judith Keane, that she “was unable to walk the equivalent of one city block without her right leg and feet becoming numb.”<sup>114</sup> She also supplied a doctor’s report that noted she had “difficulty walking distances as short as twenty feet,” and that “the way she walked was very abnormal.”<sup>115</sup> Direct comparative evidence was not required, because the court found “[a] reasonable jury could conclude, based on this evidence and its own life experience, that Keane’s severe difficulty in walking the equivalent of one city block was a substantial limitation compared to the walking most people do.”<sup>116</sup>

By contrast, in *Lusk v. Ryder Integrated Logistics*,<sup>117</sup> the Tenth Circuit upheld summary judgment for the employer after the employee failed to present sufficient evidence that his forty-pound lifting restriction substantially limited him in the major life activity of lifting.<sup>118</sup> This was after the court concluded comparative evidence

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head or lifting more than two pounds above his head was substantially limiting on its face, and required no comparative evidence); *see also* *Gillen v. Fallon Ambulance Serv. Inc.*, 283 F.3d 11, 24 (1st Cir. 2002) (finding that evidence that the plaintiff was a genetic amputee combined with her testimony concerning the extent of her limitations in grasping things was sufficient to create an issue of fact); *Lowe v. Angelo’s Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996) (finding that the plaintiff created a genuine issue of material fact with evidence that she suffered from multiple sclerosis and, as a result, was unable to lift items weighing more than fifteen pounds).

111. *Hayes v. United Parcel Serv., Inc.*, 17 F. App’x 317, 321 (6th Cir. 2001) (concluding that “[c]ommon sense and life experiences will permit finders of fact to determine whether someone who cannot sit for more than [twenty or twenty-five minutes] is significantly restricted as compared to the average person”); *Witt v. Nw. Aluminum Co.*, 177 F. Supp. 2d 1127, 1131 (D. Or. 2001) (reasoning that “in appropriate cases factfinders may draw on their own experience to determine whether particular impairments constitute ‘substantial limitations’ of major life activities”).

112. *See infra* notes 160–165 and accompanying text (discussing the lack of comparative evidence in lifting cases).

113. 417 F.3d 789 (7th Cir. 2005).

114. *Id.* at 802.

115. *Id.* at 795.

116. *Id.* at 802.

117. 238 F.3d 1237 (10th Cir. 2001).

118. *See id.* at 1240–41 (finding that, without evidence of the “average” person’s lifting capacity or the plaintiff’s substantial limitations in his day-to-day activities, a

was not required as a matter of law to withstand a motion for summary judgment.<sup>119</sup> The court was willing to accept the proposition that an impairment substantially limiting “on its face” created a genuine issue of fact, but was not convinced that a forty-pound lifting restriction met that standard.<sup>120</sup>

When courts find common sense and life experience sufficient, they do not seem to be saying that there is a common sense standard for evaluating ADA claims so much as they imply that a particular case appears obvious to them. In other words, there is little question in the “plain on their face” cases that the fact finder will conclude the plaintiff’s limitation is substantial. *Keane II* is one such example.<sup>121</sup> Another is *Hayes v. United Parcel Service, Inc.*,<sup>122</sup> in which the Sixth Circuit reversed summary judgment for the employer, finding that the plaintiff was not required to present additional evidence of his sitting limitations compared to the average population.<sup>123</sup> In that case, the plaintiff established an inability to sit for more than about twenty to twenty-five minutes at a time.<sup>124</sup> The district court required the plaintiff to present evidence of the average person’s ability to sit, but the circuit court concluded that the fact finder could rely on common sense and life experiences to determine that someone who could sit for no more than that period of time was significantly restricted as compared to the average person.<sup>125</sup> Indeed, it does seem obvious (especially to those in a profession like law that involves a lot of sitting) that most people can sit for considerably more than twenty minutes at a time.

Similarly, a federal district court in Oregon allowed the plaintiff’s disability claim to survive summary judgment without expert

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statement from the plaintiff’s doctor as to the severity of the impairment was insufficient).

119. *Id.* at 1240 (citing the court’s decision in *Lowe v. Angelo’s Italian Foods, Inc.*, 87 F.3d 1170 (10th Cir. 1996), where the court found a lifting restriction of fifteen pounds to be substantially limiting on its face, and required no comparative evidence to determine that there existed a genuine issue of fact).

120. *See id.* at 1240–41 (citing other circuits’ holdings that lifting restrictions similar to the plaintiff’s were not substantially limiting on their face).

121. *See supra* notes 113–116 and accompanying text (examining the evidence provided and the *Keane II* court’s reasoning).

122. 17 F. App’x 317 (6th Cir. 2001).

123. *See id.* at 321 (stating that the fact finders’ common sense and life experiences would sufficiently inform their determination of whether an inability to sit for more than twenty to twenty-five minutes is significantly restrictive as compared to the average person).

124. *See id.* at 320 (indicating that Hayes participated in an occupational readiness program, which evaluated his sitting capability at twenty or twenty-five minutes).

125. *See id.* at 321 (distinguishing *Hayes* from the two cases relied on by the district court, based on the credibility of Hayes’ evidence and the severity of his impairment).

comparative testimony, where the plaintiff was an individual who was unable to walk more than fifty to one hundred feet without taking a break.<sup>126</sup> The court refused to take judicial notice of the average person's ability to walk more than that distance, but instead allowed the fact finder to draw on its own experience:

Factfinders do not need expert testimony to understand that a person confined to a wheelchair is substantially limited in the major life activity of walking. Factfinders similarly are competent to weigh the evidence about other walking limitations to determine whether those limitations are so substantial that they constitute a disability.<sup>127</sup>

The plaintiff's testimony regarding his limitations and his doctor's report were sufficient to carry the case to the fact finder.<sup>128</sup>

Walking, sitting, and lifting are all basic physical activities that readily lend themselves to a common understanding of average.<sup>129</sup> In cases involving other less obvious limitations, courts have on occasion not required specific comparative evidence if the plaintiff's evidence suggested a simple comparison to a readily-understood average ability. The plaintiff in a Seventh Circuit learning disability case, for example, avoided summary judgment when she presented specific evidence about her note-taking process, from which the court was convinced a reasonable inference could be drawn that her process was substantially distinct from that of the average student.<sup>130</sup> By contrast, a federal district court found a plaintiff who asserted he had

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126. See *Witt v. Nw. Aluminum Co.*, 177 F. Supp. 2d 1127, 1131 (D. Or. 2001) (finding that "[a]lthough this evidence does not compel a finding that Plaintiff was disabled during the last few months he worked for Defendant, it is some evidence from which a factfinder could determine Plaintiff's ability to walk was substantially limited").

127. *Id.*

128. *Id.* The *Witt* court also noted the summary judgment standard in the Ninth Circuit required plaintiffs in employment discrimination cases to produce only minimal evidence to defeat a defense motion. See *id.* (distinguishing their standard from that of the Eleventh Circuit (citing *Chuang v. Univ. of Cal. Davis*, 225 F.3d 115, 1123 (9th Cir. 2000))).

129. See *supra* notes 113–128 and accompanying text (summarizing several examples of walking (*Keane II* and *Witt*), sitting (*Hayes*), and lifting (*Lusk*) cases).

130. *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 510 (7th Cir. 1998). The plaintiff in *Davidson* claimed that she had a record of disability in that she had difficulties focusing in the classroom and assimilating new material. See *id.* at 509–10. She established that during her secondary and post-secondary education, she had to dictate her class notes and then write them out again by hand, and had to write out passages she had just read in a textbook. *Id.* at 510. The court required no additional comparative evidence, instead noting that it could "not imagine that the average person in the general population finds it necessary to dictate one's school notes and then write them out again by hand, or to write out the passages she has just read in a textbook, in order to assimilate the information." *Id.* As with sitting, the court's understanding of average may well have been enhanced by personal experience with long hours of studying.

“mental and physical processes [that] are very slow as compared to the average person” did not provide enough of a benchmark for the jury to draw a common sense understanding of average.<sup>131</sup>

The commonplace nature of the activity does not necessarily mean, however, that the case will go to the fact finder using the common sense standard. As discussed in the next section, the cases involving lifting as a major life activity suggest that, in some sense, the common nature of the activity may actually make it harder for plaintiffs to convince the court that they have created a question of fact as to the substantiality of their limitations. In these cases, courts are more likely to presume most limitations are not substantial, regardless of whether common sense and life experience might suggest otherwise.

*C. Incoherent Comparative/Common Sense Distinctions and the Major Life Activity of Lifting*

The major life activity of lifting has played a unique role in substantial limitation case law. Although sitting, walking, and standing have to some extent raised similar concerns, lifting has received more judicial consideration, perhaps because back impairments tend to be quite prevalent.<sup>132</sup> Courts have been more demanding of comparative evidence in lifting cases and, despite the ADA’s requirement of individualized assessment, quite willing to find lifting restrictions not substantially limiting as a matter of law.<sup>133</sup>

Some courts presume that lifting restriction claims are not worthy of ADA protection by summarily dismissing the significance of the restrictions imposed on the plaintiff.<sup>134</sup> Even as they accept lifting as a major life activity,<sup>135</sup> these courts will state that lifting restrictions

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131. *Huizenga v. Elkay Mfg.*, No. 99 C 50287, 2001 WL 640973, at \*6 (N.D. Ill. June 5, 2001).

132. See NAT’L INST. OF ARTHRITIS & MUSCULOSKELETAL & SKIN DISEASES, U.S. DEP’T OF HEALTH & HUMAN SERVS., HANDOUT ON HEALTH: BACK PAIN 1 (2005), available at [http://www.niams.nih.gov/Health\\_Info/Back\\_Pain/back\\_pain\\_hoh.pdf](http://www.niams.nih.gov/Health_Info/Back_Pain/back_pain_hoh.pdf) (explaining “back pain affects an estimated 8 out of 10 people”).

133. *Infra* notes 160–165 and accompanying text.

134. See, e.g., *Smith v. Quikrete Co.*, 204 F. Supp. 2d 1003, 1008 (W.D. Ky. 2002) (holding that a lifting restriction of twenty-five pounds does not limit an activity of central importance in daily life); cf. *Prickett v. Amoco Oil Co.*, 147 F. Supp. 2d 1147, 1154 (D. Utah 2001) (rejecting the significance of the plaintiff’s lifting, standing, and sitting restrictions).

135. Lifting is not listed in the regulation defining “major life activities,” but is mentioned in the interpretive guidance: “Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, [and] reaching.” 29 C.F.R. §§ 1630, 1630.2(i) (2007). Some courts, such as the First Circuit, have concluded that lifting is central to daily life and is therefore a major life activity. See *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 21 (1st Cir. 2002) (finding that

alone are not sufficient to prove substantial limitation.<sup>136</sup> As one court put it, limitation on the ability to lift heavy objects is “part of the human condition.”<sup>137</sup> In some of the cases, the courts conflate the major life activities of lifting and working. These cases either fail to distinguish between working and lifting and subject lifting claims to the same narrow reading as working claims,<sup>138</sup> or erroneously import the reasoning from the Supreme Court’s recent decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*<sup>139</sup> that work-related restrictions do not establish substantial limitation in the major life activity of performing manual tasks.<sup>140</sup> In the big picture, these courts are insisting on comparative evidence in lifting cases, either directly or indirectly through rulings on evidence as a matter of law, even though lifting ability is something that can largely be judged by common sense and life experience.

### 1. *De-individualizing the assessment of lifting limitations*

A disability claim based on a lifting restriction alone is likely to meet considerable judicial resistance. Some courts perceive a difference between simple lifting restrictions and those associated with other conditions, with simple restrictions more likely to be rejected.<sup>141</sup> Others treat the issue as one of threshold—the restriction

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“[w]hether lifting pen to paper or glass to mouth, lifting is an integral part of everyday life and seems to fit comfortably within the parameters set by the Court” in *Toyota v. Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)). Other courts have been less receptive. The Seventh Circuit has expressed general skepticism that “lifting more than 10 pounds” is a major life activity. *Mays v. Principi*, 301 F.3d 866, 869 (7th Cir. 2002). The Eighth Circuit does not recognize lifting as a stand-alone major life activity, but only as “part of a set of basic motor functions that together represent a major life activity.” *Nuzum v. Ozark Auto. Distribs., Inc.*, 432 F.3d 839, 845 (8th Cir. 2005). Whether lifting is a major life activity in and of itself is beyond the scope of this Article, although it must be acknowledged that skepticism on this issue may influence, if not drive, some of the restrictive interpretations of cases discussed in the Article.

136. See, e.g., *Wenzel v. Mo.-Am. Water Co.*, 404 F.3d 1038, 1041 (8th Cir. 2005) (finding that “[a] lifting restriction, without more, is not a disability”); *Law v. City of Scottsdale*, No. 98-6335, 2000 WL 799742, at \*4 (6th Cir. June 15, 2000) (observing that “[f]ederal case law supports that a maximum weight restriction is not a disability as defined by the ADA”).

137. *Buettner v. N. Okla. County Mental Health Ctr.*, 158 F. App’x 81, 87 (10th Cir. 2005).

138. *Infra* Part III.C.2.a.

139. 534 U.S. 184 (2002).

140. *Infra* Part III.C.2.b.

141. See *Mays v. Principi*, 301 F.3d 866, 869–70 (7th Cir. 2002) (noting that the case involves only a general lifting restriction due to a back injury as opposed to a case where “the plaintiff [is] missing an arm”); *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 22–23 (1st Cir. 2002) (finding the plaintiff’s claim distinguishable from others where a weight restriction was insufficient to prove disability because the plaintiff had only one available limb with which to lift); *Smith v. Quikrete Co.*, 204 F. Supp. 2d 1003, 1008 (W.D. Ky. 2002) (noting that “uniformly . . . courts seem

must be greater than a certain weight threshold or the court is unwilling to consider it substantial.<sup>142</sup> These latter cases give lip service to the requirement of comparative evidence; courts have been willing to rule as a matter of law that certain weight restrictions are not substantial even absent any evidence of the average person's lifting ability.<sup>143</sup> The individualized assessment of the plaintiff's restrictions has been glossed over in favor of generalized conclusions about the significance of certain restrictions.<sup>144</sup>

In some cases, courts examine the reasons for a person's difficulty lifting to determine whether the lifting impairment is substantially limiting. The Seventh Circuit *sua sponte* raised a concern that a lifting limitation related to a back injury is not a disability, while at the same time suggesting that one related to a physical deformity might be.<sup>145</sup> In the words of that court, the plaintiff's disability claim based on a restriction to light duty<sup>146</sup> was questionable, not because she could not prove the restriction, but because "[i]t is not as if the plaintiff w[as] missing an arm."<sup>147</sup> Although the issue had not been raised by the parties, the court wanted to go on record "to register [its] doubts . . . that a back injury that merely limits a person's ability to lift heavy objects creates a disability."<sup>148</sup>

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reluctant to approve disability-in-lifting claims based only upon a general restriction on lifting heavy objects").

142. See *Velarde v. Associated Reg'l & Univ. Pathologists*, 61 F. App'x 627, 630 (10th Cir. 2003) (suggesting "there is a threshold of severity of impairment below which the plaintiff bears the burden of proving substantiality").

143. See, e.g., *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (holding, "as a matter of law, that a twenty-five pound lifting restriction—particularly when compared to an average person's abilities—[was] not" substantial). There is no indication in the opinion, however, that the court had comparative evidence on which to base that finding. *Id.* When plaintiffs do submit evidence regarding their limitations, courts have still been dismissive, suggesting that substantial limitation requires proof of restriction of the activities central to daily living. See, e.g., *Velarde*, 61 F. App'x at 630–31 (rejecting the plaintiff's limitation evidence because it did not show substantial limitation in "his overall daily functioning"); see also *infra* Part III.C.2.b (discussing the additional evidentiary hurdles in more detail).

144. See *Marinelli v. City of Erie*, 216 F.3d 354, 363–64 (3d Cir. 2000) (rejecting the significance of the plaintiff's evidence of limitation because the court found his ten-pound lifting restriction "not far removed from the twenty-five pound restrictions our sister circuits have held" insufficient).

145. *Mays*, 301 F.3d at 869–70. In *Mays*, the parties apparently did not dispute whether the plaintiff's back injury was a disability, which the court found "puzzl[ing]." *Id.* at 869.

146. The plaintiff in *Mays* was restricted to positions not involving lifting over ten pounds. *Id.* at 868.

147. *Id.* at 869.

148. *Id.* at 870. The court also observed that "[t]he number of Americans restricted by back problems to light work is legion." *Id.* at 869.

Indeed, where the plaintiff's lifting is restricted by some other physical condition, the court may find disability with an emphasis on the case not being simply about lifting capacity. For example, in a case involving a person born without a left hand, the First Circuit distinguished other lifting cases as "inapposite" because a "missing hand is a more profound impairment than a simple inability to lift objects over a certain weight. Such an impairment poses a type of restriction on lifting not shared by a significant portion of the populace."<sup>149</sup> Likewise, the Tenth Circuit accepted, with little question, a fifteen-pound weight restriction while noting that the restriction was the result of the plaintiff's multiple sclerosis.<sup>150</sup> A federal district court in Alabama found the "quantum of proof" not to require comparative evidence where the plaintiff's limitations were the result of a paralyzed right arm, because that type of restriction was substantial "on its face."<sup>151</sup> In both of these cases, the courts focused on the nature of the plaintiff's impairment not in terms of the limitation but in terms of how significant they viewed the impairment itself to be.

In the bulk of cases, however, the debate centers on how many pounds the plaintiff can lift and whether the plaintiff must present more evidence than the individualized facts of their restrictions. At times, the cases suggest a *per se* threshold and at other times no coherent standard. The Tenth Circuit has gone so far as to suggest that there is "a threshold of severity of impairment below which the plaintiff bears the burden of proving substantiality."<sup>152</sup> While this suggests some clear line has been drawn, this is not the case. What the threshold is, and when plaintiffs must have comparative evidence or when they can rely on individualized evidence of their limitations and the jury's common sense and life experience, is not clear.<sup>153</sup>

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149. *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 23 (1st Cir. 2002). The lower court in *Gillen* rejected the plaintiff's claim, in part, because the plaintiff had a demonstrated ability to lift objects of forty-to-fifty pounds. *Id.* at 22.

150. *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996). The sum total of the *Lowe* court's consideration of the plaintiff's lifting claim was that she had multiple sclerosis, a long-term, incurable disease, and as a result, was unable to lift more than fifteen pounds. *Id.* On this basis, the court found the plaintiff to have created a genuine issue of material fact for the jury to consider on the issue of whether she was substantially limited in her ability to lift. *Id.*

151. *Crutcher v. Mobile Hous. Bd.*, No. 04-0499, 2005 WL 2675207, at \*11 (S.D. Ala. Oct. 20, 2005).

152. *Velarde v. Associated Reg'l & Univ. Pathologists*, 61 F. App'x 627, 630 (10th Cir. 2003).

153. *Cf. EEOC v. Yellow Freight Sys., Inc.*, No. 98 Civ. 2270, 2002 WL 31011859, at \*13 (S.D.N.Y. Sept. 9, 2002) (noting that cases involving "the major life activity of sitting do not yield a single benchmark against which to test all sitting limitations").

The Tenth Circuit's decisions illustrate this. That court found a fifteen-pound lifting restriction substantially limiting on its face,<sup>154</sup> but a twenty-five pound repetitive lifting/thirty-five pound occasional restriction insufficient, at least without additional evidence.<sup>155</sup> In the latter case, the court rejected the plaintiff's request that the court "infer" [from evidence of her limitations] that she has demonstrated a significant restriction on the major life activity of lifting.<sup>156</sup> The court reasoned that "[t]his evidence in fact says nothing about the capabilities of the average person to allow a comparison, . . . [and therefore] plaintiff's evidence is insufficient to show she is substantially limited in the major life activity of lifting."<sup>157</sup> By contrast, the fifteen-pound lifting restriction case involved a plaintiff who had multiple sclerosis, which, as discussed above, seemed to lower the court's expectations regarding the amount of evidence that was required to prove substantiality.<sup>158</sup> Whether the Tenth Circuit would find fifteen pounds substantial in a simple lifting case, in the absence of the additional impairment, is an open question.<sup>159</sup>

There are a number of simple lifting cases that assert a twenty-five pound restriction is not substantially limiting.<sup>160</sup> But there are other

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154. See *Lowe*, 87 F.3d at 1174 (determining that a fifteen-pound restriction is sufficient to create a jury question); see also *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1240 (10th Cir. 2001) (interpreting *Lowe* as not requiring comparative evidence when the "impairment appear[s] substantially limiting on its face").

155. *Gibbs v. St. Anthony Hosp.*, No. 96-6063, 1997 WL 57156, at \*2 (10th Cir. Feb. 12, 1997) (finding the plaintiff failed to point to facts regarding the capabilities of the average person).

156. *Id.*

157. *Id.*

158. See *Lowe*, 87 F.3d at 1174 (asserting that a simple consideration of the plaintiff's multiple sclerosis makes it "unnecessary to consider the additional factors relied upon by the district court"); see also *supra* note 150 and accompanying text.

159. A subsequent district court opinion cites *Lowe* for the proposition that no comparative evidence is needed when the restriction is substantially limiting on its face; in that case, the limitation was a five-to-eight pound lifting restriction. *EEOC v. Valu Merchs. Co.*, No. 01-2224, 2002 WL 1932533, at \*5 (D. Kan. 2002).

160. See, e.g., *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997) (agreeing with other courts' determinations "that lifting restrictions similar to Thompson's are not substantially limiting"); *Gibbs*, 1997 WL 57156, at \*2 (dismissing the plaintiff's claim for failure to provide sufficient comparative evidence regarding the substantial limitation resulting from a twenty-five pound repetitive lifting restriction); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (holding, "as a matter of law, that a twenty-five pound lifting limitation . . . does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity"); *Prickett v. Amoco Oil Co.*, 147 F. Supp. 2d 1147, 1153-54 (D. Utah 2001) (finding that, despite his twenty-five pound lifting restriction, the plaintiff failed to present sufficient evidence of a substantial limitation "as compared to the average person in the general population"); cf. *Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (dismissing the plaintiff's claim for failure to present sufficient evidence of limitation, noting that the only evidence the plaintiff had of a medical limitation was a twenty-five pound lifting restriction).



inconsistent decisions. One case found that a twenty-pound restriction is substantial enough to raise a jury question on limited comparative evidence,<sup>161</sup> while another found a ten-to-fifteen pound restriction insufficient as a matter of law, despite evidence of restrictions on the plaintiff's daily activities.<sup>162</sup> A restriction as severe as ten pounds has been found not substantial enough as a matter of law in at least one case.<sup>163</sup>

The willingness of some courts to rule on lifting claims as a matter of law is troubling. As the Sixth Circuit noted, these rulings conflict with the standard of individualized determination required by the ADA.<sup>164</sup> Yet, some courts seem quite willing to cite the outcomes in prior cases as the sole basis for ruling the plaintiff cannot prove substantial limitation.<sup>165</sup>

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161. See *Whitfield v. Pathmark Stores, Inc.*, 39 F. Supp. 2d 434, 439 (D. Del. 1999) (involving a plaintiff who had a registered nurse testify that, in her opinion, a normal healthy adult is able to lift more than twenty pounds). *Whitfield* is particularly interesting because, in an earlier decision, the district court dismissed the plaintiff's claim, finding the plaintiff's back injuries "commonplace," and expressing concerns about "the dearth of comparative evidence" she presented in the case. *Whitfield v. Pathmark Stores, Inc.*, 971 F. Supp. 851, 858 (D. Del. 1997), *vacated in part*, 39 F. Supp. 2d 434 (D. Del. 1999). In its later opinion, reversing its grant of summary judgment, the district court not only credited the nurse's testimony, it also noted that the substantiality was "evident when one considers that 20 pounds amounts to a large bag of dog food or a small child." *Whitfield*, 39 F. Supp. 2d at 439.

162. *Zarzycki v. United Tech. Corp.*, 30 F. Supp. 2d 283, 289 (D. Conn. 1998). In *Zarzycki*, the plaintiff presented specific testimony regarding his difficulty holding heavy weights in front of him in his job as a tester and assembler, and regarding his inability to do normal activities like housekeeping. *Id.* The court rejected his claim, citing an Eighth Circuit case that reasoned "a general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA." *Id.* (citing *Snow v. Ridgeview Medical Center*, 128 F.3d 1201, 1207 (8th Cir. 1997)).

163. See *Marinelli v. City of Erie*, 216 F.3d 354, 364 (3d Cir. 2000); see also *Mays v. Principi*, 301 F.3d 866, 868–70 (7th Cir. 2002) (raising *sua sponte* the issue of whether a plaintiff, who alleged a restriction to "sedentary work, maximum lifts of 10 pounds, no work at or above shoulder level, and no patient lifting," had a disability). The Third Circuit's reasoning in *Marinelli* suggests that even if the plaintiff presented it with evidence concerning his restrictions, it would not have mattered. 216 F.3d at 363–64 ("Even if we were to consider such evidence, however, courts have rejected claims of disability based on an inability to lift similar weights to those with which *Marinelli* alleges to experience difficulty.").

164. *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 255 n.3 (6th Cir. 2000) (noting the Fourth Circuit's ruling in *Williams* that twenty-five pound restrictions are not substantial as a matter of law "conflicts with the ADA's directives that that the determination whether an impairment substantially limits a major life activity must be made on an *individual* basis").

165. See *Williams*, 101 F.3d at 349. Although the Fourth Circuit in *Williams* briefly referenced a comparison to the average person, it did not actually look at evidence that set out what average lifting ability is or how such a restriction impacted the plaintiff's daily activities, despite briefly referencing a comparison to the average person. Instead, it noted it was following the Eighth Circuit's holding in *Aucutt*. See *id.* ("Like the Eighth Circuit, we hold, as a matter of law, that a twenty-five pound lifting limitation—particularly when compared to an average person's abilities—does not

By ruling as a matter of law, these courts assume that they know what normal lifting ability is and how integral it is (or is not) to daily activity, and that there would be no comparative evidence to establish otherwise.<sup>166</sup> There is an inherent inconsistency between insisting on comparative evidence and ruling as a matter of law that certain limitations are not substantial enough. The weight limitation itself seems to be driving the courts' reasoning, not the impact on the individual plaintiff or a true need for expert evaluation of deviation from the average.<sup>167</sup>

Overbroad reasoning is also not uncommon. The Third Circuit rejected a ten-pound lifting case, for example, reasoning that the plaintiff's "ten-pound limitation is not far removed from the twenty-five pound restrictions our sister circuits have held not to render one disabled under the ADA."<sup>168</sup> There are also cases in which lifting as little as ten pounds is referred to as "heavy lifting."<sup>169</sup> That characterization makes it easier to dismiss the substantiality of the limitation. One court suggested that restrictions on heavy lifting

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constitute a significant restriction on one's ability to lift, work, or perform any other major life activity."). In *Aucutt*, however, the plaintiff apparently failed to specifically identify what major life activities he alleged were substantially limited, and while the court notes his only limitation was a twenty-five pound lifting restriction, it did not specifically address lifting as a separate major life activity. *Aucutt*, 85 F.3d at 1319. Consequently, *Aucutt* does not specifically hold as a matter of law that a twenty-five pound lifting restriction cannot be found to be substantial. *Id.*

Another problem with some cases is that the authority they cite for the proposition that lifting restrictions alone cannot be a disability are actually cases alleging substantial limitation in the major life activity of working. *See, e.g., Rakity v. Dillon Co.*, 302 F.3d 1152, 1160 (10th Cir. 2002) (citing both lifting and working cases to support its finding of no substantial limitation in a lifting disability case). Because working is subject to a separate set of substantiality criteria, the reliance on those cases in lifting claims is especially misplaced. *See infra* Part III.C.2.a.

166. *See Williams*, 101 F.3d at 349. The court in *Williams* justified its finding simply by noting the Eighth Circuit had also so held in *Aucutt*. *Id.*

167. Where the court focuses more on the impact on the individual, the lifting restriction is more likely to be considered substantial. For example, the Eighth Circuit concluded that a plaintiff who had a fifteen-pound lifting restriction had created a jury question with evidence that he was limited in his ability to walk, stand for long periods of time, and bend at the waist without pain, as a result of back surgeries. *Webner v. Titan Distrib., Inc.*, 267 F.3d 828, 834 (8th Cir. 2001). That court also considered a doctor's opinion that the plaintiff had an eighteen-percent whole body impairment as a result of his back surgeries. *Id.* Similarly, in *Whitfield v. Pathmark Stores, Inc.*, 39 F. Supp. 2d 434, 439 (D. Del. 1999), the court concluded that the impact of a twenty-pound lifting restriction was "evident when one considers that 20 pounds amounts to a large bag of dog food or a small child." *Id.* at 439.

168. *Marinelli*, 216 F.3d at 364.

169. *See Mays v. Principi*, 301 F.3d 866, 869-70 (7th Cir. 2002) (referring to a restriction from lifting over ten pounds as "merely limit[ing] a person's ability to lift heavy objects"); *Ray v. Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996) (characterizing a plaintiff who was medically permitted to lift no more than five-to-ten pounds as able to lift "as long as he avoids heavy lifting").

were just “part of the human condition.”<sup>170</sup> Another suggested that heavy lifting is a discrete task, and that the ADA does not protect individuals who are merely unable to perform a discrete task.<sup>171</sup>

The First Circuit found reluctance to recognize heavy lifting restrictions “understandable,” on the theory that because “strength varies widely throughout the population,” to do otherwise would make many normal conditions (infancy, aging, and being out of shape) a disability.<sup>172</sup> Given the regulations’ failure to incorporate age and sex-specific considerations in the definition of “substantially limits,” the First Circuit might be correct if courts were talking about what can accurately be characterized as heavy lifting. According to *DOT*,<sup>173</sup> however, jobs requiring the ability occasionally or even frequently to lift ten or even twenty pounds do not qualify as heavy work.<sup>174</sup>

The *DOT* classifies jobs based on categories of strength factors, which evaluate the worker’s involvement in activities that include, among other things, lifting.<sup>175</sup> Lifting is defined as “[r]aising or

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170. *Buettner v. N. Okla. County Mental Health Ctr.*, 158 F. App’x 81, 87 (10th Cir. 2005); *see Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 22 (1st Cir. 2002) (suggesting that “a capacity to perform heavy lifting is not a trait shared by the majority of the population”).

171. *Ray*, 85 F.3d at 229.

172. *Gillen*, 283 F.3d at 22. Although the court in *Gillen* endorsed rejecting ADA claims based on heavy lifting, it distinguished the facts in that case on the grounds the plaintiff was missing most of the lower part of her left arm. *Id.* at 22–23. The court reasoned that “[e]ven if she is able to lift more poundage than many two-handed individuals, the manner in which she lifts and the conditions under which she can lift will be significantly restricted because she has only one available limb.” *Id.* at 23.

173. *DOT*, *supra* note 23. The Department of Labor has been transitioning to a different database, O\*NET, that does not classify based on weight ranges, but rather the degree of importance in an occupation of the ability to “exert maximum muscle force to lift, push, pull or carry objects.” O\*NET Online, Abilities—Static Strength, <http://online.onetcenter.org/find/descriptor/result/1.A.3.a.1> (last visited Oct. 21, 2007). The *DOT* continues to be used in social security disability determinations. *See, e.g., Whitzell v. Barnhart*, 379 F. Supp. 2d 204, 217 (D. Mass. 2005) (explaining that “[o]ccupational evidence provided by a [vocational expert] generally should be consistent with the occupational information supplied by the *DOT*” in a social security disability case).

174. *DOT*, *supra* note 23, at 1013.

175. *See id.* (presenting a “Physical Demands Strength Rating” scheme). The *DOT* defines its strength ratings regime as follows:

The Physical Demands Strength Rating reflects the estimated overall strength requirement of the job. . . . It represents the strength requirements which are considered to be important for average, successful work performance.

The strength rating is expressed by one of five terms: Sedentary, Light, Medium, Heavy, and Very Heavy. In order to determine the overall rating, an evaluation is made of the worker’s involvement in the following activities:

a. Standing, Walking, Sitting

Standing—Remaining on one's feet in an upright position at a work station with-out moving about.

Walking—Moving about on foot.

Sitting—Remaining in a seated position.

b. Lifting, Carrying, Pushing, Pulling

Lifting—Raising or lowering an object from one level to another (includes upward pulling).

Carrying—Transporting an object, usually holding it in the hands or arms, or on the shoulder.

Pushing—Exerting force upon an object so that the object moves away from the force (includes slapping, striking, kicking, and treadle actions).

Pulling—Exerting force upon an object so that the object moves toward the force (includes jerking).

Lifting, pushing, and pulling are evaluated in terms of both intensity and duration. Consideration is given to the weight handled, position of the worker's body, and the aid given by helpers or mechanical equipment. Carrying most often is evaluated in terms of duration, weight carried, and distance carried.

Estimating the Strength factor rating for an occupation requires the exercise of care on the part of occupational analysts in evaluating the force and physical effort a worker must exert. For instance, if the worker is in a crouching position, it may be much more difficult to push an object than if pushed at waist height. Also, if the worker is required to lift and carry continuously or push and pull objects over long distances, the worker may exert as much physical effort as is required to similarly move objects twice as heavy, but less frequently and/or over shorter distances.

*Id.* at 1012.

The *DOT* then sets out the strength requirements for each of these categories:

S—Sedentary Work—Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

L—Light Work—Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

lowering an object from one level to another (including upward pulling).”<sup>176</sup> Pulling is defined as “exerting force upon an object so that the object moves toward the force (includes jerking).”<sup>177</sup> Strength ratings are expressed by “five terms: Sedentary, Light, Medium, Heavy, and Very Heavy.”<sup>178</sup> Heavy work is described as that requiring the exertion of “50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects.”<sup>179</sup> By contrast, light work involves exerting “up to 20 pounds of force occasionally, and/or 10 pounds of force frequently, and/or a negligible amount of force constantly.”<sup>180</sup> For sedentary work, the figures are “up to 10 pounds of force occasionally” and “a negligible amount of force frequently.”<sup>181</sup>

These classifications indicate that courts have been too cursory in their rejection of weight restrictions. The ten and twenty-five pound lifting restrictions imposed in many of the rejected cases implicate medium, light, and even sedentary work, which is not the heavy labor courts seem to think would be out of reach of the average person.<sup>182</sup> Indeed, the EEOC has expressed an opinion that heavy lifting is not self-defining, but rather, each job has to be evaluated individually for

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M—Medium Work—Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.

H—Heavy Work—Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Medium Work.

V—Very Heavy Work—Exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Heavy Work.

*Id.* at 1013.

176. *Id.* at 1012.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. Even the assumption that the average person cannot perform heavy labor is questionable. The jobs listed in O\*NET for which static strength is an important factor include such categories as general farm workers, construction laborers, and janitors and cleaners. *See generally* O\*NET, *supra* note 24. For a person with little education, these heavy labor jobs may be the primary source of employment. Interview with Jack Musgrave, M.S., Vocational Servs. Manager, Evaluation and Dev. Ctr., S. Ill. Univ. Rehab. Inst., in Carbondale, IL (July 11, 2006).

the actual demand it makes.<sup>183</sup> Heavy lifting has instead become a catch-phrase for some courts, circumventing the individualized assessment the ADA requires.

2. *Confusing lifting with working to demand more comparative evidence*

ADA working disability cases have also negatively impacted lifting disability cases, although they have only some elements in common. The negative impact has occurred in at least two ways. First, some courts lump together working claims and lifting claims without making distinctions between the categories.<sup>184</sup> The resulting amalgam is not just confusing, it once again fails to afford the individualized assessment required under the ADA.

Second, some courts have imported the reasoning from the Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*<sup>185</sup> to suggest that work-related lifting restrictions are not sufficient to show substantial limitation in lifting.<sup>186</sup> While some types of work-only restrictions might indeed be insufficient to establish substantial limitation, the courts' reasoning is overbroad in rejecting cases solely because the evidence is based on work-related assessment of lifting capacity. More significantly, these cases applying *Toyota* reflect that a type of doctrinal creep has occurred, one which potentially transforms consideration of every major life activity into one catch-all category of "tasks central to daily living."

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183. See Letter from Claire Gonzales, Dir. of Comm'n & Legislative Affairs, U.S. Equal Employment Opportunity Comm'n (June 29, 1998) [hereinafter Guidance Letter], available at [http://www.jan.wvu.edu/letters/Back\\_JUN\\_98.doc](http://www.jan.wvu.edu/letters/Back_JUN_98.doc) (last visited Sept. 26, 2007) (responding to an inquiry of whether a person disqualified from heavy labor has a disability by noting that an individualized assessment of the particular job is required). The EEOC Guidance Letter also stated that

an[] individual whose back impairment prevents him/her from lifting more than fifteen pounds is substantially limited in the major life activity of lifting because the average person in the general population can lift fifteen pounds with little or no difficulty. On the other hand, an individual whose back impairment prevents him/her from lifting more than fifty pounds is not substantially limited... because the average person in the general population cannot lift fifty pounds with little or no difficulty.

*Id.*

184. See, e.g., *Nuzum v. Ozark Auto. Distrib., Inc.*, 432 F.3d 839, 845–46 (8th Cir. 2005) (noting a line of cases where courts have assessed lifting restrictions by whether they pose a substantial limitation on the major life activity of working); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (holding that a twenty-five pound weight restriction "does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity").

185. 534 U.S. 184 (2002).

186. See *Velarde v. Associated Reg'l & Univ. Pathologists*, 61 F. App'x 627, 630–31 (10th Cir. 2003) (holding that the plaintiff's claim failed because his evidence of limitation addressed only his work abilities and not his activities of daily living).

a. *Amalgamating lifting and working*

There is a confusing amalgam in ADA cases of the major life activities of lifting and working. As discussed in the previous section, some courts have concluded that lifting restrictions by themselves do not substantially limit the major life activity of lifting.<sup>187</sup> Some courts have similarly concluded that lifting restrictions do not establish that a plaintiff is substantially limited in the major life activity of working.<sup>188</sup> In other words, plaintiffs cannot show that they are substantially limited in working because the lifting restriction is not evidence that the plaintiff is prevented from performing a broad class of jobs.<sup>189</sup> In both sets of cases, courts tend to cite other lifting and working cases interchangeably. Some lump the major life activities together: the lifting limitation “does not constitute a significant restriction on one’s ability to lift, work, or perform any other major life activity.”<sup>190</sup> Others string cite both lifting and working claims without noting a distinction.<sup>191</sup>

Working is, however, subject to a different analysis. Determining whether the plaintiff is substantially limited in the major life activity of working requires comparison to other individuals with similar training, skills, and ability, rather than to the general (or “average”) population.<sup>192</sup> Unlike the other major life activities, working does not proceed from a single construct based on average human ability.<sup>193</sup>

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187. *Supra* notes 125–155 and accompanying text.

188. *See, e.g., Olds v. United Parcel Serv., Inc.*, 127 F. App’x 779, 782 (6th Cir. 2005) (“[A] weight restriction alone is not considered a disability under the ADA.”); *Williams*, 101 F.3d at 349 (“[A]s a matter of law, . . . a twenty-five pound lifting limitation . . . does not constitute a significant restriction on one’s ability to lift, work, or perform any other major life activity.”). *But see Taylor v. Fed. Express Corp.*, 429 F.3d 461, 464 (4th Cir. 2005) (recognizing that working cases involving lifting are subject to individualized inquiry of the effect on the plaintiff’s employment prospects).

189. *See Olds*, 127 F. App’x at 782 (finding the plaintiff’s permanent lifting restriction proved he was prevented from doing his old job, and other jobs at his old employer, but did not show he was prevented from performing a broad class of jobs).

190. *Williams*, 101 F.3d at 349; *see McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 376–77 (6th Cir. 1997) (Hillman, J., dissenting) (noting that the majority completely ignored the plaintiff’s issue on appeal that she was substantially limited in lifting, instead ruling solely that her lifting restriction failed to be a substantial limitation on her ability to work).

191. *See, e.g., Rakity v. Dillon Co.*, 302 F.3d 1152, 1160 (10th Cir. 2002) (citing both lifting and working cases without distinguishing them); *Law v. City of Scottsville*, No. 98-6335, 2000 WL 799742, at \*4 (6th Cir. June 15, 2000) (in a lifting claim, the court cites both lifting and working cases for rule that maximum weight restrictions are not disabilities).

192. 29 C.F.R. § 1630.2(j)(3) (2007).

193. *Id.* § 1630.2(j)(1).

There are cases that recognize this distinction.<sup>194</sup> Where courts fail to do so, however, there is in effect a rush to judgment that lifting restrictions are insubstantial as a matter of law. The courts do not seem particularly concerned about the specific parameters of the ADA claim actually before them.<sup>195</sup>

Although much of the failure to make the distinction can be explained by a generally narrow reading of the ADA,<sup>196</sup> there seems to be a particular hostility to cases involving back injuries. As previously noted, the Seventh Circuit in particular has not shied away from expressing its concern that recognizing claims arising out of back injuries will result in an inordinate number of ADA claims.<sup>197</sup> Back injury claims are like a specter that haunts the federal judiciary, their worst fear that the ADA has changed them into workers' compensation forums.<sup>198</sup> Perhaps for this reason, whether the case alleges a basic motor skill disability or a working disability is of limited concern to them.

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194. See *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 255 n.3 (6th Cir. 2000) (noting that the Fourth Circuit's ruling as a matter of law in *Williams* that a twenty-five pound weight restriction is not substantially limiting "conflicts with the ADA's directives that the determination . . . must be made on an *individual* basis, and that the impaired individual's ability to work must be compared not with 'an average persons's [*sic*] abilities,' but with the abilities of a person with 'comparable training, skills and abilities.'" (citations omitted); see also *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539-40 (9th Cir. 1997) (separately analyzing the lifting claim against the general population and the working claim against a person of similar training, skills, and abilities).

195. See, e.g., *Williams*, 101 F.3d at 349 (holding that a twenty-five pound lifting restriction "does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity").

196. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 566-68 (2001) (observing that courts have "ridden herd" on ADA claims with the result that even deserving claims face a "death warrant").

197. See *Mays v. Principi*, 301 F.3d 866, 869 (7th Cir. 2002) (observing that "[t]he number of Americans restricted by back problems to light work is legion"); see also *supra* notes 145-148 and accompanying text. A similar sentiment was expressed by the First Circuit, who urged caution in accepting lifting restrictions as disabilities (despite finding lifting to be a major life activity): "strength varies widely throughout the population, and if a restriction on heavy lifting were considered a substantial limitation on a major life activity, then the ranks of the disabled would swell to include infants, the elderly, the weak, and the out-of-shape." *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 22 (1st Cir. 2002).

198. *Pedigo v. P.A.M. Transp., Inc.*, 891 F. Supp. 482, 485-86 (W.D. Ark. 1994), *vacated on other grounds*, 60 F.3d 1300 (8th Cir. 1995) (expressing skepticism about "the [ADA's] potential of turning federal courts into worker's compensation commissions, deterring such courts from competently and expeditiously handling important, traditionally federal controversies").



- b. *Broadening Toyota Motor Manufacturing, Kentucky, Inc. v. Williams’ “activities of daily living” standard beyond manual tasks claims*

Lifting cases can also be used to illustrate another area of evidentiary confusion—namely, whether these and similar claims are subject to the rule set out by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.<sup>199</sup> As previously noted in Part II,<sup>200</sup> the Supreme Court in *Toyota* held that when evaluating whether a plaintiff is substantially limited in the major life activity of performing manual tasks, it is not sufficient to consider only work-related limitations.<sup>201</sup> Rather, the plaintiff must show that she has “an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives,” which includes home-related activities.<sup>202</sup>

As this section discusses, some courts apply *Toyota* to lifting impairment claims without noting the critical distinctions between the major life activities of lifting and performing manual tasks. As a result, they deemphasize what are otherwise substantial limitations on the motor skill of lifting simply because the plaintiff experiences the impact of them more in the workplace than in home life.<sup>203</sup> Further, courts appear to be developing a new, one-size-fits-all standard for evaluating substantial limitation, one that requires plaintiffs to prove inability to perform very basic tasks (what might be called a toothbrushing inability threshold).

The judicial trend has been to treat *Toyota* as announcing an additional set of criteria that ADA plaintiffs must meet in order to

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199. 534 U.S. 184 (2002).

200. *Supra* notes 60–71 and accompanying text.

201. 534 U.S. at 200–01.

202. *Id.* at 198. The Court’s use of “severely restricts” has been criticized as not consistent with the ADA, which requires a “substantial” limitation, not a “severe” one. See Marcossou, *supra* note 67, at 373 (posing question of whether a legislator considering an amendment to change “substantially limits” to “prevents or severely restricts” would see that change “as expanding, limiting, or making no difference in the statute’s coverage”).

203. Although lifting ability is used as the primary example in the discussion, the extension of *Toyota* has occurred in other major life activity cases as well. The Ninth Circuit, for example, read *Toyota* to require a plaintiff with monocular vision to show his eyesight was severely restricted in comparison to how unimpaired individuals “use their eyesight in daily life.” See *EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794, 802–03 (9th Cir. 2002) (holding plaintiffs failed to state disability claim where their loss of near-field vision did not keep them from driving, reading, using tools, and playing sports); see also *Barta v. Sears, Roebuck & Co.*, 307 F. Supp. 2d 773, 776, 779–80 (E.D. Va. 2004) (requiring a plaintiff who established that she had correctable eyesight of 20/200, which qualified her as “statutorily blind” under the Social Security Act, to present specific evidence of how her blindness actually impacted specific day-to-day activities).

avoid summary dismissal of their claims. For example, in *Nuzum v. Ozark Automotive Distributors, Inc.*,<sup>204</sup> the Eighth Circuit relied heavily on *Toyota* to re-interpret its prior cases addressing lifting restrictions.<sup>205</sup> In *Nuzum*, the court first acknowledged that it had before recognized “the basic motor function of ‘lifting’ as a major life activity.”<sup>206</sup> The court now explained that

in cases in which plaintiffs have established restrictions on lifting, we have said flatly that restrictions on lifting will not be enough to establish disability. . . . If no amount of limitation on an activity suffices to establish disability, then the activity is not a major life activity in its own right. We have said, however, that a substantial limitation of a constellation of such basic motor functions could suffice to prove disability. Therefore, rather than viewing lifting as a major life activity in its own right, it is more accurate to say that it is part of a set of basic motor functions that together represent a major life activity.<sup>207</sup>

This reasoning led the court to *Toyota*: “Not only have we required limitations on a set, rather than on individual basic motor functions, to satisfy the ‘substantial limitation’ requirement, but we have recently applied the [*Toyota*] standard to such functions.”<sup>208</sup> The court acknowledged that “the functions at issue were neither ‘tasks,’ nor ‘manual,’” but it nonetheless required the plaintiff to prove that he was prevented or severely restricted from performing a set of activities of central importance to most people’s daily lives.<sup>209</sup>

Thus, although the motor functions listed in the EEOC definition are designated as major life activities in their own right, our cases show a finding of disability depends not on whether the plaintiff can perform every one of those functions, but on whether the net effect of the impairment is to prevent or severely restrict the plaintiff from doing the set of activities that are “of central importance to most people’s daily lives.”<sup>210</sup>

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204. 432 F.3d 839 (8th Cir. 2005).

205. *Id.* at 845–46.

206. *Id.* at 844.

207. *Id.* at 844–45 (citations omitted).

208. *Id.* at 845. The court noted that it previously rejected a claim in which the plaintiff was alleged to be “unable to grip, reach, lift, stand, sit, or walk” because there was no evidence “show[ing] how these limitations ‘impacted tasks central to most people’s daily lives.’” *Id.* (citing *Philip v. Ford Motor Co.*, 328 F.3d 1020, 1025 (8th Cir. 2003)).

209. *Id.*

210. *Id.* at 846. In a subsequent case, the Eighth Circuit apparently interpreted *Nuzum* to treat lifting claims as manual task claims. See *Breitkreutz v. Cambrex Charles City, Inc.*, 450 F.3d 780, 783–84 (8th Cir. 2006) (finding that the plaintiff who alleged “regarded as” disability did not allege that the employer “perceived him as unable ‘to do the manual tasks central to most people’s lives’”).

The Eighth Circuit's reasoning significantly ups the ante for proving disability claims. The plaintiff attempted to show that his lifting impairment did in fact affect his activities of daily living because he could no longer mow his lawn, drive his manual-transmission car, or pick up laundry baskets.<sup>211</sup> Because there was evidence the plaintiff could do other daily tasks such as picking up around the house, washing dishes, and some laundry, however, the Eighth Circuit found that he failed to show he had a substantial limitation on a set of activities central to daily living.<sup>212</sup>

Similarly, the Sixth Circuit rejected a plaintiff's lifting disability claim, despite evidence showing she could lift nothing over five or ten pounds, because the doctor's report outlining that limitation spoke only to work-related activities.<sup>213</sup> The court reasoned that "[e]ven if [the plaintiff] was unable to lift more than 5 or 10 lbs., she has not presented any evidence to show that the inability to lift this amount substantially limits her ability to lift anything else she requires in her daily life outside work."<sup>214</sup> Earlier in its decision, the court acknowledged that specific comparative evidence was not required and that common sense and life experience are a sufficient basis for the fact finder to draw a conclusion.<sup>215</sup> Apparently, however, common sense and life experience would not be a sufficient basis for the fact finder to infer how such a significant restriction would impact at-home as well as at-work activities.

Other courts have used *Toyota* to suggest that plaintiffs cannot prevail by presenting lifting weight restrictions, but rather must address which discrete tasks of daily life the restriction prevents them from performing.<sup>216</sup> One district court, in fact, suggested that a

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211. *Nuzum*, 432 F.3d at 847.

212. *Id.* Post-*Nuzum*, the Eighth Circuit also rejected a case in which the plaintiff testified that he could only bend to eighty degrees because he could still do household tasks as long as he avoided a lot of bending. *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 685–86 (8th Cir. 2003).

213. *Gerton v. Verizon S., Inc.*, 145 F. App'x 159, 166 (6th Cir. 2005). The doctor's report in *Gerton* was done by a company Verizon hired for the purpose of evaluating employees with work related injuries. *Id.* at 161. The doctor reported that the plaintiff should be "returned to work with restrictions of 5 pounds, one-handed duty and 10 minute stretch breaks every hour." *Id.*

214. *Id.* at 166.

215. *Id.* at 165.

216. *See Velarde v. Associated Reg'l & Univ. Pathologists*, 61 F. App'x 627, 630–31 (10th Cir. 2003) (finding a twenty-five pound lifting limitation at work was not enough to establish that the plaintiff was impaired from performing central daily tasks); *Harmon v. Sprint United Mgmt. Corp.*, 264 F. Supp. 2d 964, 969 (D. Kan. 2003) (finding that because the plaintiff's doctors did not specifically limit his daily activities, he did not establish a substantial limitation). The Seventh Circuit may reflect a circuit in flux on whether the plaintiff is required to prove limitation in a variety of tasks. In a 2002 case, the court relied on *Toyota* to hold that a plaintiff

plaintiff could not prove a substantial limitation in lifting because he could “clean his dishes, clean the yard, bathe his dog, do the groceries, take out the garbage, and prepare his own meals.”<sup>217</sup> Another suggested that the plaintiff needed to present evidence of an inability to “brush[] his teeth or otherwise car[e] for himself.”<sup>218</sup> By contrast, another district court found the plaintiff created a genuine issue of material fact when she presented evidence of specific limitations in her daily life, namely, cooking, cleaning, shopping, driving, and other activities.<sup>219</sup>

If *Toyota* indeed applies, these decisions are arguably consistent with the standard the Court articulated. As Professor Samuel Marcossou has noted, the Court in *Toyota* “frame[d] the inquiry not in terms of what activities the individual cannot do or is substantially limited in doing . . . but in terms of what the person *can still do*.”<sup>220</sup>

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failed to state a claim as a matter of law because his evidence addressed only a doctor’s restriction that he be returned to work only if there was no lifting. *Mack v. Great Dane Trailers*, 308 F.3d 776, 781–82 (7th Cir. 2002). According to that court,

[t]here may well be cases in which, because of the nature of the impairment, one could, from the work-restriction alone, infer a broader limitation on a major life activity. An inability to lift even a pencil on the job might suggest an inability to lift a toothbrush, for example, or to otherwise care for oneself—or at least might support an inference that the employer believed the employee was so limited. But the work restriction in this case was not nearly of that nature, and instead fits neatly into the sort of occupation-specific limitation at issue in *Toyota*.

*Id.* at 781; see *Moskerc v. Am. Air Lines, Inc.*, No. 02 C 710, 2004 WL 1354521, at \*3 (N.D. Ill. May 11, 2004) (citing the central functions discussion in *Mack*, 380 F.3d at 781, for the proposition that the ADA was intended to limit coverage to individuals “that cannot find other productive work because the impairment is so limiting in his life”); *Gilbert v. Indianapolis Pub. Sch. Dep’t of Transp.*, No. IP 00-1799-C-T/K, 2002 WL 31968235, at \*5 (S.D. Ind. Dec. 5, 2002) (suggesting *Mack* may require applying *Toyota*’s daily tasks analysis to working claims as well). Subsequently, in a walking disability case, a different panel found *Toyota* limited to performance of manual tasks:

The ability of a person who is wheelchair-bound to wash his face or pick up around the house does not indicate that he is not disabled under the ADA, and it would not relieve his employer of the obligation to install a ramp or reasonably accommodate his limitations in other ways.

*EEOC v. Sears, Roebuck & Co. (Keane II)*, 417 F.3d 789, 801 (7th Cir. 2005). Whether the reasoning in *Keane II* supersedes that in *Mack*, or whether the Seventh Circuit will apply disparate standards to walking and lifting, remains to be seen.

217. *Soler v. Tyco Elecs., Inc.*, 268 F. Supp. 2d 97, 107 (D.P.R. 2003).

218. *Moskerc*, 2004 WL 1354521, at \*4.

219. *EEOC v. Valu Merchs. Co.*, No. 01-2224, 2002 WL 1932533, at \*6 (D. Kan. Aug. 9, 2002). Even when there is evidence these tasks are limited or even totally foreclosed, however, at least one court has suggested that if the plaintiff can get someone else to do them (in that case, his wife), the plaintiff is not substantially limited in a major life activity. See *Verhoff v. Time Warner Cable, Inc.*, No. 3:05CV7277, 2006 WL 3304179, at \*4 (N.D. Ohio Nov. 13, 2006). *Verhoff* raises an interesting question about what should be considered a mitigating measure, discussion of which is beyond the scope of this Article.

220. Marcossou, *supra* note 67, at 375.

But *Toyota* probably does not apply, at least the way the courts are using it. While the Supreme Court in *Toyota* likely intended to state a general standard for identifying major life activities when it defined them as tasks “central to daily living,”<sup>221</sup> there is no indication the Court intended that case’s particular functional analysis to extend beyond the performance of manual tasks. In other words, the Court was not announcing a toothbrushing inability threshold for substantiality in all ADA cases.

This is revealed by reading *Toyota* as a whole. The plaintiff alleged not only that she was substantially limited in performing manual tasks, but also in the separate activities of housework, gardening, playing with her children, lifting, and working.<sup>222</sup> After the district court granted the employer summary judgment on all her claims, she appealed only manual tasks, lifting, and working.<sup>223</sup> The court of appeals granted the plaintiff partial summary judgment on the manual tasks claim, and side-stepped addressing any of her other claims.<sup>224</sup> The Supreme Court explicitly stated it was considering only the manual tasks claim, the remainder of her claims being preserved by her appeal in the court below.<sup>225</sup>

Accordingly, the case presented manual tasks, working, and lifting as separate major life activities, and the Court took pains to note that it was articulating a standard only for “the specific major life activity of performing manual tasks.”<sup>226</sup> In fact, a close reading of *Toyota* shows that the Court’s main concern was the possibility that a plaintiff could use manual tasks to circumvent the standards the Court previously articulated for working.

Both “manual tasks” and working are classes of tasks rather than discrete tasks in and of themselves like other activities identified in the regulations (such as breathing, seeing, walking).<sup>227</sup> In *Sutton v. United Air Lines, Inc.*,<sup>228</sup> the Court interpreted working to require that plaintiffs show that they are “unable to work in a broad class of

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221. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

222. *Id.* at 190.

223. *Id.* at 191.

224. *Id.* at 192.

225. *Id.* at 192–93.

226. *Id.* at 196.

227. Another class of tasks example in the regulations would be caring for oneself. See 29 C.F.R. § 1630.2(i) (2007); see also Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 47 (2d Cir. 2002) (defining caring for oneself to “encompass[] normal activities of daily living; including feeding oneself, driving, grooming, and cleaning home”).

228. 527 U.S. 471 (1999).

jobs”<sup>229</sup> or a “broad range of jobs,” rather than a specific job.”<sup>230</sup> The court of appeals in *Toyota* adopted a similar class-based analysis for manual tasks (i.e., whether the plaintiff was limited in “a ‘class’ of manual activities affecting the ability to perform tasks at work”).<sup>231</sup> The Supreme Court in *Toyota* found this “circumvented” *Sutton*, reasoning that “*Sutton*’s restriction on claims of disability based on a substantial limitation in working [would] be rendered meaningless because an inability to perform a specific job always can be recast as an inability to perform a ‘class’ of tasks associated with that specific job.”<sup>232</sup> Further, and “[e]ven more critically, the manual tasks unique to any particular job are not necessarily important parts of most people’s lives. As a result, occupation-specific tasks may have only limited relevance to the manual task inquiry.”<sup>233</sup>

Therefore, *Toyota* rejects reliance on occupation-specific tasks to establish substantial limitation only to the extent that those tasks do not mirror non-working tasks. In daily life, individuals rarely perform the kinds of manual tasks that the plaintiff in *Toyota* was restricted from performing—repetitive use of hands and arms lifted above the shoulders. That is much less true for lifting. There may be some idiosyncratic lifting-related movements that might not be reflected in daily living,<sup>234</sup> and courts may have a point about the insufficiency of restrictions in those idiosyncratic cases. Basic lifting in itself is generally the same, however, whether performed at home or at work.<sup>235</sup> The equivalency can be seen in this First Circuit observation:

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229. *Id.* at 491. The EEOC regulations use slightly different language, requiring significant restriction in a “class of jobs,” not a “broad class of jobs.” 29 C.F.R. § 1630.2(j)(3)(i).

230. *Toyota*, 534 U.S. at 200 (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999)); see 29 C.F.R. § 1630.2(j)(3)(i).

231. See *Williams v. Toyota Motor Mfg., Ky., Inc.*, 224 F.3d 840, 843 (6th Cir. 2000), *rev’d*, 534 U.S. 184 (2002).

232. *Toyota*, 534 U.S. at 200-01.

233. *Id.* at 201.

234. See, e.g., *Pryor v. Trane Co.*, 138 F.3d 1024, 1026-27 (5th Cir. 1998) (holding against a plaintiff who could not lift from shoulder overhead, whose push and pull ability was limited, and whose doctor testified that “her activities of daily living are 100%”); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 & n.11 (5th Cir. 1995) (affirming a judgment against a plaintiff who could not do heavy lifting, repetitive rotational movements, had trouble picking up little things from the floor, holding things real high or real tight for long periods of time, and turning a car’s ignition). *But see* *Ward v. Wal-Mart Stores, Inc.*, 140 F. Supp. 2d 1220, 1225 (D.N.M. 2001) (finding plaintiff’s restriction from all repetitive or greater than two-pound overhead lifting absolute and therefore substantially limiting on its face).

235. See *Frix v. Fla. Tile Indus., Inc.*, 970 F. Supp. 1027, 1034 (N.D. Ga. 1997) (finding that inability to lift more than twenty-five pounds disqualified the plaintiff from a class of jobs involving medium and heavy work because the lifting was not idiosyncratic to his job; it was a restriction on lifting any object over twenty-five pounds).

“Whether lifting pen to paper or glass to mouth, lifting is an integral part of everyday life.”<sup>236</sup>

For example, work-related lifting that involves lifting items from ground level to place them on shelving has a parallel in the home-related lifting of a small child or a large bag of dog food.<sup>237</sup> Other groceries, laundry, household furniture, and equipment are also items lifted in the same fashion as objects weighing similar amounts at work, as a matter of common sense. While lifting very heavy items (fifty pounds or more) arguably might not be common in daily life, lifting twenty to twenty-five pound items would certainly seem to be, as demonstrated by the foregoing list.<sup>238</sup> Recognizing the substantiality of these lifting restrictions would not present the same end-run around the major life activity of working. The individual may have more opportunities to engage in lifting in the workplace and thereby experience difficulties more often at work than at home, but the significance of the activity is the touchstone, not where and when it is conducted.<sup>239</sup>

Lifting claims have nonetheless been rejected, even in cases with restrictions as severe as five-to-ten pounds, merely because the plaintiff demonstrated her restriction in the context of her work activity and did not, for whatever reason, go into detail about everyday activities.<sup>240</sup> This makes no more sense than requiring that, in order to state an ADA claim of disability, individuals using wheelchairs must establish that they have as much difficulty getting around their own houses as they do their workplaces.<sup>241</sup> Further, it raises the question whether individuals who use wheelchairs would

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236. *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 21 (1st Cir. 2002).

237. *See Whitfield v. Pathmark Stores, Inc.*, 39 F. Supp. 2d 434, 439 (D. Del. 1999) (describing the nature of the plaintiff’s twenty-pound lifting restriction “evident when one considers that 20 pounds amounts to a large bag of dog food or a small child”).

238. *See id.*; *see also* Guidance Letter, *supra* note 183 (noting that “the average person in the general population can lift fifteen pounds with little or no difficulty”).

239. *See Bragdon v. Abbott*, 524 U.S. 624, 638 (1998). In *Bragdon*, the Court had to decide whether reproduction was a major life activity under the ADA. *Id.* The Court reasoned that in order to determine whether an activity is “major,” the activity must be evaluated based on its significance. *Id.* The Court rejected the petitioner’s argument that an activity had to fall in the public, economic, or daily dimension in order to be considered major. *Id.*

240. *See Gerton v. Verizon S., Inc.*, 145 F. App’x 159, 166 (6th Cir. 2005) (finding that even if the plaintiff “was unable to lift more than 5 or 10 lbs., she has not presented any evidence to show that the inability to lift this amount substantially limits her ability to lift anything else she requires in her daily life outside work”).

241. *See EEOC v. Sears, Roebuck & Co. (Keane II)*, 417 F.3d 789, 801 (7th Cir. 2005) (noting that an employer is not off the hook for accommodating an employee who uses a wheelchair simply because that employee is able to perform various activities at home).

fail to prove substantial limitation if they did not show they cannot do basic household chores and personal hygiene tasks.<sup>242</sup> The lower courts' reasoning makes "central to daily living" a homogenous, catch-all standard applicable to all determinations of disability.

"Central to daily living" defines the major life activity itself, not the substantiality of the limitation.<sup>243</sup> If lifting is recognized as a major life activity, it is by definition a task central to daily living.<sup>244</sup> The question then becomes, what is an average person's lifting ability and does the plaintiff's ability vary significantly from that? Where the restrictions manifest themselves most prominently is beside the point. Individualized assessment is the appropriate approach, not ruling as a matter of law that certain weight restrictions are not substantial, or that work-related evidence of lifting restrictions cannot prove substantial limitation because the evidence does not address tasks central to daily living.

3. *Failing to recognize common sense and life experience of the fact finder as the most appropriate judge of basic motor skill limitations*

From the foregoing analysis, the following two rules can be gleaned: (1) weight restrictions above some yet-undecided threshold require comparative evidence of the average person's lifting ability, and (2) plaintiffs need specific proof of the impact of the restrictions on the activities of daily living. Yet, lifting along with other basic motor functions seems easily understood through common life experience. Expert evidence may in some cases be needed to establish the parameters of the limitation, but beyond that, it really should not be necessary to develop expert evidence of the average person's ability or of how the limitation impacts specific tasks of daily living if there is other evidence of impact.

That courts are applying *per se* rules rather than sending cases to the jury should not come as a surprise. The judiciary has expressed concern about the legion of back injury cases it believes to be out

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242. Cf. *Marcosson*, *supra* note 67, at 377 (asserting that "when the major life activity in which the plaintiff claims to be substantially limited is a single, discrete activity[,] . . . there is no reason to examine unrelated activities the plaintiff can perform without substantial limitation").

243. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (discussing major life activities as central to daily life and then explaining a substantial limitation); see also *supra* notes 17–20 (explaining the *Toyota* standard).

244. As articulated in the *Interpretive Guidance*, major life activities by definition are "basic activities" the average person in the general population can perform with little or no difficulty. 29 C.F.R. § 1630.2(i) (2007).



there.<sup>245</sup> To some extent, the problem also lies with the way plaintiffs present their cases. For example, in one case, the plaintiff's doctor pronounced the plaintiff's "activities of daily living" to be "100%."<sup>246</sup> In another, when asked, the plaintiff apparently could not come up with more than golfing as something in his daily life that he was restricted from doing because of his impairment.<sup>247</sup> In yet another, the plaintiff presented only the categories of jobs she could perform under the *DOT* (light and selected medium work) and asked the court to "infer" significant limitation from that alone (i.e., without explaining how it related to general capabilities).<sup>248</sup> Two plaintiffs in a case alleging lifting and standing limitations could testify only vaguely that they could not sit in one place "too long" or lift "anything heavy" or "very heavy."<sup>249</sup>

Other cases, however, reject claims with sufficient evidence to trigger common sense evaluation of the plaintiff's limitations. One plaintiff testified that he could not mow his lawn and could not do "normal little things" like picking up a laundry basket and working on his and his sons' cars,<sup>250</sup> but the court discounted that testimony because it did not demonstrate limitation on tasks the court deemed central enough.<sup>251</sup> Similarly, another case found insufficient evidence regarding a plaintiff who was subject to a company doctor's order not

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245. See *Mays v. Principi*, 301 F.3d 866, 869 (7th Cir. 2002) ("The number of Americans restricted by back problems to light work is legion. They are not disabled."). The Seventh Circuit has raised similar concerns in non-lifting cases where the plaintiff's limitations stem from back injuries. For example, that court rejected a claim by a plaintiff who could not stand for more than thirty-to-forty minutes without having to sit or lie down, due to a spinal injury, reasoning that "all persons impaired by virtue of common afflictions cannot be disabled." *Williams v. Excel Foundry & Mach., Inc.*, 489 F.3d 309, 311 (7th Cir. 2007).

246. *Pryor v. Trane Co.*, 138 F.3d 1024, 1027 (5th Cir. 1998).

247. *Moskerc v. Am. Air Lines, Inc.*, No. 02 C 710, 2004 WL 1354521, at \*4 (N.D. Ill. May 11, 2004).

248. *Gibbs v. St. Anthony Hosp.*, No. 96-6063, 1997 WL 57156, at \*2 (10th Cir. Feb. 12, 1997).

249. *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 644 (2d Cir. 1998). Along analogous lines, a plaintiff in a walking case apparently did not clean up an inconsistency between two statements by his doctor, one that he could walk only one block without rest and another that he could jog "for only fifteen minutes." *Penny v. United Parcel Serv.*, 128 F.3d 408, 416 (6th Cir. 1997). Another plaintiff who claimed a walking disability failed to convince a court that noted that the plaintiff had not obtained a handicapped parking permit. See *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 685 (8th Cir. 2003) (acknowledging the plaintiff's ability to walk was limited, but finding that requiring rest after a quarter-mile walk did not demonstrate a severe walking restriction).

250. *Nuzum v. Ozark Auto. Distrib., Inc.*, 432 F.3d 839, 841-42 (8th Cir. 2005).

251. *Id.* at 847. The Eighth Circuit requires the plaintiff's limitation be on a set of activities central to daily living, which the court apparently views as "helping out around the house, doing dishes, tidying up, and doing laundry." See *id.* (rejecting that mowing the lawn and driving a manual transmission car are central activities to daily living).

to lift more than ten pounds, not to use her right hand, and to take a five-to-ten minute break every hour until cleared by that doctor.<sup>252</sup> The court refused to assume a five-to-ten pound lifting restriction would affect any activities outside of the workplace despite the extent that the limitation speaks for itself.<sup>253</sup>

These cases do not follow the general ADA summary judgment standard that requires the plaintiff to present “some evidence” of the substantiality of his impairment.<sup>254</sup> As one court put it, “some evidence” requires only “enough [evidence] about [the] disability so the fact finder is not left speculating about how substantial [the] limitations really are compared to the ‘average person.’”<sup>255</sup> That standard would not require comparative evidence in the sense of an expert who describes average lifting ability and then compares the plaintiff’s ability to that average. Any such expert testimony would not add much that is not already understood by the fact finder. Rather, “some evidence” in this context should be understood to mean evidence of the scope of the lifting restriction as experienced by the plaintiff. This is in effect the standard articulated by the Supreme Court in *Kirkingburg*.<sup>256</sup>

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252. *Gerton v. Verizon S., Inc.*, 145 F. App’x 159, 161, 165–68 (6th Cir. 2005). The plaintiff in *Gerton* asked the court to infer that because of the extent of the limitations imposed by the company doctor, she would be also be unable to perform any lifting activities in her daily life outside of work. *Id.* at 165. The court refused to do so, apparently because the medical records did not explicitly show that she had been asked to demonstrate her lifting ability. *See id.* at 165–66 (stating that the plaintiff provided no evidence that she was unable to care for herself).

253. *Id.* at 166–67. The plaintiff in *Gerton* may well have thought, given the nature of her restrictions, it was unnecessary to develop detailed evidence of what tasks she could and could not do.

254. *See* *Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1115–16 (D.C. Cir. 2001) (concluding in a working disability case that the plaintiff has “to produce some evidence of the number and types of jobs in the local employment market”); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 507 (7th Cir. 1998) (reasoning in a working disability case that the evidentiary burden is “not an onerous requirement, but it does require at least some evidence from which one might infer that Davidson faced ‘significant restrictions’ in her ability” to work); *Gallegos v. Swift & Co.*, 237 F.R.D. 633, 649 (D. Colo. 2006) (requiring in a lifting disability case that there be “some evidence of a substantial impairment in lifting”); *Almond v. Westchester County Dep’t. of Corr.*, 425 F. Supp. 2d 394, 399 (S.D.N.Y. 2006) (requiring in a “regarded as” case that plaintiff “introduce some evidence tending to establish . . . the perceived impairment would limit [the] plaintiff in the performance of some major life activity”); *see also* *Witt v. Nw. Aluminum Co.*, 177 F. Supp. 2d 1127, 1131 (D. Ore. 2001) (interpreting the ADA in a walking disability case to require plaintiffs to produce only “minimal evidence” to withstand a summary judgment motion).

255. *Huizenga v. Elkay Mfg.*, No. 99 C 50287, 2001 WL 640973, at \*6 (N.D. Ill. June 5, 2001).

256. *See* *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999) (stating that persons claiming ADA protection must “prove a disability by offering evidence that the extent of the limitation in terms of their own experience . . . is substantial”); *see also* *supra* notes 53–56 and accompanying text (discussing the Court’s evidentiary requirement for substantial limitation).

In other words, to prove substantial limitation, the plaintiff must testify to the limitations she personally experiences.<sup>257</sup> A doctor's testimony may clarify the medical basis of the impairment and, for less understood physical or mental impairments, explain how the impairment affects the plaintiff's abilities.<sup>258</sup> If the fact finder is permitted to use common sense and life experience, the foregoing would be sufficient evidence on which to judge whether the limitation is substantial. Following that standard, the testimony of one plaintiff who could not mow his lawn or lift a laundry basket and that of another plaintiff who was precluded from lifting more than ten pounds or using her right hand provided "some evidence" of their limitations. That evidence was certainly enough for a jury to judge on common sense and life experience whether, as a whole, they added up to a substantial limitation as compared to average human experience.

Here is where the failure to distinguish between work and lifting in major life activity analysis has the most significance. According to the Title I regulations, determining the degree of limitation on the major life activity of working requires comparison to a cohort, a person of similar skills, training, and experience.<sup>259</sup> The extent of job opportunities within the plaintiff's cohort and the extent to which his impairment impacts those opportunities may not be something of common understanding. For example, how many jobs require lifting more than twenty-five pounds? What is the relationship between jobs with lifting demands and the skills, training, and experience of the plaintiff? Vocational experts or others who can speak specifically to job abilities and job opportunities for the plaintiff and his cohorts might be needed, depending on the circumstances of the case.<sup>260</sup> By

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257. More than identification of the alleged impairment is required; there must also be evidence of how the impairment actually affects the plaintiff. *See* *Harmon v. Sprint United Mgmt. Corp.*, 264 F. Supp. 2d 964, 969 (D. Kan. 2003) (finding that the plaintiff apparently failed to present any evidence of "the nature, severity, or duration of his impairments").

258. While most disability cases will involve impairments with limitations that will be readily understood, there is the possibility that some might require additional medical understanding beyond that of the average layperson. For example, consider some diseases of the kidneys that impair the major life activity of eliminating bodily waste. In these cases, the physician might also be required to testify about how the impairment affects the plaintiff's major life activity. For more discussion of this point, see *infra* notes 305–306 and accompanying text.

259. *See* 29 C.F.R. § 1630.2(j)(3)(i) (2007) (directing comparison to "the average person having comparable training, skills, and abilities").

260. Even in working disability claims, however, vocational experts are not required. *See* *Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1115–17 (D.C. Cir. 2001) (reasoning that while the ADA requires the plaintiff to produce some evidence of the number and type of jobs from which he is excluded because of

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contrast, determining the degree of limitation on the major life activity of a basic motor skill is not subject to this same need for cohort evidence.

Ideally, when proving a lifting disability, the plaintiff would speak to both work and home limitations.<sup>261</sup> When courts reject ADA claims because the evidence of the restriction comes from workplace activities, this suggests that they believe the restrictions are purely contextual, that these plaintiffs go home at night and their restrictions disappear. These courts envision the ADA plaintiff as someone who is so impaired as to have an exceptionally diminished quality of life across the board.

But the ADA does not require that plaintiffs have an exceptionally limited quality of life, only that a particular impairment substantially limits a particular major life activity.<sup>262</sup> If the average person can perform a basic motor skill without limitation, a person who has restrictions on that motor skill should be able to show substantial limitation regardless of where the restriction has its most impact, work or home. The common-sense and life-experience standard best reflects the socially influenced nature of what is substantial. Juries have sufficient understanding of basic motor skills to define whether the limitation's impact is substantial or trivial.<sup>263</sup>

This is not just a question that goes merely to the debate over the standard for finding an impairment substantial. That debate has in itself largely been resolved in favor of requiring demanding standards. Here, courts are asserting an evidentiary standard that

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her impairment, such evidence could be based on the plaintiff's own job search experience and need not come from vocational experts).

261. See *EEOC v. Valu Merchs., Co.*, No. 01-2224, 2002 WL 1932533, at \*6 (D. Kan. Aug. 9, 2002) (applying the *Toyota* daily tasks analysis, the court found that the plaintiff created an issue of fact where she presented evidence of "specific limitations on her day-to-day activities," which included such things as cooking, cleaning, shopping for groceries, driving, child care, dressing herself, and personal hygiene).

262. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) (reasoning that "[w]hen significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable"). In *Bragdon*, the Court accepted the plaintiff's argument that an eight percent chance of transmitting HIV to a fetus during pregnancy could be a substantial limitation on a woman's major life activity of reproduction. *Id.* at 640.

263. Sitting is another activity that illustrates the real issue is not comparative evidence. Office jobs require long hours of sitting. Home life, however, may allow for more movement, more choice of resting position. As a matter of common sense and life experience, a jury would know on average that a person should be able to sit in an office chair for an eight hour-a-day job without significant pain and difficulty. The jury needs evidence of how much pain and difficulty the plaintiff experiences, but in most cases, it does not need comparative evidence to tell it how that pain and difficulty compares to the average. A jury can reasonably evaluate the claim without it, and without requiring that the plaintiff also prove the extent to which the sitting impairment affects the plaintiff's home life.

stands in the plaintiff's way—the requirement to provide certain types of evidence in order to prove limitation. Because this is a question of evidence, it might offer plaintiffs an opportunity. Plaintiffs may get past summary judgment if they present the comparative and daily task evidence that courts are saying they must present. This raises, however, a new set of questions. Is the kind of comparative evidence courts seem to be demanding available to plaintiffs? Is it any more helpful than jury common sense and life experience? The next Part addresses these questions.

### III. THE INADEQUACY OF CURRENT MEDICAL AND VOCATIONAL ASSESSMENTS TO MEET COURTS' DEMANDS FOR COMPARATIVE EVIDENCE

Courts have suggested that evidence of the plaintiff's restrictions "without more" is insufficient to establish a substantial limitation of a major life activity.<sup>264</sup> What evidence would this "more" be? At least one pair of commentators has suggested that all a plaintiff needs to do is use her medical (or vocational) expert to opine on how the plaintiff's condition compares to the average person's to create an issue of fact to survive summary judgment.<sup>265</sup> Is it that simple?<sup>266</sup> This Part considers the assessments medical and vocational experts actually make and what they say about "average."

Medical and vocational experts may be able to provide the kind of comparison to "average" that courts suggest is lacking in some cases. In others, the type of medical or vocational data that courts seem to be insisting upon might not be available. The potential for *Daubert* challenges to the evidence is therefore significant. Ultimately the

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264. See *Prickett v. Amoco Oil Co.*, 147 F. Supp. 2d 1147, 1153 (D. Utah 2001) (following the Tenth Circuit's requirement of "comparative evidence as to the general population's lifting capabilities"); see also *Olds v. United Parcel Serv., Inc.*, 127 F. App'x 779, 782 (6th Cir. 2005) (concluding that "a weight restriction alone" is not sufficient to establish substantial limitation).

265. See *Van Detta & Gallipeau*, *supra* note 15, at 522. *Van Detta and Gallipeau* cite in support of their theory a federal district court opinion in which the plaintiff submitted an affidavit from her physician stating that "90% of the general population of similar sex and age would have better ability to stand and lift than [plaintiff]." *Id.* (quoting *Wheaton v. Ogden Newspapers, Inc.*, 66 F. Supp. 2d 1053, 1062 (N.D. Iowa 1999) (alteration in original)).

266. In some cases, the "more" to which courts refer has been interpreted to mean evidence of other impairments besides the ability to lift. See *Napreljac v. Monarch Mfg. Co.*, No. 4-02-CV-10075, 2003 WL 21976024, at \*4 (S.D. Iowa May 27, 2003) (suggesting that a lifting restriction alone was not sufficient, but was evidence of disability when combined with restrictions against "repetitive pushing, repetitive pulling, repetitive working above shoulder level and reaching above her head, and . . . use [of] vibratory machinery").

expert evidence that is produced may not be better at gauging substantial limitation than the fact finder's common sense.

*A. Medical Evaluation and Comparative Evidence*

There are some well-known medical standards that incorporate what might be called an "average" norm (or at least, a range of normal from which to draw comparisons). Twenty/twenty vision, normal blood pressure, and normal cholesterol levels are three that come quickly to mind. As the Supreme Court's ADA decisions make clear, however, deviation from these norms alone does not prove disability.<sup>267</sup> Rather, the standards are at most a helpful starting point. For some functions, such as the basic motor skills discussed in this Article, there appear to be no general population norms. There is no "average lifting capacity," "average walking capacity," or "average sitting capacity." Relevant medical evaluation of these functions tends to be oriented to the task at hand, which most commonly is returning a patient to a pre-existing level of functionality.

Medical evaluation is first and foremost about the medical needs of the patient. However, a good part of medical practice involves evaluating the patient's ability to work. In fact, both medical and vocational evaluations are heavily oriented toward assessing capacity to work, whether in the pre-hire or return-to-work contexts.<sup>268</sup> For example, a common evaluation process used in occupational and rehabilitation medicine is the functional capacity evaluation ("FCE"). As described by the American Occupational Therapy Association, an FCE

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267. See, e.g., *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 564–65 (1999) (rejecting the lower court finding that the plaintiff with monocular vision was substantially limited for purposes of the ADA merely because the manner in which he sees is different); see also *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999) (finding a plaintiff's high blood pressure was not a disability because medication controlled it).

268. See generally AM. MED. ASS'N, *A PHYSICIAN'S GUIDE TO RETURN TO WORK* (James B. Talmage & J. Mark Melhorn eds., 2005) (defining capacity as embodying strength, flexibility, and endurance and stating physicians most often deal with a subject's current ability); MULTIDISCIPLINARY PERSPECTIVES IN VOCATIONAL ASSESSMENT OF IMPAIRED WORKERS (Steven J. Scheer ed., 1990) (outlining vocational evaluations and issues relating to subjects with learning disabilities, visual impairments, and hearing impairments). Even when discussing the physician's role in an ADA case, the medical literature emphasizes return to work concerns. See AM. MED. ASS'N, *DISABILITY EVALUATION* 70–71 (Stephen L. Demeter & Gunnar B.J. Andersson eds., 2d ed. 2003) (1996) [hereinafter *DISABILITY EVALUATION*] (stating a physician must provide substantial detail and quantification of a worker's restrictions and later confirm the manager's interpretation of what indicated duties the worker cannot safely perform).

is an all-encompassing term to describe the physical assessment of an individual's ability to perform work-related activity. . . . A well-designed FCE should be comprehensive in terms of encompassing the physical demands of work as defined by the U.S. Department of Labor in the Dictionary of Occupational Titles (DOT.), have standardized instructions and operational definitions, be practical regarding space and length of time for administration, be objective in minimizing examiner bias, and, most importantly, be reliable and valid. . . .<sup>269</sup>

In simplified terms, a typical FCE assesses the patient's ability to carry out various standardized physical tasks using measured weights and distances, measures range of motion and peak force, and may put the patient through a simulation of job tasks.<sup>270</sup> FCEs are particularly common in cases involving musculoskeletal system disorders.<sup>271</sup> There are several different systems for conducting FCEs sold by various commercial vendors.<sup>272</sup> FCE systems often include both performance-based and self-report measures, but a "high value" is placed on observation of the patient's physical abilities by a trained observer.<sup>273</sup> The patient is asked to exert maximum force, and the resulting performance capacities are plotted onto a scale that mirrors the DOT classifications for frequency of activity (never, occasionally, frequently, and continuously).<sup>274</sup> The ability to use hands and extremities, and the length of time activities such as sitting and standing can be performed, may also be part of the assessment.<sup>275</sup>

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269. The Am. Occupational Therapy Ass'n, Inc., Functional Capacity Evaluation Fact Sheet, <http://www.aota.org/Consumers/WhatisOT/FactSheets/Conditions/35117.aspx> (last visited Nov. 1, 2007) (citations omitted).

270. Glenn S. Pransky & Patrick G. Dempsey, *Practical Aspects of Functional Capacity Evaluations*, 14 J. OCCUPATIONAL REHAB. 217, 218 (2004).

271. Vincent Gouttebarger et al., *Reliability and Validity of Functional Capacity Evaluation Methods: A Systematic Review with Reference to Blankenship System, Ergos Work Simulator, Ergo-Kit, and Isernhagen Work System*, 77 INT'L ARCHIVES OCCUPATIONAL & ENVTL. HEALTH 527, 528 (2004).

272. *See id.* at 271. Among those mentioned in the Goutteberg et al. study are the Blankenship System, Ergo-Kit, the Ergos Work Simulator, and the Isernhagen Work System. *Id.*

273. Douglas P. Gross & Michele C. Battié, *Factors Influencing Results of Functional Capacity Evaluations in Workers' Compensation Claimants with Low Back Pain*, 85 PHYSICAL THERAPY 315, 316 (2005).

274. *See* Pransky & Dempsey, *supra* note 270, at 218, 220. Occasionally means between one and thirty-three percent of the time, frequently means between thirty-four and sixty-six percent of the time, and continuously means between sixty-seven and one hundred percent of the time. *Id.* at 220. These categories track the Physical Demand Strength Ratings used in the DOT, discussed in more detail earlier in this Article. *Supra* notes 173–182 and accompanying text.

275. The Department of Labor has posted online the Work Capacity Evaluation form it requires for Musculoskeletal Conditions, which evaluates these tasks. *See* U.S. DEP'T OF LABOR, WORK CAPACITY EVALUATION MUSCULOSKELETAL CONDITIONS 1–2 (2001), <http://www.dol.gov/esa/regs/compliance/owcp/OWCP-5c.pdf>.

Despite the claim that FCEs lead to “objective information” about an individual’s functional abilities, the reliability of the various systems used to measure functional capacity have been the subject of debate in the professional literature.<sup>276</sup> The methodology each FCE system uses to determine impairment has not been adequately studied.<sup>277</sup> Because the data obtained in the testing depends for its validity on the effort of the person being tested, which in turn requires a judgment by the tester as to the sincerity of that effort, the ability to produce accurate results has been questioned.<sup>278</sup> Even the most heavily used FCE systems have serious issues with their predictive ability.<sup>279</sup>

The same is largely true of another prominent evaluation system, the *AMA Guides*. Under the *AMA Guides*, physicians determine “whole person” impairment ratings (“WPIR”) of the kind frequently used in workers’ compensation systems.<sup>280</sup> The *AMA Guides* (1) outline diagnostic criteria and procedures for various bodily systems and structures, such as the cardiovascular system, the ear, nose and throat, and the spine, among others; (2) suggest ranges of impairment percentages based on the clinical findings; and (3) provide example cases that fall within each of those ranges.<sup>281</sup> A “whole person impairment percentage” is defined as an “estimate [of] the impact of the impairment on the individual’s ability to perform the activities of daily living, excluding work.”<sup>282</sup> The *AMA*

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276. See Goutteborge et al., *supra* note 271, at 528 (arguing that the providers of FCEs “do not supply enough evident information about the reliability and validity of these FCEs”); Pransky & Dempsey, *supra* note 270, at 226 (commenting that the acceptability of FCE use depends upon the application, such as whether for adjudication or preplacement evaluation); see also Phyllis M. King et al., *A Critical Review of Functional Capacity Evaluations*, 78 *PHYSICAL THERAPY* 852, 858 (1998) (“If an FCE measurement does not have established reliability, test results could be different with each administration.”).

277. Of the four systems mentioned in the Goutteborge article, only one, the Isernhagen Work System, had been studied for reliability and validity. See Goutteborge et al., *supra* note 271, at 535 (stating that all authors of studies on the validity of this particular system mentioned the level of reliability); see also King et al., *supra* note 276, at 858 (listing only two FCE systems as examined for reliability: (1) when administered by different evaluators and (2) when administered upon the same subject).

278. See Pransky & Dempsey, *supra* note 270, at 223–24 (emphasizing the challenge in determining what a subject cannot do rather than what the subject will not do).

279. See Goutteborge et al., *supra* note 271, at 535–36; see also Pransky & Dempsey, *supra* note 270, at 224 (observing that while accuracy of the return to work prediction from an FCE “may be acceptable for a group of persons, the level of accuracy for an individual may be low and unacceptable”).

280. *AMA GUIDES*, *supra* note 25, at 4–5.

281. See generally *id.*

282. *Id.* at 4.



*Guides* list the activities of daily living (“ADL”) commonly measured along with examples:

| Activities of Daily Living Commonly Measured in Activities of Daily Living (“ADL”) and Instrumental Activities of Daily Living (“IADL”) Scales <sup>283</sup> |  |
|---|--|
| <i>Activity</i>   | <i>Example</i>   |
| Self-care, personal hygiene   | Urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating |
| Communication   | Writing, typing, seeing, hearing, speaking   |
| Physical activity   | Standing, sitting, reclining, walking, climbing stairs                                 |
| Sensory function  | Hearing, seeing, tactile feeling, tasting, smelling                                    |
| Nonspecialized hand activities  | Grasping, lifting, tactile discrimination  |
| Travel  | Riding, driving, flying  |
| Sexual function   | Orgasm, ejaculation, lubrication, erection   |
| Sleep   | Restful, nocturnal sleep pattern   |

The *AMA Guides* represent the AMA’s attempt to provide consistent and reproducible evaluation outcomes for all types of medical impairments.<sup>284</sup> Just as with the FCEs, however, because each part of the impairment assessment comes down to the clinical judgment of the physician doing the evaluation, the meaningfulness of these impairment ratings has been questioned.<sup>285</sup>

Whichever system is at issue, there are serious issues about how well the information obtained relates to the ADA question of substantial limitation, at least in cases not involving the major life activity of working. On the positive side, like the ADA,<sup>286</sup> the *AMA Guides*

283. *Id.* tbl. 1-2.

284. *Id.* at 17 (theorizing that two physicians following the *AMA Guides* should reach similar results and conclusions).

285. See James P. Robinson et al., *Pain, Impairment, and Disability in the AMA Guides*, 32 J.L. MED. & ETHICS 315, 315 (2004); Charles Richard O’Keefe, Jr., Note, *The AMA Guides to the Evaluation of Permanent Impairment and Workers’ Compensation in Indiana*, 27 IND. L. REV. 647, 679–81 (1994) (noting a critic arguing that it would be an error to characterize the *AMA Guides* as objective and highlighting normative decisions of physicians as to both organ-level and whole person impairment).

286. 42 U.S.C. § 12101(2) (2000).

explicitly distinguish between impairment and disability, noting that “[t]he impairment evaluation, however, is only one aspect of disability determination.”<sup>287</sup> Also like the ADA, the *AMA Guides* define impairment physiologically or mentally, not functionally.<sup>288</sup> The *AMA Guides* also indicate that work-related impairment (as in the ability to work itself) is not to be considered when determining a person’s overall impairment.<sup>289</sup>

Also, both the *AMA Guides* and typical FCE systems suggest that the patient’s ADL are to be considered as part of the evaluation process.<sup>290</sup> This would seem at first glance to overlap with *Toyota’s* daily activities standard.<sup>291</sup> None of the evaluation systems is designed, however, to measure daily activities as compared to average. To be sure, the *AMA Guides* reference “normal” as a touchstone for rating impairment, but the description of what is meant by this reveals it is not the comparison courts seem to be seeking in ADA cases:

Loss, loss of use, or derangement implies a change from a normal or “preexisting” state. *Normal* is a range or zone representing healthy functioning and varies with age, gender, and other factors such as environmental conditions. For example, a normal heart rate varies between a child and an adult and according to whether a person is resting or exercising. Multiple factors need to be considered when assessing whether a specific or overall function is

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287. *AMA GUIDES*, *supra* note 25, at 8. The definition of disability in the *AMA Guides* is not, however, the same as under the ADA. The *AMA Guides* defines disability as “an alteration of an individual’s capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment.” *Id.*

288. Compare 29 C.F.R. § 1630.2(h) (2007) (defining physical impairment to include “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more . . . body systems” and mental impairment as “[a]ny mental or psychological disorder”), with *AMA GUIDES*, *supra* note 25, at 2 (defining “impairment” as “a loss, loss of use, or derangement of any body part, organ system, or organ function”).

289. *AMA GUIDES*, *supra* note 25, at 4. The *AMA Guides* provide that they are “not intended to be used for direct estimates of work disability [and i]mpairment percentages derived according to the *Guides* criteria do not measure work disability.” *Id.* at 9. At the same time, however, the *AMA Guides* recognize that physicians in appropriate cases may express opinions about disability. *See id.* at 14 (noting a physician’s input is often essential for determining substantial limitation of a major life activity or record of impairment under the ADA).

290. *See id.* at 4 tbl. I-2; King et al., *supra* note 276, at 859 (noting that as part of the data gathering process for an FCE, the evaluator interviews the patient about such things as “exercise programs, home and recreational activities, and level of functioning in activities of daily living . . . to establish a baseline on the client and reduce the risk of reinjury”).

291. *See supra* notes 199–202 and accompanying text (establishing a plaintiff under the ADA must prove substantial impairment in all activities central for daily living).

normal. A normal value can be defined from an individual or a population perspective.<sup>292</sup>

“Normal” under the *AMA Guides* can therefore be based on the individual—what is normal for that particular person.<sup>293</sup> ADA cases do not accept an individual-based norm.<sup>294</sup>

The *AMA Guide’s* definition of “normal” also suggests that some population-based norms could include age, gender and other factors.<sup>295</sup> By contrast, the ADA speaks only of “the average person in the general population.”<sup>296</sup> The *Interpretive Guidance* explicitly notes that “advanced age [and] physical or personality characteristics” are not impairments.<sup>297</sup> The regulations nowhere suggest that “average” can be based on some sliding demographic scale (even if, arguably, that would make sense).

Further, the term “activities of daily living” is somewhat misleading if looked at from an ADA perspective. In the FCE/return-to-work assessment, the patient’s ability is tested in a clinical sense—i.e., the patient is put through a series of tasks designed to measure the patient’s lifting, walking, bending, and similar categories of ADLs.<sup>298</sup> The patient may be asked questions about other activities, but, as a rehabilitation physician interviewed for this Article noted, the types of home life activities that courts suggest ADA plaintiffs must address, like difficulty carrying groceries, lifting laundry baskets, and cleaning house, are not considered a typical part of the evaluation process.<sup>299</sup> Explicit evaluation of limits in those activities comes into play only when there is a suspicion that the patient is “slipping into chronic pain behaviors.”<sup>300</sup>

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292. AMA GUIDES, *supra* note 25, at 2.

293. *See id.* (articulating a normal value may be from an individual’s perspective).

294. *See* 29 C.F.R. § 1630.2(j)(1) (2007) (defining a substantial limitation in comparison to the average person within the general population).

295. AMA GUIDES, *supra* note 25, at 4; *see* DISABILITY EVALUATION, *supra* note 268, at 91 (noting that epidemiology is a population science but that legal adjudications require individualized decisions).

296. 29 C.F.R. § 1630.2(j)(1); *see* *Arnold v. Cook County Adult Prob. Dep’t*, 13 A.D. Cases 244, 247 (N.D. Ill. 2001) (questioning relevance of a doctor’s report that compared the plaintiff’s physical ability to push and pull to that of a man of similar age).

297. 29 C.F.R. § 1630.2(j).

298. *See, e.g.*, King et al., *supra* note 276, at 860 (describing the types of functional force assessments that are typically used to measure lifting capacity).

299. Interview with Terrance Glennon, M.D., Assistant Professor, *Northwestern University, Feinberg School of Medicine*, Department of Physical Medicine and Rehabilitation, in Carbondale, Ill. (July 26, 2006).

300. *Id.* Chronic pain syndrome is not well defined in the medical literature, but involves some type of pain that has not resolved itself after a period of time, which may be a set period (three or six months) or a more condition specific time (“the reasonable expected healing time for the involved tissues”). *See* Manish K. Singh et al., *Chronic Pain Syndrome*, <http://www.emedicine.com/pmr/topic32.htm> (last visited

When an evaluation is being made for return-to-work purposes, that evaluation focuses on the demands of the particular job and the individual's ability to meet those demands without the likelihood of re-injury.<sup>301</sup> This in effect narrows the horizons of the assessment. Courts may have some basis for being reluctant to accept physician-imposed activity restrictions, such as the lifting-weight restrictions, because those restrictions might reflect a conservative treatment regime more than the extent of actual limitation. The physician in turn may be unwilling to commit to a more specific assessment of the level of impairment, because medicine is still not doing a good job (in the mind of doctors) with the science of impairment.<sup>302</sup>

In obvious cases, where the impairment is so medically substantial that there is little doubt that it also meets the ADA's definition of substantial (such as one case where the physician stated that "90% of individuals of similar sex and age" have more lifting and walking ability than the plaintiff),<sup>303</sup> the physician might be willing to state a specific opinion. Even acknowledging the physician's expertise, however, this type of opinion does not add much when the fact finder can probably draw a similar conclusion about the severity of the impairment from common sense.

There have been some cases where plaintiffs have included WPIRs and FCEs in evidence presented to prove their ADA disability.<sup>304</sup> Perhaps there are indeed cases where the impairment ratings are helpful to determine substantiality of limitation, such as cases where the impairment and the major life activity are less commonly understood. Several circuits have, for example, recognized

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Sept. 29, 2007). Part of treating chronic pain syndrome is interrupting the reinforcement of pain behavior and modulation of the pain response. *Id.* Doctor Glennon suggested that examining patients about specific daily activities like carrying laundry baskets could in effect reinforce the patient engaging in chronic pain behaviors. Interview with Terrance Glennon, *supra* note 299.

301. See, e.g., King et al., *supra* note 276, at 857 (describing a well-designed FCE).

302. Interview with Terrance Glennon, *supra* note 299; see DISABILITY EVALUATION, *supra* note 268, at xiii-xiv (noting "the almost total lack of scientific research" regarding impairment medicine).

303. See *Wheaton v. Ogden Newspapers, Inc.*, 66 F. Supp. 2d 1053, 1063 (N.D. Iowa 1999) (finding the plaintiff submitted sufficient evidence to withstand summary judgment on the issue of substantial limitation with evidence her doctor imposed a flat ten-pound lifting limitation and submitted an affidavit "opin[ing] that 90% of the general population of similar sex and age" can stand and lift more than the plaintiff could).

304. See, e.g., *Webner v. Titan Distrib., Inc.*, 267 F.3d 828, 834 (8th Cir. 2001) (noting that a doctor testified that the plaintiff had an eighteen-percent whole person impairment rating as a result of his three back surgeries); *Pryor v. Trane Co.*, 138 F.3d 1024, 1026-27 (5th Cir. 1998) (relating that a plaintiff's physical therapist testified regarding the results of her functional capacity evaluations).

“elimination of bodily waste” as a major life activity.<sup>305</sup> In that context, a doctor’s finding of a seventy-percent impairment of the whole person because of a less common impairment such as “bilateral polycystic renal disease”<sup>306</sup> might help the jury assess the degree of the plaintiff’s limitation. A seventy-percent impairment rating, however, would probably strike a court as one of the “plain on its face” types of cases.<sup>307</sup> It is doubtful that the medical profession wants to become involved in debates about the significance of lesser percentages (Forty percent? Thirty percent?), especially if asked to compare them to “the average person in the general population,” in light of the reservations medical science has regarding impairment medicine.<sup>308</sup>

Accordingly, medicine might be able to measure average capacity versus diminished capacity in such things as eyesight, heart function, and so forth, but it is still rather poor in being able to measure how impairment translates into actual disability. Moreover, the medical focus is on treatment of the individual to gain as much function as that individual is capable of gaining, not on comparison of that individual to some type of average norm. To a physician, the average person’s lifting or standing ability is a rather meaningless concept. Perhaps this is one reason why there does not appear to have been significant study of it.

#### B. Vocational Evaluation and Comparative Evidence

Many of the same issues arise regarding vocational evaluations as they relate to major life activities other than working.<sup>309</sup> Vocational evaluations

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305. *Heiko v. Colombo Sav. Bank*, 434 F.3d 249, 251 (4th Cir. 2006); *see Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378, 384 (3d Cir. 2004); *Kammueler v. Loomis, Fargo & Co.*, 383 F.3d 779, 785 (8th Cir. 2004); *see also Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991) (suggesting a willingness to find persons who cannot eliminate bodily wastes without aid of dialysis to have substantial limitation in their ability to care for themselves).

306. AMA GUIDES, *supra* note 25, at 149.

307. *See Wheaton*, 66 F. Supp. 2d at 1063 (denying a motion for summary judgment in part because of expert testimony stating that the plaintiff’s impairment restricted him more than “90% of the general population”).

308. *See* DISABILITY EVALUATION, *supra* note 268, at xiii-xiv (noting the reservations about impairment medicine and the need for further research in this area).

309. Among other things, in working disability cases, vocational experts can provide labor market data that addresses the factors outlined in the regulations for determining the substantiality of the limitation on working. *See Carl Gann, Vocational Experts in Employment Law Cases*, 11 J. LEGAL ECON. 53, 59–60 (2002) (describing vocational experts’ role in performing labor market surveys); *see also* 29 C.F.R. § 1630.2(j)(3)(ii) (2007) (setting out demographic factors that may be considered regarding substantial limitation of working).

determin[e] the occupations a person can perform based upon an analysis of foundational factors that are integrated into a meaningful conclusion about employment potential. This factor integration includes the person's age, education, work experience and training, marketable transferable skills, aptitudes, work personality, physical and mental capacities, and access to the labor market.<sup>310</sup>

Vocational evaluation, by necessity, looks at how a person's physical condition affects her ability to work. The vocational evaluator (which in ADA cases may be a rehabilitation counselor)<sup>311</sup> is charged with determining what job positions the individual can fill, with an eye toward assisting the individual in finding appropriate employment.<sup>312</sup> The evaluator gives the individual a battery of tests, some pen and paper, some requiring physical skills like manual dexterity.<sup>313</sup> The evaluator also obtains other data from the individual, which can include medical information.<sup>314</sup> A report is then generated that gives the individual undergoing evaluation information about appropriate job titles or occupations, generally based on either the *DOT*,<sup>315</sup> or more recently, O\*NET,<sup>316</sup> both developed by the U.S. Department of Labor.<sup>317</sup>

The *DOT* uses more than eighty variables to evaluate over 12,000 types of jobs, with many of the variables focusing on physical and functional skills and abilities.<sup>318</sup> As noted above, each occupation is

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310. Gann, *supra* note 309, at 54 (citation omitted).

311. Gann suggests that "[t]he rehabilitation counselor is a unique choice as a vocational expert in disability discrimination cases" because that counselor "is a blend of the bodies of knowledge of occupational information and disability information brought together by the profession of counseling." *Id.* at 55.

312. *See id.* at 54–55 (noting the vocational expert's use of a "vocational evaluation" to determine employability of an individual and "feasible vocational goals").

313. Interview with Jack Musgrave, *supra* note 182.

314. *Id.*

315. *DOT*, *supra* note 23.

316. O\*NET, *supra* note 24.

317. These reports have not been mandated by courts, even in working cases, although they may be considered helpful. *See Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1115–17 (D.C. Cir. 2001) (reasoning that evidence of the number and type of jobs from which the plaintiff is excluded because of his impairment can be based on the plaintiff's own job search experience and need not come from vocational experts); *see also Mullins v. Crowell*, 228 F.3d 1305, 1314–15 n.18 (11th Cir. 2000) (concluding that "expert vocational evidence, although instructive, is not necessary" to prove substantial limitation in working).

318. *See Jack Reeves, O\*NET versus DOT—You Have to Admit This is Getting Interesting*, <http://www.theworksuite.com/id13.html> (last visited May 18, 2007) (noting the number of variables and types of jobs listed in the *DOT*). The *DOT* is detailed and complex, and a full explanation of it is beyond the scope of this Article. The introduction to the *DOT* contains an overview that explains what comprises each title. *DOT*, *supra* note 23, at xv–xxii. In addition, Appendix C to the *DOT* sets out the

given a physical demands strength rating that categorizes the work into sedentary, light, medium, heavy, and very heavy based on the required exertion (“[e]xerting up to 20 pounds of force occasionally,” “10 pounds of force constantly,” etc.).<sup>319</sup> By contrast, O\*NET focuses more on cognitive-oriented work skills.<sup>320</sup> The job reports simply rank various variables on a 0–100 scale for each job category.<sup>321</sup>

Neither the *DOT* nor O\*NET is particularly helpful under the *Toyota* daily activities approach. To say a person is excluded from a particular number of job titles says essentially nothing about how that person’s impairment affects her ability to function outside the workplace.<sup>322</sup> Exclusion from job titles may have some relevance to the question of whether someone is substantially limited in the major life activity of working,<sup>323</sup> but is unlikely to be the “more” courts have been demanding in some other major life activity cases.<sup>324</sup>

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various physical strength variables that are part of the occupational definitions. *Id.* at 1009–14.

In addition to issues regarding substantial impairment, the *DOT* has been used in ADA litigation on the issue of the essential functions of a job. *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 147 (3d Cir. 1998) (discussing the plaintiff’s vocational expert’s reliance on the *DOT* job description for “general duty nurse” to argue that the plaintiff was qualified for the position despite her lifting restrictions because lifting was not an essential function of that job).

319. *See DOT*, *supra* note 23, at 1013.

320. Reeves, *supra* note 318.

321. O\*Net job reports demonstrating the way the system rates variables can be generated on-line. *See, e.g.*, O\*Net Online, Details Report for 51-4121.06 Welders, Cutters, and Welder Fitters, <http://online.onetcenter.org/link/details/51-4121.06> (last visited Nov. 2, 2007). O\*net’s predecessor, the *DOT*, was last updated in 1991 and has therefore been criticized for being considerably out of date. Robert E. Rains, *Debating Disability Design: A Response*, FED. LAW., May 2000, at 43. O\*NET was supposed to replace the *DOT*, as the labor market moves away from manual labor to more cognitive-based labor, but has been deemed disappointing by those who use it because what it produces is too general to be of much real use. Interview with Jack Musgrave, *supra* note 182. O\*NET has apparently proven disappointing to vocational evaluators because it does not assess transferable job skills as well as the *DOT*. *Id.* One commentator specifically noted how unhelpful O\*NET is for evaluators doing ADA work. Reeves, *supra* note 318. In addition, much of contemporary service work retains a manual labor component, including work in the retail, food service, and health care sectors. *See, e.g.*, *Galenbeck v. Newman & Newman, Inc.*, No. 02-6278, 2004 WL 1088289, at \*2 (D. Ore. May 14, 2004) (describing the plaintiff, who worked at carry-out pizza store and had to lift twenty-five pound sacks of flour).

322. Expert reports that simply gather computer-generated information based on *DOT* job titles stand less of a chance of being admissible in general. *See Zarzycki v. United Tech. Corp.*, 30 F. Supp. 2d 283, 291–92 (D. Conn. 1998) (rejecting an expert’s report in a working disability case because his analysis was based solely on the job titles he identified as matching the plaintiff’s skills and abilities and did not say anything about the actual number of jobs within each of those titles).

323. An evaluator would be able to track transferable skills using the *DOT*, and also address the degree of exclusion for a person of similar training, skills, and abilities. Software such as OASYS generates reports that supply some local

Courts may in fact be demonstrating a lack of understanding of the labor market. Some courts have suggested that “heavy lifting” is beyond average capacity.<sup>325</sup> This leads to their refusal to find substantial limitation when plaintiffs present evidence that their impairment excludes them from the very heavy, heavy, or even medium heavy job categories.<sup>326</sup> However, labor categories are to a large extent associated with education—such individuals with only a limited education may in fact be substantially limited if they are excluded from all but the sedentary and light job categories.<sup>327</sup>

In the bigger picture, what this suggests is that courts and medical/vocational professionals are speaking different languages when they consider the ability to perform the tasks of daily living. This is not to say that a physician or vocational specialist would not be able to speak to some sense of average capacity. More, the question is

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demographic info based on estimates using data gathered under the Workforce Investment Act. Interview with Jack Musgrave, *supra* note 182; *see Zarzycki*, 30 F. Supp. at 291 (describing expert’s process of using OASYS computer system to generate his report).

324. Indeed, DOT exclusion has been treated as probative in some cases and dismissed as non-probative in others. *Compare* *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 785–86 (3d Cir. 1998) (finding expert’s report, which used the DOT to estimate the types of jobs the plaintiff could do with his impairment, was sufficient to meet the evidentiary burden for substantial limitation), *with Zarzycki*, 30 F. Supp. 2d at 292 (criticizing expert’s report for failing to consider the actual number of jobs, only DOT titles that matched plaintiff’s abilities), *and* *EEOC v. Rockwell Int’l Corp.*, 60 F. Supp. 2d 791, 797-98 (N.D. Ill. 1999), *aff’d*, 243 F.3d 1012 (7th Cir. 2001) (drawing a parallel to *Zarzycki* to find vocational counselor’s expert report inadmissible because it contained no evidence on the number of jobs in the local market from which the claimants were excluded, instead analyzing job titles in the DOT only). *Rockwell International* raises the further issue of whether an expert’s report must meet the requirements for admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court in *Rockwell International* held both that the expert’s methodology was not scientifically reliable and that his conclusions were not helpful to the trier of fact because of their generality. 60 F. Supp. 2d at 797–98; *see infra* Part IV.C.

325. *Buettner v. N. Okla. County Mental Health Ctr.*, 158 F. App’x 81, 87 (10th Cir. 2005) (suggesting that restrictions on heavy lifting are “part of the human condition”); *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 22 (1st Cir. 2002) (suggesting that “a capacity to perform heavy lifting is not a trait shared by the majority of the population”).

326. The DOT defines “medium work” as “[e]xerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects.” DOT, *supra* note 23, at 1013. The cases finding twenty-pound lifting restrictions insufficient as a matter of law are, in effect, concluding that an exclusion from even medium work is not a substantial limitation.

327. Interview with Jack Musgrave, *supra* note 182. As the rejected expert report in *Zarzycki* pointed out, only 1965 out of 12,741 occupations listed in the DOT are light or sedentary work. 30 F. Supp. 2d at 291; *see* TERRY L. BLACKWELL ET AL., THE VOCATIONAL EXPERT UNDER SOCIAL SECURITY 16 (1992) (describing as “the most difficult claimants” for vocational evaluation individuals “who have sufficient impairment to restrict them to sedentary or light work, but who have no more than a grammar school education and a work history of lower level, semi-skilled jobs”).



whether insistence on expert testimony to establish comparison to average ability is disingenuous given that expert knowledge on that narrow topic may not be all that much more reliable than what common understanding and experience provides. As the next Part discusses, it also raises questions about whether the evidence would meet reliability standards under the Federal Rules of Evidence.

*C. Potential Daubert Issues in the Medical and Vocational Evidence of “Average”*

One potential problem plaintiffs will have if they seek to introduce medical and vocational evidence of “average” is whether that evidence can pass a challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>328</sup> Because courts are treating “average” as an issue of medical science, the comparative evidence must have sufficient scientific validity to be admissible under *Daubert*.<sup>329</sup> It must also assist the trier of fact in understanding a fact in issue.<sup>330</sup> Both of these requirements may prove to be difficult in some ADA claims, especially if there is no science of “average” in regard to the impairment at issue.

To be considered reliable, the Supreme Court’s decision in *Daubert* requires scientific evidence to pass four general considerations:

- 1) whether the expert’s analysis derives from a scientific method that can be or has been tested,
- 2) whether the expert’s methodology has been the subject of peer review and testing,
- 3) the actual or potential rate of error in the expert’s methodology, and
- 4) whether the relevant scientific community generally accepts the expert’s methodology.<sup>331</sup>

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328. 509 U.S. 579 (1993).

329. *Id.* at 592-93; see *EEOC v. Rockwell Int’l Corp.*, 243 F.3d 1012, 1015-18 (7th Cir. 2001) (discussing and affirming the judgment of the district court after it rejected an ADA vocational expert’s report under *Daubert* standards). A plaintiff might argue that an expert’s opinion need not be based on scientific methodology, but rather comes from “specialized knowledge,” which can be based on experience in the field. See *Humphreys v. Regents of Univ. of Cal.*, No. C 04-03808, 2006 WL 1867713, at \*2 (N.D. Cal. July 6, 2006) (allowing an expert to testify in a discrimination case as to the defendant’s human resources practices based on his long experience as a professor of organizational studies and working in the staffing and employment industry). The nature of the evidence courts seem to be demanding in the substantial limitation cases, however, most likely does not fall under the “specialized knowledge” rubric. The issue is one of medical science and will probably require plaintiffs to demonstrate scientific reliability under the general *Daubert* standard.

330. FED. R. EVID. 702.

331. *Daubert*, 509 U.S. at 593-94.

These considerations are not exhaustive, and trial judges have considerable leeway to determine whether the evidence is reliable.<sup>332</sup>

A methodology does not have to be well established to survive a *Daubert* challenge.<sup>333</sup> For example, the Sixth Circuit upheld a district court's decision to allow an academic psychologist's testimony about how the plaintiff's reading and comprehension skills compared to "average," despite acknowledging that the expert's opinion was based on a theoretical model that had not been empirically analyzed for purposes of diagnosis and treatment of reading disorders.<sup>334</sup> The expert had reviewed the results of a number of assessment tests the plaintiff completed for a clinical psychologist and neuropsychologist (which were not themselves challenged) and concluded that the data revealed that the plaintiff performed within a normal range.<sup>335</sup> The court rejected criticism of the expert's opinion, reasoning that she was not second-guessing the clinical diagnosis offered by the other experts but rather determining "whether [the plaintiff's] test results were consistent with a substantial impairment in his reading ability."<sup>336</sup> The science of testing produced a range of "average," to which the expert made a comparison.

By contrast, however, another court rejected the testimony of a physician who used a percentile formula to compare a plaintiff's ten-pound lifting restriction to the overall population.<sup>337</sup> The court in that case concluded that the physician's report provided no basis for the percentile comparison: "[The expert] offers no data, no source

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332. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); see *Daubert*, 509 U.S. at 595 (emphasizing flexibility and including other applicable evidentiary rules in a judge's analysis). Rule 702 of the Federal Rules of Evidence, amended after *Daubert*, applies to all expert testimony, not just scientific, but incorporates *Daubert's* elements:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702; see Note, *Reliable Evaluation of Expert Testimony*, 116 HARV. L. REV. 2142, 2144 (2003) (noting that Rule 702 incorporates the standards articulated by the Supreme Court).

333. See *Kumho*, 526 U.S. at 151 (noting that a claim by a scientific expert might not have been subject to peer review because the particular issue might not have raised scientific interest before the suit in question raised it).

334. *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 628 n.15 (6th Cir. 2000).

335. *Id.* at 628.

336. *Id.* at 628 n.15.

337. *Gallegos v. Swift & Co.*, 237 F.R.D. 633, 640 (D. Colo. 2006).

of information and no demographic evidence to back up his bald assertions.”<sup>338</sup>

This latter case illustrates the dilemma plaintiffs may face. They must meet courts’ expectations about comparative evidence but when they do offer expert evidence, it may end up being successfully challenged as unreliable because there is no scientific basis for a comparison to “average.”

Another *Daubert* issue is the requirement that the information “assist the trier of fact.”<sup>339</sup> The Court in *Daubert* suggested that this is primarily a question of relevance, in the sense of whether the testimony relates to an issue in the case.<sup>340</sup> But it also relates to whether having an expert testify is superfluous because the matter is one within common knowledge.<sup>341</sup> When courts in the ADA cases dismiss claims because no comparative evidence was presented, they are moving the question beyond what is helpful to what is required, either explicitly or as a matter of practical reality, to survive summary judgment.<sup>342</sup>

Interpretation of specialized test results to determine whether someone’s cognitive processing is substantially different than average may in fact be a subject beyond common understanding. An opinion on the substantiality of a lifting impairment compared to average ability is probably unnecessary.<sup>343</sup> Moreover, it raises concerns about

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338. *Id.*

339. FED. R. EVID. 702.

340. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

341. Expert opinions that are within the layperson’s knowledge may be excluded.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. “There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.”

FED. R. EVID. 702 advisory committee’s note on 1972 proposed rules (quoting Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

342. This in essence makes “average person in the general population” the legal equivalent of “unreasonably dangerous” in products liability defective design cases and the standard of care in medical malpractice cases, both of which routinely require expert testimony in order to get to a jury.

343. See *Whitfield v. Pathmark Stores, Inc.*, 39 F. Supp. 2d 434, 439 (D. Del. 1999). In *Whitfield*, the court found the following rather underwhelming expert testimony sufficient to create an issue of fact for the jury on how the plaintiff’s abilities compared to those of an average person:

Q: In your experience as a nurse, is an unimpaired person limited in their ability to do repetitive reaching?

A: (Pause) I would have to say no.

Q: How about bending?

A: (Pause) Again, I would have to say no, but I would like to qualify it by saying that one may not necessarily be impaired, but they may be limited

the “cloak of authority” that comes from having an expert testify, when the expert’s opinion is no more weighty (or scientific) than common knowledge.<sup>344</sup>

#### IV. WHAT ULTIMATELY IS COMMON-SENSE USE OF COMPARATIVE EVIDENCE?

At this point, several different conclusions might be reached about the evidentiary standard for proving substantial limitation. One is that courts are insisting on additional expert testimony that isn’t necessary for juries to be able to assess whether ADA’s legal standards are met. Another is that plaintiffs’ attorneys need to pay more attention to developing the record of impact on the daily lives of their clients. Yet another is that the medical and vocational rehabilitation fields could aid those who work with ADA claims by developing systems that establish scientific benchmarks of “average” abilities. The best conclusion is probably some form of all three.

Courts are demanding unnecessary additional evidence in some ADA contexts. The lifting cases discussed in this Article illustrate the

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because of poor muscle tone or, you know, something along those lines.  
So—

Q: Well, is a normal healthy adult generally able to repetitively bend?

A: I would have to say yes.

Q: Is a normal healthy adult able to lift more than 20 pounds?

A: (Pause) I would have to say yes, depending on the person’s stamina.

Q: Are normally healthy adults generally able to stand in one place for longer than half an hour?

A: (Pause) My professional opinion on that one is going to be no, not without requiring a position change just because of circulatory compromises.

Q: Well, are normal healthy adults able to stand in one place in the way that cashiers are required to stand in one place for longer than half an hour?

A: Yes.

*Id.*; cf. *EEOC v. Rockwell Int’l Corp.*, 243 F.3d 1012, 1021 (7th Cir. 2001) (Wood, J., dissenting) (“I see nothing to be gained by having vocational experts routinely appear in ADA cases solely for the purpose of testifying that a broad range of jobs require the ability to lift 30 pounds, or the ability to perform repetitive motions.”).

344. The case in which the court emphasized the plaintiff’s doctor’s opinion that her lifting restriction was worse than “90% of the general population of similar sex and age” demonstrates the way courts themselves attach a cloak of authority to an expert opinion, even when that severe a restriction should be obvious enough that expert testimony becomes a waste of judicial resources. See *Wheaton v. Ogden Newspapers, Inc.*, 66 F. Supp. 2d 1053, 1063 (N.D. Iowa 1999). The plaintiff in *Wheaton* also testified to her limitations, and compared her lifting abilities to that of average person. See *id.* at 1062–63. The court read Eighth Circuit precedent to require “more’ evidence than merely her lifting restriction to generate a genuine issue of material fact” regarding whether she was substantially limited, and the doctor’s affidavit convinced the court that she met that requirement. *Id.*; cf. Richard B. Katskee, *Why it Mattered to Dover that Intelligent Design Isn’t Science*, 5 FIRST AMEND. L. REV. 112, 115 (2006) (noting the “the public’s scientific illiteracy (which leads most of us, unreflectively, to regard any view dressed in the lab coat of pseudoscientific terminology as wearing the cloak of scientific authority)”).

courts' tendency to eschew individualized assessment in favor of *per se* rules, wrapped in the guise of plaintiffs' failure to meet their evidentiary burden.<sup>345</sup> Although they recognize that some impairments are limiting on their face, they also fail to credit evidence that is sufficient for the fact finder to judge whether the impairment presents a substantial enough limitation.

The Supreme Court in *Kirkingburg* stated that the burden of proving substantial limitation was not onerous and should be proven by testimony about the plaintiff's experience.<sup>346</sup> What can be gleaned from this is that the Court believed the fact finder could judge the substantiality of a limitation from knowing how the impairment (in that case, lessened visual acuity) affected the plaintiff. In other words, the Court saw substantiality as a fact question centered on the plaintiff and not on the science of "average." Most people hearing about another's personal and medical experience with a physical or mental impairment would be able to judge how it relates to average human experience.<sup>347</sup> Therefore, insisting on additional "scientific" evidence of average is unnecessary in many of these cases.

Courts should also stop being dismissive of the evidence of impact on plaintiffs' daily activities when offered to prove a limitation is substantial. Whether an impairment is substantially limiting is not the same question as whether an activity qualifies as a major life activity. *Toyota* spoke of each alleged manual task having to be central to daily living, individually or in the aggregate, because that is the nature of "performing manual tasks."<sup>348</sup> It is a class-based major

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345. When the "on its face" standard was first used by courts in evaluating substantiality questions, it probably meant only that identification of an impairment is not in itself proof of a disability. In other words, "on its face" meant "alone." That is true, as far as it goes. The individualized assessment model of the ADA does require determination of how an impairment impacts the particular plaintiff before the court. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999). As the cases discussed earlier in this Article demonstrate, however, "on its face" has shifted meaning at least for some courts to "as a matter of law." The individualized assessment has been replaced by a *per se* rule that lifting restrictions of twenty-five pounds or more are not substantially limiting. See, e.g., *Wheaton*, 66 F. Supp. 2d at 1062 (noting such a *per se* rule in the Eighth Circuit).

346. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999).

347. The Fourth Circuit rejected a claim by a woman asserting she was substantially limited in the major life activity of socializing with others by noting that her avoiding certain co-workers "[did] not distinguish her from the general population[.]" and that she failed to provide sufficient testimony about her own experience to create a question of fact as to the substantiality of her alleged limitations. *Rohan v. Networks Presentations, L.L.C.*, 375 F.3d 266, 275-76 (4th Cir. 2004).

348. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

life activity; if the individual task is not significant, the sum of the tasks must be.<sup>349</sup>

When discrete motor functions are at issue, the same analysis does not apply. Impact evidence is offered in those cases not to prove each such daily activity is a major life activity in and of itself, but rather to meet *Kirkingburg's* standard that the plaintiff must provide evidence of his or her personal experience.<sup>350</sup> For a person with restrictions on basic motor functions like lifting, walking, standing, *et cetera*, difficulty doing activities such as lawn mowing, household chores, driving, sewing, *et cetera*, is evidence of substantial impact because these are all activities the average person without basic motor function impairments can perform with little or no restriction. They are what most people can do, to put it in the language of the legislative history of the ADA.<sup>351</sup> The plaintiff need not be fully restricted from these activities, just find them significantly more difficult to do.<sup>352</sup>

That said, plaintiffs' counsel can also do a better job, based on the reported cases, of developing the fact record. ADA plaintiffs' counsel would be wise to consider a suggestion made by Professor Michael Selmi for employment law cases in general: "present evidence to explain the nature of the discrimination at issue, and in presenting the evidence . . . generally assume the court is hostile to the claim."<sup>353</sup> Even if courts are too demanding of impact evidence, plaintiffs should anticipate that judicial hostility and, when possible, articulate with some degree of detail how the impairment affects daily activities. A ten or even twenty-pound lifting restriction, for example, should have some manifestation in a person's home life. It strains credibility when a plaintiff cannot articulate how an impairment of a basic motor function actually affects him and has to rely on the mere fact of physician imposed restrictions. Plaintiffs need to overcome the apparent judicial belief that those limitations are mostly on paper.

Relatedly, the medical and vocational rehabilitation fields should consider turning more attention to the dilemma ADA claimants face with having to establish a comparison to "average." Given that both

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349. *Id.*

350. *Kirkingburg*, 527 U.S. at 567.

351. See H.R. REP. NO. 101-485, pt. 2, at 52 (1990).

352. See 29 C.F.R. § 1630.2(j)(1)(ii) (2007) (defining "substantially limits" to include "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity").

353. Selmi, *supra* note 196, at 573.

the medical and vocational rehabilitation professions responded to workers' compensation and other disability compensation programs by developing impairment rating systems (e.g., FCEs, the *AMA Guides*), they should do the same for the issues raised by the ADA. Use of ADA-specific FCE systems to demonstrate the many ways an impairment impacts daily living may help avoid summary judgment even under the current narrow construction of the ADA.<sup>354</sup>

In final assessment, courts are not wholly incorrect to conclude that some disabilities appear plain on their face and do not require additional evidence to prove substantial limitation, whereas other claims require more proof. Cases are being sent to juries, however, only when the courts think it obvious that the plaintiff can prove disability. In other cases, courts have been insisting on evidence that is either unnecessary, unattainable, or both. Close cases should first be recognized as such and second, be sent to the jury without falling back on disingenuous reasons for dismissing them.

In and of itself, "average" is a problematic concept. Undoubtedly, both individuals with disabilities and the medical and vocational professionals who work with them have a certain amount of resistance to the idea that there is an "average" person, because it suggests that there is a "normal" person. The ADA treats individuals as individuals based on their abilities, and not on some exclusionary norm.<sup>355</sup> Courts have, of course, translated this into a narrow definition of the protected category, performing a gate-keeping role. The best judge of whether the experiences of an individual are outside the norm, however, is the jury. Jury common sense is preferable to judge-made common sense when the issue is one of common experience.

#### CONCLUSION

The common sense and life experience of the fact finder is typically the best judge of whether a limitation is substantial, at least in cases in which the plaintiff presents individualized evidence of a

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354. Employers have been encouraged to avoid "generic FCEs" when evaluating existing employees' physical and functional abilities, because the ADA requires that such evaluations be job-related. See Pransky & Dempsey, *supra* note 270, at 225. On the flip side, plaintiffs' attorneys and their experts should be sensitive to the need to demonstrate the impact on their client's daily lives, not simply their generic functioning.

355. See 42 U.S.C. § 12101(a)(7) (2000) (characterizing individuals with disabilities as "a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond [their] control . . . and resulting from stereotypic assumptions not truly indicative of [their] individual ability").

physical or mental impairment. The demand made by some courts for specific comparative evidence places an inappropriate evidentiary burden on plaintiffs, even acknowledging a restrictive interpretation of “substantially limits.” Plaintiffs, along with their medical and vocational experts, nonetheless need to do a better job of anticipating judicial hostility to ADA claims when they develop the record of their limitations, and not assume that common sense will, indeed, prevail.