

# Burning the Candle at Both Ends, and There Is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness

Michelle Parikh

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## NOTE

### BURNING THE CANDLE AT BOTH ENDS, AND THERE IS NOTHING LEFT FOR PROOF: THE AMERICANS WITH DISABILITIES ACT'S DISSERVICE TO PERSONS WITH MENTAL ILLNESS

*Michelle Parikh*†

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## INTRODUCTION

In 1990, during the first Bush administration, Congress enacted the Americans with Disabilities Act (ADA).<sup>1</sup> The ADA aims to combat the vastly unaddressed, yet pervasive and prevalent, problem of discrimination against individuals with disabilities in America.<sup>2</sup> The ADA targets discrimination in a broad range of areas, including housing, public transportation, recreation, and employment.<sup>3</sup> In the realm of employment, the ADA affords persons within its reach legal protection against discrimination by a covered entity<sup>4</sup> with regard to job application procedures, hiring, advancement, discharge, compensation, and the like.<sup>5</sup>

When Congress enacted the ADA, many heralded the statute as a breakthrough for individuals with disabilities,<sup>6</sup> an aspiration that has become only a partial reality. While the ADA has succeeded in implementing change for many disabled individuals, particularly those individuals suffering from obvious physical limitations that can be easily accommodated in the workplace,<sup>7</sup> it has been less successful in assist-

<sup>1</sup> 42 U.S.C. §§ 12101–12213 (2000).

<sup>2</sup> *Id.* § 12101.

<sup>3</sup> *Id.* § 12101(a)(3).

<sup>4</sup> *Id.* § 12111(2). The ADA defines a “covered entity” as “an employer, employment agency, labor organization, or joint labor-management committee.” *Id.*

<sup>5</sup> *Id.* § 12112(a). An individual who attempts to sustain a discrimination claim against the employer is required to show, in addition to disability status and qualified individual status, that her employer subjected her to discrimination as a result of her disability. *Id.*; Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999); Poindexter v. Atchison, 168 F.3d 1228, 1230 (10th Cir. 1999). See *infra* Part I.A (explaining disability and qualified individual status).

<sup>6</sup> See William C. Smith, *Drawing Boundaries*, A.B.A. J., Aug. 2002, at 49, 53 (quoting the first President Bush, upon signing the ADA into law, as saying that the ADA signaled a new time where “every man, woman, and child with a disability can [ ] pass through once closed doors into a bright new era of equality, independence and freedom.”) (internal quotation marks omitted). See also Laura Lee Hall, *Making the ADA Work for People with Psychiatric Disabilities*, in MENTAL DISORDER, WORK DISABILITY, AND THE LAW 241, 241 (Richard J. Bonnie & John Monahan eds., 1997) [hereinafter MENTAL DISORDER] (“Disability rights advocates celebrated its passage, hailing it as the most sweeping mandate ever invoked against discrimination directed at people with disabilities.”).

<sup>7</sup> As an example, a wheelchair bound individual, for whom a wheelchair ramp would clearly be a reasonable accommodation, would easily fall under the protection of the Act,

ing individuals who suffer from more complicated illnesses that do not fit comfortably within the Act's narrow boundaries.<sup>8</sup>

This failure is nowhere more cogent, and hence, nowhere more difficult, than with respect to individuals with mental illness who attempt to gain shelter from discrimination under the ADA. Despite the fact that mentally ill individuals are explicitly listed among those who could potentially gain coverage under the Act,<sup>9</sup> the drafters clearly created the ADA without giving much thought to its impact on the mentally ill population.<sup>10</sup>

There is considerable debate as to how to remedy the injustice done by the Act. Some advocates support a broader reading of the ADA's requirements or an amendment to the statute as viable remedies to correct the current exclusion of the mentally ill under the ADA.<sup>11</sup> In light of the numerous problems arising under the ADA when dealing with claims from mentally ill plaintiffs, however, it may be more effective to start anew.

The problem mentally ill plaintiffs face under the ADA is twofold. First, mentally ill individuals have always faced considerable diffi-

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and therefore be entitled to the reasonable accommodation from her employer. See 42 U.S.C. §§ 12111(8), (9)(A).

<sup>8</sup> See Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 109 (1997) ("[W]hat was once touted as the most comprehensive civil rights legislation passed by Congress since the 1964 Civil Rights Act[ ] has become increasingly narrowed to the point where it is in danger of becoming ineffective.") (internal quotation marks omitted).

<sup>9</sup> 42 U.S.C. § 12102(2)(A) (defining disability with respect to an individual to encompass a physical or mental impairment that substantially limits one or more of the individual's major life activities).

<sup>10</sup> See Randal I. Goldstein, Note, *Mental Illness in the Workplace After Sutton v. United Air Lines*, 86 CORNELL L. REV. 927, 942 n.123 (2001). The author explains that a survey of the legislative history reveals that Congress and the experts involved in the congressional debates preceding the ADA's enactment primarily considered the plight of physically impaired individuals. The author further states that the effect of Congress's lack of consideration of mentally ill individuals is obvious in the Act itself, as § 12102(2)(A), which enumerates suggestions for possible reasonable accommodations, excludes any reference to an accommodation specifically tailored to the needs of a mentally disabled individual. *Id.*

<sup>11</sup> See, e.g., Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 572-84 (1997) (discussing alternative remedies, such as the inclusion of temporary disabilities, or the recognition of an individual's ability to pursue both disability benefits and nondiscrimination rights); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 318-19 (2000) (proposing an amendment to "discard the 'substantial limitation in major life activity' prong in . . . employment discrimination cases"); Goldstein, *supra* note 10, at 972-73 (also urging removal of "major life activity" prong). The above authors suggest that a shift in statutory language or litigation strategy would suffice to correct the mistakes of the ADA. See, e.g., *id.* at 972-73. However, this Note suggests that the problems mentally ill individuals face under the ADA are a reflection of a larger societal ambivalence toward the mentally ill, and as such, argues that action more drastic than a statutory amendment for the mentally ill is necessary to truly achieve parity.

culty<sup>12</sup> meeting the competing requirements of the ADA—disability status and qualified individual with a disability status<sup>13</sup>—but after the Supreme Court further specified the requirements needed to establish disability in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>14</sup> the challenge is practically insurmountable.<sup>15</sup> Proving that one is affected by her illness seriously enough to be considered disabled under the ADA definition, but not so disabled that she is unqualified for the position, impels the plaintiff to “burn the candle at both ends.” Essentially, mentally ill individuals defeat their own claims by asserting that they are sufficiently qualified for their position, but nonetheless simultaneously suffer from a condition pervasive enough to be considered a statutorily acceptable disability. Consequently, most, if not all, of the ADA claims brought by mentally ill plaintiffs who attempt to gain protection have failed in the past, and will likely continue to do so in the future.<sup>16</sup>

Second, mentally ill plaintiffs face a clear proof problem under the ADA. Because physicians almost always diagnose mental illness

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<sup>12</sup> See *infra* Part III; see, e.g., *Emerson v. N. States Power Co.*, 256 F.3d 506, 509 (7th Cir. 2001) (panic attacks); *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 255 (1st Cir. 2001) (bipolar disorder); *Tyler v. Ispat Inland Inc.*, 245 F.3d 969 (7th Cir. 2001) (depression); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1250–51 (10th Cir. 2001) (depression and obsessive compulsive disorder (OCD)); *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1085 (9th Cir. 2001) (post-traumatic stress disorder and depression); *Smoke v. Wal-Mart Stores, Inc.*, No. 98-1370, 2000 WL 192806 (10th Cir. Feb. 17, 2000) (severe depression); *Krocka v. City of Chicago*, 203 F.3d 507, 511 (7th Cir. 2000) (same); *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1057 (7th Cir. 2000) (depression); *Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 725 (8th Cir. 1999) (depression); *Shiplett v. Nat'l R.R. Passenger Corp.*, No. 97-2056, 1999 WL 435169 (6th Cir. June 17, 1999) (anxiety and panic attacks); *Evans v. Magna Group*, No. 98-3125, 1999 WL 402401 (7th Cir. June 11, 1999) (OCD).

<sup>13</sup> See 42 U.S.C. §§ 12102(2), 12111(8); *infra* Part IV.

<sup>14</sup> 534 U.S. 184 (2002). In *Toyota*, the Court held that in identifying a major life activity that has been affected by the alleged disability—one of the three requirements necessary to achieve disability status—the plaintiff must identify an activity that is of “central importance to daily life.” *Id.* at 197. See also *infra* Part II.C, D (discussing *Toyota* and its likely impact on mentally ill plaintiffs).

<sup>15</sup> See discussion *infra* Part IV; see, e.g., *Hill v. Metro. Gov't of Nashville*, No. 02-5305, 2002 WL 31863829 (6th Cir. Dec. 17, 2002) (bipolar disorder and chronic fatigue syndrome); *Ogborn v. United Food and Commercial Workers Union Local No. 881*, 305 F.3d 763, 766–67 (7th Cir. 2002) (major depression); *Cartwright v. Lockheed Martin Util. Servs., Inc.*, No. 00-6671, 2002 WL 1461753 (6th Cir. Jul. 3, 2002) (depression); *Carroll v. Xerox Corp.*, 294 F.3d 231, 235, 238 (1st Cir. 2002) (extreme stress); *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 848–50 (8th Cir. 2002) (depression and phobia); *Boerst v. Gen. Mills Operations, Inc.*, No. 00-3281, 2002 WL 59637 (6th Cir. Jan. 15, 2002) (anxiety disorder); *Hawana v. City of New York*, 230 F. Supp. 2d 518, 521, 531 (S.D.N.Y. 2002) (severe depression and panic disorder); *Grillasca-Pietri v. Portorican Am. Broad. Co., Inc.*, 233 F. Supp. 2d 258, 260–62 (D.P.R. 2002) (identifiable stress disorder); *Whitlock v. Mac-Gray, Inc.*, No. Civ. A. 00-10546-GAO, 2002 WL 31432688 (D.Mass. Oct. 30, 2002) (attention deficit hyperactivity disorder (ADHD)); *Pouliot v. Town of Fairfield*, 226 F. Supp. 2d 233, 238, 241–42 (D. Me. 2002) (bipolar disorder).

<sup>16</sup> See *supra* notes 12, 15 and accompanying text.

based on symptoms<sup>17</sup> to which only the individual who experiences them can really attest, mentally ill plaintiffs will necessarily base all three of the requirements needed to obtain disability status<sup>18</sup> upon self-reporting. The fact that mental illness is “hidden” from others in this fashion makes it difficult for these plaintiffs to establish adequate proof of the existence of a disability under the ADA.<sup>19</sup> Courts often find contradictory statements in a plaintiff’s self-reporting, as the individual tries simultaneously to fit herself into the both the “qualified” and “disabled” constructions under the ADA, and as a result, find her claims lacking in credibility.<sup>20</sup> Additionally, as mental illness is a deviation from “normal” mental and emotional functioning,<sup>21</sup> there exists a larger societal distrust of invisible impairments and an unwillingness to treat such impairments as true disabilities.<sup>22</sup>

This Note examines the ways in which the ADA disserves mentally ill plaintiffs who are equally vulnerable, and thus equally deserving of protection from discrimination, as physically impaired individuals. Part I examines the legislative purpose of the Act as well as the text of the ADA itself, focusing most closely on the definition of disability as set forth in the statute, as this definition is often the largest hurdle for mentally ill plaintiffs. Because the Supreme Court has not yet decided an ADA case involving a mentally ill plaintiff in the employment context, Part II examines the significant Supreme Court case law that has refined and fleshed out the ADA’s definition of disability with respect to non-mentally ill plaintiffs. This Part emphasizes the definition of disability launched in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>23</sup> the most recent Supreme Court case to address the disability definition. The examination of the Supreme Court’s decisions conducted in Part II reveals the Court’s restrictive and narrow reading of the disability definition, and explores the impact such a narrow interpretation of disability will likely have on mentally ill plaintiffs attempting to gain the protection of the ADA. In light of the potentially problematic issues the disability definition raises for plaintiffs, Part III

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<sup>17</sup> See Stephanie Proctor Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701, 725 (1997) (“Psychiatric disabilities are diagnosed not on the basis of physiological tests or symptoms, but on the basis of behavior.”).

<sup>18</sup> See *infra* Parts I.A.1, II.

<sup>19</sup> See *infra* Part IV.A.2.

<sup>20</sup> See *id.*

<sup>21</sup> See Kathleen D. Zylan, Comment, *Legislation That Drives Us Crazy: An Overview of “Mental Disability” Under the Americans with Disabilities Act*, 31 CUMB. L. REV. 79, 85 (2000) (“The basic problem inherent in defining a mental disorder is that the primary criteria for determining whether a mental disorder exists requires a judgment about the degree to which a behavior deviates from the norm.”).

<sup>22</sup> See *infra* Part V.

<sup>23</sup> 534 U.S. 184 (2002).

examines the purpose of the disability requirement, as well as the ways in which the unique nature of mental illness is ill-suited to fit within the confines of disability status under the ADA. Part IV examines the distinctive nature of the mentally ill plaintiff in the courtroom, and explores the difficulties these individuals face in meeting the dual requirements of disability as well as qualified individual status on both a conceptual and practical level. Part V considers the larger societal view of mental illness that is reflected in mentally ill plaintiffs' outcomes in suits under the ADA. This Part identifies the societal ambivalence that leads to negative results for mentally ill plaintiffs and looks to sources outside the ADA, both in litigation strategy and beyond, to aid in incorporating mentally ill individuals with disabilities into the mainstream of society and into America's workforce.

## I

### BACKGROUND AND STATED PURPOSE OF THE ADA

Throughout history, society has discriminated against individuals with disabilities, largely by marginalizing their place in society as well as by segregating them as a group from the mainstream.<sup>24</sup> At the time of the ADA's enactment, forty-three million Americans suffered from a physical or mental illness, and the numbers were steadily increasing.<sup>25</sup> The ADA functioned as a national mandate "to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life."<sup>26</sup> Congress enacted the ADA in recognition of the fact that individuals who suffered from discrimination based on disability, as opposed to discrimination based on other factors, had often been left, at that time, without legal recourse to redress their suffering.<sup>27</sup> There-

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<sup>24</sup> 42 U.S.C. § 12101(a)(2) (2000); S. REP. NO. 101-116, at 6 (1989).

<sup>25</sup> 42 U.S.C. § 12101(a)(1).

<sup>26</sup> S. REP. NO. 101-116, at 2.

<sup>27</sup> 42 U.S.C. § 12101(a)(4). The Act was largely meant to provide relief against discrimination similar to that provided by Title VII of the Civil Rights Act of 1964 for victims of discrimination based on race and gender. *See* S. REP. NO. 101-116, at 2 (1989) ("The ADA incorporates by reference the enforcement provisions under [T]itle VII of the Civil Rights Act of 1964 (including injunctive relief and back pay)."). The comparison, in some ways, is quite apt: society has also traditionally marginalized victims of discrimination based on race and gender. *See* 42 U.S.C. § 1981 (declaring that all citizens enjoy civil rights equal to white citizens). However, in dealing with race and gender discrimination, the perceived shortcomings or limitations of those marginalized groups were illusory, whereas in dealing with discrimination based on disability, the limitations are a reality that must be faced. The central pertinent difference remains that, in time, a gender or race anti-discrimination statute could succeed in wiping out all discrimination against those historically persecuted individuals. With respect to disability laws, however, the statutes and remedies will necessarily be omnipresent, as the inherent limitations individuals with disabilities must face will always require accommodation. Therefore, because the types of discrimination differ in several distinct ways, modeling the Act after race and gender anti-discrimination statutes leaves some crucial issues for disabled individuals unaddressed. For a thoughtful discus-

fore, Congress created the ADA in order to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,”<sup>28</sup> as well as to provide “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”<sup>29</sup> The ADA also complements the Rehabilitation Act of 1973, which prohibits discrimination in certain private and public sectors receiving federal funds.<sup>30</sup>

The ADA aims to “level the playing field” for individuals with disabilities.<sup>31</sup> It is intended to raise disabled individuals to the level of competitive market standards by affording them accommodations, provided that these accommodations are not overly burdensome or costly,<sup>32</sup> rather than to alter or lower the marketplace standards to integrate those individuals who have inherent limitations.<sup>33</sup> What this means for individuals with disabilities is that they must satisfy an employer’s work related standards in order to gain the ADA’s protection.<sup>34</sup> Essentially, the law intends to protect only those individuals who are able to compete for employment.<sup>35</sup>

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sion of these concerns, see Norman Daniels, *Mental Disabilities, Equal Opportunity, and the ADA*, in *MENTAL DISORDER*, *supra* note 6, at 281, 282–83.

<sup>28</sup> 42 U.S.C. § 12101(b)(1).

<sup>29</sup> *Id.* § 12101(b)(2).

<sup>30</sup> 29 U.S.C. §§ 791, 794; Locke, *supra* note 8, at 107.

<sup>31</sup> See *Siefken v. Vill. of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995) (“Congress enacted the ADA to ‘level the playing field’ for disabled people. Congress perceived that employers were basing employment decisions on unfounded stereotypes.”).

<sup>32</sup> The statute obligates an employer to make a reasonable accommodation to an individual who qualifies for protection under the ADA. However, the statute excuses the employer from providing an accommodation that causes “undue hardship,” or an action requiring significant difficulty or expense. 42 U.S.C. § 12111(10)(A). In determining whether an accommodation would impose an undue hardship on the employer, the statute contemplates the following factors: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the facility, the number of persons employed at the facility, the effect on expenses or resources, and any other effect of the accommodation on the operation of the facility; (3) the overall financial resources of the covered entity, and (4) the type of operations of the covered entity. *Id.* § 12111(10)(B).

<sup>33</sup> The ADA states that in determining whether an individual is qualified to perform the position, and therefore, whether the individual is granted statutory coverage under the ADA, “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.* § 12111(8).

<sup>34</sup> S. REP. NO. 101-116, at 26 (1989). The Senate Report for the ADA reads:

By including the phrase “qualified individual with a disability,” the Committee intends to reaffirm that this legislation does not undermine an employer’s ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose of [sic] effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.

*Id.*

<sup>35</sup> Christopher G. Bell, *The Americans with Disabilities Act, Mental Disability, and Work*, in *MENTAL DISORDER*, *supra* note 6, at 203, 204–05.

Despite the difficulties debilitated individuals face in meeting an employer's work standards for non-disabled individuals, for better or worse, Congress intended the ADA to act as an equal opportunity statute, not an affirmative action statute. Therefore, the statute does not protect disabled individuals who cannot identify a reasonable accommodation that would enable them to satisfy work-related standards, or who can identify such an accommodation, but only at an excessive cost to the employer. Further, if an individual is unable to "do the job" in whatever way the employer sees fit<sup>36</sup> as a result of the disability, the employer is free to take an adverse action against the employee, notwithstanding the disability.<sup>37</sup> In this way, the purpose of the ADA is narrower and more targeted than it may seem at first blush.

Many proponents of the ADA were well-educated, successful, and proactive individuals.<sup>38</sup> The disabilities that they shouldered were, by and large, physical in nature.<sup>39</sup> These individuals had, with the aid of wheelchairs, prosthetic limbs, hearing aids, and guide dogs, overcome adversity and managed to transcend the hurdles they had faced. In turn, they wished to create a statute that would afford similarly situated individuals the same opportunities.<sup>40</sup> The drafters did not contemplate the unique plight of those with less easily conquerable disabilities, such as mental disabilities. Thus, individuals who are unable to easily succeed in competitive employment environments find the statute much less valuable than they had initially hoped.<sup>41</sup>

#### A. The Pertinent Language of the ADA

In terms of draftsmanship, the ADA is hardly a model for clarity. Despite an unequivocal congressional mandate set forth in the ADA

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<sup>36</sup> See *supra* notes 33, 34.

<sup>37</sup> *Sprenger v. Fed. Home Loan Bank*, 253 F.3d 1106, 1114 (8th Cir. 2001) ("An employer need not retain an employee who cannot perform the essential functions of his job."); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 649-50 (1st Cir. 2000) (

We stress that the Act does not require employers to retain disabled employees who cannot perform the essential functions of their jobs without reasonable accommodation. . . . If . . . allowing the sick employee to retain his or her job places the employer in a hardship situation where it cannot secure in some reasonable alternative way the services for which it hired the ailing employee, and yet is blocked from effecting a rehire, the ADA does not require the retention of the disabled person.

); *Cousins v. Howell Corp.*, 113 F. Supp. 2d 262, 270-71 (D. Conn. 2000) ("The ADA does not require employers to retain disabled employees who cannot perform the essential functions of their jobs with or without reasonable accommodation."); *Mutchie v. TVX Mineral Hill, Inc.*, No. CV 96-81-BLG-RWA, 1998 WL 1157404, at \*2 (D. Mont. Nov. 16, 1998) ("The ADA simply does not protect an individual who cannot perform the essential functions of his position, with or without accommodation by the employer.").

<sup>38</sup> Bell, *supra* note 35, at 204.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* at 205.

which calls for clear and enforceable standards,<sup>42</sup> the actual text of the statute is broad and often ambiguous, with many central terms, yet very few definitions of or interpretive guidelines for those terms.<sup>43</sup> As a result, the courts must determine for themselves, relying on the Equal Employment Opportunity Commission (EEOC) guidelines<sup>44</sup> and their own intuition, what limitations Congress intended when drafting the statute.<sup>45</sup>

The ADA prohibits discrimination against a “qualified individual with a disability . . . .”<sup>46</sup> Therefore, an individual who seeks protection under the ADA must necessarily conquer two hurdles before claiming entitlement: first, the individual must meet the definition of disability, and second, the individual must be qualified to perform the functions of the position.<sup>47</sup> The Act defines a “qualified individual” as one who is able to perform the “essential functions of the employment position” that the individual holds or desires, with or without “reasonable accommodation.”<sup>48</sup> Exactly what constitutes a “reasonable accommodation” has been the subject of much litigation.<sup>49</sup> However, the ADA

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<sup>42</sup> 42 U.S.C. § 12101(b)(1) (2000).

<sup>43</sup> See Smith, *supra* note 6, at 49. Smith notes:

In a March 14[, 2002] speech at the Georgetown University Law Center, [Supreme Court Justice Sandra Day] O'Connor cited the ADA as “an example of what happens when the sponsors are so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together. So it leaves lots of ambiguities and gaps and things for courts to figure out.”

<sup>44</sup> Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.1–16. The EEOC composed guidelines in accordance with a Congressional grant, expressed in 42 U.S.C. § 12116. These guidelines, while providing focus and consistency to court decisions, are by no means binding; courts can, and do, freely depart from the EEOC regulations. See, e.g., *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999) (holding that, notwithstanding the inclusion of concentration as a major life activity in the EEOC guidelines, “[c]oncentration may be a significant and necessary component of a major life activity, . . . but it is not an ‘activity’ itself”).

<sup>45</sup> See, e.g., *Law v. City of Scottsville*, No. 98-6335, 2000 WL 799742, at \*5 (6th Cir. June 15, 2000) (relying, *inter alia*, on the EEOC's interpretive guidelines); *Taylor v. Phoenixville Sch. Dist.*, 174 F.3d 142, 152–53 (3d Cir. 1999) (same); *Arnold v. UPS, Inc.*, 136 F.3d 854, 863–66 (1st Cir. 1998) (citing legislative history and congressional reports as interpretive aids); *Buckley v. Consol. Edison Co.*, 155 F.3d 150, 154 (2d Cir. 1998) (same); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1301 (D.C. Cir. 1998) (same); *Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir. 1998) (same); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997) (citing EEOC interpretive guidelines).

<sup>46</sup> 42 U.S.C. § 12112(a).

<sup>47</sup> See *id.*

<sup>48</sup> *Id.* § 12111(8).

<sup>49</sup> See, e.g., *US Airways, Inc. v. Barnett*, 535 U.S. 391, 403–05 (2002) (holding that a disabled individual's requested accommodation that would disrupt an employer's seniority system is ordinarily not reasonable); *Buskirk v. Apollo Metals*, 307 F.3d 160, 169–71 (3d Cir. 2002) (finding that placing an employee in a less stressful position once a vacancy arises is a reasonable accommodation); *Palotai v. Univ. of Md. at Coll. Park*, No. 00-1147, 2002 WL 1379969, at \*8 (4th Cir. June 27, 2002) (declaring that elimination of elements of a job that arise from the position's duties is not a reasonable accommodation); *Mays v.*

itself enumerates a list of accommodations that employers should consider to be reasonable.<sup>50</sup>

The heart of the difficulty for mentally ill individuals lies within the disability inquiry, and consequently, this is an area in which litigation abounds.<sup>51</sup> Under the ADA, an individual is not automatically guaranteed protection against discrimination merely by virtue of the fact that she suffers from a physical or mental disorder.<sup>52</sup> Rather, she must meet the statutory definition of disability. The ADA defines disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”<sup>53</sup> Alternatively, an individual may attain disability status by showing that she has either a record of such an impairment<sup>54</sup> or is regarded as having such an impairment.<sup>55</sup> This definition is the same as the one used in the Rehabilitation Act of 1973.<sup>56</sup> In order to understand the full scope of

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Principi, 301 F.3d 866, 868 (7th Cir. 2002) (stating that requiring an employer to create new jobs tailored to each employee’s abilities is not a reasonable accommodation) (citing *Hansen v. Henderson*, 233 F.3d 521, 523–24 (7th Cir. 2000)); *Dilley v. SuperValu, Inc.*, 296 F.3d 958, 963–64 (10th Cir. 2002) (finding that allowing an employee to return to work with modified job duties is a reasonable accommodation); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967 (10th Cir. 2002) (holding that granting an employee’s requested leave for disability constitutes a reasonable accommodation).

<sup>50</sup> See 42 U.S.C. § 12111(9). While the list may be helpful as a starting point, it is clearly not exhaustive. The EEOC has clarified the reasonable accommodation requirement somewhat. See EQUAL EMPLOYMENT OPPORTUNITY COMM’N, TECHNICAL ASSISTANCE MANUAL FOR THE AMERICANS WITH DISABILITIES ACT III-1–37 (1992); *EEOC Enforcement Guidance: Psychiatric Disabilities and the Americans with Disabilities Act*, in 3 EEOC COMPLIANCE MANUAL (BNA) No. 224, at N:2331 (May 1997).

<sup>51</sup> See, e.g., *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. UPS, Inc.*, 527 U.S. 516 (1999); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Gagliardo v. Connaught Labs, Inc.*, 311 F.3d 565 (3d Cir. 2002); *Ageman v. AFG Indus., Inc.*, No. 01-57034, 2002 WL 31554051 (9th Cir. Nov. 14, 2002). See also *Smith*, *supra* note 6, at 50 (quoting Arlene Mayerson, a lawyer with the Disability Rights Education Fund, as stating that “[t]he courts’ receptiveness to [employers’] arguments on disability was wholly unanticipated and staggering,” and estimating that fewer than five percent of ADA litigation survives the summary judgment stage) (alteration in original) (internal quotation marks omitted).

<sup>52</sup> Some states have created a more generous approach in their antidiscrimination laws by allowing coverage for any individual with a medically diagnosable disorder. See, e.g., N.Y. EXEC. LAW § 292(21) (McKinney 2003) (defining disability as “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . .”).

<sup>53</sup> 42 U.S.C. § 12102(2)(A).

<sup>54</sup> *Id.* § 12102(2)(B).

<sup>55</sup> *Id.* § 12102(2)(C).

<sup>56</sup> See 29 U.S.C. § 705(20)(B); see also Michelle T. Friedland, *Not Disabled Enough: The ADA’s “Major Life Activity” Definition of Disability*, 52 STAN. L. REV. 171, 183–84 (1999). An alternate version of the ADA would have prohibited discrimination on the basis of handicap, defined as a physical or mental impairment, perceived impairment, or record of impairment. *Id.* at 184. Congress ultimately rejected this definition in favor of the Rehabilitation Act definition, in large part because the latter had already been in use for

the difficulties under the ADA, one must look closely at this statutory definition of disability.

1. *The Direct Route: Actual Disability*

a. *Impairment*

The text of the ADA does not more specifically define "impairment," but the EEOC has promulgated guidelines to assist with implementation of the Act.<sup>57</sup> These guidelines further define impairment as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."<sup>58</sup> In 1997, the EEOC suggested that impairment also encompass mental and emotional illnesses listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV),<sup>59</sup> which includes common mental illnesses, such as major depressive disorders, bipolar disorders, anxiety disorders, and schizophrenia.<sup>60</sup>

However, meeting the burden of establishing impairment is only the first step in achieving disability status; medical diagnosis is not the end of the inquiry. Instead, the ADA also requires an individual to show that the impairment affects her life.<sup>61</sup> Consequently, the statute's definition of disability may not treat two individuals suffering from the same affliction equally, as their fates turn in part on the magnitude of the impact that the affliction has on each individual's life.<sup>62</sup>

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fifteen years under the Rehabilitation Act, unlike the new and untested proposed definition. See Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?* 21 BERKELEY J. EMP. & LAB. L. 91, 127-28 (2000).

<sup>57</sup> 29 C.F.R. § 1630.1 *et seq.* (2002). As noted above, the guidelines are not binding upon the courts. See *supra* note 44.

<sup>58</sup> 29 C.F.R. § 1630.2(h)(2).

<sup>59</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV].

<sup>60</sup> *Id.*; EEOC Enforcement Guidance: *Psychiatric Disabilities and the Americans with Disabilities Act*, 3 EEOC COMPLIANCE MANUAL (BNA) No. 224, at N:2331 (May 1997).

<sup>61</sup> See 42 U.S.C. § 12102(2)(A).

<sup>62</sup> See 29 C.F.R. § 1630 app. at 351-53 (2003). Compare *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (holding that asymptomatic HIV is a disability under the ADA), with *Blanks v. Southwestern Bell Communications, Inc.*, 310 F.3d 398, 401-02 (5th Cir. 2002) (holding that although an individual with HIV suffers from a physical impairment, he is not disabled under the ADA because he did not establish that he is substantially limited in a major life activity); compare *Ogborn v. United Food & Commercial Workers Union, Local No. 881*, 305 F.3d 763, 767-68 (7th Cir. 2002) (holding that the plaintiff suffering from depression was not disabled within the meaning of the ADA), with *Mattice v. Mem'l Hosp., Inc.*, 249 F.3d 682, 684 (7th Cir. 2001) (declaring that plaintiff suffering from depression qualified as disabled under the ADA); compare *Nawrot v. CPC Int'l.*, 277 F.3d 896, 905 (7th Cir. 2002) (declaring that plaintiff with diabetes was disabled under the ADA), with *Nordwall v. Sears Roebuck & Co.*, No. 01-1691, 2002 WL 31027956, at \*3 (7th Cir. Sept. 6, 2002) (holding that plaintiff with diabetes was not disabled within the meaning of the ADA); compare *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1135 (9th Cir. 2001) (de-

b. *Major Life Activity*

Once an individual demonstrates that he suffers from a mental or physical impairment, the ADA then requires the individual to identify at least one major life activity that the impairment has affected as the second step to establishing disability.<sup>63</sup> Just as the statute does not further define "impairment," it similarly does not clarify what constitutes a "major life activity." However, the EEOC has interpreted major life activities to include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>64</sup> Of course, there are major life activities that the EEOC does not list, and, moreover, courts are not bound to accept the listed activities as dispositive.<sup>65</sup>

The EEOC Guidelines do provide further clarification to those individuals who claim to be limited in the major life activity of working.<sup>66</sup> Specifically, the EEOC states that an individual must be "restricted in the ability to perform either a class of jobs or a broad range of jobs" as compared with a person with similar training and abilities.<sup>67</sup> Thus, difficulty or inability in performing a single job does not qualify someone as limited in the major life activity of working.<sup>68</sup>

c. *Substantial Limitation*

The EEOC Guidelines interpret "substantial limitation," a term not clearly defined in the ADA's text itself, to mean either: (1) "[u]nable to perform a major life activity that the average person in the general population can perform," or (2) "[s]ignificantly restricted as to the condition, manner or duration under which the individual can perform a particular major life activity as compared to the condition, manner or duration under which an average person in the general population can perform that same major life activity."<sup>69</sup> The Guidelines further state that in determining substantial limitation, the following factors should be considered: "[t]he nature and severity of the impairment,"<sup>70</sup> "[t]he duration or expected duration of the impairment,"<sup>71</sup> and "[t]he permanent or long term impact, or the ex-

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ciding that OCD is a disability under the ADA), *with Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir. 2001) (determining that OCD is not a disability under the ADA).

<sup>63</sup> 42 U.S.C. § 12102(2)(A).

<sup>64</sup> See 29 C.F.R. § 1630.2(i)(2002).

<sup>65</sup> See *supra* note 44.

<sup>66</sup> See 29 C.F.R. § 1630.2(j)(3).

<sup>67</sup> *Id.* § 1630.2(j)(3)(i)

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* § 1630.2(j)(1)(i), (ii).

<sup>70</sup> *Id.* § 1630.2(j)(2)(i).

<sup>71</sup> *Id.* § 1630.2(j)(2)(ii).

pected permanent or long term impact of or resulting from the impairment.”<sup>72</sup>

2. *The Paths Indirectly Taken: “Regarded As” and “Record of” Disability Prongs*

In addition to a direct assertion of disability, an individual may use an indirect route to achieve disability status by establishing that she is regarded as, or has a record of, being disabled.<sup>73</sup> These prongs of the disability definition recognize that disability may be a social construction.<sup>74</sup> Thus, the statute also protects individuals who are disadvantaged because of their pasts or because of others’ perception of them.<sup>75</sup> Both prongs refer to “such an impairment,” thus ostensibly incorporating the “substantial limitation” and “major life activities” requirements from the first prong.<sup>76</sup> The EEOC Guidelines explain that an individual has a record of impairment if she “has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”<sup>77</sup> The EEOC Guidelines also explain that an individual may be regarded as having a disability in one of the following three ways: (1) having a physical or mental impairment that does not substantially limit major life activities but is regarded as such; (2) having a physical or mental impairment that substantially limits major life activities due only to others’ attitudes and perceptions toward the impairment; or (3) having no

<sup>72</sup> *Id.* § 1630.2(j)(2)(iii).

<sup>73</sup> 42 U.S.C. § 12102(2)(B), (C). Though these prongs are one step removed from the question of whether the individual is actually mentally ill, in some ways, these prongs comport more with the ADA’s stated purpose of preventing discrimination against individuals with disabilities. See *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995):

Many . . . impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.

<sup>74</sup> Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the “Disability” Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1432 (1999); see also Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1665 n.34 (1997). Higgins uses Nancy Hirschmann’s definition of social construction:

[Social construction embodies] the idea that human beings and their world are in no sense given or natural but the product of historical configurations or relationships. The desires and preferences we have, our beliefs and values, our way of defining the world are all shaped by the particular constellation of personal and institutional social relationships that constitute our individual and collective histories.

*Id.* (alterations in original) (quoting Nancy J. Hirschmann, *Toward a Feminist Theory of Freedom*, 24 POL. THEORY 46, 51 (1996)).

<sup>75</sup> See Eichhorn, *supra* note 74, at 1432.

<sup>76</sup> 42 U.S.C. § 12102(2)(A)–(C).

<sup>77</sup> 29 C.F.R. § 1630.2(k).

impairment at all (as defined by the Guidelines), but being treated by her employer as if she did.<sup>78</sup>

#### B. Consequences of the Definition of Disability for the Mentally Ill Plaintiff

The definition of disability, as it appears in the ADA, opens the door to two possible, and potentially undesirable, consequences. First, the definition is, on the whole, rather ambiguous, as the terms used to define disability are strikingly broad and the statute does not offer further clarification of these terms. This leaves room for varying interpretations by the courts and has ultimately resulted in a rather narrow interpretation of disability.<sup>79</sup> Further, the Act lumps both mental and physical disability together under the same requirement of impairment in the disability inquiry. Therefore, whatever interpretive action a case takes with respect to physical illness will also have binding force against mentally ill individuals, despite the fact that what may be an appropriate determination in one context does not necessarily translate to a desirable outcome in a drastically different context.<sup>80</sup>

Second, the definition of disability enables individuals who are limited in areas of their lives that are completely unrelated to their work performance to invoke protection under the law, and even to elicit accommodations by the employer. However, the law neither protects nor accommodates individuals who are suffering from discrimination beyond the confines of the statute.<sup>81</sup>

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<sup>78</sup> *Id.* §1630.2(1)(1)–(3).

<sup>79</sup> In 2001, employers prevailed in over ninety-five percent of ADA employment cases that reached the merits of claims by workers or job applicants. Smith, *supra* note 6, at 50; see also Eichhorn, *supra* note 74, at 1434, 1444–47 (examining cases in which illnesses such as hemophilia, diabetes, and cancer did not satisfy the statutory definition of disability, despite their severity and despite legislative history indicating that Congress had intended for such serious diseases to be included within the realm of disability); *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 405 (examining final Title I case decisions and finding that the definition of disability is “much more restrictive than those who drafted and supported the ADA had thought it would be”).

<sup>80</sup> As an example, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478–80 (1999), the Court examined the statute’s legislative history to determine why the ADA drafters did not intend to cover individuals with poor eyesight. However, the Court’s holding that mitigating measures must be considered when determining whether an individual is disabled means that individuals with serious impairments that are treated with medication may be shut out of coverage under the ADA. *Id.* at 482.

<sup>81</sup> See generally Friedland, *supra* note 56 (arguing that the ADA’s failure to separate the statute’s two goals—preventing pure discrimination and providing affirmative accommodation—impedes the progress of individuals with disabilities and leads to inconsistent results).

## II

THE SUPREME COURT'S BROAD STROKES: FLESHING OUT  
(AND REINING IN) THE DEFINITION OF DISABILITY

Part I examined the text of the statute to discern what is required in the ADA's disability inquiry. Examining the words of the statute alone, however, is not sufficient to truly understand the plight of the mentally ill plaintiff under the ADA's definition. It is important to also consider the Supreme Court cases that have interpreted this definition. To date, the Supreme Court has not heard a case dealing with a mentally disabled plaintiff attempting to gain protection under the ADA in the employment context. The lower federal courts have addressed issues of mental illness under the ADA, and they have admittedly struggled with how to treat such plaintiffs under the law.<sup>82</sup> Nonetheless, the Supreme Court has dedicated a substantial amount of time to clarifying the broad terms that define disability in many of the ADA cases it has reviewed. Presumably, the Supreme Court Justices would use these same interpretations if and when they hear a case concerning a mentally ill plaintiff. Although the Supreme Court's past interpretation of disability has bolstered the understanding of the term in the context of the statute, many of the lower court cases have further narrowed the disability definition, thereby increasing the possibility of excluding mental illness from coverage.

A. *Bragdon v. Abbott*: A Generous Interpretation of Disability Status

One of the most important cases defining disability, *Bragdon v. Abbott*,<sup>83</sup> is also one of the most generous in considering what constitutes a disability. In *Bragdon*, the Court found that an HIV-positive individual, still asymptomatic, fell within the ADA's definition of a disabled individual and therefore, passed the first hurdle to a successful ADA claim.<sup>84</sup> The Court held that HIV infection fell within the ADA's

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<sup>82</sup> See *Criado v. IBM Corp.*, 145 F.3d 437, 443 (1st Cir. 1998) ("Proving the elements of a mental disability will not be as easy or as clear cut as cases of physical disability. But, though mental impairments create special problems under the ADA, Congress chose to recognize these as disabilities under the Act."); *Palmer v. Cir. Ct. of Cook County*, 117 F.3d 351, 351 (7th Cir. 1997) ("The application of the Americans with Disabilities Act to persons suffering from mental illness presents difficult issues . . .") (citation omitted).

<sup>83</sup> 524 U.S. 624 (1998). Although this case does not concern the ADA in the employment context, the disability analysis is still important for our purposes because the Court used the same disability definition. In *Bragdon*, respondent Abbott was refused in-office dental treatment due to her asymptomatic HIV-positive status because the dentist had a policy against filling cavities for HIV-positive patients outside of a hospital setting. *Id.* at 628-29. The respondent therefore sued under 42 U.S.C. § 12182, alleging discrimination in a public accommodation. *Id.*

<sup>84</sup> *Id.* at 641. The Court also addressed the "direct threat" provision of the ADA, 42 U.S.C. § 12182(b)(3), which indicates that an individual who creates a significant risk to

definition of impairment,<sup>85</sup> and further, that the respondent correctly identified reproduction as a major life activity; the Court deemed reproduction “central to the life process itself.”<sup>86</sup> The Court thus interpreted “major” to mean “significant,”<sup>87</sup> as opposed to the dissent’s understanding of “major” to mean “greater in quantity, number, or extent.”<sup>88</sup> The Court further rejected the notion that a major life activity must have a public, economic, or daily character.<sup>89</sup>

## B. The *Sutton* Trilogy: Mitigating Measures

One year after *Bragdon*, the Supreme Court decided *Sutton v. United Air Lines, Inc.*,<sup>90</sup> *Albertson’s, Inc. v. Kirkingburg*,<sup>91</sup> and *Murphy v. United Parcel Service, Inc.*<sup>92</sup> Taken together, these cases stand for the proposition that, in considering whether a person is substantially lim-

the health or safety of others may be considered unqualified for purposes of the statute. *Id.* at 648-50. Discussion of this provision, however, goes beyond the scope of this Note.

<sup>85</sup> *Id.* at 632-33.

<sup>86</sup> *Id.* at 638.

<sup>87</sup> *See id.* (“[T]he plain meaning of the word ‘major’ denotes comparative importance . . . .”) (internal quotation marks omitted).

<sup>88</sup> *Id.* at 659-60 (Rehnquist, C.J., dissenting).

<sup>89</sup> *Id.* at 638. It is interesting to note that here, as in many other cases, there is no requirement that the major life activity be tied in any way to the discrimination claim. Because the purposes in the public services and accommodation realm differ from the purposes in the employment context, this lack of a connection should not be troubling. However, when considering disability in employment, the fact that the statute does not further require a connection between the major life activity cited and the employee’s work performance often proves problematic, or even fatal, to individuals seeking the ADA’s protection.

<sup>90</sup> 527 U.S. 471 (1999). In *Sutton*, the petitioners were twin sisters who both had severe myopia. *Id.* at 475. Uncorrected, each sister’s vision was extremely poor, but with the use of corrective measures, each sister had 20/20 vision or better. *Id.* United Airlines denied both sisters the opportunity to interview for a commercial pilot position because the sisters could not meet United’s minimum uncorrected vision requirement. *Id.* at 475-76. *Sutton* is widely considered to be the leading case for the principle also set forth in *Albertson’s* and *Murphy*; in fact, the Court explicitly refers to *Sutton* in their analysis as support for the decisions in the other two cases. *See Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 556 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999).

<sup>91</sup> 527 U.S. 555. In this case, petitioner fired respondent from his job as a truck driver because he suffered from amblyopia, an uncorrectable visual condition which left him with very poor vision in his left eye and in effect, monocular vision, and could not meet the petitioner’s corrected visual acuity standard. *Id.* at 558-60. Petitioner initially hired respondent because the first doctor who examined him mistakenly certified that he met the acuity standard. *Id.* at 559. After another doctor correctly determined that he did not meet the standard, petitioner fired him and refused to rehire him even after he obtained a waiver of the acuity standard. *Id.* at 559-60.

<sup>92</sup> 527 U.S. 516. The petitioner in *Murphy* was hired as a mechanic despite his high blood pressure, a condition that should have caused him to fail the certification requirements of the Department of Transportation. *Id.* at 519. Petitioner took medication for his high blood pressure, which allowed him to function normally in everyday activities, *id.* at 519-20, but he was fired when the certification error was discovered. *Id.* at 520.

ited in a major life activity, the court must take mitigating measures into account.<sup>93</sup>

This assertion ran directly counter to the EEOC Interpretive Guidelines, which, at the time, stated that “[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, without regard to mitigating measures, such as medicines, or assistive or prosthetic devices.”<sup>94</sup> The Court found, despite the EEOC Guidelines, that in order to achieve the ADA-mandated case-by-case inquiry, one must consider the individual’s situation as a whole, including the mitigating measures, lest the statute would treat all individuals with the same impairment identically.<sup>95</sup> Moreover, the Court declared that courts must consider mitigating or corrective measures whether they are achieved artificially or within the body’s own corrective systems.<sup>96</sup> Consequently, an individual who uses mitigating devices to increase her work productivity may find herself without the protection of the ADA.

C. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*: The “Central to Daily Life” Inquiry

The facts in *Toyota*,<sup>97</sup> the Court’s most recent ADA decision, are quite simple. Ella Williams worked on an engine fabrication assembly line at an automobile manufacturing plant that required her to use pneumatic tools.<sup>98</sup> As a result of using these tools, she developed pain in her wrists, arms, and hands, which a physician later diagnosed as bilateral carpal tunnel syndrome and bilateral tendonitis.<sup>99</sup> Her physician permanently restricted her from performing various job-related activities, including lifting more than twenty pounds, frequently lifting objects up to ten pounds, performing repetitive motion with her wrists or elbows, doing overhead work, or using vibrating or pneumatic

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<sup>93</sup> See *Sutton*, 527 U.S. at 482–84 (“A ‘disability’ exists only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would’ be substantially limiting if mitigating measures were not taken . . . . [Ignoring an individual’s actual condition] is contrary to both the letter and the spirit of the ADA.”); *Albertson’s*, 527 U.S. at 565–66 (stating that the ADA “concerns itself only with limitations that are in fact substantial” and that “[m]itigating measures . . . must be taken into account in judging whether an individual has a disability”); *Murphy*, 527 U.S. at 521 (holding that consideration of mitigating measures is necessary to determine whether a limitation is in fact substantial).

<sup>94</sup> *Sutton*, 527 U.S. at 480 (alteration in original) (citing EEOC Interpretive Guidelines, 29 C.F.R. § 1630, app. § 1630.2(j) (1998)).

<sup>95</sup> *Id.* at 483.

<sup>96</sup> *Albertson’s*, 527 U.S. at 565–66 (“We see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body’s own systems.”)

<sup>97</sup> 534 U.S. 184 (2002).

<sup>98</sup> *Id.* at 187.

<sup>99</sup> *Id.*

tools.<sup>100</sup> Williams' supervisor modified her duties for the next two years<sup>101</sup> and, subsequently, her employer, Toyota, placed her on a team of Quality Control Inspection Operations.<sup>102</sup> At first, Toyota only required Williams to perform certain tasks, but later, it required all persons on the control inspection team to perform all tasks, including a shell body audit. The shell body audit required Williams to hold her hands and arms at about shoulder height for extended periods of time,<sup>103</sup> causing her to suffer adverse medical consequences.<sup>104</sup> After seeking the advice of a physician, who diagnosed her with further health complications, Williams requested that she be allowed to perform only some of the control inspection team's tasks.<sup>105</sup> Shortly thereafter, Toyota terminated Williams due to poor attendance.<sup>106</sup>

Williams sued Toyota, claiming disability based on her carpal tunnel syndrome and related impairments, for failing to provide her with a reasonable accommodation in accordance with the ADA.<sup>107</sup> Her disability claim was based on the grounds that her various physical impairments substantially limited the major life activity of, among other things, performing manual tasks.<sup>108</sup> The district court granted summary judgment for Toyota after finding that Williams was not substantially limited in any major life activity.<sup>109</sup> The Sixth Circuit reversed the District Court's finding on the ground that Williams had shown substantial limitation in the major life activity of manual tasks.<sup>110</sup> Consequently, the Sixth Circuit granted partial summary judgment for Williams on the issue of whether she was actually disabled for the purposes of the ADA.<sup>111</sup> The Supreme Court granted certiorari to determine whether the Sixth Circuit employed the proper standard in determining disability status.<sup>112</sup>

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<sup>100</sup> *Id.* at 187–88.

<sup>101</sup> *Id.* at 188.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 189.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 190. Respondent and petitioner differed as to the exact course of events following the medical diagnosis. Both parties agreed, however, that respondent requested accommodation and was soon after terminated for poor attendance. *Id.* at 189–90.

<sup>107</sup> *Id.* at 190.

<sup>108</sup> *Id.* Respondent had also originally claimed substantial limitation in the major life activities of lifting and working. See Respondent's Brief at 11–12 n.6, *Toyota*, 534 U.S. 184 (No. 00-1089). The Supreme Court, however, only considered respondent's claim with regard to performing manual tasks. *Toyota*, 534 U.S. at 192.

<sup>109</sup> *Toyota*, 534 U.S. at 190–91.

<sup>110</sup> *Id.* at 191–92; *Williams v. Toyota Motor Mfg., Ky., Inc.*, 224 F.3d 840, 843 (6th Cir. 2000), *rev'd*, 534 U.S. 184 (2002).

<sup>111</sup> *Williams*, 224 F.3d at 843.

<sup>112</sup> *Toyota Motor Mfg., Ky., Inc. v. Williams*, 532 U.S. 970 (2001).

In its analysis, the Court first looked to the language of the ADA itself,<sup>113</sup> as well as to the interpretive guidelines for both the Rehabilitative Act of 1973,<sup>114</sup> which utilizes the same definition of disability, and the EEOC Guidelines,<sup>115</sup> for guidance in interpreting the ADA.<sup>116</sup> The Court noted that although Congress intended the courts to construe the terms of the statute in accordance with pre-existing regulatory interpretations, the EEOC Guidelines have questionable force in interpreting the ADA.<sup>117</sup>

The Court, however, used the interpretive guidelines merely as a starting point from which to launch its own analysis of the definition of disability.<sup>118</sup> The Court held that it is inadequate for a hopeful plaintiff to merely submit evidence of a medical diagnosis in an attempt to establish disability.<sup>119</sup> Instead, a court must determine disability on an individual basis, especially when dealing with impairments for which the symptoms vary from person to person.<sup>120</sup> The Court explained that the drafters of the ADA designed the requirement of substantial limitation of a major life activity to “preclude[ ] impairments that interfere in only a minor way with the performance of [major life activities] from qualifying as disabilities.”<sup>121</sup> Moreover, in considering whether an impairment substantially limits a major life activity, the Court reasoned that the “major life activity” must be one that is of “central importance to daily life.”<sup>122</sup> Thus, the analysis in ADA cases should not focus on the claimant’s ability to perform the tasks associated with the her particular job.<sup>123</sup> Rather, courts must make a broader, more searching investigation into how well the claimant is able to perform a “variety of tasks” that are “central to most people’s daily lives.”<sup>124</sup>

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<sup>113</sup> See 42 U.S.C. §§ 12102(2), 12111(2), 12111(8), 12112(b)(5)(A) (2002).

<sup>114</sup> 29 U.S.C. § 705(20)(B).

<sup>115</sup> 29 C.F.R. § 1630.2(g)–(j) (2001).

<sup>116</sup> *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193–96 (2002).

<sup>117</sup> *Id.* at 194. Ultimately, the Court did not rule on the force of the EEOC Guidelines either way, as neither party had challenged them in this case. *Id.*

<sup>118</sup> *See id.* at 196.

<sup>119</sup> *Id.* at 198.

<sup>120</sup> *Id.* The Court used carpal tunnel syndrome, claimed in this case as an impairment, as an example illustrative of this point. *Id.* at 199.

<sup>121</sup> *Id.* at 197.

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 200–01.

<sup>124</sup> *Id.* Thus, in *Toyota*, the Court declared that the Court of Appeals had improperly focused their inquiry on respondent’s performance of her job’s specific tasks, while ignoring the very evidence, such as respondent’s ability to tend to personal hygiene and carry out personal or household chores, that should have been determinative. *See id.* 201–02.

#### D. Effect of Case Law on Mentally Ill Potential Plaintiffs

Although none of the above three cases involved mentally ill plaintiffs, all have binding force on such individuals attempting to establish disability status. Further, from each, one can discern an important piece of information about mental illness under the ADA.

For example, the plaintiff in *Bragdon*, the most pro-plaintiff case of the three, shares characteristics with mentally ill plaintiffs. As an individual suffering from asymptomatic HIV, the plaintiff suffered from a "hidden" disability, in that she had few, if any, obvious physical manifestations of her illness.<sup>125</sup> This type of disability departs from the "traditional" conception of disability that is generally marked by an obvious physical limitation.<sup>126</sup> The fact that the Supreme Court held asymptomatic HIV to constitute a disability is a promising notion for individuals with mental disabilities.

The remaining cases, however, are significantly less generous, and are generally regarded as pro-employer decisions.<sup>127</sup> Both cases have outcomes that are understandable, even advisable, given the circumstances involved. Clearly, Congress did not intend for every individual with correctable visual limitations or suffering from repetitive stress injuries to find protection under the ADA; rather, the drafters designed the statute to protect only those individuals who suffer from significant physical or mental limitations.<sup>128</sup> When viewing the impact of these holdings on disabled plaintiffs at large, however, one must wonder whether these straightforward cases in context have created undesirable precedential effect.

*Sutton* has obvious implications for disabled individuals, as mitigating measures would cover psychotropic medications.<sup>129</sup> This complicates an already demanding set of requirements, and creates a perverse set of incentives for mentally ill individuals who desire workplace accommodation. The *Sutton* rule forces individuals with mental illness to choose between two equally unattractive situations: 1) remaining in a less functional unmitigated state, but thereby potentially having protection under the law, and 2) undergoing therapy, including medication, which, if "too" effective, could potentially remove them from the realm of disability and leave them unprotected at law, though the discrimination they face may continue. Meanwhile, even

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<sup>125</sup> See *Bragdon v. Abbott*, 524 U.S. 624, 628 (1998).

<sup>126</sup> See Jean Campbell & Caroline L. Kaufmann, *Equality and Difference in the ADA: Unintended Consequences for Employment of People with Mental Health Disabilities*, in MENTAL DISORDER, *supra* note 6, at 221, 223 ("In the simplest view of disability, membership in the community of 'the disabled' is both involuntary and obvious.").

<sup>127</sup> See Smith, *supra* note 6, at 50–51 (stating that the recent Supreme Court decisions, including *Toyota*, reinforce the "overwhelmingly pro-employer trend" in Title I ADA cases).

<sup>128</sup> See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999).

<sup>129</sup> See *id.* at 488.

if the individual can alleviate his condition with medication, the condition still remains real and very present for the individual.

Finally, *Toyota* adds the requirement that the individual claiming disability must be substantially limited in an activity that is “of central importance to daily life.”<sup>130</sup> This clarification of the major life activity requirement operates as a further narrowing of the class of individuals who will be able to gain protection under the ADA. Further, the Court’s strict interpretation of substantial limitation in *Toyota*, requiring a far-reaching and long-term impact, will also be limiting on individuals with mental illness, as such illnesses tend to ebb and flow as opposed to being consistent in presence and severity.<sup>131</sup> Mentally ill individuals, by definition, are limited or affected cognitively in their functioning in comparison with non-disabled individuals.<sup>132</sup> By requiring that mentally ill individuals meet such a stringent test of proving pervasive limitation, rather than limitation that affects only work performance and not other activities in daily life, the statute excludes individuals who suffer from mild or moderate mental illness.

Meanwhile, in all likelihood, those individuals who can meet the test for disability will not be able to meet the other requirement for protection under the statute: ability to perform the essential functions of the position, or qualified individual status.<sup>133</sup> This ruling short-changes both employer and employee, for the statute ignores individuals with manageable mental illnesses and instead favors individuals with profoundly debilitating mental limitations at the disability stage of the inquiry. A more severely impaired individual, if she is able to demonstrate that she qualifies under the statute, will require her employer to defend its business decisions at high cost if she resorts to litigation. And in practice, these plaintiffs are the least likely to be

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

131 JOHN PARRY & F. PHILIPS GILLIAM, *ABA COMM’N ON MENTAL & PHYSICAL DISABILITY LAW, HANDBOOK ON MENTAL DISABILITY LAW* 12 (2002).

132 29 C.F.R. §1630.2(h)(2) (2000) (defining mental impairment as “any mental or psychological disorder”).

133 See JOHN W. PARRY, *AM. BAR ASS’N COMM’N ON MENTAL & PHYSICAL DISABILITY LAW, MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT* 29 (2d ed. 1997).

[N]ot being otherwise qualified is one of the most significant reasons why persons with mental and physical disabilities fail to prevail in ADA employment-related actions. The dual requirements of having to demonstrate a qualifying disability and being otherwise qualified to perform the essential functions of the job arguably has become a catch-22 that makes it particularly difficult for a person with a mental disability to prevail in court. In order to overcome both of these hurdles, complainants have to demonstrate simultaneously a substantial limitation in a major life function based on their disability, while also demonstrating that any substantial limitation they have does not make them unqualified to carry out essential job functions.

*Id.*

able to function sufficiently in the workplace, and thus are very unlikely to obtain a favorable verdict.

### III A THRESHOLD DEVICE: PURPOSE OF THE DISABILITY REQUIREMENT AND THE NATURE OF MENTAL ILLNESS

After considering the full implication of the disability definition as well as the relevant Supreme Court case law, which further explains the disability standard, this Note now turns to the ways in which the unique plight of the mentally ill plaintiff intersects with the demands of the definition.

The statute requires an individual to meet a three-pronged inquiry to rise to the level of disability, because the drafters of the ADA intended disability to be a threshold requirement.<sup>134</sup> The statute intentionally excludes insignificant, trivial, or temporary illnesses or afflictions.<sup>135</sup> Thus, by requiring that an individual not only identify a diagnosis or an ailment, but also an activity that is significantly affected as a result, the statute sought to provide protection only to those individuals who truly need such protection.<sup>136</sup> In the instance of a severely physically disabled individual who is nonetheless quite capable of performing his job functions, the Act serves its intended purpose of obligating the employer to make the accommodation that will remove the proverbial stumbling block from the individual's path.<sup>137</sup>

The same kinds of statutory limitations should not be operative with respect to mental illness, however, because mental illness varies in significant degree from physical illness. First, mental illness is less linear in progression than physical illness, in that mental illness tends to be more erratic, less predictable, and more sudden.<sup>138</sup> Many mental illnesses tend to be episodic, following a kind of ebb and flow

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<sup>134</sup> See S. REP. NO. 101-116, at 23 (1989).

<sup>135</sup> See *Toyota*, 534 U.S. at 196-97; *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999). See also S. REP. NO. 101-116, at 23 (1989) ("Persons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity.").

<sup>136</sup> See S. REP. NO. 101-116, at 23 (1989).

<sup>137</sup> See 29 C.F.R. § 1630.9(a).

<sup>138</sup> See *Heller v. Doe*, 509 U.S. 312, 322 (1993) (stating that mental illness is "sudden and may not occur, or at least manifest itself, until adulthood" and that "diagnosis of mental illness is difficult"); DEBORAH ZUCKERMAN ET AL., *THE ADA AND PEOPLE WITH MENTAL ILLNESS: A RESOURCE MANUAL FOR EMPLOYERS* 7 (1993) ("Mental illnesses typically are recurring, ongoing conditions that do not follow a regular pattern of development and outcome.").

one rarely sees in physical illness.<sup>139</sup> Therefore, the factors that indicate a serious or debilitating physical condition may be quite different from those that are used to identify a serious mental condition. Additionally, in diagnosing mental illness, unlike in diagnosing a broken leg or a virus—two potentially excludable impairments—a severity and duration assessment has already been entered into the calculus.<sup>140</sup> The DSM-IV relies on factors such as duration and severity in the initial diagnosis of the mental illness,<sup>141</sup> whereas a physician is able to diagnose a broken leg or influenza within days, or even hours, of onset.

Mental illness differs from physical illness in at least two other significant aspects. First, unlike physical illness, which is often fairly apparent to others, mental illness tends to be hidden and is therefore more difficult to diagnose.<sup>142</sup> The symptoms or results of a physical disability tend to manifest themselves in obvious ways, whereas mental disability is rarely as self-evident.<sup>143</sup> Particularly for an individual who attempts to keep a mental disability private to avoid stigma or for some other purpose, the lack of outward warning signs make the illness inherently more suspect, as many believe it could easily, and conveniently, be faked.<sup>144</sup> Additionally, even if the mental illness claim is accepted as bona fide, mentally disabled individuals are much more likely to be viewed as having control over the illness, or of suffering from the illness as a result of a character flaw, rather than for a medically valid reason.<sup>145</sup> Society frequently assumes that a person with a physically debilitating condition would prefer not to suffer from that particular affliction, and that therefore, the condition is involuntary,

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<sup>139</sup> See Karin A. Guiduli, Comment, *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, 1179–80 (1996).

The episodic nature of mental illness is seen by some to be as much a part of the debilitating nature of the illness as the symptoms themselves: "[A]n intermittent impairment that is a characteristic manifestation of an admitted disability is, we believe, a part of the underlying disability. . . . Often the disabling aspect of the disability is, precisely, an intermittent manifestation of the disability, rather than the underlying impairment." *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995).

<sup>140</sup> See DSM-IV, *supra* note 59.

<sup>141</sup> See *id.*

<sup>142</sup> See Guiduli, *supra* note 139, at 1157 (1996) ("[U]nlike physical disability, which is typically apparent, mental illness is a disease hidden in the mind.").

<sup>143</sup> Campbell & Kaufmann, *supra* note 126, at 224.

<sup>144</sup> PARRY & GILLIAM, *supra* note 131, at 6 ("[T]here is a widespread belief that many defendants/respondents are manufacturing mental impairments to benefit themselves . . .") (footnote omitted).

<sup>145</sup> Campbell & Kaufmann, *supra* note 126, at 223–24. An alternative theory, which is more sympathetic to, and less suspicious of, mentally ill individuals, also calls into question whether such illness truly exists. This theory rejects the concept of mental illness as a social construct, invented by individuals with more power to oppress individuals with less power. For a more complete discussion, see THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1974).

and the individual, blameless.<sup>146</sup> In contrast, individuals who suffer from mental conditions are often perceived to be lazy, irrational, or merely obstinate in their refusal to conquer the illness.<sup>147</sup>

Second, the diagnosis and underlying understanding of mental illness are significantly more complex than those of physical illness. Physicians diagnose mental illness based upon the subjective symptoms that the individual experiences and relays to the health care provider.<sup>148</sup> Because a mentally ill individual's symptoms tend to be much more severe than those of the rest of the population,<sup>149</sup> the mental health care provider must engage in a very difficult, and often contentious, line-drawing exercise to determine the point at which the behaviors become abnormal.<sup>150</sup> This is true, in part, because the medical community understands the "biology" of mental illness to a much lesser degree than other kinds of illness, though physicians continue to make advancements in developing tools to better understand the biological causes of mental illness.<sup>151</sup> Though mental illness may be theoretically provable, it likely occurs as a result of some type of brain malfunctioning, and therefore, because we lack the medical technology to verify such malfunctioning during diagnosis, we must often rely solely upon "symptomatology" without "proof" to back it.<sup>152</sup> Further, the source of the illness may be difficult to ascertain, as most mental illnesses are due to varied, and sometimes indirect, causes.<sup>153</sup> Therefore, understanding the reasons for mental illness, as well as ways to diminish the individual's suffering through treatment, is both

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<sup>146</sup> See Campbell & Kaufmann, *supra* note 126, at 223.

<sup>147</sup> *Id.* at 223-24.

<sup>148</sup> See Zylan, *supra* note 21, at 85 ("[T]he diagnosis of many disorders hinges on the personal, subjective distress and experience of the patient.").

<sup>149</sup> See *id.* ("The basic problem inherent in defining a mental disorder is that the primary criteria for determining whether a mental disorder exists requires a judgment about the degree to which a behavior deviates from the norm.").

<sup>150</sup> See *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) ("Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, [and] on cure and treatment . . .").

<sup>151</sup> See PARRY & GILLIAM, *supra* note 131, at 39-40.

<sup>152</sup> See JENNIFER HUGHES, AN OUTLINE OF MODERN PSYCHIATRY 15 (3d ed. 1991) ("Reaching a diagnosis in a psychiatric patient relies on accurate case history and mental state examination. Laboratory investigations help in the minority of cases only."). However, some psychiatrists are able to confirm hypotheses regarding the biochemical origin of a mental illness to some degree by observing a patient's reaction to medication. See JOHN O. BEAHR, LIMITS OF SCIENTIFIC PSYCHIATRY: THE ROLE OF UNCERTAINTY IN MENTAL HEALTH 21 (1986).

<sup>153</sup> See HUGHES, *supra* note 152, at 3 ("For most psychiatric disorders . . . the cause appears to be 'multifactorial' or is unknown."); see also BEAHR, *supra* note 152, at xix (listing numerous potential causes for the onset of major depression).

more individualized and more complex than understanding and treating the vast majority of physical illnesses.<sup>154</sup>

#### IV

#### BARRIERS TO SUCCESS FOR THE MENTALLY ILL POTENTIAL PLAINTIFF

##### A. Jumping Hoops and Obstacle Courses: Actual Disability

The incompatibility of the disability definition with mental illness, explored above, has played out quite starkly in recent case law. The two main shortcomings of the ADA's treatment of mental illness<sup>155</sup> are borne out in the case law of the lower federal courts. By and large, mentally ill individuals who attempt to gain protection under the ADA are unsuccessful.<sup>156</sup> On a conceptual level, it is difficult for individuals who are mentally ill and in the workforce to juggle the dual requirements of disability and qualified individual status. An individual who clearly suffers from a mental illness that has a detrimental effect on her work functioning may look to the statute for a safe haven. What she finds instead are formalistic, rigid requirements, which incur more qualifications and caveats with each Supreme Court decision. What the ADA drafters intended to be an individualized, case-by-case inquiry has turned into a series of obstacles and hoops, as individuals attempt to translate the complexities of their experiences into the "buzzwords" of the courts' opinions.<sup>157</sup>

##### 1. *Disabled but Still Qualified: The Inconsistent Pleading Problem*

Part of the reason that the lower courts may have a hard time with ADA cases involving mental illness is that the courts sense that the claims are, in some way, disingenuous. They are, in part, correct, as such individuals are trying desperately to achieve disability status by identifying certain functions from an approved list that are severely affected, while still maintaining that they are perfectly capable of performing the job. As a result, the claims of substantial limitation of major life activity may have nothing to do with the true impact of the illness on the individual, or of the illness's impact on work function-

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<sup>154</sup> See HUGHES, *supra* note 152, at Part III (outlining the broad range of treatments for mental disorders that a mental health specialist may use, either in isolation or in combination with other treatments, in treating her patients).

<sup>155</sup> See *supra* notes 79–81 and accompanying text.

<sup>156</sup> See Michael L. Perlin, "Where the Winds Hit Heavy on the Borderline": *Mental Disability Law, Theory and Practice, "Us" and "Them,"* 31 *LOV. L.A. L. REV.* 775, 780 (1998) ("[I]n . . . every kind of psychiatric disability Title I ADA case, [the plaintiff] is losing.") (alteration in original) (internal quotation marks and footnote omitted).

<sup>157</sup> See *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 311 (3d Cir. 1999) ("If there has ever been a legal term of art, 'disabled' certainly qualifies.")

ing.<sup>158</sup> Consequently, the broad, complex issues a mentally ill individual faces are squeezed into a one-size-fits-all formula.

As an illustration, the Tenth Circuit was clearly uncomfortable finding for an individual suffering from Obsessive Compulsive Disorder (OCD) who claimed discrimination based on disability status, despite the fact that his co-workers taunted him extensively for his mental issues and his superiors disbelieved him when he tried to give notice of his disability.<sup>159</sup> Instead of resting his claim upon the particulars of his experience and the resulting discrimination, the plaintiff, in order to fit the form of an ADA claim, was forced to identify a traditional major life activity that was substantially limited.<sup>160</sup> The court ultimately was unconvinced that the plaintiff, a worker who was "twice promoted on the basis of his performance," was substantially limited in the major life activities of sleeping, walking, or interacting with others.<sup>161</sup> The court held that the plaintiff did not meet the disability requirement, and consequently, he failed in his discrimination claim.<sup>162</sup> Though the plaintiff was clearly troubled, he attempted to identify "safe" major life activities that courts have previously acknowledged<sup>163</sup> to fit his unique situation within the borders of the ADA. In this case, the plaintiff failed, as the narrow list of "approved" categories did not allow him to get at the heart of his difficulty.<sup>164</sup>

However, an individual who attempts to meander outside the accepted borders will not fare much better, as courts seem hesitant to entertain alternate major life activities that are potentially more concordant with the true experiences and challenges of mentally ill plaintiffs in the work setting. In the words of the Second Circuit with respect to a mentally ill individual's attempt to adapt the "disability equation" to a claim of substantial limitation in the major life activity

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<sup>158</sup> See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200-01 (2002) (holding that the court of appeals erred because it incorrectly focused its inquiry on whether the plaintiff was substantially limited in a major life activity by examining the major life activity as it related to her job).

<sup>159</sup> *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1250-52 (10th Cir. 2001). In this case, co-workers in numerous departments taunted the plaintiff, calling him "Psycho Bob" among other things, despite the fact that he switched to different departments in an attempt to avoid such treatment. The plaintiff was ultimately terminated as the result of a workforce reduction. *Id.* at 1252.

<sup>160</sup> *Id.* at 1253.

<sup>161</sup> *Id.* at 1250, 1253-55.

<sup>162</sup> *Id.* at 1254-55.

<sup>163</sup> See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 639-42 (1998) (reproduction); *EEOC v. United Parcel Servs., Inc.*, 306 F.3d 794, 802 (9th Cir. 2002) (seeing); *Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 834 (8th Cir. 2001) (sitting, standing, lifting and reaching); *Williams v. Hallmark Cards, Inc.*, No. 00-3199, 2001 WL 617821 (10th Cir. June 5, 2001) (sleeping); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 307 (3d Cir. 1999) (thinking); *Hamm v. Runyon*, 51 F.3d 721, 724-25 (7th Cir. 1995) (walking). See also *supra* text accompanying note 64 (listing the major life activities set out in the EEOC Guidelines).

<sup>164</sup> *Steele*, 241 F.3d at 1254-55.

of “everyday mobility”: “[The plaintiff] narrows the frame of reference and hypothesizes a major life activity called ‘everyday mobility,’ which he then defines (so far as he attempts to define it) largely by means of examples that are coextensive with his symptoms.”<sup>165</sup> Thus, despite the fact that the plaintiff, who suffered from panic disorder and agoraphobia, was significantly limited in day-to-day functioning,<sup>166</sup> the court rejected his disability claim and afforded him no relief.<sup>167</sup>

Intuitively disbelieving the stylized claims, courts dispense of them quickly, going for the most vulnerable element of the case, and therefore, dismiss the claimants in the manner easiest to justify, given the narrow formulation of disability. By and large, courts do not find mentally ill individuals to be disabled, regardless of what substantial limitation of a major life activity the individual claims, and regardless of how severely limited the individual in fact may be.<sup>168</sup> For example, the Seventh Circuit held that an individual suffering from severe depression treated with Prozac and who had “consistently received good performance evaluations,” was not substantially limited in the major life activity of working.<sup>169</sup> Despite the fact that the plaintiff stated that he was “more irritable, less able to concentrate, and more prone to fatigue than the average police officer,” the court dispensed with his claims, stating that his depression “[did] not *appear* to have impacted his ability to perform the duties of a Chicago police officer.”<sup>170</sup>

After the *Sutton* Court’s mitigating measures ruling,<sup>171</sup> even more generous courts that might otherwise have more readily found disability status will have to narrow their disability lens. For example, the Third Circuit overturned a summary judgment against a bipolar plaintiff who had earned praises for her work performance prior to the onset of her mental illness.<sup>172</sup> The circuit court, apparently more re-

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<sup>165</sup> *Reeves v. Johnson Controls World Servs. Inc.*, 140 F.3d 144, 152 (2d Cir. 1998).

<sup>166</sup> *Id.* at 148, 153. Due to his illness, the plaintiff was unable to take vacations or perform routine errands such as visiting shopping malls, taking transportation that might cross a bridge or tunnel or travel on high roads, staying at unfamiliar destinations overnight, and traveling unaccompanied on trains. *Id.* at 153.

<sup>167</sup> *Id.* at 152–53.

<sup>168</sup> *See, e.g.*, *Ogborn v. United Food & Commercial Workers Union, Local No. 881*, 305 F.3d 763, 767–68 (7th Cir. 2002); *Cartwright v. Lockheed Martin Util. Servs., Inc.*, No. 00-6671, 2002 WL 1461753 (6th Cir. July 3, 2002); *Carroll v. Xerox Corp.*, 294 F.3d 231, 241 (1st Cir. 2002); *Palotai v. Univ. of Md. at Coll. Park*, No. 00-1147, 2002 WL 1379969 (4th Cir. June 27, 2002); *Lamb v. Qualex, Inc.*, No. 99-1188, 2002 WL 500492 (4th Cir. Apr. 3, 2002); *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 850 (8th Cir. 2002); *Steele*, 241 F.3d at 1256; *Evans v. Magna Group*, No. 98-3125, 1999 WL 402401 (7th Cir. June 11, 1999); *Reeves*, 140 F.3d at 154; *Francis v. Chem. Banking Corp.*, 62 F. Supp. 2d 948, 962–63 (E.D.N.Y. 1999); *Sherman v. N.Y. Life Ins. Co.*, No. 96 Civ. 9665, 1997 WL 452024, at \*4 (S.D.N.Y. Aug. 7, 1997).

<sup>169</sup> *Krocka v. City of Chicago*, 203 F.3d 507, 513 (7th Cir. 2000).

<sup>170</sup> *Id.* (emphasis added).

<sup>171</sup> *See discussion supra* Part II.B.

<sup>172</sup> *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 302 (3d Cir. 1999).

ceptive to the plaintiff's claim of substantial limitation in the ability to think than the district court had been—and presumably, than the vast majority of federal courts would be—nonetheless noted that “the central question [for the jury], in light of *Sutton* and *Murphy*, is whether [the plaintiff's] continuing impairment remained a ‘disability’ under the ADA by imposing substantial limitations even while treated.”<sup>173</sup> *Toyota*, with its pervasive limitation requirement,<sup>174</sup> further narrowed the disability requirement by throwing yet another qualification, and blocking mechanism, at mentally ill plaintiffs.<sup>175</sup>

## 2. *Pleading the Invisible: Proof Problems*

A mentally ill individual who somehow successfully conceives of a theory that will allow her to jump through both the disability as well as the qualified individual hoops will have yet another, more practical, hurdle: proving the illness's existence. Another reason why mental illness is more problematic than physical illness under the ADA is that mental illness lacks measurable or traceable criteria.<sup>176</sup> This is where the *Bragdon* plaintiff—an individual suffering from asymptomatic HIV—and the mentally ill plaintiff part ways. A simple blood test will reveal the presence of asymptomatic HIV, whereas the only proof of an individual's mental illness is her own subjective assessment of her experiences.<sup>177</sup> Though mental illnesses are diagnosable, experts diagnose afflicted individuals largely on the basis of self-reporting, and to a lesser extent, based upon observation of the patient.<sup>178</sup> Such a symptomatological diagnosis, unsubstantiated by clinical evidence, however, does not provide much proof with which to support a claim in court. Furthermore, only the plaintiff's self-reported symptoms will underlie the substantial limitation and major life activity claims. The episodic, recurrent nature of mental illness thus makes substantial limitation of major life activity more difficult to prove. A sudden acute outburst of mental impairment may easily be dismissed as an impairment of too short a duration to constitute a substantial limitation, regardless of whether this assessment represents a correct characterization of the illness.<sup>179</sup>

Such self-interest, without more, is a hard pill for the courts to swallow, and furthermore, easy for them to dismiss. Courts are quick to conclude that, for example, “[t]here is simply no way to determine from [the plaintiff's] generalized allegations of sleep disturbance

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<sup>173</sup> *Id.* at 308, 311 (remanding the case to reconsider the plaintiff's disability status).

<sup>174</sup> 534 U.S. 184 (2002).

<sup>175</sup> See discussion *supra* Part II.C.

<sup>176</sup> See *supra* notes 152–53 and accompanying text.

<sup>177</sup> See *supra* text accompanying note 148.

<sup>178</sup> See *supra* notes 148, 152 and accompanying text.

<sup>179</sup> Bell, *supra* note 35, at 207.

whether she was significantly restricted as to the condition, manner or duration of her ability [to perform a major life activity] as compared to the average person in the general population.”<sup>180</sup> Findings that confidently state that the plaintiff “failed to present *any* evidence” of substantial limitation of a major life activity abound.<sup>181</sup>

Further, the individual’s attempt to “burn the candle at both ends” by simultaneously emphasizing the difficulties the mental illness presents while downplaying the challenges so as to be fit for work lead to an “I’m ok/I’m not ok” split in her litigation strategy. As was illustrated in *Evans v. Magna Group*, an individual who attempts to downplay the impact of her illness, presumably in order to meet the qualified individual status, will not be able to present sufficient evidence to rise to the level of a disability under the statute.<sup>182</sup> The Third Circuit recognized the irony involved when a plaintiff, in an attempt to establish qualified individual status, effectively unseated her substantial limitation of a major life activity claim, but it nevertheless unquestioningly accepted such irony in holding the individual to be non-disabled.<sup>183</sup>

Courts, often relying on therapists’ notes which ordinarily span a range of months or years and which reflect the normal variation in the person’s ability to cope with the illness and which reflect the often oscillating nature of mental illness, judge the individual after the fact, and discredit their claims of limitations.<sup>184</sup> In viewing these notes, which also reflect the individual’s improvements made in therapy and which were not prepared to prove a legal theory, courts have either rejected these illnesses as not rising to the level of disability, or found

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<sup>180</sup> *Smoke v. Wal-Mart Stores, Inc.*, No. 98-1370, 2000 WL 192806, \*5 (10th Cir. Feb. 17, 2000) (finding that an individual suffering from depression failed to show substantial limitation in a major life activity).

<sup>181</sup> *Evans v. Magna Group*, No. 98-3125, 1999 WL 402401, \*2 (7th Cir. June 11, 1999) (emphasis added) (holding that an individual who suffered from OCD was not disabled because she did not show that she was substantially limited in a major life activity). *See also* *Boyer v. KRS Computer & Bus. Sch.*, 171 F. Supp. 2d 950, 964 (D. Minn. 2001) (granting summary judgment after finding that the plaintiff’s claims that schizophrenia substantially limited major life activities were “too vague and conclusory” to be successful); *Olson v. Gen. Elec. Astrospace*, 966 F. Supp. 312, 314 (D.N.J. 1997) (noting the Third Circuit’s affirmation of its holding that the plaintiff, who suffered from multiple personality disorder and depression, was not disabled within the meaning of the ADA because he had “failed to demonstrate that his impairments substantially limited his major life activities”).

<sup>182</sup> *Evans*, 1999 WL 402401 at \*2 (holding that because the plaintiff, who suffered from OCD, stated in a deposition that OCD was a “fairly harmless disorder” that “did not in any way prevent her from performing her job,” she failed to establish impairment in any major life activity).

<sup>183</sup> *Olson*, 101 F.3d at 953 (“[T]he evidence that was apparently offered to demonstrate Olson’s fitness as an employee ironically establishes that he was not substantially limited in a major life activity.”).

<sup>184</sup> *See Smoke*, 2000 WL 192806.

that the illnesses' periods of severity did not coincide with the relevant time period of an instant case.<sup>185</sup>

By definition, many mentally ill individuals have an altered perception of reality.<sup>186</sup> The courts, as a result, often read the attempt to establish disability as merely an inability to cope with everyday stress or an inability to work under a given supervisor, rather than as a true limitation of a major life activity befitting of the disability inquiry.<sup>187</sup> Courts are unwilling to recognize difficulties that arise from what they perceive as "general stresses of the workplace"<sup>188</sup> or a "low threshold of tolerance."<sup>189</sup> Further, particularly where the individual has a solid work history, the courts use that history to unseat claims of the individual's subjective experience, regardless of the fact that being able to perform at some basic level, while still being severely limited in many ways, is not an internally inconsistent state of being.<sup>190</sup>

The only conceivable "hard evidence" that an individual might supply as proof of true impairment and limitation is the administering of medication to treat the alleged problems. However, after *Sutton*, bringing medication into the court as "proof" of disability could just as easily get the plaintiff escorted out of court as a corrected and non-disabled individual. Oddly, often the only place a mentally ill plaintiff can use medication as proof is in instances where the medication imposes physical side effects. The Ninth Circuit determined that a plaintiff suffering from anxiety, panic, and somatoform disorders had raised a genuine issue of material fact about his ability to engage in the major life activity of "sexual relations" due to his claimed impotence caused by psychotropic medications.<sup>191</sup> One has to wonder whether Congress was attempting to protect individuals from psychotropic side effects when it enacted this legislation, or if, in removing

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<sup>185</sup> *Id.*

<sup>186</sup> See HUGHES, *supra* note 152, at 4 (defining mental illness as involving, among other things, disorders in thought, perception, and cognition, and as sometimes including psychosis, and symptoms outside normal experience, such as hallucinations or delusions).

<sup>187</sup> See *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1061 (7th Cir. 2000) ("[The plaintiff] has not demonstrated that her depression substantially limits her ability to work or any other major life activity. Instead, the record shows that [her] inability to work was due, not to her depression, but to her inability to work under [her supervisor]."); *Palmer v. Circuit Court of Cook County*, 117 F.3d 351, 352 (7th Cir. 1997) ("[A] personality conflict with a supervisor or coworker does not establish a disability within the meaning of the disability law, even if it produces anxiety and depression, as such conflicts often do. Such a conflict is not disabling; at most it requires the worker to get a new job.") (citation omitted).

<sup>188</sup> *Martin v. Gen. Mills, Inc.*, No. 95 C 2846, 1996 WL 648721, \*7 (N.D. Ill. Nov. 5, 1996).

<sup>189</sup> *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437, 1446 (D. Kan. 1996) (holding that being easily angered is not a disability under the ADA).

<sup>190</sup> See *Steele v. Tbiokol Corp.*, 241 F.3d 1248, 1250-52 (10th Cir. 2001) (involving a plaintiff who, despite suffering from OCD, was able to perform his work duties effectively); *Krocka v. City of Chicago*, 203 F.3d 507, 513 (7th Cir. 2000).

<sup>191</sup> *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999).

the disability inquiry so far from the initial problem, the ADA has gone awry somewhere. This “proof problem,” resulting from seemingly contradictory evidence of ability to work and impairment of a major life activity, provides courts with an easy way to dispose of mental illness claims under the ADA without excluding mentally ill plaintiffs outright.

B. Bleak Alternatives: Attempting To Remedy the Broken Disability Definition with the “Record of” or “Regarded As” Prongs

As a result of the exacting *Toyota* “central importance to daily life”<sup>192</sup> interpretation of disability, many plaintiffs may justifiably look to an alternative route to attain coverage under the ADA. On a theoretical level, it is troubling to think that individuals with mental illness are so thoroughly shut out of achieving disability status by showing that they have an actual disability that they are forced to attempt to use the “back door” of the second and third prongs: having a record of a disability or being regarded as disabled.<sup>193</sup> The inquiry in such a claim would be one step removed from the disability itself, as the plaintiff would have to convince the court that someone else thought he was disabled, or that he used to be disabled, rather than conveying the reasons why, in his own experience, he is actually limited. However, as a practical matter, such concerns would lessen if mentally ill individuals were, in fact, successful using these alternative, albeit indirect, routes. Unfortunately, mentally ill individuals who fail to establish actual disability are unlikely to find greater success through one of the other two prongs.

First, as previously mentioned, these methods of establishing disability status are indirect; thus, the focus is not on whether the individual is actually currently disabled, but on whether there is a history or perception of disability, regardless of whether the history or perceptions are erroneous.<sup>194</sup> This method may be of limited use to individuals with actual mental illness, given that mental illness is often hidden and episodic,<sup>195</sup> and may also oddly exclude individuals who are suffering from mental illness in favor of individuals who were previously mentally ill or who are mistakenly labeled mentally ill. Additionally, these two prongs present a more pragmatic problem. Because both prongs include the language “such an impairment,”<sup>196</sup> they ostensibly incorporate the substantial limitation of major life ac-

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<sup>192</sup> See *supra* note 122 and accompanying text.

<sup>193</sup> See 42 U.S.C. § 12102(2)(B), (C) (2000).

<sup>194</sup> PARRY, *supra* note 133, at 9, 11–12.

<sup>195</sup> See Bell, *supra* note 35, at 207.

<sup>196</sup> 42 U.S.C. § 12102(2)(B), (C).

tivity requirements from the first prong, thereby importing all of the problems of establishing actual disability.<sup>197</sup>

A second practical problem arises with respect to the latter two prongs of the disability inquiry. If the plaintiff is able to establish discrimination on the basis of a past disability that is no longer substantially limiting a major life activity, then it is unclear why her employer would be required to make a reasonable accommodation.<sup>198</sup> Likewise, an individual who is only "regarded as" disabled due to a third party's misperceptions rather than actually disabled would not seem to be entitled to reasonable accommodation.<sup>199</sup> Rather, an individual who experiences discrimination under the "regarded as" prong seems to be in a situation analogous to that of individuals who experience racial or gender discrimination.<sup>200</sup> Individuals who bring an ADA claim under this prong are, after all, asserting not that they are actually substantially limited in a major life activity, but rather that the employer wrongly judged them as substantially limited in a major life activity. Therefore, like the gender or race discrimination victim, they are entitled to be free from prejudice, but they are not entitled to special accommodations.<sup>201</sup> Thus, such claims do not help an individual who is currently employed and wishes to receive assistance to improve her performance at work.

### 1. *Having a "Record of" a Disability*

The ADA drafters designed the "record of" prong of disability to protect individuals who have overcome their disability from an employer's residual hostility or stereotyping.<sup>202</sup> This prong requires that the employer know that the individual at one time suffered from a mental illness.<sup>203</sup>

Unfortunately, the "record of" prong has not offered much protection to mentally ill plaintiffs. A survey of the federal case law under the ADA shows that this prong is the least utilized of the three disability prongs.<sup>204</sup> Individuals likely shy away from it for many of the same reasons this Note stated in the previous subpart.<sup>205</sup> Under this prong, a plaintiff must show that the past impairment, at one time, had substantially limited a major life activity.<sup>206</sup> Given the difficulty present in

<sup>197</sup> See Eichhorn, *supra* note 74, at 1432.

<sup>198</sup> See Friedland, *supra* note 56, at 185-86.

<sup>199</sup> See *id.* at 186.

<sup>200</sup> See Goldstein, *supra* note 10, at 962.

<sup>201</sup> See *id.*

<sup>202</sup> See S. REP. NO. 93-1297, at 38-39 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389 (discussing the "record of" prong as embodied in the Rehabilitation Act).

<sup>203</sup> PARRY & GILLIAM, *supra* note 131, at 64.

<sup>204</sup> See Eichhorn, *supra* note 74, at 1461 n.363.

<sup>205</sup> See discussion *supra* Part IV.A.1-2.

<sup>206</sup> See 29 C.F.R. § 1630.2(k) (2002).

establishing discrimination based on current mental illness, even where the individual is taunted about such illness,<sup>207</sup> as well as the obvious practical reasons that an employee would desire to keep her mental health history undisclosed, establishing that an employer discriminated against an employee on the basis of a record of disability is a very difficult additional hurdle for a potential plaintiff.<sup>208</sup>

Because the “record of” prong is generally underused, there are few cases involving this prong and a mentally ill plaintiff available for examination. Those that do exist, however, do not present a brighter picture than the cases decided under the first disability prong. Several district courts have read the “record of” prong narrowly, holding that the record of a psychiatric hospital stay due to a mental illness is insufficient to establish a “record of” a disability.<sup>209</sup> Although the plaintiffs established that they had been hospitalized due to the severity of their mental illness, the courts rejected their claims of disability, by declaring that the hospital records were insufficient to establish that the individuals had a record of being substantially limited in a major life activity.<sup>210</sup> Likewise, an individual who had taken two leaves of absence, during which a physician certified that she was unable to work, failed in her attempt to establish that she had a record of disability, because she did not show that she was substantially limited in any major life activity.<sup>211</sup>

## 2. *Being “Regarded As” Disabled*

The ADA drafters designed the “regarded as” prong to protect individuals from being disadvantaged purely as a result of stereotyping and misperceptions.<sup>212</sup> As mentioned above,<sup>213</sup> the EEOC Guidelines list three scenarios in which an individual would qualify as disabled under this third prong: 1) having a physical or mental impairment that does not substantially limit major life activities but is regarded as such; 2) having a physical or mental impairment that substantially limits major life activities due only to others’ attitudes toward the impair-

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<sup>207</sup> See *supra* note 159 and accompanying text.

<sup>208</sup> See, e.g., *Olson v. Gen. Elec. Astrospce*, 101 F.3d 947, 953 (3d Cir. 1996) (holding that an individual did not establish the elements of actual disability and, therefore, likewise failed on his claim of having a record of a disability).

<sup>209</sup> See *Heisler v. Metro. Council*, No. 00-2749, 2001 WL 1690052 (D. Minn. Dec. 14, 2001) (hospitalized for major depressive disorder), *rev’d in part on other grounds*, 339 F.3d 622 (8th Cir. 2003); *Horwitz v. L & J.G. Sticklely, Inc.*, 122 F. Supp. 2d 350, 356–58 (N.D.N.Y. 2000) (hospitalized for bipolar disorder).

<sup>210</sup> *Heisler*, 2001 WL 1690052; *Horwitz*, 122 F. Supp. 2d at 356–58.

<sup>211</sup> *Doebele v. Sprint Corp.*, 157 F. Supp. 2d 1191, 1212 (D. Kan. 2001), *rev’d in part on other grounds* by *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117 (10th Cir. 2003).

<sup>212</sup> See S. REP. NO. 101-16, at 23 (1989) (stating that “[the] third prong includes an individual who has a physical or mental impairment that does not substantially limit major life activities, but that is treated by [an employer] as constituting such a limitation”).

<sup>213</sup> See *supra* text accompanying note 78.

ment; or 3) having no impairment at all, but being treated by her employer as disabled.<sup>214</sup> The second of these scenarios allows for the possibility of an individual achieving disability status, even if he is not perceived as being substantially limited in a major life activity, if the discrimination itself, or perception thereof, causes substantial limitation of a major life activity.<sup>215</sup> However, the *Sutton* Court oddly only recognized the first and third scenarios to achieving disability status through the “regarded as” disabled prong, essentially requiring the employer to believe that the individual is substantially limited in a major life activity due to a real or perceived impairment.<sup>216</sup>

The legislative history indicates that the drafters of the ADA had intended the third disability prong to be read fairly expansively.<sup>217</sup> Further, one could argue that the ADA should cover discrimination based on any kind of impairment.<sup>218</sup> After all, if we believe that discrimination on the basis of any kind of impairment should not be tolerated in our society, why should protection under the ADA depend on whether an employer behaves in a discriminatory fashion towards a severely impaired or a more moderately impaired individual?<sup>219</sup> Nevertheless, despite existing alternatives, the lower

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<sup>214</sup> 29 C.F.R. § 1630.2(*h*)(1)–(3) (2002).

<sup>215</sup> See Feldblum, *supra* note 56, at 130; Arlene B. Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 597–98 (1997). Mayerson argues that the “regarded as” definition of impairment is superfluous, because once an individual is substantially limited in a major life activity, even if it is only due to the attitudes of other people, the individual would qualify under the first prong of the disability definition and therefore, would not need to resort to the third prong. See *id.* at 597.

<sup>216</sup> See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). The Court declared: There are two apparent ways in which individuals may fall within [the] statutory definition [of regarded as having a disability]: (1) a covered entity mistakenly believes that a person has [an] impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

*Id.*

<sup>217</sup> See S. REP. NO. 101-116, at 23–24 (1989). See also Eichhorn, *supra* note 74, at 1465–67 (arguing that legislative history reveals a broader intended reading of the “regarded as” prong).

<sup>218</sup> Feldblum, *supra* note 56, at 101–02.

<sup>219</sup> *Id.* Feldblum likens the situation to race, gender, and sexuality discrimination, pointing out:

[M]ost white people, or most men, or most heterosexuals [do not] experience discrimination on the basis of their race, gender, or sexual orientation. Nevertheless, as a society, we have not passed laws that prohibit discrimination *solely* against those individuals whose race, or gender, or sexual orientation have historically been the object of stigma and discrimination. Rather, our civil rights laws prohibit the use of a *characteristic* that the legislature has decided should ordinarily be irrelevant in decision-making.

courts have effectuated a much narrower reading of this prong, so as to defeat its true purpose. In fact, one commentator has said that the courts' current approach has "effectively shut out this avenue of relief."<sup>220</sup>

The main source of the problem is that lower courts tend to require that the individual show not only that her employer behaved in a discriminatory fashion based on stereotypes or misconceptions about the individual's perceived mental illness, but also that the employer believed that the illness substantially limited a major life activity.<sup>221</sup> This requirement is stringent; a plaintiff must prove with particularity that an employer perceived her as substantially limited. Consequently, courts have dismissed many plaintiffs' claims that they were "regarded as" disabled due to mental illness for failure to meet this standard.<sup>222</sup>

For example, the Tenth Circuit held that a plaintiff did not sufficiently establish that her employer perceived her as substantially limited, despite the fact that she established that her employer referred to her as "incapacitated" and that her work problems were "not [ ] fixable" as a result of her major depression and anxiety attacks. The court held that these statements alone were too generalized to satisfy the disability requirement.<sup>223</sup>

Similarly, the Seventh Circuit rejected a plaintiff's claim that he was "regarded as" disabled by his employer, where the employer knew that the plaintiff suffered from major depression and required that the plaintiff participate in the a "Personnel Concerns Program" where he was more closely monitored than his peers, because the employer allowed him to keep his job as a police officer and to continue to carry a gun.<sup>224</sup> Apparently because the employer allowed the plaintiff to

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Once that characteristic has been identified, no decision may be made on that basis (unless otherwise justified by the law) regardless of who possesses that characteristic.

*Id.* at 101.

<sup>220</sup> Locke, *supra* note 8, at 141.

<sup>221</sup> See PARRY & GILLIAM, *supra* note 131, at 64–65.

<sup>222</sup> See, e.g., Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 153–54 (2d Cir. 1998); Huizenga v. Elkay Mfg., 2001 WL 640973 (N.D. Ill. June 5, 2001); Doebele v. Sprint Corp., 157 F. Supp. 2d 1191, 1212–14 (D. Kan. 2001), *rev'd in part on other grounds* by Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117 (10th Cir. 2003); Law v. Garden State Tanning, 159 F. Supp. 2d 787, 791–92 (E.D. Pa. 2001); Robb v. Horizon Credit Union, 66 F. Supp. 2d 913, 919 (C.D. Ill. 1999); Sullivan v. River Valley Sch. Dist., 20 F. Supp. 2d 1120, 1124–25 (W.D. Mich. 1998).

<sup>223</sup> Doyal v. Okla. Heart, Inc., 213 F.3d 492, 499 (10th Cir. 2000). See also Steele v. Thiokol Corp., 241 F.3d 1248, 1256 (10th Cir. 2001) (holding that although the employer knew of the plaintiff's disability and of the medication he was taking, and had expressed concern over the plaintiff's mood swings, thinking that such mood swings were the result of plaintiff's medication, this knowledge was still insufficient to create a triable issue of fact as to whether the plaintiff was "regarded as" disabled).

<sup>224</sup> Krocka v. City of Chicago, 203 F.3d 507, 513–14 (7th Cir. 2000).

retain his position at the police department, the court concluded that the employer did not believe that the plaintiff was restricted in his ability to do his job, and thus his claim of being regarded as disabled necessarily failed.<sup>225</sup>

Likewise, the Eighth Circuit found that an individual was not regarded as disabled because the employer did not believe she was substantially limited in a major life activity, despite the fact that the employer offered her paid medical leave and required that she see a psychologist before returning to work.<sup>226</sup> The court reasoned that “[e]mployers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims . . . .”<sup>227</sup> As these cases illustrate, the plaintiff’s mere showing of substantial limitation of a major life activity is difficult, but the additional requirement of showing that his employer *believed* he was substantially limited in a major life activity—as the “regarded as” disability prong requires—makes the task nearly impossible.

Further, as a result of the lower court’s reading of the third prong, most individuals identify “working” as the major life activity that the employer believed was substantially limited.<sup>228</sup> Such a tactic is unsurprising, as working is the most plausible major life activity the plaintiff can readily use to demonstrate that the employer perceived the employee to be limited at the time of the adverse employment action. However, the EEOC Guidelines have interpreted substantial limitation in working to mean limitation in a “broad class of jobs,”<sup>229</sup> an interpretation that most of the courts have wholeheartedly endorsed.<sup>230</sup> By and large, with such a standard, plaintiffs fail.<sup>231</sup> In fact, in *Sutton*, the petitioners’ attorneys accepted that they had to show substantial limitation in a broad class of jobs, rather than arguing for a less stringent standard.<sup>232</sup> Predictably, individuals have experienced

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<sup>225</sup> See *id.* at 514.

<sup>226</sup> *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 598–99 (8th Cir. 1998).

<sup>227</sup> *Id.* at 599.

<sup>228</sup> See *Mayerson*, *supra* note 215, at 598.

<sup>229</sup> See *supra* text accompanying notes 67–68.

<sup>230</sup> *Id.*; *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200 (2002) (quoting *Sutton*, 527 U.S. 471, 491 (1999)), and finding that the EEOC’s definition of substantial limitation applies to either a class of jobs or a broad range of jobs in various classes); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 517 (1999) (citing the EEOC’s definition of substantial limitation as applying to “either a class of jobs or a broad range of jobs in various classes” (internal quotation marks omitted)); *Sutton*, 527 U.S. at 491–92 (same).

<sup>231</sup> See, e.g., *Shiplett v. Nat’l R.R. Passenger Corp.*, 182 F.3d 918 (Table) (6th Cir. 1999); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 153 (2d Cir. 1998); *Whalley v. Reliance Group Holdings, Inc.*, 2001 WL 55726 (S.D.N.Y. Jan. 22, 2001). See also *Locke*, *supra* note 8, at 122–23 (noting that courts generally require plaintiffs to show that they are unable to do practically all other jobs except the one that they were actually doing under the current standard).

<sup>232</sup> *Sutton*, 527 U.S. at 490.

tremendous difficulty establishing that an employer believed them to be incapable of working at any of a broad class of jobs at the time of the adverse employment action. Most employers reasonably only think about their own needs, as opposed to the larger employment implications for the employee, when they make business decisions.<sup>233</sup> Further, it is not a heavy burden for the employer to establish that there is *some* existing set of jobs that she believed the plaintiff would have been qualified to do.<sup>234</sup> Finally, the dilemma of “burning the candle at both ends” is overtly present here: if an employer truly believed that the plaintiff was unqualified to perform a broad class of jobs, then she would generally be able to defend her employment decision by showing also that the plaintiff was not qualified for the essential functions of the position in question. Because there is a slim likelihood that an individual would be unqualified for most jobs, but qualified for the one the plaintiff formerly held, the courts would likely find such an assertion to be untenable.<sup>235</sup>

Thus, the “record of” and “regarded as” prongs of the statute do not present much respite from the difficulties that plague the first prong of the statute. Regardless of which prong a mentally ill plaintiff chooses to sue under, the bottom line is that the claim is exceedingly likely to be unsuccessful.

## V

### RESOLUTION

This Note has explored the intricacies of the disability definition, and has attempted to make tangible the various ways this definition has failed to protect mentally ill plaintiffs. This Part aims to offer deeper insight into the reasons for the ADA’s failures, as well as present the choices that we, as a society, face.

First and foremost, the drafters created the ADA with the specific purpose of “bring[ing] persons with disabilities into the economic and social mainstream of American life.”<sup>236</sup> Reality tells a different story. More than one in five Americans has a diagnosable mental illness in a given year.<sup>237</sup> These individuals are the second largest group of individuals with disabilities that file charges with the EEOC.<sup>238</sup>

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<sup>233</sup> See Locke, *supra* note 8, at 143.

<sup>234</sup> See *id.* at 124–25. See also Feldblum, *supra* note 56, at 157 (“Thus, if a defendant employer refuses to hire an individual because of an impairment, but concomitantly [sic] believes the individual’s impairment will not preclude her from working elsewhere, the defendant will not have regarded the individual as being substantially limited in the life activity of working.”).

<sup>235</sup> See Locke, *supra* note 8, at 127.

<sup>236</sup> S. REP. NO. 101-116, at 2 (1989).

<sup>237</sup> Hall, *supra* note 6, at 248 (providing data from 1993).

<sup>238</sup> *Id.* at 247 (citing U.S. EEOC data from 1993).

Mental disorders in the workplace that are not treated properly give rise to many and varied problems, including stigmatization by other employees, work impairment for the mentally ill individuals, and the increased societal cost of decreased productivity and lost work days.<sup>239</sup> Despite the congressional intent to aid individuals with mental disabilities in the workplace, the employment rate for these individuals has remained the same as it was in a pre-ADA world.<sup>240</sup> When reviewing the ADA's effectiveness for people with mental disabilities in light of Congress's stated purpose of a national mandate for the elimination of discrimination against individuals, it is painfully clear that the ADA has been woefully inadequate at attaining those goals.<sup>241</sup> Consequently, change is imperative.

First, employers must be more flexible in their conception of accommodation. Although a request for accommodation may be unusual, the employer should try to effectuate the request if it is feasible and not unduly costly. Additionally, at the litigation stage, courts should interpret the disability requirements more flexibly, so that instead of forcing plaintiffs to fit their experience into the ADA "formula," the courts engage in a truly individualized inquiry, with a fundamental focus on the fairness of the employer's actions. The ADA disability inquiry must be freed from its "term of art" status.

Nevertheless, working within the confines of the statute is not enough. The structure and ideology of the ADA excludes most mentally ill individuals, and under the current text of the ADA alone, even with a more flexible interpretation, the statute will continue to exclude most mentally ill individuals from protection in the workplace.<sup>242</sup> The drafters designed the employment components of the ADA to enable individuals to compete in the job market. For that purpose, it may indeed have been effective. After all, many of the people claiming mental disability for whom the ADA has denied coverage were likely unable to perform as well as individuals who do not suffer from mental limitations. However, this leveling approach has proven itself to be laden with problems for the mentally ill.

An amendment or addition to the text of the ADA is one possible solution to this problem. Many commentators and supporters of the mentally ill have proposed such a remedy.<sup>243</sup> However, this Note does not, likewise, advocate revision of the statute, because such a revision

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<sup>239</sup> *Id.* at 246–248.

<sup>240</sup> MENTAL DISORDER, *supra* note 6, at 199–200 (citing data from 1994).

<sup>241</sup> See generally Stefan, *supra* note 11 (arguing that the ADA's inclusion of mental disabilities as protected from discrimination and subsequent treatment of mentally ill plaintiffs in the courts amounts to a delusion of rights).

<sup>242</sup> See *supra* Part IV.A–B.

<sup>243</sup> See, e.g., Goldstein, *supra* note 10, at 972–73 (proposing an amendment to the "regarded as" prong of the ADA in order to better accommodate mentally ill plaintiffs).

would likely be ineffective in ameliorating the harm mentally ill plaintiffs face. At this moment in history, our judicial system is reluctant to allow mentally ill plaintiffs to prevail on their disability discrimination claims. Courts show a great discomfort in dealing with these cases, and apparently intuit that mentally ill individuals should not recover for employment discrimination. Even though it so happens that the ADA is an extraordinarily broad and ambiguous statute under which to justify such a result, it is likely that mentally ill plaintiffs would fail even if the statute's language were changed. This phenomenon is part of a larger societal lack of resolve regarding mentally ill individuals in America.

We, as a society, have reached a crossroads in our treatment of the mentally ill population. We exhibit a profound ambivalence regarding what we believe constitutes mental illness, whether mental illness constitutes disability, and how afflicted individuals should be treated.<sup>244</sup> Part of the problem is that "disability," unlike race and gender, is a relative term, as it is defined in terms of how much a person's mental functioning "deviates" from the norm.<sup>245</sup> The manner in which our society treats the mentally ill indicates that we are undecided whether we believe, as we do with reference to race and gender, that mentally ill individuals should be integrated into our society.<sup>246</sup>

Mentally ill individuals, and the health care practitioners who treat them, continue to experience pervasive stigmatization at the hands of the "normal" public at large.<sup>247</sup> Society often treats mentally

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<sup>244</sup> See 135 CONG. REC. S10,753 (daily ed. Sept. 7, 1989) (statement of Sen. Armstrong).

What concerns me is the thought that this disability might include some things which by any ordinary definition we would not expect to be included . . . . Mental disorders, such as alcohol withdrawal, delirium, hallucinosis, dementia with alcoholism, marijuana, delusional disorder . . . . I could not imagine the sponsors would want to provide a protected legal status to somebody who has such disorders . . . .

*Id.*

<sup>245</sup> See generally PAULA J. CAPLAN, *THEY SAY YOU'RE CRAZY: HOW THE WORLD'S MOST POWERFUL PSYCHIATRISTS DECIDE WHO'S NORMAL* (1995) (exploring the often arbitrary and unclear definition of abnormality as opposed to normalcy).

<sup>246</sup> See SUSAN STEFAN, *UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 8-9* (2001) (citing a recent Harris poll in which fifty-nine percent of respondents stated they would be very comfortable meeting someone wheelchair bound and forty-seven percent stated they would be comfortable meeting someone blind, but only nineteen percent stated that they would be comfortable meeting someone who had a mental illness).

<sup>247</sup> *Id.* at 4-5 ("Discrimination pervades the lives of people with psychiatric diagnoses . . . . Social science research confirms that mental illness is one of the most—if not the most—stigmatized of social conditions."); see generally *STIGMA AND MENTAL ILLNESS* (Paul Jay Fink & Allan Tasman eds., 1992) (exploring the way that mentally ill individuals, their families, and their health care providers are stigmatized, both historically and in present times).

ill individuals with suspicion, contempt, and fear.<sup>248</sup> Even after the adoption of the ADA, very little has changed: mentally ill individuals tend to be substantially more disadvantaged in the workplace as compared with the rest of the population.<sup>249</sup>

Both the development of the ADA and subsequent lawyering under it have been plagued by ambivalence and discrimination.<sup>250</sup> Although the statute's drafters intentionally included individuals with mental illness within the pool of individuals the Act was designed to assist,<sup>251</sup> from the outset, the needs and unique nature of mental illness have continually been ignored. The ADA, while purporting to create equality for the mentally ill, has never fully committed to eradicating discrimination against these individuals.<sup>252</sup> Society has not yet assumed the responsibility of doing so. As long as the ADA pays only lip service to discrimination against the mentally ill, without leading to relief for the mentally ill individuals who genuinely try to rid their lives of such discrimination, anti-discrimination disability law will remain of limited value to individuals with mental illness.

Consequently, society, as well as the law, faces a choice. If we continue to straddle the proverbial fence about whether to integrate mentally ill individuals into the workforce, or if we are unwilling to assume responsibility for managing the unique position of individuals with mental illness in the realm of employment, then perhaps the range of these individuals that are covered under the ADA should be narrowed to include only those illnesses that are deemed worthy of protection.<sup>253</sup> Although such action would be drastic, and would unfairly leave some individuals without recourse for the discrimination they experience, it seems equally unfair to permit mentally ill individuals to dedicate time, energy, and money to litigating claims that are rarely, if ever, granted relief. The growing din of dissatisfaction from

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<sup>248</sup> STEFAN, *supra* note 246, at 10–11.

<sup>249</sup> See Edward H. Yelin & Miriam G. Cisternas, *Employment Patterns Among Persons with and Without Mental Conditions*, in MENTAL DISORDER, *supra* note 6, at 25, 36–37 (finding that for the period from 1987 to 1991, persons with mental illness had much lower employment rates than those without mental conditions).

<sup>250</sup> Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth": *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as it Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 4 (1999) (arguing that mental health law is plagued by "sanism," an "irrational prejudice" that "is based predominantly upon stereotype, myth, superstition, and deindividualization," which "infects both our jurisprudence and our lawyering practices").

<sup>251</sup> Mental illness was not included without a fight, however. See STEFAN, *supra* note 246, at 6 ("Mental illness was the only disability that was subject to attack on the floor of Congress during the debate over the ADA.") (footnotes omitted).

<sup>252</sup> See *id.* at xiii.

<sup>253</sup> For example, the ADA could acknowledge certain illnesses listed in the DSM-IV to the exclusion of others. See DSM-IV, *supra* note 59. Alternatively, the Act could identify more specific criteria in defining disability with respect to mentally ill individuals, to create a narrower class of individuals who would be afforded protection under the law.

dissonant voices that advocate for change in how we treat mental illness, however, indicate that this is not the proper solution.

If we are, within the realm of the law as well as within the larger context of society, truly committed to the stated purposes of the ADA and thus, desirous of integrating individuals with mental disabilities into the workforce, change is necessary. Mentally ill plaintiffs must begin to look outside the confines of the ADA to find respite from discrimination. One example of an alternative can be found in the recent Seventh Circuit case of *Byrne v. Avon Products, Inc.*<sup>254</sup> In this case, the Seventh Circuit found that the plaintiff's severe depression prevented him from meeting the statutory definition of a qualified individual with a disability, and therefore, found him unable to assert a valid discrimination claim under the ADA.<sup>255</sup> In doing so, the court noted the fact that the ADA only applies to individuals who can "do the job," thereby taking individuals who need long periods of time off out of the range of individuals protected under the ADA.<sup>256</sup> However, the court did not leave the individual without any protection. Instead, it reversed the grant of summary judgment with respect to the claim asserted under the Family and Medical Leave Act (FMLA).<sup>257</sup> The FMLA was designed to provide greater flexibility to working individuals with children and to foster "stability and economic security of families,"<sup>258</sup> not to remedy discrimination against individuals with mental disabilities. Despite this fact, the Seventh Circuit found that an individual in need of leave due to a "serious health condition," such as mental illness, might be able to recover under the FMLA.<sup>259</sup> Thus, as an interim measure, plaintiffs should examine alternative sources such as the FMLA under which to state a cause of action. If the ADA will not suffice, perhaps other courts will follow the Seventh Circuit in affording mentally ill plaintiffs relief through claims outside the ADA.<sup>260</sup>

However, looking to alternate grounds for one's discrimination claim at the litigation stage alone is not the solution. Much of the answer must lie outside the courtroom. The key to truly integrating the mentally ill will likely require creating incentives and training for mentally ill individuals to make such individuals competitive in the job

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<sup>254</sup> 328 F.3d 379 (7th Cir. 2003).

<sup>255</sup> See *id.* at 380–81.

<sup>256</sup> *Id.* at 381.

<sup>257</sup> *Id.* at 382; see 29 U.S.C. § 2601 (2000).

<sup>258</sup> 29 U.S.C. § 2601(b)(1).

<sup>259</sup> See *Byrne*, 328 F.3d at 382.

<sup>260</sup> Of course, the fact that mentally ill plaintiffs must resort to a statute that Congress designed for a wholly different purpose because the ADA offers such little chance for success further illustrates the ADA's inadequacy. Therefore, this Note suggests resort to alternative statutes such as the FMLA only as an interim measure to increase plaintiffs' chances at the litigation stage, rather than as a permanent, or ideal, solution.

market, and thus less likely to resort to litigation. The legislature must act to achieve true integration for the mentally ill; courts are neither best equipped, nor evidently inclined, to address this pervasive social issue through litigation.

As a start, Congress could create a national training program to work with individuals who suffer from more pervasive mental illnesses. Such a program would enable the participants to manage their illnesses in order to meet the expectations that would be placed upon them in competitive employment. The program would be rehabilitative in purpose: mentally ill individuals could develop coping mechanisms necessary to handle their illness in the employment context, and do so in a more supportive atmosphere. Further, Congress could create mandatory educational programs to destigmatize mental illness in the workplace. Employers would communicate to employees that discrimination and stigmatization against individuals with mental illness was unacceptable, thereby eliminating a significant additional hurdle to the mentally ill. Finally, Congress could create a tax incentive structure to encourage employers to "take a chance" on mentally ill employees after such individuals had completed the training program. Such an "affirmative action" based approach may suit mentally ill individuals better than the current bare-bones equal opportunity structure.

#### CONCLUSION

The specific strategies presented above are, of course, merely ideas; they are not the only, or even necessarily the most effective, possibilities. What is crucial, however, is the underlying shift in thinking about how to approach mental illness in the workplace. The suggestions seek to encourage greater societal responsibility for training and employing mentally ill individuals, as well as more pro-active, preventative, and supportive tactics aimed at integrating individuals with mental illness into the workforce. The effectuation of such a shift in thinking would hopefully greatly decrease the amount of ADA discrimination claims brought by mentally ill plaintiffs, as it would address the problem of integrating the mentally ill population at a much earlier stage. Ideally, individuals with mental illness in the workplace would face less discrimination, and therefore, have less of a need to resort to the courts. Ultimately, such an approach just might be the initial step to achieving the laudable goals of the ADA.