Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability

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"SUBSTANTIALLY LIMITED" PROTECTION FROM DISABILITY DISCRIMINATION: THE SPECIAL TREATMENT MODEL AND MISCONSTRUCTIONS OF THE DEFINITION OF DISABILITY

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I. Introduction

Disability nondiscrimination laws, such as the Americans with Disabilities Act of 1990 (ADA), and the disability rights movement which spawned them have, at their core, a central premise that is both simple and profound. That premise is that people denominated as "disabled" are just people, not different in any critical way from other people. Paradoxically, commentators, enforcement agencies and the courts, with manifest good intentions, have frequently interpreted and applied these laws in ways that reinforce a diametrically opposite premise—that people with disabilities are significantly different, special and need exceptional status and protection. One is reminded of Justice Brandeis's admonition that citizens should be most on guard "when Government's purposes are beneficent" and that the greatest dangers arise from "encroachment by [people] of zeal, well-meaning but without understanding."9

1. Terminology regarding disabilities can be a sensitive issue. For a discussion of terminology that individuals with disabilities and the organizations representing them prefer and the reasons behind such predilections, see Robert L. Burgdorf Jr., Disability Discrimination in Employment Law 15-23 (1995) [hereinafter Burgdorf, Disability Discrimination in Employment Law]. This Article makes use of the currently preferred terminology except in quoted materials where the now outmoded wording is used in the original. In particular, this means that the Article shall comply with the following two conventions: (1) noun plus prepositional phrase formulations (such as "person with a disability," "Americans with epilepsy," "individual with a hearing impairment" and "citizens with diabetes") will be used instead of adjective and noun phrasing (such as "disabled person," "mentally retarded children" and "hearing impaired people") and instead of phrases that turn the disabling condition into a noun (such as "the disabled," "an epileptic" and "the learning disabled") and (2) the word "disability" will be used in place of the word "handicap." See Robert L. Burgdorf Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 Harv.C.R.-C.L. L. Rev. 413, 414 n.7 (1991) (discussing "revolution" that has occurred over past decade in regard to disability terminology) [hereinafter Burgdorf, Analysis and Implications].


Recent public, legal and juridical discourse concerning affirmative action initiatives has often included rhetorical flourishes about the negative effects of singling out groups of citizens for preferred treatment. An article in the Washington Post declared: "Misapplied, affirmative action is at best an entitlement program that exalts group identity over individual promise. At worst, it yields corruption . . . . But even properly applied, affirmative action is unsettling for Americans. It is at odds with the end it serves."4 Even some Justices of the Supreme Court of the United States have written in disparaging terms about various kinds of group preferences.5 There are, of course, staunch defenders of affirmative action and other remedial and corrective programs.6 For instance, the United States Commission on Civil Rights wrote:


5. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 538 (1980) (Stevens, J., dissenting) (noting with respect to minority business set-aside program that "[a] best the statutory preference is a somewhat perverse form of reparation for the members of the injured classes"). In Fullilove, Justice Stevens also noted: "Preferences based on characteristics acquired at birth foster intolerance and antagonism against the entire membership of the favored classes." Id. at 547 (Stevens, J., dissenting). Also in Fullilove, Justice Powell said: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Id. at 497 (Powell, J., concurring) (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967)). In one case, the Court noted with respect to racial preferences for admission to medical school that "there are serious problems of justice connected with the idea of preference itself . . . . [P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978). In another case, Justice Brennan noted with respect to racial criteria in redistricting, that "preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection." United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 450 U.S. 144, 173-74 (1977) (Brennan, J., concurring in part and dissenting in part).

6. See, e.g., Adarand Const. Co. v. Pena, 515 U.S. 200, 242-64 (1995) (Stevens, J., dissenting) (arguing to uphold constitutionality of minority preference for federal contractors); Fullilove, 448 U.S. at 482 ("As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."); Bakke, 438 U.S. at 324 (Brennan, J., concurring in part and dissenting in part) ("Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.").

Even Justice Powell, an outspoken critic of most preference programs, found in Bakke that diversity in a student body could be a sufficiently compelling reason to justify the consideration of race in admissions, so long as it is done in a proper way. Id. at 311-19. Justice Powell suggested that the Harvard University admission program was the proper way to consider race in admissions and appended it to his opinion. See id. at 321-24.
Without affirmative intervention, discriminatory processes may never end. Properly designed and administered affirmative action plans can create a climate of equality that supports all efforts to break down the structural, organizational, and personal barriers that perpetuate injustice. They can be comprehensive plans that combat all manifestations of the complex process of discrimination. In such a climate, differences among racial and ethnic groups and between men and women become simply differences, not badges that connote domination or subordination, superiority or inferiority.\(^7\)

In the absence of compelling remedial necessity, the notion of singling out one group of citizens for superior treatment or special protection under our laws seems inherently un-American and contrary to the constitutional edict of “equal protection of the laws.”\(^8\) To the extent that affirmative action, set-asides and other race-conscious measures have been permitted in government programs and activities, the courts subject them to “strict scrutiny” and require them to be narrowly tailored to the promotion of a compelling governmental objective.\(^9\)

Without fanfare or debate, however, a special treatment or preferred group approach has crept into the interpretation of laws prohibiting discrimination based on disability in this country. Such an approach may have an appropriate place in laws and programs that establish special benefits or programs for people with disabilities, including affirmative action programs. Notably, no statutory or constitutional prohibition of discriminating \textit{in favor of} people with disabilities,\(^10\) comparable to the “reverse discrimination” analysis

\(^7\) U.S. Comm’n on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination 41 (1988). This report, though somewhat dated, provides a thorough and thoughtful analysis of the objectives and characteristics of affirmative action efforts. \textit{See id.}

\(^8\) \textit{See, e.g., Bakke}, 438 U.S. at 295 (“It is far too late to argue that the guarantee of equal protection to \textit{all} persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.”).


\(^10\) \textit{See Burgdorf}, Disability Discrimination in Employment Law, supra note 1, at 125-26. This difference may stem from the inherent nature of the concept of disability. Disability is conceived in negative terms as the absence or impairment of something that other people have (e.g., the absence of a limb, the inability to hear or to connect with reality in the same way that other so-called “normal” peo-
that has sometimes prevailed in race and gender discrimination cases, exists.\(^\text{11}\) In the context of laws prohibiting discrimination based on disability, however, the special treatment approach has impaired the interpretation and enforcement of these laws. The approach has generated unnecessary complexity, harsh technicalities and niggardly standards regarding protection under such statutes.

This Article examines the extent to which a preferred group mentality has tainted regulatory and judicial interpretations of the scope of protection afforded under the primary federal laws that prohibit discrimination based on disability. Part II of this Article reviews the history surrounding the enactment of the Rehabilitation Act of 1973 (Rehabilitation Act), the statutory predecessor to the ADA.\(^\text{12}\) Part III considers the 1974 Amendments to the Rehabilitation Act ("1974 Amendments"), where Congress created a three-prong definition of an "individual with a handicap" that was im-

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11. See City of Richmond v. J.A. Groson Co., 488 U.S. 469, 509-11 (1989) (striking down city's requirement that prime contractors subcontract at least 30% of city contracts to minority businesses); Bakke, 438 U.S. at 265 (invalidating, by divided opinion, special admissions program that set aside positions for racial and ethnic minorities); Kirkland v. New York State Dep't Of Correctional Servs., 520 F.2d 420, 427-29 (2d Cir. 1975) (holding in absence of "clear-cut pattern of long-continued and egregious racial discrimination" quota for promotions constituted "constitutionally forbidden reverse discrimination"); Sterling v. Klamath Forest Protective Ass'n, 528 P.2d 574, 578 (Or. Ct. App. 1974) (finding that preference for members of racial minorities over more qualified whites would constitute reverse discrimination under Oregon civil rights statute). \textit{But see} Johnson v. Transp. Agency, 480 U.S. 616, 640-42 (1987) (upholding affirmative action program that established short-range goals and permitted gender and race to be considered as factors in promotion decisions in traditionally segregated job classifications); United Steel Workers v. Weber, 443 U.S. 193, 208-09 (1979) (upholding affirmative action plan that reserved 50% of openings in craft training program for black employees until percentage of black employees became equal to percentage of blacks in labor force). \textit{See generally}, \textsc{Barbara Lindemann Schleif & Paul Grossman}, \textsc{Employment Discrimination Law} 785-870 (1983) (discussing Supreme Court decisions between 1978 and 1980 that "made and remade the law on reverse discrimination in the context of affirmative action plans").

In \textit{Adarand}, the Supreme Court ruled that all racial classifications, whether remedial or not, and whether imposed by federal, state or local governments must be subjected to strict judicial scrutiny. \textit{See Adarand}, 515 U.S. at 223-27 ("[S]uch [racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

12. For a discussion of the history surrounding the enactment of the Rehabilitation Act of 1973, see \textit{infra} notes 18-97 and accompanying text.
ported verbatim into the ADA. Next, Part IV of this Article addresses various judicial misconstructions of the three-prong definition as well as the problems that these misinterpretations have caused. Because the constricted interpretation of protection under the ADA represents a considerable journey down the wrong road, Part V provides principles that courts can follow to reconsider and reorient the law so that analysis and interpretation can take a path that is more consistent with the purposes and philosophy of federal laws that proscribe discrimination based on disability. Part VI discusses the consequences of traveling down the wrong road. Finally, Part VII provides analytical alternatives to the prevailing interpretations.

II. STARTING DOWN THE WRONG ROAD—SECTION 504 OF THE REHABILITATION ACT OF 1973

A. The Origins of Section 504

The pervasiveness and perniciousness of discrimination based on disability has been abundantly documented in legal literature. The executive, judicial and legislative branches of government, in

13. For a discussion of the 1974 Amendments to the Rehabilitation Act through which Congress created a three-prong definition of an "individual with a handicap," see infra notes 98-145 and accompanying text.

14. For a discussion of various judicial misconstructions of the three-prong definition as well as the problems that these misinterpretations have caused, see infra notes 146-545 and accompanying text.

15. For a discussion of principles that courts can follow to reconsider and reorient disability nondiscrimination law, see infra notes 546-623 and accompanying text.

16. For a discussion of the consequences of traveling down the wrong road in disability nondiscrimination law, see infra notes 624-818 and accompanying text.

17. For a discussion of analytical alternatives to the prevailing interpretations in disability nondiscrimination law, see infra notes 819-75 and accompanying text.

18. See, e.g., U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 17-42, 159 (1983) (documenting long pattern of discriminatory practices against handicapped in United States) [hereinafter ACCOMMODATING THE SPECTRUM]; Jack Achtenberg, "Crips" Unite to Enforce Symbolic Laws: Legal Aid for the Disabled: An Overview, 4 U. SAN FERNANDO VALLEY L. REV. 161, 163-64 (1975) (citing various examples of discrimination based on disability including theater manager saying, in effect, that if you are in wheelchair, he didn’t want you here); Richard A. Bales, Once Is Enough: Evaluating When a Person Is Substantially Limited In Her Ability to Work, 11 HOFSTRA LAB. L.J. 203, 210-11 (1993) (discussing congres-sional findings in ADA indicating recognition that discrimination against individuals with disabilities persists and is pervasive throughout all facets of life including relegation to lesser services, programs, activities, benefits and jobs); Burgdorf, Analysis and Implications, supra note 1, at 415-26 (discussing pervasiveness of discrimination based on disability and stating “people with disabilities are victims of widespread discrimination and constitute a severely disadvantaged segment of society”).
dependent federal agencies and numerous other authorities have all condemned such discrimination, identified the serious problems that it poses and described the personal, social and fiscal costs that it entails.\footnote{See, e.g., H.R. Rep. No. 101-485, at 28-50 (1990) ("The [Education and Labor] Committee . . . concludes that there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, public services, transportation, and telecommunications."); id. at 25-26 (discussing need for legislation addressing problem of disability discrimination); S. Rep. No. 101-116, at 5-20 (1989) (describing need for legislation to deal with disability discrimination); NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 3 (1986) (discussing need for legislation); TASK FORCE ON THE RIGHTS & EMPOWERMENT OF AMERICANS WITH DISABILITIES, EQUALITY FOR 43 MILLION AMERICANS WITH DISABILITIES: A MORAL AND ECONOMIC IMPERATIVE 8 (1990) (discussing need for legislation because "[i]ndividuals with disabilities experience staggering levels of unemployment and poverty").}

In Alexander v. Choate, 469 U.S. 287 (1985), the Supreme Court noted that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference of benign neglect." Id. at 295-96. Furthermore, in a concurrence, Justice Stevens noted that "through ignorance and prejudice the mentally retarded have been subjected to a history of unfair and often grotesque mistreatment." City of Cleburne, Inc. v. Cleburne Living Ctr., 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (quoting Cleburne Living Ctr., Inc. v. City Of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984)). Similarly, in a separate concurrence Justice Marshall dramatically highlighted the plight of people with mental retardation stating:

[T]he mentally retarded have been subject to a "lengthy and tragic history" of segregation and discrimination that can only be called grotesque. During much of the 19th century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices. By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feeble-minded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded "unfit for citizenship."

Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the "basic civil rights of man"—the right to marry and procreate. Marriages of the retarded were made, and in some States continue to be, not only voidable but also often a criminal offense. The purpose of such limitations, which frequently applied only to women of child-bearing age, was unabashedly eugenic: to prevent the retarded from propagating. To assure this end, 29 States enacted compulsory eugenic sterilization laws between 1907 and 1931. Prejudice, once let loose, is not easily cabined. As of 1979, most States still categorically disqualified "idiots" from voting, without regard to individ-
Apart from a post–World War II measure enacted in 1948 that prohibited discrimination based on “physical handicap” in U.S. civil service employment (“1948 Act”), the first attempt to provide protection from disability discrimination focused on adding disability to the types of discrimination prohibited under the Civil Rights Act of 1964 (Civil Rights Act). In December 1971, Representative Charles Vanik (D-Ohio) introduced in the U.S. House of Representatives a bill to amend Title VI of the Civil Rights Act (Title VI), which prohibits discrimination in federally assisted programs, to add “physical or mental handicap” to the prohibited grounds for discrimination. In his remarks in support of the bill, Congressman Vanik declared that “the treatment and regard for the rights of handicapped citizens in our country is one of America’s shameful oversights” and that his proposed legislation would ensure equal opportunities for people with disabilities “by making discrimination illegal in federally assisted programs and activities.” A companion bill was introduced in the U.S. Senate in early 1972 by Senator Hubert Humphrey (D-Minn.) on behalf of himself and Senator

Id. at 461-64 (footnotes and citations omitted) (Marshall, J., concurring in part and dissenting in part); see also LOUIS HARRIS & ASSOCIATES, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 70, 75 (1986) (finding that two-thirds of Americans with disabilities between ages of 16 to 64 are not working, but would like to be); LOUIS HARRIS & ASSOCIATES, THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS 12 (1987) [hereinafter EMPLOYING DISABLED AMERICANS] (finding employment discrimination remains significant barrier to Americans with disabilities).

In enacting the ADA, Congress expressly found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination . . . continue to be a serious and pervasive social problem.” 42 U.S.C. § 12101(a)(2) (1994). Further, it declared that individuals with disabilities “have been faced with restrictions and limitations, subject to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.” Id. § 12101(a)(7).

20. Act of June 10, 1948, Pub. L. No. 80-617, 62 Stat. 351 (prohibiting discrimination “in any case because of any physical handicap, in examination, appointment, reappointment, reinstatement, reemployment, promotion, transfer, retransfer, demotion, or removal, with respect to any position the duties of which, in the opinion of the Civil Service Commission, may be efficiently performed by a person with such a physical handicap”).


22. Id. § 2000(d).


Charles Percy (R-Ill.). Senator Humphrey asserted that America should no longer "live with the hypocrisy that the promise of America should have one major exception: Millions of children, youth, and adults with mental or physical handicaps." He insisted that "the civil rights of 40 million Americans now be affirmed and effectively guaranteed by Congress." This guarantee could be accomplished by passing his bill and would ensure "equal opportunities for the handicapped by prohibiting needless discrimination in programs receiving Federal financial assistance." Some sixty members of the House and twenty members of the Senate cosponsored the Vanik and Humphrey bills, but no hearings were held in either chamber and the bills died in the respective judiciary committees.

In a separate bill introduced in 1972, Representative Vanik sought to amend Title VII of the Civil Rights Act (Title VII) to "make discrimination because of physical or mental handicap in employment an unlawful employment practice, unless there is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." This bill also died in committee.

When Humphrey's and Vanik's attempts to amend Title VII to add disability to the list of prohibited grounds for discrimination failed, similar language was incorporated into a broader rehabilitation bill and was enacted into law as section 504 of the Rehabilitation Act. The new law also included two provisions imposing affirmative action requirements. First, section 501 required departments, agencies and instrumentalities in the executive branch of the federal government to submit an affirmative action plan for the hiring, placement and advancement of individuals with disabilities. Additionally, section 503 mandated that federal contracts over $2500 must contain a provision requiring the contractor to take affirmative action to employ and advance workers with disabili-

27. Id.
28. Id.
33. See id. § 791.
ties. 34 Although they are framed in terms of affirmative action, court decisions have interpreted both section 501 and section 503 as implicitly prohibiting discrimination by the entities that are subject to the affirmative action obligation. 35 The Rehabilitation Act also included section 502, which established an Architectural and Transportation Barriers Compliance Board within the federal government to facilitate the removal of architectural and transportation barriers that impede the mobility and access of people with disabilities. 36

B. A Drafting Disaster—The Wording of Section 504

The details of the drafting of the language of section 504 of the Rehabilitation Act are shrouded in some mystery. Seven Senate staff members met in August of 1972 to discuss a bill to extend and strengthen the federal vocational rehabilitation program; the bill had already been "marked-up" by the Senate Labor and Public Welfare Committee. 37 At the meeting, the staff members agreed to add

34. See id. § 798. The minimum contractual amount was raised to $10,000 in 1992. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 505(a)(1), 106 Stat. 4344, 4427.

35. See Gardner v. Morris, 752 F.2d 1271, 1278-80 (8th Cir. 1985) (noting that section 501 of Rehabilitation Act "prohibit[s] discrimination on the basis of handicap by the federal government" and additionally "[section] 501 requires the federal government to act affirmatively in order to reasonably accommodate handicapped employees or applicants."); Shirey v. Devine, 670 F.2d 1188, 1200-01 (D.C. Cir. 1982) (holding section 501 of Rehabilitation Act implicitly prohibits discrimination on basis of employee's handicap by federal government); Prewitt v. United States Postal Serv., 662 F.2d 292, 304 (5th Cir. 1981) ("Congress clearly recognized both in section 501 and in section 504 that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the federal government and its agencies."); Ryan v. Federal Deposit Ins. Corp., 565 F.2d 762, 765 (D.C. Cir. 1977) (declining to decide appellant's claim that section 501 of Rehabilitation Act implies "a private right of action for disability discrimination" and instead finding that "it is clear to us that [section 501] impose[s] a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion"); Rhone v. United States Dep't of the Army, 665 F. Supp. 734, 742 (E.D. Mo. 1987) (holding that, under section 501(b) of Rehabilitation Act, "[t]he Federal Government shall become a model employer of handicapped individuals" and "shall not discriminate against a qualified physically or mentally handicapped person"); see also Moon v. Secretary of Labor, 747 F.2d 599, 604 (11th Cir. 1984) (upholding agency rejection of appellant's claim of discrimination in violation of section 503 of Rehabilitation Act); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1103-04 (D. Haw. 1980) (holding claimant who was "denied employment because of either an impairment he had or an impairment [prospective employer] believed he had" falls under protection of section 503 of Rehabilitation Act).


37. See generally Richard K. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy 41-59 (1984) (providing comprehensive
a new section to the bill comparable to Title VI and Title IX of the Education Amendments of 1972 (Title IX).\textsuperscript{38} One staff member retrieved a copy of Title VI from his office, and the group adapted its language to craft a provision that they added to the very end of the Rehabilitation Act.\textsuperscript{39}

The new section, which was enacted as section 504 of the Rehabilitation Act of 1973, provided: “No otherwise qualified handicapped individual in the United States, as defined in Section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”\textsuperscript{40} A comparison of the language of the new section with the statutory language that would have resulted if Humphrey’s and Vanik’s proposals to amend Title VI had been enacted is informative. The pertinent language of the amended Title VI would have read: “No person in the United States shall, on the ground of ... physical or mental handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”\textsuperscript{41} The differences are significant. Title VI states that “[n]o person” is to be subjected to discrimination, yet section 504 of the Rehabilitation Act says that “[n]o otherwise qualified handicapped individual” is to be subjected to discrimination.\textsuperscript{42} Moreover, while Title VI unrestrictively prohibits the proscribed types of discrimination, section 504 prohibits discrimination only if it is “solely by reason of handicap.”\textsuperscript{43}

Section 504 has been heralded as one of the milestones of the disability rights movement.\textsuperscript{44} To some people with disabilities and

\footnotesize{background on origins of section 504 of Rehabilitation Act). The author conducted personal interviews of some of the participants in the formative meetings, including the meeting of the seven staffers. See id. at 47, 183 n.5.}

\textsuperscript{38} See id. at 51-52. Title IX prohibits discrimination based on sex or blindness in any federally funded education program. See 20 U.S.C. §§ 1681-1688 (1994).

\textsuperscript{39} See Scotch, supra note 37, at 51-52.

\textsuperscript{40} 29 U.S.C. § 794(a).

\textsuperscript{41} S. 3044, 92d Cong., 2d Sess. (1972); H.R. 12154, 92d Cong., 2d Sess. (1971). For a discussion of both bills, see supra notes 22-32 and accompanying text.

\textsuperscript{42} Compare H.R. 12154 (seeking to amend Title VI), with 29 U.S.C. 794(a) (giving language contained in section 504 of Rehabilitation Act).

\textsuperscript{43} 29 U.S.C. § 794(a).

\textsuperscript{44} See Scotch, supra note 37, at 52 (noting that within several years after enactment, “section 504 would be seen as landmark legislation, bearing both tremendous costs and benefits”); see also Frank Bowe, Handicapping America 205 (1978) (noting that section 504 of Rehabilitation Act is landmark for disability rights).
their advocates, the provision has almost mystical significance. It is hard to overplay section 504's import as the first broad civil rights law outlawing discrimination based on disability. Yet, however groundbreaking and beneficial section 504 was and whatever credit the Senate staffers deserve for their creativity, innovation and initiative, the largely unmentioned fact is that section 504 is a disaster from a drafting standpoint. The drafting problems in the one sentence provision are so numerous and severe that this author uses section 504 in his classes on legislation as a case study on how not to draft legislation.

One problem with the wording of section 504 is its cross-reference to the definition of "handicapped individual" that was added to the Rehabilitation Act.45 The Rehabilitation Act defined "handicapped individual" in terms of employability and ability to benefit from vocational rehabilitation services.46 This definition had been formulated in light of the programmatic purposes of the rest of the Rehabilitation Act. It was totally inappropriate for use with a provision that prohibited discrimination in all kinds of programs and activities conducted by recipients of federal assistance, not just those offering rehabilitation services, and that guaranteed equal access to a broad range of opportunities, not just employment. Congress noticed this error and addressed it in 1974 by devising the three-prong definition of disability described later in this Article.

Another shortcoming of the language of section 504 is the use of the phrase "otherwise qualified."47 In issuing the first regulations of section 504 in 1978, the Department of Health, Education and Welfare ("HEW") identified the problem created by the word "otherwise" in this formulation:

The Department believes that the omission of the word "otherwise" is necessary in order to comport with the in-
tent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. 48

To remedy this problem, HEW omitted the word "otherwise" and simply referred to "qualified" in its regulation. 49 In 1979, the Supreme Court expressly endorsed HEW's position and declared that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." 50 Other federal agencies issuing section 504 regulations followed HEW's lead and omitted the unfortunate word "otherwise." The ADA also speaks of "qualified" in lieu of "otherwise qualified." 51

The U.S. Civil Rights Commission and the National Council on Disability have suggested that, whether framed as "qualified" or "otherwise qualified," neither phrase is necessary in section 504 and both distort the thrust of the statute. 52 The U.S. Civil Rights Commission declared: "The limitation of protection to 'otherwise qualified' appears unnecessary. If a handicapped person is denied an opportunity because he or she is not qualified, the discrimination is not 'solely on the basis of [his or her] handicap.' To have been discriminated against, one must, ipso facto, be qualified." 53 In the report in which it proposed the enactment of the ADA, the National Council argued that the "otherwise qualified" language is illogical, unnecessary, problematic and serves to obscure the real impetus of the statute. 54 Similarly, in Alexander v. Choate, 55 the

49. Id.
51. See 42 U.S.C. § 12111(8) (1994) (using term "qualified individual with a disability"); see also id. § 12112(a) ("No covered entity shall discriminate against a qualified individual.").
53. Accommodating the Spectrum, supra note 18, at 17-42, 159.
54. See National Council on the Handicapped, supra note 19, at 19-22. The National Council observed:

The phrase "otherwise qualified" is not found in other types of nondiscrimination laws, presumably because it is assumed that denials of opportunity because of failure to meet legitimate qualifications do not constitute discrimination condemned by these laws. From this point of view, the phrase "otherwise qualified" in section 504 may be considered a
United States Supreme Court stated that "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the section would seem to be two sides of a single coin." Attesting that the "qualified" or "otherwise qualified" language is not required, Title III of the ADA does not incorporate such a phrase.

Another dubious aspect of section 504 of the Rehabilitation Act is the use of the word "solely." On its face, this phrasing permits covered entities to discriminate against people on the express grounds of their disabilities, so long as that discrimination is accompanied by some other unprohibited grounds. For example, a recipient of federal financial assistance could send an employee a "pink slip" stating that the employee is being terminated because he or she has a disability and because the employee has red hair or likes baseball or reads poetry. Because such action would not be premised "solely" on discrimination based on disability, it would not be actionable under the literal language of section 504. The ADA does not include the word "solely."

C. The Protected-Class Problem

Perhaps the most significant problem with the wording of section 504 is that it appears to create an eligibility class for protection from discrimination under the statute. Despite a popular misconception that civil rights laws afford protection only to certain groups, federal civil rights laws and constitutional nondiscrimination requirements generally protect all individuals from discrimination on the grounds prohibited, whether it be race, gender, age, etc. 

55. See 29 U.S.C. § 794(a) (1994) ("No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in . . . any program or activity receiving Federal financial assistance.") (emphasis added).
national origin, age or religion. Judicial precedents have established that race discrimination prohibitions protect whites, blacks and other racial groups. Furthermore, gender discrimination proscriptions can be invoked by males and females. Discrimination based on a person’s national origin is unlawful no matter what the country of origin. Similarly, religious freedom is guaranteed to atheists, agnostics and members of traditional deistic religions. The Age Discrimination Act of 1975 applies to individuals of any age who are subjected to discrimination because of their age.


62. See, e.g., McDonald, 427 U.S. at 280 (“Title VII prohibits racial discrimination against . . . white [people] upon the same standards as would be applicable [to discrimination against black people].”); Gary A. Greenfield & Don B. Kates, Jr., Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866, 63 CAL. L. REV. 662, 676-80 (1975) (arguing that racial discrimination should be interpreted as encompassing any discrimination in which discriminator perceives victim as having distinct racial characteristics).

63. See, e.g., Hogan, 458 U.S. at 731 (1982) (holding that university rule excluding men from nursing program violated Equal Protection Clause); Orr v. Orr, 440 U.S. 268, 283 (1979) (holding that statute permitting wives but not husbands to recover alimony violated Equal Protection Clause); Sibley Mem’l. Hosp. v. Wilson, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973) (allowing male private duty nurse to bring action under Title VII for alleged sex discrimination); Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971) (holding that refusal to hire males as flight attendants violated Title VII).

64. See, e.g., Espinoza, 414 U.S. at 88 (“The term ‘national origin’ on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”).

65. See Young v. Southwestern Sav. & Loan Ass’n, 509 F.2d 140, 144-45 (5th Cir. 1975) (holding that discrimination against atheist employee prohibited by Title VII); 29 C.F.R. § 1605.1 (1997) (setting forth EEOC guidelines on discrimination because of religion and providing religious practices defined as including “moral and ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views”); see also Welsh v. United States, 398 U.S. 333, 339 (1970) (announcing test for conscientious objector is whether beliefs professed by registrant are sincerely held and whether they are “in his own scheme of things” religious); United States v. Seeger, 380 U.S. 163, 184 (1965) (holding that conscientious objector exemption is available to persons whose nonetheister beliefs “occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption”).


Despite the notoriety and scholarly debate attached to footnote four of the Supreme Court's decision in United States v. Carolene Products Co., the Court has generally not restricted heightened scrutiny under the Equal Protection Clause to "discrete and insular minorities." Rather, the Court has applied strict or moderate judicial scrutiny to types of classifications, such as race or gender, regardless of whether the individual invoking the Equal Protection Clause is a member of a minority or the majority.

Section 504 seems to deviate from the norm of other civil rights laws by establishing a protected class—a designated group of persons whose members are the only individuals entitled to invoke the protection of the statute. Because section 504 prohibits discrimination aimed at an "otherwise qualified individual with a disability," a prospective plaintiff has been required to establish that: (1) he or she has a disability and (2) he or she is nevertheless qualified for the position or program at issue.

These two required elements have a certain tension between them that courts have described as a "catch-22." In Doe v. Region 13 Mental Health-Mental Retardation Commission, the United States

68. 304 U.S. 144 (1938).
69. Id. at 152-53 n.4. Justice Powell termed footnote four in Carolene as "the most celebrated footnote in constitutional law." Lewis F. Powell, Jr., Carolene Products Revisited, 82 Colum. L. Rev. 1087, 1087 (1982); see also Owen M. Fiss, The Forms of Justice, 93 Harv. L. Rev. 1, 6 (1979) (terming footnote four "the great and modern charter for ordering the relations between judges and other agencies of government").
70. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification."); Craig v. Boren, 429 U.S. 190, 204 (1976) (holding statute unconstitutional because it discriminated against males in violation of Equal Protection Clause by allowing females to purchase "near" beer at 18 years of age, but not males until age of 21).
71. See Olson v. General Elec. Astrospace, 101 F.3d 947, 951-52 (3d Cir. 1996) (noting that plaintiff must show that he or she is disabled, but also that he or she is otherwise qualified to perform job).
72. See Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1408 n.6 (5th Cir. 1983) (noting catch-22 situation that arises in section 504 of Rehabilitation Act); Tudyman v. United Airlines, 608 F. Supp. 739, 744 (C.D. Cal. 1984) ("Section 504's 'Catch 22' aspect appears: the plaintiff must first show that he or she has some impairment which substantially limits a major life activity, but this same plaintiff must show that he or she is not so handicapped as to be unable to perform the job."); Bales, supra note 18, at 239 ("[T]he employee is put in a catch-22 situation"); Burgdorf, Analysis and Implications, supra note 1, at 448 (noting that claimants may be placed in catch-22 situation because first task is to prove that he or she has condition that substantially limits one or more major life activities, and if that hurdle is cleared, then individual must turn around and prove that condition is not really serious limitation in the context of particular job).
73. 704 F.2d 1402 (5th Cir. 1983).
Court of Appeals for the Fifth Circuit observed: “The ‘Catch 22’ implicit in virtually all section 504 actions is particularly evident in this case . . . . Ms. Doe was required to prove her handicap for jurisdictional purposes, but simultaneously required to prove that she was not so handicapped as to be unqualified to perform her job.” The National Council has similarly described this catch-22: “To be a ‘handicapped individual’ eligible for Section 504 protection, a person has to show that he or she has a substantial impairment of ability that limits major life activities, but to be qualified, a person has to show that he or she is not substantially impaired in ability.”

The formulation of a protected class in section 504 also leads to illogical, convoluted outcomes. For instance, in the Supreme Court’s first substantive section 504 decision, Southeastern Community College v. Davis, a clinical registered nurse training program excluded a woman with a serious hearing disability. The Court determined that there were no modifications that the college could make that would enable Davis to successfully participate in the program. The logical conclusion in such a case would seem to be that Davis had not been discriminated against. But, under the protected class formulation of section 504, the Court ruled that section 504 did not cover Davis because she was not an “otherwise qualified handicapped individual.” Amazingly, after the case had been litigated through the lower courts and up to the Supreme Court, it turned out that the plaintiff was not within the protection of the statute.

Most importantly, the differentiation of a class of people who, unlike all other Americans, are accorded statutory protection directly contravenes the central premises of the disability rights move-

74. Id. at 1408 n.6; see also Doe v. New York Univ., 666 F.2d 761, 775 (2d Cir. 1981) (discussing conflicting elements of plaintiff's prima facie case in ADA claim); Williams v. Avnet, Inc., 910 F. Supp. 1124, 1131 (E.D.N.C. 1995) (concluding that proving one is included in “the ADA’s protected class” requires plaintiff to establish “two conflicting elements,” namely that one is substantially limited in working yet also qualified), aff’d sub nom. Williams v. Channel Master Satellite Sys. Inc., 101 F.3d 346 (4th Cir. 1996), and cert. denied, 117 S. Ct. 1844 (1997). One federal district court went so far as to characterize it as “impossible” for a plaintiff to be both substantially limited in regard to working and “qualified.” See Everette v. Runyon, 911 F. Supp. 180, 183-84 (E.D.N.C. 1995).

75. NATIONAL COUNCIL ON THE HANDICAPPED, supra note 19, at 25.
76. 442 U.S. 397 (1979).
77. See id. at 402.
78. See id. at 409-10.
79. See id. at 404.
80. See id.
ment and the essential purposes of nondiscrimination laws such as section 504 of the Rehabilitation Act and the ADA. These central premises and the mischief and injustice that have resulted from deviations from those premises are described later in this Article.

D. How Did the Language of Section 504 Get That Way?

The obvious question arising from the foregoing discussion of section 504's defects is why section 504 was formulated with such problematic and awkward language. There is no legislative history explaining the differences between the language of section 504 and that of Title VI. Both Senator Humphrey and Representative Vanik testified that the intent of their respective bills to amend Title VI was accomplished by the passage of section 504.81 Why then did the troublesome phrase "otherwise qualified handicapped individual" and the requirement that discrimination is prohibited only if it is "solely" on the basis of disability (neither of which are found in Title VI or in Humphrey's and Vanik's proposals to amend Title VI) turn up in the language of section 504?

Two prior pieces of disability rights legislation suggest the answer.82 First, the 1948 Act, which prohibited discrimination on the basis of "physical handicap" in civil service employment stated:

[W]ith respect to any position the duties of which, in the opinion of the Civil Service Commission, may be efficiently performed by a person with such a physical handicap: And provided further, [t]hat such employment will not be hazardous to the appointee or endanger the health or safety of his fellow employees or others.83

Similarly, Representative Vanik's 1972 bill to amend Title VII would have made discrimination because of "physical or mental handicap" an unlawful employment practice, "unless there [was] a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."84 Obviously, these

81. See 119 Cong. Rec. 7114 (1973); 119 Cong. Rec. 6145 (1973); see also Alexander v. Choate, 469 U.S. 287, 295-96 n. 13 (1985) ("Given the lack of debate devoted to § 504 . . . when the Rehabilitation Act was passed in 1973, the intent with which Congressman Vanik and Senator Humphrey crafted the predecessor to § 504 is a primary signpost on the road toward interpreting the legislative history of § 504.").
83. Id.
two formulations contain additional language not found in Title VI or Title VII.

The added wording was designed to solve a perceived potential problem that might result from simply prohibiting discrimination based on disability. This problem was identified in the discussion of “otherwise qualified” in the appendix to the HEW regulations of section 504 quoted above—the “blind bus driver” problem.85 Because “discrimination based on disability” was not defined and prohibiting discrimination based on disability was a novel idea, the fear arose that proscribing such discrimination would mean that a person’s disability could play no role in eligibility determinations. For example, a blind person could not be disqualified from a bus driver job. With regard to race, color, ethnicity or gender, not discriminating often requires treating a person as if he or she did not possess the characteristic. If not discriminating on the basis of disability meant treating the individual as if he or she does not have a disability, serious mischief, such as blind bus drivers, might ensue.

Arguably this problem has always been more perceived than real. Disqualifying a person from a bus driving job for inability to drive is not an act of discrimination based on disability. It is an evenhanded application of a job-related qualification standard. Not discriminating against people with disabilities does not mean that employers must hire every applicant with a disability no matter how unqualified. As long as the application of bona fide, job-related qualification standards is understood not to constitute discrimination, no problem occurs.

The need to explain that this perceived problem would not be created by a statutory prohibition against discrimination based on disability and to reassure potential critics has repeatedly led drafters to seek to make the statutory language of such legislation explicit. There are several methods for accomplishing this objective. The 1948 Act provided that its nondiscrimination requirement did not apply to positions that the person with the disability could not perform efficiently and safely.86 Vanik’s 1972 bill made discrimination unlawful except in situations involving “bona fide occupational qualification[s] reasonably necessary to the normal operation” of the business.87

85. See 45 C.F.R. § 84 app. A (1997). The Supreme Court quoted this regulatory commentary in one case, characterizing it as emphasizing “that legitimate physical qualifications may be essential to participation in particular programs.” Southeastern Community College v. Davis, 442 U.S. 397, 407 n.7 (1979).
86. See 62 Stat. at 351.
87. H.R. 14033.
Title IX offered an alternative approach for the drafters of section 504. See Section 1681(a) of Title IX proscribed discrimination based upon sex in any education program receiving federal financial assistance. At the end of the nondiscrimination requirement, section 1681(a) of Title IX contained the words “except that” followed by a list of nine exceptions. Moreover, the next subsection provided additional limiting language to make clear what Title IX does not require. Thus, the most logical and effective way to preempt concerns that a disability nondiscrimination provision might prohibit the application of bona fide job or program requirements to persons with disabilities is simply to state that the exclusion of a person who cannot perform adequately and safely is not discrimination.

89. See id. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance [unless one of the exceptions set forth in § 1681(a)(1)-(9) applies.”).
90. See id. These nine exceptions are: (1) certain educational institutions; (2) certain single-sex educational institutions commencing planned change in admissions; (3) certain religious institutions; (4) certain military educational institutions; (5) certain traditionally single-sex public educational institutions; (6) certain social fraternities or sororities and voluntary youth service organizations; (7) certain boy or girl conferences; (8) certain father-son or mother-daughter activities; and (9) certain beauty pageants. See id.
91. See id. § 1681(b). Section 1681(b) states:

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area. Provided. That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

Id.
92. A similar approach is taken in Title I of the ADA. See 42 U.S.C. § 12113(a) (1994). Section 12113(a) states:

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subsection.

Id.
The drafters of section 504 followed none of the foregoing approaches. They rashly concocted their own approach, using the "otherwise qualified handicapped individual" phrasing with the cross-reference to the definition of "handicapped individual" used for other purposes in the Rehabilitation Act. It is highly unfortunate that the Senate staffer who ran out to his office to find a legislative model for section 504 returned with only the language of Title VI, which he and his colleagues then proceeded to adapt spontaneously. Apparently as pure overkill, they added that discrimination was prohibited only if it was based "solely" on disability. All of this problematic verbiage was intended to accomplish the same end that could have been achieved by the other approaches. Specifically, the drafters intended to mollify the apprehension that a ban on discrimination based on disability would require the hiring, inclusion and retention of nonqualified persons, such as blind bus drivers.

The protected-class phrasing of the provision is merely incidental to the primary goal of such wording, which was to make absolutely clear that the statute did not contemplate that exclusions of unqualified and unsafe persons would constitute unlawful acts of discrimination. As will become evident, an accurate understanding of the real objectives of the supplementary language in section 504 makes a huge difference in its interpretation and application.

93. See 29 U.S.C. § 794 (1994) (defining terms under Rehabilitation Act). This section was amended in 1992 when "handicapped individual" was changed to "individual with a disability." See id. § 794(a).

94. See SCOTCH, supra note 37, at 51-52 (noting that Ray Millerson of Senator Javits' staff was involved in developing Title IX and during meeting held to discuss revising Rehabilitation Act, Millerson ran to his office to retrieve language from Title VI upon suggestion that language proscribing discrimination against handicapped people in federally assisted programs be added to Rehabilitation Act). This language from Title VI was inserted into the Rehabilitation Act and subsequently entered into section 504. Id. at 52.


96. Actually, much subsequent misperception and difficulty might have been avoided if the purpose of the additional language had simply been specified at the time section 504 was drafted and enacted. In the absence of such explanation, the extra language has often been viewed as if it had been intended to restrict protection from discrimination to a protected class. See, e.g., Southeastern Community College v. Davis, 442 U.S. 397, 405 n.6 (referring to class of handicapped persons covered by section 504 of Rehabilitation Act). Of course, the statutory language is formulated in terms of protecting "otherwise qualified handicapped persons," and one cannot reconstruct or ignore the plain language of section 504.

III. ATTEMPTING TO GET BACK ON THE RIGHT TRACK—THE THREE-PRONG DEFINITION OF DISABILITY

A. The 1974 Amendment

The inattentive drafting of the section 504 language that appears to embrace a protected-class approach might have been effectively rectified a year after it was enacted. When Congress enacted the 1974 Amendments, it added a new definition of disability for purposes of sections 501, 502, 503 and 504 and other provisions. The Senate Committee Report accompanying the 1974 Amendments declared that the prior definition had proven to be "troublesome" in its application to section 503 and section 504, particularly because of its focus on employability and vocational rehabilitation services. Actually, the focus on employability in the prior definition was not a problem with section 503, because that provision addressed only employment. The focus upon capability of benefitting from rehabilitation services, however, was not applicable.

In revising the definition, Congress did not simply expand the focus of the definition from employment and rehabilitation to en-

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99. See id.
100. See S. Rep. No. 93-1297 (1974). The Supreme Court described the principal reason for the need for a revised definition:
The primary focus of the 1973 Act was to increase federal support for vocational rehabilitation; the Act's original definition of the term "handicapped individual" reflected this focus by including only those whose disability limited their employability, and those who could be expected to benefit from vocational rehabilitation. Congress concluded that the definition of "handicapped individual," while appropriate for the vocational rehabilitation provisions in Titles I and III of the Act, was too narrow to deal with the range of discriminatory practices in housing, education, and health care programs which stemmed from stereotypical attitudes and ignorance about the handicapped.
101. See 29 U.S.C. § 793(a) (discussing employment under federal contracts).
Section 793(a) provides in part:
Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title.
Id.
102. This problem was solved in the 1974 amendments. See id. § 706(7)(A) (defining "handicapped individual" only as to subchapters that contain section 503 and 504 of Rehabilitation Act).
compass other types of programs and activities. Instead, it made two other important additions. First, it framed a definition for an actual disability that required a substantial limitation on a major life activity.\footnote{See id. § 111(a), 88 Stat. at 1619.} Second, it included two new categories of potentially protected persons who "may at present have no actual incapacity at all."\footnote{See Southeastern Community College v. Davis, 442 U.S. 397, 405-06 n.6 (1979) ("Such . . . person[s] would be exactly the kind of individual[s] who would be 'otherwise qualified' to participate in covered programs.").} The Senate Committee stated that the new legislation employed a three-prong approach to respond to different ways in which individuals with disabilities are discriminated against.\footnote{See S. Rep. No. 93-1297 (1974) ("First, [plaintiffs] are discriminated against when they are, in fact handicapped . . . . Second, they are discriminated against because they are classified or labeled, correctly or incorrectly, as handicapped. Third, they are discriminated against if they are regarded as handicapped, regardless of whether they are in fact handicapped.").} Accordingly, the new three-prong definition accorded protection under the statute to any person who: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.\footnote{29 U.S.C. § 706(7)(B).}

There is an apparent incongruity between the first prong, which is worded in restrictive terms, and the second and third prongs, which are expansive in scope.\footnote{Compare 29 U.S.C. § 706(7)(A) ("[H]andicapped individual means any individual who . . . has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment."), with id. § 706(7)(B) ("[H]andicapped individual means . . . any person who . . . has a physical or mental impairment which substantially limits one or more of such person's major life activities.").} The explanation for this seeming inconsistency lies in the dual purposes that Congress framed this definition to serve. The revised definition applies to affirmative action efforts, barrier removal efforts and nondiscrimination requirements.\footnote{See 29 U.S.C. § 706(7)(B).} Congress wanted the definition to be very broad for nondiscrimination purposes to protect people from being discriminated against on the basis of a handicap whether they had any actual impairment or not.\footnote{See S. Rep. No. 93-1297 (1974) ("The amended definition . . . takes cognizance of the fact that handicapped persons are discriminated against . . . [w]hen they are, in fact, handicapped. . . . [a]nd when they are classified or labeled, correctly or incorrectly, as handicapped, regardless of whether they are in fact handicapped.").} Conversely, the objective of affirmative action programs would surely be undermined if covered employers could claim success based upon workers whom the em-
employer merely regarded as being a person with a disability.\textsuperscript{110} It does not stretch credulity too far to imagine an employer who says: "I have a perfect affirmative action program under section 503; I regard all my employees as impaired." Nor does removing architectural and transportation barriers with reference to people with a record of disability or who were only regarded as having a disability make sense.\textsuperscript{111}

The legislative history explicitly describes the purposes of the third prong as linked to the nondiscrimination mandates.\textsuperscript{112} Calling the prior definition "far too narrow and constricting," the Senate Committee declared that it had devised a new definition "which would provide sufficient latitude (but still not be totally open ended), particularly for the nondiscrimination programs carried out under sections 501, 503, and 504."\textsuperscript{113} Furthermore, the Senate Committee clarified that the definition had other applications focused on the more restrictive first prong, contrasting the broad nondiscrimination purpose with the affirmative action obligations created in the 1973 Act.\textsuperscript{114}

\textsuperscript{110} See, e.g., 29 U.S.C. § 791(b) (enacting broad requirement that "[e]ach department, agency, and instrumentality ... in the executive branch shall . . . submit . . . an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality"); id. § 795(a) (creating broad requirement of inclusion of affirmative action provision in every federal contract in excess of $2,500).

\textsuperscript{111} See, e.g., id. § 794(b) (allowing appropriation of funds to persons or entities operating rehabilitation facilities for "purpose of assisting such persons or entities in removing architectural, transportation, or communication barriers" in order to provide facilities equipped for persons with disabilities).

\textsuperscript{112} See S. Rep. No. 93-1297, at 39 (explaining that perceived prong of definition of disability covers those who are discriminated against on basis of handicap, even where person is not, in fact, handicapped); see also 120 Cong. Rec. 30531 (1974) (expressing view of Senator Cranston that perceived prong of definition covers those who are not handicapped). For example, the Senate Committee explained:

Clause [iii] in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protect of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause [i] in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.


\textsuperscript{113} See id. at 63.

\textsuperscript{114} See id. at 39. Specifically, the Senate Committee stated:
To whatever extent the original phrasing of section 504 restricted its protection to a select group of people, the second and third prongs of the revised definition clearly move beyond such narrow constraints. The second prong includes not only those who previously had a disability, but also those who never really had such a condition, but were mistakenly listed or described in someone's records as having had a disability. Further, the third prong of the revised definition clearly can be invoked by anyone who claims that he or she has been regarded as having a disability.

Since 1974, the three-prong definition has formed the basis of section 504 analysis, and in 1990 the ADA similarly adopted its formulation. The broadened definition, and in particular the "regarded as" prong, might have served to correct most of the problems inherent in the awkward drafting of section 504, but such has not been the whole course of subsequent analysis.

B. Initial Regulatory Interpretations

Early explanations of section 504, by administrative agencies charged with enforcing it, emphasized the breadth of the three-prong definition and gave no indication of any desire to designate a tightly restricted group of persons who alone would be eligible for protection from discrimination. In 1977, HEW issued the first regulations implementing section 504 of the Rehabilitation Act.

The new definition applies to section 503, as well as to section 504, in order to avoid limiting the affirmative action obligation of a Federal contractor to only that class of persons who are eligible for vocational rehabilitation services. It should be noted, however, that the affirmative action obligation cannot be fulfilled by the expediency of hiring or limiting services to persons marginally or previously handicapped or persons "regarded as" handicapped.

Id.


116. See id. § 706(7)(B) (ii) (covering those individuals who "have a record of" physical or mental impairment which substantially limits one or more of person's major life activities).

117. See id. § 706(7)(B) (iii) (covering those individuals who are "regarded as" having physical or mental impairment that substantially limits one or more of person's life activities).

118. See 42 U.S.C. § 12102(2) (1994) ("The term 'disability' means, with respect to an individual: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.").

119. See 45 C.F.R. § 84.3(j) (2)(iv) (1997) (describing meaning of "regarded as" prong of definition of "handicapped individual" under Rehabilitation Act).

120. See generally id. §§ 84.1-84.99 (containing HEW's regulations with respect to Rehabilitation Act).
Noting that "these regulations were drafted with the oversight and approval of Congress," the Supreme Court has recognized the preeminent influence of the original HEW regulations as "an important source of guidance on the meaning of [section] 504." HEW defined "regarded as" as follows:

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

The lines separating these three situations are not always sharp, and this formulation may over-complicate an otherwise relatively straightforward statutory concept. The common feature of all three, however, is that a person who does not have a condition that satisfies the definition of an actual disability is treated as having such a disability. This approach, while framed by the "otherwise qualified handicapped individual" phrasing of section 504, focuses on how individuals are treated rather than upon technical distinctions about how much impairment makes a person disabled. Thus, it focuses on the existence of discrimination, not upon the characteristics of the person upon whom discrimination is visited.

The HEW’s three-part definition of the "regarded as" prong was incorporated in the Department of Justice (DOJ) regulations coordinating section 504 regulations and subsequently in regulations of other federal agencies. The Senate and House Commit-

122. Id. at 279 (quoting Alexander v. Choate, 469 U.S. 287, 304 n.24 (1985)).
123. 45 C.F.R. § 84.3(j)(2)(iv). This definition is adopted, with a few inconsequential wording variations, in the EEOC’s ADA regulations. See 29 C.F.R. § 1630.2(l) (1997).
124. See BURGDORF, DISABILITY DISCRIMINATION IN EMPLOYMENT LAW, supra note 1, at 152-54.
125. See 45 C.F.R. § 84.3(j)(2)(iv) (providing explanation of “regarded as” prong of definition of disability).
126. See 28 C.F.R. § 41.31(b)(4) (1997) (explaining “regarded as” prong of definition of disability in Department of Justice regulations).
127. See, e.g., 15 C.F.R. § 8b.3(g)(1)(iii)(1997) (defining handicapped person as "any person who . . . [i]s regarded as having . . . an impairment in Department of Commerce regulations"); 29 C.F.R. § 32.3 (defining “regarded as” prong in Department of Labor regulations).
tee Reports accompanying the ADA directed that analysis of the
term “individual with handicaps” in the HEW regulations interpret-
ing section 504 should be applied to the term “disability” under the
ADA.128 In 1992, section 504 was amended to substitute the term
“disability” for “handicap.”129

C. The Arline Decision

The leading judicial decision applying the second and third
prongs of the Rehabilitation Act definition of disability is the
Supreme Court’s ruling in School Board v. Arline.130 The plaintiff,
Gene Arline, was discharged from her job as an elementary public
school teacher because she had infectious tuberculosis.131 She
brought a lawsuit alleging that she had been discriminated against
in violation of section 504 of the Rehabilitation Act and the school
board defended by arguing that she was not a handicapped person
under the definition.132

In examining the three-prong definition, the Court declared
that: “Congress expanded the definition of ‘handicapped individ-
ual’ so as to preclude discrimination against ‘[a] person who has a
record of, or is regarded as having, an impairment [but who] may
at present have no actual incapacity at all.’”133 As a preliminary
matter, the Court determined that Arline’s tuberculosis constituted
an actual physical impairment that affected one of the principal
body systems—her respiratory system.134 The Court also reasoned
that “[t]his impairment was serious enough to require hospitaliza-
tion, a fact more than sufficient to establish that one or more of her

tions for interpretation of meaning of disability); see also H.R. Rep. No. 101-485, at
27 (1990) (same).
129. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569,
131. See id. at 276.
132. See id.
133. Id. at 279 (quoting Southeastern Community College v. Davis, 442 U.S.
397, 405-06 n.6 (1979)).
134. See id. at 281.
major life activities were substantially limited by her impairment." Next, the Court concluded that Arline’s hospitalization for tuberculosis sufficed to establish that she had “a record of... impairment” under the second prong of the statutory definition.

The school district argued that the actual impairment and this record of impairment were not relevant in this case because the plaintiff was dismissed not because of diminished physical capabilities or her history of hospitalization, but because of the threat raised by her contagious condition. Rejecting the school district’s argument, the Court declared that it would be “unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.” The Court held that allowing employers to rely upon that distinction was inconsistent with the legislative history of the definition, because “[t]hat history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual.” The Court underscored that the basic purpose of section 504 was to ensure that individuals “are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others” or because of “reflexive reactions to actual or perceived handicaps.” Thus, the Court ruled that the plaintiff met the statutory definition of a “handicapped person” and remanded the case to the district court for determining whether she was “otherwise qualified” for her position.

135. Id.
136. Id.
137. See id.
138. Id. at 282.
139. Id. In support of this conclusion, the Court particularly examined the third prong of the statutory definition:
Congress extended coverage ... to those individuals who are simply “regarded as having” a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection “a person with some kind of visible physical impairment which in fact does not substantially limit that person’s functioning.” Such an impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.
Id. at 283-84 (quoting S. Rep. No. 93-1297, at 64 (1974)).
140. Id. at 284-85.
141. See id. at 289. On remand, the United States District Court for the Middle District of Florida found that the plaintiff was “otherwise qualified” and entered judgment in her favor. See School Bd. v. Arline, 692 F. Supp. 1286, 1291-92 (M.D. Fla. 1988) (finding that plaintiff was “otherwise qualified” for job of elementary school teacher because plaintiff’s tuberculosis was not easily communicated, duration of risk of infection was slight, severity of risk to third parties was low and
Apart from the Court's specific holding, the decision in Arline makes other significant points. The Court expressly recognized the importance of the Department of Health and Human Services ("HHS") regulations (originally issued by HEW) in interpreting the statutory definition.142 Furthermore, the Court accorded considerable weight to statements by Representative Vanik, Senators Humphrey and Mondale and others in the legislative history of section 504.143 Finally, the Court established guidelines for the district court to apply on remand when it addressed the concept of "otherwise qualified."144

The over-arching significance of this ruling, however, lies in its analysis of the purposes and application of the three-prong statutory definition of handicapped individual. After Arline, it is clear that individuals can be included under the statutory definition of disability solely because of the negative reactions, prejudiced attitudes, ignorance, misapprehensions, irrational fears, mythology, stereotypes or reflexive reactions of others, regardless of whether an individual does or does not have a mental or physical impairment that satisfies the other prongs of the definition.145

IV. Judicial and Administrative Disorientation

The discussions of the development of section 504, the three-prong definition of disability, the section 504 regulations and the Arline decision all point to a single interpretation of the "qualified individual with a disability" language of the Rehabilitation Act and the ADA.146 First, they suggest that the purpose of that language was to make crystal clear that it is not unlawful discrimination to exclude people with disabilities if they are unqualified to perform safely and efficiently. Thus, the language was intended to solve the putative blind bus driver problem, rather than to create a highly restricted protected class. Second, each of the factors discussed above also suggests that the impetus toward a restrictive interpreta-

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142. See Arline, 480 U.S. at 279 ("In determining whether a particular individual is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance.").

143. See id. at 282-83 n.9, 284 n.13.
144. See id. at 287-89.
145. See id. at 278-85 (discussing "stereotypical attitudes and ignorance about the handicapped").
tion of "individual with a disability" is largely abated by the second and third prongs of the 1974 Amendments. Finally, these factors highlight that a person who has no actual disability whatsoever is nonetheless protected by section 504 and the ADA from discrimination if he or she is regarded, perceived or treated as having a disability.

Many court decisions have been consistent with these principles, as have been, generally, the section 504 regulations and most of the regulations issued under the ADA.147 In a few areas, however, lines of cases have developed, fueled at times by regulatory commentary, that take a much more restrictive stance toward the protection afforded by section 504 and the ADA. This Part analyzes decisions where courts have taken a more restrictive approach to the question of coverage under the ADA and Rehabilitation Act.

A. The Exclusion-from-Only-One-Job Problem

"Major life activities" are defined in section 504 regulations to mean "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."148 This definition is recited verbatim in the Senate and House Committee Reports on the ADA and in the ADA regulations.149 If an individual can show a substantial limitation on some major life activity other than working, he or she is covered by the statutory definition of disability and does not need to establish a limitation on the activity of working.150

In less common situations, where an individual seeks to invoke statutory protection solely on the basis that the activity of working is impaired, an issue may arise as to how much impairment of em-

147. See, e.g., Thornhill v. Marsh, 866 F.2d 1182, 1183-84 (9th Cir. 1989) (providing broad interpretation of "regarded as" prong of definition of disability); Doe v. New York Univ., 666 F.2d 761, 775 (2d Cir. 1981) (same); 29 C.F.R. § 1630.2(1) (1997) (discussing "regarded as" prong of definition of disability under ADA and providing examples for each of three possible ways that employer may regard employee as disabled).


149. See H.R. Rep. No. 101-485, at 28 (1990) ("Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."); S. Rep. No. 101-116, at 22 (1989) ("A 'major life activity' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."); see also 29 C.F.R. § 1630.2(i) ("Major Life Activity means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.").

150. See 29 C.F.R. pt. 1630, app. A § 1630 ("If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.").
ployability must be shown. Specifically, courts have faced the question of whether exclusion from a particular job because of an actual or perceived impairment is sufficient by itself to establish that a person was regarded as having a physical or mental impairment that substantially limited a major life activity. 151

1. Case Law Under the Rehabilitation Act

With respect to the actual disability prong of the disability definition, most courts have ruled that in order to be substantially limited in the major activity of working, a plaintiff must show more than inability to perform a single specific job for one particular employer. 152 Courts have considered factors such as the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access and the individual’s job expectations and training. 153 A few courts have been less demanding regarding the breadth of job limitations that must be shown to establish a substantial impairment of “working.” 154


152. See, e.g., Homemyer v. Stanley Tulchin Assocs., 91 F.3d 959, 961 (7th Cir. 1996) (stating that plaintiff must show that her impairment substantially limits employment generally); Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 723-24 (2d Cir. 1994) (noting that plaintiff was not considered handicapped person under Rehabilitation Act because asthmatic condition did not preclude plaintiff's other employment); Gupton v. Virginia, 14 F.3d 203, 205 (4th Cir. 1994) (noting that for plaintiff to show that allergy to tobacco smoke substantially limited her ability to work, plaintiff had to prove that allergy precluded her from obtaining other jobs in her field of employment); Jasany, 755 F.2d at 1248-50 (stating that, although plaintiff’s impairment, strabismus or crossed eyes, interfered with his ability to perform his job, it did not significantly decrease plaintiff’s ability to obtain other employment, and therefore, plaintiff’s impairment was not substantially limiting under statute); Tudyman v. United Airlines, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (sustaining plaintiff’s termination as airline steward because plaintiff exceeded weight requirements of job); E.E. Black, 497 F. Supp. at 1099-1100 (stating that impairment that interferes with individual’s ability to do particular job, but does not significantly decrease individual’s ability to obtain satisfactory employment otherwise, was not substantially limiting under Rehabilitation Act).

153. See, e.g., Forrisi, 794 F.2d at 955 (focusing on fact that plaintiff was seen as unsuited for “one position in one plant”); Jasany, 755 F.2d at 1249-50 (focusing on type of job in case where plaintiff could not operate machinery because of impairment); E.E. Black, 497 F. Supp. at 1099-1100 (illustrating several colorful examples in order to emphasize factors of individual’s job expectations and training).

154. See, e.g., Harrison v. Marsh, 691 F. Supp. 1223 (W.D. Mo. 1988) (finding that plaintiff was substantially limited in her ability to work); Vickers v. Veterans Admin., 549 F. Supp. 85, 87 (W.D. Wash. 1982) (holding that plaintiff was substantially limited in major life activity).
“SUBSTANTIALLY LIMITED” PROTECTION

In regard to the third prong of the definition of disability under the Rehabilitation Act, the courts of appeals are split on whether an employer’s rejection of a person with a physical or mental impairment as incapable of doing a particular job is sufficient to establish that the employer regarded the person as having a disability.\textsuperscript{155} The first circuit court decision to rule that exclusion

For example, in Vickers, the court ruled that a plaintiff was a “handicapped person” under section 504 because he was “unusually sensitive to tobacco smoke.” \textit{Id.} at 86-87. Rather than insisting on a showing that this would have made the plaintiff unqualified for other jobs in his field and geographic area, the court simply inferred “that this hypersensitivity does in fact limit at least one of his major life activities, that is, his capacity to work in an environment which is not completely smoke free.” \textit{Id.} at 87.

Similarly, in Harrison, the court declared that it was “quite comfortable” in ruling that a woman who had a radical mastectomy involving removal of muscle in one arm and shoulder for treatment of breast cancer had a disability under sections 501 and 504 of the Rehabilitation Act. \textit{See Harrison}, 691 F. Supp. at 1229-30. The plaintiff challenged the defendants’ reassigning her from her regular duties as a clerk typist to an emergency typing pool and ordering her to perform continuous typing duties that exacerbated her physical limitations. \textit{See id.} at 1225-27. The defendant took the position that it was “merely required to offer her one job and one job only.” \textit{Id.} at 1226. The court ruled that in such circumstances the plaintiff had established that she was an individual with a disability within the meaning of the Rehabilitation Act, without demanding any evidence that she would have been limited or rejected in connection to any other positions or by any other employers. \textit{See id.} at 1229-30. The complaint alleged a violation of section 501, and the court made its ruling under that provision, but the court discussed section 504 precedent and ruled that it was “appropriate to borrow the § 504 definition of disability in addressing the case at bar.” \textit{Id.} at 1227. The court explained:

It cannot be seriously disputed that [the plaintiff’s] impairment affected her ability to work. That is self-evident. Working is clearly among one’s “major life activities.” \textit{Ergo}, even if one assumes, \textit{argumento}, that [the plaintiff’s] condition impairs only her ability to work, then she nonetheless clearly qualifies as handicapped within the meaning of the Act. \textit{Id.} at 1320.

155. \textit{Compare} Cook v. Rhode Island Dep’t. of Mental Health, Retardation, and Hosps., 10 F.3d 17, 26 (1st Cir. 1993) (holding that jury could rationally conclude that defendant’s perception of plaintiff’s impairment, as exhibited in its refusal to hire her for particular position, foreclosed wide range of jobs and served as proof of substantial limitation), Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1126 (11th Cir. 1993) (“[T]he [plaintiff] firefighters’ inability to shave that results from [his impairment], ‘substantially limit[ed]’ the firefighters’ ability to engage in the ‘major life activity’ of shaving work on account of the [defendants’] no-beard rule.”), and Taylor v. United States Postal Serv., 946 F.2d 1214, 1218 (6th Cir. 1991) (permitting “applicant to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so-called job requirement due to physical impairment”), \textit{with} Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993) (holding that employer’s belief that employee was unable to perform one task—driving—was not sufficient to establish that plaintiffs were “regarded as” substantially limited in working), Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992) (“[A]n impairment that an employer perceives as limiting an individual’s ability to perform only one job is not a handicap under the Act.”), and Forrissi, 794 F.2d at 935 (finding employer’s perception that discharged plaintiff was unsuited for one position in one plant was not sufficient to establish that employer regarded condition as “substantial limitation” on working).
from a particular job because of a physical or mental impairment is not sufficient to establish that the excluded individual was "regarded as" having a disability by the employer was *Forrisi v. Bowen*. Several courts have relied upon the *Forrisi* decision in reaching a similar conclusion.

In *Forrisi*, the United States Court of Appeals for the Fourth Circuit held that a utility systems repair worker dismissed from his job because of his acrophobia had not proven that he was "regarded as" having a disability. In reaching its conclusion, the

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Two other United States Courts of Appeals have made statements in dicta that seem to support the restrictive view adopted in *Chandler, Welsh* and *Forrisi*. For example, the court found the plaintiff did not have an impairment, nor was regarded as having an impairment in *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989). The court stated in dicta that "[h]e was declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity." *Id.*

Similarly, in another case, the court found that the plaintiff did not produce adequate evidence of the existence of an actual disability. *Maulding v. Sullivan*, 961 F.2d 694, 696 (8th Cir. 1992). Thus, the court did not rely on the "regarded as" prong, and only discussed it in a parenthetical after citation to *Forrisi*. *Id.* at 698. In the parenthetical, the court quoted the following language from *Forrisi*: "'[A]n employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job." *Id.* (quoting *Forrisi*, 794 F.2d at 934).

Finally, in a case whose results are more difficult to characterize, the court asserted (inaccurately) that courts have uniformly agreed with the *Forrisi* court that "an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job." *Byrne v. Board of Educ.*, 795 F.2d 560, 567 (7th Cir. 1992). The court then proceeded to rule that proof in the case at bar that a teacher was unable to teach in two particular classrooms "could allow a jury reasonably to differ about whether the [defendant] regarded [the plaintiff] as handicapped," and consequently upheld denial of a motion for a directed verdict. *Id.*

156. *794 F.2d 931* (4th Cir. 1986).

157. See, e.g., *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727-28 (5th Cir. 1995) (stating that plaintiff, who was welder with arm injury, was not regarded as having disability because employer only precluded plaintiff from welding jobs that involved climbing, not entire field of welding); *Welsh*, 977 F.2d at 1419 ("[A]n impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the Act."); *Byrne*, 979 F.2d at 565 (stating that person's inability to perform specific job for particular employer does not substantially limit that person's ability to work); *Daley*, 892 F.2d at 214-16 (stating that being declared unsuitable for specific position of police officer because of poor judgment and irresponsible behavior is not substantial limitation to major life activity of working); *Smaw v. Virginia Dep't. of State Police*, 862 F. Supp. 1469, 1475 (noting obesity of former state trooper was not substantial limitation of major life activities and did not substantially limit ability to work).

Another circuit court decision frequently cited in this context, which was decided more than a year before *Forrisi*, is *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985). The *Jasany* decision, however, considered only the first prong of the statutory definition and never discussed or even mentioned the "regarded as" prong. *Id.* at 1248-50.

158. See *Forrisi*, 794 F.2d at 935. The court found that plaintiff's acrophobia did not substantially limit plaintiff's major activities, including the major life activ-
court relied on three district court decisions, namely de la Torres v. Bolger, Tudyman v. United Airlines and E.E. Black, Ltd. v. Marshall. The court’s reliance upon these decisions, however, is problematic for several reasons. First, the characteristics involved in de la Torres and Tudyman, left-handedness and body-building weight gain, respectively, were not actual “impairments.” Both

ity of working. See id. The court held that the evidence in the case had shown that “[f]ar from being regarded as having a ‘substantial limitation’ in employability, [plaintiff] was seen as unsuited for one position in one plant—and nothing more.” Id. The court further explained that “[t]he Rehabilitation Act, seeks to remedy perceived handicaps that, like actual disabilities, extend beyond this isolated mismatch of employer and employee.” Id.

159. 610 F. Supp. 595 (N.D. Tex. 1985), aff’d, 781 F.2d 1134 (5th Cir. 1986).
162. See de la Torres, 610 F. Supp. at 596 (“Being lefthanded is a ‘physiological condition . . . affecting the neurological and musculoskeletal systems,’ but it is no more so than (and no more of an impairment than) being right handed or ambidextrous.”). Tudyman, 608 F. Supp. at 746 (“[P]laintiff’s ‘unique musculo-skeletal system and body composition,’ are not the result of ‘physiological disorders’ . . . .

His weight and low fat content are self-imposed and voluntary.”).

In de la Torres, the plaintiff was a natural born left-handed person who worked as a part-time flexible letter carrier for the United States postal service. de La Torres, 610 F. Supp. at 594. Mail casing at the post office where the plaintiff worked was to be performed with the right hand, regardless of whether the carrier was right- or left-handed. See id. at 595. The plaintiff had problems associating the mail with street addresses using only his right hand and in locating the mailboxes. See id. at 594. Defendant terminated the plaintiff because the plaintiff took an “excessive” amount of time to complete his assignments and he showed no signs of improvement after having undergone training in using only his right hand to perform his tasks at work. See id. at 594-95. The plaintiff brought suit under the Rehabilitation Act, alleging he was terminated because the defendant was biased against left-handed people. See id. at 595. The court found that plaintiff’s left-handedness could not be considered a disability under the terms of the Rehabilitation Act. See id. at 596. The court noted that the plaintiff was in excellent health, had performed a wide array of jobs without apparent difficulty, and was an accomplished athlete in college. See id. The court also noted that the defendant did not regard the plaintiff as substantially limited in working. See id.

In Tudyman, the plaintiff applied for a position as a flight attendant, but was rejected because of the defendant’s weight requirements. Tudyman, 608 F. Supp. at 740. Because of his avid bodybuilding, which resulted in his low percentage of body fat and high percentage of muscle, the plaintiff exceeded defendant’s maximum weight requirements by 15 pounds. See id. at 740-41. The plaintiff brought suit under the Rehabilitation Act, alleging that his rejection constituted handicapped discrimination. See id. at 740. The court held that the plaintiff did not have a physical impairment and was not substantially limited in any of his major life activities. See id. at 746. The court stated that the plaintiff’s excessive bulk was caused by his own voluntary behavior and, therefore, the Rehabilitation Act does not apply to the plaintiff: “[Section] 504 was not intended to protect those with voluntary ‘impairments’ from employment discrimination.” Id. at 746. Nor, did the defendant view the plaintiff as having a physical impairment that limited his major life activities. See id. As the court noted, “what the plaintiff is really suing for is his right to be both a body builder and a flight attendant, a right that [section] 504 was not intended to protect.” Id.
courts further recognized that neither employer considered them to be impairments.\textsuperscript{163}

Second, the Forrissi court’s use of the \textit{E.E. Black} decision raises its own unique problems and has largely obscured the actual ruling in that case.\textsuperscript{164} \textit{E.E. Black} was one of the first reported decisions to examine the definition of disability under the Rehabilitation Act in any depth.\textsuperscript{165} Prior administrative proceedings in the case squarely framed the debate over the one-job issue.\textsuperscript{166} An administrative law judge (ALJ) ruled that the plaintiff had not proven that the perceived impairment, a congenital back anomaly, substantially limited a major life activity because he had not shown that it had “impeded activities relevant to many or most jobs.”\textsuperscript{167} On appeal, the Assistant Secretary of Labor for the Employment Standards Administra-

\textsuperscript{163} See de la Torres, 610 F. Supp. at 597 (“Defendants did not regard Plaintiff as one ‘substantially limited’ from working . . . . If he was so regarded, neither he nor [another left-handed employee] would have been hired in the first place.”); Tudyman, 608 F. Supp. at 746 (“Defendant merely regards plaintiff as not being under a certain weight . . . . [R]efusal to hire someone for a singular job does not in and of itself constitute perceiving the plaintiff as a handicapped individual.”).

\textsuperscript{164} See Forrissi v. Bowen, 794 F.2d 931, 934-35 (stating that employer does not necessarily regard employee as handicapped merely by finding that employee is unable to meet specific demands of particular job).

\textsuperscript{165} See \textit{E.E. Black}, 497 F. Supp. at 1090 (“This case of first impression involves the construction and interpretation of several sections of the Rehabilitation Act.”). The plaintiff, George Crosby, was an apprentice carpenter, who was referred to the defendant, E.E. Black, by Crosby’s union. See \textit{id.} at 1091. E.E. Black, a general construction contractor, required all apprentice carpenters applicants to take pre-employment physical examinations. See \textit{id.} Crosby had x-rays taken of his back, and a surgeon, Dr. Henry, detected a congenital back abnormality. See \textit{id.} Dr. Henry informed E.E. Black that Crosby was a poor risk for heavy labor because of his back, and E.E. Black denied him employment as a result of the preemployment physical. See \textit{id.} Subsequently, Crosby was examined by another doctor, an orthopedist, who concluded that Crosby’s condition did not prevent him from performing the job of apprentice carpenter. See \textit{id.} at 1091-92. Despite the fact that the orthopedist wrote a letter detailing his findings, E.E. Black refused to hire Crosby as an apprentice. See \textit{id.} at 1092.

\textsuperscript{166} See \textit{id.} at 1093. Initially, the administrative law judge (ALJ) noted that the term “impairment” was not defined in the Rehabilitation Act or the Regulations. See \textit{id.} Accordingly, the ALJ defined impairment as “any condition which weakens, diminishes, restricts, or otherwise damages an individual’s health or physical or mental activity.” See \textit{id.} The ALJ then found that the employer perceived Crosby as having an impairment, and that he had difficulty obtaining employment as a result of this perception. See \textit{id.} Nevertheless, the ALJ determined that the employer did not perceive this impairment as “substantially limiting a major life activity of . . . Crosby—in this case, employment.” See \textit{id.} The ALJ explained that in order to show that the employer perceived Crosby as substantially limited, the employer would have to perceive Crosby’s impairment as “so severe as to limit employment generally.” \textit{Id} at 1093-94.

\textsuperscript{167} See \textit{id.} at 1094. An ALJ initially determined that the plaintiff’s condition, a “congenital back anomaly” discovered by x-rays, was “perceived” by the defendant as constituting an “impairment [that] caused him to experience . . . difficulty in obtaining employment.” \textit{Id.}
tion ruled that coverage under the Rehabilitation Act definition did not require a showing that the impairment impeded activities relevant to many or most jobs because coverage is "extended to every individual with an impairment that is a current bar to employment that the individual is currently capable of performing [and it is] sufficient that the impairment is a current bar to the employment of one's choice . . . which the individual is currently capable of performing."\textsuperscript{168}

Later decisions, including the \textit{Forrisi} ruling, treat the decision of the United States District Court for the District of Hawaii in \textit{E.E. Black} as if the court had adopted the position of the ALJ in the case.\textsuperscript{169} In fact, the \textit{E.E. Black} court settled for neither of the prior articulated positions, but instead forged its own unique, albeit questionable, stance.\textsuperscript{170} The \textit{E.E. Black} court rejected the notion that the statutory definition includes anyone who is refused a particular job because of a real or perceived impairment, but held that the plaintiff was regarded as having an impairment by virtue of his having been refused an apprentice position because of back abnormalities.\textsuperscript{171} In reaching that result, the \textit{E.E. Black} court reasoned that the focus cannot be simply on the job criteria or qualifications used by the individual employer because it should be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process.\textsuperscript{172} Otherwise, according to the court, in situations involving "some aberrational type of job qualification," an employer "discriminating against a qualified handicapped individual would be rewarded if his reason for rejecting the applicant were ridiculous enough."\textsuperscript{173} The \textit{E.E. Black} court's generalization of other employers' hiring criteria undercuts much of the impact of the "not just one job" principle in this case, and its appli-

\textsuperscript{168} Id. Administrative procedures applicable to the plaintiff's complaint under section 503 of the Rehabilitation Act permitted an appeal of the ALJ's determination to the Assistant Secretary. \textit{See id.} The Assistant Secretary agreed with the facts as found by the ALJ. \textit{See id.}

\textsuperscript{169} \textit{See Forrisi v. Bowen}, 794 F.2d 931, 934-35 (citing \textit{E.E. Black} to support proposition that "statutory reference to a substantial limitation indicates . . . that an employer regards an employee as handicapped merely by finding the employee's impairment to foreclose generally the type of employment involved").

\textsuperscript{170} \textit{See E.E. Black}, 497 F. Supp. at 1100 ("The court believes that the real focus must be on the individual job seeker and not solely on the impairment or the perceived impairment. This necessitates a case-by-case determination of whether the impairment or perceived impairment of a rejected, qualified job seeker, constitutes, for that individual, a substantial handicap to employment.").

\textsuperscript{171} \textit{See id.} at 1102.

\textsuperscript{172} \textit{See id.} at 1100.

\textsuperscript{173} \textit{Id.}
cation might have led to an opposite result in Forrisi. The Forrisi decision quoted the discussion of why a single rejection should not demonstrate a substantial limitation, but ignored the E.E. Black court's analysis of the need to generalize an employer's screening standard.

Apart from the dubious precedents upon which it relied, the Forrisi court also seems to have been particularly influenced by concrete evidence of the plaintiff's ability to find other jobs. The Fourth Circuit noted the district court's finding that the plaintiff "had no difficulty in obtaining other jobs in his field prior to this one, and defendant's uncontroverted allegation is that plaintiff is currently employed once again as an engineer." The court also quoted from the plaintiff's deposition testimony: "My fear of heights never affected my life at all on any job or anything . . . . It never was a problem before I got this job." Thus, the facts suggested that the Forrisi court might have been able to find that the plaintiff did not meet the statutory definition of disability without its stance on the one-job issue.

In contrast to Forrisi, other courts have been considerably more expansive in applying the "regarded as" concept. For instance, in Doe v. New York University, the United States Court of Appeals for the Second Circuit observed that "the legislative history . . . indicates that the definition is not to be construed in a niggardly fashion." The court ruled that a medical student, denied readmission because of psychiatric problems, was regarded as hav-

174. See Forrisi, 794 F.2d at 934-35 (providing no discussion as to whether other employers would have regarded plaintiff as handicapped in ability to work as utility systems repair person because of plaintiff's acrophobia).

175. See id. at 935 (quoting E.E. Black to support proposition that if Rehabilitation Act applied to all persons who have been rejected from particular job because of perceived inability to perform that job, it would therefore cover individual with acrophobia "who was offered 10 assistant accountant jobs with a particular company, but was disqualified from one job because it was on the 37th floor").

176. See id. at 935 (discussing that plaintiff, despite his acrophobia, could readily find employment in his chosen field of utility systems repair).

177. Id. (quoting Forrisi v. Heckler, 626 F. Supp. 629, 632 (M.D.N.C. 1985)).

178. Id. at 934.

179. Even if the court had ruled that being rejected or dismissed from a single job by a single employer because of a physical or mental impairment is sufficient to establish a prima facie case or a presumption (subject to contrary evidence) that the individual has been regarded as having an impairment under the third prong of the definition, Forrisi probably would not have qualified under the third prong of the definition of disability.

180. 666 F.2d 761 (2d Cir. 1981).

181. Id. at 775.
ing a disability. In reaching it conclusion, the court applied the definition liberally by characterizing the plaintiff as having a “substantial limitation on a major life activity, the ability to handle stressful situations of the type faced in a medical training milieu.”

Moreover, in Thornhill v. Marsh, the United States Court of Appeals for the Ninth Circuit held that a man discharged from a job when the Army Corps of Engineers erroneously interpreted the consequences of his congenital spine abnormality satisfied the statutory definition of “individual with [a] handicap.” The court found that the plaintiff met the “regarded as” criteria because of “the congenital deformity of his spine which the Corps perceived as imposing a disqualifying limitation on his ability to lift weight.”

Significantly, the court made no suggestion of a need to show that his perceived impairment would have an impact on his employability beyond the immediate position from which he had been discharged.

A possible explanation of the differing outcomes in Thornhill and Forrisi is that Thornhill was decided after the Supreme Court’s decision in Arline, while Forrisi was decided before Arline. While the Arline decision rested upon an interpretation of the second prong (record of an impairment) of the definition of disability, the Court’s discussion of the third prong was extensive. For example, in its examination of the purpose and impact of the third prong, the Court came close, but did not quite address, the one-job issue. The Court did discuss, however, the major life activity of working and stated that an impairment that substantially limited only the activity of working would still constitute a disability under

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182. See id. The court stated that because of the plaintiff’s lengthy history of mental impairments requiring hospitalization and her departure from New York University as a result of her psychiatric problems, the plaintiff “has suffered from a substantial limitation on a major life activity, the ability to handle stressful situations of the type faced in a medical training milieu.” Id.

183. Id.

184. 866 F.2d 1182 (9th Cir. 1989).

185. See id. at 1184.

186. Id. at 1183-84.

187. See id. (providing no explanation as to whether plaintiff must show that his perceived impairment would affect his employability in other jobs in his field of work).


189. See id. at 284 (stating that primary purpose of section 504 of Rehabilitation Act was to ensure that individuals “are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others,” but fails to explain whether impairment that precludes individual from specific job qualifies as disability).
the third prong. Responding to a contention by the United States at oral argument that a condition could not constitute a disability if the only major life activity it affects is the ability to work, the Court declared:

The United States recognized that “working” was one of the major life activities listed in the regulations, but said that to argue that a condition that impaired only the ability to work was a handicapping condition was to make “a totally circular argument which lifts itself by its bootstraps.” The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one’s ability to work.

Furthermore, the Arline Court noted the Senate Report’s example of a person “regarded as” having a disability as “a person with some kind of visible physical impairment which in fact does not substantially limit that person’s functioning.” The Court declared that: “Such an impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.” It also quoted a portion of the legislative history where Senator Mondale described a situation that was meant to be addressed by the legislation—that of a woman disabled by arthritis who was denied “a job” not because she could not do the work, but because “college trustees [thought] ‘normal students shouldn’t see her.’” Neither Senator Mondale, nor the Court, suggested that such a plaintiff would have to show that she would also be excluded from other positions.

Similar to the Ninth Circuit’s decision in Thornhill, several other post-Arline decisions have been less restrictive than the Forrissi analysis. Nevertheless, several circuits have continued to follow

190. See id. at 283 n.10.
191. Id.
192. Id. at 282.
193. Id. at 283.
194. Id. at 283 n.9 (quoting 117 Cong. Rec. 36761 (1972)).
195. See, e.g., Cook v. Rhode Island, 10 F.3d 17, 26 (1st Cir. 1993) (holding jury could rationally conclude that defendant’s perception of plaintiff applicant’s impairment, as exhibited in its refusal to hire her for particular position, foreclosed sufficiently wide range of jobs to serve as proof of substantial limitation); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1125-1126 (11th Cir. 1993) (“[I]mpairment [pseudofolliculitis barbae], and the [plaintiff] firefighters’ inability to shave that
the Forrisi reasoning in decisions entered after Arline. The significance of Forrisi is evidenced by the fact that each of the initial decisions in a circuit that ruled that exclusion-from-one-job is not enough under the "regarded as" prong of the definition of disability relied on Forrisi as controlling precedent. This line of cases is, therefore, directly traceable to the decision in Forrisi, which in turn, is traceable to that court's dubious interpretations of de la Torres, Tudyman and E.E. Black.

2. ADA Legislative History

The legislative history of the ADA offers some support for the notion that exclusion because of a physical or mental impairment that prevents the individual from performing a single specific job with unique qualifications is not enough to establish a disability under the first prong of the definition. Under the "regarded as"

results from it, 'substantially limit' the firefighters' ability to engage in the 'major life activity' of work on account of the [defendants'] no-beard rule.); Taylor v. United States Postal Serv., 946 F.2d 1214, 1218 (6th Cir. 1991) (permitting "applicant to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so called job requirement due to physical impairment"). In one case, a federal district court showed similar flexibility in applying the "regarded as" branch of the definition when it ruled that an individual who had been excluded from an alcohol and drug treatment program because of human immunodeficiency virus (HIV) infection had thereby been regarded a having an impairment affecting the major life activity of "learning." Doe v. Centinela Hosp., No. CV87-2514, 1988 WL 81776, at *6-7 (C.D. Cal. June 30, 1988).

196. See, e.g., Chandler v. City of Dallas, 2 F.3d 1385, 1392-93 (5th Cir. 1993) (following Forrisi line of reasoning); Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992) (same).

197. See Chandler, 2 F.3d at 1392 (following Forrisi in dicta); Maulding v. Sullivan, 961 F.2d 694, 698 (8th Cir. 1992) (same); Welsh, 977 F.2d at 1417 (same); Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (same).

198. See de la Torres v. Bolger, 610 F. Supp. 593 (N.D. Tex. 1985) (finding that left-handedness did not constitute disability under Rehabilitation Act); Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984) (holding that overweight bodybuilder was not person with disability under Rehabilitation Act); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980) (finding that person with back problems was substantially limited in his ability to work as apprentice carpenter).


A person with an impairment who is discriminated against in employment is... limited in the major life activity of working. However, a person who is limited in his or her ability to perform only a particular job, because of circumstances unique to that job site or the materials used, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in the major life activity of working if he has a mild allergy to a specialized paint used by one employer which is not generally used in the field in which the painter works.

Id.
prong of the definition of disability, however, the legislative history of the ADA indicates considerable congressional intent to reject the Forrisi "not just one job" approach. The Senate Committee Report to the ADA pointedly cites as examples of individuals included within the "regarded as" concept "people who are rejected for a particular job for which they apply because of findings of a back abnormality in an x-ray, notwithstanding the absence of any symptoms, or people who are rejected for a particular job solely because they wear hearing aids."200 Not only is there no suggestion of a need to show that the individual is limited in connection with other jobs or participation in other programs in the Senate Report, but in support, the report cites Thornhill and Doe v. Centinela Hospital,201 both of which differ from the Forrisi approach.202

The House Committee on the Judiciary Report on the ADA used language that differed somewhat from the language found in the other reports.203 Nevertheless, the House Report evinced a similar intent:

[A] person who is rejected from a job because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and


A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.

Id.


203. See H.R. REP. No. 101-485, at 53 ("[I]f an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working that person is covered under the third prong of the definition of disability."); S. REP. No. 101-116, at 24 ("[I]f an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.").
whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.204

To manifest its intent even further, the House Committee declared:

In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test.205

Thus, under the House Report's approach, excluding a person from a job or activity because of an actual or perceived physical or mental impairment would create at least an inference or presumption that the excluded individual has been regarded as having a disability.206 Under the language of the other committees, exclusion from a single job because of a physical or mental impairment would establish coverage of the excluded individual as having been regarded as having a disability.207

3. **ADA Regulations**

The Equal Employment Opportunity Commission (EEOC) regulations implementing the ADA rejected an extremely restrictive approach that would require a showing of inability to perform an expansive array of jobs in order to establish a substantial limitation of the major life activity of working. Nevertheless, the regulations did not resolve the ambiguity of previous case law as to the "regarded as" prong of the definition of disability.209

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205. Id. at 30-31.
206. See id.
207. See id. at 53 ("[i]f an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability."); S. Rep. No. 101-116, at 24. (same).
208. See 29 C.F.R. § 1630.2(j) (3) (1997).
209. See, e.g., id. pt. 1630, app. A § 1630.2(j) (commenting on regulation in section 1630.2(j)).
a. Actual Disability Under the ADA Regulations

Under the first prong of the definition, the EEOC clearly indicated that exclusion from a single position is not enough: "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."\(^{210}\) Furthermore, the Interpretive Guidance promulgated by the EEOC explained that the inability to perform one job for one employer is not enough under the first prong of the definition, nor is inability "to perform a specialized job or profession requiring extraordinary skill, prowess or talent."\(^{211}\) To exemplify this analysis, the EEOC referred to the following relatively specialized situations: (1) a (seemingly unlikely) scenario of an individual unable to be a commercial airline pilot because of a minor vision impairment, but who is able to be a copilot or pilot for a commercial service and (2) a professional baseball pitcher who develops a bad elbow and is no longer able to throw a baseball.\(^{212}\) In each of those situations, the EEOC concluded that the individual involved does not have a disability because he or she is only unable to perform either a particular specialized job or a narrow range of jobs.\(^{213}\) These examples suggest that the EEOC viewed as quite limited those situations in which proof of inability to perform a particular type of job will not establish a substantial limitation on working.\(^{214}\)

The regulations make clear that an individual does not have to be totally unable to work to meet the statutory definition of actual disability.\(^{215}\) As one example, the EEOC used the situation of a worker with a back condition that prevents him from performing

\(^{210}\) Id. § 1630.2(j)(3)(i). Regarding the activity of working, "substantially limits" under the regulations referred to significant restrictions "in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." Id.

\(^{211}\) Id. pt. 1630, app. A § 1630.2(j).

\(^{212}\) See id.

\(^{213}\) See id.

\(^{214}\) See id. ("[A]n individual does not have to be totally unable to work in order to be considered substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes.").
jobs involving heavy labor but does not interfere with other classes of jobs (such as semiskilled work). Under the EEOC's approach, such an individual is substantially limited in the life activity of working. Similarly, an individual with a serious allergy to a substance found in most high-rise buildings would be substantially limited in the ability to perform the broad range of jobs conducted in such buildings. Thus, the individual would be substantially limited in the life activity of working.

The regulations do not expressly define the terms "class of jobs" and "broad range of jobs in various classes." In the previous examples, the EEOC Interpretive Guidance provided "heavy labor" and "semiskilled" work as examples of different classes of jobs. Thus, its discussion of "broad range of jobs" seems to have used that phrase to mean several different types of jobs.

Nevertheless, under the regulations, determining limitations on a class of jobs or on a broad range of jobs in various classes must be done on a case-by-case basis, based on the following factors: (1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified because of an impairment and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment; or (3) the job from which the individual has been disqualified because of an impairment and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). The second and third factors, differing as they do only in the presence of the word "not" before the words "utilizing similar training, knowledge," are not very enlightening. Thus, the meaning of the phrases "a class of jobs" and "a broad range of jobs in various classes" will presumably have to await further elucidation by the courts.

To ameliorate the concerns of disability rights advocates who felt that the EEOC's proposed regulations regarding the phrase

216. See id.
218. See id.
219. See id.
220. See id. (providing no definition of "class of jobs" or "a broad range of jobs in various classes").
221. See id.
222. See id. § 1630.2(j) (3) (ii) (1997).
“substantially limited in working” unduly limited coverage and presented potential plaintiffs with onerous burdens of evidence and proof, the EEOC revised its Interpretive Guidance to expressly indicate the contrary.223 The final Interpretive Guidance states that standards regarding numbers and types of jobs that are limited “are not intended to require an onerous evidentiary showing.”224 They are meant to require only evidence of “general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., ‘few,’ ‘many,’ ‘most’) from which an individual would be excluded.”225

b. “Regarded As”

The EEOC’s central dictate about “substantially limited in working” is that exclusion from a single, unique job because of an impairment is not sufficient to establish the existence of a disability under the first prong of the statutory definition. The EEOC’s regulatory guidance provides, however, that exclusion from a single position may be sufficient to satisfy the third prong of the definition in certain circumstances. The Interpretive Guidance declares: “An individual rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities would be covered under this part of the definition of disability, whether or not the employer’s or other covered entity’s perception were shared by others in the field.”226

The EEOC considers exclusions based on “common attitudinal barriers” toward individuals with disabilities—including “concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers’ compensation costs, and acceptance by coworkers and customers”—to constitute discrimination based on perceptions of disability.227 Thus, if an individual with a physical or mental impairment can show that he or she was terminated from or not hired for a particular job because of that impairment, and the employer took the exclusionary action because of one of the listed concerns, such a showing may be sufficient to establish that the individual was regarded as having a substantially limiting impairment. According to the EEOC, unless the employer can articulate a nondiscriminatory reason for the employment action in such a situation, “an inference that the em-

225. Id.
226. Id. pt. 1630, app. A § 1630.2(l) (emphasis added).
227. Id.
employer is acting on the basis of 'myth, fear or stereotype' can be drawn."

The EEOC's analysis thus affords three avenues for establishing that exclusion from a particular job constitutes regarding an individual as having a disability: (1) by proving that the exclusion resulted from myths, fears or stereotypes on the part of the employer; (2) by demonstrating that the exclusion was caused by one of the "common attitudinal barriers" toward individuals with disabilities such as an employer's concern about productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs and acceptance by coworkers and customers; and (3) by the employer's inability to articulate a nondiscriminatory reason for the employment action. In any of these three situations, the EEOC's analysis permits coverage under the third prong for exclusion from a single job, significantly ameliorating the impact of the contrary outcome of the EEOC's analysis under the first prong.

4. Split in ADA Circuit Decisions Under the "Regarded As" Prong

The circuit decisions under the ADA are in agreement with those under the Rehabilitation Act that proof of actual disability as to the activity of working requires a showing of more than exclusion from a single job. Circuit court decisions applying the "regarded as" prong under the ADA, however, are sharply divided, as with Rehabilitation Act decisions, on the exclusion-from-a-single-job issue.

228. Id.

229. See Homeyer v. Stanley Tulchin Assocs., 91 F.3d 959, 961 (7th Cir. 1996) (holding proof of actual disability as to activity of working requires more than exclusion from single job); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (same); Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (same); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 (5th Cir. 1995) (same); Bolton v. Scrivner, Inc., 36 F.3d 939, 942-43 (10th Cir. 1994) (same).

230. Compare Katz v. City Metal Co., 87 F.3d 26, 32-33 (1st Cir. 1996) (noting that salesman discharged by his employer had presented evidence sufficient for jury to decide that he had been "regarded as" having disability, even though he had presented no medical testimony), and Holihan, 87 F.3d at 366 (noting that evidence that defendant conducted meetings to discuss plaintiff's aberrational behavior prior to his termination established genuine issue of material fact whether discharged employee was "regarded as" having disability), with Ray v. Glidden Co., 85 F.3d 227, 229-30 (5th Cir. 1996) (upholding summary judgment against plaintiff who had his shoulders and hips surgically replaced because of avascular necrosis on grounds that he was not person with disability, because reasonable juror could not find that employer "regarded" plaintiff as having impairment), and Wootten v. Farmland Foods, 58 F.3d 382, 385-86 (8th Cir. 1995) (upholding summary judgment for defendant where evidence showed that employer had regarded
The Fifth Circuit has been the preeminent leader in rulings imposing Forrisi-based analysis of the one-job issue under the third prong of the definition of disability in ADA cases.\(^{231}\) In Dutcher v. Ingalls Shipbuilding,\(^{232}\) for instance, a welder with an arm injury resulting from a gun accident alleged that her former employer violated the ADA when it failed to reinstate her in the position she had previously occupied.\(^{233}\) Relying upon Forrisi, the Fifth Circuit ruled that the woman had not been "regarded as" having a disability, because the employer regarded her as being precluded only from welding jobs requiring climbing, and thus, she did not qualify as an individual with a disability under the ADA.\(^{234}\)

plaintiff's condition as "prevent[ing] him from performing a narrow range of meatpacking jobs").

\(^{231}\) See Ray, 85 F.3d at 229-30 (holding that employer did not regard plaintiff as having disability); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 192-95 (5th Cir. 1996) (finding employer does not necessarily regard employee as having impairment because employee is incapable of performing job); Dutcher, 53 F.3d at 727-28 (finding plaintiff failed to provide evidence that she was "regarded as" having disability). In 1988, the Fifth Circuit had affirmed without opinion a district court decision that quoted the Forrisi reasoning under the "regarded as" prong in a case that was decided solely under the first prong. See Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328, 1342-43 (S.D. Tex. 1987), aff'd, 863 F.2d 881 (5th Cir. 1988).

\(^{232}\) 53 F.3d 723 (5th Cir. 1995).

\(^{233}\) See id. at 724-25.

\(^{234}\) See id. at 727-28. Similarly, in Ray, a lift truck operator whose shoulders and hips had been surgically replaced because of avascular necrosis filed an ADA suit alleging his employer had terminated him because of his disability. See id. at 228. In addressing the plaintiff's contention that the defendant had regarded him as having a disability, the Ray court ruled it had not. See id. at 229-30. Citing its holding in Dutcher, the Fifth Circuit upheld summary judgment against the plaintiff on the grounds that he was not a person with a disability under the ADA. See id. Although plaintiff was "significantly restricted" in his capacity to do the heavy lifting required for his job, plaintiff's "inability to perform that discrete task does not render [plaintiff] substantially limited in a major life activity." Id. at 229. Central to the court's reasoning was that the employer had presented evidence it had terminated the plaintiff because of the belief that his medical condition precluded his performance of the job of lift truck operator. See id. Furthermore, the plaintiff had not presented any evidence that he had been denied any other job or that any other job of the employer was available. See id. Such a standard of "regarded as" places a plaintiff at a serious disadvantage if he or she is terminated from a position and the employer does not have available any other position for which the plaintiff is eligible to apply.

In Ellison, a woman with breast cancer for which she underwent a lumpectomy and radiation treatment alleged that she had been discriminated against when she received a lowered evaluation rating, a lower pay raise than other employees and was included among four employees (out of thirty-five in her department) to be fired. See Ellison, 85 F.3d at 189. Relying upon the Forrisi precedent, the Fifth Circuit upheld a summary judgment ruling against her on the ground that she was not a person with a disability under any of the prongs of the statutory definition. See id. at 192-93. The court ruled that the plaintiff had not shown herself to have been regarded as having a disability, even though her supervisor had made some highly insensitive comments about her condition, because her employer had later
In *Wooten v. Farmland Foods*, the United States Court of Appeals for the Eighth Circuit joined the Fifth Circuit in ruling that exclusion of an employee from a job because of a physical or mental impairment is not evidence that the employer regarded the employee as having an impairment under the ADA. In *Wooten*, a ham boner was terminated from his job after submitting a note from his doctor indicating that because of tendinitis, inflammation and carpal tunnel syndrome affecting his left hand and shoulder, he should not work in a cold environment or with meat products. The employer assigned the man to light duty status temporarily and later terminated him. The Eighth Circuit affirmed summary judgment against the plaintiff, finding that he had not been "regarded as" having a substantially limiting impairment, because the employer only regarded him as having an impairment that prevented him from "performing a narrow range of meatpacking jobs." The court declared that "working does not mean working at a particular job of that person's choice."

Counterpoised against the Fifth and Eighth Circuits' rulings that being regarded as unable to perform a single job or a narrow range of jobs is not sufficient to establish that one is regarded as having a substantially limiting impairment are rulings by the United States Courts of Appeals for the First and Ninth Circuits. In *Katz v. City Metal Co.*, the First Circuit reviewed a district court's judgment as a matter of law against the plaintiff, a scrap metal salesman, who was terminated from his job five weeks after he had a heart attack due to chest pain and was subsequently diagnosed with coronary artery disease. The court held that the plaintiff's condition did not substantially limit his job because he was able to perform his job with reasonable accommodations, such as using a desk or taking breaks.

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235. 58 F.3d 382 (8th Cir. 1995).
236. See id. at 386.
237. See id. at 384.
238. See id. The supervisor stated that the plaintiff's "termination was due to his disability (the extent of which they were skeptical), the unavailability at that time of light duty jobs that would accommodate [his] restrictions . . . and their unwillingness to terminate another employee in order to provide the plaintiff with a job compatible with his physical restrictions." Id.
239. See id. at 386.
240. Id. The court added that "[a]n impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." Id.
241. 87 F.3d 26 (1st Cir. 1996).
attack. The First Circuit concluded that it was “a debatable question” whether the plaintiff’s evidence, which did not include any medical testimony, was sufficient to allow a jury to conclude that he had an actual disability, but held that it “need not definitively resolve the issue” because the plaintiff had presented sufficient evidence that he was “regarded as” having a disability. The court declared that “the jury certainly did not need medical testimony in making its own judgment as to what the employer may have perceived, rightly or wrongly, about Katz’s condition.” The court ruled that the plaintiff’s testimony regarding his condition and the circumstances that led up to his employer terminating him provided “enough evidence to reach the jury on the issue of perception.”

In Holihan v. Lucky Stores, Inc., the district court ruled that the plaintiff did not qualify as an individual with a disability under the first prong of the definition because the evidence showed that he was not prevented from working at a class or a broad range of jobs. The Holihan court reversed the district court, however, because evidence that the employer had received medical reports about plaintiff’s condition and had meetings to discuss plaintiff’s aberrational behavior prior to his termination established a genuine issue of material fact whether the plaintiff was “regarded as” having a disability.

The Fifth and Ninth Circuits recognized that, under the first prong, plaintiffs need to show more than exclusion from a single

242. See id. at 28. The plaintiff had a heart attack on September 27, 1992. See id. The plaintiff called his employer at the end of October to return to work. See id. at 29. The employer then informed him that he had been terminated. See id. The district court ruled that the plaintiff had not presented evidence sufficient to show that he had a “disability” under the ADA. See id. at 28.

243. See id. at 32. The court stated that even if the plaintiff did not have an actual disability, “both the language and policy of the statute seem to us to offer protection as well to one who is not substantially disabled or even disabled at all but is wrongly perceived to be so.” Id. at 33.

244. Id.

245. Id.

246. 87 F.3d 362 (9th Cir. 1996).

247. See id. at 366 (discussing that plaintiff did not qualify as individual with disability). The plaintiff was diagnosed with “Organic Mental Syndrome” with symptoms of depression, anxiety and stress. See id. at 364. The employer terminated the plaintiff from his job as a store manager. See id.

248. See id. at 366-67 (“From these facts, a reasonable jury could infer that [the defendant] regarded [the plaintiff] as suffering from a disabling mental condition that substantially limited his ability to work.”). The Ninth Circuit made this ruling even in the face of evidence that the defendant had offered to rehire the plaintiff as a clerk and to let him reapply for a store manager position as soon as one became available. See id. at 365.
job to demonstrate a substantial limitation of working that qualifies as an actual disability. Nevertheless, the Katz and Holihan rulings demonstrate that those circuit courts will permit plaintiffs to use a defendant's conduct toward an employee in regard to a particular job to show that the defendant regarded the plaintiff as substantially limited. Plaintiffs may, therefore, establish disability under the third prong of the statutory definition without showing that they were regarded as impaired for a broad range of jobs.

5. **Current State of Law**

On the one hand, the federal courts of appeals have generally agreed with the position taken in the EEOC regulations, that to establish an actual disability by virtue of a limitation upon the activity of working, a plaintiff must show that a physical or mental impairment precludes him or her from performing a class or broad range of jobs. On the other hand, the courts of appeals are sharply split as to whether a similar job analysis is more appropriate than a particular job analysis under the "regarded as" prong of the statutory definition of disability. The EEOC's ADA regulations suggest that lesser showings may suffice under the third prong.

The split in the federal circuit court decisions, however, does not tell the complete story. A number of district court decisions have been influenced by the Forrisi approach and have applied it to avoid reaching the merits of alleged violations of the ADA or sections 501 or 504 of the Rehabilitation Act. The exclusion-from-one-job approach has been applied mechanically by some courts to justify dismissal of claims under the "regarded as" prong, often at the motion to dismiss or summary judgment stage. In making such rulings, courts have often ignored the analysis of the "re-

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250. See, e.g., Blouin, 1996 WL 19138, at *1-3 (granting summary judgment for defendants); Venclauskas, 921 F. Supp. at 82 (granting defendant's motion to dismiss); Joyce, 911 F. Supp. at 94-98 (same); Williams, 910 F. Supp. at 1131-33 (same); Redlich, 899 F. Supp. at 108 (same); Muller, 897 F. Supp. at 1298 (same); Marschand,
garded as" prong suggested by the Arline decision and the means provided by the EEOC regulations for proving that an employee was perceived as having a substantial limitation on the activity of working.

One common thread of the Arline decision and the EEOC regulations that has been considered in court decisions under the "regarded as" prong of the definition involves employees who have received negative treatment because of stereotypes and prejudice. The Supreme Court indicated in Arline that individuals can be included under the statutory definition of disability solely because of the negative reactions, prejudiced attitudes, ignorance, misapprehensions, irrational fears, mythology, stereotypes or reflexive reactions of others. This notion is partially reflected in the EEOC's Interpretive Guidance which provides that one can prove a substantial limitation on the activity of working by proving that exclusion from one's job resulted from myths, fears or stereotypes on the part of the employer whether or not the employer's perception was shared by others in the field.

Consistent with Arline and the EEOC Interpretive Guidance, a few district courts have recognized that plaintiffs may establish the existence of disability under the "regarded as" prong by demonstrating that the plaintiff was rejected for or terminated from a job because of "myths, fears and stereotypes associated with disabilities." In Wooten, the Eighth Circuit recognized that the "re-

876 F. Supp. at 1540-42 (granting summary judgment for defendant); Smaw, 862 F. Supp. at 1472 (same); Partlow, 826 F. Supp. at 43, 46 (same).


252. See id. at 284 (noting "prejudiced attitudes" towards those with disability).

253. See id. at 274, 278 n.3 (discussing "ignorance" of disabilities).

254. See id. at 284 (discussing "misapprehension" of disabilities).

255. See id. (discussing "irrational fear" and "fears" regarding those with disabilities).

256. See id. at 285 (discussing "mythology" regarding those with disabilities).

257. See id. at 287 (discussing "stereotypes" of those with disabilities).

258. See id. at 285 (discussing "reflexive reactions" regarding those with disabilities).


garded as" prong of the definition of disability encompasses "archaic attitudes, erroneous perceptions, and myths."\(^{261}\) Ironically, the court indicated that evidence would have to demonstrate that such attitudes, perceptions and myths disqualified the plaintiff from more than a narrow range of jobs.\(^{262}\) This suggestion contradicts the principles announced both in Arline and in the EEOC regulatory guidance. The Wooten court concluded that the employer's perception regarding the abilities of the plaintiff "was not based upon speculation, stereotype, or myth," but was based solely on a letter from the plaintiff's doctor recommending certain restrictions upon his job duties.\(^{263}\)

The application of a "myths, fears and stereotypes" standard under the EEOC regulations and in court decisions reflects some narrowing of the Supreme Court's analysis in Arline that also referred to negative reactions, prejudiced attitudes, ignorance, misapprehensions and reflexive reactions. Moreover, almost completely lost in the reasoning of the courts in such cases is the additional analysis contained in the EEOC's regulations which states that one

\(^{261}\) See Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995) (discussing "regarded as" prong).

\(^{262}\) See id. at 385-86.

\(^{263}\) See id. at 386. In a case involving the actual disability prong, the United States Court of Appeals for the Seventh Circuit hyperbolized that the similarity between misperceptions about disability and racial discrimination explains the focus of the third prong:

"Disability" is broadly defined. It includes not only "a physical or mental impairment that substantially limits one or more of the major life activities of [the disabled] individual," but also the state of "being regarded as having such an impairment." The latter definition, although at first glance peculiar, actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such 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.

Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995) (citations omitted). The naiveté of this analysis in its seeming lack of awareness of blatant discrimination visited upon people with actual disabilities is striking. Examination of the many analytical shortcomings of the Vande Zande opinion is beyond the scope of this Article.
can demonstrate a substantial limitation in working in two other ways:

[1] by demonstrating that the exclusion was caused by one of the “common attitudinal barriers” toward individuals with disabilities such as an employer’s concern about productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers’ compensation costs, and acceptance by coworkers and customers; and

[2] by the employer’s inability to articulate a nondiscriminatory reason for the employment action.264

Only one decision, *Rogers v. International Marine Terminals, Inc.*,265 even mentions the first of the two analytical standards established by the EEOC.266 In *Rogers*, the plaintiff contended that his employer regarded him as having a disability as a result of his ankle problems and his absenteeism.267 The Fifth Circuit noted the EEOC Interpretive Guidance language regarding employers’ concerns about a variety of issues including productivity, safety, insurance, liability and attendance.268 The court ruled, however, that the language applied to unfounded concerns about people with disabilities, while the *Rogers* plaintiff’s unavailability to work was “very real.”269

Likewise, only one decision, *EEOC v. Texas Bus Lines*,270 mentions the second way established by the EEOC to demonstrate a substantial limitation in working.271 In *Texas Bus Lines*, the court considered whether a “morbidly obese” plaintiff had been regarded as having a disability under the ADA by an employer who refused to hire her because of her condition.272 The court quoted the following language from the EEOC Interpretive Guidance: “If the employer cannot articulate a nondiscriminatory reason for the employment action, an inference that the employer is acting on the basis of ‘myth, fear or stereotype’ can be drawn.”273 Applying this standard to the facts in the case, the court ruled that the defendant

265. 87 F.3d 755 (5th Cir. 1996).
266. See id. at 760 n.4.
267. See id. at 760.
268. See id. at 760 n.4.
269. See id. at 760-61.
271. See id. at 975.
272. See id.
273. Id.
had made its decision not to hire the plaintiff "because of a perception of disability based on 'myth, fear or stereotype,'"\(^{274}\) and therefore, the plaintiff was regarded as having a disability under the ADA definition.\(^{275}\) Apart from Rogers and Texas Bus Lines, the alternative EEOC standards for determining "myth, fear or stereotype" seem to have been overlooked by the courts.

Plaintiffs can use various means to seek to avoid the evidentiary burdens and harsh impact of the not-just-one-job principle, and various decisions reflect plaintiffs' successful use of such approaches. The most obvious method is to establish that the plaintiff qualifies as an "individual with a disability" under one of the first two prongs of the statutory definition. Thus, a plaintiff can avoid the issue of substantial limitation in working by proving that he or she has a physical or mental impairment that substantially limits some other major life activity and, thus, has an actual disability.\(^{276}\) In Loue v. Angelo's Italian Foods, Inc.,\(^{277}\) for example, the United States Court of Appeals for the Tenth Circuit ruled that lifting is a major life activity.\(^{278}\) Therefore, evidence that the plaintiff's multiple sclerosis made her unable to lift more than fifteen pounds was sufficient evidence of disability to survive a motion for summary judgment.\(^{279}\)

Similarly, a plaintiff can avoid having to confront the "regarded as" prong of the definition by demonstrating a record of disability under the second prong of the statutory definition. In Arline, the Supreme Court ruled that the plaintiff's hospitalization for tuberculosis was sufficient to establish that she had a "record of impairment" under the statutory definition, and therefore, she qualified as an individual with a disability.\(^{280}\) Despite the Arline precedent, three circuit courts have indicated that they are unwilling to read Arline as mandating that any sort of hospitalization is sufficient to establish a "record of impairment."\(^{281}\) At least one district

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274. Id. at 979.
275. See id.
276. See 29 C.F.R. pt. 1630, app. A § 1630.2(j) (1997) ("An individual who satisfies this first part of the definition of the term 'disability' is not required to demonstrate that he or she satisfies either of the other parts of the definition.").
277. 87 F.3d 1170 (10th Cir. 1996).
278. See id. at 1176-78 (denying defendant's motion for summary judgment).
279. See id.
281. See Byrne v. Board of Educ., 979 F.2d 560, 566 (7th Cir. 1992) (stating that single hospital stay for administration of allergy tests does not create "record of impairment"); Taylor v. United States Postal Serv., 946 F.2d 1214, 1216-17 (6th Cir. 1991) (declining to read Arline as establishing "nonsensical proposition that any hospital stay is sufficient to evidence a 'record of impairment'"); cf. Demming v. Housing & Redevelop. Auth., 66 F.3d 950, 955 (8th Cir. 1995) (stating that hospital-
court, however, ruled that plaintiff’s affidavits indicating he had been hospitalized on more than one occasion as a result of diabetes were sufficient to establish a genuine issue of material fact that he had a “record of impairment.”

Plaintiffs may, of course, establish that they have a “record of impairment” by proof of facts other than hospitalization. A plaintiff may establish a “record of impairment” by showing that an employer had access to medical records documenting the existence of a prior disability. Existence of a “record of impairment” does not, however, depend upon whether the employee continues to have the impairment at the time of the allegedly discriminatory job action.

Plaintiffs choosing to proceed under the “regarded as” prong of the definition may sometimes succeed in sidestepping the effects of the one-job-is-not-enough restriction. One way to do so is by showing that the employee was regarded as having an impairment that substantially limits a major life activity other than working. In *Spath v. Berry Plastics Corp.*, for example, the court found that a woman with an ankle injury had shown that her employer regarded her as having an impairment that limited major life activities of walking and performing manual tasks. Also, in *Milton v. Bob Maddox Chrysler Plymouth*, the court ruled that proof that an employer and coworkers believed that a man whose left lung had been removed had a physical impairment that substantially limited his

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284. See Julien v. Louisiana, No. CIV.A.94-32-77, 1995 WL 110632, at *1 (E.D. La. Nov. 10, 1995) ("The ADA clearly contemplates protecting workers from discrimination if they have a record of physical or mental impairment . . . irrespective of whether they are, in fact, disabled.").


286. See id. at 216 (stating that employer perceived that ankle problem was ongoing situation and denying defendant's motion for summary judgment).

breathing was sufficient to establish that he was regarded as having a disability.\textsuperscript{288}

In some circumstances, courts have been willing to assume that perceptions that employees have certain conditions, such as human immunodeficiency virus (HIV) infection or mental illness, are sufficient to establish that such persons are regarded as having a disability.\textsuperscript{289} In other cases, an employer's pejorative language or negative characterization of a plaintiff's condition has been held sufficient to establish that the employer regarded the condition as substantially limiting.\textsuperscript{290}

Certain actions by an employer may demonstrate that it regarded an employee as having a substantially limiting impairment.\textsuperscript{291} In Derbis v. United States Shoe Corp.,\textsuperscript{292} for example, the

\textsuperscript{288} See id. at 323, 325-26 (stating that denial of defendant's motion was in part caused by failure of defendant to address plaintiff's "regarded as" argument which "cannot be disposed of on the current record").

\textsuperscript{289} See Biddle v. Ruben, No. 95 C 1505, 1995 WL 382961, at *2 (N.D. Ill. June 23, 1995) (stating that allegation that Secretary of Treasury perceived plaintiff as "delusional" sufficiently alleges that plaintiff was regarded as suffering from qualifying impairment of mental illness and denying defendant's motion for failure to state claim); Doe v. Kohn Nast & Graf, 862 F. Supp. 1310, 1322-23 (E.D. Pa. 1994) (stating that managers of law firm perceived that plaintiff was infected with HIV and denying defendants' motion for summary judgment); see also Dertz v. City of Chicago, 912 F. Supp. 319, 326 (N.D. Ill. 1995) (finding city's perception that police officer was "psychologically disabled" sufficient to qualify him as individual with disability and denying defendants' motion to dismiss).

\textsuperscript{290} See Overturf v. Penn Ventilator, Co., 929 F. Supp. 895, 899-900 (E.D. Pa. 1996) (holding that evidence that company officer announced at plant managers' meeting that plaintiff had brain tumor and "was better off being terminated" was sufficient to establish genuine issue of material fact that plaintiff was regarded as having disability); Stradley v. LaFourche Communications, Inc., 869 F. Supp. 442, 443-44 (E.D. La. 1994) (stating that evidence that manager terminated plaintiff because manager believed he suffered from anxiety and depression that made him "potentially violent and hostile in the workplace" sufficient to establish genuine issue of material fact that plaintiff was regarded as having disability); Merrifield v. Beaver Inter-Am. Cos., No. 89 C 8436, 1991 WL 171376, at *4-5 (N.D. Ill. Aug. 30, 1991) (noting that remarks by supervisor that plaintiff was "crazy," "insane" and "suffered from a nervous breakdown" were sufficient to establish genuine issue of material fact that she was perceived as having disability under state nondiscrimination law).

\textsuperscript{291} See EEOC v. Joslyn Mfg. Co., 95 C 4956, 1996 WL 400037, at *7 (N.D. Ill. July 15, 1996) (holding that employer's refusal to hire plaintiff for particular position because of perceived impairment that would have excluded him from seven other positions with company was sufficient to establish that plaintiff was regarded as having disability for purposes of motion for summary judgment); EEOC v. Chrysler Corp., 917 F. Supp. 1164, 1168-69 (E.D. Mich. 1996) (ruling that evidence that plaintiff's failure on medical examination required by defendant would have precluded him not only from electrician job he was applying for, but also from several other positions with company, was sufficient to establish that he had been regarded as having substantially limiting impairment); Smith v. Kitterman, Inc., 897 F. Supp. 423, 428-29 (W.D. Mo. 1995) (finding that combination of evidence that supervisors refused to permit the plaintiff to return to work "without a 100%
court ruled that the defendant's act of recommending that the plaintiff apply for long-term disability benefits was sufficient to create a genuine issue of fact as to whether the plaintiff had been regarded as having a disability.\textsuperscript{293} Similarly, the court in \textit{Stroud v. Cessna Aircraft Co.}\textsuperscript{294} ruled that evidence that the employer had recommended the filing of a "Kansas Form 88" to notify the state workers' compensation fund of the employment of a "handicapped worker," was evidence that the defendant had regarded the plaintiff as having a disability under the ADA.\textsuperscript{295}

In other situations in which plaintiffs are unable to avoid the application of the one-job-is-not-enough formula, some courts have countenanced analytical approaches that diminish the formula's harshness. In \textit{Cook v. Rhode Island},\textsuperscript{296} the United States Court of Appeals for the First Circuit cited with apparent approval a principle regarding perceived disabilities that it derived from prior decisions of other courts: "[F]ailure to qualify for a job possessing unique qualifications did not constitute a substantial limitation of a major life activity."\textsuperscript{297} It rejected, however, the defendant's argument that the plaintiff could not have demonstrated that she was regarded as having a disability by the employer she had "applied for and was rejected from only one job."\textsuperscript{298} The \textit{Cook} court explained why it rejected such a restrictive standard:

The Rehabilitation Act simply does not condition such claims on either the quantum of a plaintiff's application efforts or on her prospects of finding other employment. By way of illustration, suit can be brought against a warehouse operator who refuses to hire all turquoise-eyed applicants solely because he believes that people with such coloring are universally incapable of lifting large crates,

\begin{itemize}
\item release from her doctor," believed she would never return to work and refused to allow her to attempt various job duties to determine whether or not she could do them were sufficient to establish genuine issue of material fact that plaintiff was regarded as having disability under ADA); Harrison v. Marsh, 691 F. Supp. 1223, 1229-30 (W.D. Mo. 1988) (holding that evidence that EEOC investigator had concluded that plaintiff was "handicapped" and employer acted upon this finding by promising to accommodate her condition "provided ample reason" for the court to conclude that employer had regarded plaintiff as having disability).
\item See \textit{id.} at *4 (denying defendant's motion for summary judgment).
\item See \textit{id.} at *7 (holding that genuine issue of material fact exists as to whether plaintiff was disabled under meaning of ADA).
\item 10 F.3d 17 (1st Cir. 1993).
\item \textit{Id.} at 26.
\item \textit{Id.} at 25.
\end{itemize}
notwithstanding that other warehousemen might hire the applicants—or that the recalcitrant firm might hire them for other more sedentary posts.299

On the facts before it, the First Circuit upheld a jury verdict for the plaintiff on the grounds that the jury had been entitled to conclude that the defendant had regarded plaintiff’s “morbid obesity” as substantially limiting the major life activity of working.300 The court declared that “the jury rationally could have concluded that [the defendant’s] perception of what it thought to be plaintiff’s impairment, as exhibited in its refusal to hire her for the [particular] position, foreclosed a sufficiently wide range of jobs to serve as proof of a substantial limitation.”301

Finally, plaintiffs may tackle the one-job-is-not-enough standard by satisfying the evidentiary burden of proving that they were regarded as having an impairment that substantially limited their ability to perform a class or a broad range of jobs. In doing so, the testimony of medical and vocational experts may be very helpful.302 The court in Scharff v. Frank,303 for example, denied summary judgment on whether the plaintiff had been regarded as having a physi-

299. Id. at 25-26.
300. See id. at 25.
301. See id. at 26. The Eighth Circuit’s reasoning in Cook is strongly reminiscent of the reasoning in E.E. Black that “it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process,” because otherwise employers rejecting applicants for “aberrational” or “ridiculous” reasons would be insulated from liability. See E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Haw. 1980).
302. See Huber v. Howard County, 849 F. Supp. 407, 412 (D. Md. 1994) (ruling that probationary county firefighter who had been refused full-time position because he had asthma was person with disability under section 504 of Rehabilitation Act even though he was not precluded from various other jobs including those related to firefighting, such as cardiac rescue technician). The Huber court declared:

[Plaintiff’s] condition does not substantially limit his employment opportunities in general. However, because Huber is disqualified from advancing the firefighting career for which he is well trained, and in which he has extensive background, his disability is substantially limiting as to being a career firefighter as such. Although a person’s inability to fulfill one narrow job classification because of a physical or mental impairment does not constitute a disability . . . inability to perform specific job duties substantially limits a person’s employment opportunities as to a job calling for performance of those duties. Such a person may have to seek a different job, even if that calls upon him to alter his career path and/or to start at the bottom of the ladder. In that context, [plaintiff] has a disability which prevents him from performing the duties of a firefighter and is a disabled person as defined by the Rehabilitation Act.

Id.
cal impairment that substantially limited her ability to work. The court noted the testimony of the plaintiff’s vocational expert that if the plaintiff had the impairments that the defendant employer regarded her as having, she “would be prevented from performing approximately half of the unskilled jobs in the local economy that she would otherwise be qualified to perform.”

Similarly, in *EEOC v. Joslyn Manufacturing Co.*, the EEOC relied upon the testimony of “a rehabilitation expert.” The expert testified that the defendant’s perception that the complainant could not perform repetitive hand motions would exclude him not just from the position for which he was not hired but also from several other positions with the defendant employer. The evidence regarding the scope of jobs for which the employee was trained and capable was an important factor in the successful *Joslyn* case.

Nevertheless, plaintiffs having abilities and qualifications that make them eligible for a wide range of jobs may find it harder to show that a perceived limitation constitutes a substantial impairment on working. People with stronger resumes will have less

304. See id. at 186-87.

305. Id. Two subsequent decisions discussing the *Scharff* ruling have expressly held that the absence of *Scharff*-like expert testimony is fatal to such an argument. See *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (affirming district court’s grant of defendant’s motion for summary judgment); *Partlow v. Runyon*, 826 F. Supp. 40, 46 (D.N.H. 1993) (granting defendant’s motion for summary judgment).


307. See id. at *7 (ruling that evidence based in part on expert testimony was sufficient to create genuine issue of material fact as to whether plaintiff’s perceived disability substantially limited his ability to work).

308. See id.

309. See id. The court found: [T]he record indicates that Cruz’[s] access to the job market is limited. His educational and employment background demonstrate a capacity for low and semi-skilled work, but not jobs that require a college education or any type of professional training. Cruz’[s] employment history also focuses on manual labor of one variety or another. Thus, a perceived impairment that prevents him from doing any job involving “repetitive motions of bilateral hands” is particularly damaging to his job prospects.


McKay was a 24 year old graduate, working on earning her teaching certificate. Given her educational background and age, she is qualified for numerous positions “not utilizing” the skills she learned as an automobile assembler. Merely because she can no longer perform repetitive factory work does not render her significantly limited under the ADA.
access to protection against discrimination on the basis of disability. Some of the unfortunate and harsh results of this uneven and fluctuating state of the law under the “regarded as” prong of the definition of disability will be examined later in this Article.

B. The Temporary Disability Issue

Although it is a variation on the general theme of the one-job-is-not-enough difficulty, the temporary disability problem can be explained more directly and succinctly. This difficulty concerns a principle imposed by some courts and certain regulations of the EEOC that an impairment does not constitute a disability under the ADA or the Rehabilitation Act if its duration is too short. Such a requirement is an extension of the notion that a condition is not a disability if it is not sufficiently serious—a principle that is derived from the statutory requirements that to be a disability an impairment must substantially limit a major life activity.311

1. Origins

Section 504 of the Rehabilitation Act regulations, as originally issued by HEW and those published subsequently by other federal agencies, do not contain any restrictions regarding the duration a condition must have to constitute a disability.312 Indeed, the regulatory guidance accompanying the HEW regulations and current regulations of HHS indicate that the respective agency “has no flexibility within the statutory definition [of individual with a disability] to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps.”313

The view that a condition may not qualify as a disability because it is only temporary or of insufficient duration can be traced to court decisions that have weaknesses and deficiencies limiting their value as convincing legal precedent. Arguably, the temporary disability limitation appears to have originated in Grimard v. Carlton.314 In Grimard, a student in a two-year clinical nursing program fractured his ankle and the college determined that he would be

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Id. While McKay involved an actual disability, its language could be invoked to apply to a “regarded as” claim as well.  
312. See 45 C.F.R. § 84.3 (1997) (listing no time requirements in definition section).  
314. 567 F.2d 1171 (1st Cir. 1978).
unable to fulfill his clinical duties that semester. He filed suit claiming that the college officials had denied him due process of law and had discriminated against him in violation of section 504 of the Rehabilitation Act.

The district court in Grimard denied the student’s request for a preliminary injunction because it found that he had not shown a likelihood that he would succeed on the merits. On appeal, the First Circuit conducted a very restricted review of the unpublished memorandum opinion of the trial court because the plaintiff had failed to comply with rules regarding appellate briefs. The First Circuit did not allude to any evidence or findings as to how long the student would be impaired. The court also never mentioned that duration of or the temporary nature of a condition was a factor to be considered, but merely upheld in a summary fashion the district court’s finding “that plaintiff was unlikely to succeed in proving that his was an incapacity within the statutory meaning of handicapped person, so as to invoke the nondiscrimination mandate of [section 504].”

While the authority of the Grimard decision would later be questioned, the opinion’s various shortcomings did not prevent a district court, in Saffer v. Town of Whitman, from citing Grimard as

315. See id. at 1178.
316. See id. at 1173-74 (stating school’s strong interest in protecting patients from possible injury resulting from plaintiff’s physical incapacity warranted its acting prior to granting termination hearing).
317. See id. (holding plaintiff had been afforded considerable notice and sufficient due process).
318. See id. at 1172-74 (stating that district court found that plaintiff’s claim would most likely be unsuccessful).
319. See id. at 1172-73 (stating that issuance of preliminary injunction is discretionary “and will not be reversed absent a clear showing of abuse of that discretion”). The failure to comply with rules regarding appellate briefs included requirements of clearly articulating a statement of the issue for review, providing a statement of the case and ordering a transcript of the proceedings of the lower court to provide a record for the appellate court. See id. As a result of the failure to comply, the First Circuit observed that there was “uncertainty as to the precise basis of his appeal,” that it would not review the sufficiency of the district court proceedings and that it would confine its analysis to reviewing the legal conclusions of the lower court under a “clear error of law” standard. See id.
320. See id. at 1174.
321. Id. To make this rather weak precedent even more dubious, the First Circuit added that the “[p]laintiff conceded at oral argument that his position on his section 504 claim was not particularly well taken.” Id.
authority for the proposition that a temporary condition is not a disability for purposes of section 504.\textsuperscript{324} The court ruled that plaintiff could not state a claim under section 504, because "a temporary condition, such as pregnancy, is not a disability under that statute."\textsuperscript{325} None of the court's reasoning offers any support for the

\textsuperscript{324} See id. (citing Grimard to support conclusion that pregnancy is temporary condition and, therefore, not disability under Rehabilitation Act).

\textsuperscript{325} See id. The plaintiff, a teacher, entered into a written employment contract with the defendant school board. \textsuperscript{See id.} After signing the agreement, the plaintiff informed the school superintendent that she was pregnant and she would need to take a short maternity leave at the beginning of the school year. \textsuperscript{See id.} Because the plaintiff would require maternity leave, she was not hired. \textsuperscript{See id.} In considering the defendant's motion to dismiss, the court held that plaintiff could not base her claim on section 504 of the Rehabilitation Act because "a temporary condition, such as pregnancy, is not a disability under the statute." \textsuperscript{See id.} The EEOC would later make clear that pregnancy is excluded under the definition of disability because it is "not the result of a physiological disorder" and thus is not an impairment. \textsuperscript{See [1993-1997 Transfer Binder] EEOC Compl. Man. (CCH) \textsuperscript{¶} 6882 (Mar. 15, 1995) [hereinafter EEOC Compl. Man.]; see also 29 C.F.R. \S\ 1630 app. (1997) ("Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments."). The EEOC has recognized that complications arising from pregnancy are impairments and may constitute disabilities under the ADA. \textsuperscript{See id.} (noting complications resulting from pregnancy are impairments). Several courts have agreed with this conclusion. \textsuperscript{See Patterson v. Xerox Corp., 901 F. Supp. 274, 278 (N.D. Ill. 1995) (noting that severe back pain from pregnancy and aggravation of prior back injury may constitute disability); see also Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465, 473 (D. Kan. 1996) ("The physiological conditions and changes related to a pregnancy . . . are not impairments unless they exceed normal ranges or are attributable to some disorder."). But see Johnson v. A.P. Prods., 934 F. Supp. 625, 627 (S.D.N.Y. 1996) ("Pregnancy and related medical conditions are not disabilities under the ADA."). Such complications are presumably coextensive with or shorter in duration than pregnancy itself, suggesting that the nine-month duration of pregnancy is not a reason for its exclusion from the definition of disability. While the EEOC has refused to establish a bright-line rule for determining when duration of an impairment is long enough, it has declared that "[a]n impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time." \textsuperscript{See EEOC Compl. Man., supra, \textsuperscript{¶} 6882. Moreover, a condition "is not substantially limiting if it lasts for only a brief time." \textsuperscript{Id.} In particular circumstances, the EEOC has indicated that eight weeks of impairment can be too short a period for the impairment to constitute a disability, but that 11 months of impairment does amount to a disability. At least one court has disagreed with the EEOC's underlying premise that pregnancy by itself is not a disability under the statutory definition. \textsuperscript{See Chapsky, 1995 WL 109299, at *3 & n.4 ([P]regnancy is physical impairment which substantially limits major life activity and therefore is a disability.); see also Kindlelspark v. Metropolitan Life Ins., No. 94 C 7542, 1995 WL 275576, at *1 (N.D. Ill. May 8, 1995) ("The Court does not believe that the ADA countenances discharge because a woman must seek medical attention related to pregnancy."). Several courts have agreed with the EEOC that pregnancy, per se, is not a disability. \textsuperscript{See, e.g., Johnson, 934 F. Supp. at 626 (holding plaintiff's pregnancy was not disability under ADA); Gudenkauf, 922 F. Supp. at 473 (noting that term "impairment" does not include conditions, such as pregnancy, that do not arise from physiological disorder); Villareal v. J.E. Merit Constructors, 895 F. Supp. 149, 152 (S.D. Tex. 1995) (concluding pregnancy, absent unusual circumstances, is not physical impairment under
Saffer court’s abrupt statement that pregnancy is not a disability because it is temporary. In 1995, a district court opinion disagreeing with the Saffer court’s conclusion characterized Saffer as a decision that “relies on questionable authority.”

The Saffer court did not discuss the 1983 ruling of a federal district court in Stevens v. Stubbs, reached some five years after Grimard, which also contained language suggesting that temporary conditions are not disabilities. In Stevens, an employee of the U.S. Army and Air Force Exchange Service asserted a claim under section 501 of the Rehabilitation Act alleging that he had been subjected to discrimination based on disability when his employment status was downgraded for unsatisfactory performance. The plaintiff did not present any evidence of the nature of any disability and the record showed only that he had missed a lot of work "due to illness, the exact nature of which is unclear." Thus, the court ruled that the plaintiff had not given evidence of an actual disability and granted summary judgment for the defendant. Applying the Rehabilitation Act definition of "individual with handicap," the judge commented that he was "unconvinced that it encompasses transitory illnesses which have no permanent effect on the person’s health." As authority for this pronouncement, the Stevens court

ADA; Tsetsenanos v. Tech Prototype, 893 F. Supp. 109, 119 (D.N.H. 1995) (stating that pregnancy is not physical impairment under ADA). Most of the courts that have agreed that uncomplicated pregnancy is not covered have premised that conclusion in part on the fact that pregnant women who are subjected to discrimination are protected by the Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076. See 42 U.S.C. § 2000e(k) (1994). See, e.g., Johnson, 934 F. Supp. at 627 (stating that pregnancy is not disability under ADA and that PDA covers discrimination based on pregnancy); Gudenkauf, 922 F. Supp. at 470-73 (noting that PDA and Title VII cover discrimination based on pregnancy); Villereal, 895 F. Supp. at 152 (referring to plaintiff’s ability to claim discrimination based on pregnancy under PDA and Title VII as further justification for not defining pregnancy as impairment under ADA); Tsetsenanos, 893 F. Supp. at 119 (finding support for denying pregnancy status as impairment under ADA, in ability to bring such claim under Title VII and PDA).

326. See Chapsky, 1995 WL 103299, at *3 & n.4 (questioning line of reasoning in Grimard).
328. See id. at 1410-12 (granting defendant’s motion for summary judgment in regard to plaintiff’s handicap discrimination claim).
329. See id. at 1413 ("[T]he nature of his ‘handicap’ is somewhat uncertain."). The court found that, during the evaluation period leading to the downgrade, the plaintiff had been certified by his doctor as being fit for duty. See id. ("[T]he plaintiff’s physician had certified him as fully able to return to work and handle all the responsibilities of his job.").
330. See id. at 1414-15 ("Giving all reasonable inference to the plaintiff, the court concludes that plaintiff has failed to establish that he is a ‘handicapped person.’").
331. Id. at 1414.
cited two decisions. The two precedents offered by the Stevens court afford no support for the proposition for which they are cited. Both of these cases were decided under provisions of Illinois state law that did not include a definition of disability analogous to the federal definition, and ironically, neither case involved a transitory condition nor discussed duration of impairment as a relevant factor. The Stevens case reflects more of a deficiency of proof by the plaintiff than a platform for a new analytical principle, but upon this slim reed the temporary disability limitation has been constructed.

Even more insubstantial and problematic was the fourth case, Evans v. City of Dallas, where the plaintiff had been discharged from a job with the city at the end of a probationary period. The plaintiff asserted a section 504 claim on the grounds that "one of the alleged reasons for his discharge was his excessive absenteeism resulting from a knee injury which required surgery." The Fifth Circuit agreed with the district court's determination that Evans's injury did not bring him within the scope of section 504's prote-


333. See Doss, 1980 WL 344, at *1 (deciding case under Illinois Equal Opportunity for the Handicapped Act); Advocates, 385 N.E.2d at 41 (raising claims under the Illinois Equal Opportunity for the Handicapped Act and provision of Illinois Constitution Act that prohibited discrimination based on "handicap" in employment and housing). The plaintiff in Doss had originally included a claim under section 503 of the Rehabilitation Act, but this claim had been dismissed because the court ruled that section 503 does not create a private right of action. See Doss, 1980 WL 344, at *3. The Advocates court noted that the state constitution did not provide any definition of "physical or mental handicap," and that the Illinois Equal Opportunity for the Handicapped Act only defined handicap in a circular definition that "is of little use to us." See Advocates, 385 N.E.2d at 42.

334. See Doss, 1980 WL 344, at *3 (finding that plaintiff was refused employment "because of the chronic otitis externa in both ears and the chronic otitis media in the left ear together with [a] growth in that ear," and because of "the chronic condition of ill being existing in his ears"); Advocates, 385 N.E.2d at 41 (involving plaintiff who had undergone kidney transplant and was denied position because employer deemed him "an uninsurable risk"). No evidence in the Doss case suggested that the plaintiff's condition was going to improve. See Doss, 1980 WL 344, at *1-3. In Advocates as well, there was no evidence that the plaintiff would ever cease to be a kidney recipient, and nothing in the court's opinion even remotely suggests that a duration of impairment factor is a relevant consideration. See Advocates, 385 N.E.2d at 39-44.

335. 861 F.2d 846 (5th Cir. 1988).
336. See id. at 852.
337. See id. The record showed that progress reports regarding Evans's performance indicated not just excessive absenteeism, but also "poor attitude, public criticism of his department, bad language, and alienation of co-workers." Id. at 851 n.29.
The Fifth Circuit offered no explanation for its analysis and conclusion other than reciting that the district court had noted "the transitory nature of the injury." However, the Fifth Circuit supplemented this dubious support by appending a footnote that stated: "Additionally, we note that the district court found nothing in the legislative history of the Act to indicate that Congress contemplated including an injury such as plaintiff's within the [Rehabilitation] Act's scope." Given the almost total absence of legislative history of section 504 and the other provisions of the Rehabilitation Act, a reference to knee injuries requiring surgery would be surprising indeed. In fact, there are no references to any specific conditions in the legislative history of section 504. According to the Fifth Circuit's reasoning, amputations, paraplegia, blindness, deafness and numerous other particular conditions, whether permanent or not, would be excluded from the statutory definition of disability.

338. See id. at 852 (noting transitory nature of injury did not bring plaintiff within Rehabilitation Act).

339. See id. at 852-53. The Fifth Circuit quoted the following language from the district court's opinion:

Although the injury may have limited Plaintiff's life activities during his recuperation, Plaintiff does not allege that it continues to do so; nor does he contend that others regard him as having an impairment that continues to do so. At first glance Plaintiff might be supposed to have a record of such impairment. However, subsections (i) and (iii) [of section 504 of the Rehabilitation Act], cast in the present tense . . . contemplate an impairment of a continuing nature.

Id. To this reasoning the district court affixed a mystifying citation to footnote six in the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397, 405-06 n.6 (1979). The referenced footnote quotes the three-prong statutory definition and then points out that the definition includes "a person who has a record of, or is regarded as having, an impairment [who] may at present have no actual incapacity at all." Id. This is a principle that seems not only not to support but to fly directly in the face of the decisions of the district court and Fifth Circuit in Evans.


341. Compounding this illogic, the Fifth Circuit cites the 1973 volume of the U.S. Code Congressional and Administrative News as the source of its conclusion regarding legislative history. This volume discusses the original Rehabilitation Act of 1973, which did not contain the three-prong definition of disability that Congress added in 1974. The only particular conditions mentioned in the legislative history of the amended definition are "mental retardation," "mental illness," "neurological illness," "heart attack" and "cancer." See S. Rep. No. 1297, 93 Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6375, 6388-91. If it had referred to the legislative history of the correct piece of legislation, presumably the Fifth Circuit would nonetheless not have maintained that these are the only conditions Congress intended the definition to cover. The 1974 legislative history also contains a description of the "regarded as" branch of the definition, which indicates that people who have no impairment at all or one that does not substantially limit their activities may still be included in the definition, thus making the Fifth Circuit's search for a
These four dubious decisions constituted the only sources of judicial or administrative articulation of anything resembling a duration limitation on disabilities under federal nondiscrimination laws at the time the 101st Congress began considering the enactment of the ADA in 1989.

2. ADA Legislative History

The legislative history of the ADA does not contain a single reference to any duration limits on disabilities, nor any suggestion that "temporary" conditions are not covered. The only discussion of impairments that do not substantially limit a major life activity occurs in a nearly identical sentence found in the Senate and the House Education and Labor Committee Reports on the ADA. The report of the Senate Committee on Labor and Human Resources declared: "Persons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity." The report of the House Committee on Education and Labor echoed in singular form: "A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity." These references provide a modicum of support for not including "minor" or "trivial" impairments, but do not in any way suggest that otherwise substantial impairments should be excluded because they do not last long enough.

Neither supporters nor opponents of the legislation claimed that an impairment had to have some degree of duration in order to constitute a disability. Nor were there any references in the listing of conditions "that Congress contemplated including" virtually irrelevant. See id. at 6389-90.


343. See S. Rep. No. 101-116, at 22 ("The term 'physical or mental' does not include simple physical characteristics such as blue eyes or black hair. Further, because only physical or mental impairments are included, environmental, cultural, and economic disadvantages are not in themselves covered."); H. Rep. No. 101-485, at 52 ("A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity.").


346. See, e.g., 45 C.F.R. § 84.3(j) (1997) (suggesting Rehabilitation Act precluded ruling that only permanent handicaps were covered); Thomas H. Christopher & Charles M. Rice, The Americans with Disabilities Act: An Overview of the Employment Provisions, 33 S. Tex. L. Rev. 759, 769 n.77 (1992) ("[N]either the ADA's legislative history nor the EEOC's interpretive regulations suggest any bright-line test or general standard for determining when an illness or condition that is not of permanent duration ceases to be a transitory illness and becomes a
committee reports or the floor debates to any of the four court cases discussed in the prior section that had hinted or alluded to a duration limitation.\textsuperscript{347} All in all, the ADA legislative history offers not a trace of support for ousting temporary impairments from the coverage of the ADA.

Neither the original ADA bill as proposed by the National Council in 1988,\textsuperscript{348} the language of the ADA as finally enacted\textsuperscript{349} nor any of the versions in between\textsuperscript{350} contained a limitation or exclusion for "temporary" conditions or any other language imposing or suggesting a duration of impairment restriction upon conditions that might constitute disabilities under the legislation.

3. Federal Agency Interpretations

Despite the absence of any basis in statutory language or prior regulatory interpretation, and with only the flimsiest of foundations in case law, the EEOC decided to impose, in its ADA Title I regulations, a new requirement that conditions might be excluded from the definition unless their duration was sufficiently long.\textsuperscript{351} This requirement is all the more surprising because deliberations about the ADA legislation were conducted under a uniform understanding by proponents and opponents of the ADA alike, that the ADA definition of disability would generally be interpreted in a manner consistent with the section 504 statutory language and regulations from which it was borrowed.\textsuperscript{352} Additionally, the members of Congress were very specific in crafting statutory language indicating cir-

\textsuperscript{347} See H.R. Rep. No. 101-485, at 52 (noting that there was no discussion of duration limits); S. Rep. No. 101-116, at 22 (same).


\textsuperscript{350} See, e.g., S. Rep. No. 101-116, at 22 (discussing ADA without reference to whether disability need be permanent or temporary).

\textsuperscript{351} See EEOC, Technical Assistance Manual for the Americans with Disabilities Act II-5 (1992) [hereinafter EEOC Technical Assistance Manual] ("Temporary, nonchronic impairments that do not last for a long time and that have little or no long term impact usually are not disabilities.").

\textsuperscript{352} See S. Rep. No. 101-116, at 21 (defining "disability" in manner consistent with similar terms in section 7(8)(B) of Rehabilitation Act of 1973 and section 802(h) of Fair Housing Act); H.R. Rep. No. 101-485, pt. 2, at 50 (noting definition of term "disability" in ADA is comparable to definition of "individual with handicaps" in Rehabilitation Act).
cumstances in which they wished to deviate from section 504 and its implementing regulations.footnote{353}

While regulations under the Rehabilitation Act had not defined the phrase "substantially limits,"footnote{354} EEOC's ADA Title I formulated a definition.footnote{355} In addition, the regulation indicates that the following factors are to be considered in determining whether an individual's major life activity is substantially limited:

(i) The nature and severity of the impairment;
(ii) The duration or expected duration of the impairment; and
(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.footnote{356}

The delineation of these factors marks the first, and still the only, adoption of explicit regulatory language indicating that duration is a criterion for determining whether an impairment is substantially limiting.

In its Interpretive Guidance, the EEOC has elaborated on its view of the duration factor by declaring that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza."footnote{357} The EEOC's...
Technical Assistance Manual adds “common colds” to this list of examples.358

The EEOC illustrates its analysis of the duration factor by providing an example of a broken leg and suggests that “a broken leg that takes eight weeks to heal is an impairment of fairly brief duration”359 and, thus, would not be a disability under the ADA.360 If, however, a broken leg takes “a significantly longer time than the normal healing period to heal,” or if “the leg did not heal properly, and resulted in a permanent impairment,” then the condition would constitute a disability.361 Specifically, the EEOC has indicated that a broken leg that requires eleven months to heal is a disability.362

While eight weeks is too short and eleven months is sufficiently long a period of impairment for a broken leg to constitute a disability, the EEOC has refused to establish any bright line for determining when duration of an impairment is sufficiently long for it to constitute a disability. Instead, it declared that “[t]here are no set time limits for determining whether an impairment is of sufficient duration to be considered substantially limiting.”363 It has declared, however, that “[a]n impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time.”364 And the EEOC has indicated that a mood disorder condition requiring ten months hospitalization and two months intensive outpatient treatment is a disability.365

At the other end, the EEOC has indicated “relatively brief and transitory illnesses or injuries that have no permanent or long-term effects” are not disabilities.366 Illustrating an impairment of too

358. See EEOC TECHNICAL ASSISTANCE MANUAL, supra note 351, at I-4 (listing numerous ailments not considered disabilities).
360. See EEOC TECHNICAL ASSISTANCE MANUAL, supra note 351, at II-5 (“A broken leg that heals normally within a few months would not be a disability under the ADA.”).
361. See id. (“[I]f the broken leg heals improperly, the ‘impact’ of the impairment would be the resulting permanent limp.”).
362. See EEOC Compl. Man., supra note 325, ¶ 6884 (noting that impairment which substantially limits ability to walk is disability).
363. Id. (“[T]he duration of an impairment does not, by itself, determine whether the impairment substantially limits an individual’s major life activities. It is just one factor to be considered with all of the other relevant information.”).
364. Id.
365. See id. (noting that duration and impact of impairment should be determined on case-by-case basis).
366. Id.
brief a duration, the EEOC opines that a temporary illness expected to require “six to eight weeks” for complete recovery is not a disability.\footnote{367}{Id.; see also Stevens v. Stubbs, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) (holding that transitory illness that may require periods of sick leave is not sufficient to establish that party is “handicapped individual”).}

The EEOC concedes that “[h]ow long an impairment lasts . . . does not by itself determine whether a person has a disability under the ADA.”\footnote{368}{EEOC TECHNICAL ASSISTANCE MANUAL, supra note 351, at II-5 (“This question is answered by looking at the extent, duration, and impact of the impairment.”).} The EEOC indicates that “[t]emporary impairments may be disabilities if they take significantly longer than normal to heal and significantly restrict the performance of major life activities during the healing period.”\footnote{369}{EEOC Compl. Man., supra note 325, ¶ 6884.} A flaw in the logic of this “longer than normal to heal” consideration can be easily exposed. Suppose that two persons each have a broken bone in the knee area that requires a cast to be put on so that neither is able to walk. If one of them has a type of break that is only supposed to take six weeks to heal, but because of complications or idiosyncratic factors, actually takes six months to heal, how is that person any more substantially limited in the major life activity of walking than the individual whose break was expected to take six months to heal from the outset? Comparisons with “normal” healing periods seem to have little or nothing to do with the question whether the condition substantially limits the performance of major life activities.

Again, none of the EEOC’s gloss on temporary impairments has any basis in regulations issued under the Rehabilitation Act, nor in the legislative history of the ADA, which suggests only that “trivial” impairments having a minor impact on major life activities, such as an infected finger, should not be considered disabilities.\footnote{370}{See S. REP. NO. 101-116, at 23 (1989) (stating that persons with minor trivial impairments are not impaired in major life activity).} Nowhere does the legislative history suggest that an otherwise substantially limiting condition should not be considered so because it does not last long enough.

In inserting a general duration of impairment factor and selecting an eight weeks of impairment example, the EEOC reinterprets the statutory formulation that an impairment must substantially limit a major life activity in order to constitute a disability; the statutory concept of “substantial limitation of a major life activity” imports quality and quantity considerations—which life ac-
tivity is limited and how seriously.\textsuperscript{371} Nevertheless, neither of these factors involve temporal considerations. If a person has a condition that substantially limits a major life activity of that individual at the time that some actor covered by the ADA discriminates against the individual because of the condition, it seems irrelevant how long thereafter the condition will continue. In addition, if Congress believed that "temporariness" was a disqualifying factor, it could certainly have imposed a duration factor or even a minimum time limit for duration.

In deciding that temporary conditions should not be considered disabilities under the Rehabilitation Act, the EEOC went out on a limb which the other federal agencies that implement the ADA expressly declined to follow. In their proposed regulations for implementation of Titles II and III of the ADA, both the DOJ and the Department of Transportation (DOT) took positions diametrically opposed to the EEOC on this issue.\textsuperscript{372} In its proposed regulations for the implementation of Titles II and III of the ADA, the DOJ defined "disability" as "a \textit{permanent or temporary} physical or mental impairment that substantially limits one or more of the major life activities of such individual."\textsuperscript{373} The identical definition was included by the DOT in its proposed regulation to implement the transportation requirements of the ADA.\textsuperscript{374} In the interest of interagency harmony, the DOJ dropped the words "temporary or permanent," from both sets of its final regulations.\textsuperscript{375} The DOT also

\textsuperscript{371} See 29 C.F.R. § 1630.2(j)(2) (1997) (discussing factors that are considered when determining whether person is "substantially limited in a major life activity").


\textsuperscript{373} 56 Fed. Reg. at 7483 (proposing regulation of Title III) (emphasis added); 56 Fed. Reg. at 8551 (proposing regulation of Title II) (emphasis added).

\textsuperscript{374} See 56 Fed. Reg. at 13879.

\textsuperscript{375} See 28 C.F.R. § 35.104 (defining "disability" without reference to "permanent or temporary" impairment); \textit{id.} § 36.104 (1997) (same).

The DOJ explained that critics had objected to the inclusion of this language "both because it is not in the statute and because it is not contained in the definition of 'disability' set forth in the Title I regulations of the [EEOC]." \textit{Id.} pt. 35, app. A § 35; \textit{id.} pt. 36, app. A § 36. The DOJ decided to delete the phrase from the final rule "to conform with the statutory language." \textit{Id.} pt. 35, app. A § 35; \textit{id.} pt. 36, app. A § 36. It indicated that "impairments are not necessarily excluded from the definition of 'disability' simply because they are temporary," but that the "question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration . . . of the impairment and the extent to which it actually limits the major life activity of the affected indi-
agreed to delete the words “temporary or permanent” from its regulation in the interest of uniformity, but strongly rejected the exclusion of impairments that only limit activities temporarily. 376

Even the EEOC might consider a short-term physical or mental impairment on which an employer predicates an adverse action as constituting a disability. The EEOC offers the following guidance to individuals investigating charges of discrimination:

If the charging party does not have an impairment that substantially limits his or her ability to work (or to perform any other major life activity), then the investigator should determine whether the charging party has a record of such an impairment, or is regarded as having such an impairment. 377

Thus, the EEOC may view its temporary disability restriction as applying only under the first prong of the statutory definition, leaving open the possibility that a very short-lived impairment may consti-

376. See 49 C.F.R. § 37.3 (1997) (defining “disability” without reference to “temporary or permanent”). In the section-by-section analysis accompanying its final regulation, the DOT declared:

A few comments addressed “disability.” Some suggested removing “permanent or temporary,” suggesting that this language is unnecessary. The DOJ definition does not include these words, so we have deleted them for consistency. In our view, the terms are unnecessary because any condition that meets the criteria of the definition, regardless of its duration, is a disability.

tute a disability if the employer treats it as substantially limiting. Under this analysis, if an employer bases a drastic job action, such as forced retirement or termination, on such a temporary impairment, the employer's action would manifestly put the employee in the status of "regarded as" having a disability, under the third prong of the definition.

4. Case Law Subsequent to ADA's Enactment

Whatever ameliorative comments and concessions the EEOC may have made regarding its initiative to exclude most short-term impairments from the definition of disability, and whatever alternatives the third prong of the definition may offer, many courts have not heeded such nuances and have expanded the EEOC's standards and commentary into a virtual rule that plaintiffs having temporary physical or mental impairments cannot avail themselves of the protection of the ADA. The first such decision was in Vande Zande v. Wisconsin Department of Administration.\(^{378}\) In Vande Zande, the Seventh Circuit considered an ADA employment discrimination claim filed by a woman "paralyzed from the waist down as a result of a tumor of the spinal cord."\(^{379}\) The temporary disability issue arose because the plaintiff sought a reasonable accommodation for pressure ulcers that she was prone to develop periodically, and the defendants argued that they did not have to accommodate the pressure ulcers because they did not fit the statutory definition of a disability.\(^{380}\) The Vande Zande court declared that "[i]ntermittent, episodic impairments are not disabilities, the standard example being a broken leg."\(^{381}\)

Some three months after its decision in Vande Zande, the Seventh Circuit decided Hamm v. Runyon,\(^{382}\) a case involving a proba-

\(^{378}\) 44 F.3d 538 (7th Cir. 1995).

\(^{379}\) Id. at 543.

\(^{380}\) See id. at 543-44 ("The defendant and the amici curia argue that there is no duty of reasonable accommodation of pressure ulcers because they do not fit the statutory definition of disability.").

\(^{381}\) Id. at 544. As authority for this proposition, the Seventh Circuit cited the EEOC's ADA Title I regulatory guidance and the Fifth Circuit's 1988 decision. See id. In the factual situation of the case, however, the Vande Zande court ruled that the plaintiff's pressure ulcers were "a characteristic manifestation of an admitted disability" and, as a part of the underlying disability, were a condition that the employer must reasonably accommodate even though in themselves they were only "intermittent." Id. ("Often the disabling aspect of a disability is, precisely, an intermittent manifestation of the disability, rather than the underlying impairment."). The court concluded that an intermittent impairment that is a "characteristic manifestation of a disability is part of the underlying disability and thus, the employer must reasonably accommodate." Id.

\(^{382}\) 51 F.3d 721 (7th Cir. 1995).
tionary postal service employee who claimed that he was fired from his job because of his arthritic condition which, he alleged, his supervisors regarded as a disability. The employee filed suit charging a violation of sections 501 and 505 of the Rehabilitation Act, and the district court granted summary judgment for the defendants on the grounds that Hamm presented insufficient evidence that he had a disability. The Seventh Circuit affirmed the district court's decision. In its opinion, the appellate court discussed evidence that the employee's supervisors regarded his condition and resulting problems as "temporary" and "short-term." The court quoted its statement in Vande Zande that "[i]ntermittent, episodic impairments are not disabilities," and ruled that the plaintiff had not shown that the defendants regarded him as having a substantially limiting impairment.

Similarly, in McDonald v. Pennsylvania Department of Public Welfare, the Third Circuit discussed duration of impairments as a factor in determining whether a condition constituted a disability. McDonald involved a woman who had to undergo surgery because of severe abdominal pain. She was terminated from her job as a

383. See id. at 724 (addressing postal service's perception that employee's arthritis substantially limited his ability to walk).
384. See id. at 722 ("The district court found that Hamm had presented insufficient evidence that he was disabled within the meaning of the Act and granted summary judgment in favor of the Postal Service."). The employee in Hamm worked as an electronic technician at the Rock Island, Illinois Post Office. See id. at 723. He was supposed to begin work on February 27, 1988. See id. The first 90 days were a probationary period during which the post office could monitor his habits and attendance. See id. Hamm's supervisor was very strict concerning attendance. See id. About three weeks after he began working, he began having problems with his arthritis. See id. Around this time, his fellow employees began to notice that there was a difference in his physical condition. See id. On March 21, 1988, he reported 11 minutes late to work. See id. Two days later, he and his supervisor had an official discussion concerning this tardiness. See id. On April 14, 1988, he was 44 minutes late for work. See id. Both times he explained that he had overslept. See id. Finally, on April 18, he requested and was granted an immediate leave of absence in order to see his doctor. See id. On April 27, 1988, he completed his probationary period. See id. His supervisors agreed to terminate him because of dissatisfactory attendance. See id.
385. See id. at 722 (affirming summary judgment because of insufficient evidence).
386. See id. at 725 (discussing supervisor's belief that employee's condition was temporary).
387. Id. at 725-26.
388. 62 F.3d 92 (3d Cir. 1995).
389. See id. at 93.
390. See id. at 94 (stating that plaintiff underwent surgery because of disabling abdominal pain). On September 8, 1992, the plaintiff began working as a nurse at the Polk Center in Venango County. See id. at 93. Polk Center, operated by the Pennsylvania Department of Public Welfare, is an institution that provides services
nurse at a state residential facility for people with mental retardation as of the day of her surgery on grounds that “she was unable to attend to her duties.”\textsuperscript{391} She brought suit under section 504 of the Rehabilitation Act and the ADA.\textsuperscript{392} In affirming the district court’s decision, the Third Circuit stated that the definition of disability “contemplates an impairment of a permanent nature.”\textsuperscript{393} In addition, the court quoted the \textit{Vande Zande} language about “intermittent, episodic impairments” not constituting disabilities, and recited the EEOC regulatory provision directing that the “duration or expected duration of the impairment” is to be considered in determining whether an impairment is substantially limiting.\textsuperscript{394} Against this precedential and regulatory backdrop, the Third Circuit ruled that McDonald could not qualify for relief under the ADA or section 504.\textsuperscript{395}

Subsequent federal circuit court decisions indicate that impairments may not qualify as disabilities unless their duration is sufficiently long.\textsuperscript{396} For instance, in \textit{Rogers}, the Fifth Circuit ruled that ankle problems necessitating surgery did not qualify a terminated employee for protection under the ADA because the “ankle afflictions were temporary and did not constitute a permanent disabil-

\begin{footnotesize}
\textsuperscript{391} See id. at 93-94. On December 24, 1992, the plaintiff began to suffer from severe abdominal pain. See id. at 94. She was hospitalized and underwent surgery. See id. She then requested a sick leave from work. See id. Because she was unable to complete her duties, she was terminated. See id.

\textsuperscript{392} See id. (“Because she was unable to attend her duties the Center discharged plaintiff.”).

\textsuperscript{393} Id. at 93.

\textsuperscript{394} Id. at 95-96.

\textsuperscript{395} See id. at 96. Specifically, the court stated:

As the complaint reveals, her inability to work caused by the surgery was of limited duration. She entered the hospital on December 25, 1992, and would have been able to return to her duties . . . on February 15, 1993, a period of less than two months. Although she was incapacitated for these weeks, her inability to work was not permanent, nor for such an extended time as to be of the type contemplated by the statutes she cites.

\textit{Id.}

\textsuperscript{396} See, e.g., \textit{Roush v. Weastec}, Inc., 96 F.3d 840, 844 (6th Cir. 1996) (holding that, because plaintiff’s kidney condition was temporary, it was not disability under ADA); \textit{Sanders v. Arneson Prods.}, Inc., 91 F.3d 1351, 1355 (9th Cir. 1996) (noting that plaintiff’s temporary psychological impairment was not of sufficient duration to fall within ADA); \textit{Ellison v. Software Spectrum}, Inc., 85 F.3d 187, 193 (5th Cir. 1996) (finding plaintiff was not covered by ADA when evidence showed she was “back to normal in three or four months” following radiation treatment).
\end{footnotesize}
"Substantially Limited" Protection

In support of its decision, the court cited the EEOC regulatory guidance regarding "temporary, non-chronic impairments of short duration." In Sanders v. Arneson Products, Inc., a production manager who had undergone surgical treatment for bladder cancer and subsequently required psychiatric treatment for a psychological reaction to his cancer was terminated while he was on medical leave. The Ninth Circuit affirmed summary judgment in favor of the defendant on the issue of whether the plaintiff's psychological impairment was a disability under the ADA. The court declared that "Sanders' temporary psychological impairment, from December 19, 1992 to April 5, 1993, with no residual effects after April 5, 1993, was not of sufficient duration to fall within the protections of the ADA as a disability."402

In Roush v. Weaste, Inc., the plaintiff had two conditions that she alleged were disabilities under the ADA—one was a kidney obstruction for which she had two surgeries and various other medical treatments, and the other was a chronic bladder inflammation that resulted in periodic bladder infections accompanied by sharp pains and fever. Because of these two conditions and treatments for them, the plaintiff worked less than ten weeks per year in 1991 and 1992 and missed three months of work in 1993 after her second kidney operation. The United States Court of Appeals for the

397. Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996). In 1992, Rogers took paid sick leave from his employment as a mechanic at International Marine Terminals (IMT). See id. He suffered from persistent pain, swelling and other problems with his right ankle. See id. After his sick leave, he received a year of disability benefits. See id. In 1993, while Rogers was unavailable for work, IMT implemented a layoff plan. See id. Rogers and five others were terminated. See id.

398. Id.

399. 91 F.3d 1351 (9th Cir. 1996).

400. See id. at 1352 ("Sanders sought relief under the . . . ADA . . . for his termination while he was on leave for a cancer-related psychological disorder.").

401. See id. at 1355.

402. Id. at 1354.

403. 96 F.3d 840 (6th Cir. 1996).

404. See id. at 842 (discussing plaintiff's numerous surgeries regarding removal of obstruction from her kidney). The plaintiff also began experiencing recurring bladder inflammation, which was diagnosed as interstitial cystitis, a chronic bladder inflammation that results in pain and intermittent bladder infections. See id. "She alleges that this condition causes sharp pains in her bladder, extreme tenderness in her pelvic area, a constant feeling of needing to urinate, an inability to control urination, and a fever." Id.

405. See id. ("Due to this condition and other medical problems, she worked less than ten weeks during 1991 and less than ten weeks in 1992."). In addition, in 1993, the plaintiff was unable to work for a period of three months following her
Sixth Circuit relied upon the *Vande Zande* decision in reversing the district court’s granting of summary judgment. The court remanded the case on the issue of the bladder condition qualifying as a disability, ruling that “[t]he bladder infections, though intermittent and temporary, are a characteristic manifestation of this physical impairment [the bladder condition] and, thus, are a part of the underlying impairment.”

At the same time, the Sixth Circuit ruled that the district court was correct in its determination that the kidney condition did not constitute a disability because “plaintiff’s kidney is no longer obstructed and no longer affects her ability to work.” Relying on *Hamm v. Runyon* and the EEOC Title I regulation, the court reasoned that because “plaintiff’s kidney condition was temporary, it [was] not substantially limiting and, therefore, not a disability under the ADA.”

In *Gordon v. E.L. Hamm & Assoc., Inc.* a maintenance worker was discharged while undergoing treatment, including a bone marrow test and a series of chemotherapy treatments, for a cancerous growth on his shoulder. The United States Court of Appeals for the Eleventh Circuit overturned a jury verdict in favor of the plaintiff on his ADA claim, and ruled that reasonable persons could not conclude that the plaintiff had an impairment that substantially limited his ability to work. The court observed that except for a couple of days of medical testing and a ten-day leave of absence for the bone marrow test, “the plaintiff was fully capable of working,” and that, even though he experienced some side effects from the chemotherapy, he “tolerated the treatments ‘quite well.’” The court also ruled that the plaintiff’s evidence that the defendant had restricted his assignments and otherwise treated him differently from other employees was insufficient to demonstrate that he had been “regarded as” having a disability.

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second operation. *See id.* The district court granted the defendant's motion for summary judgment, ruling that neither of the conditions constituted a disability—the kidney condition because it had ultimately been corrected and the bladder condition because it was only intermittent and not chronic. *See id.*

406. *Id.* at 844.

407. *Id.*

408. *Id.*

409. 100 F.3d 907 (11th Cir. 1996).

410. *See id.* at 909.

411. *See id.* at 912 (determining that extent, duration and impact of plaintiff's chemotherapy did not substantially impair ability to care for himself or work).

412. *Id.*

413. *See id.* at 913-14 (noting that employer adjusted work assignments to meet deadlines during plaintiff's absence and that employer continued to pay plaintiff same compensation and benefits).
These cases represent a strong consensus in post-ADA enactment cases at the circuit level that impairments of too short a duration are not disabilities under the first prong of the statutory definition, and that such claims should not be allowed to proceed to trial. The Seventh Circuit's decision in *Hamm v. Runyon* expressly ruled, and the Eleventh Circuit's decision in *Gordon* suggested, that such claims could also not succeed under the third, "regarded as," prong of the definition.

In *Katz*, the First Circuit agreed that impairments of short duration are not disabilities under the first prong of the statutory definition, but disagreed that impairments of short duration cannot be a disability under the "regarded as" prong.\(^\text{414}\) The appellate court concluded that the district court erroneously granted judgment as a matter of law against the plaintiff who had been terminated from his job five weeks after a heart attack.\(^\text{415}\) The district court ruled at the end of the plaintiff's case that he had not presented evidence sufficient to show that he had a "disability" under the ADA.\(^\text{416}\)

The First Circuit held that whether the plaintiff's evidence, which did not include any medical testimony, was sufficient to allow a jury to conclude that he had an actual disability was "a debatable question."\(^\text{417}\) The *Katz* court suggested that, to find in his favor, the jury would have to conclude that plaintiff's heart condition and its surgical treatment by angioplasty caused "limitations [that] were permanent or persist[ent] on a long-term basis, or that their duration was indefinite and unknowable or expected to be at least several months."\(^\text{418}\)

The First Circuit ruled that it did not need to resolve this issue because the plaintiff had presented sufficient evidence under the "regarded as" prong of the ADA definition of disability.\(^\text{419}\) After reviewing the evidence in the record, the court ruled that the cir-

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\(^\text{414}\) See *Katz v. City Metal Co.*, 87 F.3d 26, 31-32 (1st Cir. 1996) ("Although short term, temporary restrictions generally are not substantially limiting . . . the evidence permitted Katz to reach the jury under one of the alternative definitions of disability, that City Metal regarded [Katz] as having such an impairment.").

\(^\text{415}\) See id. at 33-34 (concluding that reasonable jury could have found that plaintiff's employer regarded plaintiff as having impairment because of heart attack).

\(^\text{416}\) See id. at 29-30.

\(^\text{417}\) See id. at 31 ("[I]t is a very close question whether Katz offered sufficient evidence to prove that the impairment 'substantially limited' his major life activities within the meaning of the ADA.").

\(^\text{418}\) Id. at 32.

\(^\text{419}\) See id. (discussing employer's perception that employee was disabled). The court stated that even if the plaintiff did not have an actual disability, "both the language and policy of the statute seem to us to offer protection as well to one
cumstances surrounding the plaintiff’s termination provided enough evidence to reach the jury on the “regarded as” issue. Having reversed and remanded on the “regarded as” prong of the definition, the court decided, in the circumstances of the case, to expressly direct the district court on retrial to allow the plaintiff to present expert testimony to show actual disability as well. Katz is the exception, however, to the strong consensus at the federal circuit level that plaintiffs with impairments of short duration are not covered by the definition of disability under the ADA and the Rehabilitation Act.

who is not substantially disabled or even disabled at all but is wrongly perceived to be so.” Id. at 33.

420. See id. The court specifically held:
Even if medical expert testimony were required here to permit the jury to find that Katz was suffering from a continuing serious heart condition, the jury certainly did not need medical testimony in making its own judgment as to what the employer may have perceived, rightly or wrongly, about Katz’s condition.

Id.

421. See id. at 34 (allowing expert testimony to establish disability under statute). The First Circuit's final resolution actually went even further and directed that on retrial the plaintiff could present evidence "under any or all of the three theories of disability under the statute." Id.

422. A few district court decisions straying from the majority position are worthy of note. In one case, a plant foreman, who suffered a fractured spinal vertebrae that required some three months to heal and was terminated by his employer after he had missed 49 days of work, brought an ADA action. See Muller v. Hotsy Corp., 917 F. Supp. 1389, 1396, 1398-99 (N.D. Iowa 1996). The court did not expressly deviate from the standard view that a temporary impairment is not a disability, but ruled instead that the plaintiff had made out a prima facie case and could proceed on his theory that his employer had regarded him as having a substantially limiting impairment. See id. at 1412. Although the supervisor who discharged Muller claimed that he regarded his condition as temporary, the court noted that there was evidence of the supervisor’s reasons for terminating Muller and comments he made regarding Muller’s condition that were sufficient to raise a material question of fact as to whether the supervisor “regarded Muller as having more than a temporary impairment under the ADA.” Id. at 1411.

In another case, the court denied defendant’s motion for summary judgment and granted a preliminary injunction to the plaintiff, who had developed symptoms of anxiety and depression after a hostile encounter with a subordinate. See Wood v. County of Alameda, No. C 94 1557 THE, 1995 WL 705139, at *1 (N.D. Cal. Nov. 17, 1995). The court concluded that there was sufficient evidence that plaintiff had a mental impairment that rendered her unable to work for about a year and declared that it “readily” concluded that “a mental impairment which renders an individual unable to work for a full year constitutes a disability under the ADA.” Id. at *8. In reaching this conclusion, the court expressly ruled that the factor of “permanent or long-term impact of the individual’s impairment” contained in the EEOC ADA Title I regulation is not meant to be dispositive. Id. at *9 (citing 29 C.F.R. § 1630.2(j) (1997)). The court ultimately found that the plaintiff had established probable success on the merits of her claim, including a “strong showing that she is disabled, under the ADA, by virtue of the fact that she has a record of a mental impairment which substantially limited her in the major life activity of working.” Id. at *15.
C. Other Restrictive Interpretations of Statutory Protection

The one-job-is-not-enough rulings and the temporary disability rulings are only two blatant examples of ways in which some courts have narrowly confined the protection afforded by the ADA and sections 501, 503 and 504 of the Rehabilitation Act. Similar parsimony is present in various other clusters of decisions.

1. Judicial Estoppel

While the two aforementioned grounds for restricting the scope of protection afforded under federal disability nondiscrimination laws focus on the definition of the term "disability," other lines of cases have focused on the "qualified" criterion. One group of decisions has rejected plaintiffs' claims of statutory protection by applying the doctrine of "judicial estoppel." Although the doctrine

In reaching its conclusion that an impairment does not have to be permanent to constitute a disability, the court in Wood relied on the decision of another federal district court in Patterson v. Downtown Medical & Diagnostic Ctr., Inc., 866 F. Supp. 1379 (M.D. Fla. 1994). Wood, 1995 WL 705139, at *9 (citing Patterson, 866 F. Supp. at 1379). In Patterson, the defendant moved to dismiss the plaintiff's ADA claim on the grounds that the plaintiff had failed to allege that her disability was permanent. Patterson, 866 F. Supp. at 1381. The court ruled, however, that "the definition of 'disability' does not require permanency." Id. Therefore, the court ruled that a plaintiff is not required to allege a permanent disability to establish a prima facie case. See id.; see also Abbasi v. Herzfeld & Rubin, P.C., No. 94 Civ. 2809 (RLC), 1995 WL 303603, at *3 (S.D.N.Y. May 17, 1995). In Abbasi, the plaintiff stated in his complaint that he "suffered a minor stroke which disabled him for two weeks," and the defendant moved to dismiss the grounds that "the duration of the plaintiff's disability is allegedly temporary;" the court rejected the motion to dismiss and reasoned that elsewhere in his complaint the plaintiff had made sufficient allegations that "the disabilities that affected his ability to work are ongoing." Abbasi, 1995 WL 303603 at *2.

In another decision, a district court examined the interrelationship between a temporary, treatable disability and the employer's obligation under the ADA to make a reasonable accommodation to an employee's impairment. See Schmidt v. Safeway, Inc., 864 F. Supp. 991, 996-98 (D. Or. 1994). The plaintiff was a truck driver who had been discharged because he was allegedly intoxicated on the job. See id. at 998. The court ruled that if he were shown to be suffering from alcoholism, the plaintiff should be afforded the reasonable accommodation of time to undergo treatment for the condition and granted partial summary judgment on this issue. See id. at 966-97. The court concluded that the ADA prohibits an employer from terminating a current employee "who was initially qualified for the position but subsequently developed a disqualifying condition that could be controlled with reasonable accommodation." Id. at 998. The court elaborated as follows:

The employer would have to first give the employee a reasonable opportunity to obtain treatment for the condition before terminating him. A comparable situation would be a driver who develops high blood pressure that can be controlled with medication. The employer cannot terminate the employee because he is temporarily unqualified if that condition can be alleviated through reasonable accommodation.

Id.
has not been uniformly adopted by the federal courts, it is a matter of judicial discretion in those circuits where it has been adopted. The doctrine of judicial estoppel, or the "doctrine against the assertion of inconsistent positions," seeks to prevent a litigant from asserting a position that contradicts one that he or she previously asserted in the same or a previous proceeding. Usually a plaintiff is precluded from asserting a position inconsistent with a position previously advanced only if the plaintiff succeeded in the earlier litigation.

A number of courts have ruled that an employee who has alleged that he or she is totally disabled in order to receive disability

423. See Bennett v. United Parcel Serv., Inc., No. CITV.A.H-94-3270, 1995 WL 819035, at *2 (S.D. Tex. Dec. 19, 1995) (applying judicial estoppel doctrine and stating that use of this doctrine is matter of judicial discretion); see also Britton v. Co-Op Banking Group, 4 F.3d 742, 744 (9th Cir. 1993) (acknowledging majority and minority views on judicial estoppel, but refusing to adopt either view); Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir. 1993) (stating that judicial estoppel has never been uniformly adopted by federal courts); United States v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986) (recognizing adoption of judicial estoppel by several courts, but stating that Tenth Circuit has rejected doctrine).

424. See Bennett, 1995 WL 819035, at *2; Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990).


426. See id. ("Judicial estoppel . . . is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous procedure."); Bates, 997 F.2d at 1037 ("The doctrine of judicial estoppel prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by him in a legal proceeding."); Morris v. California, 966 F.2d 448, 452-53 (9th Cir. 1991) ("As a general principle, the doctrine of judicial estoppel bars a party from taking inconsistent positions in the same litigation."); American Nat'l Bank v. Federal Dep. Ins. Corp., 710 F.2d 1528, 1536 (11th Cir. 1983) ("Judicial estoppel is applied to the calculated assertion of divergent sworn positions.").

As one court noted: "It is intended to protect the integrity of the judicial process, avoid inconsistent results, and prevent litigants from playing fast and loose in order to secure an advantage." Grant v. Lone Star Co., 21 F.3d 649, 651 n.2 (5th Cir. 1994).

427. See, e.g., Britton, 4 F.3d at 744 (describing majority view on judicial estoppel and finding "judicial estoppel does not apply unless the assertion inconsistent with the claim made in the subsequent litigation 'was adopted in some manner by the court in the prior litigation'" (quoting In re Corey, 892 F.2d 829, 836 (9th Cir. 1989))); Smith v. Midland Brake, Inc., 911 F. Supp. 1351, 1360 (D. Kan. 1995) (establishing that criteria for judicial estoppel included prevailing in previous litigation).

A minority of the circuits, however, have ruled that the party's earlier position need not have been adopted by the court in the earlier proceeding. See Britton, 4 F.3d at 744 (describing minority view on judicial estoppel as not requiring success in previous litigation and requiring finding by court that "alleged offending party engaged in 'fast and loose' behavior which undermined the integrity of the court").
or other types of benefits is estopped from claiming or proving that he or she can perform the essential functions of the job under the ADA or sections 501, 503 or 504 of the Rehabilitation Act.428 In making such rulings most courts have blithely assumed that judicial

428. See Bollenbacher v. Helena Chem. Co., 934 F. Supp. 1015, 1027-28 (N.D. Ind. 1996) (deciding plaintiff who claims total disability in one count of his complaint addressing denial of long-term disability benefits estopped from asserting ADA claim); Miller v. United States Bancorp, 926 F. Supp. 994, 999 (D. Or. 1996) (determining recipient of disability benefits from social security and employer's disability insurance policy not "qualified" under ADA); Cline v. Western Horseman, Inc., 922 F. Supp. 442, 448 (D. Colo. 1996) (deciding that plaintiff was estopped from claiming that she is "qualified" where she made representations that she is totally disabled in seeking social security and other long-term disability benefits); Pegues v. Emerson Elec. Co., 913 F. Supp. 976, 980-81 (N.D. Miss. 1996) (deciding plaintiff's applications for workers' compensation and social security disability benefits do not in themselves foreclose ADA claim, but plaintiff's statements in proceedings to obtain such benefits and findings in her favor make it "legally improper" for her to claim she is "qualified"); Bennett, 1995 WL 819035, at *2 (determining plaintiff who had testified to ALJ that he was unable "to even try to comprehend doing anything" estopped from asserting that he was "qualified" under ADA); Baker v. Asarco, Inc., No. CIV-94-1045-PHX-ROS, 1995 WL 795665, at *7 (D. Ariz. Nov. 9, 1995) (deciding that in opposing defendant's motion for summary judgment, plaintiff's deposition or affidavit testimony could not contradict former sworn statements made while applying for employer's disability benefits programs and social security program that he was totally disabled), aff'd, No. 95-17296, 1995 WL 429178, at *1 (9th Cir. July 31, 1997); Lamury v. Boeing Co., No. 94-1225-PFK, 1995 WL 643835, at *6 (D. Kan. Oct. 5, 1995) (deciding plaintiff was estopped from contending that at time of layoff she could perform essential functions because she sought and received workers' compensation benefits); Lewis v. Zilog, Inc., 908 F. Supp. 951, 945 (N.D. Ga. 1995) (determining plaintiff who applied for and received disability benefits from her former employer is "precluded or estopped as a matter of law from claiming" that she is "qualified" under ADA); Reiff v. Interim Personnel, Inc., 906 F. Supp. 1280, 1289 (D. Minn. 1995) (stating that weight of authority favors summary judgment when plaintiff has received disability benefits because "estoppel argument is a persuasive one, and it has convinced a number of courts to decide in [defendants'] favor"); Nguyen v. IBP, Inc., 905 F. Supp. 1471, 1484 (D. Kan. 1995) (determining plaintiff was estopped because of Social Security representations and stating "[f]ederal courts facing similar situations have ruled as a matter of law that the plaintiff was not a 'qualified individual with a disability.'"); McNemar v. Disney Stores, Inc., No. CIV.A.94-6997, 1995 WL 390051, at *3 (E.D. Pa. June 30, 1995) (deciding that plaintiff who stated on his applications for Social Security disability benefits and state disability benefits that he was "totally and permanently disabled" was estopped from arguing that he was "qualified" under the ADA), aff'd, 91 F.3d 610 (3d Cir. 1996), cert. denied, 117 S. Ct. 958 (1997); Berry v. Norfolk S. Corp., No. CIV.A.94-0075-R, 1995 WL 465819, at *3 (W.D. Va. June 23, 1995) (deciding plaintiff's representations of total and permanent disability estop him from asserting ADA claim); Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. 547, 555 n.5 (D. Kan. 1995) (determining plaintiff, who certified on long-term disability benefits application that she was "unable to perform material duties of work," was estopped from arguing that she was "qualified" under ADA); Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 970-71 (E.D.N.C. 1994) (deciding woman who certified that she was "wholly unable to work" to her disability insurer was estopped from establishing that she was qualified under ADA); Peoples v. City of Salina, No. CIV.A.88-4280-S, 1990 WL 47436, at *4 (D. Kan. Mar. 20, 1990) (determining plaintiff who claimed he was completely disabled to obtain disability retirement benefits es-
estoppel is not limited to statements made under oath in judicial or quasi-judicial proceedings, but applies to any statement made under oath, including disability benefits applications.429 Some of the courts ruling in favor of judicial estoppel have recognized the inherent unfairness of “forcing individuals to choose between seeking disability benefits and suing under the ADA,”430 but have held that it is the province of the legislature, not the courts, to remedy this dilemma.431 Application of estoppel while recognizing its inequity is highly surprising because judicial estoppel is often regarded as an equitable doctrine within the discretion of the court.432

Some courts invoking judicial estoppel use harsh language in characterizing attempts by plaintiffs to pursue nondiscrimination actions while receiving disability payments or pursuing other benefits or compensation for impairment of their ability to work. In McNeill v. Atchison, Topeka, & Santa Fe Railroad Co.,433 the plaintiff sought to return to his former job eight days after he had won a jury verdict of $305,000 against his employer, under the Federal Employers' Liability Act,434 for an on-the-job injury.435 The employer refused to let the plaintiff return to work, and nearly two years later, the plaintiff filed an ADA action.436 The court noted that, prior to the current damages action, the plaintiff had testified that he was “permanently disabled.”437 The court declared that it was “seriously
topped from later claiming he was qualified under section 504 of Rehabilitation Act).


430. See, e.g., Garcia-Paz, 873 F. Supp. at 556 (“Plaintiff argues that . . . to allow an employer to terminate an employee for unlawful reasons, and then attempt to defend that action after the fact by asserting a partial or temporary handicap, would subvert the meaning and intent of [the ADA]. The Court, however, is unconvinced.”).

431. See McNemar, 1995 WL 390051, at *4 (“[I]t is the province of the legislature rather than this court to authorize such double recovery.”).

432. See, e.g., Morris v. California, 966 F.2d 448, 453 (9th Cir. 1992) (finding that judicial estoppel is equitable doctrine based on its purpose to protect integrity of judicial process); Russell v. Rolfis, 893 F.2d 1033, 1037 (9th Cir. 1990) (recognizing judicial estoppel as equitable doctrine based on its intent to "protect the integrity of the judicial process"); Baker, 1995 WL 795663, at *4 (“The general rule in the Ninth Circuit is that a party cannot establish the existence of a genuine issue of material fact by submitting deposition or affidavit testimony contradicting his or her former sworn statements.”).


436. See id.

437. See id.
disturbed by the obvious bad faith exhibited by the [plaintiff] and his counsel” in pursuing the ADA claim.\textsuperscript{438} The court concluded that the factual basis for the ADA action was “either blatantly fraudulent or utterly ridiculous.”\textsuperscript{439} While McNeill represents a rather extreme set of circumstances, other courts have been only slightly less condemnatory of plaintiffs who allege that they are “qualified” under federal disability nondiscrimination laws after they have applied for disability benefits—the most common characterization being that such plaintiffs are “talking out of both sides of their mouths.”\textsuperscript{440} Plaintiffs in such situations have also been described as taking positions that are “logically impossible,”\textsuperscript{441} “mutually exclusive,”\textsuperscript{442} “not legally proper,”\textsuperscript{443} “disingenuous”\textsuperscript{444} and “incredible”\textsuperscript{445} and that “believe” one another.\textsuperscript{446}

Not all courts, however, have applied judicial estoppel to invalidate the discrimination claims of plaintiffs who have applied for and received disability benefits. For example, in Overton v. Reilly,\textsuperscript{447} the Seventh Circuit reversed the district court’s grant of summary judgment for the defendants.\textsuperscript{448} In Overton, the plaintiff brought an action under sections 501 and 504 of the Rehabilitation Act to challenge his termination, which was allegedly in response to his disabling emotional illness and depression.\textsuperscript{449} The court observed

\textsuperscript{438} Id. at 990. The court also said that it was “astonished by the audacity of the [p]laintiff,” and added that “absent a representation of outright divine intervention, which has not been proffered, the Court is left with an uncomfortable inference of outright fraud.” Id.

\textsuperscript{439} See id. at 991. Not having spent its ire, the court characterized the plaintiff’s ADA claim as “a blatant attempt to extort additional money from the Defendant” and declared that it was not the ADA’s objective “to facilitate and ensure double recoveries for the exclusive benefit of a duplicitous Plaintiff or his misled or over-eager counsel.” Id.

\textsuperscript{440} See Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 970 (E.D.N.C. 1994) (“Plaintiff ... cannot speak out of both sides of her mouth with equal vigor and credibility before this court.”); see also Nguyen v. IBP, Inc., 905 F. Supp. 1471, 1485 (D. Kan. 1995) (“It is impossible for Nguyen to have been both disabled under social security law and able to perform the essential functions of his work under the ADA.”); Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1538 (N.D. Ala. 1995) (stating that no rational trier of fact could find in plaintiff’s favor after he provided affidavit controverting his prior sworn statements).


\textsuperscript{445} \textit{Reigel}, 859 F. Supp. at 974.


\textsuperscript{447} 977 F.2d 1190 (7th Cir. 1992).

\textsuperscript{448} See id. at 1195.

\textsuperscript{449} See id.
that "[t]he district court was greatly impressed by the finding of the Social Security Administration (SSA) that Overton was entitled to disability benefits."450 The Seventh Circuit ruled, however, that receipt of such funds should not be accorded a preclusive effect on plaintiff's claim that he had been discriminatorily terminated.451

Both the Seventh and Eighth Circuits have cited Overton, in slightly different circumstances, for the principle that social security disability determinations are not dispositive findings for purposes of the ADA.452

Even if courts are inclined to apply judicial estoppel, plaintiffs and their counsel may sometimes be able to avoid or sidestep its application. For example, in Ward v. Westvaco Corp.,455 the defendant, who was alleged to have discriminatorily discharged a worker with a visual disability, invoked the doctrine of judicial estoppel because the plaintiff was receiving disability benefits from the defendant and from social security.454 The plaintiff stated in his benefits application that he was "totally and permanently disabled by bodily injury or disease so as to be prevented from engaging in any occupation or employment for wage or profit whatever."455 The court

450. Id.
451. See id. at 1196. Specifically, the court noted: [E]ven if a finding of disability could have preclusive effect in a private lawsuit, such a finding is consistent with a claim that the disabled person is "qualified" to do his job under the Rehabilitation Act. First, the SSA may award disability benefits on a finding that the claimant meets the criteria for a listed disability, without inquiring into his ability to find work within the economy. As it turns out, the SSA granted benefits to Overton on this basis. Second, even if the SSA had looked into Overton's ability to work in the national economy, its inquiry would necessarily be generalized. The SSA may determine that a claimant is unlikely to find a job, but that does not mean that there is no work the claimant can do. In sum, the determination of disability may be relevant evidence of the severity of Overton's handicap, but it can hardly be construed as a judgment that Overton could not do his job at the EPA.

452. See Weiler v. Household Fin. Corp., 101 F.3d 519, 523-24 (7th Cir. 1996) ("Because the ADA's determination of disability and a determination under the Social Security disability system diverge significantly in their respective legal standards and statutory intent, determinations made by the Social Security Administration concerning disability are not dispositive findings for claims arising under the ADA."); Robinson v. Neodata Serv., Inc., 94 F.3d 499, 502 n.2 (8th Cir. 1996) ("Social Security determinations . . . are not synonymous with a determination of whether a plaintiff is a 'qualified person' for purposes of the ADA."); see also Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1141 (N.D. Ill. 1994) ("[A] finding of disability by the Social Security Administration cannot be construed as a judgment that the plaintiff is unable to do his job.").

454. See id. at 614.
455. Id. at 614-15.
decided, however, that Ward was not precluded from showing that he was "qualified" because (1) he had explicitly stated in his disability benefits application that he would have been able to perform his former job if his employer had made reasonable accommodations and (2) he had notified Westvaco in writing that his application for disability benefits was not a waiver of his rights against the employer for failing to afford him reasonable accommodations. The court noted that "Ward’s clear and deliberate qualification of his handicap status in his application for disability benefits takes his case outside the framework of" estoppel precedent.

Another avenue for skirting the estoppel trap involves precise consideration of the relevant time periods for the employer’s challenged discriminatory actions and the eligibility period for disability benefits. Though courts have not always been careful or precise about these matters, the relevant time for an ADA or section 501, 503 or 504 action is the time when the alleged discriminatory act by the employer occurred. In Cheatwood v. Roanoke Industries, a plaintiff made representations in a workers’ compensation trial that he could not work during the same time period when the employer refused to let him return to work. Therefore, “[h]e cannot now assert a claim for damages against defendant claiming that he could perform the essential functions of his job during the time in ques-

456. Id. at 615.

457. Id. The Ward court contrasted the plaintiff’s situation with that of the plaintiff in August v. Offices Unlimited, Inc., 981 F.2d 576, 581-83 (1st Cir. 1992) (granting summary judgment for defendant on “qualified” issue). The court noted that in August the plaintiff in no way renounced his statements in his benefits application forms that he was totally and completely disabled, nor had he pointed to any fact which suggested that he was not totally disabled or given any indication that his inability to work resulted from his employer’s discrimination toward him or that he had any intention of returning to work. See id. at 615. The Ward ruling suggests that plaintiffs and their counsel may want to carefully word the documents they submit in applying for disability benefits, in the hope of preserving their rights to pursue nondiscrimination remedies against the employer.


459. See id. Specifically, the court found:

"Significantly, these provisions contain no reference to an individual’s future ability to perform the essential functions of his position. To the contrary, they are formulated entirely in the present tense, framing the precise issue as whether an individual ‘can’ (not ‘will be able to’) perform the job with reasonable accommodation.” The question therefore becomes whether plaintiff could perform the essential functions of his previous job or any job at defendant’s plant as of February 8, 1994. It is irrelevant for purposes of this action whether plaintiff could perform the essential functions at some later date.

Id. (quoting Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995)).
Dockery's mere admitted incapacitation at the time of her termination, however, does not, as North Shore contends, automatically lead to the legal conclusion that she is not a qualified individual under the ADA . . . . [A] person, totally disabled at one point, may be considered a qualified individual if the allowance of a leave of absence or possible reassignment would provide them [sic] the opportunity to resume working at a later date.

It is perfectly possible, therefore, for a plaintiff to allege that he or she was fully qualified for a job from which he or she was discriminatorily terminated on date A, and that he or she was completely unable to work on some later date B. Conversely, a plaintiff may apply for benefits at a particular time during which he or she is not able to work and later seek to return to a former job claiming that he or she is now "qualified" by producing evidence of improvement in the condition that had impaired his or her ability to work.

Plaintiffs and their counsel should give careful consideration to the

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460. See id. at 1538 (emphasis added). On the other hand, another court denied defendant's motion for summary judgment on an ADA claim by a plaintiff who was receiving both Social Security disability benefits and disability retirement benefits from his employer. See Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1152 (D. Minn. 1995). The Heise court denied the summary judgment motion because the plaintiff's ADA claim related to a particular period, the plaintiff claimed his condition had improved and the record did not show conclusively "that Heise was totally disabled during the relevant time period." Id.


462. Id. at 1555-56.

463. See Marvello v. Chemical Bank, 923 F. Supp. 487, 492 (S.D.N.Y. 1996) (denying motion to dismiss and ordering additional discovery as to changes in plaintiff's condition after he made disability benefits representations); Heise, 900 F. Supp. at 1152 (denying summary judgment in light of plaintiff's and his doctor's testimony that "his condition had improved sufficiently to perform the essential functions of the job"); Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1142 (N.D. Ill. 1994) (denying summary judgment based on doctor's testimony that plaintiff had recovered); see also Harden v. Delta Airlines, Inc., 900 F. Supp. 493, 497 (S.D. Ga. 1995) (granting summary judgment for defendant because of plaintiff's representations that he was unable to work in connection with disability benefits claim). In Harden, the plaintiff contended that he should be permitted to return to work because "you get better over a period of time." See id. at 497. The court concluded that the problem with plaintiff's argument was "that plaintiff ha[d] offered no evidence that his condition ha[d] improved." See id. He did "not introduce any doctor reports indicating that his disability ha[d] lessened," and "[i]n fact, at least one of his physicians opined that his condition would continue to worsen." See id. The court ruled that the plaintiff could not maintain an argument that he had become able to work "without offering any evidence whatsoever that his condition has changed." See id.
applicable time periods in applying for disability benefits in the hope of preserving their rights to pursue relief against the employer under the ADA and sections 501, 503 and 504.464

Another way to evade the damaging effects of judicial estoppel is through precise analysis of the criteria imposed by the benefits program and of the exact wording of assertions made by the plaintiff in trying to obtain these benefits. The court in Fussell v. Georgia Ports Authority,465 for example, employed this approach.466 The court indicated that it was "inclined to grant [the defendant] summary judgment" on the issue of the plaintiff being "qualified" because he was receiving social security disability benefits based on the SSA finding that he had a "100% disability."467 Nonetheless, the court ordered further discovery to determine whether the SSA granted disability benefits to the plaintiff without his having actually represented himself as "permanently disabled" and unable to work.468 The court directed the plaintiff to provide promptly whatever waivers and other paperwork the defendant needed to obtain the plaintiff's disability benefits application papers to see exactly what representations were made.469 Thus, meticulous analysis

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464. See D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 4 (1st Cir. 1996) (ruling, under state nondiscrimination statute, that estoppel was not applicable when plaintiff never claimed to be totally disabled during time she requested accommodation and denial of accommodation was basis of discrimination claim).


466. See id. at 1576; see also Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (examining particular criterion under which plaintiff was awarded social security disability benefits and holding that requisite finding was not inconsistent with plaintiff being "qualified" under section 504 of Rehabilitation Act).

467. See Fussell, 906 F. Supp. at 1576.

468. See id. The court observed:
There is no direct evidence in the record showing that Fussell swore to this fact. There is every reasonable inference that he did, given the working framework of the SSI program, but there is no dispositive evidence . . . . It is conceivable, though not probable, that he made no such representation to the SSA but the SSA for some reason granted him permanent disability benefits anyway. Errors happen.

Id.

469. See id. Likewise, another court ruled that "[i]n order to apply the doctrine of judicial estoppel, the Court must have before it a prior sworn inconsistent statement by the plaintiff" and noted that "in every case [applying judicial estoppel to an ADA claim], there was evidence of plaintiff's inconsistent testimony before the Social Security Administration or similar agency, or plaintiff's statement in a disability application, that he or she was "totally disabled."" Marvello v. Chemical Bank, 925 F. Supp. 487, 490 (S.D.N.Y. 1996). The Marvello court denied the defendant's motion to dismiss because "[t]he Court has no evidence as to what statement [the plaintiff] might have made to the Social Security Administration about his condition." Id. at 490.

Additionally, Senior Judge Pettine warned in his dissent in August, that courts should not rely too heavily upon certain prior inconsistent statements. August v.
of the benefits eligibility criteria and the statements and representations made by the plaintiff may suggest grounds for not applying judicial estoppel to preclude the plaintiff from proving that he or she was not "qualified" for employment in a nondiscrimination lawsuit.

Nevertheless, neither the cases ruling against such estoppel nor the theories for evading it fully address the central issue. The markedly different purposes of and the small degree of intersection between the criteria imposed under disability benefits programs and the concept of being "qualified" under federal nondiscrimination laws suggest that there should be little extrapolation from one to the other.

Section 504 regulations define "qualified" as meaning, with respect to employment, that the individual "can perform the essential functions of the job in question." The statutory language of the ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." All definitions focus upon the ability of the individual to perform the essential functions of the particular job he or she holds or seeks.

Social security programs have much different and much more complicated concerns. The two principal federal social security

Offices Unlimited, Inc., 981 F.2d 576, 586 (1st Cir. 1992) (Pettine, J., dissenting). Judge Pettine argued that the majority had accorded too much weight to the plaintiff's characterization of himself as "totally disabled," made to obtain temporary disability benefits under the defendant's insurance plan:

For one thing, the disability insurance forms are not legally or medically precise. As the majority acknowledges, it is not clear how "total disability" is defined in August's insurance policy. The insurance forms simply describe "total disability" as an "inability to work." On its face, this definition would not preclude an individual from concurrently claiming "qualified handicapped person" status under Massachusetts (or federal) law.

Id. at 491.

470. 45 C.F.R. § 84.3(k) (1997).

The vagaries of various disability retirement and benefits programs offered by the states, individual employers and private insurers are, however, beyond the scope of this Article. Therefore, this Article will focus primarily on social security disability programs, but many of the observations made herein are applicable to those other types of programs as well.
programs that provide monetary benefits to persons in connection with their disabilities are (1) Social Security Disability Insurance (SSDI), for which eligibility requires proof of insured status (by having paid into the system through taxes on earned income)\(^{473}\) and (2) Supplemental Security Income, which requires proof of limited income and resources.\(^{474}\) The two programs employ identical statutory standards for disability; claimants must prove that they are unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).\(^{475}\)

The perspectives of the two formulations are quite different. The disability nondiscrimination laws focus upon ability to perform essential functions of one particular job, while the disability benefits programs look at a bigger picture of ability to perform any gainful activity. In the words of the Seventh Circuit, the disability benefits programs have a more "generalized" focus.\(^{476}\) While the focuses of the nondiscrimination and the benefits programs are different, courts that have applied judicial estoppel have concluded that a worker who cannot engage in any gainful activity certainly cannot do the particular job. In so doing, they exhibit a superficial and uninformed view of the criteria applied under disability benefits programs, how the criteria are applied and their purposes and objectives.

Disability benefits programs deal with people who do not currently have a job, but they do not operate a job bank for applicants. Consequently, they operate in a somewhat speculative realm, trying to determine what types of physical or mental limitations a particular individual has and how those limitations will affect a person’s present and future ability to obtain employment. Unless the person processing the application happens to know of a particular job for the applicant, the process must be somewhat abstract and con-

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475. 42 U.S.C. § 1382c(a) (3)(A); see 42 U.S.C. § 416(i); see also Sullivan v. Zebley, 499 U.S. 521, 525 n.3 (1990) (discussing standard for adult disability claims).
jectural. The SSA does not have a litmus test to determine whether applicants are employable or unemployable. Indeed, there are very few, if any, individuals who can do no task at all and, thus, can be said to be unable to work in all imaginable circumstances. So, while disability determinations are inevitably conjectural, they must operate in a real world context where actual availability of work is as important as some abstract concept of ability to work.

Social security disability benefits programs seek to deal with these difficulties by applying a series of sequential steps for determining an applicant’s eligibility. The SSA’s processes for determining eligibility for disability benefits certainly have their shortcomings. One central flaw has been that the initial determination of benefits eligibility and the reviews conducted by ALJs do


The SSA first determines whether the applicant is currently “engaged in substantial gainful activity,” that is, has a job. See Sullivan, 493 U.S. at 525; 20 C.F.R. § 416.920(a)-(c). If not, the SSA looks to see whether the applicant’s physical or mental impairment is “severe.” See Sullivan, 493 U.S. at 525; 20 C.F.R. §§ 404.1520(c), 416.920(c). If it is severe, the SSA evaluates the applicant’s medical records and compares them to a listing of impairments maintained by the SSA to see if they demonstrate a condition that is included on the listing or one that is “equal” to the listed conditions. See Sullivan, 493 U.S. at 525; 20 C.F.R. pt. 404, subpt. P, app. 1 (1997). If so, the SSA can make a finding that the applicant has a “disability” and is eligible for benefits. See Sullivan, 493 U.S. at 525; 20 C.F.R. §§ 404.1520(d), 416.920(d). Thus, a person who does not currently have a job and has a type of severe physical or mental impairment that is listed in or commensurate with a condition on the listing can be awarded social security disability benefits.

If the SSA finds that an applicant’s impairments are severe, but do not meet or equal a listed condition, then the SSA considers whether the applicant has the residual functional capacity to return to past relevant work. See Sullivan, 493 U.S. at 525-26; 20 C.F.R. §§ 404.1520(f), 416.920(f) (1997). If not, then the SSA must find the applicant has a disability entitling him or her to benefits, unless the SSA can show, in light of the applicant’s age, education, work, experience and residual functional capacity, there is work in the national economy that the applicant can perform. See id. The placement of the burden of proof on the SSA regarding this last determination is quite significant. See Gellhorn, supra, at 993. If an applicant for benefits has a severe impairment, does not now have a job, cannot do the type of work he or she did in the past and the SSA is unsure whether there is other work that the individual can do, the SSA must find the individual eligible for benefits. See id.

478. For a critical analysis and proposals for reform, see Gellhorn, supra note 477, at 993. Although the article occasionally makes use of terminology that is not wholly up to date, e.g., “the disabled,” it provides an excellent critique of the disability determination process and constructive suggestions for improving it, particularly procedurally. See also NATIONAL COUNCIL ON THE HANDICAPPED, supra note 19, at 27-31 (discussing disincentives to work under social security laws). A particularly disquieting statistic about the benefits determination process is that ALJs reverse
not use the same standards. The staff making the initial determinations do not consider themselves bound by codified regulations, court decisions or SSA rulings. As a result, two persons who have obtained benefits at different review levels may have been approved under different standards.

The wording of the statutory eligibility standard—"unable to engage in any substantial gainful activity"—is perhaps misleading to some degree and should be revised to make it more clear because the SSA does not consider the standard to be total inability to do any kind of work. As the Seventh Circuit observed, "[t]he SSA may determine that a claimant is unlikely to find a job, but that does not mean that there is no work the claimant can do." Federal social security benefits laws authorize recipients to work for a "period of trial work" of up to nine months while receiving SSI benefits. One court characterizes the statutory provision as "clearly intended to encourage recipients to seek work even while receiving SSI support" and discusses the SSA's program pursuant to it. If the SSA considers working and receiving its disability benefits to not be inconsistent, how can courts say that they are?

If a finding that a person has a "total and permanent disability" does not mean that a person is totally unable to do any kind of work, the finding also does not mean that the individual is permanently precluded from working. Disability benefits recipients are not entitled to lifelong continuation of their benefits. SSA conducts periodic case reviews to redetermine continuing eligibility, promotes rehabilitation and encourages recipient participation in its Plan to Achieve Self Support (PASS) program, which seeks to help participants achieve economic self-sufficiency.

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479. See Gellhorn, supra note 477, at 976-77, 987-89.
480. See id. at 976-77, 987 n.130.
481. See id. at 987 n.130 (referring to differing standards as "one of the Alice in Wonderland aspects of social security practice").
482. Perhaps the statutory eligibility standard for benefits should be framed in wording such as the following: "[I]s unlikely, in light of the claimant's physical or mental impairment and the reasonable availability of relevant work opportunities, to obtain paid employment in the near future."
487. See id. §§ 416.989, 416.204.
488. See id. §§ 416.1180.
tions contain provisions dealing with determinations that disability has “stopped,” “ended” or “changed.”

These observations about disability determinations also apply to the representations applicants make in seeking to obtain benefits. As the unemployed individual with a disability applies for disability benefits, he or she quickly learns that the magic words for receiving benefits are “permanently and totally disabled.” Using those words may mean no more to the benefits claimant than “I think I deserve these benefits” or “I have a permanent disability.” After all, the claimant is quickly made aware that the SSA will review all of the medical records and other evidence and make its own determination of whether the claimant satisfies the benefits criteria.

The SSA itself has admitted that its intake and processing is a “complex, confusing process.” A commentator has observed that “[i]t is extraordinarily difficult under the current process for claimants to understand what information is needed to prove disability.” Claimants arrive at the benefits office to be confronted by “a vast array of forms” and may discover that they do not have all of the factual information they need. Nonetheless, the data and statements provided at the initial application are the critical basis for the agency’s evidentiary development of the claim. The pressure is on the applicant to “say the right things” to satisfy the benefits representative and give the claimant a shot at getting the benefits. Perhaps the claimant acted under the advice of an attorney who suggested applying for disability benefits, with the implication that the claimant met the legal standards and was entitled to such benefits.

489. See id. §§ 416.988 (1997) (“After we find that you are disabled, we must evaluate your impairments from time to time to determine if you are still eligible for payments based on disability. We call this evaluation a continuing disability review.”).


492. Gellhorn, supra note 477, at 983.

493. See id. (“Further, claimants are rarely provided with a clear framework to understand how the information requested by the agency drives the determination process.”).

The simplistic reasoning of the courts that have made too facile a leap from eligibility for disability benefits to inability to work precluding a plaintiff from being "qualified" has some other apparent shortcomings. One shortcoming is ignoring the impact of losing a job upon the employability of a worker with a disability. Workers who consider themselves competent to do their jobs and fully able to engage in "substantial gainful activity" while they are employed may find themselves unemployable after they are discharged. For example, if a middle-aged worker with cerebral palsy loses her job inspecting beer-bottle labels at the only brewery in her small town, she may be unable to find another job. Statistics suggest that, for individuals with disabilities, the chance of getting a job is always something of a longshot.495 Even if some potential for finding other work exists, the recently discharged individual may not know or believe it. For most people, losing one's job is a strong psychological blow. People in such circumstances may have difficulty seeing any light at the end of the tunnel of unemployment, particularly when former fellow workers, friends, physicians, lawyers and sometimes even the former employer496 are saying "you can always just go on disability."497

Finally, and critically, criteria and representations regarding ability to do a job in the disability benefits context do not consider

495. See Burgdorf, Analysis and Implications, supra note 1, at 420-22.
496. See, e.g., Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1143 (D. Minn. 1995) (noting that employer called meeting to discuss plaintiff's absences from work because of severe headaches and hospitalization and invited its personnel manager to explain application process for disability retirement process, including estimate of amount of such benefits plaintiff could receive); Derbis v. U.S. Shoe Corp., No. Civ.A.MJG-93-130, 1994 WL 631155, at *1 (D. Md. Sept. 7, 1994) (noting that employer allegedly suggested that plaintiff apply for long-term disability benefits instead of returning to work), aff'd, 67 F.3d 294 (4th Cir. 1995); see also August v. Offices Unlimited, Inc., 981 F.2d 576, 579 (1st Cir. 1982) (noting that supervisor suggested that plaintiff "should consider applying for disability benefits").
497. See, e.g., Daffron v. McDonnell Douglas Corp., 874 S.W.2d 482, 486-87 (Mo. Ct. App. 1994) (discussing facts of case). The plaintiff's deposition testimony indicated that, after his discharge from his job, he met with his doctor "who told him that he could not go out in the labor field and get another job because of his limitations and advised appellant to take full disability." Id. at 487. Plaintiff also stated that he "went into . . . a very deep depression" after he was terminated. Id.

This example illustrates that a person who is "qualified" one day may become unable to find substantial gainful activity, or sincerely believe this to be true, after he or she is terminated because of a disability. In addition, for many conditions, as for example, multiple sclerosis and some emotional illnesses, the very stress of being fired from a job or treated unfairly can exacerbate the individual's disability. These various plaintiffs ought to be able to obtain disability benefits without losing their rights to pursue legal remedies against the employers who discriminated against them on the basis of their disability.
a key component of disability nondiscrimination laws—employers' obligation to make "reasonable accommodations" to enable workers with disabilities to perform the essential functions of their jobs. In disability discrimination cases brought by plaintiffs who receive disability benefits, some courts consider the plaintiffs' claims that, with reasonable accommodation by their former employers, the plaintiffs could have returned to work. The social security disability benefits process explicitly does not consider employers' reasonable accommodation obligations in making its disability determinations.498

If an employer does not make the adjustments to the work environment called for by the reasonable accommodation mandate, the worker may be legally "qualified," but rendered unable to do the job.499 Moreover, based upon his or her experiences with a recalcitrant employer and other employers in the industry or field, the former worker with a disability may believe it unrealistic to expect that future employers will comply with their legal obligations to afford reasonable accommodations. Thus, the individual may

498. In 1994, the SSA proposed that reasonable accommodations that might be made by employers as required under the ADA should be considered in deciding whether a claimant's disabilities were disabling and whether jobs exist in the national economy that might be performed by the claimant. See Disability Reengineering Project Proposal, 59 Fed. Reg. 18,188, 18,264 (1994). After commentators pointed out that this inclusion of reasonable accommodations would work against the interests of persons with disabilities whom the ADA was intended to protect, by presuming that employers were complying with the ADA and making reasonable accommodations when in fact they might or might not actually do so, the SSA deleted the ADA reasonable accommodation references from the revised reengineering plan. See 59 Fed. Reg. 47,887, 47,940 (1994).

499. In Heise, for example, the defendant's motion for summary judgment on an ADA claim by a plaintiff who was receiving both Social Security disability benefits and disability retirement benefits from his employer was denied, in part because the plaintiff claimed the employer had failed to make reasonable accommodations required under the ADA and the court found that "[o]n the record presented, there exist numerous questions of fact regarding the existence and reasonableness of possible accommodations." Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1145 (D. Minn. 1995). And in Dockery, the plaintiff contended that with certain reasonable accommodations she would have been able to return to work at a later time. See Dockery v. North Shore Med. Ctr., 909 F. Supp. 1550, 1553 (S.D. Fla. 1995). In response to the defendant's motion for summary judgment, the court declared that "[i]f the record can support an inference that North Shore should have provided these accommodations, and that with their provision Dockery would have been able to return to work, then this motion for summary judgment would have to be denied." Id. at 1555. On the record before it, the court ruled that the accommodation requested by the plaintiff—an extended leave of absence for at least a year—was not reasonable, and it granted summary judgment in favor of the defendant. See id.; see also August v. Offices Unlimited, Inc., 981 F.2d 576, 581 (1st Cir. 1982) (Petting, J., dissenting) (arguing in dissent that plaintiff might be unable to work without some accommodation from employer, but that did not mean he was unable to work if those accommodations were provided).
quite honestly, and often correctly, believe that he or she was “qualified” to do the former job (if only the employer would have made reasonable accommodations) and yet will not be able to find another job. The two positions are not inconsistent, and the latter should manifestly not result in preclusion of the ability to demonstrate the former.

In Anzalone v. Allstate Insurance Co., the court was faced with precisely these considerations. The plaintiff had suffered a back injury in an accident. When he sought to return to his job doing field work as an insurance claims adjuster, his employer refused his request and restricted him to office duty, which he and his physician both found unacceptable because it involved too much sitting. When the plaintiff learned that the employer permitted other employee claims adjusters to work from their homes, he requested that his employer permit him to do so as a reasonable accommodation for his disability. In his application for disability benefits, the plaintiff stated: “Due to the fact that I’ve had three prior back operations—and now another herniated disc in the neck—and further lower back problems of unknown severity with nerve damage—I do not believe I’ll be able to work for anyone else—who’d hire a person in this condition.” The court ruled that, in these circumstances, plaintiff’s claims of eligibility for disability benefits and his claim to be “qualified” were not inconsistent. The court determined that “[p]laintiff is not ‘talking out of both sides of his mouth,’” and refused to preclude the plaintiff from proving that he was “qualified.”

The lack of clarity in disability benefits criteria and the deficiencies of the administrative and judicial processes for determin-

501. See id. at *4.
502. See id. at *1.
503. See id.
504. See id. at *2. Both plaintiff and physician agreed that he could perform the essential function of his job as an insurance claims adjuster from his home. See id.
505. Id.
506. See id. at *2 (finding that plaintiff never “unambiguously characterized himself as totally and completely disabled”).
507. Id. But see Harden v. Delta Airlines, Inc., 900 F. Supp. 498, 497 (S.D. Ga. 1995) (finding it “incredible” that plaintiff “would claim that he was discriminated against by his employer for failing to make reasonable accommodations while representing to various entities that he was unable to work” without offering any evidence that his condition had changed, and concluding that there is “no reasonable accommodation that can be given to allow a totally disabled person, as plaintiff claims he was, to perform the essential functions of any job”).
ing whether such criteria have been met should certainly not be visited on the heads of out-of-work applicants for desperately needed benefits acting in good faith. Additionally, these deficiencies should not provide a justification for insulating employers who have allegedly committed acts of discrimination on the basis of disability with the result that the applicant was thrown out of work and forced to seek disability benefits.

2. Preclusion of Former Employees from Pursuing Actions to Challenge Discrimination Regarding Employer-Provided Benefits

A related, but more bizarre, limitation upon the protections afforded by federal disability nondiscrimination laws has been created by another line of cases holding that people who must stop working because of their disabilities, and thereby become eligible for disability and other types of benefits provided by their employers, are no longer "qualified individuals with disabilities." Thus, these employees cannot challenge discriminatory denials of their benefits.

Both the ADA and section 504 of the Rehabilitation Act prohibit discrimination on the basis of disability in regard to various kinds of employer-provided fringe benefits, including pension plans, disability insurance, life insurance and health insurance.\(^508\) This prohibition has been nullified to some extent as to those benefits for which eligibility presupposes discontinuance of employment by a line of cases holding that one must continue to be employed by the employer or continue to be able to perform the job in order to be accorded the protection of the nondiscrimination statutes. For many types of disability benefits, disability retirement benefits and similar programs, a person is not eligible until he or she is unable, because of a disabling condition, to continue in the job.

This line of cases has its origin in a 1987 decision by the Eighth Circuit in Beauford v. Father Flanagan’s Boys’ Home.\(^509\) In Beauford, the Eighth Circuit determined that section 504 does not "prohibit[ ] discrimination in the handling of an employee salary continuation program and employee health and dental benefits when the handicapped employee is no longer able to perform the essential functions of his or her job."\(^510\) The court affirmed the district

\(^{508}\) See 45 C.F.R. § 84.11(b)(6) (1997) (prohibiting discrimination with regards to "fringe benefits available by virtue of employment"). See generally BURGDORF, DISABILITY DISCRIMINATION IN EMPLOYMENT LAW, supra note 1, at 463-71 (discussing discrimination in employment fringe benefits).

\(^{509}\) 831 F.2d 768 (8th Cir. 1987).

\(^{510}\) Id. at 769.
court's decision that the plaintiff could not maintain a claim under section 504 for salary continuation and health and dental benefits. The decision was based on the statutory language affording protection to "otherwise qualified handicapped individuals," i.e., individuals with disabilities who can perform the essential functions of the job. Because the plaintiff was on disability leave and affirmatively asserted that she was totally unable to perform her job, the court found her to be not otherwise qualified and, thus, to be outside the protection of section 504.

Citing the section 504 regulation of the HHS, the district court had ruled that "the Rehabilitation Act's statutory protection reached fringe benefits available by virtue of employment," a proposition with which the Eighth Circuit expressed no disagreement. The circuit court's determination that Beauford could not pursue her section 504 claim for denial of the particular benefits at issue was based upon a technical reading of the same regulation. The court pointed out that the HHS regulation is divided into four subparts: (1) employment; (2) preschool, elementary, secondary or adult education; (3) postsecondary and vocational educational services; and (4) other services. With respect to employment, the regulation defines "qualified" to mean "with reasonable accommodation, can perform the essential functions of the job in question." Because Beauford admitted that she could not and would not be able to perform the essential functions of her former job in the near future, the court concluded that she was not "qualified" and could not pursue her action to challenge the allegedly discriminatory denial of her benefits.

The Beauford court also rejected the plaintiff's argument that she should be considered "qualified" under the "other services" category in the regulation. The court viewed this category as addressing discrimination by entities that are "providers of health, welfare, and other social services." The court deemed it "apparent that this subpart is concerned not with the discriminatory han-

511. See id. at 773.
512. See id. at 771 (defining statutory language of "otherwise qualified handicapped individuals").
513. See id. (holding plaintiff did not fall within statutory definition).
514. 45 C.F.R. § 84.11(b)(6) (1997).
515. See Beauford, 831 F.2d at 770.
516. See id. at 771; see also 45 C.F.R. § 84.3(k) (1997).
517. Beauford, 831 F.2d at 771.
518. See id. (stating plaintiff was not "qualified" as defined).
519. See id. at 771-72.
520. See id. at 772.
dling of benefits due a recipient's employees, but rather with prohibiting discrimination by certain recipients who provide certain types of health, welfare and social services toward applicants applying for these services."521 Thus, the court's view was that even if the employer is covered under the fourth subpart, only its clients, not its employees, are protected under that section.522

The court offered no explanation as to why a recipient agency could not be covered as an employer under the first subpart and simultaneously as a provider of employment benefits to its workers under the fourth subpart. There is no obvious reason why such an interpretation, more consistent with the statutory purposes of section 504, would be an impermissible construction. Nor is there an obvious reason why the HHS four-part categorization should restrict the scope of the very broad statutory language, particularly as the Beauford court recognizes that "[d]iscrimination in the handling of salary continuation and health and dental benefits due handicapped employees unable to perform the essential functions of their jobs is an undesirable thing."523 Ironically, the plaintiff in Beauford received her full disability insurance benefits and her lawsuit did not raise any claim regarding those benefits.524 The general reasoning of Beauford is that a person who is unable to work cannot be a "qualified" individual with a disability entitled to protection from discrimination in regard to benefits.

The Sixth Circuit in Parker v. Metropolitan Life Insurance Co.,525 and the Seventh Circuit in EEOC v. CNA Insurance Cos.,526 have denied former employees the right to pursue ADA actions to challenge allegedly discriminatory denials of long-term disability benefits provided by their employers.527 In Gonzales v. Garner Food

521. Id.

522. See id. The court views such coverage as appropriate for "a patient or other applicant . . . denied treatment or access" in regard to the services provided. Id.

523. Id. at 773. The Eighth Circuit noted that the plaintiff in Beauford had filed an action in state court claiming that the defendant had violated its contract of employment with her by failing to provide her with salary continuation and health and dental benefits, and that she "can still pursue" that claim. Id. The court does not acknowledge, however, that the contract action cannot address discrimination countenanced in the terms of the contracts—the details of which workers often are unaware and about which they usually have no opportunity to negotiate with the employer.

524. See id. at 770 (noting that plaintiff received full benefit of disability insurance, but later claims were denied).

525. 99 F.3d 181 (6th Cir. 1996).

526. 96 F.3d 1039 (7th Cir. 1996).

527. See Parker, 99 F.3d at 183; CNA Insurance, 96 F.3d at 1040.
"Substantially Limited" Protection

Services, Inc., the Eleventh Circuit made a similar ruling, relying on Beauford to preclude a former employee from pursuing an ADA action to challenge an allegedly discriminatory cap on medical insurance benefits.

The Parker and CNA Insurance decisions followed the Beauford approach in finding the plaintiffs to be not qualified because they were unable to perform their former jobs. The Gonzales decision, however, proceeded on a different but related theory that Title I of the ADA protects only "employees" and "applicants," not former employees. The Parker court also concurred with the Beauford suggestion that permitting discrimination against former employees in regard to fringe benefits is "undesirable," but that the courts are constrained not to rewrite the statutes. In Gonzales, however, the Eleventh Circuit ruled that the clearly expressed congressional intent was "to limit the scope of the Act to only job applicants and current employees capable of performing essential functions of available jobs" and that "excluding former employees from protection under the Act is not inconsistent with the policies underlying the statute."

The EEOC, the federal agency charged with implementing the employment nondiscrimination requirements of the ADA and the Rehabilitation Act, has disagreed with the notion that former employees unable to continue in their jobs because of their disabilities

528. 89 F.3d 1523 (11th Cir. 1996).
529.  See id. at 1530-31 (holding former employee was not "qualified individual" with disability).
530.  See Parker, 99 F.3d at 183; CNA Insurance, 96 F.3d at 1040.
531.  See Gonzales, 89 F.3d at 1526-31 (holding former employee not within protection of ADA). Former employees of state and local government entities have an easier time pursuing employment benefits claims under Title II of the ADA, because the Title II definition of "qualified individual with a disability" is framed in terms of "an individual who . . . meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity." 42 U.S.C. § 12131 (1994); see Castellano v. City of New York, No. 95 Civ. 5014 (SHS), 1996 WL 361547, at *4 (S.D.N.Y. Jun. 28, 1996) (finding that Title II and Section 504 standards for being "qualified" for challenging discrimination in regard to benefits differ from standard under Title I).
532.  See Parker, 99 F.3d at 187. Discussing legislative intent and statutory language, the Parker court stated that [p]erhaps the drafters of the statute intended that Ms. Parker's situation bring her within the coverage of the [ADA]. If that is the case, they failed to provide definitions that lend themselves to doing so. Unfortunately, Congress may not have taken this situation into account. Such an oversight, however, is for Congress to remedy. We should not try to rewrite the statute in a way that conflicts with what appears to be fairly clear language.

Id.
533.  Gonzales, 89 F.3d at 1528-29.
are precluded from pursuing ADA actions to challenge discrimination in regard to fringe benefits. The EEOC has asserted that Beauford and Parker were wrongly decided and appeared as amicus curiae to argue against the position the Eleventh Circuit eventually adopted in Gonzales. Additionally, the EEOC was itself the plaintiff in the CNA Insurance case. The EEOC has offered a variety of arguments in opposition to the reasoning and conclusions of the circuit courts in these four cases. One argument is that these rulings undermine the ADA’s express prohibition against discrimination in fringe benefits. Another argument is that former employees occupy the “employment position” of “benefit recipient” and can be “qualified” for that position even though unable to perform their former jobs. A further argument expressed by the EEOC is that the status as a former employee is sufficient to confer authority to sue for wrongs occurring in the employment context.

As many good arguments as the EEOC and creative plaintiffs’ attorneys may propound, the fact is that four circuits have precluded persons whose disabilities prevent them from continuing to

534. See Parker, 99 F.3d at 186 (noting that EEOC asserted in amicus brief that Beauford was wrongly decided and should not be followed).
535. See Gonzales, 89 F.3d at 1530.
536. See Parker, 99 F.3d at 186-87; CNA Insurance, 96 F.3d 1039, 1043-45 (7th Cir. 1996); Gonzales, 89 F.3d at 1529-30.
537. See Parker, 99 F.3d at 186 (explaining that ADA “explicitly prohibits discrimination in fringe benefits”).
538. See id. (asserting plaintiff is “invoking the [ADA] in an effort to retain the ‘employment position’ of ‘benefit recipient’”); CNA Insurance, 96 F.3d at 1043-44 (asserting plaintiff’s new “employment position” is that of “disability benefit recipient,” a position imposing no job related duties, so plaintiff can, by definition, perform essential functions of her position, so she is a “qualified individual”); Leonard F. v. Israel Discount Bank, No. 95-6964, 1996 WL 634860, at *3 (S.D.N.Y. Sept. 24, 1996) (noting statement in amicus brief that “relevant ‘employment position’ in any case involving post-employment fringe benefits” is that of “benefit recipient,” occupied by plaintiff, and “as long as the plaintiff satisfies any nondiscriminatory eligibility criteria for receipt of benefits, he is a ‘qualified individual’ within the meaning of the ADA”).
539. See CNA Insurance, 96 F.3d at 1045. The EEOC has proffered other arguments. One is that the ADA language of “employment position” in defining “qualified individual with a disability” is broader than the Rehabilitation Act reference to “job.” See id. Another EEOC argument is that there are prior precedents permitting ADA actions challenging health and disability insurance limitations by plaintiffs who were qualified for the benefit but not able to work. See id. Another is that “qualified” in the context of benefits means qualified to meet the requirements of the plan. See Gonzales, 89 F.3d at 1529. Finally, the EEOC has argued that interpretations of the term “employee” under Title VII allowing former employees to bring suit should apply to the use of the same terms under the ADA. See CNA Insurance, 96 F.3d at 1043-45 (discussing right of former employee to bring Title VII post-termination retaliation charges).
do their jobs and other former employees from challenging discrimination they encounter in regard to the benefits they obtained as part of the terms and conditions of their employment.\textsuperscript{540} This surely is not what Congress and the EEOC expected when they provided that the ADA was to cover fringe benefits and outlaw discrimination in regard to them.

3. \textit{Other Examples}

The foregoing are only some of the ways in which courts have restricted the coverage of protection against discrimination provided under the ADA and Rehabilitation Act.\textsuperscript{541} Another judicially created pitfall is derived from several decisions in which courts have granted summary judgment for defendants based upon the plaintiffs’ failure to satisfy “medical clearance” requirements. These requirements are imposed by employers as a prerequisite for rehiring or return to work after an absence caused by a physical or mental condition, even when the medical clearance process probes more deeply into the nature and extent of the person’s disability than would be permitted at the preemployment stage before a conditional job offer has been made.\textsuperscript{542} Additionally, without a founda-

\textsuperscript{540}. See \textit{CNA Insurance}, 96 F.3d at 1039-40 (holding totally disabled former employee lacked standing to challenge former employer’s long-term disability plan as discriminatory); \textit{Gonzales}, 89 F.3d at 1529 (affirming district court’s grant of former employer’s motion to dismiss because plaintiff was not “qualified individual” with disability within the meaning of ADA); see also \textit{Parker}, 99 F.3d at 193 (holding former employee was not qualified individual with disability for standing to challenge denial of benefits under ADA); \textit{Beauford v. Father Flanagan’s Boys Home}, 831 F.2d 768, 773 (8th Cir. 1987) (holding Rehabilitation Act did not prohibit discrimination by employer in handling of employee fringe benefits).


\textsuperscript{542}. See, e.g., \textit{Grenier v. Cyanamid Plastics, Inc.}, 70 F.3d 667, 670 (1st Cir. 1995) (granting summary judgment for employer when employee was terminated at conclusion of two-year disability leave because of psychological problems, and employer refused to consider rehiring former employee until employee provided medical certification that he could return to work without restrictions or that identified reasonable accommodations); \textit{Brumley v. Pena}, 62 F.3d 277, 279-80 (8th Cir. 1995) (granting summary judgment for defendants when former employee pursuing statutory right to priority consideration for reemployment upon recovery challenged employer’s insistence that he undergo physical examination prior to being allowed to return to work and in absence of conditional job offer); \textit{see also} \textit{Williams v. Channel Master Satellite Sys., Inc.}, 101 F.3d 346, 348 (4th Cir. 1996) (granting summary judgment for defendants where plaintiff was not permitted to return to work until her doctor released her from “any and all restrictions”); \textit{Reigel v. Kaiser Found. Health Plan}, 859 F. Supp. 963, 974-77 (E.D.N.C. 1994) (granting summary judgment for defendants in ADA action in which plaintiff challenged employer’s requirement of mental fitness evaluation prior to returning to work).
tion in the statutes, regulations or legislative history, a few courts have suggested that prison inmates seeking or holding prison employment are not employees or applicants under the ADA or the Rehabilitation Act. Some courts have ruled that these federal laws also do not cover other aspects of prison life and the programs and activities conducted there. An analogous, though arguably more well-founded, judicially created exception to the coverage of the Rehabilitation Act and the ADA has thwarted uniformed members of the military from challenging discrimination by their superiors and the branches and departments of the military hierarchy.

543. See, e.g., White v. Colorado, 82 F.3d 364, 367 (10th Cir. 1996) ("[T]he ADA does not apply to prison employment situations."); Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991) (determining inmate not "employee" under Rehabilitation Act of 1973); Pierce v. King, 918 F. Supp. 932, 938 (E.D.N.C. 1996) (stating ADA "does not create a cause of action for state inmates displeased with their prison work assignments"); see also Haston v. Tatham, 842 F. Supp. 483, 487 (D. Utah 1994) (suggesting that "it is doubtful that the ADA applies in the case of a disabled prisoner who seeks prison employment").


545. See, e.g., Doe v. Garrett, 903 F.2d 1455, 1462 (11th Cir. 1990) (holding that section 504 does not afford naval reservist avenue for challenging exclusion from reenlisting because he tested positive for HIV); Smith v. Christian, 765 F.2d
V. REORIENTING PRINCIPLES

To understand fully the extent to which the restrictive, preferred group approach represents a substantial and portentous misreading of the Rehabilitation Act and the ADA, it is necessary to examine the implications of such an approach in the context of some basic, but often overlooked concepts underlying disability nondiscrimination statutes. This Part attempts to outline the principal underlying conceptual premises of federal disability nondiscrimination laws that have not been understood by those courts, administrators and commentators who have spawned the confining interpretations described in the prior Parts of this Article. Though most of these concepts have been described and explained elsewhere in the legal literature, they have not been assimilated into the mainstream of legal analysis and have largely been ignored by the courts. This Part will present their general contours and major implications and provide references for additional commentary.546

A. The Goals—Integration and Full Participation

There has been no ambiguity about the overall objectives of federal laws regarding people with disabilities. Federal statutes on disability have consistently opted for integration over alternative approaches of custodialism and segregation. In 1966, Jacobus S. tenBroek, a blind professor and distinguished legal commentator, published a pair of law review articles. In the first of these, The Disabled and the Law of Welfare, tenBroek outlined two basic approaches that a society can take in regard to its citizens with disabilities, custodialism or integration.547 He wrote:

The older custodial attitude is typically expressed in policies of segregation and shelter, of special treatment and

546. See generally ACCOMMODATING THE SPECTRUM, supra note 18, at 67-101. For a prior version of some of the materials in this Part, see BURGDORF, DISABILITY DISCRIMINATION IN EMPLOYMENT LAW, supra note 1, at 2-9, 12-15.

separate institutions. The newer integrative approach focuses attention upon the needs of the disabled as those of normal and ordinary people caught at a physical and social disadvantage. The effect of custodialism is to magnify physical differences into qualitative distinctions; the effect of integrationism is to maximize similarity, normality, and equality as between the disabled and the able-bodied.\textsuperscript{548}

Noting that integration emphasizes people with disabilities "potential for full participation as equals in the social and economic life of the community," tenBroek concluded that integration was both the more equitable and the more practical option.\textsuperscript{549}

In the second article, \textit{The Right to Live in the World: The Disabled in the Law of Torts}, tenBroek posited that people with disabilities have a constitutional right to freedom of movement and argued that artificial barriers that keep such individuals from moving throughout society are illegal.\textsuperscript{550} His ideas of the choice between custodialism and integration and of the legal system's role in protecting the legal rights of individuals with disabilities accurately framed the issues that would later be addressed by the Disability Rights Movement.\textsuperscript{551}

Congress and other governmental bodies have come down solidly on the integration side of tenBroek's two alternatives.\textsuperscript{552} In 1974, Congress officially embraced the goal of integration of people with disabilities when it declared: "[I]t is essential . . . that the complete integration of all individuals with handicaps into normal community living, working, and service patterns be held as the final objective."\textsuperscript{553} In a related statutory finding, Congress stated that "it is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by

\begin{itemize}
\item \textsuperscript{548} tenBroek, \textit{The Disabled and the Law of Welfare}, supra note 547, at 816.
\item \textsuperscript{549} Id. at 815.
\item \textsuperscript{550} See tenBroek, \textit{The Right to Live in the World}, supra note 547, at 849-50 (noting denial of equal access to public places is unconstitutional as well as socially and morally wrong).
\item \textsuperscript{551} See, e.g., \textsc{Joseph P. Shapiro}, \textit{No Pity: People with Disabilities Forging a New Civil Rights Movement} 5, 11 (1993) (noting background of disability rights movement).
\item \textsuperscript{552} See, e.g., 29 U.S.C. § 701(a)(6)(B) (1994) ("[T]he goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to . . . achieve equality of opportunity, full inclusion and integration into society, employment, independent living, and economic and social self-sufficiency."); 42 U.S.C. § 12101(a)(8) (1994) ("[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for [disabled] individuals.").
\item \textsuperscript{553} S. Rep. No. 93-1297, at 34 (1974).
\end{itemize}
the Constitution of the United States be provided to all individuals with handicaps.\textsuperscript{554} The Senate Committee report accompanying this legislation expressed its understanding that people with disabilities have a "basic human right of full participation in life and society."\textsuperscript{555}

Subsequently, Congress has repeatedly endorsed integration as the national policy regarding individuals with disabilities.\textsuperscript{556} In amending section 504 of the Rehabilitation Act in 1978, the Senate report described the statute as representing a commitment by Congress to people with disabilities that "to the maximum extent possible, they shall be fully integrated into the mainstream of life in America."\textsuperscript{557} In the ADA, Congress identified "full participation" as a component of "the Nation’s proper goals regarding individuals

\textsuperscript{554} Id. at 56.

\textsuperscript{555} Id.

\textsuperscript{556} See, e.g., 29 U.S.C. § 701 (a)(6) (stating national goals include "full inclusion and integration in society"); 29 U.S.C. § 760(1) (stating purpose of rehabilitation research, demonstration and training projects is to "maximize the full inclusion and integration into society"); 29 U.S.C. § 796 (stating that purpose of independent living services to promote "integration and full inclusion of individuals with disabilities into the mainstream of American society").

In establishing and funding programs and services for people with developmental disabilities, Congress has established a goal of integration and inclusion into the community. The national goals established by the legislation include:

- [P]roviding individuals with developmental disabilities with the opportunities and support to—
  - (A) make informed choices and decisions;
  - (B) live in homes and communities in which such individuals can exercise their full rights and responsibilities as citizens;
  - (C) pursue meaningful and productive lives;
  - (D) contribute to their family, community, State, and Nation;
  - (E) have interdependent friendships and relationships with others; and
  - (F) achieve full integration and inclusion in society, in an individualized manner, consistent with unique strengths, resources, priorities, concerns, abilities, and capabilities of each individual.

42 U.S.C. § 6000(a)(10) (1994). Integration and inclusion into the community is defined as:

- (A) the use by individuals with developmental disabilities of the same community resources that are used by and available to other citizens;
- (B) living in homes close to community resources, with regular contact with citizens without disabilities in their communities;
- (C) the full and active participation by individuals with developmental disabilities in the same community activities and types of employment as citizens without disabilities, and utilization of the same community resources as citizens without disabilities, living, learning, working, and enjoying life in regular contact with citizens without disabilities; and
- (D) having friendships and relationships with individuals and families of their own choosing.

with disabilities.” A federal district court has declared that “in enacting the Americans with Disabilities Act of 1990, Congress affirmed that section 504 prohibits unnecessary segregation and requires reasonable accommodations to provide opportunities for integration.” In 1992, Congress amended the Rehabilitation Act to expressly endorse the full participation, inclusion and integration approach.

Regulations under both section 504 and the ADA have consistently endorsed the integrative approach. The original regulations of HEW under section 504 of the Rehabilitation Act prohibited the provision of “different or separate” aids, benefits or services, and provided that such aids, benefits and services were to be provided “in the most integrated setting appropriate to the person’s needs.” Covered employers were directed not to “segregate . . . applicants or employees in any way that adversely affects their opportunities or status” because of disability. These provisions of the section 504 regulations were adopted and elaborated on in the statutory language of the ADA and the regulations issued to implement it.

B. The Problem—Social Differentiation

Opposing the societal goals of integration and full participation are the problems of widespread prejudice and discrimination against people with disabilities. Discrimination on the basis of disa-


562. Id. § 84.11(a)(3).

563. See 42 U.S.C. § 12182(b)(1)(B) (1994) (“Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”); 28 C.F.R. § 36.203 (1997) (“A public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate.”).
In the first type of discrimination, people with disabilities are singled out and identified as having a characteristic that makes them significantly different from other people. Others may react with discomfort, patronization and pity, stereotyping, blame or other negative attitudes. As a result, individuals with disabilities find themselves shunned, excluded, overprotected, segregated and otherwise channeled away from equal participation with their fellow citizens in the mainstream of society. This type of discrimination is reminiscent of race, gender and religious discrimination in that it involves an overreaction by others to a particular characteristic of an individual, i.e., prejudice.

The second type of discrimination on the basis of disability results from ignoring the actual differences in mental and physical attributes and structuring services, facilities, programs and opportunities as if everyone were an "ideal user . . . in the prime of the life cycle and . . . [with] maximum physical and mental capabilities." This form of discrimination often stems, not so much from prejudice or antipathy, but from "simple thoughtlessness" and "oversight." This is an approach that the U.S. Civil Rights Commission has called "an out-of-sight, out-of-mind attitude" toward people with disabilities that "has led to their being overlooked in the planning

564. See Prudence M. Rains et al., The Labeling Approach to Deviance 88, 94 (Nicholas Hobbs ed., 1975). The authors wrote:

The distinction [between having a disability and not having a disability] is not "given," so to speak, by reality. Instead, salient and socially meaningful differences among persons (and acts) are a product of our ways of looking, our schemes for seeing and dealing with people. Thus, people are made different—that is, socially differentiated—by the process of being seen and treated as different in a system of social practices that crystallizes distinctions between deviant and conventional behavior and persons. For example, the legal definition of blindness is clear-cut, but it includes poorly sighted persons as well as persons who are totally impaired visually. The legal definition therefore serves to crystallize blindness as both a social status and an experience of self for those persons who might not otherwise have defined themselves as blind.

Id. at 94.

565. See Nettie Bartel & Samuel Guskin, A Handicap as a Social Phenomenon 75, 76 (William Cruickshank ed., 1971) ("It is an imputation of difference from others; more particularly, imputation of an undesirable difference.").


process and has resulted in the creation of barriers to their integration."\(^{568}\)

Such disregard for the existence and individual characteristics of people with disabilities, perhaps based on an assumption that there are "normal" people who can participate and people with physical and mental disabilities who cannot, ultimately operates as another mechanism by which such individuals are made unnecessarily different. Consider a group of people attending a conference who decide to go out together for lunch. The person who uses a wheelchair may be just "another member of the gang" until they arrive at the restaurant and find that the dining room is down a flight of stairs and there is no elevator. Suddenly, the person who uses a wheelchair is made very different from the others. Similarly, the members of a board of directors may operate as equals and colleagues, but the delivery of a key, last-minute report in written form, without a tape recorded or braille version, suddenly puts the member who is blind at a severe disadvantage and makes him or her very different from all the rest. Like the first form of discrimination, the second results in the individual with a disability being singled out as different and denied an opportunity to participate on equal terms with everyone else.

In analysis that roughly identifies these two different dynamics of discrimination, the United States Supreme Court recognized "well-catalogued instances of invidious discrimination against the handicapped" that exist alongside discrimination that is the product "of thoughtlessness and indifference—of benign neglect."\(^{569}\) The Court also quoted congressional declarations that discrimination against people with disabilities is one of America's "shameful oversights" that causes individuals with disabilities "to live among society 'shunted aside, hidden, and ignored'" and that such discrimination constitutes "glaring neglect" by our society.\(^{570}\)

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\(^{568}\) See S. REP. NO. 99-1297, at 56 (1974). The Civil Rights Commission also quotes from the Senate report accompanying the 1974 amendment to the Rehabilitation Act of 1973 (that added the three-prong definition of disability) as follows:

Until this Nation has the foresight to include in all of its planning the need to make all areas of society accessible and usable to individuals with handicaps, they will continue to be excluded and will have little or no opportunity to achieve their basic human right of full participation in life and society.


\(^{570}\) Id. at 295-96.
C. The Solutions

1. Recognizing the Spectrum of Abilities

The first prerequisite for addressing disability discrimination is to come to grips with the underlying reality of human abilities and disabilities. Though we are conditioned to think otherwise, human beings do not really exist in two sharply distinct groups, people with disabilities and those without disabilities. The "spectrum of abilities" concept seeks to describe how things really are and recognizes that some arbitrariness inheres in the determination that a certain degree of impairment of particular functions constitutes disability.

The spectrum of abilities concept received its most comprehensive articulation in and entered disability rights legal analysis through the U.S. Civil Rights Commission. In a chapter devoted to "Orienting Principles" in disability nondiscrimination law, the U.S. Civil Rights Commission included a section titled "The Spectrum of Physical and Mental Abilities." It noted that while our laws and the general public usually assume that people with disabilities are significantly impaired in ways that make them sharply distinguishable from nondisabled people, the underlying reality is not so easily categorized; instead of two separate and distinct classes, "there are spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional."

To illustrate this spectrum phenomenon, the U.S. Civil Rights Commission examined the faculty of sight:

The simplistic categorization of "blind" and "sighted," for example, actually covers infinite gradations and variations of the ability to see. Vision is not one-dimensional, but rather involves a number of component functions, such as seeing at a distance, distinguishing colors, focusing on nearby objects, seeing in bright light, seeing in shade or darkness, seeing to the side and so on. For each such visual function there is a range of abilities. For example, at one end of the visual acuity spectrum are the few people with unusually sharp eyesight—those who can read finer print than that on the bottom of a doctor's eye chart. At

571. See Robert L. Burgdorf Jr., The Legal Rights of Handicapped Persons: Cases, Materials, and Text 11 (1980) ("From the broad spectrum of human characteristics and capabilities certain traits have been singled out and called handicaps. The fine line between handicapped and normal has been arbitrarily drawn by the 'normal' majority.").
572. See Accommodating the Spectrum, supra note 18, at 87-89.
573. Id. at 87.
the other end are the tiny proportion with no vision whatsoever. The vast majority of people fall somewhere between these two extremes. A similar continuum occurs in other component functions of the ability to see.\textsuperscript{574}

The U.S. Civil Rights Commission noted examples of the range of ability in regard to other visual functions—differences in visual fields varying from tunnel vision to excellent peripheral vision, and variations in the way the eyes focus, including at one extreme, conditions such as amblyopia, so-called "lazy eye."\textsuperscript{575} It also observed that there are great variations in the parity or disparity of an individual's eyes, with some having almost equal vision in both eyes, others having clearly superior vision in one eye and inferior vision in the other eye and some having vision in only one eye.\textsuperscript{576}

A similar spectrum or continuum occurs with each other human function, whether it is intelligence, mental health and emotional stability, ability to walk, ability to perform manual functions, hearing or speech. Regarding so-called intelligence quotient (IQ) measurements, the Civil Rights Commission quoted an authority on psychological assessment:

One level of intelligence merges into the next, just as colors do when seen through a refracting prism. Levels of behavior that present certain patterns are called defective, still others dull-normal, and so on until the other end of the scale is reached, at which point they are labeled as "very superior" or "genius." In the general population this spread of intelligence follows what is usually referred to as a normal distribution curve.\textsuperscript{577}

In regard to mental health, the U.S. Civil Rights Commission noted that "mental health and emotional stability occur as a contin-

\textsuperscript{574} Id.
\textsuperscript{575} See id. at 87 n.2.
\textsuperscript{576} See id.
\textsuperscript{577} Id. at 88 n.3 (quoting KARL FISHLER, THE MENTALLY RETARDED CHILD AND HIS FAMILY 176 (Richard Koch & James C. Dobson eds., 1976)). The Civil Rights Commission added that even this picture of intelligence is too simplistic: [E]ven those with identical IQ scores differ widely in their ability to deal with various aspects of daily life.

Intelligence ability also varies with regard to different subject matters: Some people are better at mathematical concepts than literature, some do well at history but not science, and so on. Thus intelligence is a spectrum of relative degrees, not composed of distinct groups or susceptible to the drawing of sharp lines.

\textit{Id.}

uum, and people exhibit every imaginable degree of being in touch with reality and ability to cope with the demands of life.\textsuperscript{578} The United States Supreme Court has observed: "At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable."\textsuperscript{579} The U.S. Civil Rights Commission elaborated: "From this hazy standard of relative normality, the mental health spectrum continues through an overlapping range of conditions labeled personality disorders, psychosomatic reactions, neuroses, and psychoses. Within each of these categories of psychiatric labels, there are endless variations and degrees."\textsuperscript{580} The American Psychiatric Association (APA) has recognized that the boundaries between mental health and a mental disorder, and between various particular mental disorders, are blurry. In explaining its list of mental disorders, the APA has observed: "There is no assumption that each mental disorder is a discrete entity with sharp boundaries (discontinuity) between it and other mental disorders, or between it and no mental disorder."\textsuperscript{581}

Various other conditions considered disabilities, including epilepsy, cosmetic disfigurements and learning disabilities, though commonly thought of as distinct and homogenous conditions, actually consist of a wide range of conditions with infinite gradations and variations.\textsuperscript{582}

\textsuperscript{578} Id. at 88.
\textsuperscript{580} ACCOMMODATING THE SPECTRUM, supra note 18, at 88 n.4.
\textsuperscript{581} AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) xxii (4th ed. 1994).
\textsuperscript{582} See ACCOMMODATING THE SPECTRUM, supra note 18, at 88-89 (discussing range of conditions associated with disabilities). The U.S. Civil Rights Commission noted that epilepsy consists of a range of seizure disorders and explained:

A seizure is an abnormal electrical discharge by nerve cells in the brain. The effects of these discharges range from the dramatic to the relatively inconsequential, depending upon the number of cells involved, the area in which they are located, and the duration and frequency of the discharges. Seizures range from the petit mal, an almost unnoticeable loss of consciousness for a few seconds, to the grand mal, which may last 2 or 3 minutes or more and involve a sudden loss of consciousness, falling to the ground, temporary interruption of breathing, and general convulsive or shaking movements. There are all sorts of variations in the manner of onset, the parts of the body affected, the individual's awareness of the occurrence, the severity of the seizure, and its aftereffects. The effectiveness of medication also varies among individuals, eliminating seizures for some, reducing the frequency for others, and failing completely for some others. The end result is a wide range of seizure conditions.

\textit{Id.} at 88 n.5.
In one case involving the education rights of children with disabilities, the United States Supreme Court characterized the disabilities of children as a "spectrum" varying greatly at the extremes "with infinite variations in between."583 Such differences in the scope and degree of various impairments and limitations are further complicated by wide variations in the applicability and efficacy of equipment, devices and techniques for dealing with such limitations. "Wheelchairs, braces, walkers, crutches, prosthetic devices, canes, hearing aids, eyeglasses, and other devices may enhance the abilities of different persons to different degrees."584 Techniques, such as signing, speech reading and braille may be easy to master and very beneficial for one individual, moderately helpful for a second person and nearly impossible or frustrating for a third individual.

The result of such complexities and nuances is that for each human function, some individuals excel, some perform minimally or not at all and others perform at all levels and gradations in between.585 Regarding this spectrum notion of human abilities, the U.S. Civil Rights Commission noted: "This simple concept's relevance to discrimination lies in the frequency with which it is ignored. Instead of discerning the range of individual abilities, society categorizes people as either blind or sighted, either epileptic or not epileptic, either handicapped or normal."586

2. Flexibility in Structuring Tasks and Programs

The inaptness of sharp distinctions based upon degrees of impairment of mental and physical abilities is underscored by recognition of the important role that context plays in conceptions of disability and "normality." A person may perform some mental or physical function in a way that falls short of most other people, but the limitations imposed upon that individual frequently result as much from the social context as from the impaired function itself.587 This idea of relativity of impairments was perhaps described most explicitly in the decision of a federal district court:

584. ACCOMMODATING THE SPECTRUM, supra note 18, at 89.
585. See id.
586. Id.
587. See id. at 89, 90 ("Concepts of normality and abnormality and of ability and disability have no real meaning unless they are considered in the context of the nature and purpose of a particular task or activity.").
Human talent takes many forms, and within each talent is a continuum of achievement. While one individual might be on the high end of the scale of achievement in one area, that same individual might rank very low in another area. In sum, the identification of various gradations of handicap is not an easy task, especially if such is attempted in a vacuum. Assessing the capability of various individuals to perform without knowledge of the particular task under consideration and its various requirements, or without an individualized determination of their strengths and weaknesses would appear to be impossible.588

Under this approach, an accurate assessment of a person’s suitability for a particular job slot must entail an individualized appraisal of that person’s strengths and weaknesses in the particular tasks the job entails. To the notion that disabilities are relative in light of the context, the U.S. Civil Rights Commission’s report suggested a refinement—the concept of flexibility in the structuring of tasks and programs:

It is often incorrectly assumed that there is only one way of doing something—the customary way that “normal” people do it. But programs, activities, and facilities may actually be organized and structured in a variety of ways. The assignment of tasks and the methods of performing them can be changed in response to the abilities and characteristics of the person involved.

Although it is sometimes difficult to see alternatives when “things have always been done that way,” the tasks that comprise most jobs are often easily changed.589


589. ACCOMODATING THE SPECTRUM, supra note 18, at 90. The Civil Rights Commission provided a concrete illustration of this inherent flexibility in structuring tasks:

A secretarial position, for example, frequently requires filing, answering the telephone, taking dictation, and ordering supplies. But no factor inherent in the position of secretary demands that all the secretaries in the same office be able to do the same things. In an office with several secretaries, these tasks might be assigned in various ways to achieve the same results despite different functional limitations. For example, a person with no hearing might perform typing, filing and ordering supplies (and perhaps take dictation by lipreading) but not answer telephones.

In addition, there are several different ways of performing each secretarial task. Dictation, for example may be taken with a tape recorder instead of shorthand; letters can be typed on a word processor that vocalizes letters or words that appear on the screen instead of a standard type-
In addition to the spectrum of human abilities, these ideas—of the role of context in determining impairment, of the need for individualized assessment in relation to particular tasks and of inherent flexibility in the structuring of programs, jobs and other opportunities—are key components for an understanding analysis of disability nondiscrimination law.

3. **Appropriate Consideration of Disabilities**

a. **Flawed Options**

The foregoing suggests that simplistic solutions to the problem of disability discrimination are not the answer. A traditional goal of laws prohibiting other kinds of discrimination has been to achieve a situation in which everyone is treated exactly the same way—what the U.S. Civil Rights Commission has called “neutrality toward class characteristics.” The elimination of discrimination based on race has at times been articulated as “color blindness.” While debates have raged as to whether this is a present operational principle or only a long-term goal, “color blindness” is a desirable ultimate objective.

Identical treatment of people with and without disabilities, however, cannot address many of the dynamics that cause this type of discrimination. To say that everyone is treated equally is no answer to the obstacle posed by a flight of stairs to many people with disabilities. Because people’s abilities in relation to particular functions and tasks vary widely, inadequate consideration of such

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writer. In each case, one functional ability substitutes for another that may be impaired or missing.

*Id.*

590. *Id.* (“With regard to race, sex, and national origin, anti-discrimination laws aim to eliminate consideration of race, sex, and national origin from decisions regarding rights, benefits, and services.”).

591. See, *e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (“At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that ‘[o]ur Constitution is color blind, and neither knows nor tolerates classes among citizens.’” (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)) *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 327 (1978) (Brennan, J., concurring in part and dissenting in part) (“[C]laims that the law must be ‘color-blind’ or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality.”).

592. See 118 CONG. REC. 11363 (1972). In a floor statement made in 1972, Congressman Vanik observed that “Greyhound has an official policy that states if an individual cannot walk onto the bus on his own power he cannot ride the bus.” *Id.* Likewise, to say that everyone is treated equally is of no avail to a person who is deaf and is staying in a hotel where guests are being warned of fire by alarm bells. Treating everyone alike is hardly a helpful justification when an employer insists
differences leads to numerous examples of denial of equal opportunities. In fact, the Supreme Court of Washington has articulated that “[i]dentical treatment may be a source of discrimination.” 593 An identical treatment approach in regard to disabilities gives “the form, but not the substance, of equal opportunity.” 594

Because equal treatment may be a form of discrimination, the U.S. Civil Rights Commission concluded that discrimination on the basis of disability and its remedies “differ in important ways from other types of discrimination and their remedies.” 595 The Civil Rights Commission quoted with approval the conclusion of one federal court which stated that attempting to fit the problem of disability discrimination into the remedial scheme devised for race discrimination is “akin to fitting a square peg into a round hole.” 596 Discounting differences in physical and mental abilities and treating all people as if they come out of the same mold does not permit the planning for differences and individualized appraisal of, and adjustments to, physical and mental impairments that are essential to avoiding or eliminating discrimination on the basis of disability.

At the other extreme, singling out people with disabilities as a distinctive group needing special treatment is equally unworkable and perhaps even more injurious. The U.S. Civil Rights Commission has charged that the delineation of a societal grouping of “disabled" people is a “distortion of reality [that] breaks an infinite spectrum of human functions into two distinct categories,” 597 and “fosters the erroneous idea that all people who differ significantly from the norm in regard to any functional ability are somehow alike and should be treated similarly to each other and differently from the rest of society.” 598 The classification and labeling of people with disabilities as a distinctive status group in society is not merely a cause of discrimination, it is the “wellspring” and the “essence” of discrimination on the basis of disability. 599

The perception that people with disabilities are distinctively different and “special” is closely associated with attitudes of patronization and pity that most individuals with disabilities decry.

on handwritten reports and one worker's multiple sclerosis makes it impossible for him or her to write by hand.

594. ACCOMMODATING THE SPECTRUM, supra note 18, at 99.
595. Id. at 149.
596. Id.
597. Id.
598. Id. at 96.
599. See id. at 94, 97.
One commentator has labeled this type of oversolicitousness as "benevolent paternalism."600 Another authority observed that, at their root, such attitudes are based on "a belief that such poor, blighted creatures as these must be protected from the world, instead of helped to become part of it."601

b. The Right Route

In lieu of the extremes of overreaction and identical treatment, a constructive approach neither exaggerates people's physical and mental differences nor ignores their actual functional limitations.602 Such an approach must accept that disability is a natural part of the human condition resulting from the spectrum of human abilities603 and will touch most of us at some time in our lives.604 The goal is not to fixate on, overreact to, or engage in stereotypes about such differences, but to take them into account in the planning and dispensing of programs, services and facilities, and in allowing for reasonable accommodation for individual abilities and impairments that will permit equal participation. Such an approach would seek to eliminate unnecessary differentiation, but also would consider individual differences relevant to the integration of people with various levels of ability and impairment into job, consumer, recreational and other societal opportunities. This twofaceted objective is the goal of nondiscrimination laws such as the ADA and Rehabilitation Act. Accomplishing that end demands that nondiscrimination standards focus principally on the practices and facilities of the employer, business or provider and only secondarily, if at all, on the characteristics of the individual seeking protection from discrimination. The ultimate goal is to provide equal opportunities for all Americans regardless of disability, not to identify a particular group of individuals who are entitled to some kind of special treatment.

600. Kent Hull, supra note 567, at 21; see Accommodating the Spectrum, supra note 18, at 24.
602. See Accommodating the Spectrum, supra note 18, at 144.
604. See, e.g., National Council on Disability, Achieving Independence: The Challenge for the 21st Century 4 (1996) ("Most Americans will experience disability at some point during their lives, either themselves or within their families. Disability is not the experience of a minority of Americans. Rather, like aging, it is an experience that will touch every American family.").
c. The Use of the “Individuals with Disabilities” Classification in Nondiscrimination Laws

Laws that prohibit discrimination based on disability and require integration incorporate the nondifferentiation and non-special-treatment approaches. The question arises, then, as to what terminology, such as “individuals with disabilities,” means in the language of such laws. If all individuals have different combinations of strengths and impairments that fall somewhere on the “spectrum of abilities” for the particular function at issue, and if no group of such individuals should be singled out as significantly different from the remainder, then what do laws such as the ADA mean when they prohibit discrimination against an “individual with a disability?”

The U.S. Civil Rights Commission provided an explanation in a footnote in its report on disability discrimination:

The problems created by the handicapped-normal dichotomy paradoxically have required the use of the terms “handicap” and “handicapped person” in Federal and State legislation. Such terminology gives the appearance of accepting the handicapped-normal dichotomy. It may also create an impression that the distinctions between those labeled handicapped and others are legislatively authorized or mandated. Such appearances should not obscure the fact that Federal laws use these terms in remedial and rational ways to provide opportunities and services previously unavailable to many people. It is appropriate to speak of a class of handicapped people when certain individuals have been singled out, designated handicapped, and treated poorly as a result. To rectify this situation, legislative remedies have to focus on the disadvantaged class of handicapped persons.605

If the terms “disability” and “individuals with disabilities” are substituted for the outmoded terms “handicap,” “handicapped people” and comparable phrases, the above statement is as true now as when the U.S. Civil Rights Commission issued its report in 1983.

The recognition that “individuals with disabilities” is a classification created by societal mechanisms that have singled out some people and caused them to be treated differently from others because of real or perceived mental or physical impairments has

605. ACCOMMODATING THE SPECTRUM, supra note 18, at 96 n.22.
profound consequences. It explains the overriding importance of the third prong of the definition of disability. If one is regarded as having a substantial impairment by others, then one has a disability. Satisfaction of this prong focuses solely on whether a person has been singled out for different treatment, not upon whatever physical or mental characteristics the person possesses.

The term "individuals with disabilities" also underscores the critical difference between laws that provide services and benefits, on the one hand, and nondiscrimination laws, on the other. The benefit laws aim to give something to one group of people that is not made available to others. This necessitates a definite, circumscribed standard for determining who can get the services or benefits—an eligibility class. A nondiscrimination law, on the other hand, aims to provide a remedy for a much less confined class—anyone who has been subjected to discrimination.

Congress faced a challenge in 1974 when it tried to fashion a single statutory definition to describe the protection afforded against discrimination under section 504 and the nondiscrimination components of sections 501 and 503 of the Rehabilitation Act and, simultaneously, govern eligibility for "affirmative action" under the latter two statutes. Though affirmative action initiatives are designed to address the effects of previous exclusion and discrimination, such programs operate like a special service in that they are predicated on a definite class of eligible participants. For example, covered employers are not free to "count" anyone whom they choose, but only those meeting the statutory and program criteria. The restrictive language of the first prong of the definition of disability responds to this need for a definite eligibility class for affirmative action purposes, while the second and third prongs give the expansive breadth needed for the prohibition of discrimination. When properly understood, the term "individual with a disability" and the prohibition of discrimination against individuals "on the basis of disability" under the broad three-prong definition afford protection to any person who has been treated differently or unequally in relation to a real or perceived mental or physical impairment.

606. The definition was also designed for use in regard to architectural, transportation and communication barrier removal under section 502 of the Rehabilitation Act. See 29 U.S.C. § 792 (1994) (establishing Architectural and Transportation Barriers Compliance Board).
d. Is Reasonable Accommodation Special Treatment?

A possible response to much of the foregoing is that disability rights laws do, in fact, contemplate a special protected class entitled to something other persons are not—reasonable accommodation.607 Although court opinions and regulatory comments have done little to respond to this contention, and indeed may have added fuel to its fire, this observation reflects a misunderstanding of the purpose and dynamics of reasonable accommodation and why such an element was incorporated into the disability nondiscrimination analysis.608 Reasonable accommodation was not devised, and does not operate, as a special service program for individuals with disabilities. It has its roots in the concept of flexibility in the structuring of tasks and programs.609 It responds to forms of discrimination that are presumably unintended and habitual, but that nonetheless present very real obstacles to the participation of those whose physical and mental abilities fall below the expected norm. In its seminal report on the concept of reasonable accommodation, the Civil Rights Commission observed that disability discrimination “cannot be eliminated if programs, activities, and tasks are always structured in the ways people with ‘normal’ physical and mental abilities customarily undertake them.”610 Thus, adjustments or modifications of opportunities—reasonable accommodations—are necessary to permit people with disabilities to participate fully.611


608. See Pierce v. King, 918 F. Supp. 923, 940 (E.D.N.C. 1996) (“Although framed in terms of addressing discrimination, the Act’s remedial provisions demand not equal treatment, but special treatment tailored to the claimed disability.”); see also Doll v. Brown, 75 F.3d 1200, 1203 (7th Cir. 1996) (“[T]he Rehabilitation Act imposes on federal employers a positive duty of accommodation to any known physical or mental handicap of a qualified applicant or employee, as well as the usual negative duty of nondiscrimination.” (parenthetical omitted)); Hurley-Bardige v. Brown, 900 F. Supp. 567, 573 (D. Mass. 1995) (“[T]he Rehabilitation Act imposes greater duties on employers than other federal discrimination statutes,” including an “affirmative duty reasonably to accommodate persons with disabilities.”).

609. For a discussion of flexibility in structuring tasks and programs, see supra notes 587-89 and accompanying text.

610. ACCOMMODATING THE SPECTRUM, supra note 18, at 102.

611. See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(o)(1) (1997) (defining “reasonable accommodation” as “modifications or adjustments” that enable applicant to
The Supreme Court has recognized that reasonable accommodation "relates to the elimination of existing obstacles against [individuals with disabilities]."612

Such obstacles exist because, in fashioning their facilities and devising their practices, policies and procedures, public agencies, employers and businesses make assumptions about the characteristics of their workers, customers, clients and visitors. These assumptions are based upon a person with so-called "normal" physical and mental abilities—the "ideal user." Discriminatory obstacles and practices are, therefore, either literally built into the workplace or incorporated into the business's ways of doing things. The reasonable accommodation obligation merely requires the removal of the physical obstacle or disadvantaging practice for this particular customer, client, employee, applicant or visitor.613

The often ignored fact is that, in almost all circumstances, employers, businesses and government agencies put a great deal of money and energy into "accommodating" the users of their services, facilities and programs without denomingating it as such.614 Take a simple example of offices for employees. Before any worker occupies a particular office, many features have been installed to facilitate comfort and efficiency: electric lights were installed; the floor may have been carpeted; telephones have been installed; a desk and a chair were purchased; perhaps pictures are hung on the walls; a computer and other office equipment may be provided; pens, pencils and writing paper are purchased; bookshelves may be installed, and possibly stocked with a dictionary, reference works and other relevant books, journals and reports; there may be a table, file cabinets and other furniture in the room; in most places, heating and air conditioning are put in; and if the employer's re-

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613. See McWright v. Alexander, 982 F.2d 222, 227 (7th Cir. 1992) (identifying "the essence of reasonable accommodation" as "a change in the (supposedly neutral) standard operating procedure").

614. Interview with Susan Daniels, Assistant Commissioner for Disability, Social Security Administration, in Washington, D.C. (May 1995). The gist of this analysis of reasonable accommodation, fleshed out in the remainder of this Part, was suggested by Ms. Daniels during discussions with the author in May 1992, in Washington, D.C. Ms. Daniels reports that she has proffered and promoted this concept in various presentations dating as far back as 1980. Telephone Interview with Susan Daniels (Nov. 12, 1997).
sources permit and the employee is lucky, there may be a window with some kind of view.

External to the particular office, other accommodations are supplied: access to a restroom is provided and the toilet, sink and other fixtures are installed in that room; there may be a coffee maker and water cooler (and in some office suites even a refrigerator or a mini-kitchen); photocopy and facsimile machines are provided; possibly parking spaces or some other arrangements for parking are provided. In addition to office configuration and accessories, many policies, practices and procedures are based upon expectations of the usual needs of workers. The work week schedule, meal breaks, coffee breaks, vacation schedules, office parties and holidays are all arranged with an eye to the presumed needs and wishes of workers (to a greater or lesser degree depending upon the solicitousness or austerity of the particular employer).

Of course, the number and type of such furnishings, amenities and benefits vary greatly depending upon the type of business, available resources and employer attitudes. Some will not have all of the accommodations listed here, while others may be much more posh and generous, with exercise facilities, day-care services, expensive antique furniture, educational subsidies, paid leave and numerous other perks. But no matter how sparse or plush a workplace may be, almost all provide some type of facility, equipment and supplies to enable employees to perform their job duties. Most provide some types of benefits or services. Nearly all make at least some concession to human needs.

In making these accommodations for workers, employers generally engage in assumptions about the characteristics and needs of employees, and most of the time the assumption is that workers will have ordinary mental and physical abilities. The choices of office furnishings, equipment, accessories, services, benefits, policies, procedures and prerequisites are made with the standard employee in mind. Even the heights and location of countertops, tables, light switches, electric outlets and controls are chosen in the context of the presumed ability of employees to use them.

For many people whose mental and physical abilities deviate from the norm, some of the various accommodations ordinarily provided for workers may be largely useless or even counterproductive. Thus, for a worker with quadriplegia, the desk chair may be useless, the desk itself may not accommodate the wheelchair, the restroom facility may not be accessible, the file cabinet and other furniture in the office may be of less use and perhaps impede move-
ment into and within the room, the fancy treadmill and the step machine may not be of much value, and if the carpeting is too plush, it may impede the individual’s ability to traverse the room. Similarly, the parking space, the pictures on the wall, the nice view, the photocopy machine and even the lights may be of considerably less importance to a worker with no vision.615 The standard computer, without adaptations, may be essentially useless to both of these workers. Likewise, without adaptation, the standard office telephone and intercom system, a loudspeaker system and audio fire alarm will be basically worthless for a worker who cannot hear.

The point is not that employers should somehow anticipate the actual physical or mental limitations of all future employees and have the work environment ready to meet their specific needs. It is, rather, that employers routinely devote considerable energy and money into providing accommodations for employees based upon assumptions that workers will have standard physical and mental characteristics. Reasonable accommodation for workers with disabilities, then, is simply the same type of accommodation that is provided generally, but it is tailored to the actual needs of the particular worker for whose benefit it is made. Moreover, available evidence indicates that the costs of accommodation for workers with disabilities are not significantly different from the expenses associated with the employment of other workers.616

The same observations apply to opportunities and services other than employment provided by government agencies and public accommodations. Stores and shops, for example, make many accommodations for putative future customers and shoppers (usually designed to induce them to spend money). Electric lighting, signs and displays, price tags, service and check-out counters, shopping carts, parking lots, fitting rooms, the loudspeaker system that announces “Attention K-Mart shoppers,” piped-in music, shopping

615. This is not to suggest that a worker who is blind might not wish to have paintings, a good view and other features for the benefit of visitors, fellow workers or clients and to signify a level of success or status.

616. See, e.g., NATIONAL COUNCIL ON DISABILITY, VOICES OF FREEDOM: AMERICA SPEAKS OUT ON THE ADA 19-20 (1995) (citing PETER BLANCK, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT—TRANSCENDING COMPLIANCE: A CASE REPORT ON SEARS, ROEBUCK, AND CO. (1994) (reporting that average reasonable accommodation cost $121, 69% cost nothing, 28% had a cost less than $1000, and 3% exceeded $1000) and JOB ACCOMMODATION NETWORK, ACCOMMODATION BENEFIT/COST DATA 4 (1994) (stating that businesses making reasonable accommodations got $15.34 in benefit from each $1 spent)); EMPLOYING DISABLED AMERICANS, supra note 19, at 9 (noting that 75% of managers reported that average cost of hiring employee with disability is about same as cost of employing worker without disability).
bags and product packaging are all examples of accommodations provided to patrons in the hope of securing their business; each amenity is designed and executed with the expected characteristics of people who do not deviate from the physical and mental norm in mind. Likewise, restaurants and other eating establishments provide tables and chairs, lighting, menus, tableware, furnishings and decorations, blackboards posting daily specials, restrooms, sound systems, parking, carpeting and other accoutrements for the comfort and enjoyment of their customers.

Almost every type of business establishment provides accommodations for the benefit of its patrons, and many of these accommodations will not serve their intended purposes for individuals with particular physical and mental limitations unless they are modified. Thus, requiring reasonable modifications of facilities, policies, practices and procedures is certainly not asking anything extraordinary or beyond the bounds of that which is already being supplied to other customers.

Similarly, government facilities open to the public, though they are sometimes more spartan, take into account and respond to the expected physical and mental traits of the model user. At a minimum, they always have electric lighting, and most feature signs suggesting where to proceed. Government service offices often provide waiting areas with chairs; where forms need to be filled out there may be tables or counters; detailed written instruction sheets are common; most public buildings have restrooms; parking is frequently available; public meeting places have seating and may make use of microphones and speakers for the benefit of attendees; and many types of government facilities, such as museums, educational institutions, public monuments and parks, have numerous other facilities, furnishings and amenities. These are only a few examples of accommodations routinely provided for citizens by their government agencies, and many of these, unless modified or adjusted, will be ineffective for people whose mental and physical abilities differ from the norm.

Properly understood, then, reasonable accommodation is not a special service for individuals with disabilities. It is a method for eliminating discrimination that inheres in the planning and organization of societal opportunities based on expectations of certain physical and mental characteristics. It is a necessary device for achieving real equal opportunity, not deviating from it.
4. People with Disabilities as Regular Joes and Janes

Over thirty years ago, Jacobus tenBroek characterized people with disabilities as "normal and ordinary people caught at a physical and social disadvantage." In his remark, Professor tenBroek captured a truth that is both the guiding star and essential foundation of all of the "orienting principles" that have been presented previously in this section—that individuals with disabilities are just people, not essentially different from other people. Though this proposition is relatively simple to state, its acceptance is the single most universal aspiration of most individuals with disabilities, a central tenet of the Disability Rights Movement and a sine qua non of real equality for people with disabilities.

This helps to explain why terminology in regard to disabilities has been a sensitive issue. People with disabilities have come to recognize that processes by which they are assigned labels have reinforced the perception that they are substantially different from others. In response, they have strongly insisted that "we are 'people first,'" and have demanded that their common humanity be acknowledged rather than their differences magnified. It also explains why many individuals with disabilities resist attempts to characterize them as "special," or their daily accomplishments as "inspirational" or "courageous." At best, such characterizations


618. One research study found that respondents with disabilities who were asked to identify the objectives that should be pursued in attempting to engender "the most positive attitudes toward persons with disabilities" identified "dispensing with the special category of disability entirely" and "promoting attitudes that defend the civil and social rights of disabled persons." Elaine Makas, Positive Attitudes Toward Disabled People: Disabled and Nondisabled Persons' Perspectives, 44 J. Soc. Issues 49, 58 (1988). For respondents without disabilities, the author of the study characterized the responses as "reflect[ing] a desire to be nice, helpful, and ultimately place the disabled person in a needy situation." Id.

619. For a discussion of terminology, see supra note 1.

620. See Joseph P. Shapiro, No Pity: People with Disabilities Forging a New Civil Rights Movement 184 (1993). "People First" is the name of a self-advocacy organization of individuals with disabilities. See id. One of the tenets of People First is that in referring to people with disabilities, the differentiating characteristic—the disability—should be affixed as a prepositional phrase after the noun that denotes a common human identity. See id. For example, "person with a disability" is preferred, not "disabled person" or "the disabled." Id.

621. A dramatic illustration of the resistance of people with disabilities to having their accomplishments labeled "courageous" or "inspirational" occurred at the 1997 Academy Awards ceremony, when Jessica Yu, the recipient of an Oscar for "Breathing Lessons," a documentary film about Mark O'Brien, a man with quadriplegia, noted in receiving the award that the subject of the film did not like such characterizations and thanked him by declaring: "Mark, it was not your bravery but your humanity that earned this award." See also Shapiro, supra note 620, at
mark the individual as extraordinary and different from the rest of
the population and as one whose accomplishments and success are
a surprise. At worst, they suggest that the speaker really means: "Be-
ing who you are is so bad that I could not face it; I would just give
up," "Your limitations are so severe that I don't see how you accom-
plish anything," or even "I would rather be dead than to live with
your impairments." People with disabilities do not view going
about the tasks and trials involved in their ordinary activities and
trying to achieve accomplishments and success as something atypical
and heroic.622 They would prefer to be seen for what they are,
as ordinary individuals pursuing the same types of goals—love, suc-
cess, sexual fulfillment, contributing to society, material comforts—
as other folks.

The "integration" that is required under the ADA and sections
501, 503 and 504623 and the "full participation" that is the ultimate
objective of federal laws relating to disabilities dictate that individu-
als with disabilities not be unnecessarily differentiated from the rest
of society. To achieve this end, analysis under these laws should not
focus on differentiating characteristics of the individual alleging
discrimination, but instead, on the practices and operations of cov-
ered entities to determine whether they are in fact discriminatory
when examined in light of latent flexibility in structuring and modi-
ying tasks, programs, facilities and opportunities. Legal standards
imposed under these laws should serve to eliminate practices, poli-

622. See Leonard Kriegl, Claiming the Self: The Cripple as American Male, in Dis-
abled People as Second Class Citizens 52-63 (Myron G. Eisenberg et al. eds.,
1982) (discussing that some individuals with disabilities take healthy pride (or
sometimes even arrogant pride) in their accomplishments and in surmounting ob-
stacles and disincentives that society has placed in their paths). Professor Kriegl
has written passionately about the pride, deflations, longings and arrogance that
have been part of his struggle to wrest an authentic self in the face of the roles and
expectations that others have tried to foist upon him as a man with a disability.
Kriegl, however, views this struggle as something people with disabilities have in
common with the rest of humanity—"the very essence of what we somewhat glibly
refer to as The Human Condition"—not as a peculiar or distinguishing feature of
a significantly different minority. Id. at 58.

623. For a discussion of integration, the ADA and sections 501, 503 and 504,
see supra notes 547-63 and accompanying text.
cies, barriers and other mechanisms that discriminate on the basis of disability, not to eliminate as many people as possible from the protection provided in these laws. In short, these laws seek to promote real equality, not to protect a special group.

VI. THE CONSEQUENCES OF THE WRONG COURSE

From the discussion of cases dealing with the scope of protection afforded under federal disability nondiscrimination laws, it is possible to deduce that some courts have gone out of their way to dismiss cases raising claims of discrimination under these laws at the summary judgment stage. They have done so even though the cases they were deciding are the types of cases in which summary judgment is particularly disfavored.624 Regarding the judicial estoppel rulings, one commentator has suggested that most courts “have evidenced substantial hostility” toward plaintiffs in such cases.625

Whatever motivations actually foster these restrictive interpretations of the protection afforded by the statutes,626 many of the courts making such rulings have suggested majesticon rationale for their positions. Thus, in Forrisi, the progenitor of the one-job-is-not-enough rulings, the court postulated that “[t]he Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about how their handicaps are insurmountable.”627 The court added: “It would be debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was

624. See, e.g., DeLuca v. Winer Indus., Inc., 53 F.3d 793, 797 (7th Cir. 1995) (finding in ADA case that summary judgment standard “is applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues.”); Crawford v. Runyon, 37 F.3d 1388, 1341 (8th Cir. 1994) (reversing summary judgment for defendant in section 501 and 504 case because “summary judgment should seldom be used in employment discrimination cases”), aff’d, 79 F.3d 743 (8th Cir. 1996); Fitzgerald v. Allegheny Corp., 904 F. Supp. 223, 227 (S.D.N.Y. 1995) (“Summary judgment in employment discrimination cases must be approached with great caution . . . .”).


626. The unworkability of simply transferring Title VI and Title VII analysis to discrimination based on disability, and a lack of desire to undertake the challenge of mastering the principles and nuances of disability nondiscrimination law may help to explain why many courts have been reluctant to take on such cases. As the numbers of ADA cases have grown rapidly, overcrowded dockets may offer another partial explanation. Offering the theoretical justifications discussed above, many courts appear to have jumped at the chance to clear such cases from their dockets.

widely shared." This high-sounding rationale was parroted by some of the courts that adopted the Forrisi analysis.

The notion of protection for only the "truly disabled" has been reiterated in the context of excluding temporary disabilities from statutory protection. One federal district court announced that its ruling was in furtherance of "the paramount interest of Congress in enacting the ADA [that] was to protect the truly disabled." Similarly, in McDonald v. Pennsylvania Department of Welfare, the Third Circuit dismissed the suit of an employee discharged during a temporary absence of seven weeks for abdominal surgery. The court cloaked its ruling in lofty purposes:

To apply the Rehabilitation and [Americans with] Disabilities Acts to circumstances such as those presented here would be a massive expansion of the legislation and far beyond what Congress intended. In the absence of statutory language, or even legislative history, indicating that the Acts are to cover an impairment of such limited dura-

628. Id.
629. See Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (quoting Forrisi rationale and holding that appellant's alleged disability could be described as commonplace and did not rise to level of disability); Venclauskas v. Connecticut Dep't of Pub. Safety, 921 F. Supp. 78, 81 (D. Conn. 1995) (quoting Forrisi rationale and holding that plaintiff's visual impairment, 20/80 and 20/120, was not unusually severe or rare and does not limit plaintiff's ability to work); Everette v. Runyon, 911 F. Supp. 180, 184 (E.D.N.C. 1995) (quoting Forrisi rationale and holding that Rehabilitation Act cannot shield employees whose disabilities render them unable to perform their jobs); Williams v. Avnet, Inc., 910 F. Supp. 1124, 1131-32 (E.D.N.C. 1995) (quoting Forrisi rationale and holding that Fourth Circuit imposed "a strong variant" of substantial impairment test in Forrisi), aff'd sub nom. Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346 (4th Cir. 1996), and cert. denied, 117 S. Ct. 1844 (1997); Elstner v. Southwestern Bell Tel. Co., 699 F. Supp. 1328, 1342-43 (S.D. Tex. 1987) (quoting Forrisi rationale and holding that plaintiff's physical impairment did not substantially limit plaintiff's major life activities), aff'd, 863 F.2d 881 (5th Cir. 1988); see also Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1460 (7th Cir. 1995) (stating that ADA and Rehabilitation Act seek "to ensure that the truly disabled will not face discrimination").
631. 62 F.3d 92 (3d Cir. 1995).
632. See id. at 97 (affirming district court's dismissal of case). The plaintiff was hired as a charge nurse on September 8, 1992 by the defendant, Pennsylvania Department of Public Welfare. See id. at 93-94. The plaintiff underwent surgery on December 31, 1992, after becoming disabled with severe abdominal pain. See id. On January 14, 1993, plaintiff requested that she be placed on unpaid sick leave until February 14, 1993, at which point she would be able to return to work. See id. The defendant denied the request because she was still a probationary employee and, therefore, not eligible for extended sick leave. See id. The court held that the plaintiff did not qualify for relief under the ADA or Rehabilitation Act because her inability to work was not permanent. See id. at 96.
tion, and not within the general concept of handicap, we cannot conclude that plaintiff was entitled to the benefits of the legislation.633

Similarly, the courts that have applied judicial estoppel to prevent recipients of disability benefits from pursuing ADA claims have asserted that they were doing so to preserve the integrity of the judicial process634 to prevent the legal system "from being manipulated by 'chameleonic litigants,'"635 to avoid inconsistent results636 and to keep plaintiffs from "speaking out of both sides of [their] mouths."637 Some courts have invoked the lack of any legislative history indicating an intent "to provide disability benefits to persons capable of obtaining gainful employment" and have ruled that it is the province of the legislatures rather than the courts to authorize such a "double recovery."638 The courts that have precluded former employees from filing ADA and Rehabilitation Act claims to challenge alleged discrimination in regard to benefits have professed to being respecting and protecting the statutory language.639

633. Id.
636. See Bennett, 1995 WL 819035, at *2 (discussing purposes of doctrine of judicial estoppel).
638. McNemar, 1995 WL 390051, at *4; see Bennett, 1995 WL 819035, at *3 (using similar reason of similar double recovery rationale as in McNemar to deny ADA claim).

The court in McNemar applied the doctrine of judicial estoppel to the plaintiff's ADA claim. See McNemar, 1995 WL 390051, at *4. The court stated that there is no indication that Congress intended to provide disability benefits to persons capable of obtaining gainful employment, and that it is the province of the legislature to authorize such a "double recovery." Id.
639. See Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 187 (6th Cir. 1996) (stating that court should not rewrite statute in way that conflicts with "fairly clear language"); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1045 (7th Cir. 1996) (concluding that plaintiff did not suffer discrimination cognizable under Title I of ADA based on statutory language of applicable provisions); Gonzales v. Garner Food Serv., Inc., 89 F.3d 1523, 1526 (11th Cir. 1996) (holding plaintiff was not "qualified individual with disability" within meaning of ADA based on review of statutory language), cert. denied, 117 S. Ct. 1822 (1997).
The Sixth Circuit, for example, admitted that the actual legislative intent might have been to let such claims proceed, but concluded that “[w]e should not try to rewrite the statute in a way that conflicts with what appears to be fairly clear language.”

Despite the various declarations of magnanimous purposes in these lines of decisions, however, they have had consequences that have been anything but benevolent. Consistent with the religious adage which tells us that “[b]y their fruits ye shall know them,” this Part will discuss the actual effects these restrictive approaches to the protection afforded under the ADA and Rehabilitation Act have produced.

A. Unjust Outcomes, Illogic and Convoluted Reasoning

The “exalted” purposes of the narrow interpretations of statutory protection are belied by the concrete results in litigation in which these interpretations have been applied. The results in many of these decisions are manifestly inequitable and, because the constriction of the protection against discrimination is at odds with the underlying aims of the ADA and Rehabilitation Act, often illogical. Justice Oliver Wendell Holmes counseled that “[t]he life of the law has not been logic.” He did not say that the law’s life is illogic, and yet illogic is at the core of many of the rulings in this area. Reaching such results has precipitated some exceedingly complicated, convoluted and counterintuitive legal reasoning.

1. Exclusion-from-Only-One-Job Cases

The restrictions on the term “disability,” imposed in the name of reserving the protection of the statute for “the truly disabled,” have caught many plaintiffs with serious, highly disabling conditions in their webs. The exclusion-from-one-job-is-not-enough formula has resulted in, or contributed to, the dismissal of ADA or section 504 of the Rehabilitation Act claims by plaintiffs with, among others, the following kinds of impairments: replacement of hips and shoulders (as a result of avascular necrosis), diabetes, and physical disorder rather than a physical disorder. See id.

640. Parker, 99 F.3d at 187. In Parker, a former employee brought action against former employer and its insurer under Employee Retirement Income Security Act (ERISA) and ADA. Id. at 183. Plaintiff’s action stemmed from a termination of long-term benefits after two years because her disability was deemed to be caused by a nervous and mental disorder rather than a physical disorder. See id.


642. Oliver Wendell Holmes, Jr., The Common Law I (1881).

643. See Ray v. Glidden Co., 85 F.3d 227, 228 (5th Cir. 1996) (affirming district court’s grant of summary judgment to employer because employee who un-
cancer;\textsuperscript{645} laryngectomy (removal of larynx);\textsuperscript{646} hemophilia;\textsuperscript{647} heart attack;\textsuperscript{648} absence of one eye;\textsuperscript{649} degenerative hip disease resulting in a limp;\textsuperscript{650} permanent severe limitations in use of the right arm and shoulder;\textsuperscript{651} various serious back injuries;\textsuperscript{652} depression
derwent surgeries to replace hips and shoulders failed to show he was substantially limited under ADA).

644. \textit{See} Schluter v. Industrial Coils, 928 F. Supp. 1437, 1440 (W.D. Wis. 1996) (concluding defendant is entitled to summary judgment because plaintiff with diabetes could not establish she was disabled under ADA); Gilday v. Mecosta County, 920 F. Supp. 792, 793 (W.D. Mich. 1996) (holding plaintiff’s diabetic condition did not substantially limit his major life activities and was not disability as defined in ADA); Deckert v. City of Ulysses, Kansas, No. 93-1295-PFK, 1995 WL 580074, at *9 (D. Kan. Sept. 6, 1995) (holding that termination of employee with diabetes did not violate ADA).

645. \textit{See} Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907, 915 (11th Cir. 1996) (holding that cancerous growth on shoulder was not disability under ADA); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 189 (5th Cir. 1996) (holding employee did not establish that breast cancer was “disability” within meaning of ADA); Demming v. Housing & Redevelopment Auth., 66 F.3d 950, 955 (8th Cir. 1995) (concluding that plaintiff failed to establish that thyroid cancer limited her major life activities); Andrews v. Jones Truck Lines, 741 F. Supp. 867, 869, 871-72 (D. Kan. 1990) (holding that cancerous tumor on knee was not physical handicap under state nondiscrimination statute, with analysis based on Rehabilitation Act).


651. \textit{See} Freund v. Lockheed Missiles & Space Co., 930 F. Supp. 613, 615-18 (S.D. Ga. 1996) (dismissing claim of plaintiff with serious limitations in shoulder involving numerous limitations including inability to push, to pull, to perform tasks above the shoulder level, to make repetitive motions or to lift anything weighing more than 10 pounds).

and paranoia;\textsuperscript{653} a six-inch scar on the face resulting in supervisors calling the employee "scarface;"\textsuperscript{654} "bilateral carpal tunnel syndrome;"\textsuperscript{655} asthma;\textsuperscript{656} asbestosis;\textsuperscript{657} HIV infection;\textsuperscript{658} traumatic brain injury resulting in vision limitations, memory deficiencies, problems with verbal fluency, problems abstracting and motor deficits;\textsuperscript{659} and stroke resulting in the loss of use of the left hand, arm and leg.\textsuperscript{660} The individuals who had these conditions hardly fit the \textit{Forrisi} image of someone "whose disability was minor and whose relative severity of impairment was widely shared."\textsuperscript{661} Yet, the claims of the plaintiffs who had these conditions were thrown out of court on the basis that the plaintiffs did not have a "disability" under the statutes. They never had the opportunity to litigate their contents that their employers had engaged in illegal discrimination against them.

A closer examination of some such decisions further illustrates the obvious injustice they have countenanced. For example, one such case is \textit{Redlich v. Albany Law School of Union University,}\textsuperscript{662} in

\begin{itemize}
\item[653.] See Palmer v. Cook County Soc. Serv. Dep’t, 905 F. Supp. 499, 506 (N.D. Ill. 1995) (holding that plaintiff did not establish that depression and paranoia were disabilities under ADA), aff’d, 117 F.3d 351 (7th Cir. 1997).
\item[654.] See Van Sickle v. Automatic Data Processing, Inc., 952 F. Supp. 1213, 1215 (E.D. Mich. 1997) (concluding that employee with six-inch scar on face was not limited in major life activity and, therefore, not disabled under ADA).
\item[655.] See Wooten v. Farmland Foods, 58 F.3d 382, 384 (8th Cir. 1995) (holding that employee with bilateral carpal tunnel syndrome was not qualified individual with disability under ADA).
\item[656.] See Heilweil v. Mount Sinai Hosp., 32 F.3d 718 (2d Cir. 1994) (holding that plaintiff with asthma was not handicapped under Rehabilitation Act because she was not limited in major life activity); Mobley v. Board of Regents, 924 F. Supp. 1179, 1186-87 (S.D. Ga. 1996) (concluding that plaintiff’s asthmatic condition did not substantially limit her major life activities).
\item[657.] See Robinson v. Global Marine Drilling Co., 101 F.3d 35, 36 (5th Cir. 1996) (concluding shortness of breath when walking up stairs is not sign of disability because not major life activity), cert. denied, 117 S. Ct. 1820 (1997). Asbestosis is “a progressive and often fatal condition of the lungs” that had reduced the \textit{Robinson} plaintiff’s lung capacity to 50%. \textit{See id.}
\item[658.] See Cortes v. McDonald’s Corp., 955 F. Supp. 531, 532 (E.D.N.C. 1996) (discussing plaintiff’s claim that he was terminated from his employment in violation of ADA because of HIV-positive status).
\item[659.] See Riblett v. Boeing Co., No. 94-1055-PFK, 1995 WL 580053, at *6 (D. Kan. Sept. 22, 1995) (holding that individual with lack of peripheral vision on one side and learning impairments is not substantially limited under ADA).
\item[660.] See Redlich v. Albany Law Sch. of Union Univ., 899 F. Supp. 100, 106-08 (N.D.N.Y. 1995) (deciding that plaintiff who suffered stroke that impaired use of left leg, arm and hand was not disabled within meaning of ADA because his condition did not substantially limit or affect his major life activity of teaching).
\item[661.] Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986).
\item[662.] 899 F. Supp. 100 (N.D.N.Y. 1995).
\end{itemize}
which the plaintiff, a tenured law professor, suffered a stroke.\textsuperscript{663} Although the stroke resulted in paralysis of his left hand, arm and leg, the plaintiff managed to teach his law school classes, to perform committee work and even to write some law review articles after a medical leave of absence for some months.\textsuperscript{664} This continued for ten years, when the plaintiff allegedly discovered that the law school had been secretly granting him smaller annual raises than those given to other comparable tenured faculty members.\textsuperscript{665} He alleged that the disparity occurred because of "a discriminatory bias against him as a disabled individual" and filed a section 504 action.\textsuperscript{666}

The court granted the defendant's motion for summary judgment, ruling that the professor neither had an impairment that substantially limited a major life activity nor was regarded as having such an impairment.\textsuperscript{667} The court opined that the plaintiff's impairment was not one that "substantially affected the major life activity of working, such that he was significantly restricted in his ability to perform the class of job in which he was engaged, that of law professor."\textsuperscript{668} As to the "regarded as" contention, the court relied on \textit{Forrisi} and similar rulings and indicated that the relevant issue was whether the employer "regards the employee as having a substantial limitation on his ability to work in general."\textsuperscript{669}

Perhaps the plaintiff was correct that he had been intentionally discriminated against because of bias against him based on his disability. Perhaps he was wrong, and he could not have successfully proven discrimination. Perhaps he could have produced additional evidence to prove the presence of bias and to rebut the defendant's alternative explanations for the salary differentials.\textsuperscript{670} In any case, he never got the chance because he was deemed not to have a disability and the defendant was granted summary judgment.\textsuperscript{671}

\textsuperscript{663} See \textit{id.} at 102.
\textsuperscript{664} See \textit{id.} at 106-07.
\textsuperscript{665} See \textit{id.} at 102.
\textsuperscript{666} See \textit{id.} at 102, 105.
\textsuperscript{667} See \textit{id.} at 106-08.
\textsuperscript{668} Id. at 107.
\textsuperscript{669} Id. In \textit{Redlich}, the employer was aware of the plaintiff's basic limitations but took no actions to accommodate any alleged perceived physical impairment. \textit{Id.} The court held that the employer did not "perceive" any limitation. \textit{See id.}
\textsuperscript{670} See \textit{id.} at 108 (noting that law school contended that salary differences were based on unbiased assessment and were related to substandard performance by plaintiff).
\textsuperscript{671} See \textit{id.} (granting defendant's motion for summary judgment as to claims brought pursuant to ADA and Rehabilitation Act).
The plaintiff in Wooten also did not get past the summary judgment stage even though the Eighth Circuit expressly found that the defendant employer had fired him because of his disability.\textsuperscript{672} Hubert Wooten was a ham boner who suffered work-related injuries to his shoulder that were diagnosed as "bilateral carpal tunnel syndrome," "generalized inflammation" and "tendinitis of the left hand and left shoulder."\textsuperscript{673} After a period of light duty work, Wooten and his supervisors met to discuss the work restrictions—no work in a cold environment and limited lifting—prescribed in a note from his doctor.\textsuperscript{674} According to the opinion of the Eighth Circuit, "[t]he supervisors then terminated Wooten, stating that the termination was due to his disability."\textsuperscript{675}

The court nonetheless ruled that Wooten did not have a disability within the meaning of the ADA.\textsuperscript{676} It recited the Forrisi-inspired formula that "[a]n impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one," and concluded that the defendant had not regarded Wooten as having a disability, because Wooten's impairments "only appeared to prevent him from performing a narrow range of meatpacking jobs."\textsuperscript{677} Wooten's employer thus said that he was terminated "due to his disability" and then turned around and successfully claimed in court papers that he did not have a disability. This puts in a different light the comments of various courts, discussed above, about not permitting litigants "to talk out of both sides of their mouths."\textsuperscript{678} Does this concern apply only to plaintiffs and not defendants?

\textit{Wooten} is representative of other cases in which plaintiffs have suffered work-related injuries that prevent them from performing some job duties, their employers have then discharged them or forced them out of their jobs by refusing to accommodate their conditions, and in court papers the employers take the position that the employees do not have a disability and prevail on summary

\begin{footnotes}
\footnote{672}{Wooten v. Farmland Foods, 58 F.3d 382, 384 (8th Cir. 1995).}
\footnote{673}{See id.}
\footnote{674}{Id.}
\footnote{675}{Id.}
\footnote{676}{See id. at 386.}
\footnote{677}{Id. (quoting Heilweil v. Mount Sinai Hospital, 32 F.3d 718 (2d Cir. 1994), \textit{cert. denied}, 115 S. Ct. 1095 (1995)).}
\footnote{678}{Id. For a discussion of cases in which courts apply judicial estoppel to prevent litigants from talking "out of both sides of their mouths," see \textit{supra} note 637 and accompanying text.}
\end{footnotes}
judgment.\textsuperscript{679} It is difficult to see how these decisions further any conceivable policy of the ADA and sections 501, 503 and 504, each of which seeks to eliminate discrimination against employees and to get employers to make accommodations.

Taking the one-job-is-not-enough approach to an extreme, a federal district court in North Carolina viewed the congruence of a substantial limitation in working and being qualified as "impossible." In \textit{Everette v. Runyon},\textsuperscript{680} the court, examining a situation in which the plaintiff claimed to have been discharged because of his impaired vision, declared:

Of course, it is impossible to demonstrate that one is both completely disabled from work, thus qualifying as a protected member of the Rehabilitation Act class, while at the same time fully capable of performing the work as well as anyone else. . . . For purposes of claiming job discrimination based on handicap, the protected group cannot include those completely unable to work by reason of their disability. Any language in the code of federal regulations that suggests otherwise is superfluous. The "major life activity" cited by handicapped or disabled plaintiffs as the basis for their claims of discrimination cannot be the very ability to work.\textsuperscript{681}

Applying the \textit{Forrisi} one-job-is-not-enough rationale, the court in \textit{Everette} concluded that the plaintiff was not a member of "the protected group."\textsuperscript{682} At the same time, the court ruled that plaintiff's vision limitation rendered him not "qualified."\textsuperscript{683} Simultaneously,


\textsuperscript{680} 911 F. Supp. 180 (E.D.N.C. 1995).

\textsuperscript{681} Id. at 183-84.

\textsuperscript{682} Id. at 184-85.

\textsuperscript{683} Id. at 185.
then, Everette's condition was ruled too insubstantial to amount to a disability and so substantial that it rendered him not qualified.

Another example of the illogic inherent in this line of cases is provided by *Heitweil v. Mount Sinai Hospital*, which involved a woman with asthma and bronchiectasis who alleged that her employer, the hospital, had refused to accommodate her condition and had demoted and discharged her because of it. Although the plaintiff desired the hospital to transfer her to a work area other than the unventilated blood bank that caused her to experience serious respiratory problems, because of the one-job-is-not-enough standard applied by the court, it was the hospital, not the plaintiff, that benefitted from evidence that the air in the blood bank was the source of her difficulties. The Second Circuit observed that "Mount Sinai proved . . . that it was the conditions of the blood bank that worsened her asthmatic symptoms, leaving no genuine issue of material fact as to what caused her respiratory problems at her place of employment." One might have thought that this statement would precipitate summary judgment for the plaintiff on the reasonable accommodation issue, but because of the *Forrisi* reasoning, the court in *Heitweil* ruled that the plaintiff was not disabled because she "was medically restricted from working in only one place in the hospital—the blood bank"—and affirmed summary judgment in favor of the defendant.

The Sixth Circuit has identified another aspect of illogic in *Forrisi* and its progeny. In *Taylor v. United States Postal Service*, the court noted the language in *Forrisi* declaring that permitting every unsuccessful applicant who was rejected because of a job requirement to be deemed as having a disability "would stand the Act on its head." In response, the Sixth Circuit declared:

However, a per se rule that never permitted an unsuccessful job applicant to prove he was perceived as being handi-

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685. *Id.* at 721. Bronchiectasis is a change in the lining of the lung that renders it more sensitive and susceptible to fluid infiltration and infection. *See id.*
686. *Id.* at 723.
687. *Id.* at 724.
688. 946 F.2d 1214 (6th Cir. 1991). In *Taylor*, the court found that the defendant's determination that the applicant with back and knee impairments was medically unqualified for positions as mail carrier and distribution clerk was sufficient to establish it had regarded the plaintiff as having a disability. *Id.* at 1218. The *Taylor* court also permitted the applicant "to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so-called job requirement due to physical impairment." *Id.*
689. *Id.* (quoting *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986)).
capped by pointing to the fact that he did not possess a so-called job requirement due to physical impairment would likewise stand the Act on its head. How else would a person who, for example, had a cosmetic disfigurement ever prove that he was handicapped under the Act except by pointing to the fact that an employer did not hire him for that reason.690

This example serves to demonstrate the fact that it is the employer’s conduct that it is at issue in a nondiscrimination case not the exact dimensions of the plaintiff’s condition.

The cases discussed here provide only a sampling of the untoward results engendered by the restrictive interpretation of impairments to the activity of working. One commentator has catalogued and explored some of the doctrinal and practical consequences of the one-job-is-not-enough analysis suggested in the EEOC regulations and imposed in the Rehabilitation Act decisions.691 He observed that such analysis and decisions contain the following deficiencies: (1) inadequate accounting for the employee’s training and expectations;692 (2) restricting the protection afforded to non-skilled employees;693 (3) failing to assume that all other similarly situated employers will apply the same exclusionary criteria;694 (4) rewarding employers for saying one thing and doing another;695 (5) imposing an unreasonable burden on plaintiffs;696 (6) rewarding the first-in-time discriminator;697 (7) rewarding big-city discriminators;698 and (8) ignoring the fact that the loss of one job can constitute a substantial limitation on an individual’s ability to work.699

2. Temporary Disability Rulings

One effect of the temporary disability cases is that the types of conditions that have been ruled not to be disabilities seem quite serious. Conditions that have been held not to be disabilities be-

690. Id. (citations omitted).
691. See Bales, supra note 18, at 203, 235-42.
692. See id. at 235.
693. See id. at 236.
694. See id. at 237.
695. See id. at 239.
696. See id.
697. See id. at 240.
698. See id. at 241.
699. See id.
cause of their temporary nature include: epilepsy;\textsuperscript{700} breast cancer, lumpectomy and radiation treatment;\textsuperscript{701} cancer of the shoulder, bone marrow tests and chemotherapy treatments;\textsuperscript{702} psychological reaction to having bladder cancer;\textsuperscript{703} “dysthymia,” a chronic depressive disorder characterized by intermittent bouts of depression;\textsuperscript{704} arthritis hampering the ability to walk;\textsuperscript{705} severe abdominal pain necessitating stomach surgery;\textsuperscript{706} painful back injury (“trapped nerve”);\textsuperscript{707} kidney obstruction, surgical treatment, periodic bladder infections, sharp pain and fever.\textsuperscript{708} These conditions seem a far cry from the “transitory illnesses” mentioned in Stevens, the case precedent relied upon by the EEOC in concocting its temporary-impairment exclusion.\textsuperscript{709} These conditions are also a far cry from the “simple infected finger” mentioned in the ADA congressional reports.\textsuperscript{710}

\textsuperscript{700} See Matczak v. Frankford Candy & Chocolate Co., 950 F. Supp. 693, 696 (E.D. Pa. 1997) (concluding that plaintiff with epilepsy did not have physical or mental impairment that substantially limited his life activities within meaning of ADA).

\textsuperscript{701} See Ellison v. Software Spectrum, Inc., 85 F.3d 187, 189-92 (5th Cir. 1996) (holding that plaintiff with breast cancer who underwent lumpectomy and radiation treatment was not “disabled” within meaning of ADA).

\textsuperscript{702} See Gordon v. E.L. Hamm & Assoc., Inc., 100 F.3d 907, 915 (11th Cir. 1996) (holding that plaintiff with cancerous growth on shoulder did not have disability under ADA because plaintiff was not substantially limited in major life activity).

\textsuperscript{703} See Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1353-54 (9th Cir. 1996) (stating that employee’s temporary psychological impairment, which was related to his cancer diagnosis was of insufficient duration to constitute disability under ADA).

\textsuperscript{704} Soileau v. Guilford of Me., Inc., 105 F.3d 12, 14-15 (1st Cir. 1997) (holding that plaintiff with dysthymia was not disabled under ADA because plaintiff did not suffer substantial impairment of major life activity).

\textsuperscript{705} See Hamm v. Runyon, 51 F.3d 721, 725-26 (7th Cir. 1995) (concluding that plaintiff’s arthritic condition was not substantial enough to render him disabled within meaning of Rehabilitation Act); Sutton v. New Mexico Dep’t of Children, Youth and Families, 922 F. Supp. 516, 517 (D.N.M. 1996) (finding that plaintiff’s arthritic condition was not substantial limitation and did not affect major life activity).

\textsuperscript{706} See McDonald v. Pennsylvania Dep’t of Pub. Welfare, 62 F.3d 92, 96 (3d Cir. 1995) (concluding that plaintiff suffering from severe abdominal pain was not disabled under ADA or Rehabilitation Act because her inability to work was of limited duration).

\textsuperscript{707} See Rakestraw v. Carpenter Co., 898 F. Supp. 386, 390 (N.D. Miss. 1995) (stating that ADA does not encompass “transitory injuries” such as plaintiff’s trapped nerve).

\textsuperscript{708} See Roush v. Weastec, Inc., 96 F.3d 840, 844 (6th Cir. 1996) (concluding that plaintiff’s kidney condition was not disability within ADA because it did not substantially limit major life activity within meaning of ADA).


The concept that conditions that can be characterized as "temporary" or that have not been proven to be long-term or permanent are not disabilities has produced many harsh and inequitable rulings. For example, in *Sutton v. New Mexico Department of Children, Youth and Families,* the plaintiff suffered from degenerative arthritis in her hip, which had deteriorated to the point that she could walk only by using a walker. She had surgery to address the condition and, while recuperating, was allegedly terminated by her employer because of her disability. The court granted the employer's motion to dismiss the plaintiff's ADA action on the ground that plaintiff had not made sufficient allegations that her condition was substantially limiting. In explaining this severe outcome, the court proclaimed that "the paramount interest of Congress in enacting the ADA was to protect the truly disabled." It would surely come as a big surprise to Congress that a person like the plaintiff in *Sutton* is not protected by the ADA.

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712. See id. at 517.
713. See id.
714. See id. at 518-19. The court stated: Paragraphs 10 through 13 of the complaint allege the existence of Plaintiff's condition, her use of medication, her use of a walker, the occurrence of surgery, her physical inability to work for four weeks, and her ability to work only four hours per day for some unspecified period thereafter. No inference of permanence or long-term impact, and thus of substantial limitation, can be drawn from these allegations.

*Id.*

715. See id. at 519.
716. It certainly engenders incredulity for persons, such as the author, who drafted the actual language of the ADA definition.

Another example of the harsh effects of the "temporary disability" interpretation occurred in *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997). In *Soileau*, the plaintiff had dysthymia, a chronic depressive disorder characterized by intermittent bouts of depression. *Id.* at 14. During a bout of depression caused by the condition, Soileau was allegedly terminated from his job because of his disability, immediately after he requested an accommodation. *See id.* at 14, 16. The defendant employer successfully moved for summary judgment on the plaintiff's ADA claim. *See id.* at 17. The First Circuit affirmed, ruling that while Soileau's doctor had concluded that his "underlying disorder (dysthymia) will be a life-long condition, [plaintiff] has failed to adduce any evidence that his impairment—the acute, episodic depression—will be long-term." *Id.* at 16. The court noted that the plaintiff's last previous bout of depression "required only a five week work absence." *Id.* at 16. The result in *Soileau* should be contrasted with the ruling of the Seventh Circuit in a case where the plaintiff sought a reasonable accommodation for pressure ulcers that she was prone to develop periodically as a result of her paralysis below the waist. *See Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 546 (7th Cir. 1995) (holding that employee prone to developing pressure ulcers as result of paralysis below waist did not suffer unlawful discrimination because employer made reasonable accommodations and only turned down requests for unreasonable accommodations). Although the Seventh Circuit accepted the dubious proposition that "[i]ntermittent, episodic impairments are not disabili-
Another example of the problematic and pernicious results of the exclusion of temporary conditions from the definition is provided by Rakestraw v. Carpenter Co.\textsuperscript{717} Rakestraw involved a truck driver who suffered a back injury while performing job duties.\textsuperscript{718} The court noted that "it is evident from the record that [plaintiff's] injury was painful and required frequent medical attention."\textsuperscript{719} This situation continued for nearly a year and ten months until the plaintiff was discharged because, he alleged, accommodating his condition by adjusting driver assignments to avoid his having to make deliveries involving heavy lifting was considered inconvenient by the company.\textsuperscript{720}

Although the EEOC has indicated that a broken leg that requires eleven months to heal is a disability,\textsuperscript{721} the Rakestraw court found a duration of twice that much insufficient.\textsuperscript{722} Sometime after he had been terminated, the plaintiff's doctors conducted additional tests and discovered a "trapped nerve."\textsuperscript{723} This diagnosis resulted in back surgery that corrected the problem and led to plaintiff's full recovery.\textsuperscript{724} The fact that the plaintiff had fully recovered by the time that the court considered the case convinced it that "the relatively short duration" of the plaintiff's injury rendered its limitations "insubstantial."\textsuperscript{725} Thus, the court held, a finding that the injury constitutes a disability would be contrary to the weight of relevant precedent.\textsuperscript{726}

\textsuperscript{717} See Rakestraw, 898 F. Supp. at 389. 
\textsuperscript{718} See id. 
\textsuperscript{719} Id. at 390. 
\textsuperscript{720} See id. at 389. The defendant alleged that the plaintiff was fired for lateness, a charge that he argued was "mere pretext." \textit{Id}. 
\textsuperscript{721} See EEOC Compl. Man., supra note 325, ¶ 6884 (stating that broken leg requiring 11 months to heal is disability because of abnormally long healing period). 
\textsuperscript{722} See Rakestraw, 898 F. Supp. at 389. 
\textsuperscript{723} See id. 
\textsuperscript{724} See id. 
\textsuperscript{725} See id. at 390. The court declared: "The evidence in this case demonstrates that surgery has corrected [plaintiff's] back injury, and the impairment no longer exists." \textit{Id}. 
\textsuperscript{726} See id. It added that the plaintiff's condition "was not a significant barrier to employment because the injury was not long-lasting." \textit{Id}.
The fact that the cause of the Rakestraw plaintiff’s incapacity was only discovered after he had been terminated underscores another flaw in the temporary disability exclusion rationale. Suppose that doctors had not conducted further tests until ten years after his termination, or that the underlying cause of the severe back pain had never been discovered. Presumably, his condition could not have been deemed “temporary” in those circumstances. And yet the conduct of the employer, and what the employer and the employee knew about the condition at the time of the discharge, would have been exactly the same. How can the legality of someone’s conduct at point A in time depend upon what occurs at some later point B in time? Does the outcome depend upon getting a court to decide the case before improvement in the condition occurs? If a court decides a nondiscrimination case in favor of the plaintiff, would the court have to reopen the proceedings if it turned out that the plaintiff’s condition improved or was cured at some later time? Obviously such questions are absurd and the only relevant question is whether the plaintiff was discriminated against on the basis of disability at the time the alleged discrimination occurred.

A similar problem confronts plaintiffs who have a condition of indefinite duration, are discharged because of the condition and try to prove, under the third prong of the definition of disability that the employer regarded them as having a substantial impairment. If the court follows the Forrisi line of analysis, such plaintiffs cannot rely simply on the fact that the employer terminated them. They are then reduced either to trying to prove by medical evidence and other experts that their conditions are long-term, when in fact they and their doctors may not know how long the conditions will continue and they may hope that they will soon improve, or to prove that their employers regarded their conditions as permanent. The latter requires a terminated employee to prove some-

federal cause of action.” Id. at 390-91. It indicated that it was bound by constraints imposed in the ADA:

[A]lthough a precise delineation of the term “impairment” is not set forth within the ADA’s provisions, the court does not believe that it encompasses transitory injuries such as that suffered by [the plaintiff]. The injury’s non-permanent nature, and the fact that it was perceived as such, prevent a finding that it rose to the required status of a disability.

Id. The court exhibits no awareness that the exclusion of “temporary” conditions is nowhere suggested in the statutory language or legislative history of the ADA, and makes no acknowledgment that it has taken the concepts of “temporary” and “transitory” to an extreme far beyond that comprehended in any regulatory language or interpretation by any other court.
thing within the mind of the employer, and "reward[s] employers for saying one thing and doing another." 727

A further effect of the temporary disability line of cases is exemplified by a federal district court which put a bizarre twist on the temporary disability issue. 728 The court ruled that a trucking company employee who suffered a serious back injury was not eligible for accommodation in a modified work program for injured employees because the program was limited to employees whose disabilities were temporary, and the employer regarded this employee's condition as permanent. 729 Such a ruling, coupled with an exclusion of temporary conditions from the definition of disability, would mean that an employee with a disabling condition would not be entitled to a reasonable accommodation if the condition is temporary because such conditions are not protected. If the condition is permanent, however, the employee is not eligible because the accommodation is only available to those having a temporary condition. 730 The analysis in these cases distorts both the meaning of disability in the context of an impaired ability to work and the role of reasonable accommodation.

3. *Estoppel from Proving that the Plaintiff Is Qualified*

Many inequities arise from decisions in which plaintiffs, who have represented that they are disabled while applying for disability benefits, are judicially estopped or otherwise precluded from contending that they are "qualified" in the context of the ADA or Rehabilitation Act. After an extensive review of case law, one

727. Bales, supra note 18, at 239.

728. See Collins v. Yellow Freight Sys., Inc., 942 F. Supp. 449, 452-53 (W.D. Mo. 1996) (holding that employee with back injury was not "qualified individual" under the ADA because he was not physically capable of returning to his former job that required much reaching and bending).

729. See id. at 452-53.

730. Similarly, in another case, a choice between the frying pan and the fire was imposed by the court. See Johnson v. Foulds, Inc., No. 95 C 5062, 1996 WL 41482, at *5 (N.D. Ill. Jan. 30, 1996) (dismissing plaintiff's discrimination claim for failure to allege that she was "qualified" due to her request for an extended leave of absence, a reasonable accommodation). In *Johnson*, while discussing the plaintiff's request for medical leave as a reasonable accommodation, the court declared: "[T]he implication of the plaintiff's request for medical leave as a result of her mental depression is that once she has recovered, she will be able to return to work. If that is so, then her impairment must be considered to be a temporary condition that does not meet the requirements of a disability under the ADA. On the other hand, if the impairment is not of short duration, then her request for medical leave appears to be a concession that she cannot work.

*Id.*
commentator has observed that "an individual in the 'prior inconsistent statement' situation is, as described by more than one observer, between a rock and a hard place."731

The decision of the Third Circuit in *McNemar v. Disney Stores, Inc.*732 illustrates the hard-hearted application of such reasoning. The plaintiff in *McNemar* was the assistant store manager of a Disney store, having worked his way up from lower positions.733 He was terminated from his job several hours after informing his supervisors that he had acquired immunodeficiency syndrome (AIDS).734 Although McNemar did not give any permission for disclosure of his AIDS status, a casual telephone caller to the store was told that McNemar had resigned because he had AIDS.735 When McNemar did not find other employment after his termination, he applied for and obtained social security and state disability benefits. During the application process, McNemar represented that he was "totally and permanently disabled."736 McNemar sued the store, alleging discrimination in violation of the ADA and state statutes, along with violation of privacy, intentional infliction of emotional distress and other claims.737

The Third Circuit affirmed summary judgment for the defendant on McNemar's ADA claim, applying the doctrine of judicial estoppel.738 The plaintiff, with the EEOC as amici curiae, argued that the lower court decision applying judicial estoppel had "stretched the doctrine to address a problem that properly should be decided by looking to the legislative purposes of antidiscrimination that un-

731. Zachary, supra note 625, at 133.


733. See McNemar v. Disney Stores, Inc., 1995 WL 390051, at *1 (E.D. Pa. June 30, 1995) ("McNemar held different positions at Disney, starting as Receiving Manager at Disney's Cherry Hill, New Jersey store, moving up to Second Assistant Manager at Disney's Christiana, Delaware store, and finally being promoted to Assistant Store Manager at the Cherry Hill store.").

734. See id. at *2 ("McNemar told [his supervisors] that he did have AIDS. Several hours after this meeting, [a supervisor] informed McNemar that he was terminated.").

735. See id.

736. See id. at *2, *3 ("Following his dismissal, McNemar applied for and received disability benefits from the Social Security Administration and the New Jersey Department of Labor. . . . [O]n his applications for . . . disability benefits, McNemar and his physicians certified . . . that he was 'totally and permanently disabled.'").

737. See id. at *1.

underlie the ADA.” The appellate court stated, however, that the argument for not applying judicial estoppel in such circumstances “carries the implication that a person afflicted with HIV somehow should be permitted to misrepresent important information.”

The EEOC argued that the plaintiff’s representations of total disability were “after-acquired evidence” that should be relevant only as a defense and should not be evidence of whether the plaintiff had made a prima facie case. The Third Circuit responded to this argument by accusing the EEOC of attempting “to mix apples . . . with oranges.” Ironically, the EEOC’s basic argument was that the court was mixing apples—a potential defense—with oranges—an element of the plaintiff’s prima facie case—in applying judicial estoppel.

The double irony lies in the fact that the Third Circuit, like other courts that have applied estoppel in such cases, does not appear to be at all aware of, or open to, the fact that linking representations regarding disability under social security and other disability benefits programs with the question of whether one is qualified to do the job from which one has been terminated is itself mixing apples and oranges. Both the SSA, which administers the social security disability programs, and the EEOC, which implements the employment requirements of the ADA and the federal agency obligations under sections 501 and 504 of the Rehabilitation Act, have declared that the two federal programs have such different purposes and standards that the representations and findings made under either should not be deemed relevant to the other.

739. Id. at 620.
740. Id. The court declared:

The fact that the choice between obtaining federal or state disability benefits and suing under the ADA is difficult does not entitle one to make false representations with impunity. Nothing in the reasoned jurisprudence of judicial estoppel goes this far. Nothing grants a person the authority to flout the exalted status that the law accords statements made under oath or penalty of perjury. Nothing permits one to undermine the integrity of the judicial system by “playing fast and loose with the courts by asserting inconsistent positions.” Nothing vests such an immunity.

Id. (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1996)).
741. See id. at 620-21 (arguing that prior declaration of total disability has no bearing on prima facie issue of status as qualified individual with disability).
742. See id. at 621 (“[T]he EEOC wants to mix apples—a plaintiff’s prima facie case—with oranges—a defendant’s non-discriminatory reasons.”).
743. Similarly, in another case, the Eighth Circuit noted that “[t]he Associate Commissioner of Social Security issued a statement that the ADA and the disability provisions of the Social Security Act have different purposes and have no direct relationship to each other.” Eback v. Chater, 94 F.3d 410, 412 (8th Cir. 1996). The court quoted the following portion of the statement:
4. **Ability of Former Employees to Challenge Discriminatory Denials of Benefits**

Delineation of the reasoning that led some courts to rule that former employees, particularly those who are eligible for disability benefits, are precluded from challenging discrimination regarding benefits indicates the inequity of such rulings. A constricted interpretation of the protection afforded under statutes that undeniably cover discrimination in regard to the availability of benefits serves no statutory purpose nor any other apparent purpose, except perhaps a miserly insistence on tortuous technicalities.

Some of the problems with such decisions are illustrated by the ruling of the Eleventh Circuit in *Gonzales v. Garner Food Services.*744 The plaintiff, Timothy Bourgeois, worked at a Hardee’s restaurant owned and operated by Garner Food Services and participated in a group health insurance plan that provided coverage up to a lifetime limit of $1 million.745 When Bourgeois was diagnosed with AIDS, Garner discharged him from employment (in April 1991—prior to the effective date of the ADA’s applicable employment provisions), “to avoid paying future health insurance claims.”746 Bourgeois paid the necessary premiums to continue his health insurance benefit

[The inquiry into other available jobs] is based on the functional demands and duties of jobs as ordinarily required by employers throughout the national economy, and not on what may be isolated variations in job demands (regardless of whether such variations are due to compliance with anti-discrimination statutes or other factors). Whether or how an employer might be willing (or required) to alter job duties to suit the limitations of a specific individual would not be relevant because our assessment must be based on broad vocational patterns... rather than on any individual employer’s practices. To support a... finding that an individual can perform “other work,” the evidence would have to show that a job, which is within the individual’s capacity because of employer modifications, is representative of a significant number of other such jobs in the national economy. 

*Id.* In *Ebach,* the Eighth Circuit ruled that determinations of ability to work for purposes of Social Security disability benefits could not assume that prospective employers would make reasonable accommodations for an employee’s disability. See *id.* For our present purposes, the ruling’s significance is that a discharged worker can perfectly well say that “because of my disability I cannot find other employment, but if I had not been discharged I would have been perfectly capable of continuing to do the job I had, with reasonable accommodation to my impairment.”

744. 89 F.3d 1523 (11th Cir. 1996) *reh’g denied en banc,* 104 F.3d 373 (11th Cir. 1996), *cert. denied,* 117 S.Ct. 1822 (1997). The Eleventh Circuit held that a former employee whose ADA claim arose after his termination did not meet the “qualified individual with a disability” definition.

745. See *id.* at 1524 (summarizing Bourgeois’ employment background and health insurance coverage).

746. See *id.* (summarizing events leading up to Bourgeois’ termination).
coverage. Garner subsequently amended the plan and placed a $10,000 annual and $40,000 lifetime cap on AIDS-related treatment. By the time of Bourgeois's death, he had exhausted the benefits available to him under the cap and had incurred some $90,000 in additional claims for which payment was denied. The administrator of Bourgeois's estate filed suit under Title I of the ADA alleging that the defendants had discriminated against Bourgeois by placing the cap on AIDS-related treatment benefits.

The district court granted defendants' motion to dismiss the case. On appeal, the Eleventh Circuit assumed that maintenance of the cap on treatment benefits might constitute a continuing violation to which the ADA, once its effective dates were reached, would apply. The remaining question was whether Bourgeois was a "qualified individual with a disability" under the ADA definition, "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

The appellant estate argued that the term "employee" in this definition should be interpreted consistently with the meaning given that term under Title VII where courts had ruled it includes former employees. The Eleventh Circuit had itself ruled in a Title VII case that the "plain-meaning rule should not be applied to produce a result which is actually inconsistent with the policies un-

747. See id. ("Following his termination, Bourgeois paid the necessary premiums to continue his health insurance benefit coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).").
748. See id. ("At least partly because of Bourgeois' continued participation in the health insurance benefit plan after his discharge, GFS amended the plan on October 1, 1991, to cap AIDS-related treatment to $10,000 annually with a lifetime maximum limit of $40,000.").
749. See id. at 1525 (summarizing status of Bourgeois' insurance claims at time of his death).
750. See id. at 1524 (describing Gonzalez's claim against Garner Fast Food Services, Inc., as administrator of Bourgeois' estate).
751. See id. ("The district court granted a motion to dismiss jointly filed by Garner Fast Foods, Inc. (GFF) and Garner Food Services, Inc. (GFS). Thereafter, Appellant dismissed claims against all Defendants other than GFF and moved for reconsideration of the order of dismissal. This motion was denied . . . .").
752. See id. at 1525 (explaining that, although AIDS cap on benefits was implemented prior to ADA's effective date, court will treat denial of benefits after effective date as continuing ADA violation for purposes of analysis).
754. See Gonzales, 89 F.3d at 1527 ("Appellant points to the Title VII retaliation statute, contending that although the statute on its face only protects 'employees' and 'applicants for employment' from illegal retaliation, . . . . courts have broadened the class of protected persons under the statute to include former employees." (citation omitted)).
derlying the statute," and that "a strict and narrow interpretation of the word 'employee' to exclude former employees would undercut the obvious remedial purposes of Title VII."\textsuperscript{755} In \textit{Gonzales}, however, the court distinguished such rulings as limited to retaliation claims\textsuperscript{756} and declared that "a review of both the ADA and its legislative history suggests that Congress intended to limit the protection of Title I to either employees performing, or job applicants who apply and can perform, the essential functions of available jobs which their employers maintain."\textsuperscript{757}

Where did the court find evidence of such legislative intent? It inferred it from the absence of any legislative expression on the issue.\textsuperscript{758} In the absence of statutory language or legislative history, the rules of statutory construction dictate that deference should be given to the interpretation of the statute by the implementing agency.\textsuperscript{759} The EEOC, the implementing agency, indicated that the \textit{Beauford} line of cases is wrong and that former employees are protected under Title I.\textsuperscript{760}

As an alternative theory, the appellant in \textit{Gonzales}, joined by the EEOC, contended that the term "qualified individual with a disability" should be interpreted comparably to the Supreme Court's

\begin{itemize}
  \item \textsuperscript{755} Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988) (holding that former employees may sue for retaliation under Title VII).
  \item \textsuperscript{756} See \textit{Gonzales}, 89 F.3d at 1528-29 ("The expansion of the term 'employee' to confer standing to sue upon former employees claiming retaliation is necessary to provide meaning to anti-retaliation statutory provisions and effectuate congressional intent . . . . [H]owever, . . . . excluding former employees from protection under the ADA is not inconsistent with the policies underlying the statute."). \textit{Id.} at 1529.
  \item \textsuperscript{757} \textit{Id.} at 1527 (recognizing as well that definitions in Title I are substantially identical to those found in Title II and therefore deserve equivalent interpretation).
  \item \textsuperscript{758} See \textit{id.} at 1528 ("We find no clearly expressed legislative intent suggesting that former employees such as Bourgeois should be covered under the Act as well.").
  \item \textsuperscript{759} See, e.g., Western Airlines, Inc. v. Criswell, 472 U.S. 400, 412 (1985) (deferring to Department of Labor and EEOC on interpretation of Age Discrimination in Employment Act); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) ("If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); \textit{reh'g} denied, 468 U.S. 1227 (1984); EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981) (stating that contemporaneous and consistent interpretation by agency responsible for Act's enforcement is entitled to "special deference").
  \item \textsuperscript{760} See \textit{Parker} v. Metropolitan Life Ins. Co., 99 F.3d 181, 186 (6th Cir. 1996) (noting EEOC's assertion, in amicus brief, that \textit{Beauford} was wrongly decided and should not be followed), \textit{vacated}, 107 F.3d 359 (6th Cir. 1997), \textit{aff'd}, 121 F.3d 1006; EEOC v. CNA Ins. Cos., No. 95 C 5835, 1996 WL 26879, at *3 (N.D. Ill. Jan. 23, 1996) (noting EEOC urged the court, in amicus brief, to reject \textit{Parker} as wrongly decided), \textit{aff'd}, 96 F.3d 1039 (7th Cir. 1996).
\end{itemize}
interpretation of the term “otherwise qualified handicapped individual.” In Davis, the Supreme Court determined that being an “otherwise qualified handicapped individual” simply required the plaintiff to be qualified to receive or gain from the benefit or program at issue. Essentially, the appellant and EEOC in Gonzales asked the Eleventh Circuit to rule that the “employee or applicant” language of the ADA applies to discrimination in hiring or employment, but that discrimination in regard to benefits should use the Davis-like eligibility concept. The Eleventh Circuit “declined[d] this invitation,” and indicated that “comparing the qualifications necessary for admission to the nursing program in Davis to those required for Bourgeois to receive health benefits is like comparing apples to oranges. . . .” The court stated that such arguments were actually an attempt to “create a new job category, a ‘post-employment benefits recipient.’” The Eleventh Circuit concluded that “Bourgeois, a former employee, was not a ‘qualified individual with a disability’ as defined under the ADA and therefore not entitled to the Act’s protection.”

Circuit Judge R. Lanier Anderson III wrote a strong dissenting opinion, criticizing “the majority’s conclusion that the ADA provides protection only for currently active employees.” In his summary paragraph, he wrote:

I respectfully submit that the majority sees “plain meaning” where there is none. The majority ignores the common sense reading of the statute and the evident congressional purpose as revealed in the structure of the statute, its legislative history, and the overwhelming case

761. See id. at 1259 (noting that appellant correctly recognizes that Rehabilitation Act is ADA’s predecessor, and thus interpretation of Rehabilitation Act is apt precedent in interpreting ADA).

762. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (construing “otherwise qualified” persons protected by section 504 of Rehabilitation Act of 1973 as persons who are able to meet all program requirements despite handicap).

763. See Gonzales v. Garner Food Servs., 89 F.3d 1523, 1530 (11th Cir. 1996), reh’g denied en banc, 104 F.3d 373 (11th Cir. 1996), cert. denied, 117 S.Ct. 1822 (1997) (disagreeing with EEOC’s analysis of Davis interpretation of phrase “otherwise qualified handicapped individual” and characterizing it as creating new job category of “post-employment benefits recipient”).

764. See id. (acknowledging Eighth Circuit’s appropriate rejection of the interpretation of “otherwise qualified handicapped individual” as creating new job category).

765. Id. at 1531.

766. Id. (Anderson, J., dissenting).
law which provided the background against which Congress legislated.\textsuperscript{767}

Despite Judge Anderson's protestations, however, the outcome of \textit{Gonzales} was that, although Bourgeois was allegedly subjected to blatant and egregious discrimination by Garner Food Services in regard to employment benefits, an aspect of the employer/employee relationship that is manifestly covered by the ADA, his estate was denied an opportunity to try the case on its merits.

The problems with this line of cases go back to its origins in \textit{Beauford}.\textsuperscript{768} The \textit{Beauford} court determined that the application of section 504 of the Rehabilitation Act to employees of a recipient of federal financial assistance only covered employees who could perform the essential functions of the job and did not provide protection to former employees who were alleging discrimination in regard to disability benefits.\textsuperscript{769} In making this determination, the \textit{Beauford} court mangled the statutory term used in section 504 at that time—"otherwise qualified handicapped individual"—by interpreting it as meaning only an "employee" and refusing to apply the provisions of the regulation dealing with "other services."\textsuperscript{770} Subsequent cases, such as \textit{Gonzales}, have proceeded, in the spirit of \textit{Beauford}, to go even further by limiting the word "employee" to current employees only. In his \textit{Gonzales} dissent, Judge Anderson seems to have responded appropriately to these strained interpretations:

It is a matter of common knowledge that fringe benefit plans routinely and commonly cover retirees and other former employees. Indeed, pension and profit-sharing plans are designed primarily for the post-employment years. It is entirely reasonable to infer that Congress intended the Act's protection to extend to those individuals

\textsuperscript{767} Id. at 1536 (Anderson, J., dissenting).

\textsuperscript{768} Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987) (holding that section 504 of Rehabilitation Act does not protect former employees alleging discrimination in regard to disability benefits who can no longer perform essential functions of job). For a discussion of \textit{Beauford}, see \textit{supra} notes 509-24 and accompanying text.

\textsuperscript{769} See \textit{Beauford}, 831 F.2d at 771-72 ("With respect to employment, the federal regulations define a handicapped individual as one who, with reasonable accommodation, can perform the essential functions of the job in question. Beauford admits that she cannot perform the essential functions of the job . . . [t]herefore, she does not meet the prerequisites to be protected under this provision." (citation omitted)).

\textsuperscript{770} See id. (holding that statutory interpretation only extends to "potentially functional employment relationships" and that clause pertaining to "other services" is not applicable to Beauford's claim).
"SUBSTANTIALLY LIMITED" PROTECTION

routinely and commonly included within such fringe benefit plans. It would be counter-intuitive, and quite surprising, to suppose . . . that Congress intended to protect current employees' fringe benefits, but intended to then abruptly terminate that protection upon retirement or termination, at precisely the time that those benefits are designed to materialize.\footnote{771}

\section{B. The Underlying Problems}

The problematic outcomes in specific cases are the manifestation of deeper deficiencies—broader and more systemic difficulties—that rest upon analytical mistakes and basic misunderstandings of the nature of the laws being interpreted and applied. It is necessary to identify and discuss some of these underlying problems.

\subsection{1. Focusing on the Wrong Issues}

The decision of the court in \textit{Hatfield v. Quantum Chemical Corp.}\footnote{772} illustrates several of the problems arising from the misguided analytical approaches to the ADA discussed above. The \textit{Hatfield} court invoked the one-job-is-not-enough principle in discussing whether the plaintiff has a disability under the ADA and considered the significance of statements made in applying for disability benefits to determining whether the plaintiff is qualified.\footnote{773} As an employee at Quantum, Hatfield allegedly was subjected to personal and sexual harassment by his supervisor.\footnote{774} The supervisor directed Hatfield to engage in oral sex with him, pulled Hatfield's head toward his groin while asking if Hatfield was ready to perform oral sex and summoned him on some occasions by calling him "pussy."\footnote{775} Hatfield claimed these incidents were so trau-

\footnote{771. \textit{Gonzales}, 89 F.3d at 1532 (Anderson, J., dissenting).}
\footnote{772. 920 F. Supp. 108 (S.D. Tex. 1996). The court held that plaintiff's mental condition caused by interaction with his supervisor did not render him "substantially limited" in the activity of working and, thus, not "disabled" under the ADA. \textit{See id.} at 110.}
\footnote{773. \textit{See id.} at 110. Plaintiff asserted that his mental disorder substantially curtailed his ability to work as a plant technician. \textit{See id.} The court responded that: "A person is substantially limited in working if the person is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs . . . . The ability to perform a single, particular job does not constitute a substantial limitation on working." \textit{See id.}}
\footnote{774. \textit{See id.} at 109.}
\footnote{775. \textit{See id.} (summarizing facts of plaintiff's complaint).}
matic that they caused a mental disability. Hatfield eventually entered a mental hospital on the advice of a psychiatrist and was diagnosed as having severe major depression, post-traumatic stress disorder and borderline personality disorder. Hatfield requested his employer to transfer him to a different supervisor. When the employer refused, Hatfield filed an ADA claim based on the employer's failure to provide a reasonable accommodation.

The court granted summary judgment in favor of the defendants, finding that Hatfield was neither disabled nor qualified, and thus, was not entitled to a reasonable accommodation. The court concluded that Hatfield was not substantially limited in his ability to work because "Hatfield present[ed] no evidence that his condition prevent[ed] him from performing either a class of jobs or a range of jobs in whatever class. Hatfield's testimony show[ed] that the only reason he could not return to work was that he would be in contact with his former supervisor." As to whether Hatfield was qualified to perform his job, the court ruled that his claim that he was "totally disabled" as stated in his application for Social Security disability benefits and similar benefits from Quantum's insurance carrier were "enough to conclude that Hatfield was not a 'qualified individual with a disability.'" After reaching out to a disability benefits proceeding to find evidence sufficient to conclude as a matter of law that Hatfield was "totally disabled," the court could find no evidence that he had a "disability." Even though the court found, in the same paragraph, that the supervisor had precipitated a serious mental disability for Hatfield that made him "totally disabled," Hatfield was not disabled.

Apart from serving as an example of astounding illogic, Hatfield is instructive because the court never considered the conduct of the supervisor and the employer. If this were a case of race, religion or gender discrimination, the court would not focus on the

776. See id.
777. See id.
778. See id.
779. See id.
780. See id.
781. Id. at 110.
782. Id. at 111. The court summarized its holding as follows: Hatfield is not disabled as a matter of law because he presents no summary judgment evidence that he is substantially limited in a major life activity as required by the act. Even if Hatfield could demonstrate the existence of a disability, he cannot recover because he is not a qualified individual. By Hatfield's own admission, he is totally disabled.

Id.
783. See id.
relative darkness or lightness of the plaintiff’s skin, how religious
the plaintiff was, how feminine or masculine the plaintiff was or on
the plaintiff’s job performance (unless the pleadings raised poor
performance as a justification for the defendants’ conduct). Rather,
it would focus primarily, and often solely, on the alleged
conduct of the defendants. The restrictive interpretations of statu-
tory protection under the ADA and Rehabilitation Act, however,
have engendered a situation in which many cases are decided solely
by looking at the characteristics of the plaintiff.

For any nondiscrimination law, this would be a strange state of
affairs. These laws prohibit certain kinds of conduct by covered in-
dividuals and entities. They are not intended as engines for evaluat-
ing, comparing, differentiating and classifying plaintiffs.

For discrimination based on disability, the focus on the limita-
tions and capabilities of plaintiffs is particularly unfortunate. As
previously discussed, a major form of disability discrimination is dif-
ferentiating, classifying and labeling people as disabled. Proving
that one is disabled is the direct antithesis of the goals underlying
the nondiscrimination mandates of the ADA and sections 501, 503
and 504 of the Rehabilitation Act. Having to turn around and
prove that, despite having a disability, one is not so disabled that
one cannot do the job that one has been performing or has applied
for simply adds insult to injury.

The intense focus on the abilities and impairments of the com-
plainant instead of on the allegedly discriminatory conduct of the
employer is reminiscent of the complaint leveled at investigations
and trials of rape and other sexual offense charges—that the al-
leged victim is often on trial rather than the alleged perpetrator.
This author once had a client whose former employer had deliv-
ered to him a discharge notice that said “because your disability,
multiple sclerosis, prevents you from hand writing your reports, you
are being terminated from your position.” The client also had writ-
ten documentation that he had purchased a dictation recorder and
had requested the employer to accommodate him by having a sec-
retary type up his reports, which the employer refused to do. Thus,
there was irrefutable evidence that the employer had terminated
the author’s client because of his disability and that the employer
had refused to make a reasonable accommodation. Imagine the
difficulty the author had in explaining to the client why, in these
circumstances, we still had to produce medical and other evidence.
Such evidence would have to prove that the client had a substantial
limitation in a major life activity and that he was qualified to per-
form the essential tasks of the job that he had been doing. Because these matters were at issue, the client would have to grant the employer, as part of discovery, access to all of his medical and psychiatric records. Naturally, the client came to feel that he, not the employer, was on trial.

2. Imposing Technical Evidentiary Hurdles Contrary to Common Sense and Statutory Purposes

In addition to being diametrically opposed to statutory objectives, the restrictive interpretation of the protection afforded under disability nondiscrimination laws also has engendered procedural and evidentiary hurdles that are frequently misunderstood by plaintiffs, their attorneys and the courts. These hurdles are misunderstood largely because they defy common sense and statutory purpose.

Regarding the one-job-is-not-enough concept, for example, the EEOC is aware of its harsh effects. The agency has offered some ameliorative suggestions. It has suggested that an individual avoid the analysis of substantial limitation in employment by alleging an impairment to some other major life activity.784 It also indicated that, in certain circumstances, exclusion from a single position may be sufficient to satisfy the “regarded as” prong of the definition.785 Finally, the EEOC offers the general palliative that its requirements about the numbers and types of jobs that are limited “are not intended to require an onerous evidentiary showing.”786

784. See 29 C.F.R. pt. 1630, app. A § 1630 (1997) (“If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.”).

785. See id. The EEOC’s Interpretive Guidance on Title I of the ADA declares: “An individual rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities would be covered under this part of the definition of disability, whether or not the employer’s or other covered entity’s perception were shared by others in the field.” Id. (emphasis added). The EEOC also considers exclusions based on “common attitudinal barriers” toward individuals with disabilities, including “concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers’ compensation costs, and acceptance by coworkers and customers,” to constitute discrimination based on perceptions of disability. See id. If an individual with a physical or mental impairment can show that he or she was terminated from, or not hired for, a particular job because of that impairment, and the employer took the exclusionary action because of one of the listed concerns, such a showing may be sufficient to establish that the individual was “regarded as having” a substantially limiting impairment. Unless the employer can articulate a nondiscriminatory reason for the employment action, “an inference that the employer is acting on the basis of myth, fear or stereotype can be drawn.” Id.

786. See id.
Such sentiments and alternatives are of little avail. Many plaintiffs and their legal counsel, as well as many courts that hear their cases, are not aware of or do not understand these nuances. Also, many do not see why these nuances are necessary given the commonsense deduction that employers who discriminate against employees because of their physical or mental impairment have regarded the employees as having a disability that impairs their ability to work.  

Whatever validity or good intentions the EEOC's ameliorative suggestions may have, Allen Redlich, the veteran law professor who suffered a stroke with resulting permanent paralysis of his left hand, arm and leg, was not aware of and able to take advantage of them, nor was his attorney aware. Many other plaintiffs, like Redlich, have had their cases tossed out of court because of lack of disability even though they have been discharged, paid lower wages or denied promotions because of their physical or mental impairment. These other plaintiffs were also not aware.

The judges in many such cases have not applied any of the aforementioned ameliorative approaches. In the Redlich case, for example, the court recited the list of major life activities delineated in the regulations. Included in this list of activities was performing manual tasks and walking, each of which would seem to have been applicable to Redlich, but the court then ruled that "[t]he relevant 'major life activity' at issue in this case [was] 'working.'" In practical effect, the one-job-is-not-enough precept has extinguished the claims of numerous plaintiffs who alleged that they were subjected to express and sometimes extreme discrimination prohibited under the ADA and Rehabilitation Act. Any pleading or procedural maneuvers that might theoretically have been available to them to avoid such results were too subtle, too complicated and too antithetical to common sense or were not accepted by the courts hearing their cases.

787. See Bales, supra note 18, at 225 ("If [the plaintiff's] supervisor denied him the promotion because of his disability, how can it be that the supervisor did not regard [the plaintiff] as disabled?").

788. See Redlich v. Albany Law Sch. of Union Univ., 899 F. Supp. 100, 107 (N.D.N.Y. 1995) (dismissing plaintiff's discrimination claim under Rehabilitation Act because plaintiff did not establish that major life activity of working was substantially impaired or that defendant regarded him as substantially limited in major life activity).

789. See id. at 106.

790. See id. ("Under the Department of Health and Human Services regulations 'major life activity' is defined as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.").
Theoretically, there may also be a few techniques for trying to avoid the damaging effects of excluding temporary disabilities. Thus, the EEOC has fashioned the somewhat illogical premise that a temporary condition that takes longer than normal to heal may thereby constitute a disability. Even plaintiffs are in a position, however, to avail themselves of this argument even if they happen somehow to be aware of it. In one of the few cases in which the facts supported such an approach, the issue was not raised.

Even if a court subscribes to the temporary disability exclusion, the plaintiff may nonetheless argue that the length of time his or her disability persisted is sufficient to avoid its application. In Wood v. County of Alameda, for example, the court denied a motion for summary judgment filed by the defendant and granted a preliminary injunction to the plaintiff, who had a mental impairment that rendered her unable to work for about a year. The court declared that "a mental impairment which renders an individual unable to work for a full year constitutes a disability under the ADA." Such arguments will not necessarily prevail. In Rakestraw, the court ruled that an injury lasting one year and ten months was not of sufficient duration to constitute a disability. Again, as with the one-job-is-not-enough approach, many plaintiffs and their attorneys are amiss of the need to pursue strategies that sidestep the temporary disability exclusion because of the cogency of the reasoning that an employer who terminates or otherwise penalizes a person because of a temporary disability has "regarded" that person as having a disability under the third prong of the statutory definit-

791. See EEOC Compl. Man., supra note 325, at ¶ 6885 ("Temporary impairments may be disabilities if they take significantly longer than normal to heal and significantly restrict the performance of major life activities during the healing period.").

792. See Grindley v. Royal Indemnity Co., No. 94-12511-RGS, 1996 WL 780557, at *5 (D. Mass. Nov. 19, 1996) (holding that plaintiff's temporary limitations from surgery to correct knee injury not disability, even though "typical recovery period" for plaintiff's type of knee surgery was two to four weeks, and plaintiff was on medical leave for five months, had to have second surgery approximately 10 months after first, and was on medical leave for two months after second surgery).

793. No. C 94 1557 TEH, 1995 WL 705139 (N.D. Cal. Nov. 17, 1995) (holding that reasonable jury could conclude that plaintiff's mental impairment rendered her substantially limited in major activity of working even though several doctors, including plaintiff's, determined she could return to work after one year).

794. Id. at *10.

795. Id. at *8 (noting factors set forth in EEOC regulations).

tion. Once a person has been subjected to discriminatory treatment because of a disability, it simply appears irrelevant how long thereafter the plaintiff's condition persists. Few people can readily grasp the logic of reasoning that denies statutory protection from discrimination for an employee when recovery is more rapid and the impact on the employer's operations are less, but affords it if the disruption takes longer and thus the burden on the employer is greater. Try explaining to clients with a temporary disability that the law does not stop their employer from firing them because their disability will make them miss some work, but if they had a condition that forced them to be out of work for a longer time, they might be protected.

Obviously, the line of cases holding that plaintiffs who have made representations of total disability in applying for disability benefits are precluded from establishing that they are "qualified," as well as cases holding that former employees cannot pursue actions under the ADA and the Rehabilitation Act places overwhelming procedural obstacles in the way of plaintiffs. Courts endorsing these approaches dismiss the plaintiffs' claims in such cases. Regarding the first of these—estoppel or preclusion of plaintiffs who apply for disability benefits—various approaches were suggested previously by which plaintiffs may be able to thwart its potential application. These include focusing upon different time parameters for the representations made, scrutinizing the exact content of the representations made and arguing that representations made in unsuccessful applications for benefits do not trigger estoppel. Yet such strategies have obviously not prevented many plaintiffs from being deprived of their day in court. After reviewing such cases, one commentator observed that "[d]espite the arguments of plaintiffs, the EEOC, and other interested parties, and the decisions of some courts who find these arguments persuasive, it is clear that many courts are unwilling to accept them." 798

Until such decisions became fairly common, most plaintiffs and their attorneys had no reason to suspect that courts would interpret their disability benefits applications and their ADA claims as inconsistent. Far from trying to "put something over" on the court, one plaintiff's attorney included a disability insurance claim and an ADA claim in two different counts in the same complaint. In Bollen-

797. See Bales, supra note 18, at 244 ("A plaintiff . . . who proves that her employer fired her because she has an infected finger is entitled to the Act's protection.").

798. See Zachary, supra note 625, at 132.
bacher v. Helena Chemical Co., 799 Count I of the complaint made a claim of wrongful denial of long-term disability benefits in violation of the Employee Retirement Income Security Act of 1974 (ERISA), 800 while Count II alleged that the defendant employer had terminated Bollenbacher because of his disability in violation of the ADA. 801

The Bollenbacher court applied judicial estoppel to the plaintiff’s ADA claim. 802 It did not differentiate the situation before it in which the supposedly inconsistent allegations were made in a single proceeding from prior cases in which the representations of “total disability” were made in applications to the SSA or other disability benefits provider. Recognizing that the Bollenbacher situation might merit different treatment than the other cases, the plaintiff argued that Federal Rules of Civil Procedure 8(a) and 8(e) permit a party to seek alternative forms of relief and to assert separate or alternative claims “regardless of consistency.” 803

The court did not respond to this argument directly; it merely noted the defendant’s argument that plaintiff’s claims were “not merely alternative claims or inconsistent claims, but rather, are mutually exclusive.” 804 The court did not suggest how one distinguishes between “inconsistent” and “mutually exclusive” claims. Moreover, the Bollenbacher plaintiff’s position that representations made in a complaint can be inconsistent is an accurate statement of modern pleading rules. 805 Also, Federal Rule of Civil Procedure 11(b), which provides ethical standards for representations in papers filed with a federal court, provides that allegations and factual

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799. 934 F. Supp. 1015 (N.D. Ind. 1996) (holding that plaintiff could not claim he was “qualified individual with a disability” under ADA after having alleged he was totally disabled in applying for disability benefits).

800. See 29 U.S.C. §1132(a)(1)(B) (1994) (empowering persons to bring civil action to recover benefits due, or to enforce rights, under the terms of their plan).

801. See Bollenbacher, 934 F. Supp. at 1026 (describing Count II of Bollenbacher’s complaint).

802. See id. at 1027-28 (“The cases cited [by the defendant] are sufficiently persuasive to convince this court that a plaintiff who claims to be totally disabled in one proceeding should be estopped from asserting an ADA claim in a subsequent suit . . . .”).

803. See id. at 1026 (responding to defendant’s contention that plaintiff cannot claim that he is totally disabled and also that he is qualified individual with disability).

804. See id. (responding to plaintiff’s argument that Federal Rules of Civil Procedure permit alternative claims regardless of consistency).

805. See, e.g., Stephen C. Yeazell, Civil Procedure 415-16 (4th ed. 1996) (‘‘As a result, a defendant may deny that she ever entered into a contract with plaintiff and at the same time assert that she kept her side of the bargain . . . .’’).
contentions shall "have evidentiary support,"806 not that they shall be true or consistent. In any event, as noted previously, familiarity with the nature and context of the representations made in disability benefits claims and in ADA and Rehabilitation Act nondiscrimination claims has convinced the frontline federal agencies involved in implementing these federal laws—the SSA and the EEOC—that such representations cannot be transferred from one of these situations to the other. Some courts, however, with less expertise regarding both processes, have continued to insist that being "totally disabled" for disability benefits purposes is equivalent to being unqualified under the ADA.

Likewise, the Beauford line of cases imposes a total bar against former employees suing under the ADA and Rehabilitation Act to challenge discrimination in regard to benefits for which they are eligible by virtue of their former employment. Most plaintiffs and their attorneys have not anticipated that courts might apply this reasoning. This is because a straightforward reading of the statutes and regulations makes it clear that discrimination in regard to benefits is actionable, and regulations and legislative history make it clear that the term "employee" is intended to be given the same meaning as that under Title VII, a meaning that has consistently been read to include former employees. To the extent that plaintiffs and their counsel identify this potential difficulty, there is little that they can do to avoid it. There are no clever maneuvers or pleading alternatives that can enable a plaintiff to dodge this line of analysis if a court chooses to follow Beauford and its ilk.

The upshot is that numerous plaintiffs who believe they have been subjected to serious discrimination in violation of the ADA or sections 501, 503 or 504 of the Rehabilitation Act find themselves on the wrong side of a summary judgment or dismissal order, asking their surprised and dismayed attorneys what went wrong. The attorneys are then faced with trying to explain the illogical and counterintuitive doctrines, antithetical to the purposes of the federal nondiscrimination statutes, that derailed their cases. None of this advances, by one iota, the goals of eliminating discrimination on the basis of disability that prompted Congress to enact the ADA and the Rehabilitation Act. On the contrary, it suggests to employers that there are huge loopholes that will enable them to escape with impunity when they have violated the requirements of nondiscrimination laws.

The focus on the wrong issues and the counterproductive technical evidentiary and procedural obstacles are symptoms of a more basic analytical error—the protected class mentality. Perhaps, in part, because people with disabilities have historically been viewed as objects of pity and charity, and because many governmental and private programs provide special benefits and programs for people with disabilities, disability nondiscrimination laws have become tainted with a special, protected-class perspective. During the Reagan and Bush Administrations, the EEOC, under the chairmanship of Evan Kemp, helped to promote such a view—that there is a certain core group of severely disabled people who are deserving of the special service of being protected from discrimination. Programs providing services and benefits to targeted groups of citizens with disabilities are, of course, an appropriate and worthwhile governmental undertaking. In many areas, including personal assistance services and community living alternatives, much more needs to be done. But in the area of prohibiting and eliminating discrimination, the protected-class approach has absolutely no place. Nondiscrimination is a guarantee of equality. It is not a special service reserved for a select few.

The history of gender discrimination in this country counsels that it can be very harmful to be deemed "special." As Justice Brennan wrote, traditionally discrimination against women "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage." Similarly, for people with disabilities, the special class mentality—the notion that these people are quite different from others and need special help and protection—has helped spawn such historical and, in some cases, present practices as confinement in residential institutions (supposedly for treatment and habilitation), segregated schools, laws restricting marriage rights, segregated housing, laws restricting voting rights, all-or-nothing guardianship laws that deprive "wards" of all decision-making authority and even compulsory sterilization laws (to prevent these poor unfortunates from having to deal with

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807. See, e.g., National Council on Disability, supra note 348, at 96-114 (discussing how need for providing services, especially community living services, is sorely needed).

menstruation, accidentally getting pregnant or fathering a child).  

The protected-class approach has certainly framed the restricted interpretation of protection from discrimination in the line of cases discussed in this Article. Many of the cases have explicitly referred to the "protected class" or "protected group" entitled to protection under the ADA or sections 501, 503 or 504 of the Rehabilitation Act. These terms can, of course, be used to simply identify those individuals able to sue under the Rehabilitation Act, who, given the "regarded as" prong of the statutory definition, would include anyone who has been discriminated against on the basis of disability, whether or not the individual has any impairment at all. Most of the court decisions discussed have used the "protected class" phrasing in this context. Usually, implicit in these decisions, but made explicit by one court that reviewed numerous precedents to arrive at a comprehensive framework for addressing ADA cases, the "protected class" phrasing is in the spirit of the "threshold question": Is the plaintiff disabled enough to seek relief under the ADA?

The protected-class perception of the protection afforded by disability nondiscrimination statutes does violence to the very essence of statutes designed to prevent unnecessary differentiation, i.e., discrimination. The courts have been clear that the ADA and section 504 are not supposed to require preferences. The Supreme Court has identified "the central purpose of [section] 504" as assuring "'evenhanded treatment' in relation to nonhandicapped individuals." Other courts have declared that "it is the aim of the ADA to merely ensure equality and not preference to disabled employees" and that the purpose of the nondiscrimination requirements of the ADA and sections 501, 503 and 504 is to ensure that individuals with disabilities "receive the same treatment as those

809. See generally City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 462-64 (Marshall, J., concurring in part and dissenting in part) (asserting that custodial institutions were erected for lifetime committal of individuals with mental retardation with aim of halting their reproductive capabilities and removing them from society).


811. See Muller v. Hotsy Corp., 917 F. Supp. 1389, 1411 (N.D. Iowa 1996) (determining such question to be typical and even threshold in any ADA case).


without disabilities."\textsuperscript{814} These statutes prohibit discrimination, "no more and no less."\textsuperscript{815}

The restrictive interpretation of statutory protection, induced by the preferred group or protected-class mentality has done no favors for any group of persons with disabilities. The one-job-is-not-enough and temporary disability exclusion problems have defeated the discrimination claims of individuals with a variety of severe impairments and what might be viewed as "traditional" disabilities. The rulings in the judicial estoppel and preclusion line of cases apply to all persons who have filed for disability benefits, certainly including those with severe disabilities. The former employee-benefits discrimination decisions can snare any former employee, no matter what the nature or degree of the person's impairment. These lines of cases present harrowing obstacles for all complainants of disability discrimination, no matter how "truly disabled" their attorneys or they themselves believe they are.

At the very least, these lines of cases require plaintiffs to shoulder heavy burdens of proving the substantiality of their impairments, often by presenting medical evidence and sharing the details of their medical conditions with the defendants, the court and, ultimately, anyone else who views the court documents. Plaintiffs also must prove that their physical or mental impairments substantially limit major life activities, i.e., prove how really disabled and disadvantaged they are in performing daily activities, a very unwelcome task for a person with a disability who is striving to prove to oneself and to others that he or she can be capable, independent and self-supporting. If they wish to rely on the major life activity of working, plaintiffs will have to prove, often by vocational experts, that they will be precluded from performing a class or a broad range of jobs, i.e., proving based on speculation and statistics how other employers will react to their impairments.\textsuperscript{816} The need for medical and vocational experts asks for quite a sizable financial investment for a recently unemployed individual with a disability.


\textsuperscript{815} Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) ("[The ADA does not require] affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less."), \textit{cert. denied}, 116 S. Ct. 1263 (1996).

\textsuperscript{816} \textit{See, e.g.}, Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992) (noting that plaintiff failed to present evidence from vocational experts in reaching decision that plaintiff had not proven that he was precluded from wide range of jobs).
Even with medical and vocational experts, plaintiffs may still be held not to have satisfied these weighty burdens.\(^8\)^17

Having expended all this money and energy, to demonstrate that they have a disability, would-be plaintiffs then have to turn around and prove that the impairment is not so serious as to prevent doing the job. To the extent that the "disability" criterion has been made too expansive, it then becomes harder to show that the plaintiff's condition does not interfere with job performance. The possibility of reasonable accommodation may explain, however, why a person's ability to work is significantly impaired by a disability (without accommodation) and yet the person is fully able to do the job (with accommodation). Proving an ability to perform particular job tasks may again require testimony of medical or vocational experts.

While preparing and litigating an ADA or Rehabilitation Act claim, which may include footing the bill for expert witnesses, the jobless individual with a disability may, depending upon the rulings of the courts in the jurisdiction in which the cause of action will be litigated, need to avoid applying for disability benefits to which he or she may be entitled. In addition, again depending upon the rulings in the relevant jurisdiction, a former employee, who believes that he or she has been subjected to discrimination in regard to the fringe benefits that accrued out of the former employment relationship may have to face the fact that pursuing litigation may be a futile undertaking unless the individual has the will and assets to take the matter to a higher judicial level. Thus, a former employee who is out of work because of a disability and is discriminatorily denied disability benefits under a program obtained through the employer or who has such benefits discriminatorily cut off or decreased may have to choose between undertaking protracted, extensive and expensive litigation with unclear chances of prevailing, or simply giving up on challenging the discrimination.

Despite a widespread misconception to the contrary, none of these dire results and ponderous burdens are inherent in the statutory formulations of the ADA and sections 501, 503 and 504 of the Rehabilitation Act. Properly understood, the need to prove that one is "disabled" is amply satisfied by proving that an employer pur-

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817. See, e.g., McKay v. Toyota Motor Mfg., U.S.A., Inc., 878 F. Supp. 1012, 1015-16 (E.D. Ky. 1995) (ruling that plaintiff's evidence at summary judgment stage, which included testimony of two orthopedic surgeons and one vocational expert, did not establish that she was disabled under ADA, in part because vocational expert had made only "conclusory" unsupported statement that plaintiff was "perceived as impaired"), aff'd, 110 F.3d 369 (6th Cir. 1997).
posefully inflicted a negative consequence upon an individual because of a physical or mental impairment (whether real or perceived), thus satisfying the "regarded as" prong of the definition. The "qualified" criterion appears in the statute to make sure that people who cannot perform the essential tasks of a job, even if they are provided a reasonable accommodation, do not have to be hired and retained. It was not intended to set up an elaborate pretrial contest in which the plaintiff is required to prove how excellent he or she is in performing every element of the job before getting a chance to proceed with the case. Finally, nothing in any of the federal nondiscrimination laws or their legislative history hints that people who represent that they have or are found to have a total disability under disability benefits standards are not "qualified" and should not be permitted to pursue their nondiscrimination claims or that former employees should not be able to challenge discrimination they encounter in regard to their employment fringe benefits.

These burdensome interpretations are entirely judge-made doctrines that represent a substantial misunderstanding of the wording of the nondiscrimination laws and the policies that underlie them, do an egregious disservice to the people who are supposed to be protected by these laws, benefit no one but perpetrators of discrimination and are largely the product of the misguided concept of a special protected class.\(^{818}\) The federal disability nondiscrimination statutes do not contemplate that there is some core group of people whose statutory protection needs to be narrowly and carefully restricted so as not to be used up by the undeserving others. Such a construction is antithetical to any nondiscrimination law and certainly to one prohibiting discrimination on the basis of disability—an area of the law that recognizes the dangers of differentiating and meting out disparate treatment for particular segments of society.

VII. Analytical Alternatives

There are clear and sometimes obvious alternatives to the lines of analysis that have engendered restricted protection under the ADA and Rehabilitation Act. Some of these alternatives have been suggested in court decisions that have taken a more informed and less penurious view of the scope of these laws. Others are derived from an examination of the original purposes of the phraseology in

\(^{818}\) Perhaps some courts simply may want to lighten their dockets without regard to the meritoriousness of claims that are jettisoned.
the statutes and of the conceptual principles underlying disability nondiscrimination laws and the disability rights movement. This Part first presents suggested alternatives to the analysis that has spawned the four major constricting interpretations of statutory coverage discussed in this Article. Part VII also recommends some basic principles that should be adopted for a clearer, more coherent and analytically sound conceptual framework for interpreting and applying disability nondiscrimination laws.

A. Discrimination in One Job Is Enough

Proof that an employer purposefully inflicted a negative consequence upon an individual because of a physical or mental impairment, whether real or perceived, should be deemed sufficient to establish that the individual has been “regarded as” having a disability that impairs the activity of working and, thus, is an “individual with a disability” under the statutory definition. One author has labeled this approach the “once is enough” standard.819 He has also suggested that in this context the phrase “substantially limits” could be useful in distinguishing between employer actions or decisions that have a serious impact on the employee’s work status (e.g., termination, refusal to hire or promote, lower pay, segregating the employee) and actions or decisions that have a minor impact (e.g., choosing an accommodation that is merely adequate and effective instead of an alternative that is the optimal first choice of the employee).820

Some courts, including several federal circuit courts, have rejected the Forrisi rationale on the exclusion-from-a-single-job issue.

819. Bales, supra note 18, at 245 (stating that initial burden should be on plaintiff to show that employer took adverse action against plaintiff because of actual or perceived impairment, shifting burden to employer to prove statutorily created affirmative defenses).

820. See id. at 230-31 (offering alternative way of using phrase “substantially limits”). The commentator offered this interpretation in response to the contention, articulated in Forrisi and other decisions, that without the one-job-is-not-enough principle, the words “substantially limits” would be rendered meaningless in regard to the major life activity of working. See id. at 230; see also Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) (“It would debase [the high purpose of the Rehabilitation Act] if the statutory protections . . . could be claimed by anyone whose disability was minor.”); Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992) (“[A]n impairment that an employer perceives as limiting an individual’s ability to perform only one job is not a handicap under the [ADA]. Any other interpretation would render meaningless the requirement that the impairment substantially limit a major activity.”); Reeder v. Frank, 813 F. Supp. 773, 780 (D. Utah 1992) (interpreting phrase “substantially limits” narrowly to prevent broad protection), aff’d, 986 F.2d 1428 (10th Cir. 1993). The commentator labels this contention “nonsense.” Bales, supra note 18, at 230.
Other courts have continued to find rationales for avoiding its application.\textsuperscript{821} The reasoning of \textit{Forrisi} and its followers on this issue is a product of flawed logic, misunderstandings of the basic nature and purposes of disability nondiscrimination laws and misguided impulses to protect the "truly disabled" by treating them differently from everyone else. The results have been harsh and inequitable even to those with severe disabilities whom it was purported to assist. It is time for this erroneous line of reasoning to be challenged head on and rooted out of American jurisprudence. The EEOC should take the lead in repudiating this pernicious misinterpretation of federal statutes it is charged with implementing.

B. \textit{Inclusion of Temporary Disabilities}

Individuals with temporary disabilities should not be excluded from the protection provided under disability nondiscrimination laws. Persons with temporary disabilities should be considered individuals with disabilities under disability nondiscrimination laws if (1) except for its limited duration, the condition is substantial enough to otherwise constitute a disability or (2) evidence indicates that an employer purposefully inflicted a negative consequence upon an individual because of a temporary impairment, whether real or perceived. In the first situation, the individual has an actual disability. In second situation, the individual has been "regarded as" having a disability that impairs the activity of working and, thus, is an "individual with a disability" under the statutory definition.

Several courts have already rejected the notion that a temporary disability is not a "disability" under the ADA and Rehabilitation Act.\textsuperscript{822} It is time for other courts to reject this senseless, irrelevant

\textsuperscript{821} See, e.g., Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996) (reversing summary judgment for defendant because district court "should have determined what class of jobs was relevant . . . . taking into consideration the job from which Webb was fired and the specialized skills that he developed in his twenty-four years with Garelick," and "should have considered whether Webb was significantly restricted in his ability to perform that class of jobs as compared to the average person with his supervision and production development skills"); Lee v. Trustees of Dartmouth College, 958 F. Supp. 37, 43 (D.N.H. 1997) ("Certainly, a fact finder could determine that defendants viewed plaintiff as unable to be a surgeon, the class of job he had spent years training to become."); Smith v. Kitterman, Inc., 897 F. Supp. 423, 427-29 (W.D. Mo. 1995) (denying defendant's motion for summary judgment because of genuine issues of material fact regarding whether plaintiff's limitations created significant barrier to employment positions comparable in stature to former job, especially given plaintiff's "limited educational, training, and employment background" and whether plaintiff was regarded as having disability under ADA).

technicality that has no basis in the statutes or their legislative history. The DOJ and especially the EEOC should join the DOT in recognizing that "any condition that meets the criteria of the definition, regardless of its duration, is a disability."823

If an individual has a disability at the time that an employer discriminates against him or her because of it, then the individual has a disability under the statutes. Whether the condition vanishes, improves or worsens thereafter does not matter. The only relevant question is whether the individual had, or was "regarded as" having, a disability at the time the alleged act of discrimination occurred.

C. Recognition of Ability to Pursue Both Disability Benefits and Nondiscrimination Rights

Representations of "total disability" or "inability to work" made in the context of obtaining disability and similar types of benefits should not estop or otherwise preclude an individual from pursuing discrimination claims based on disability. Judicial unwillingness to preclude, or estop, plaintiffs who have previously applied for disability benefits from pursuing claims that their employers have discriminated against them based on their disability is growing. Some courts have simply dodged the application of estoppel and preclusion by distinguishing the time periods covered by, or the exact nature of, the disability benefits representations and the discrimination claim.824 Others have rejected the estoppel ap-

824. See, e.g., D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 4-5 (1st Cir. 1996) (reversing summary judgment for defendant and holding estoppel not appropriate under Massachusetts nondiscrimination law because of precise nature of representations made in disability benefits process and because plaintiff never claimed to be totally disabled during time when she requested reasonable accommodation from employer); Nixon v. Digital Equip. Corp., No. 94 CV 3120, 1996 WL 772521, at *4 (E.D.N.Y. Nov. 18, 1996) (denying defendant's motion for summary judgment due to evidence that plaintiff was capable of performing job duties at time of
proach more directly. In Mohamed v. Marriott International, Inc., the court summarized previous decisions that had rejected the application of judicial estoppel in such circumstances and concluded that "it would be inappropriate to invoke the fact-sensitive and limited doctrine of judicial estoppel to erect a per se bar to ADA protection for individuals who have also applied for and/or received [SSDI] benefits." Regarding the analysis in cases where judicial estoppel had been applied, the court declared:

Such uncritical application of judicial estoppel fails to recognize significant differences in: (1) the applicable legal standards of the ADA and the Social Security Act; (2) the types of fora and procedures involved in ADA cases and SSDI administrative determinations; and (3) the policy goals animating the two statutes' definitions of disability.

The court pointed out that an individual may be "disabled" for purposes of disability benefits because few potential jobs are currently structured to accommodate his or her disability. Yet that individual may still be protected by the ADA because a particular job he or she held, or is interested in, could be modified to accommodate his disability. The court also noted that "the Social Security Act itself permits individuals to receive benefits and work at the same time, demonstrating that the classes of individuals entitled to protection under the two statutes are not mutually exclusive."

Thus, the court said that "in light of these differing legal standards, Mohamed's assertion of inability to work for SSDI purposes is not necessarily inconsistent with his claim here to be capable of performing the essential functions of the job from which he was discharged." It also observed that the doctrine of judicial estoppel properly applies "in cases where parties made inconsistent representations to two different courts, not to an administrative agency..."

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825. For a discussion of the decisions rejecting the estoppel approach, see supra notes 447-52 and accompanying text.
827. Id. at 282.
828. Id. at 282-83.
829. See id.
830. See id.
831. Id.
832. Id.
and a court." The court also found that "applying estoppel in the circumstances here could undermine the policy goals of the ADA without advancing the separate goals of the Social Security Act." Ultimately, the Mohamed court reached the following conclusion:

[T]he SSA's determination, while amounting to an adoption of Mohamed's claim of disability, was hardly the result of a formal adjudication on the merits that he is not a "qualified individual with a disability" within the meaning of the ADA. Finally, estopping Mohamed under the circumstances of this case would undermine the legislative policy of providing the disabled with both protection against destitution and a genuine opportunity to participate fully in the job market.

Similarly, the court in Dockery examined the purposes of judicial estoppel and rules governing its application and concluded that it should not be applied in ADA cases in which the plaintiff has made allegedly inconsistent representations in applying for disability benefits. Initially, the court ruled that estoppel only applies to judicial or quasi-judicial proceedings and not to statements made under oath in "administrative filings," such as benefits applications. The court also noted that "[a]t its core, the doctrine of judicial estoppel ensures that a party will not argue 'inconsistent positions to gain an unfair advantage over its adversary.'" It found that "[t]he receipt of disability benefits in no way provides an unfair advantage to a plaintiff in an ADA case." The court further stated that "[t]o the contrary, such an admission can only hinder any attempt by a plaintiff to later claim that she was not totally disabled."

To the extent that an individual has made false statements in applying for disability benefits, the court states that "a plaintiff may

833. Id.
834. Id. at 284.
835. Id.
836. See Dockery v. North Shore Med. Ctr., 909 F. Supp. 1550, 1558 (S.D. Fla. 1995) ("[Regarding] whether 'prior proceedings' applies to any action taken under oath, including the filing of a disability application, or is intended to apply to judicial, or at least quasi-judicial proceedings; [this] Court believes the latter . . .").
837. Id. at 1559 (quoting Sullivan Properties, Inc. v. City of Winter Springs, 899 F. Supp. 587, 591 (M.D. Fla 1995)).
838. Id.
839. Id.
be exposing herself to potential liability in a separate fraud proceeding.”

If that is the case, however, it is not the job of the court hearing the nondiscrimination action to provide a remedy:

[T]he appropriate sanction in such an instance is for the governing authority to take action against the party in question. It is not the province of the courts in cases like these to enforce perjury or fraud penalties by excluding a plaintiff from formulating her case as she sees fit within the bounds of allowable procedure.

For these various reasons, the Dockery court decided to deviate from the “chorus of judicial opinions which proceed to dismiss cases brought under the ADA purely on the technical grounds that an inconsistent position was taken by the plaintiff in his or her administrative filings.”

840. See id. at 1559 n.16 (reasoning that fraud proceeding, not judicial estoppel, is appropriate means of sanctioning plaintiff for making false representations in administrative filing).

841. Id. A few other courts have suggested that statements by disability benefits recipients that they can perform the essential functions of a job with a former employer provide a basis for an insurance fraud investigation. See Miller v. U.S. Bancorp, 926 F. Supp. 994, 999 (D. Or. 1996) (citing Reigel, 859 F. Supp. at 969); Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 969 n.7 (E.D.N.C. 1994) (“[A] ny attempt by plaintiff to rebut the accuracy or veracity of [prior] statements may serve as a foundation for the instigation of an insurance fraud investigation.”).

This suggestion raises the question alluded to in Dockery about the logic of the estoppel decisions in precluding the plaintiffs from pursuing their nondiscrimination actions even if one accepts those courts’ premise that being disabled for purposes of disability benefits and being qualified under nondiscrimination laws are inconsistent. In order to pursue a nondiscrimination claim, the plaintiff will have to produce evidence that he or she is qualified, i.e., can perform the essential functions of the job. If such evidence is produced, why should the nondiscrimination action be precluded when the allegations in that situation are apparently the ones that are true? It would appear that the representations made in the disability benefits process are the ones that are suspect. If so, why not let the benefits provider pursue reimbursement, damages or file criminal charges? If the plaintiff cannot produce evidence of ability to perform the job, the nondiscrimination action will fail anyway, so the plaintiff will not gain any inequitable advantage. Furthermore, if the nondiscrimination claim is found to be frivolous or without basis, the courts certainly have other avenues for sanctioning irresponsible plaintiffs and their attorneys, including Rule 11 sanctions, contempt of court charges and perjury proceedings. None of these require sheltering employers who have engaged in discrimination that violates federal laws. As the Tenth Circuit noted in rejecting the application of judicial estoppel in another context, “[e] ven in the case of false statements in pleadings, public policy can be vindicated otherwise—and more practicably and fairly in most instances—than through suppression of truth in the future.” Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956). See also Smith v. Midland Brake, Inc., 911 F. Supp. 1351, 1359 (D. Kan. 1995) (quoting Parkinson, 233 F.2d at 438).

842. Dockery, 909 F. Supp. at 1559 (concluding that judicial estoppel is not applicable in situations like case at bar).
Unlike its complicity or acquiescence on the one-job-is-not-enough and temporary disability exclusion issues, the EEOC has taken a forceful and positive role in challenging the estoppel approach. On February 12, the EEOC issued guidance on the effect of representations made in applications for benefits on the determination of whether a person is a qualified individual with a disability under the ADA. The guidance indicates that it "explains why representations about the ability to work made in the course of applying for social security, workers' compensation, disability insurance, and other disability benefits do not bar the filing of an ADA charge."844

The guidance discusses the particular standards and purposes of the ADA, social security, worker's compensation and disability insurance plans. Among its conclusions, the EEOC found that (1) the ADA's purposes and standards are fundamentally different from the purposes and standards of other statutory schemes and contractual rights; (2) the ADA definition of "qualified individual with a disability" always requires an individualized assessment of the particular individual and the particular position, and other definitions permit generalized inquiries and presumptions; (3) the ADA's definition of "qualified individual with a disability" requires consideration of reasonable accommodation, and other definitions do not consider whether an individual can work with reasonable accommodation; (4) because of fundamental differences between the ADA and other statutory and contractual disability benefits programs, representations made in connection with an application for benefits may be relevant to—but are never determinative of—whether a person is a "qualified individual with a disability"; (5) representations made in connection with an application

843. See EEOC Compl. Man., supra note 325, ¶ 5415.
844. Id. The EEOC guidance is an extensive document that (1) analyzes the differences between the ADA's purposes and standards and those of other statutory schemes, disability benefits programs and contracts; (2) discusses recent and significant court decisions that have addressed this issue; (3) explains why the doctrine of judicial estoppel and summary judgment procedures should not be used to bar the ADA claims of individuals who have applied for disability benefits; (4) delineates why public policy supports the EEOC's position; and (5) explains how to assess what weight, if any, to give to such representations in determining whether an individual is a "qualified individual with a disability" for purposes of the ADA. Id. ¶ 5416.
845. See id. ¶ 5419-24.
846. See id. ¶ 5417.
847. See id. ¶ 5424.
848. See id. ¶ 5426.
849. See id. ¶ 5428.
for disability benefits are not determinative of whether a person is a "qualified individual with a disability;"\(^{(6)}\) a determination of what, if any, weight to give to representations made in support of applications for disability benefits depends on the context and timing of the representations;\(^{(7)}\) public policy supports the conclusion that representations made in connection with an application for disability benefits are never an absolute bar to an ADA claim;\(^{(8)}\) permitting individuals to go forward with their ADA claims is critical to the ADA’s goal of eradicating discrimination against individuals with disabilities;\(^{(9)}\) and (9) individuals should not have to choose between applying for disability benefits and vindicating their rights under the ADA.\(^{(10)}\) The EEOC also concludes that neither judicial estoppel nor summary judgment is appropriate in such cases.\(^{(11)}\) The EEOC guidance, along with the reasoning in cases such as *Mohamed* and *Dockery*, provide ample rationale and an alternative analysis for rejecting the estoppel lines of cases.

**D. Recognition of Rights of Former Employees to Challenge Discrimination in Regard to Benefits**

Former employees should be permitted to pursue discrimination claims based on disability that arise out of the former employment relationship, whether or not they are currently able to perform the essential functions of their former job. The analytical alternative to the *Beauford* line of cases is simply to discontinue the fundamentally unsound analysis that led to this irrational, mean-spirited group of decisions. The notion that a former employee is not "qualified" because he or she cannot perform the "essential functions" of the former job makes no sense as a limitation on protection from discrimination in regard to benefits that apply after the worker has left employment. This notion becomes even more ridiculous once one appreciates that the "qualified" limitation was not inserted in the statutes to narrow the scope of statutory protection. Rather, the qualified limitation was inserted to make it clear that discrimination does not include refusing to hire or retain people who cannot do the essential functions of the job.\(^{(12)}\)

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850. See id.
851. See id. \(\footnote{p. 5430.}\)
852. See id. \(\footnote{p. 5432.}\)
853. See id.
854. See id. \(\footnote{p. 5433.}\)
855. See id. \(\footnote{p. 5428-29.}\)
856. For a discussion of the reasons for the "qualified" limitation, see *supra* notes 47-57 and accompanying text.
the language of the section 504 regulations that the *Beauford* court relied on—"can perform the essential functions of the job in question"—is relevant only if there are functions of the job that the employee is going to be called on to perform. The assurance that the employee is capable of doing the essential tasks is necessary only where the employee is going to be called on to perform these tasks.

The related rationale propounded by the court in *Gonzales*, that former employees do not fit into categories of employee or applicant who are afforded protection under the ADA, is equally unsound. The term "employee" should be interpreted, as Congress assumed it would be when it enacted the ADA, consistent with Title VII precedents that construe the term broadly to include former employees. The pretense that the *Gonzales* court was simply applying the plain language of the statute is punctured by recognizing that the statutory language does not say current employee. Thus, the term itself is ambiguous on this issue. Moreover, all the other indicators of its meaning—other portions of the statute that provide for coverage of fringe benefits, the overall objectives of the statute in eliminating discrimination, the Title VII precedents indicating that "employee" should be interpreted broadly and includes former employees, the general rule that remedial and civil rights measures are to be construed liberally and the interpretations of the agency statutorily charged to implement the statute—support permitting former employees to pursue ADA charges when they are subjected to discrimination arising out of their former employment.

Both the *Beauford* and *Gonzales* rationales are directly and blatantly contrary to the announced purposes of the ADA, prohibiting discrimination and providing remedies to those who have been subjected to such discrimination. This point was forcefully made by the court in *Graboski v. Guiliani*,\(^{857}\) in which New York City firefighters who retired on disability retirement pensions challenged their exclusion from certain supplemental benefits available to other retirees.\(^{858}\) The defendant New York City officials made both the *Beauford* and *Gonzales* arguments, i.e., that the plaintiffs were not "qualified" because they could not perform the essential functions of their former jobs and that only "employees," not "former employees," were protected by the ADA.\(^ {859}\) The court said: "In other words, the City argues that once plaintiffs retired on the basis of


\(^{858}\) See id. at 260.

\(^{859}\) See id. at 265-66.
disability, the ADA no longer requires that they be treated even-handedly.\textsuperscript{860} The court responded to these arguments as follows:

Such a crabbed view of the ADA's coverage would undermine the statute's unambiguous remedial purpose. Title I of the ADA expressly prohibits discrimination in the provision of fringe benefits. As certain fringe benefits (such as pensions and health insurance continuation) are meaningful only post-employment, it is only logical that the statute's coverage reaches the period when the employment benefits are to be reaped.\textsuperscript{861}

The Graboski court also noted that the ADA incorporates by reference the Title VII definition of employee and was intended to have the same meaning, and that under Title VII, "'discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct' is actionable."\textsuperscript{862} The court ruled that the definition of the term "qualified" in Title I of the ADA "was not intended to distinguish this employment discrimination law from Title VII by abrogating coverage of former employees challenging discrimination arising out of the employment relationship."\textsuperscript{863} The court expressly declined to follow Beauford and Gonzales and similar rulings.\textsuperscript{864}

Ultimately, the court concluded that "[t]his standing argument simply begs the question of whether or not the exclusion of disability retirees from [supplemental] payments states a claim of discrimination under the ADA."\textsuperscript{865} The pertinent question for the Graboski court, then, as it should be in all such cases, was whether or not the defendants had discriminated against the plaintiffs on the basis of disability. All the rest is obfuscation.

E. Overall Framework

Getting rid of these four problematic and unfortunate lines of analysis and avoiding other similar problems depends upon recognition of some underlying principles. Thus, it is necessary to sum-

\textsuperscript{860} Id. at 266.
\textsuperscript{861} Id.
\textsuperscript{862} Id. (quoting Pantchenko v. C.B. Dodge Co., Inc., 581 F.2d 1052, 1055 (2d Cir. 1978)).
\textsuperscript{863} Id.
\textsuperscript{864} See id. at 266-67 n.12 (noting holdings of Beauford and Gonzales and expressly declining to follow them).
\textsuperscript{865} Id. at 267.
marize a few of the most important conceptual foundations of informed analysis under disability nondiscrimination laws.

First, the "otherwise qualified handicapped individual" language of section 504 of the Rehabilitation Act as it was originally enacted, and its analogs in the current language of section 504 and the ADA were included in the statutes, not to establish a limited class of persons eligible for protection, but to make it imminently clear that people who cannot perform the essential functions of the job or activity do not have to be included anyway. To the extent that the formulation of the nondiscrimination provision as originally enacted in 1973, and emulated thereafter might suggest a limited protected class, Congress corrected such an impression when it enacted the three-prong definition in 1974. The coverage of these disability nondiscrimination laws should not be limited to any special protected class.

Second, the classification "individuals with disabilities" is an artificial social categorization. Its usefulness lies principally in that it identifies a grouping of people who have been labeled as different from the rest of society and have been the objects of discrimination and prejudice because of such identification. It does not demarcate a group of people who are drastically different from others and, therefore, should be treated differently and given special protection. Strict eligibility criteria may be necessary in programs that provide benefits or specialized services for particular groups of people within the portion of the population denominated as having disabilities. Affirmative action programs of the federal government make use of a list of "targeted disabilities." Protection from discrimination based upon disability, however, belongs to everyone.

Third, the three-prong definition and protection under federal nondiscrimination laws were intended to be very broad. Remedial and civil rights statutes such as the ADA and Rehabilitation Act should be interpreted expansively to achieve their remedial purposes. In regard to the three-prong definition of disability, the

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866. For a discussion of the purpose of the "otherwise qualified handicapped individual" language of section 504 of the Rehabilitation Act and its analogs in the current language, see supra notes 47-57 and accompanying text.

867. For a discussion of the purposes of the "individuals with disabilities" classification, see supra notes 605-06 and accompanying text.

868. See Accommodating the Spectrum, supra note 18, at 55.

869. See, e.g., Moreno v. Consolidated Rail Corp., 63 F.3d 1404, 1415 (6th Cir. 1995) ("Section 504 is a civil rights statute, and as such, should be broadly construed.") vacated and decided on other grounds, 70 F.3d 782 (6th Cir. 1996); Anderson v. Gus Mayer Boston Store of Del., 924 F. Supp. 763, 771 (E.D. Tex. 1996) ("ADA has a comprehensive reach and should be interpreted with this goal in
Second Circuit has observed that “its legislative history . . . indicates that the definition is not to be construed in a niggardly fashion.”

Fourth, reasonable accommodation is an essential part of eliminating discrimination. It is not a special service or opportunity for people with disabilities.

Fifth, analysis under disability nondiscrimination laws should focus on the alleged discriminatory treatment meted out by the party charged with discriminating, not on the characteristics of the person allegedly subjected to such discrimination. These laws seek to regulate the conduct of employers and other covered entities and to induce them to stop discriminating. To the extent that these parties can divert the focus to a microscopic dissection of the complaining party, the central objectives of these laws will be frustrated.

VIII. CONCLUSION

In Germany, disability rights laws have taken a very different road from that of American laws. In the German system, people who meet statutory criteria can apply to be certified as a “handicapped person.” Certifications record the degree of disability based upon a numerical scale of functional limitations and establish an overall percentage of handicap. There are some subcategories for people falling within certain ranges of percentages. Once they have obtained such a certificate, individuals are eligible for a variety of benefits. Each employer in the country having over sixteen job slots is required to employ a specified percentage of workers with disabilities. Among other special rights, benefits and

871. For a discussion of “reasonable accommodation,” see supra notes 498-507 and accompanying text.
872. See Burgdorf, Disability Discrimination in Employment Law, supra note 1, at 1175-98.
873. See id.
874. See id.
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protections, persons with the certificates receive extra vacation time and cannot be fired without advance notice to and approval by a government office. The German system is truly a preferential treatment model provided to a special class of German citizens who are treated differently from others. The majority of Americans with disabilities recoil at the paternalistic and denormalizing underlying assumptions of this model.

The United States, however, has endorsed a model that stresses integration, full participation and nondiscrimination. The goal of such a model has been frustrated by a special class and preferential treatment mentality that has crept into the interpretation and enforcement of some of the very laws that were designed to assure equality and integration. And in the name of restricting this special treatment to the supposed truly deserving beneficiaries, obstacles have been erected that have kept many of the supposed core group along with many other citizens from the protection these laws were enacted to provide. Through the several lines of cases discussed in this Article that have imposed restrictive standards upon the protections afforded by nondiscrimination statutes, legal analysis under these statutes has proceeded quite a long way down the wrong road. There are countervailing authorities, however, and if the basic premises that underlie disability rights initiatives can be articulated, understood and incorporated into the analytic framework, then it is not too late for the jurisprudence in this area to get back on the right track.

875. See id.