Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection Under Title I of the Americans with Disabilities Act

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"The ADA is a legislative Rorschach test, an inkblot whose meaning and significance will be determined through years of costly litigation."

— *Senator William Armstrong, upon passage of the ADA by Congress*[1]

I. INTRODUCTION

The purpose of this Article is to discuss the unique ramifications of Title I[2] of the Americans with Disabilities Act (ADA)[3] for employees suffering from bipolar disorder or clinical depression.[4] Specifi-

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[1] 136 CONG. REC. S9694 (daily ed. July 13, 1990). Senator Armstrong's statement has proven to be prophetic. Courts have witnessed a deluge of litigation during the more than six years that have passed since Title I of the Americans with Disabilities Act (ADA) became fully effective. It is also interesting to note Senator Armstrong's use of imagery from the field of psychology — a choice that is uniquely appropriate to the scope of this Article. Contrast Senator Armstrong's statement with the following one made by President Bush when he signed the ADA into law: "Fears that the ADA is too vague or too costly and will lead to an explosion of litigation are misplaced." 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601.

[2] Title I of the ADA is the subchapter of the statute that is applicable to employment. The remaining subchapters cover public transportation and other state and local government services (Title II), public accommodations (Title III), telecommunications (Title IV), and miscellaneous provisions (Title V).

[3] 42 U.S.C. §§ 12101-12213 (1994).

[4] In this Article, the author broadly uses the terms "bipolar disorder" and "depression" (or "clinical depression") even though the American Psychiatric Association (APA) recognizes more specific categories of mood disorders within each of these classifications. See generally the chapter on "Mood Disorders" in AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter *DSM-IV*].

cally, this Article seeks to demonstrate that the reason these individuals are usually unsuccessful in litigating Title I claims is partly attributable to poor choices of legal strategy. In addition to presenting support for this proposition, the author suggests alternative courses of action for future litigants to follow in order to avoid the legal pitfalls of their predecessors.

This Article is divided into several parts. Part I begins with an overview of bipolar disorder and depression to provide the non-mental health professional with a rudimentary understanding of these two illnesses. It then continues by briefly discussing the history, purpose, and basic tenets of the ADA. Part I concludes by examining the role of the courts and the Equal Employment Opportunity Commission (EEOC) in interpreting and applying this statute. Part II proceeds to dissect Title I, analyzing each of its important components in an effort to give the reader an understanding of the more prominent nuances to this complex statute. In particular, the analysis will focus on how Title I's major provisions apply to employees who have bipolar disorder or depression. Part III recaps the major obstacles faced by such employees under Title I and suggests what changes — both by Congress and the EEOC as well as by future plaintiff-employees — could possibly remedy this situation. Additionally, throughout the Article, special attention will be given to issues of statutory and regulatory interpretation that have generated disagreement among various courts and the EEOC. Part IV concludes the Article by briefly reiterating that employees suffering from mental illness, especially those suffering from bipolar disorder or depression, face a constant struggle when seeking protection under Title I's various provisions.

This Article *does not* purport to accomplish the following: First, it does not attempt to provide an in-depth analysis of all the fine intricacies and legal controversies surrounding Title I of the ADA. The progeny of case law that this statute has spawned is far too vast to be adequately addressed in anything short of a treatise. Second, in contrast to most other commentators, the author has tried to limit discussion of the case law to controversies actually decided under the ADA rather than its related predecessor, the Rehabilitation Act of 1973.[5] Nonetheless, several Rehabilitation Act cases are cited in this

[5] *See infra* Parts I.B., I.C. (discussing the Rehabilitation Act of 1973). Most of these articles were written shortly after the ADA was enacted. Consequently, the commentators had to rely on Rehabilitation Act precedent for interpretations of similar provisions under the ADA. However, as the number of decisions interpreting the ADA has continued to grow, the need for this reliance has diminished. In

Article because of their particular relevance to the specific issue being discussed or because of a remaining lack of ADA cases on the subject. Third, Title I is primarily discussed in the context of individuals who are already employees. Although Title I also applies to pre-employment screening, inquiries, and medical examinations, these sections have been adequately addressed by other commentators and, therefore, will not be addressed in this Article. Fourth, the author does not intend for this Article to serve as a step-by-step litigation handbook for prospective plaintiffs or their employers.[6] Rather, the author's goal is to provide an academic discourse in an area of law that is becoming increasingly convoluted. A growing number of decisions reflect conflicting interpretations among tribunals as to Title I's applicability to employees suffering from depression or bipolar disorder.[7] The author hopes, nonetheless, that an analysis of these issues will provide practicing attorneys with the foundation upon which to assess better the strengths and weaknesses of these types of cases.

Why depression and bipolar disorder? Two reasons. First, these two mood disorders are considered to be severely debilitating and

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addition, for an excellent discussion of why Rehabilitation Act cases are not good precedent for the ADA in any event, see generally Stephanie P. Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701 (1997).

[6] The ADA involves a complex scheme of shifting burdens of proof, which are too complex to be discussed within the relatively narrow framework of this Article. See Loretta K. Haggard, *Reasonable Accommodation of Individuals with Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans with Disabilities Act*, 43 WASH. U. J. URB. & CONTEMP. L. 343, 350 (1993) and *Pouncy v. Vulcan Materials Co.*, 920 F. Supp. 1566, 1579 (N.D. Ala. 1996) for a discussion and application of the burdens of proof under the ADA, respectively. *See also infra* notes 82-83 and accompanying text.

[7] *See* Cody v. Cigna Healthcare of St. Louis, 139 F.3d 595, 598 (8th Cir. 1998) (depression); Equal Employment Opportunity Comm'n v. Amego, 110 F.3d 135, 148-49 (1st Cir. 1997) (depression); Soileau v. Guilford of Me., Inc., 105 F.3d 12, 14 (1st Cir. 1997) (depression); Siemon v. AT&T Corp., 117 F.3d 1173, 1176 (10th Cir. 1997) (depression); Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996) (bipolar disorder); Webb v. Mercey Hospital, 102 F.3d 958, 959 (8th Cir. 1996) (depression); Miller v. National Cas. Co., 61 F.3d 627, 630 (8th Cir. 1995) (bipolar disorder); Leisen v. City of Shelbyville, 968 F. Supp. 409, 416 (S.D. Ind. 1997) (depression); Sarko v. Penn-Del Directory Co., 968 F. Supp. 1026, 1034-35 (E.D. Pa. 1997) (depression); Jerina v. Richardson Automotive, Inc., 960 F. Supp. 106, 109 (N.D. Tex. 1997) (depression); Motichek v. Buck Kreihs Co., Inc., 958 F. Supp. 266, 269 (E.D. La. 1996) (depression); Husowitz v. Runyon, 942 F. Supp. 822, 832-33 (E.D.N.Y. 1996) (bipolar disorder); Kotlowski v. Eastman Kodak Co., 922 F. Supp. 790, 797 (W.D.N.Y. 1996) (depression); Henry v. Guest Services, Inc., 902 F. Supp. 245, 251 (D.D.C. 1995) (depression); Palmer v. Circuit Court of Cook County, 905 F. Supp. 499, 506-07 (N.D. Ill. 1995) (depression); Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321, 1326 (W.D. Tenn. 1995) (depression).

relatively prevalent among the various types of possible mental disorders that afflict humans.[8] Therefore, they have serious consequences for affected individuals as well as their employers. Second, although there have been numerous commentaries about mentally disabled individuals under the ADA, none has specifically focused on the two disorders that are the subject of this Article.[9] Other commentators have chosen to focus on such mental illnesses as alcoholism,[10] phobias and anxiety disorders,[11] and psychoactive substance abuse.[12] Consequently, the author hopes to add to the composite of available literature by providing a contemporaneous analysis of Title I and its application to these two additional debilitating mental illnesses.

A. *Bipolar Disorder and Depression: A Growing Problem for America's Workforce*

Cicero observed, more than two thousand years ago, that "'the diseases of the mind are more destructive than those of the body.'"[13] Similarly, disability issues concerning workers who are mentally impaired are considerably more complex than those involving physical impairments.[14] Furthermore, it is commonly believed that mental illness is rare. Such is not the case. Approximately two percent of American adults have a serious mental illness.[15] More specifically, the National Institute of Health estimates that more than 17.6 million Americans suffer from some type of depression, including nine percent of the male work force and seventeen percent of the female

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[8] *See* Susan Stefan, *"You'd Have to be Crazy to Work Here": Worker Stress, The Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 802 (1998).

[9] Although schizophrenia would arguably serve as a better illustration of most of the problems faced by employees with bipolar disorder and depression, there have been very few Title I cases involving employees with schizophrenia, presumably because this mental disorder has a relatively low prevalence rate. (Schizophrenia afflicts approximately one percent of the population.)

[10] *See generally* Wendy K. Voss, *Employing the Alcoholic Under the Americans with Disabilities Act*, 33 WM. & MARY L. REV. 895 (1992).

[11] *See generally* John M. Casey, *From Agoraphobia to Xenophobia: Phobias and Other Disorders Under the Americans with Disabilities Act*, 17 U. PUGET SOUND L. REV. 381 (1994).

[12] *See generally* Haggard, *supra* note 6.

[13] Louis Pechman, *Mental Disabilities in the Workplace*, N.Y. L.J., March 2, 1994, at 1.

[14] *See id.*

[15] *See* Industrial and Labor Relations Program on Employment and Disability, Cornell University, *Employing and Accommodating Workers with Psychiatric Disabilities* (visited Oct. 10, 1998) <http://www.janweb.icdi.wvu.edu/kinder/pages/psychiatric.html>.

work force.[16] Indeed, major depression and alcohol dependence are the two most common psychiatric disorders.[17] These statistics are particularly troublesome in the context of employment because the first symptoms of mental illness usually surface "between the ages of fifteen and twenty-five," a period during which most individuals are receiving their vocational or educational training.[18] Consequently, the unemployment rate for these individuals is disproportionately high — measured to be as much as seventy percent.[19]

The quintessential guide used by "mental health professionals"[20] in diagnosing mental illnesses is the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*), published by the American Psychiatric Association (APA). The purpose of this manual is to provide mental health professionals with a uniform system of diagnosis. The current version of the manual (*DSM-IV*) has been criticized because of its complexity and because it is viewed as functioning more as an encyclopedia than as a diagnostic tool.[21]

The legislative history of the ADA indicates that Congress intended courts to rely upon the *DSM* when interpreting this statute.[22] Likewise, the EEOC recognizes the importance of this publication in diagnosing mental impairments under the ADA.[23] Not all conditions

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[16] *See* Kenneth E. Young & William H. Foster III, *Stress and Mental Disorders in the Workplace: Increased Focus Under the Americans With Disabilities Act*, 8 S.C. LAW. 33, 33 (July/Aug., 1996).

[17] *See* John D. Thompson, *Psychiatric Disorders, Workplace Violence and the Americans with Disabilities Act*, 19 HAMLINE L. REV. 25, 26 (1995).

[18] Karen A. Guiduli, *Challenges for the Mentally Ill: The "Threat to Safety" Defense Standard and the Use of Psychotropic Medication Under Title I of the Americans with Disabilities Act of 1990*, 144 U. PA. L. REV. 1149, 1155 (1996) (citing DEBORAH ZUCKERMAN ET AL., THE ADA AND PEOPLE WITH MENTAL ILLNESS: A RESOURCE MANUAL FOR EMPLOYERS 1, 8 (1993)).

[19] *See id.* (footnotes omitted).

[20] The following, among others, are considered "mental health professionals" by the *DSM*: psychiatrists, psychologists, social workers, occupational and rehabilitation therapists, and counselors. *See DSM-IV*, *supra* note 4, at xv.

[21] *See* Karin Mika & Denise Wimbiscus, *Responsibilities of Employers Toward Mentally Disabled Persons Under the Americans with Disabilities Act*, 11 J.L. & HEALTH 173, 175 (1996/1997) (citing Herb Kutchins & Stuart A. Kirk, *DSM-IV: Does Bigger Mean Better?*, HARV. MENTAL HEALTH LETTER (May 1, 1995)); *see also* David A. Larson, *Mental Impairments and the Rehabilitation Act of 1973*, 48 LA. L. REV. 841, 850 (1988) (criticizing the *DSM-III-R* (*DSM-IV*'s immediate predecessor) because of the difficulty of applying the APA's diagnostic criteria consistently). Even the Supreme Court has recognized the "severe difficulties inherent in psychiatric diagnosis" faced by mental health professionals. Heller v. Doe, 509 U.S. 312, 329 (1993).

[22] See 135 CONG. REC. S11,174 (daily ed. Sept. 14, 1989). Senator Armstrong declared: "A private entity that wishes to know what the [ADA] might mean with respect to mental impairments would do well to turn to DSM-III-R." *Id.*

[23] *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT

listed in the *DSM-IV*, however, are "mental disabilities" — or even "mental impairments" — for purposes of the ADA.[24] Nonetheless, the legislative history does support the argument that Congress intended depression and bipolar disorder be classified as "mental impairments."[25] At this point, it is important to understand that simply because a condition has been recognized as a mental *impairment* does not necessarily imply that it is also a mental *disability*.[26] Only if the latter is true will the employee possibly be entitled to the anti-discriminatory protections afforded by Title I.

1. Depression

The symptoms of depression include: "feelings of worthlessness or helplessness, persistent and intense sadness, pessimism, social withdrawal, inappropriate guilt, recurrent thoughts of suicide, marked personality change, problems with sleeping or excessive fatigue, irregular eating patterns, difficulty concentrating, restlessness, and anger out of proportion to the situation."[27] The severity of this mental illness should not be trivialized. As recognized by one court: "[D]epression is a misleadingly mild term for an extraordinarily debilitating illness."[28]

GUIDANCE: THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES 2-3 (1997) [hereinafter EEOC, ENFORCEMENT GUIDANCE].

[24] *See id.* at 2. *See infra* Part II.B (discussing these two terms).

[25] According to the House Report:

> It is not possible to include in the [ADA] a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. The term includes, however, such conditions, diseases and infections as: orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, *emotional illness*, specific learning disabilities, drug addiction, and alcoholism.

H.R. Rep. No. 101-485, pt. 2, at 51 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 333 (emphasis added); *see also* H.R. Rep. No. 101-485, pt. 3, at 28 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 450 (stating that physical or mental impairment "also means *any mental or psychological disorder*, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities") (emphasis added).

By "emotional illness," Congress is arguably referring to the conditions that *DSM-IV* classifies as "mood disorders." Under *DSM-IV*, mood disorders include, among others, depression and bipolar disorder. *See supra* note 4.

[26] For an impairment to be elevated to the level of a disability, it must substantially limit the person's ability to perform a major life activity, such as working. *See infra* Part II.B.

[27] Guiduli, *supra* note 18, at 1154 n.15 (citing ZUCKERMAN ET AL., *supra* note 18, at 64-65).

[28] Weiler v. Household Finan. Corp., No. 93 C 6454, 1994 WL 262175, at *3

Depression is treated with a class of psychotropic medications referred to — appropriately enough — as "antidepressants." These drugs control the level of neurotransmitters in the brain and include the following medications: tricyclics, monoamine oxidase inhibitors and serotonin reuptake inhibitors. The common side effects of these medications include "drowsiness, dizziness, dry mouth, blurred vision, nausea, and headaches."[29]

In addition to medication, depression is treated by other various modes of therapy, including "cognitive therapy (focusing on thought processes), behavioral therapy (working to establish adaptive habits), interpersonal therapy (focusing on developing relationships with others), psychosocial therapy (developing social and vocational skills), and psychodynamic therapy (focusing on conflicts in the unconscious)."[30]

2. Bipolar Disorder

Bipolar disorder is considered "one of the most severe mental illnesses."[31] Bipolar disorder differs from depression "in that the individual experiences manic episodes" in addition to depressive episodes.[32] These manic episodes consist of a euphoric state that can lead the person to experience the following: "rushes of ideas or thoughts, grandiose notions, extreme distractibility, abundant energy, increased risk-taking, rapid talking or fidgeting, and a tendency to act irrationally," overlooking the harmful or painful consequences of such behavior.[33] Many individuals suffering from bipolar disorder can function well when treated with medication. It is important to keep in mind, however, that whether or not an employee has a "mental impairment" is to be determined without considering the mitigating effects of medication.[34]

(N.D. Ill.) (citing Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992)). Not everyone agrees, however, as can be seen from the following representative comment: "Any one of us can get a shrink to diagnose us as having a mood disorder . . . . The big question in these [ADA] cases is where you draw the line between what constitutes a disability and what doesn't." Mark Hansen, *The ADA's Wide Reach*, A.B.A. J. 14, 16 (Dec. 1993).

[29] Guiduli, *supra* note 18, at 1161 n.51 (citing ZUCKERMAN ET AL., *supra* note 18, at 68).

[30] *Id.* at 1161 n.47 (citing ZUCKERMAN ET AL., *supra* note 18, at 69-70). A full discussion of these various types of therapy is beyond the scope of this Article.

[31] Miller, *supra* note 5, at 713 (citing ROBERTA G. SANDS, CLINICAL SOCIAL WORK PRACTICE IN COMMUNITY MENTAL HEALTH 183-86 (1991)).

[32] Guiduli, *supra* note 18, at 1155 n.15 (citing ZUCKERMAN ET AL., *supra* note 18, at 65).

[33] *Id.*

[34] *See* EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 6-8; *see also*, 29 C.F.R. pt.

Bipolar disorder is treated with the class of psychotropic medications known as "antimanics," the most common of which is lithium carbonate.[35] Lithium helps to subdue the mood swings experienced by individuals suffering from bipolar disorder.[36] Common side effects of lithium include fatigue, cramps, and severe thirst.[37] As a result, supplemental medication may be prescribed to counteract these side effects.[38] In addition, bipolar disorder may be treated with the same alternative modes of therapy that are available to individuals suffering from depression.[39]

B. *The Americans with Disabilities Act: Promise of a New Era for the Disabled*

On July 26, 1990, Congress enacted the Americans with Disabilities Act[40] to remedy, in part, what it perceived as employment discrimination against individuals with disabilities.[41] However, Title I (the subchapter governing employment) did not become fully effective until two years later on July 26, 1992. Simply stated, the ADA "is an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given."[42] The ADA is "designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities."[43] By "leveling the playing field" for disabled individuals, Congress wished to eradicate the discriminatory effects caused by employers "basing employment decisions on unfounded stereotypes."[44] The purpose of the statute makes clear that Congress intended to include individuals with *mental*, as well as *physi-*

1630 app. (1998); S. Rep. No. 101-116, at 23 (1989); H.R. Rep. No. 101-485, pt. 2, at 52 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 334; H.R. Rep. No. 101-485, pt. 3, at 28-29 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 451. *See also infra* Part II.B.

[35] *See* Guiduli, *supra* note 18, at 1161 n.52 (citing ZUCKERMAN ET AL., *supra* note 18, at 68).

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *See supra* note 30 and accompanying text.

[40] 42 U.S.C. § 12101-12213 (1998).

[41] *See id.* § 12101; *see also* McCoy v. Pennsylvania Power and Light Co., 933 F. Supp. 438, 440 (M.D. Pa. 1996); Tenbrink v. Federal Home Loan Bank, 920 F. Supp. 1156, 1160 (D. Kan. 1996).

[42] 29 C.F.R. § 1630.1(a) (1998).

[43] *Id.*

[44] Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995); Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 541 (7th Cir. 1995); *see also* Dey v. Milwaukee Forge, 957 F. Supp. 1043, 1050 (E.D. Wis. 1996).

cal, disabilities.[45] Congress realized that, unlike individuals discriminated against on the basis of other factors, individuals with disabilities historically had little or no means of legal recourse.[46] The ADA, however, "does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities."[47] Rather, it simply "requires employers to consider whether reasonable accommodation could remove the barrier" presented by the employee's disability.[48]

The specific purpose of Title I of the ADA, as with the Rehabilitation Act of 1973[49] before it, is "to ensure that handicapped indi-

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[45] *See* 42 U.S.C. § 12101(a)(1).

[46] *See id.* § 12101(a)(4). One only has to look at the oft-quoted Supreme Court decision in *Buck v. Bell*, 274 U.S. 200 (1927), to see how our courts traditionally offered little protection to the mentally disabled. In *Buck*, the Supreme Court upheld a Virginia law providing for the sterilization of the "feebleminded" because — referring to the plaintiff's family history of mental retardation — "three generations of imbeciles are enough." *Id.* at 207; *see also* Guiduli, *supra* note 18, at 1152 n.10 (discussing commentary on the historical lack of protections for the mentally disabled and the stigma attached to those suffering from such disabilities).

[47] 29 C.F.R. pt. 1630 app.

[48] *Id.*

[49] The ADA shares its common substantive core with the Rehabilitation Act of 1973. Both statutes prohibit broad arrays of institutions from discriminating against disabled individuals on the basis of their disability. In enacting the ADA, Congress was partly responding to problems caused by inconsistent interpretations of the Rehabilitation Act and the inadequacies of that statute's protections. *See* McDonald v. Pennsylvania, 62 F.3d 92, 94 (3d Cir. 1995) (as to inconsistent interpretations); Hutchinson v. United Parcel Serv., Inc. 883 F. Supp. 379, 387 (N.D. Iowa 1995) (as to inadequacies). *See generally* S. Rep. No. 101-116 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267-602. Congress also wished to broaden the scope of coverage provided by the Rehabilitation Act beyond its limited applicability to federally funded entities. The Rehabilitation Act primarily only afforded protection to government (rather than private sector) employees. *See* Miller, *supra* note 5, at 704. Consequently, the substantive standards for determining liability are the same under both statutes. *See* Myers v. Hose, 50 F.3d 278, 281 (4th Cir. 1995) ("Thus, whether suit is filed against a federally-funded entity under the Rehabilitation Act or against a private employer under the ADA, the substantive standards for determining liability are the same."). As one court noted, "the ADA was patterned after the Rehabilitation Act and has been interpreted in light of that statute." Equal Employment Opportunity Comm'n v. Kinney Shoe Corp., 917 F. Supp. 419, 430 n.6 (W.D. Va. 1996) (citing Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 57 (4th Cir. 1995)). Therefore, ADA claims, to the extent possible, are to be adjudicated "in a manner consistent with decisions interpreting the Rehabilitation Act." *Ennis*, 53 F.3d at 57; 42 U.S.C. § 12117(b) (1998); *see also* Tyndall v. National Educ. Ctrs., 31 F.3d 209, 213 n.1 (4th Cir. 1994).

Not everyone, however, agrees with the suitability of cases decided under the Rehabilitation Act as precedent for ADA claims. *See generally* Miller, *supra* note 5 (pointing out statutory changes and differences in legislative intent, as well as the discriminatory bias against mentally disabled individuals reflected in Rehabilitation Act cases).

viduals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."[50] Nonetheless, "[t]he ADA is not a 'job insurance policy,' but rather a congressional scheme for correcting illegitimate inequities the disabled face."[51] The statute "is not designed 'to allow individuals to advance to professional positions through a back door. Rather, it is aimed at rebuilding the threshold of a profession's front door.'"[52] Congress's intent was to afford relief only to those employees with disabilities who are otherwise able to perform the "essential functions"[53] of the job that they hold or seek.[54]

C. *Judicial Interpretation of the ADA and the Role of the Equal Employment Opportunity Commission*

The EEOC is responsible for enforcement of Title I of the ADA, which prohibits employment discrimination on the basis of disability.[55] Section 106 of the ADA[56] requires that the EEOC issue substantive regulations implementing Title I within one year after the date the ADA was enacted (i.e., by July 26, 1991). The EEOC indeed published its final rules on this date, stating that they would become effective one year later on July 26, 1992.[57] These regulations were later codified as Part 1630 of Title 29 of the Code of Federal Regulations

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[50] School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987) (quoted by Equal Employment Opportunity Comm'n v. Kinney Shoe Corp., 917 F. Supp. 419, 429 (W.D. Va. 1996)); *see also* Galloway v. Superior Court of the District of Columbia, 816 F. Supp. 12, 20 (D.C. 1993). "The Rehabilitation Act was the first federal statute to" provide "civil rights protections to individuals with disabilities." Miller, *supra* note 5, at 704. In contrast to the ADA, however, this statute was limited to federal employees and contractors as well as individuals receiving services from the federal government. *See id.*; *see also supra* note 49.

[51] Hedberg v. Indiana Bell Tel. Co., Inc. 47 F.3d 928, 934 (7th Cir. 1995); *see also* Bacon v. Great Plains Mfg., Inc., 958 F. Supp. 523, 528 (D. Kan. 1997).

[52] Price v. National Bd. of Med. Exam'rs, 966 F. Supp. 419, 421-22 (S.D. W. Va. 1997) (quoting Jamie Katz & Janine Valles, *The Americans with Disabilities Act and Professional Licensing*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 556, 561 (Sept./Oct. 1993)). "The purpose of the ADA 'is to place those with disabilities on an equal footing and not to give them an unfair advantage.'" Petition of Rubenstein, 637 A.2d 1131, 1137 (Del. 1994) (quoting D'Amico v. New York State Bd. of Law Exam'rs, 813 F. Supp. 217, 221 (W.D.N.Y. 1993)).

[53] *See infra* Part II.A.

[54] *See* 42 U.S.C. § 12111(8) (1998); *see also* Vaughan v. Harvard Indus., Inc., 926 F. Supp. 1340, 1348 (W.D. Tenn. 1996).

[55] *See* 29 C.F.R. pt. 1630 app. (1998).

[56] 42 U.S.C. § 12116.

[57] *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (1991).

(EEOC regulations).[58] Additionally, the rules contain an appendix, which the EEOC intended to function as "interpretive guidance" for individuals trying to comprehend and apply the EEOC regulations[59] — a daunting task at best. Congress's goal was that these regulations be "comprehensive and easily understood."[60] However, based upon the subsequent plethora of cases that emerged calling upon courts to interpret various terms and provisions contained in both the ADA and the EEOC regulations, it is doubtful that this goal has been reached.

In addition, as promised, the EEOC has generated a number of "compliance manuals" to provide guidance on specific Title I issues.[61] Courts, in seeking guidance, may rely on the myriad guidelines and technical manuals produced by the EEOC.[62] These manuals, though, are *not* mandatory authority,[63] i.e., the EEOC's interpretations are "not controlling."[64] Instead, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[65]

Congress specifically required that the ADA be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements" under the Rehabilitation Act.[66] As one court noted, "In drafting the ADA, Congress drew upon and incorporated standards developed under the Rehabilitation Act. Therefore, the ADA is to be interpreted consistently with the Rehabilitation Act."[67] Courts may rely upon judicial decisions interpreting the Re-

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[58] 29 C.F.R. § 1630.1-1630.16.

[59] *See id.* pt. 1630 app. "This appendix represents the [EEOC's] interpretation of the issues discussed, and the [EEOC] will be guided by it when resolving charges of employment discrimination." *Id.*

[60] *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726.

[61] *See id.*

[62] *See* Meritor Savings Bank, F.S.B. v. Vinson, 477 U.S. 57, 65 (1986).

[63] *See, e.g.*, Schluter v. Industrial Coils, 928 F. Supp. 1437, 1444 (W.D. Wis. 1996).

[64] *See id*; *see also* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 864 (1st Cir. 1998); Porter v. United States Alumoweld Co., 125 F.3d 243, 246 (4th Cir. 1997). *But see* Anderson v. Gus Mayer Boston Store of Del., 924 F. Supp. 763, 772 (E.D. Tex. 1996) (according much more deference to the EEOC guidelines, at least as to their interpretation of the EEOC regulations). The *Anderson* court remarked: "[W]hen an agency pronounces what its own regulations mean, that pronouncement is understood to be prima facie correct. What court would presume to tell an agency that when it promulgated regulation X it did not really mean to do so?" *Id.*

[65] *Meritor*, 477 U.S. at 65; *see also* Halperin v. Abacus Tech. Corp., 128 F.3d 191, 199 n.12 (4th Cir. 1997); *Porter*, 125 F.3d at 246.

[66] 42 U.S.C. § 12117(b) (1998).

[67] Vande Zande v. State Dept. of Admin., 851 F. Supp. 353, 359 (W.D. Wis. 1994) (citations omitted); *see also Halperin*, 128 F.3d at 197 n.7.

habilitation Act when confronting similar questions under the ADA.[68] Moreover, courts have consistently ruled that because of the ADA's broad goals of eliminating discrimination against disabled individuals, "[t]he ADA must be broadly construed to effectuate its remedial purpose."[69]

In 1994, a Congressional study directed that the EEOC provide better guidance to employers concerning "job discrimination based on psychiatric disorders . . . since many EEOC field offices lack any information on psychiatric disabilities."[70] The study indicated that the current levels "of assistance provided to employers and individuals with psychiatric disabilities is unlikely to" help implement the ADA.[71] It attributed this problem to several factors, "including the complexity of psychiatric conditions, society's stigmatization of such conditions, and the limited federal funding" allocated to eradicating this type of discrimination under the ADA.[72] The result of this push for more guidance from the EEOC materialized on March 25, 1997, when it published the *EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities* (hereinafter *EEOC Enforcement Guidance*).[73] Subsequently, these enforcement guidelines were incorporated into the EEOC's *Compliance Manual*.[74]

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[68] *See id.* For a commentary discussing why Rehabilitation Act cases are *not* good precedent for ADA claims, see generally Miller, *supra* note 5.

[69] Lincoln CERPAC v. Health and Hosp. Corp., 920 F. Supp. 488, 497 (S.D.N.Y. 1996); *see also* Tcherepnin v. Knight, 389 U.S. 332, 335 (1967); Civic Ass'n of the Deaf v. Giuliani, 915 F. Supp. 622, 634 (E.D.N.Y. 1996). Courts have recognized the need to construe the ADA broadly: "The ADA is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society. As a remedial statute it must be broadly construed to effectuate its purposes." Kinney v. Yerusalem, 812 F. Supp. 547, 551 (E.D. Pa. 1993) (citing *Tcherepnin*, 389 U.S. at 335).

[70] *Congressional Report Calls for More Guidance from EEOC to Firms on Psychiatric Disorders*, DAILY LAB. REP. (BNA), March 22, 1994, at A-5.

[71] Janet E. Goldberg, *Employees with Mental and Emotional Problems — Workplace Security and Implications of State Discrimination Laws, The Americans with Disabilities Act, The Rehabilitation Act, Workers' Compensation, and Related Issues*, 24 STETSON L. REV. 201, 202 n.5 (1994).

[72] *Id.* (citing U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, PSYCHIATRIC DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 13 (1994)).

[73] It is unclear why the EEOC chose to use the term "psychiatric disabilities" rather than "mental disabilities." However, the EEOC does state that the definition of "mental impairment" found at 29 C.F.R. § 1630.2(h)(2) "also refers to mental retardation, organic brain syndrome, and specific learning disabilities. These additional mental conditions, as well as other neurological disorders such as Alzheimer's disease, are not the primary focus of this guidance." EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 2 n.6.

[74] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL (1995).

Neither the ADA nor the EEOC regulations attempt to enumerate every condition that constitutes either a physical or mental impairment "because it would be impossible to provide a comprehensive list, given the variety of possible impairments."[75] Numerous courts, however, have determined that depression and bipolar disorder are mental impairments that, given the right set of circumstances, can be considered disabilities under the ADA.[76] Nonetheless, for the reasons discussed in this Article, employees claiming discrimination on the basis of a mental disability involving bipolar disorder or clinical depression have been mostly unsuccessful in litigating their claims.

II. SCOPE, COVERAGE, AND APPLICATION OF TITLE I OF THE ADA

The rules of Title I can be succinctly summarized as follows: An employer interacting with an individual who has a known disability, but is qualified for a job and is capable of performing its essential functions with or without reasonable accommodation, is prohibited from discriminating against that individual and must provide reasonable accommodation unless it can establish that the individual poses a direct threat or that the accommodation would create an undue hardship. Currently, these rules only apply to employers with fifteen or more employees.[77] Title I's ban on discrimination is phrased as follows:

> No covered entity[78] shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or

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[75] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 2.1(a) (1992) [hereinafter EEOC, ASSISTANCE MANUAL].

[76] *See, e.g.*, Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 561 (7th Cir. 1996) (depression); Guice-Mills v. Derwinski, 967 F.2d 794, 796-97 (2d Cir. 1992) (depression); Duda v. Board of Educ. of Franklin Park, 133 F.3d 1054 (7th Cir. 1998) (bipolar disorder); Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1081 (10th Cir. 1997) (bipolar disorder).

[77] For the first two years after its enactment, the ADA was limited to employers with 25 or more employees. *See* 42 U.S.C. § 12111(5)(A) (1998). As of July 26, 1994, the ADA is applicable to employers with 15 or more employees. *See id.* § 2000e(b). Presently, an "employer" is "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year" with certain exceptions listed in 42 U.S.C. § 12111(5)(B). *Id.* § 12111(5)(A).

[78] "Covered entity" includes an employer, employment agency, labor organization, or joint labor-management committee. *See id.* § 12111(2).

discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[79]

The statute specifically lists seven types of conduct that an individual can use to show that an employer intended to "discriminate" against him on the basis of a disability.[80] Additionally, the EEOC

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[79] *Id.* § 12112(a).

[80] [T]he term "discriminate" includes —
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
(3) utilizing standards, criteria, or methods of administration —
(A) that have the effect of discrimination on the basis of disability; or
(B) that perpetuate the discrimination of others who are subject to common administrative control;
(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;
(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Id. § 12112(b).

regulations further explain what conduct that agency believes constitutes discrimination.[81]

Employees who believe that they have been discriminated against because of their disability must do more than simply allege such discrimination in order to litigate successfully a claim for violation of Title I. Although courts have failed to reach a consensus as to the elements of a prima facie case, most likely a plaintiff-employee will find it necessary to establish each of the following:

1. That he or she is disabled due to:
   i. an impairment which substantially limits a major life activity;
   ii. a record of such an impairment; or
   iii. having been regarded by his or her employer as having such an impairment;
2. That he or she is qualified for the job (with or without reasonable accommodation); and
3. That he or she was discriminated against because of the disability.[82]

Once the employee has established a prima facie case, the burden of proof shifts to the employer to challenge each of these elements and to assert any affirmative defenses.[83] All of these require-

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[81] *See* 29 C.F.R. §§ 1630.4 - 1630.13 (1998) (listing, as examples, limiting, segregating, or classifying employees based on their disabilities).

[82] *See generally* Pouncy v. Vulcan Materials Co., 920 F. Supp. 1566, 1578-79, 1579 (N.D. Ala. 1996). As a stark example of how the requirements for a prima facie case remain unsettled, note the internal inconsistency within *Pouncy*. *Compare id.* at 1578-79 ("A plaintiff seeking relief under the ADA must establish that she is a disabled person within the meaning of the ADA, that she is qualified to perform the essential function of her job either with or without reasonable accommodation, and that she was terminated because of her disability.") *with id.* at 1579 ("[A] plaintiff may prove a prima facie case by showing (1) she was in the protected class; (2) she was discharged; (3) at the time of the discharge, she was performing the job at a level that met her employer's legitimate expectations; and (4) her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.").

[83] The seminal case governing the shifting burden of proof issue for Title I cases is *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), *as clarified by St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). Courts originally applied the *McDonnell Douglas* framework to claims brought under several other anti-discrimination statutes. In recent years, however, courts began expanding the scope of *McDonnell Douglas* to reach ADA cases as well. *See Pouncy*, 920 F. Supp. at 1579. Under this framework,

> a plaintiff has the initial burden of proving a prima facie case of discrimination. If the plaintiff meets this burden, the defendant must articulate some legitimate, nondiscriminatory reason for the termination. If the defendant meets this burden of production, the presumption of discrimination created by the prima facie case "drops out of the picture," and the plaintiff has the ultimate burden of proving that [he or] she has been the victim of intentional discrimination.

ments, as well as possible affirmative defenses, are discussed in greater detail *infra.*

A. *Who is a "Qualified Individual with a Disability"?: A Two-Step Process*

A "qualified individual with a disability" is entitled to reasonable accommodation from his or her employer under the ADA. This term specifically refers to "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, *and* who, with or without reasonable accommodation, can perform the essential functions of such position."[84] In other words, the employee must be disabled, but not *too* disabled, i.e., not disabled to the point that he or she cannot perform the job's essential functions even with reasonable accommodation.[85]

The "first step" (sometimes referred to in the case law as the "otherwise qualified" requirement) of the analysis is "to determine if the individual satisfies the prerequisites for the position," such as appropriate education and employment experience.[86] The "second step" is "to determine whether the individual is able" to perform the "essential functions" of the position.[87] "Essential functions" are defined by the EEOC regulations as those "fundamental duties of the employment position."[88]

> To defeat a motion for summary judgment, the plaintiff must present evidence sufficient for a reasonable jury to conclude that the employer's articulated reason is pretextual by presenting concrete evidence in the form of specific facts that either show that a disability played an impermissible role in the employer's decision or that the proffered nondiscriminatory reasons are unworthy of credence.

Id. (citations omitted).

[84] 29 C.F.R. § 1630.2(m) (emphasis added).

[85] As one commentator noted: "Indeed, mentally impaired employees often find themselves in an 'inescapable quandary' because the very evidence which establishes their disability also proves that they are 'not otherwise qualified.'" Jeffrey I. Cummings et al., *Personnel Update: An Employer's Duty to Accommodate Mental Illness in the Workplace,* SC40 ALI-ABA 263, 270 (1998) (citing Fields v. Lyng, 705 F. Supp. 1134, 1137 (D. Md. 1988)). For example, one court determined that an employee did not have standing to sue her employer because she asserted that her depression caused her to be "completely disabled." *See* Morton v. GTE North, Inc., 922 F. Supp. 1169, 1184 (N.D. Tex. 1996), *aff'd,* 114 F.3d 1182 (5th Cir.), *cert. denied,* 118 S. Ct. 205 (1997). Thus, she was not a qualified individual with a disability because she was unable to perform the essential functions of her job, even with reasonable accommodation. *See id.* at 1180.

[86] 29 C.F.R. pt. 1630 app.

[87] *Id.*

[88] *Id.* § 1630.2(n)(1). The EEOC's definition of essential functions reads:

> *In general.* The term *essential functions* means the fundamental job du-

The purpose of this "second step" is "to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform *marginal* functions of the position."[89] Determining if a particular function is essential must be done on a case-by-case basis and is highly fact specific.[90] Furthermore, "It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards."[91]

Essentially, then, to be a "qualified individual with a disability," the plaintiff must establish both that he has a disability *and* that he can perform the essential functions of the job with or without rea-

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ties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

Id.; see also 42 U.S.C. § 12111(8) (1991) which, in addition to a definition of "essential functions" similar to that found in the EEOC regulations, provides:

> For the purposes of [Title I], consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Id.

[89] 29 C.F.R. pt. 1630 app. (emphasis added); *see also* H.R. Rep. No. 101-485, pt. 2, at 55 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 337.

[90] *See* 29 C.F.R. pt. 1630 app.

[91] *Id.*

sonable accommodation.[92] Although few courts have ventured so far as to attempt to quantify this definition, one court found that an employee who was only able to perform fifty percent of his duties was not a qualified individual with a disability.[93] Another case of particular relevance to this Article involved an employee who was incapable of working for her employer because of her perfectionism and sensitivity to criticism.[94] The court determined that she was not a "qualified individual with a disability" because her mental disorder could not be reasonably accommodated to enable her to perform the job's essential functions.[95] Therefore, it is important to keep in mind that although "the ADA focuses on eradicating barriers, [it] does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job."[96] In arguing a claim for violation of the ADA, plaintiff-employees must be careful not to admit that their disability is so substantial that it prevents them from being able to perform their job's essential functions even with reasonable accommodation.[97]

B. What is a Disability?

There are three prongs to the ADA's definition of disability. An employee is "disabled"[98] if he satisfies the requirements of any one of these prongs. The first prong concerns an employee who has "a *physical or mental impairment*[99] that *substantially limits*[100] one or more of the *major life activities*[101] of such individual."[102] Notably, the require-

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[92] *See* Whillock v. Delta Airlines, Inc., 926 F. Supp. 1555, 1561 (N.D. Ga. 1995).

[93] *See* Bivins v. Bruno's, Inc., 953 F. Supp. 1558, 1562 (M.D. Ga. 1997).

[94] *See* Waite v. Blair, Inc., 937 F. Supp. 460, 472 (W.D. Pa. 1995).

[95] *See id.* at 471-72.

[96] 29 C.F.R. pt. 1630 app. (1998).

[97] *See* Cramer v. Florida, 117 F.3d 1258, 1264 (11th Cir. 1997); *see also* Nguyen v. IBP, Inc., 905 F. Supp. 1471, 1485 (D. Kan. 1995).

[98] The ADA uses the term "disabilities" in contrast to the Rehabilitation Act, which uses the term "handicaps." Substantively, however, these two terms are equivalent. *See* 29 C.F.R. pt. 1630 app. The choice in phraseology merely reflects the House Committee on the Judiciary's desire to adopt the more widely used term at present. *See* H.R. Rep. No. 101-485, pt. 3, at 26-27 (1990), *reprinted in*, 1990 U.S.C.C.A.N.; *see also* S. Rep. No. 101-116, at 21 (1989); H.R. Rep. No. 101-485 pt. 2, at 50-51 (1990), *reprinted* in 1990 U.S.C.C.A.N. 333.

[99] *See infra* Part II.B.1.

[100] *See infra* Part II.B.2.

[101] The EEOC regulations and the regulations interpreting the Rehabilitation Act both include similar definitions of "major life activities." *See* 29 C.F.R. pt. 1630 app. (1998); 34 C.F.R. § 104.504 (1998). This term refers to "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," 29 C.F.R. § 1630.2(i), as well as "sitting, standing, lifting,

ments of this prong can also be satisfied if the individual has "multiple impairments" which combine to limit substantially one or more major life activities.[103] The second prong pertains to employees who can only show "a record of such an impairment."[104] Finally, the third prong encompasses employees who are simply "regarded as

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[and] reaching." 29 C.F.R. pt. 1630 app. This list, however, was intended to be illustrative, not exhaustive. *See id.* The EEOC has added to this list by stating that the abilities to interact with others, concentrate, and sleep are all major life activities. *See* EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 10-12. Regarding the first ability in this list — the ability to interact with others — the EEOC has stated that an impairment substantially limits this major life activity only if the employee is significantly restricted when compared with the average person in the general population. *See id.* at 10. Furthermore,

> [s]ome unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a substantial limitation in interacting with others. An individual would be substantially limited, however, if [his] relations with others were characterized on a regular basis by severe problems, [such as] consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.

Id. Nonetheless, at least one court has determined that the "inability to interact with others *does not* implicate a major life activity." Soileau v. Guilford of Maine, Inc., 928 F. Supp. 37, 48 (D. Me. 1996), *aff'd*, 105 F.3d 12 (1st Cir. 1997) (emphasis added). In fact, the court even went so far as to claim that the "inability to get along with others . . . does not belong in this list of major life activities." *Id.* (referring to 29 C.F.R. § 1630.2(i)); *see also* Part II.B.2, *infra* (discussing "major life activities"). Whether future courts will continue to follow *Soileau*'s position on this point remains to be seen, given that the decision was delivered before the *EEOC Enforcement Guidance* was published in March 1997. Recall, though, that the EEOC's guidelines are just that — *guidelines*. They are not binding upon the courts. *See supra* Part I.C.

[102] 42 U.S.C. § 12102(2)(A) (1991); 29 C.F.R. § 1630.2(g)(1) (emphasis added).

[103] *See* 29 C.F.R. pt. 1630 app.

[104] 42 U.S.C. § 12102(2)(B); 29 C.F.R. § 1630.2(g)(2). The regulation states:

> The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled.

29 C.F.R. pt. 1630 app.; *see also* H.R. Rep. No. 101-485 pt. 3, at 29 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 452; S. Rep. No. 101-116, at 23 (1989); H.R. Rep. No. 101-485 pt. 2, at 52-53 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 334-335. "Records" include (but are not limited to), education, medical, and employment records. *See* 29 C.F.R. pt. 1630 app. The regulations continue:

> This part of the definition [of disability] is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.

Id. Note that "relied on by an employer" necessarily implies that the employer must actually know of the employee's record of impairment. *See* Davidson v. Midelfort Clinic, 133 F.3d 499, 510 n.8 (7th Cir. 1998).

having such an impairment."[105] Note that the final prong protects individuals who may not even have an impairment, let alone one that is substantially limiting.[106] It is sufficient under this prong if the employee can prove that he or she was "perceived"[107] as having a substantially limiting impairment.[108]

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[105] 42 U.S.C. § 12102(2)(C); 29 C.F.R. § 1630.2(g)(3). "Regarded as having such an impairment" refers to a person who:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
> (3) Has none of the impairments defined in [29 C.F.R. § 1630.2(h)(1) or 29 C.F.R. § 1630.2(h)(2) (*see infra* note 118 and accompanying text)] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l).

For examples of conduct coming within each of these three parts of the third prong, see 29 C.F.R. pt. 1630 app. For example,

> suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled," satisfying the requirements of subparagraph (1).

Id.

The rationale for the "regarded as" part of the definition of disability is the same as that for its inclusion within the Rehabilitation Act. The Supreme Court, in interpreting this definition of "disability" in the context of the earlier statute, determined that although an individual might have an impairment that does not in fact substantially limit a major life activity, the reaction of others could prove to be just as disabling. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987); *see also* 29 C.F.R. pt. 1630 app. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Arline*, 480 U.S. at 283 (quoted at 29 C.F.R. pt. 1630 app.). By including this language in the ADA, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." *Arline*, 480 U.S. at 284 (quoted at 29 C.F.R. pt. 1630 app.).

[106] *But see* Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1568 (S.D. Ga. 1995), *aff'd*, 106 F.3d 417 (11th Cir. 1997) (employees with a "perceived" impairment must be substantially limited, the same as employees with a "real" impairment).

[107] Courts often refer to the third prong using the term "perceived" rather than "regarded." *See also supra* notes 105-06 and accompanying text.

[108] Courts have inferred that an employer perceives an employee as having a mental impairment when the employer: (1) knows that the "employee has been diagnosed with a mental impairment," (2) knows "that the employee has taken extended leaves on account of a mental impairment," (3) receives "statements from the employee to the effect that he is mentally impaired," (4) "inquires as to impairment-related absences," (5) "inquires as to whether the employee is having any

Note that "disability" under the ADA is quite different from traditional notions of its definition. For instance, an employee claiming that she was "totally disabled" and who therefore could not perform any work because of her clinical depression was found not to be disabled for purposes of the ADA.[109] The reason: She was not a "qualified individual with a disability" by virtue of the fact that she was unable to perform the essential functions of her job even with reasonable accommodation.[110]

The EEOC regulations specifically remove certain conditions from the definition of "disability."[111] Included among these exemptions are the *current* use of an illegal drug[112] and the following conditions that otherwise might possibly be argued as constituting "mental impairments" under the ADA:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.[113]

In addition, the EEOC regulations summarily conclude that "[h]omosexuality and bisexuality are not impairments and so are not disabilities."[114] Moreover, "individuals with common personality traits

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'problems,'" or (6) refers "the employee to counseling or to an employee assistance program." Cummings et al., *supra* note 85, at 268 (citations omitted). An employee is covered by this prong of the definition if he or she can show that the employer "made an employment decision because of a perception of disability based on 'myth, fear or stereotype' . . . . If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of 'myth, fear or stereotype' can be drawn." 29 C.F.R. pt. 1630 app.; *see also* H.R. Rep. No. 101-485, pt. 3, at 30-31 (1990).

[109] *See* Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321, 1326 (W.D. Tenn. 1995), *aff'd*, 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998); *see also supra* note 85 and accompanying text.

[110] *See Parker*, 875 F. Supp. at 1325; *see also supra* Part II.A (discussing "essential functions"); *infra* Part II.C. (discussing "reasonable accommodation").

[111] *See* 29 C.F.R. § 1630.3.

[112] *See id.* § 1630.3(a).

[113] *Id.* § 1630.3(d).

[114] *Id.* § 1630.3(e). Some members of Congress were concerned that the ADA was a "homosexual rights bill in disguise." H.R. Rep. No. 101-485, pt. 4, at 82, *reprinted in* 1990 U.S.C.C.A.N. 565. Although the source of this concern is unclear, it might possibly, albeit unjustifiably, emanate from the fact that "[p]ersons infected with the Human Immunodeficiency Virus are considered to have an impairment that substantially limits a major life activity, and thus are considered disabled under" the ADA. H.R. Rep. No. 101-485, pt. 3, at 28, *reprinted in*, 1990 U.S.C.C.A.N. 451.

such as poor judgment or a quick temper are not" disabled.[115] Similarly, generalized stress from job or personal pressures, without more, is not a disability.[116]

1. "Physical or Mental Impairment"[117]

A physical or mental impairment is defined as follows:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[118]

At first glance, it might appear that the EEOC intended subparagraphs (1) and (2) to be its definitions of "physical impairment" and "mental impairment," respectively. Indeed, several commentators and courts have mistakenly referred to subparagraph (2) as the definition of "mental impairment."[119] However, upon closer examination, it becomes clear that such a reference is in error. Consider, for example, that a "physiological disorder" that affects the "neurological" body system (subparagraph (1)) could nonetheless manifest itself as a "mental illness" (subparagraph (2)), i.e., Alzheimer's disease.

Additionally, the EEOC specifically excludes the following conditions from the definition of impairment: (1) "physical characteristics," such as a person's eye color, hair color, or left-handedness; (2)

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[115] Pouncy v. Vulcan Materials Co., 920 F. Supp. 1566, 1580 n.8 (N.D. Ala. 1996); Greenberg v. New York, 919 F. Supp. 637, 642 (E.D.N.Y. 1996); *see also* 29 C.F.R. pt. 1630 app.

[116] *See* EEOC, ASSISTANCE MANUAL, *supra* note 75, § 2.1(a)(i). In contrast, stress and depression that result from a documented physiological or mental disorder would be an impairment (although not necessarily a disability). *See id.*

[117] "Physical or mental impairment" is defined the same under the ADA and the Rehabilitation Act. *See* 29 C.F.R. pt. 1630 app.; 34 C.F.R. § 104.504 (1998).

[118] 29 C.F.R. § 1630.2(h).

[119] *See, e.g.*, Casey, *supra* note 11, at 389; Cummings et al., *supra* note 85, at 265; Duda v. Board of Educ. of Franklin Park, 133 F.3d 1054, 1058 (7th Cir. 1998); Fenton v. Pritchard Corp., 926 F. Supp. 1437, 1444 (D. Kan. 1996). In contrast, the EEOC seems implicitly to recognize the applicability of subparagraph (1) to mental, as well as physical, impairments. *See* EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 2 n.6; *see also DSM-IV*, *supra* note 4, at xxi (discussing the difficulty of distinguishing mental disorders from physical disorders).

"physical characteristics," such as "height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder;" (3) "characteristic predisposition to illness or disease;" (4) conditions, such as pregnancy, which are not the result of a physiological disorder; (5) "environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record;" (6) advanced age, except for "various medical conditions commonly associated with aging, such as hearing loss, osteoporosis, or arthritis."[120]

An issue left open by Title I's definition of impairment is whether the effects of the individual's condition should be evaluated after it has been treated with mitigating measures such as medication. Both the legislative history and EEOC guidance strongly support the position that the limitations of mental impairments should be evaluated without taking into consideration the mitigating effects of any medication.[121] Nonetheless, courts faced with this question have been split in their decisions.[122] A survey of the cases, however, reveals that those courts finding that the impairment should be assessed before any mitigating measures have been implemented advocate the more sound of the two positions.[123] As a related caveat, it should be noted

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[120] 29 C.F.R. pt. 1630 app.

[121] *See* H.R. Rep. No. 101-485, pt. 3, at 28 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 451; S. Rep. No. 101-116, at 23 (1989); H. R. Rep. No. 101-485 pt. 2, at 52 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 334. In determining whether an impairment exists, "mitigating measures," such as medicine and assistive or prosthetic devices, should be disregarded. *See id.* "For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine." 29 C.F.R. § 1630.2(h); *see also* EEOC, ASSISTANCE MANUAL, *supra* note 75, § 902.5. Likewise, medication should not be considered in determining whether an individual is disabled. *See* EEOC, ASSISTANCE MANUAL, *supra* note 75, § 902.5.

[122] See *Gilday v. Mecosta County*, 124 F.3d 760, 762-63 (6th Cir. 1997) for a list of cases taking both positions.

[123] For example, in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859 (1st Cir. 1998), the court found that "[a] reasonable person could interpret the plain statutory language [of the ADA] to require an evaluation either before or after ameliorative treatment." Therefore, the court looked to the legislative history for guidance. In assessing the legislative history, the court determined that "the House and Senate Committee reports explicitly state that, in determining whether an impairment substantially limits a major life activity, the impairment 'should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation.'" *Id.* at 859-60 (quoting H.R. Rep. No. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 451). Likewise, the Senate reported that a disability "'should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.'" *Id.* at 860 (quoting S. Rep. No. 101-116, at 23 (1989)). Based upon these reports, as well as others, the *Arnold* court concluded that it is "abundantly clear"

that simply because a person is taking medication does not necessarily mean that he or she is disabled — or even impaired.[124] For example, evidence that an employee has been prescribed Prozac is not, by itself, conclusive proof that the employee has depression and, thereby, a disability.

Courts have also recognized that a disability does not have to be permanent.[125] At the same time, however, intermittent and episodic impairments usually do not suffice to constitute a disability,[126] presumably because the lack of continuity prevents them from being "substantially limiting." This limitation on the definition of impairment presents a particularly difficult hurdle to be overcome by individuals with certain mental disorders, not the least of whom are those suffering from bipolar disorder or clinical depression. According to the *DSM-IV*, more than fifty percent of individuals diagnosed with major depression will eventually experience another major depres-

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that "disability" is "the underlying medical condition . . . without regard to whether 'the effects of the impairment are controlled by medication.'" *Id.*

[124] *See id.*

[125] *See* Paterson v. Downtown Med. Ctr., 866 F. Supp. 1379, 1381 (M.D. Fla. 1994).

[126] *See* Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 544 (7th Cir. 1995); *see also* Hamm v. Runyon, 51 F.3d 721, 725 (7th Cir. 1995); Duff v. Lobdell-Emery Mfg. Co., 926 F. Supp. 799, 808 (N.D. Ind. 1996). According to the EEOC, "temporary, *non-chronic* impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza." 29 C.F.R. pt. 1630 app. (emphasis added). The EEOC recently provided guidance on this issue by presenting the following two relevant illustrations, the first involving an employee suffering from depression and the second involving an employee with bipolar disorder:

> Example A: An employee has had major depression for almost a year. He has been intensely sad and socially withdrawn (except for going to work), has developed serious insomnia, and has had severe problems concentrating. This employee has an impairment (major depression) that significantly restricts his ability to interact with others, sleep, and concentrate. The effects of this impairment are severe and have lasted long enough to be substantially limiting.

EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 8.

> Example B: An employee has taken medication for bipolar disorder for a few months. For some time before starting medication, he experienced increasingly severe and frequent cycles of depression and mania; at times, he became extremely withdrawn socially or had difficulty caring for himself. His symptoms have abated with medication, but his doctor says that the duration and course of his bipolar disorder is indefinite, although it is potentially long-term. This employee's impairment (bipolar disorder) significantly restricts his major life activities of interacting with others and caring for himself, when considered without medication. The effects of his impairment are severe, and their duration is indefinite and potentially long-term.

Id. at 8-9; *see also* EEOC, ASSISTANCE MANUAL, *supra* note 75, § 902.4(d).

sive episode and between twenty and thirty-five percent will experience a chronic course of the mental disorder, with periods of remission and recurrence.[127] Bipolar disorder exhibits similar cycles in the course of its symptoms.[128] Possibly in response to this problem, the EEOC recently took the position that

> [c]hronic, episodic conditions *may* constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms. For some individuals, psychiatric impairments such as bipolar disorder, major depression, and schizophrenia may remit and intensify, sometimes repeatedly, over the course of several months or several years.[129]

What seems to emerge from the EEOC regulations and guidance manuals is a distinction between "chronic" and "non-chronic" impairments. Before the *EEOC Enforcement Guidance* was published in March 1997, this distinction may have been lost upon the courts. Indeed, until that time, the EEOC only referred to "non-chronic" impairments in its regulations.[130]

Nonetheless, although the EEOC's position may appear to offer hope for employees with depression and bipolar disorder, three things must be noted. First, the quoted *EEOC Enforcement Guidance* language is somewhat noncommittal, i.e., use of the word "may" rather than "will." Second, because the *EEOC Enforcement Guidance* was only recently published, few reported opinions have paid homage to this material, and none have cited it in regard to this particular issue. For employees with depression or bipolar disorder, such recognition seems to be imperative if they are to overcome the "substantial limitation" hurdle. Otherwise, employers may continue to argue successfully that these diseases, albeit "mental impairments," are not "mental disabilities" because the afflicted employees experience remissions or because the disorders are cyclic in nature. Third, recall that the EEOC's guidelines are nonbinding upon the courts.[131] Consequently, it is possible that some courts will still use the courses of these two mental illnesses as a basis for denying claims, employing the following logic: no impairment, no disability, no recovery under

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[127] *See DSM-IV*, *supra* note 4, at 325.

[128] *See id.* at 235.

[129] EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 9 (emphasis added); *see also* EEOC, ASSISTANCE MANUAL, *supra* note 75, § 902.4(d); Clark v. Virginia Bd. of Bar Exam'rs, 861 F. Supp. 512, 519 (E.D. Va. 1994) (ruling that the plaintiff's recurrent major depression could constitute a disability under the ADA).

[130] *See supra* note 126 and accompanying text.

[131] *See supra* Part I.C.

the ADA. Once again, only future cases will reveal the willingness of courts to accept the EEOC's position on this issue.

2. "Substantially Limits" a "Major Life Activity"

The term "substantially limits" has two alternative definitions. First, it refers to a physical or mental impairment that causes a person to be "unable to perform a major life activity that the average person in the general population can perform."[132] This definition has been interpreted as requiring the court "to compare an individual's impaired functioning with the functioning of most unimpaired people."[133] Second, it also refers to a physical or mental impairment which causes a person to be "[s]ignificantly restricted as to the condition, manner or duration under which [he or she] 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."[134] In determining whether an individual is substantially limited, the courts consider the following factors:

(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.[135]

These "economic impact factors are intended to ensure that the business' size, type, sales, and relevant labor markets are not affected by accommodations" that would "cause a financial hardship to the operation of the business" or that would "fundamentally alter the nature of the business."[136]

An important fact that must not be overlooked is that "[a]n illness cannot in and of itself be considered an impairment. Only its symptoms and/or ramifications actually limit the inflicted person's

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[132] 29 C.F.R. § 1630.2(j)(1)(i) (1998).

[133] Price v. National Bd. of Med. Exam'rs, 966 F. Supp. 419, 426 (S.D. W.Va. 1997).

[134] 29 C.F.R. § 1630.2(j)(1)(ii).

[135] *Id.* § 1630.2(j)(2); *see also id.* pt. 1630 app.; EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 6.

[136] Peter D. Blanck, *Individual Rights and Reasonable Accommodations Under the Americans with Disabilities Act: The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I — Workplace Accommodations*, 46 DEPAUL L. REV. 877, 898 (1997).

ability to perform major life activities."[137] In other words, it is insufficient for an employee to claim simply that he suffers from depression or bipolar disorder.[138] The court will actually look at the underlying symptoms and complications to determine if they substantially limit the employee's performance of a major life activity. Consequently, an employee's specific set of circumstances must be considered on a case-by-case basis under the ADA.[139] In spite of the EEOC's guidance, not all courts have followed this policy.[140] Moreover, in a seemingly self-contradictory maneuver, the EEOC has stated that the impair-

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[137] Rodriguez v. Loctite Puerto Rico, Inc., 967 F. Supp. 653, 659 (D.P.R. 1997). As the *Rodriguez* court noted, "For the plaintiff to ask the Court or the jury to simply infer than [sic] a person with [an illness] is substantially limited in some life activity goes against the very mission of the statute." *Id.* at 658. *Rodriguez* is in accord with the EEOC regulations, which provide that

> [t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

29 C.F.R. § 1630.2(j); *see also* Homeyer v. Stanley Tulchin Assocs., Inc., 91 F.3d 959, 962 (7th Cir. 1996); Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996); EEOC, ASSISTANCE MANUAL, *supra* note 75, § 902.4(c)(1).

[138] *See* Adams v. Rochester Gen. Hosp., 977 F. Supp. 226, 232 (W.D.N.Y. 1997). *Compare* Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 561 (7th Cir. 1996) (holding that severe depression with psychosis constitutes a disability); Guice-Mills v. Derwinski, 967 F.2d 794, 796-97 (2d Cir. 1992) (holding that depression with anxiety, insomnia, and migraine headaches is a disability) *with* Sarko v. Penn-Del Directory Co., 968 F. Supp. 1026, 1035-36 (E.D. Pa. 1997) (holding that employee's depression is not a disability). The reason the *Bombard* and *Derwinski* courts found a disability, whereas the *Sarko* court did not, may stem from the fact that the employees in the former cases had other medical symptoms in addition to their depression, causing those courts to be more inclined to find that their plaintiffs' depression was substantially limiting.

[139] *See Adams*, 977 F. Supp. at 232.

[140] *See, e.g.*, Soileau v. Guilford of Maine, Inc., 928 F. Supp. 37 (D. Maine 1996), *aff'd*, 105 F.3d 12 (1st Cir. 1997). Nonetheless, it would be wrong to claim, as one commentator has, that "[g]enerally, if a disorder is included in the DSM IV . . . the courts will recognize a plaintiff's mental impairment as a disability." Paul I. Weiner, *Stress and Mental Disorder: New Responsibilities for Employers Under the ADA*, 586 PLI/Lit 453, 456 (1998). Neither the EEOC regulations nor the prevailing case law support this statement. Weiner might have been correct if he had instead claimed that disorders included in the *DSM-IV* would be recognized as mental *impairments*. *See supra* note 22. There is a critical distinction under the ADA between an impairment and a disability. For the former to rise to the level of the latter, it must substantially limit the person in his or her performance of a major life activity. Moreover, Weiner's confusion surfaces again later in his article when he indicates that a case in which the judge "observed that . . . depression existed in degrees and that depression should not be rendered a disability per se" was correctly decided. Weiner, *supra*, at 457-58.

ment of being HIV-infected automatically qualifies as "substantially limiting."[141]

Although "major life activities" include such things as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working,"[142] only the last activity — working — is of particular relevance to the scope of this Article.[143] When the major life activity that is substantially limited is "working," then the term "substantially limiting" is further defined as follows:

> (i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[144]

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[141] *See* 29 C.F.R. pt. 1630 app. However, in fairness, it should be pointed out that the EEOC's position on this issue is supported by the ADA's legislative history. *See supra* note 114; *see also* Bragdon v. Abbott, 118 S. Ct. 2196, 2205 (1998) (holding that HIV may impair a major life function — procreation).

[142] *See supra* note 101.

[143] *See infra* Part III.B. (discussing why this major life activity may be receiving an undue amount of attention from courts and plaintiffs alike).

[144] *See, e.g.*, Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285 (11th Cir. 1997); Crumpton v. St. Vincent's Hosp., 963 F. Supp. 1104, 1112 (N.D. Ala. 1997); Motichek v. Buck Kreihs Co., 958 F. Supp. 266, 270 (E.D. La. 1996). Furthermore, "the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation of the [major life] activity of working." Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 (5th Cir. 1995); *see also* Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 723 (2d Cir. 1994). Therefore, "a person who merely cannot work on particular job(s) at particular place(s) is not considered to be disabled. In order to establish a disability under [the] ADA, the impairment must substantially limit employment *generally*." Patrick v. Southern Co. Serv., 910 F. Supp. 566, 569-70 (N.D. Ala. 1996) (citations omitted) (emphasis added). This facet of the "substantially limiting" requirement, however, should not pose much of a problem for employees with bipolar disorder or depression. The mental illnesses from which these individuals suffer are usually so pervasive that they will affect more than "one aspect of a job." In fact, if anything, these employees will likely be compelled to prove that they are not *completely* disabled, thereby denying them designation as a "qualified individual with a disability." *See supra* notes 84-85 and accompanying text.

Nor does the inability to work for a specific employer constitute a disability. *See* Jerina v. Richardson Automotive, Inc., 960 F. Supp. 106, 109 (N.D. Tex. 1997) (citing Weiler v. Household Fin. Corp., 101 F.3d 519, 524 (7th Cir. 1996)).

> The ADA does not protect people from the general stresses of the work place. Everyone has encountered difficult situations in the working environment. Being unwilling or even unable to work with a particular individual simply is not the equivalent of being 'substantially limited' in the major life activity of working.

Weiler v. Household Fin. Corp., No. 93 C 6454, 1995 WL 452977 at *5 (N.D. Ill. 1995), *aff'd*, 101 F.3d 519 (7th Cir. 1997). The court's reasoning was that a disability

> (ii) In addition to the factors listed in, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":
>
> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs);[145] and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).[146]

Consequently, "an individual is not substantially limited in the major life activity of working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent."[147] The inability to perform a "particular specialized job" or a "narrow range of jobs" does not constitute a substantial limitation.[148] Although "an individual does not have to be totally unable to work . . . [he must be] significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs."[149] Indeed, if the person was "totally unable to work," he would, by definition, not be a "qualified individual" because he would be unable to perform the

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is part of a person and continues with him to his next job. *See id.* In contrast, a personality conflict is specific to the individual (i.e., employer or supervisor) who is "causing" the problem and, therefore, is not a disability.

[145] One example of "a class of jobs" is "heavy labor jobs" for which a person would be substantially limited if a back injury prevented him or her from lifting heavy objects. *See* 29 C.F.R. § 1630.2(j).

[146] *Id.* § 1630.2(j)(3); *see supra* note 132 and accompanying text. An example of "a broad range of jobs in various classes" is a person allergic to a substance found in most high rise office buildings that causes breathing difficulties. This individual would be unable to perform a broad range of jobs in various classes that are conducted in high rise office buildings. *See id.* § 1630.2(j).

[147] *Id.* at pt. 1630 app.

[148] *See id.*

[149] *Id.*

job's essential functions.[150] In any case, as noted by one court, "The ADA standard of a class or broad range of jobs, is not easily met."[151]

C. *What is a "Reasonable Accommodation"?*

Neither the ADA nor the EEOC regulations define "reasonable accommodation." Instead, these two bodies of law provide examples of what Congress and the EEOC believe constitute reasonable accommodations. According to the ADA, "reasonable accommodation"

> *may include* —
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[152]

The language "may include" indicates Congress intended that the enumerated examples not be exhaustive. Compare the EEOC regulations, which essentially reiterate the definition in the ADA, but add the introductory language: "Reasonable accommodation *may include but is not limited to* . . . ."[153] Consequently, neither the ADA nor the EEOC regulations mandate any specific accommodation. Although this lack of specificity might cause uncertainty for both employers and employees, it is most likely the result of an effort to cover as many individuals and circumstances as possible.[154]

The purpose of the reasonable accommodation requirement is not "to place the disabled employee in a superior position;" rather, it is to enable such employees to enjoy the same benefits and privileges of employment as are enjoyed by employees without disabilities.[155] In addition, the policy of the ADA is to require that employers implement reasonable accommodations for disabled individuals, not to force employers to implement accommodations the costs of which to

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[150] *See supra* Part II.A.

[151] Vaughan v. Harvard Indus., Inc., 926 F. Supp. 1340, 1347 (W.D. Tenn. 1996).

[152] 42 U.S.C. § 12111(9) (1998) (emphasis added).

[153] 29 C.F.R. § 1630.2(o)(2) (1998) (emphasis added).

[154] *See* EEOC, ASSISTANCE MANUAL, *supra* note 75, § 3.4; *see also infra* Part III.

[155] Pegues v. Emerson Elec. Co., 913 F. Supp. 976, 981 (N.D. Miss. 1996).

the employer are out of proportion to the benefits reaped by the individual.[156]

It should be noted that an employer is not required to reallocate "essential functions" as a means of accomplishing a reasonable accommodation.[157] In addition, simply because an accommodation is *possible* does not necessarily imply that it is *reasonable.*[158] Furthermore, even though an employer should first try to identify open positions for which the employee is qualified and which have equivalent pay status and conditions of employment, the employer is nonetheless permitted to reassign the employee to a lower graded position if no equivalent one is available.[159] In such cases, an employer need not maintain the employee's current salary unless it maintains the salaries of other similarly reassigned employees who are not disabled.[160] At the same time, however, "[r]eassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities."[161]

In looking at this list of possible reasonable accommodations, note a possible problem with "reassignment to a vacant position." The legislative history of this reasonable accommodation indicates that Congress intended that it be used for employees who, "because of disability, can no longer perform the essential functions of the job."[162] One commentator goes so far as to suggest that this purpose reflects an internal contradiction within the statute and predicted that it would lead to an onslaught of litigation.[163] Specifically, he points out that if an employee is a "qualified individual with a disability,"[164] an employer is prohibited from discriminating against such a person on the basis of that disability.[165] He then continues his analysis by recognizing that an employer is simultaneously required to rea-

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[156] *See* Altman v. New York City Health and Hosp. Corp., 903 F. Supp. 503, 513 (S.D.N.Y. 1995), *aff'd*, 100 F.3d 1054 (2d Cir. 1996).

[157] *See* 29 C.F.R. § 1630.2(o).

[158] *See* Mohamed v. Marriott Int'l, Inc., 905 F. Supp. 141, 152 (S.D.N.Y. 1995).

[159] *See* 29 C.F.R. pt. 1630 app.; *see also* EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 28.

[160] *See id.*

[161] *Id.*

[162] S. Rep. No. 101-116, at 26, 31-32 (1989); H.R. Rep. No. 101-485, pt. 2, at 63 (1990).

[163] *See* David Harger, *Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act: Reducing the Effects of Ambiguity on Small Businesses*, 41 U. KAN. L. REV. 783, 785-86 (1993).

[164] 42 U.S.C. § 12111(8) (1998).

[165] *See* Harger, *supra* note 163, at 786 n.20; 42 U.S.C. § 12112(a).

sonably accommodate a disabled employee.[166] Up to this point his analysis is correct; however, he then states that the statute specifies "that reassignment to a vacant position *is* reasonable."[167] The statutory language is not as conclusive as this commentator believes. In fact, the remark reflects a fundamental misunderstanding of statutory interpretation. Both Title I and the EEOC regulations governing this issue use the word "may" to qualify their list of possible reasonable accommodations. Neither Congress nor the EEOC mandate that "reassignment to a vacant position" *is* obligatory if an employee has a disability, i.e., there is a distinct difference between "may" and words like "shall" and "must." Moreover, what constitutes a reasonable accommodation is to be determined on a case-by-case basis, taking into consideration the particular facts relevant to that individual's situation.[168] Finally, the barrage of litigation on this issue that the commentator predicted has, to date, not come to pass.

D. Defenses for Employers

As a first line of defense, an employer can rebut the plaintiff-employee's prima facie case by arguing that he failed to offer sufficient evidence to establish one of the elements listed in Part II.[169] If such an approach proves unsuccessful, an employer may then proceed to proffer any one of a number of affirmative defenses:

1. Employee's Disability Not "Known" to Employer

The ADA does not require an employer to reasonably accommodate an employee with a disability of which the employer is unaware.[170] Courts have ruled that the burden is initially on the em-

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[166] *See* Harger, *supra* note 163, at 786 n.20; 42 U.S.C. § 12112(b)(5)(A).

[167] Harger, *supra* note 163, at 786 n.20 (emphasis added); 42 U.S.C. § 12111(9)(B).

[168] *See infra* note 180.

[169] *See supra* note 83 and accompanying text.

[170] *See* 29 C.F.R. pt. 1630 app. The regulation states, "It is unlawful for a covered entity not to make reasonable accommodation to the *known* physical or mental limitations of an otherwise qualified applicant or employee with a disability . . . ." *Id.* (emphasis added). As poignantly stated by one court: "The ADA does not require clairvoyance." Miller v. National Cas. Co., 61 F.3d 627, 630 (8th Cir. 1995). It should be recognized that the EEOC believes that *Miller* was decided incorrectly. EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 20 n.48. In *Miller*, the employee's sister repeatedly telephoned the employer, informing it that Miller was "mentally falling apart" and that her family was trying to admit Miller to a hospital. *See Miller*, 61 F.3d at 629. Nonetheless, the court determined that the employer was neither alerted to Miller's disability (bipolar disorder) nor to her need for reasonable accommodation. *See id.* at 630; *see also* 29 C.F.R. pt. 1630 app.

ployee to bring the disability to the attention of the employer.[171] However,

> "cases involving an alleged mental disability generally come about after the employee has been discharged without any accommodation having been sought. In these situations, the employee usually asserts that [he or she] had a mental disability that was not diagnosed during employment, but was nonetheless responsible for the behavior that resulted in discharge. Despite no accommodation being sought while employed, these plaintiffs bring causes of action under the ADA maintaining that the termination was discrimination based on disability."[172]

Such cases provide the employer with a ready-made defense, since the employer cannot be said to have been aware of the employee's purported disability.

This defense presents potential problems for employees with mental illnesses because such individuals are understandably reluctant to disclose their conditions for fear of embarrassment or other undesirable consequences.[173] The EEOC, though, steadfastly takes the position that "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed."[174] Likewise, courts are disinclined to infer that an employee's mental disability is "known" to the employer simply because the employee exhibits abnormal or disruptive behavior.[175] Nonetheless, it might be possible for an employee to argue successfully that the employer came to "know" of the disability through means other than an affirmative disclosure by the employee.[176] For instance, observing that

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[171] *See* Taylor v. Principal Fin. Group, Inc. 93 F.3d 155, 165 (5th Cir. 1996); Adams v. Rochester Gen. Hosp., 977 F. Supp. 226, 235 (W.D.N.Y. 1997); Lippman v. Sholom Home, Inc., 945 F. Supp. 188, 192 (D. Minn. 1996).

[172] Mika & Wimbiscus, *supra* note 21, at 179 (citations omitted).

[173] *See* Pechman, *supra* note 13.

[174] 29 C.F.R. pt. 1630 app.

[175] *See, e.g., Lippman*, 945 F. Supp. at 192; Stola v. Joint Indus. Bd., 889 F. Supp. 133, 135 (S.D.N.Y. 1995). "An employer is not obligated to observe employees for any behavior which may be symptomatic of a disability, and then divine that the employee actually suffers from a disability." *Lippman*, 945 F. Supp. at 192. Moreover, "[e]mployers are not required to be clairvoyant as to hidden medical problems of their employees and provide assistance where none is requested." *Adams*, 977 F. Supp at 235; *see also supra* note 170.

[176] One court found that an employee's symptoms were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability." Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 932 (7th Cir. 1995). This decision leaves open the possibility that, given the right set of circumstances, an employer could be presumed to have "known" of an employee's disability.

an employee limps might be sufficient to put the employer on notice that the employee has a physical disability. Similarly, witnessing an employee's unusual behavior might be an adequate basis upon which to claim the employer had "constructive knowledge" of that employee's mental disability. Exactly how this knowledge requirement is to be interpreted has yet to be resolved by courts construing the EEOC regulations.[177]

Undoubtedly, employers are faced with a "Catch-22" because, on the one hand, they are required to make accommodations for an employee once they "know" of a disability, but, on the other hand, they are simultaneously prohibited from inquiring as to a disability which has not yet been disclosed.[178] From an employer's perspective, walking the fine line between violating one section of the ADA as opposed to another is fundamentally unfair. At what point is an employer presumed to know that an employee has a disability? This problem is especially acute when the disability results from a mental impairment that does not manifest itself in a way readily apparent to the untrained observer.[179]

2. Refusal of "Reasonable Accommodations"

In at least two cases, employees' failure to accept what the court considered reasonable accommodations offered by the employer caused them to be ineligible for classification as a "qualified individual with a disability."[180]

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[177] In *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437 (D. Kan. 1996), an employee essentially claimed, albeit unsuccessfully, that his employer should have known that his disruptive behavior was caused by a mental illness. *See id.* at 1445. Moreover, at least one case decided under the Rehabilitation Act indicates that an employer should not only be held responsible for disabilities of which it has actual knowledge, but also for disabilities of which a "reasonable person" would have known. *See* Nathanson v. Medical College of Pa., 926 F.2d 1368, 1381-83 (3d Cir. 1991). Consequently, employers would be well-advised to determine early on whether an employee possesses a mental disability that is affecting his or her work and, if so, determine what can be done to accommodate that disability. *See* Pechman, *supra* note 13.

[178] *See* 42 U.S.C. §§ 12112(a), 12112(c)(2)(A) (1990). However, if an employee has a known disability or an obvious one that appears to limit, interfere with, or prevent the individual from performing the essential functions of the job, the employer may inquire as to how the employee would perform the functions with or without reasonable accommodations. *See* Miller, *supra* note 5, at 710, (citing EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TECHNICAL ASSISTANCE PROGRAM, DISABILITY DISCRIMINATION: EMPLOYMENT DISCRIMINATION PROHIBITED BY THE AMERICANS WITH DISABILITIES ACT OF 1990 III-7 (1996 rev.)).

[179] See Part III *infra*, for a discussion of "hidden" mental disabilities.

[180] *See* Willett v. Kansas, 942 F. Supp. 1387, 1395 (D. Kan. 1996), *aff'd*, 120 F.3d 272 (1997); Hankins v. Gap, Inc., 84 F.3d 797, 801 (6th Cir. 1996). In *Willett*, a nurse with lupus requested, as a reasonable accommodation, that her employer supply her

3. "Undue Hardship" for Employer

Even if an employer's conduct otherwise constitutes discrimination under the ADA, such conduct will be protected if the employer can prove that providing "reasonable accommodations" for the employee would create an "undue hardship."[181] Basically, "undue hardship" refers to "any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[182] As discussed in Part

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with a light-weight cart for dispensing medications and that it reassign her to a facility that would require less walking. *See Willett*, 942 F. Supp. at 1394. When Willett's employer offered to make these accommodations, she refused to accept them. Consequently, the court found that, based upon this refusal, Willett was not a "qualified individual with a disability." *Id.* at 1395 (citing 29 C.F.R. § 1630.9(d) (1998)).

In *Hankins*, an employee with migraine headaches requested as a reasonable accommodation that she be transferred to either one of two other available positions. *See Hankins*, 84 F.3d at 799. Hankins believed that both of these positions would be less stressful. *See id.* Her employer, however, contested this fact and claimed that she should have made use of one of the other reasonable accommodations available to her such as medical leave, voluntary time off, and vacation time. *See id.* at 801. The court agreed with Hankins' employer and consequently ruled that by refusing these accommodations, Hankins was not a "qualified individual with a disability." *Id.* at 802 (citing 29 C.F.R. § 1630.9(d)).

[181] *See* 29 C.F.R. § 1630.2(p).

[182] *Id.* § 1630.2(p). The ADA defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in [42 U.S.C. § 12111(10)(B)]." 42 U.S.C. § 12111(10)(A); *see also* 29 C.F.R. § 1630.2(p) (1998). The "factors" to be considered are the following:

> (i) the nature and cost of the accommodation needed under [the ADA];
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(10)(B); *see also* 29 C.F.R. 1630.2(p)(2).

The EEOC regulations add the following factor to this list: "The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business." 29 C.F.R. § 1630.2(p)(2)(v). This additional factor seems to be particularly applicable to employees with mental illnesses. For instance, when an employee suffering from bipolar disorder is experiencing a manic episode, the resultant behavior could obviously have an "impact on the ability of other employees to perform their duties." Surprisingly, though, little judicial attention has focused on this factor.

II.D.4., within this defense is a provision permitting employers to require that an employee "not pose a direct threat to the health or safety of other individuals in the workplace."[183] The EEOC regulations indicate that an employer *should* work with the employee to determine what, if any, accommodations can be facilitated.[184] In addition, the EEOC regulations list a host of factors to be considered in determining if an "undue hardship" exists.[185] At the same time, the EEOC has stated that the following *do not* constitute an undue hardship: (1) disruption to employees caused by their fears or prejudices toward the individual's disability as opposed to disruption caused by providing the accommodation, or (2) the accommodation's negative impact on the morale of other employees.[186] Although not acknowl-

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[183] 42 U.S.C. § 12113(b).

[184] *See* 29 C.F.R. § 1630.2(o)(3). The regulation states:

> To determine the appropriate reasonable accommodation it *may* be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

Id. (emphasis added). "This process of identifying whether, and to what extent, a reasonable accommodation is required *should* be flexible and involve both the employer and the individual with a disability." *Id.* at 1630 app. (emphasis added). Note that the EEOC chose not to make it incumbent upon an employer to involve the employee in determining what accommodation would be reasonable. Nonetheless, when confronted with this situation, an employer might wish to consider the following: Generally, involving an employee in this process should help to stymie any potential ADA claims. However, when the employee in question is suffering from a mental illness, such as depression or bipolar disorder, communication could understandably be quite difficult. In these situations, an employer may be well-advised to opt for excluding the employee or only dealing with his or her legal representative, if one has been designated.

Although one would like to believe that the EEOC had the foresight to avoid the potential problems that could arise with mentally disabled employees if it had mandated the process suggested by 29 C.F.R. § 1630.2(o)(3), it is unlikely that this was the case. Rather, the voluntariness of this provision is most likely an unintended and fortuitous consequence of the EEOC regulations.

In any event, despite the EEOC regulations, one court held that an employer was required to work with an employee suffering from bipolar disorder to determine what accommodations would be reasonable. *See* Bultemeyer v. Fort Wayne Community Sch., 100 F.3d 1281, 1285 (7th Cir. 1996). The *Bultemeyer* court professed that "[a]n employee's request for reasonable accommodation requires a great deal of communication between the employee and employer." *Id.* The court continued its opinion by recognizing that "[i]n a case involving an employee with mental illness, the communication process becomes more difficult. [Nonetheless, it] is crucial that the employer be aware of the difficulties, and 'help the other party determine what specific accommodations are necessary.'" *Id.* (quoting Beck v. University of Wisc. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996)).

[185] *See supra* note 182.

[186] *See* 29 C.F.R. § 1630.15(d); *see also supra* note 182.

edged by the EEOC, it is clear that these two exceptions have underlying implications for mentally disabled employees.[187] Furthermore, with these exceptions, the EEOC is tacitly acknowledging Congress's intent that the ADA eradicate the unsubstantiated myths and fears surrounding mentally disabled individuals.[188]

Decisions as to where the line is to be drawn between a reasonable accommodation and an undue hardship are to be made on a case-by-case basis in which the accommodations are specifically tailored to ensure that an employee is able to perform the job's essential functions.[189] Courts have drawn certain limits as to what constitutes reasonable accommodation, finding that the following would be "unreasonable": (1) unpaid leave of an indefinite duration,[190] (2) keeping an employee on unpaid leave indefinitely until a position opens,[191] (3) creating a new position for a disabled employee,[192] (4) eliminating or reallocating "essential functions" of a position,[193] (5) providing an employee with the specific accommodation that individual requests,[194] and (6) allowing employees to work only when their mental or physical impairment permits.[195] This last rule obviously has particularly pertinent consequences for employees suffering from bipolar disorder or depression (not to mention mental dis-

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[187] *See supra* note 182.

[188] *See supra* note 105.

[189] *See* 29 C.F.R. pt. 1630 app. The regulation states,

> This case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs. For this reason, neither the ADA nor [the EEOC regulations] can supply the 'correct' answer in advance for each employment decision concerning an individual with a disability. Instead, the ADA simply establishes parameters to guide employers in how to consider . . . the disabling condition involved.

Id.

[190] *See* Hudson v. MCI Telecomm. Corp., 87 F.3d 1167, 1169 (10th Cir. 1996).

[191] *See* Monette v. Electric Data Sys. Corp., 90 F.3d 1173, 1187 (6th Cir. 1996).

[192] *See id.* However, if an employer knows of a position for which the disabled employee is qualified and which will become available relatively soon, it might be required to offer the position to that employee. *See id.* (citing 29 C.F.R. § 1630.2(o) app.). Still, the accommodation must not impose an undue hardship on the employer. *See* Dey v. Milwaukee Forge, 957 F. Supp. 1043, 1052 (E.D. Wis. 1996).

[193] *See* Hershey v. Praxair, Inc., 969 F. Supp. 429, 434 (S.D. Tex. 1997).

[194] *See* Equal Employment Opportunity Comm'n v. Newport News Shipbuilding & Drydock Co., 949 F. Supp. 403, 408 (E.D. Va. 1996); Scheer v. City of Cedar Rapids, 956 F. Supp. 1496, 1501 (N.D. Iowa 1997). The employer need only provide *a* reasonable accommodation that is necessary to enable the employee to perform the essential functions of the job.

[195] *See* Aquinas v. Federal Express Corp., 940 F. Supp. 73, 79 (S.D.N.Y. 1996). Complying with such a request would undermine the regular attendance that is an "essential function" of almost any job.

orders in general). Recall that these two mental illnesses can involve periods of remission and that bipolar disorder, by its very nature, is cyclic.[196] Consequently, such precedent presents just one more obstacle to be overcome by the mentally disabled employee.

In addition to the six limitations noted above, one court ruled that a mentally impaired employee who engaged in misconduct was not entitled to "another chance" as a reasonable accommodation.[197]

4. "Direct Threat to the Health or Safety of Other Individuals in the Workplace"[198]

a. Threat to Others

"Direct threat," according to the EEOC, refers to "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[199] Determinations as to whether a direct threat exists are to be "based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[200] In its guidance materials, the EEOC consistently restates that these determinations must be based on an "individualized assessment" of the employee in question.[201] With respect to the employment of individuals with mental disabilities, the employer must identify the specific behavior that would pose a direct threat.[202] Employees do not pose a "direct threat" simply by virtue of either having a history of mental disability or being treated for such a disability.[203] Additionally, although the "risk" is usually considered to be part of the "qualified individual with a disability" requirement,

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[196] *See supra* Part I.A.

[197] *See* Siefken v. Village of Arlington Heights, 65 F.3d 664, 666-67 (7th Cir. 1995).

[198] *See* 29 C.F.R. § 1630.15(b)(2) (1998).

[199] *Id.* § 1630.2(r). This principle is sometimes referred to in the literature as the "safety defense." *See* Guiduli, *supra* note 18, at 1165 n.71; *see also* Bryan P. Neal, *The Proper Standard for Risk of Future Injury Under the Americans with Disabilities Act: Risk to Self or Risk to Others*, 46 SMU L. REV. 483, 484 (1992).

[200] 29 C.F.R. § 1630.2(r).

[201] *See generally* EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 33-36.

[202] *See* 29 C.F.R. § 1630.2(r).

[203] *See* H.R. Rep. No. 101-485, pt. 3, at 45-46 (1990), *reprinted in* 1990 U.S.C.C.A.N. 468-469.

some courts have bifurcated the two issues and addressed them separately. [204]

In examining the legislative history pertaining to this section of the ADA, it is interesting to note that, initially, Congress was primarily concerned with "threats of harm" resulting from communicable diseases (i.e., AIDS), and not mentally ill employees who, for instance, may be prone to violence.[205] Nonetheless, common stereotypes of mentally ill individuals include the belief that they are more likely to be violent than "normal" individuals.[206] The validity of this popular perception is currently unsettled.[207] As a result of these stereotypes, this defense remains particularly problematic for employees with bipolar disorder or depression. In fact, most cases involving an issue as to whether an employee was a "direct threat" to others concern individuals with some type of mental disorder.

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[204] *See, e.g.*, Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1265 (4th Cir. 1995); Altman v. New York City Health and Hosp. Corp., 903 F. Supp. 503, 509-10 (S.D.N.Y. 1995); Mauro v. Borgess Med. Ctr., 886 F. Supp. 1349, 1352-53 (W.D. Mich. 1995), *aff'd*, 137 F.3d 398 (6th Cir.), *cert. denied*, 119 S. Ct. 51 (1998). One court noted that "[t]here may be other cases under Title I where the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden." Equal Employment Opportunity Comm'n v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997). (Recall that in order to be a "qualified individual with a disability," one must be able to perform the job's essential functions.) In addition, another court has ruled that "'the essential functions of any job include avoidance of violent behavior that threatens the safety of other employees.'" Boldini v. Postmaster General United States Postal Serv., 928 F. Supp. 125, 130 (D.N.H. 1995) (quoting Mazzarella v. United States Postal Serv., 849 F. Supp. 89, 94 (D. Mass. 1994)). Consequently, the ADA "protects only 'qualified' employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one." Palmer v. Circuit Court of Cook County, 117 F.3d 351, 352 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 893, *reh'g denied*, 118 S. Ct. 1344 (1998).

[205] *See* H.R. Rep. No. 101-485, pt. 3, at 45-46 (1990), *reprinted in* 1990 U.S.C.C.A.N. 468-69 ("During Committee consideration, this 'direct threat' standard was extended to all individuals with disabilities, and not simply to those with contagious diseases or infections."); H.R. Conf. Rep. No. 101-558 (1990) ("The Senate bill include[d] as a defense that a covered entity may fire or refuse to hire a person with a contagious disease if the individual pose[d] a direct threat to the health and safety of other individuals in the workplace." This bill was supplanted by the House amendment which broadened the defense to cover "all applicants and employees, not just to those with contagious diseases."); *see also* H.R. Rep. No. 101-485, pt. 2 (1990).

[206] *See* Miller, *supra* note 5, at 727-28.

[207] *See id.* at 728 (taking the position that there is no scientific evidence to substantiate this characterization of the mentally disabled). *But see* John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 1992 AM. PSYCHOLOGIST 511, 511 (April 1992) (claiming that there is a significant relationship between *some* types of mental illnesses and violence).

Determining whether an employee is a "direct threat" is conducted on a case-by-case basis[208] and is a matter for the trier of fact to determine after weighing all evidence as to the nature of the risk and its potential harm.[209] However, an employer is not required to wait until an employee actually injures someone if that employee exhibits work attributes that could cause an accident.[210] Indeed, Title I clearly states "that an individual shall not *pose* a direct threat" to others.[211] The ADA does not require that an individual do something that is a direct threat, only that he or she "pose" a direct threat to others. Furthermore, the employer must conduct an "individualized assessment" of the employee's ability to perform safely the essential functions of the job in question — mere speculation is not enough.[212] In particular, "[f]or individuals with mental or emotional disabilities, the employer must identify the *specific* behavior on the part of the individual that would pose the direct threat."[213] Unfortunately, the EEOC does not provide any further insight into just *how specific* the specific behavior must be. Nonetheless, the EEOC regulations provide the following guidelines for making "direct threat" determinations:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.[214]

As one court noted, "[t]he determination that an individual poses a 'direct threat' must be based on an individualized assessment of the individual's" present ability to perform safely the essential functions of the job.[215] This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge or on the best available objective evidence.[216]

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[208] *See* 29 C.F.R. pt. 1630 app. (1998).

[209] *See* Rizzo v. Children's World Learning Ctrs., Inc., 84 F.3d 758, 764 (5th Cir. 1996).

[210] *See* Jackson v. Boise Cascade Corp., 941 F. Supp. 1122, 1127 (S.D. Ala. 1996).

[211] 42 U.S.C. § 12113(b) (1998) (emphasis added).

[212] *See* Equal Employment Opportunity Comm'n v. Chrysler Corp., 917 F. Supp. 1164, 1170 (E.D. Mich. 1996).

[213] 29 C.F.R. pt. 1630 app. (emphasis added). In contrast, "[f]or individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the direct threat." *Id.*

[214] *Id.* § 1630.2(r).

[215] *Chrysler*, 917 F. Supp. at 1170.

[216] *See* 29 C.F.R. pt. 1630 app.

Additionally, in January 1992, the EEOC published *A Technical Assistance Manual on the Employment Provisions (Title I) of the ADA* (hereinafter *EEOC Technical Manual*). This manual expands on the four factors listed above by requiring that an employer claiming that an individual is disqualified for posing a "direct threat" do the following: (1) prove the existence of a significant risk of substantial harm, (2) identify the specific risk, (3) establish that the risk is current and not speculative or remote, (4) assess the risk on the basis of objective medical or other factual evidence concerning the specific individual,[217] and (5) consider if the risk could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation.[218]

Nonetheless, not all courts appear to abide by these requirements. *Palmer v. Circuit Court of Cook County*[219] is but one example. The plaintiff in *Palmer* suffered from depression and a delusional disorder.[220] At work, she made various statements to coworkers, which led to her termination.[221] Palmer testified that only after another employee had physically threatened her did she retort: "'Look, if you don't leave me alone, I'm going to throw you out the window.'"[222] She also told a different coworker that she was "'so sick' of [her supervisor that] she 'could just kill her.'"[223] The court found that these statements justified Palmer's employer deeming her a "direct threat" to other employees and, consequently, terminating her.[224]

The problem with the *Palmer* decision is that the court failed to apply the requirements of either the EEOC regulations or the *EEOC Technical Manual*. Specifically, there is no indication that the court considered the "likelihood" or "imminence" of the potential harm, as mandated by the EEOC regulations.[225] Similarly, the court did not

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[217] This requirement was also addressed by the EEOC in its appendix to the EEOC regulations. *See id.* at pt. 1630 app. Determining whether a person is a direct threat to himself or herself must be based on "valid medical analyses and/or other objective evidence . . . rather than on stereotypic or patronizing assumptions and must consider potential accommodations." *Id.* By way of example, the EEOC provides the following interesting illustration: "[A] law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness." *Id.*

[218] EEOC, ASSISTANCE MANUAL, *supra* note 75, § 4.5.

[219] 905 F. Supp. 499 (N.D. Ill. 1995), *aff'd*, 117 F.3d 351 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 893, *reh'g denied*, 118 S. Ct. 1344 (1998).

[220] *See id.* at 501-02.

[221] *See id.*

[222] *Id.* at 501.

[223] *Id.* at 502.

[224] *See id.* at 510.

[225] *See* 29 C.F.R. § 1630.2(r) (1998).

query as to whether the potential harm was too "remote or speculative" as required by the *EEOC Technical Manual*.[226] The court also did not consider any "objective medical or other factual evidence;"[227] rather, it based its decision solely on the subjective testimony of Palmer's coworkers trying to recall statements that she made on prior occasions. Finally, the court did not satisfactorily consider whether the problem could have been alleviated through "reasonable accommodation."[228]

The facts imply that Palmer only had a confrontation with two other employees.[229] To alleviate this conflict, Palmer's employer tried to accommodate her by transferring her to another facility.[230] Shortly thereafter, Palmer encountered one of these individuals at her new job location by chance, consequently renewing the hostilities that previously existed.[231] The court accepted this fact as evidence sufficient to prove that Palmer's employer could not reasonably accommodate her,[232] presumably because there were no additional locations for her possible reassignment. What the court failed to recognize, however, was that the employer transferred Palmer to this new location because it initially determined that she would be able to avoid contact with the two employees who were the source of her troubles. Therefore, the employer should have been estopped from later arguing that this option was no longer feasible. A far more just course of action would have been for the court to order that a reasonable accommodation required the employer to prohibit these two employees from entering Palmer's new job site, and vice versa.

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[226] *See* EEOC, ASSISTANCE MANUAL, *supra* note 75, § 4.5.

[227] *See id.* This requirement can be satisfied by documentation from a designated health care provider, who is familiar with the disability involved or the individual in question, that the employee is a "direct threat" to others. *See id.* In addition, "[a]n employee's violent, aggressive, destructive or threatening behavior may provide [factual] evidence" sufficient to fulfill this standard. *Id.* Arguably, Palmer's alleged statements could constitute the "threatening behavior" to which the EEOC refers. The more rational position, however, is that words alone are not enough to establish a "direct threat." The court should have inquired into Palmer's past employment and medical records to determine whether these sources of "objective" evidence, in combination with her recent hostile outbursts, caused her to be a "direct threat" to the other employees.

[228] *See* Palmer v. Circuit Court of Cook County, 905 F. Supp. 499, 509-11 (N.D. Ill. 1995), *aff'd*, 117 F.3d 351, 352 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 893, *reh'g denied*, 118 S. Ct. 1344 (1998).

[229] *See id.*

[230] *See id.* at 509.

[231] *See id.*

[232] *See id.*

Based upon these observations, one can infer an inherent bias by the court underlying its assessment of the facts. It is doubtful that the court would have been as quick to judge a non-mentally disabled employee a direct threat to coworkers based on such impassioned statements alone. The *Palmer* court, evaluating the employee's comments in the abstract, overlooked the fact that it is not unusual for individuals to say that they are going to "kill" somebody without truly intending to commit a homicide. If Palmer had been "normal," it seems safe to predict that the court would reasonably have concluded that such statements merely reflected the exasperation of a frustrated employee — not the impending threats of a potentially dangerous individual.

b. Threat to Self

The legislative history of the ADA states quite clearly that Congress intended this section to cover only threats to others.[233] Despite this fact, a noticeable disagreement has arisen among the courts as to whether an employer can avail itself of the "direct threat" defense if the employee poses a threat only to himself or herself. For instance, in *Moses v. American Nonwovens, Inc.*,[234] the court validated this defense in regard to an epileptic employee whose illness, claimed his employer, prevented him from working safely around fast-moving press rollers and conveyor belts.[235]

The courts are not wholly to blame for this confusion. In fact, the problem stems from the EEOC itself, which (for some inexplicable reason) interpreted the ADA's undeniably lucid language[236] as extending to threats of harm to oneself:

> An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable ac-

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[233] *See* H.R. Rep. No. 101-485, pt. 3, at 45-46 (1990), *reprinted in* 1990 U.S.C.C.A.N. 468-69; H.R. Rep. No. 101-485, pt. 2, at 56-57, 73-74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 338-39, 356; S. Rep. No. 101-116, at 27 (1989).

[234] 97 F.3d 446 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997).

[235] *See id.* at 447.

[236] 42 U.S.C. § 12111(3) reads as follows: "The term 'direct threat' means a significant risk to the health or safety of *others* that cannot be eliminated by reasonable accommodation." (emphasis added). How the EEOC interpreted this language to include a risk to oneself remains a mystery. In the appendix to the EEOC regulations, the EEOC conspicuously neglects to cite any statutory authority or legislative history supporting its extrapolation, in stark contrast to the rest of its explanation of the "direct threat" statutory provision. *See* 29 C.F.R. pt. 1630 app. (1998).

> commodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.[237]

Therefore, the official position of the EEOC seems to support *Moses*. Nonetheless, another court determined that the EEOC's interpretation of "direct threat," as including one directed to the individual himself or herself, was untenable.[238] Otherwise, according to this court, it would render meaningless the statutory language: "of other individuals."[239] Additionally, it would conflict with the definitional section of the ADA, which specifically refers to "the health or safety of others."[240] Furthermore, as noted by one commentator, the EEOC's interpretation of the ADA may violate the "*Chevron* doctrine," which stands for the principle that a federal agency's interpretation of an *ambiguous* statute must be accepted unless it is "'arbitrary, capricious, or manifestly contrary to the statute.'"[241] The ADA's definition of "direct threat" as only a "threat to others" is anything but ambiguous. Consequently, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"[242] in applying the concept of "direct threat" to Title I claims.

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[237] 29 C.F.R. pt. 1630 app. In addition to directly contradicting the language of the ADA and its legislative history, this opinion by the EEOC was generated despite the fact that

> [m]any disability rights groups and individuals with disabilities asserted that the definition of direct threat should not include a reference to the health or safety of the individual with a disability. They expressed concern that the reference to 'risk to self' would result in direct threat determinations that are based on negative stereotypes and paternalistic views about what is best for individuals with disabilities.

Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35726, 35730 (1991).

[238] *See* Kohnke v. Delta Airlines, Inc., 932 F. Supp. 1110, 1111 (N.D. Ill. 1996).

[239] *See id.* at 1111-12.

[240] *See id.*; *see also* 42 U.S.C. § 12111(3) (1998) (defining "direct threat").

[241] *See* Guiduli, *supra* note 18, at 1176 n.130 (discussing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

[242] *Chevron*, 467 U.S. at 842-43.

c. Common Aspects of Both "Threat to Others" and "Threat to Self"

Regardless of which type of threat is involved or recognized by the applicable jurisdiction, mere "speculation"[243] or "slightly increased risk"[244] as to any potential threat caused by an employee's disability is not sufficient to constitute a "direct threat" — the risk must be "significant."[245] To summarize, if

> an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.[246]

5. Other Defenses

There are other defenses available to an employer, including those applicable to "religious entities"[247] and one concerning "infectious and communicable diseases."[248] A discussion of these defenses, however, is beyond the scope of this Article.

III. PLAINTIFF-EMPLOYEES SUFFERING FROM BIPOLAR DISORDER, DEPRESSION, AND OTHER MENTAL DISORDERS UNDER TITLE I: ENDING THE LOSING STREAK

In surveying the cases involving mentally disabled employees claiming protection by Title I, one cannot help but notice a common aspect to all these decisions: The employer usually wins.[249] This

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[243] *See* Equal Employment Opportunity Comm'n v. Chrysler Corp., 917 F. Supp. 1164, 1170 (E.D. Mich. 1996); *see also* 29 C.F.R. pt. 1630 app. (1998) ("[S]peculative or remote risk is insufficient.").

[244] *See* 29 C.F.R. pt. 1630 app.

[245] *See id.* "The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm." *Id.*

[246] *Id.*

[247] *See* 42 U.S.C. § 12113(c).

[248] *See id.* § 12113(d).

[249] *See generally* Cody v. Cigna Healthcare of St. Louis, Inc., 139 F.3d 595 (8th Cir. 1998); Equal Employment Opportunity Comm'n v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997); Soileau v. Guilford of Me., Inc., 105 F.3d 12 (1st Cir. 1997); Siemon v. AT&T Corp., 117 F.3d 1173 (10th Cir. 1997); Taylor v. Principal Fin. Group, Inc., 93 F.3d 155 (5th Cir. 1996); Webb v. Mercy Hospital, 102 F.3d 958 (8th Cir. 1996); Miller v. National Cas. Co., 61 F.3d 627 (8th Cir. 1995); O'Neal v. Atlanta Gas and Light Co., 968 F. Supp. 721 (S.D. Ga. 1997); Langford v. County of Cook, 965 F. Supp. 1091 (N.D. Ill. 1997); Leisen v. City of Shelbyville, 968 F. Supp. 409 (S.D. Ind. 1997); Sarko v. Penn-Del Directory Co., 968 F. Supp. 1026 (E.D. Pa. 1997); Jerina v. Richardson Automotive, Inc., 960 F. Supp. 106 (N.D. Tex. 1997); Pouncy v. Vulcan

characteristic is particularly true when the mental impairment is the result of either an employee's bipolar disorder or clinical depression.[250] However, in reaching these decisions, the courts have not always applied a uniform system of analysis.

A. *Judicially Constructed Obstacles Commonly Faced by Mentally Ill Plaintiff-Employees and the Need for Further Guidance from Congress and the EEOC*

Courts commonly justify their decisions against mentally disabled employees in one of six ways. First, courts sometimes find that an employee's disruptive behavior or other misconduct (even with reasonable accommodation) prevents him or her from being able to perform the job's "essential functions."[251] Thus, they are not qualified individuals. Many of these decisions have occurred even in cases in which the employees had medically diagnosed mental disorders.

Second, courts occasionally find that an employee is not disabled because the claimed disability results from difficulties related to a particular supervisor.[252] As noted in *Misek-Falkoff v. International*

Materials Co., 920 F. Supp. 1566 (N.D. Ala. 1996); Fenton v. Pritchard Corp., 926 F. Supp. 1437 (D. Kan. 1996); Motichek v. Buck Kreihs Co., Inc., 958 F. Supp. 266 (E.D. La. 1996); Husowitz v. Runyon, 942 F. Supp. 822 (E.D.N.Y. 1996); Kotlowski v. Eastman Kodak Co., 922 F. Supp. 790 (W.D.N.Y. 1996); McCoy v. Pennsylvania Power and Light Co., 933 F. Supp. 438 (M.D. Pa. 1996); Smith v. Ciba-Geigy Corp., No. H-94-2381, 1996 WL 437458 (S.D. Tex. May 23, 1996); Henry v. Guest Services, Inc., 902 F. Supp. 245 (D.D.C. 1995); Palmer v. Circuit Court of Cook County, 905 F. Supp. 499 (N.D. Ill. 1995); Stola v. Joint Industry Bd., 889 F. Supp. 133 (S.D. N.Y. 1995); Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321 (W.D. Tenn. 1995). *But see* Collins v. Blue Cross Blue Shield of Mich., 916 F. Supp. 638 (E.D. Mich. 1995).

[250] *See Cody*, 139 F.3d at 598 (depression); *Amego*, 110 F.3d at 148-49 (depression); *Soileau*, 105 F.3d at 14 (depression); *Siemon*, 117 F.3d at 1176 (depression); *Taylor*, 93 F.3d at 164 (bipolar disorder); *Webb*, 102 F.3d at 959 (depression); *Miller*, 61 F.3d at 630 (bipolar disorder); *Leisen*, 968 F. Supp. at 416 (depression); *Sarko*, 968 F. Supp. at 1034-35 (depression); *Jerina*, 960 F. Supp. at 109 (depression); *Motichek*, 958 F. Supp. at 269 (depression); *Husowitz*, 942 F. Supp. at 832-33 (bipolar disorder); *Kotlowski*, 922 F. Supp. at 797 (depression); *Henry*, 902 F. Supp. at 251 (depression); *Palmer*, 905 F. Supp. at 506-07 (depression); *Parker*, 875 F. Supp. at 1326 (depression). *But see Collins*, 916 F. Supp. at 642-43 (depression).

[251] *See, e.g., Amego*, 110 F.3d at 147-48 (employee's depression caused her to be unqualified to perform essential job function of administering and monitoring residents' medication); *Kotlowski*, 922 F. Supp. at 798 (employee's depression, which caused her to be unable to arrive at work on time, prevented her from being able to perform her job's essential functions); *Palmer*, 905 F. Supp. at 508-09 (employee with depression who repeatedly made abusive comments to other workers could not perform her job's essential functions).

[252] *See, e.g.*, Weiler v. Household Fin. Corp., No. 93 C 6454, 1995 WL 452977, at *5 (N.D. Ill. July 27, 1995).

Business Machines, Co.,[253] "it is certainly 'a job-related requirement' that an employee, handicapped or not, be able to get along with co-workers and supervisors."[254] Decisions such as *Misek-Falkoff* have been made despite the EEOC's guidance that interacting with others is a major life activity.[255] Nonetheless, a person "is not substantially limited just because [he or she] is irritable or has some trouble getting along with a supervisor or coworker."[256] Also, a noticeable discrepancy in the case law — possibly indicating a judicial bias against mental illnesses — is apparent when one compares these illustrative cases with *Gilday v. Mecosta County*[257] and *Palmer v. Circuit Court of Cook County*.[258]

In *Gilday*, the court found that an employee with diabetes who was having trouble getting along with others might be substantially limited in the major life activity of working because most jobs require the ability to get along with others.[259] Consequently, the courts in *Weiler*[260] and *Gilday*, faced with similar sets of circumstances, reached opposite conclusions as to this issue.

In *Palmer*, Judge Posner, writing the opinion for the Seventh Circuit, concluded that "if a personality conflict triggers a serious mental illness that is in turn disabling, the fact that the trigger was not itself a disabling illness is no defense. Schizophrenia and other psychoses are frequently triggered by minor accidents or other sources of normal stress."[261] Depression and bipolar disorder can similarly be triggered by these same factors.[262] Moreover, one commentator opines that "the very few psychiatric disability cases that survive motions to dismiss or for summary judgment are cases in which the disability either clearly does not arise from the work environment at all or arises from some physical and non-personal aspect of the employment."[263]

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[253] 854 F. Supp. 215 (S.D.N.Y. 1994).

[254] *Id.* at 227.

[255] *See, e.g., Soileau*, 105 F.3d at 15; Emberger v. Deluxe Check Printers, 1997 WL 677149, at *5 (E.D. Pa. Oct. 30, 1997); Breiland v. Advance Circuits, Inc., 976 F. Supp. 858, 863 (D. Minn. 1997); *see also* EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 5.

[256] EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 5 n.15.

[257] 124 F.3d 760 (6th Cir. 1997).

[258] 117 F.3d 351 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 893, *reh'g denied*, 118 S. Ct. 1344 (1998).

[259] *See Gilday*, 124 F.3d at 765.

[260] *See supra* note 252 and accompanying text.

[261] *Palmer*, 117 F.3d at 352.

[262] *See* Stefan, *supra* note 8, at 814 n.125 (1998).

[263] *Id.* at 814-15.

Third, tribunals also hold that the ability to withstand a stressful work environment is an "essential function" of the job. Therefore, an employee lacking this ability is not a qualified individual with a disability.[264]

Fourth, courts either refuse to consider, or flatly reject, the employee's proposed reasonable accommodation.[265]

Fifth, courts often find that many mental illnesses are "hidden." Although an employer cannot terminate an employee "solely" because of his or her disability, an employer can terminate an employee whose unknown illness manifests itself in objectionable job conduct. In such circumstances, it would be unreasonable to expect an employer to have "known" of the employee's disability.[266] If an employer is unaware that the employee has a disability, it can easily argue that it terminated an employee for non-discriminatory reasons. For instance, even if an employee with a mental disability, such as bipolar disorder, can perform the essential functions of a job, the employer can terminate him or her for consistently unacceptable behavior that stems from the mental disability — a disability unknown to the employer.[267] The employer was not aware of the disability; therefore, it could not have been the "sole" reason for terminating the employee.[268]

Many commentators who have written articles concerning mentally disabled employees and the ADA discuss how mental disabilities, in contrast to their physical counterparts, are often "hidden."[269] In

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[264] *See, e.g.*, Mundo v. Sanus Health Plan of Greater N.Y., 966 F. Supp. 171, 173 (E.D.N.Y. 1997) ("[A]n inability to tolerate stressful situations is not an impairment for purposes of the ADA."); Dewitt v. Carsten, 941 F. Supp. 1232, 1236 (N.D. Ga. 1996), *aff'd mem.*, 122 F.3d 1079 (11th Cir. 1997) (finding that stress caused by only one job does not constitute a disability). Courts usually deliver these decisions couched in the framework of generalizations and do not examine the underlying causes of the stress on an individualized basis, in contravention of the ADA's requirements. *See* Stefan, *supra* note 8, at 805. Consequently, they fail to address whether the particular "stressor" is essential to the employee's job. *See id.*

[265] *See, e.g.*, Lewis v. Zilog, Inc., 908 F. Supp. 931 (N.D. Ga. 1995). In *Lewis*, an employee suffering from bipolar disorder requested a transfer to one of her employer's other offices. *See id.* at 941. After reviewing this request for a reasonable accommodation, the court ruled that the "transfer [was] unreasonable as a matter of law." *Id.* at 946. In the court's opinion, even with a transfer, the employee would have been unable to maintain a regular level of attendance at work. *See id.*

[266] *See* Landefeld v. Marion Gen. Hosp., Inc., 994 F.2d 1178, 1181 (6th Cir. 1993).

[267] *See id.*; *see also* Mary E. Sharp, Note, *The Hidden Disability that Finds Protection Under the Americans with Disabilities Act: Employing the Mentally Impaired*, 12 GA. ST. U. L. REV. 899, 916 (1996).

[268] *See Landefeld*, 944 F.2d at 1181.

[269] *See, e.g.*, Guiduli, *supra* note 18, at 1157-58; ZUCKERMAN ET AL., *supra* note 18, at 22; Paul F. Mickey & Maryelena Pardo, *Dealing with Mental Disabilities Under the ADA*,

other words, they claim that mental illnesses usually do not have overt manifestations. However, the author of this Article is dubious of such generalizations, particularly when considering the more severe mental illnesses such as bipolar disorder, schizophrenia, and major depression. Anyone who has observed a delusional or paranoid schizophrenic would likely scoff at the notion that such a mental disorder is in any way inconspicuous. In contrast, the real problem with mental disorders, when compared to physical disabilities, is that the former are often much more difficult to diagnose.[270] Simply because a mental illness is more difficult to diagnose, however, does not necessarily imply that it is elusive. Mental health professionals may not agree upon — or even know — the correct label for a patient presenting a particular set of symptoms. Nonetheless, when somebody is suffering from a severe mental illness such as schizophrenia, it should be apparent that the individual is suffering from *some* mental disorder, albeit one that might not lend itself to easy diagnosis. Despite this fact, at least one court has determined that unless an employer has been put on notice by an employee, it is not required to determine "whether . . . [the] behavior was the product of a mental disorder."[271]

Sixth, courts are often all too eager to accept an employer's statutorily sanctioned defenses that a mentally disabled employee either posed a direct threat to the safety of others in the workplace[272] or that accommodating the employee would create an undue hardship.[273]

In addition to these six judicially constructed barriers faced by all mentally disabled employees, those suffering from bipolar disorder or depression must surmount two additional obstacles. First, because these two mental illnesses often undergo periods of remission, such individuals may have trouble overcoming precedent holding that intermittent and episodic conditions are not impairments for purposes of Title I, particularly if the jurisdiction does not give much credence to the EEOC guidelines on this subject.[274] Second, because of the seriousness of these two mental illnesses, individuals afflicted with them will find it difficult to argue successfully that they are "qualified individual[s] with a disability." In other words, the manifestations of these disorders might be so pervasive that no reasonable

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9 LAB. LAW. 531, 533 (1993).

[270] *See* Guiduli, *supra* note 18, at 1157-58.

[271] Stola v. Joint Indus. Bd., 889 F. Supp. 133, 136 (S.D.N.Y. 1995).

[272] *See supra* Part II.D.4.a.

[273] *See supra* Parts II.D.2., 3.

[274] *See supra* Part II.B.1.

accommodation would enable the individuals to perform their jobs' essential functions. Also, the side effects of medication used to treat these diseases could likewise impede the ability to carry out job-related functions.[275]

Even though the growing body of Title I case law weighs heavily against employees suffering from bipolar disorder or depression, it is the ADA and the EEOC regulations themselves that are these individuals' primary adversaries. The problem is twofold. First, employers are uncertain of when their obligations under these two bodies of law are called into action. Second, employees cannot be sure if anything less than telling an employer outright that they have a mental disorder will suffice for protection. In addition, many employees choose to conceal their mental illness, hoping that they can manage to perform their jobs adequately. They are concerned that, if they disclose their illness, they will be providing their employers with an easy means by which to justify their subsequent termination, i.e., that they cannot perform their jobs' "essential functions."

Ironically, this confusion and skepticism expressed by employers and employees alike is a byproduct of the legislative and administrative intent behind the ADA and the EEOC regulations, respectively. Both bodies of law are purposefully vague in order to permit "flexibility."[276] However, at least in regard to the persistent quandary faced by employers and employees as to what constitutes a mental impairment (not to mention what constitutes a mental disability), this intent seems less justified given the recent advances made within the mental health profession to achieve uniformity in diagnosing mental illnesses.[277] More specificity from either Congress or the EEOC would also help to eliminate malingering by persons Congress never intended to be afforded Title I protection. Two commentators, Mika and Wimbiscus, suggest as a possible remedy that an employee claiming to have a mental disability be required to supply his or her employer with a documented diagnosis by a mental health professional, which, most importantly, includes proposed accommodations for that employee.[278] There are two benefits to this proposal. First, it would enable courts to dismiss suits in which the employee asserts an undiagnosed ailment while employed and then attempts

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[275] *See supra* Part I.A. (discussing medication side effects).

[276] *See* H.R. REP. NO. 101-485, pt. 3, at 41 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 464.

[277] *See supra* Part I.A. (discussing the *DSM*).

[278] *See* Mika & Wimbiscus, *supra* note 21, at 190; *see also* EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 23.

medical validation after termination.[279] Second, it would eliminate the need for employers to guess as to what are the appropriate measures necessary to rectify an employee's disruptive behavior.[280]

Although the commentators' proposal offers obvious benefits, it carries with it several problems as well. First, it places the entire burden on the employee, which may be particularly inequitable when considering the vulnerable and fragile state of many individuals with mental disorders. Moreover, as discussed above,[281] one of the reasons employees choose not to disclose their mental disorder is the stigma that society still attaches to these types of medical conditions.[282] Second, the proposal presumes that employees are sufficiently cognizant of the fact that they have a mental illness and, as a result, seek medical treatment. In contrast, persons suffering from depression or bipolar disorder are not necessarily the first to realize they have a condition that requires medical attention, partly because the onset of the symptoms may be gradual. Moreover, individuals afflicted with more serious psychoses (such as delusional schizophrenia) might have such a distorted perception of reality that they will never fully comprehend the nature of their mental illness, even after seeking medical treatment.[283]

Mika and Wimbiscus also point out the "Catch-22" faced by employers: On the one hand, an employer violates the ADA if it fails to make reasonable accommodation for an employee whom it "knows" has a disability. On the other hand, an employer is prohibited from inquiring as to such disabilities.[284] To remedy this situation, they suggest that "the statute should be amended to absolve an employer

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[279] *See* Mika & Wimbiscus, *supra* note 21, at 190.

[280] *See id.*

[281] *See supra* note 46.

[282] The results of one study ranked attitudes about disabilities from least stigmatized to most stigmatized as follows: ulcers, arthritis, asthma, diabetes, heart disease, amputation, blindness, deafness, stroke, cancer, old age, paraplegia, epilepsy, dwarfism, cerebral palsy, hunchback, tuberculosis, criminal record, mental retardation, alcoholism, mental illness. *See* John L. Tringo, *The Hierarchy of Preference Toward Disability Groups*, 4 J. SPECIAL EDUC. 295 (1970) (cited by Miller, *supra* note 5, at 705) (presumably, "criminal record" was included as a reference point). Miller points out that "[a]cceptance of people with major mental disorders may pose the greatest challenge to the ADA's nondiscrimination mandate." Miller, *supra* note 5, at 705 n.28. This attitude is in stark contrast to the empathy most persons naturally express toward persons with physical disabilities, such as deafness, blindness, or an amputation. Consequently, social attitudes toward the mentally disabled must change before the remedies sought by the ADA can be fully realized. *See id.*

[283] *See supra*, notes 269-71 and accompanying text (discussing the position of some commentators that such mental illnesses are often "hidden").

[284] *See* Mika & Wimbiscus, *supra* note 21, at 190.

from liability for asking about a disability, or should more clearly apprise the employer when it is obligated to inquire whether an individual requires an accommodation."[285] A less complicated answer, however, would be for the EEOC simply to define the term "known" as that word is to be applied in section 1630.9(a) of its regulations.[286]

B. Reformulating the Legal Strategy of Plaintiff-Employees with Bipolar Disorder or Depression

Changes to the statute and the EEOC regulations, however, are not the only possible mechanisms by which to ensure that Title I's protections are fully extended to individuals with bipolar disorder and depression, as Congress intended. The author has emphasized throughout this Article that, even under the law as it currently exists, future plaintiff-employees can restructure their legal strategy in order to obtain better results when litigating Title I claims.

First, as was discussed in Part II.B.2., most employees bringing these claims argue that they are substantially limited in the major life activity of working. The EEOC regulations and guidelines, however, make it clear that working is only to be considered as a major life activity if none of the other enumerated activities are substantially limited by the employee's impairment. In this regard, the EEOC has stated:

> Most of the discussion and analysis of the concept of substantial limitation has focused on its meaning as applied to the major life activity of working. This is largely because there has been little dispute about what is meant by such terms as "breathing," "walking," "hearing," or "seeing" but much dispute about what is meant by the term "working." Consequently, the determination of whether a person's impairment is substantially limiting should first address major life activities other than working. If it is clear that a person's impairment substantially limits a major life activity other than working, then one need not determine whether the impairment substantially limits the person's ability to work. On the other hand, if an impairment does not substantially limit any of the other major life activities, then one must determine whether the person is substantially limited in working.[287]

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[285] *Id.* One of the reasons for this proposal, according to the commentators, is that "mental disabilities are rarely obvious . . . ." *Id.* The author of this Article disagrees with this generalization. Some of the behavioral manifestations of the more common mental disorders (i.e., depression, alcoholism, and schizophrenia) are anything but elusive. *See also supra* notes 269-71.

[286] *See* 29 C.F.R. § 1630.9(a) (1998).

[287] EEOC, ASSISTANCE MANUAL, *supra* note 75, § 902.4(c) (citations omitted); *see*

In other words, an employee should rely on working as a major life activity only as a last resort. This is sound advice from the EEOC, considering that, in addition to the somewhat uncertain definition of "working," it is comparatively difficult to prove that this activity is substantially limited.[288] Regrettably, most plaintiffs suffering from bipolar disorder or depression have failed to heed this advice from the EEOC, choosing instead to focus their litigation on this one major life activity — much to their peril.[289] Such an approach is unwise for several reasons, most notable of which is that the EEOC *Compliance Manual* states: "Mental and emotional processes such as thinking, concentrating, and interacting with others are other examples of major life activities."[290] Undoubtedly, an individual suffering from depression or bipolar disorder, particularly without the benefit of medication, will be substantially limited in the major life activities of either "thinking" or "concentrating," and possibly both.[291] Additionally, the EEOC considers "sleeping" to be a major life activity[292] — an activity that is disrupted by both depression and the depressive episodes of bipolar disorder.[293] Consequently, employees with bipolar disorder or depression should reevaluate their choice of major life activities with this thought in mind. Selecting a major life activity that

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also EEOC, ASSISTANCE MANUAL, *supra* note 75, § 2.2(a)(iii).

[288] *See supra* Part II.B.2. (discussing the factors to be considered in determining whether an employee is substantially limited in the major life activity of working).

[289] *Bacon v. Great Plains Mfg., Inc.*, 958 F. Supp. 523 (D. Kan. 1997), is one example. In *Bacon*, the employee apparently left it to the court to decide what major life activity was substantially limited by his depression. Consequently, to Bacon's detriment, the court focused on the major life activity of working. *See id.* at 530. Also, the court only cursorily addressed the other major life activities listed in the EEOC regulations (i.e., walking, seeing, hearing, speaking, breathing, and learning), concluding that none of these activities was substantially impaired by Bacon's depression. *See id.* at 528, 529. Noticeably absent from the court's discussion are the other major life activities listed in the appendix to the EEOC regulations (i.e., sitting, standing, lifting, and reaching) and the *EEOC Enforcement Guidance* (i.e., interacting with others, concentrating, and sleeping). *See* 29 C.F.R. pt. 1630 app.; EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 10-12. (Admittedly, this last source of guidance was not published until after *Bacon* was decided. Nonetheless, recall that the list of major life activities found in the EEOC regulations was not meant to be exhaustive, such that the *Bacon* court could have considered these other activities.) The facts disclose that Bacon's mental illness was causing him to have marital and other family problems as well as persistent difficulty in getting along with coworkers. *See id.* at 526-28. If Bacon had emphasized these problems, he possibly would have been more successful in arguing that he had a "disability" under the first prong of that term's definition. *See supra* Part II.B.

[290] EEOC, ASSISTANCE MANUAL, *supra* note 75, § 902.3(b); *see also* EEOC, ENFORCEMENT GUIDANCE, *supra* note 23, at 10-12.

[291] *See supra* Part I.A. (discussing the symptoms of these two mental disorders).

[292] *See supra* note 101.

[293] *See supra* Part I.A. (discussing the symptoms of these two mental disorders).

is medically recognized as being hindered by both of these mental illnesses (i.e., sleeping, thinking, or concentrating) should enable future plaintiff-employees to achieve more successful results under the ADA.

Second, employees suffering from bipolar disorder or depression should make better use of the third prong of the definition of disability, i.e., that their employers "regard" or "perceive" them as having a disability.[294] All too often, employees take the more difficult route, from an evidentiary perspective, of trying to prove that they are actually disabled. In contrast, it is much easier to prove that an employer regarded an employee as disabled because this prong of the definition targets the myths and prejudices that the ADA sought to eradicate — yet that still prevail in society today. For instance, the EEOC gives an example in which an employee seeks counseling from a psychologist for a condition that does not constitute a disability under the ADA.[295] Upon learning of her consultation, the employer terminates her under a false pretext, believing "that anyone who sees or has seen a psychologist 'must be crazy.'"[296] Therefore, according to the EEOC, the employee "is covered by the third part of the definition of 'disability,' because she is being treated by her employer as though she has a substantially limiting impairment although, in fact, she does not."[297] Although not indicated by the EEOC example, the one potential problem with this course of action is proving an employer's true motivation in firing a specific employee. However, persons with deeply rooted prejudices such as these seldom keep their opinions to themselves. Thus, it may just be a question of either finding a sympathetic coworker who is willing to testify against the employer or locating a "smoking gun," such as an internal memorandum or document in a personnel file memorializing the employer's discriminatory actions.

Third, employers often raise the defense that an employee's mental disability was not "known" to them and therefore they were not required to accommodate the disability. However, as discussed in Part II.D.1., the employee suffering from bipolar disorder or major depression should make a "constructive knowledge" argument when confronted with this defense. These two mental illnesses, as well as the other severe mental disorders, manifest themselves with such obvious signs that employers cannot in good faith claim they did

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[294] *See supra* notes 105-08 and accompanying text.

[295] *See* EEOC, ASSISTANCE MANUAL, *supra* note 75, § 902.8 (Example 2).

[296] *Id.*

[297] *Id.*

not know that an employee suffering from one of these diseases was burdened with a "mental limitation."[298]

Fourth, when employers submit a defense that an employee with bipolar disorder or depression is a "threat to others" in the workplace, the employee should first objectively determine whether there is a basis for such a claim, i.e., does he or she have a history of threatening coworkers or a medically documented propensity toward violence.[299] Even if there is such a record, the employee might try to argue, through the use of expert witnesses, that current therapeutic interventions (e.g., medication) can successfully prevent this past behavior from reoccurring. Thus, the employee has the "present ability to safely perform the essential functions of the job" and, consequently, the employer's defense is unsubstantiated.[300]

Fifth, if an employer propounds the related defense that an employee with bipolar disorder or depression was a threat to himself or herself, the employee should raise a constitutional argument under the *Chevron* doctrine.[301] The EEOC's institutionalization of this defense is arguably at odds with Supreme Court precedent dictating the scope of federal agencies' authority to interpret statutes.

Sixth, these employees should more aggressively challenge the defense often argued by their employers that accommodating their disabilities would cause an "undue hardship." Other than the few instances in which the safety of other employees is a genuine concern, employers are primarily wary of the expense such accommodations may impose upon them.[302] However, a study conducted by the Department of Labor found that most reasonable accommodations for mentally disabled employees would cost little.[303] Specifically, the study determined that fifty percent of the accommodations for men-

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[298] *See* 29 C.F.R. § 1630.9(a) (1998); *see also supra* note 170.

[299] See 29 C.F.R. § 1630.2(r).

[300] *Id.*

[301] *See supra* Part II.D.4.b.

[302] One commentator has opined that an inherent problem with the undue hardship defense is that "[a]ttitudes about the cost-effectiveness of accommodations by employers . . . often have more to do with unfounded beliefs than with the actual qualifications of persons with disabilities or their ability to add to employers' economic value." Blanck, *supra* note 136, at 897; *see also id.* at 897 n.100 & 899 n.111 (citing studies supporting the author's position). Consequently, courts will need to examine carefully this defense on a case-by-case basis to ensure that employers really are confronted with an "undue hardship" as Congress originally envisioned that term's definition.

[303] *See* Haggard, *supra* note 6, at 369. Note that this study was conducted as to accommodations provided pursuant to the Rehabilitation Act, not the ADA. Nonetheless, the accommodations provided under the earlier statute would be very similar to those required by the ADA.

tally ill employees cost nothing and only twenty-two percent cost more than $500.[304] A criticism of this study is that it neglected to consider the prolonged leaves of absences that might be required of employees with mental disorders.[305] This criticism was particularly directed at mood disorders such as depression and bipolar disorder. As such, this criticism may no longer be valid for several reasons. First, there are many medications available that control the "peaks" and "troughs" experienced by individuals with bipolar disorder and the malaise endured by those who suffer from depression.[306] Second, with the increasing penetration (or "infestation," depending upon one's perspective) of managed care, there is an increased emphasis on outpatient treatment to control escalating health care costs — including those for treating the mentally ill. Therefore, prolonged hospitalization is quickly becoming a characteristic of a foregone era.

IV. CONCLUSION

As the title of this Article suggests, employees with bipolar disorder or depression continue to wage an uphill battle for protection under Title I of the ADA. This unfortunate situation emanates partly from a lack of clear guidance from either Congress or the EEOC. Additionally, the pervasiveness in society of the myths and prejudices surrounding mental illness have undoubtedly infiltrated the courts as well, impermissibly swaying judicial decisions in favor of employers. However, Congress, the EEOC, and the judiciary are not wholly to blame for plaintiff-employees' lack of success in litigating Title I claims. Much of this problem can be negated by future plaintiffs implementing the legal strategies discussed in Part III.B. Nonetheless, as seen in the aftermath of other governmentally imposed anti-discrimination measures, no innovative legal tactics or procession of victorious lawsuits are likely to reshape society's attitudes toward the mentally ill. Consequently, the unfortunate reality is that mentally disabled employees will never realize the equal treatment that was

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[304] *See id.* Additionally, a more recent study of the ADA found that nine percent of *all* accommodations made under that statute ranged from $2,001 to $5,000 while another five percent cost employers more than $5,000. *See* Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 394 (1995). This study apparently did not attempt to distinguish between accommodations provided to mentally disabled employees and those provided to the physically disabled. Therefore, its validity in specifically predicting the costs likely to be incurred by employers accommodating mentally disabled employees pursuant to the ADA is questionable.

[305] *See* Haggard, *supra* note 6, at 369.

[306] *See supra* Part I.A. (discussing of the treatment of these two disorders).

Congress's goal in enacting the ADA until labels like "mental illness" and "mentally ill" no longer carry a stigma.[307]

[307] *See supra* notes 46, 282.