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AD HOC DECISION MAKING AND PER SE PREJUDICE: HOW INDIVIDUALIZING THE DETERMINATION OF “DISABILITY” UNDERMINES THE ADA

CATHERINE J. LANCTOT*

THE Americans with Disabilities Act (ADA)\(^1\) represents a broad mandate for the improvement of the lives of millions of people with disabilities. When President George Bush signed the ADA into law in 1990, he described the new statute as “an historic opportunity” that represented “the full flowering of our democratic principles,” noting that it would “signal[] the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.”\(^2\) Congress had found that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older”\(^3\) and that individuals with disabilities continue to suffer from various forms of discrimination.\(^4\) Further, Congress found that:

[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars.

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4. See id. § 12101(a)(2) (“[H]istorically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination . . . continue to be a serious and pervasive social problem.”).
in unnecessary expenses resulting from dependency and nonproductivity.\(^5\)

In light of these findings, Congress announced that its purpose in passing the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"\(^6\) and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."\(^7\) The ADA passed by huge bipartisan majorities in both houses of Congress, with apparently widespread popular support as well.\(^8\)

It is now more than five years after the effective date of the ADA, but a review of the Articles appearing in this Symposium demonstrates that the ADA's promise of an end to discrimination against people with disabilities has yet to become a reality.\(^9\) In large part, the failure of the ADA to provide comprehensive protection against discrimination can be attributed to judicial narrowing of its provisions. As ADA filings continue to increase in number, many federal courts have proven to be hostile to claims of discrimination on the basis of disability.\(^10\) Courts often dismiss ADA cases on the ground that the plaintiff could not show that he or she was covered under the ADA as "an individual with a disability." Many courts insist that the ADA requires a searching inquiry into the particular medical symptoms of each individual plaintiff. The result has been a patchwork of holdings, often varying from court to court, as to what set of symptoms constitutes a disability.

It is time for lawyers and academicians to scrutinize the gulf that has emerged between the ADA's bold mandate of antidiscrimination and the courts' constricted interpretation of that mandate. The most logical place to begin this inquiry is at the

5. Id. § 12101(a)(9).
6. Id. § 12101(b)(1).
7. Id. § 12101(b)(2) (emphasis added).
9. See 42 U.S.C. § 12117 (noting that effective date of ADA was July 26, 1992).
The threshold issue of what disability means under the ADA. The Villanova Law Review Symposium represents the first step in what should be a continuing dialogue among lawyers, scholars and the courts as to what groups Congress intended to protect when it passed the ADA and what methods of judicial interpretation will best achieve the ADA's objectives. Until the threshold issue of ADA coverage is resolved, the ADA will never have the transformative effect its supporters optimistically anticipated in 1990.

One of the most striking aspects of ADA litigation today is that there remains such widespread disagreement over what class of people Congress intended to protect when it passed the ADA. As Professor Robert Burgdorf notes in his contribution to this Symposium, no other civil rights statute has engendered such controversy over the threshold issue of coverage. Even assuming that the concept of "disability" is more ambiguous than that of race or sex, however, one reasonably would have expected that some consensus might have emerged after five years of experience under the Act. Simple common sense would suggest that certain impairments are, by their very nature, disabilities per se and presumptively covered. The Equal Employment Opportunity Commission's (EEOC) guidance to the ADA explicitly anticipates such a development, when it states that some impairments "are inherently substantially limiting."

Quite the opposite has occurred. Many courts have flatly rejected the concept of a disability per se. Even more disquieting is

11. Only recently has academic attention focused on this critical ADA issue. See, e.g., Lisa E. Key, Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations," 48 HASTINGS L.J. 75, 84 (1996) (addressing whether individual with "voluntary" disability is entitled to full protection of ADA). To date, most of the law review commentary on the definitional sections of the ADA has been generated by students. See generally Eric Wade Richardson, Comment, Who Is a Qualified Individual With a Disability Under the Americans With Disabilities Act, 64 U.CIN. L. REV. 189, 191 (1995) (emphasizing importance of defining "qualified individual with a disability" under ADA). Two recent symposia, focusing more generally on ADA issues, have been published. See Symposium, Individual Rights and Reasonable Accommodations Under the Americans with Disabilities Act, 46 DePAUL L. REV. 871 (1997); Symposium, Special Issue on the Americans with Disabilities Act, 38 S. Tex. L. REV. 861 (1997). For a listing of other student written articles on this topic, see infra notes 18-19, 21.

12. See Robert L. Burgdorf, Jr., "Substantially Limited" Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997). The traditional Title VII protected classes of race, color, sex, religion and national origin, and ADEA's protected class of those over age 40, have provided their share of judicial controversy, but the coverage issues that have arisen have been peripheral to the broader questions arising under those statutes.


14. See, e.g., Bridges v. City of Bossier, 92 F.3d 329, 336 n.11 (5th Cir. 1996) ("[W]e disagree that hemophilia is a disability per se.").
the judicial refusal to recognize a variety of life-threatening diseases as disabilities on the ground that they are not sufficiently impairing. A sampling of some recent opinions may sound the alarm for those who thought the ADA would eliminate widespread discrimination. The United States Court of Appeals for the Fifth Circuit held that a woman who had recently had a mastectomy and was undergoing radiation treatment for breast cancer could not raise a genuine issue of material fact as to whether she was an individual with a disability.15 Several courts have held that an individual with diabetes does not have a disability under the ADA, as long as the diabetes can be controlled with insulin.16 Most recently, the United States Court of Appeals for the Fourth Circuit has held, en banc, that an individual who tests positive for human immunodeficiency virus (HIV), but remains asymptomatic, does not have a disability within the meaning of the ADA.17

If cancer, diabetes and HIV infection do not qualify as disabilities per se under the ADA, then it is difficult to imagine who constituted the 43,000,000 people with disabilities whom Congress

(1997); McKey v. Occidental Chem. Corp., 956 F. Supp. 1313, 1317 (S.D. Tex. 1997) (stating that ADA does not designate any impairments as disabilities per se); Merry v. A. Sulka & Co., 953 F. Supp. 922, 925 (N.D. Ill. 1997) (recognizing that no per se rule makes dyslexia disability under ADA, even though other courts have held it to be such); Mobley v. Board of Regents, 924 F. Supp. 1179, 1187 n.13 (S.D. Ga. 1996) (stating that it is not "obvious" that asthma is disability under ADA); Deckert v. City of Ulysses, No. 93-1295-PFK, 1995 WL 580074, at *7 (D. Kan. Sept. 6, 1995) (arguing that ADA provides no "checklist" of approved disabilities), aff'd, 105 F.3d 669 (10th Cir. 1996).

15. See Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 (5th Cir. 1996) (holding there is no genuine issue of material fact as to whether cancer and treatment "substantially limited [plaintiff's] major life activity of working"). The Fifth Circuit has been reluctant to extend ADA coverage to a variety of serious physical impairments. See, e.g., Still v. Freeport-McMoran, Inc., 120 F.3d 50, 51 (5th Cir. 1997) (per curiam) (holding that being blind in one eye is not disability per se); Burch v. Coca-Cola Co., 119 F.3d 305, 307 (5th Cir. 1997) (stating that untreated alcoholism is not disability per se); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 803 (5th Cir. 1997) (noting that heart condition with pacemaker is not disability per se); Oswalt v. Sara Lee Corp., 74 F.3d 91, 92 (5th Cir. 1996) (stating that high blood pressure is not disability per se); Chandler v. City of Dallas, 2 F.3d 1385, 1391 (5th Cir. 1993) (noting that no circuit court has addressed whether insulin-dependent diabetes is disability per se).


17. See Runnebaum v. Nationsbank of Md., No. 94-2200, 1997 WL 465301, at *7 (5th Cir. Aug. 15, 1997) (en banc) (stating that one who tests positive for human immunodeficiency virus (HIV), but has no symptoms, cannot be said to have disability per se); Ennis v. National Ass'n of Bus. & Educ. Radio, 53 F.3d 55, 60 (4th Cir. 1995) (same).
thought it was covering when it passed the ADA. But these cases typify the fractured nature of ADA case law today. Courts and commentators are split over whether the federal prohibition against discrimination on the basis of disability includes such conditions as AIDS or asymptomatic HIV infection,18 morbid obesity,19 cancer and associated conditions20 or infertility.21 More generally, an


20. See, e.g., Gordon v. E.L. Hamm & Assoc., 100 F.3d 907, 909, 915 (11th Cir. 1996) (holding that symptoms associated with chemotherapy are not disability under ADA); Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1354 (9th Cir. 1996) (concluding that temporary psychological condition relating to cancer is not disability under ADA), cert. denied, 117 S. Ct. 1247 (1997); Ellison, 85 F.3d at 193 (holding employee did not establish breast cancer as disability under ADA).

21. See Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996) (holding that infertility is not disability under ADA); Erickson v. Board of Governors, 911 F. Supp. 316, 325 (N.D. Ill 1995) (holding that plaintiff’s infertility states claim under ADA); Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 244 (E.D. La. 1995) (holding that plaintiff’s reproductive disorder is not disability under ADA), aff’d, 79 F.3d 1143 (5th Cir. 1996); Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1404-05 (N.D. Ill. 1994) (holding that plaintiff’s infertility is covered under ADA). See generally Sandra M. Tomkowicz, The Disabling Effects of Infertility:
emerging line of cases excludes from ADA coverage any medical conditions that are fully correctable by medication or other aids.22 Several of the Symposium Articles identify other exceptions and restrictions that have been judicially created in recent cases. How have the courts arrived at these apparently unreconcilable conclusions? In large part, courts that have narrowed ADA’s protected class have done so by insisting that they are required to engage in a “case-by-case” analysis of each individual plaintiff’s medical condition, rather than an analysis of whether a particular impairment inherently poses such a limitation.23 By thoroughly probing each factual aspect of the plaintiff’s medical history and then woodenly applying the definitional section of the ADA, these courts often conclude that many apparently disabling conditions are not covered by the ADA. This excessive reliance on a fact-bound approach to the threshold issue means that each ADA plaintiff is considered in a vacuum, without reliance on other reported cases addressing the same disease. Each symptom is then scrutinized to see whether the claimant is truly "substantially limited" by the particular set of symptoms he or she possesses. This methodology enables lower courts to dispose of ADA claims on motions to dismiss and motions for summary judgment and to insulate their ADA rulings from further review by resting them on factual findings of deficiencies in the plaintiffs’ particularized medical conditions. Underlying this ad hoc approach is a palpable reluctance by many


23. See generally Development in the Law—Employment Discrimination, supra note 10, at 1609 (“Because the question whether an individual is disabled is so fact-intensive, courts have developed further exclusions and inclusions on a case-by-case basis.”); Richardson, supra note 11, at 225 (“The cases decided under the ADA thus far demonstrate that courts recognize that an individualized analysis of each case’s facts is necessary to understand the application of the ADA. The courts have been unwilling to accept any type of blanket exclusion or inclusion of individuals under the [ADA]’s coverage.”).
judges to recognize even the most deadly of diseases—HIV infection, diabetes, hemophilia and cancer—as being presumptively within the protection of the ADA.  

A dissection of each ADA plaintiff's particularized medical condition virtually forecloses the development of judicial consensus as to whether certain diseases are "inherently substantially limiting." At best, the inevitable result of this ad hoc approach to ADA litigation is to create massive confusion for employers and lower courts. At worst, judicial construction of the ADA to exclude people with serious medical conditions from ADA protection means that employers are given free rein to discriminate against such employees. Could this have been Congress's intent when it passed the ADA? The Villanova Law Review Symposium represents the first comprehensive examination of this question.

A quick review of the ADA's definitional section is a necessary starting point. The ADA itself gives limited guidance on the parameters of disability. Congress did not list the specific disabilities it intended to include when it passed the ADA, although some people had urged such an approach at the time the bill was under consideration. Instead, Congress listed several conditions it intended to specifically exclude from coverage. Congress then defined disability in language that appears, at least on its face, to be broad enough to encompass a wide variety of physical and mental conditions: "(A) a physical or mental impairment that substantially limits


The initial story of ADA has been the attempt of persons to stretch the intent of ADA with regard to alleged "disabilities." Much of the criticism of the ADA in practice has come from the truly disabled who recognize that such attempted stretches can cause negative reaction to the Act and perhaps undermine its true purposes.

25. See Dallmann, supra note 21, at 379 (discussing criticism of vagueness of statutory language). Some opponents of the ADA argued that employers would be burdened by an open-ended definition of disability and contended that Congress should list the disabilities it intended to cover. See id. Congress ultimately did not follow this suggestion. The legislative history indicates that Congress chose not to provide such a list because of the difficulty of ensuring the "comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future." H.R. Rep. No. 101-485, at 51 (1990).

26. See 42 U.S.C. § 12211 (1994) (listing exclusions from definition of disability); see also Development in the Law—Employment Discrimination, supra note 10, at 1609 n.52 ("In light of the fact that Congress decided not to offer a listing of conditions included in the statutory definition of 'disability,' it is noteworthy that it chose to provide a list of those conditions that, for political reasons, are excluded from the definition.") (emphasis added).
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."27 It fell to the EEOC to define the statutory terms, ostensibly to give guidance to the courts in determining whether Congress intended to cover particular types of impairments.

In its original guidance, the EEOC had provided a list of "commonly disabling impairments," such as cancer, tuberculosis, HIV infection and epilepsy, but the agency removed this list from the final regulations in order to "avoid confusion."28 Instead, the EEOC's final regulations define "impairment" to mean:

(1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.29

"Substantially limits" means:

(i) [u]nable to perform a major life activity that the average person in the general population can perform; or (ii) [s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.30

"Major Life Activities," as defined by the EEOC, include "functions such as caring for oneself, performing manual tasks, walking,

28. See Employee Rights & Employer Obligations, supra note 8, at 3-15, 3-16 ("Apparently, the EEOC was concerned that the list could be misinterpreted as implying that an individual who has one or more of the listed impairments would automatically be considered an individual with a disability.").
29. 29 C.F.R. § 1630.2(h)(1), (2) (1997).
30. Id. § 1630.2(j)(1)(i), (ii). Moreover, "substantially limits" requires an evaluation of "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment, and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Id. § 1630.2(j)(2)(i)-(iii).
seeing, hearing, speaking, breathing, learning, and working."31 Presumably, all these definitions and amplifications sought to give meaning to Congress's express intent in the ADA.32

Much of the ensuing judicial discord over the definition of disability has stemmed from the statutory requirement that an impairment "substantially limit" a major life activity. Consider the recent treatment of asymptomatic HIV infection by the courts of appeals. The EEOC has taken the position that HIV infection is "inherently substantially limiting."33 Despite this explicit guidance, the courts remain split over whether a person who is HIV positive, without symptoms, is an individual with a disability under the ADA. Two recent appellate decisions illustrate the point.34 In *Abbott v. Bragdon*,35 the United States Court of Appeals for the First Circuit held "unhesitatingly" that "HIV-positive status is a physical impairment that substantially limits a fecund woman's major life activity of reproduction."36 In contrast, in *Runnebaum v. Nationsbank of Maryland*,37 the United States Court of Appeals for the Fourth Circuit held, en banc, that asymptomatic HIV infection could not be considered to be a disability per se, and that the particular manifestation of the infection must be considered before permitting an ADA claim to proceed.38 Writing for six members of the court, Judge Williams further asserted: "The plain meaning of 'impairment' suggests that asymptomatic HIV infection will never qualify as an im-

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31. Id. § 1630.2(h)(2)(i).
32. See 42 U.S.C. § 12101(b)(1) (1994) (explaining that express intent of ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").
35. 107 F.3d 934, 938 (1st Cir. 1997).
36. Id. at 939, 942. Although its holding appears to state a per se rule, the *Abbott* court hastened to qualify it and stated that the ADA requires individualized determinations and that each case depends on the facts and circumstances presented. See id. at 949. Other courts have concluded that HIV infection is a disability per se under federal antidiscrimination laws. See, e.g., *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) (stating that person with HIV is "individual with a disability" within meaning of Rehabilitation Act); *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994) (concluding that individual with HIV has disability within meaning of ADA).
38. See id. at *6. The court reaffirmed its holding in *Ennis v. National Ass'n of Business & Education Radio*, 53 F.3d 55 (4th Cir. 1995), that determinations of whether an individual has a disability must be made on an individual basis. See *Runnebaum*, 1997 WL 465301, at *5.
pairment: by definition, asymptomatic HIV infection exhibits no diminishing effects on the individual.\textsuperscript{39} At the same time, the court insisted that the determination of whether a disability exists "must be made on an individual basis."\textsuperscript{40}

One might argue that the difference between Abbott and Runnebaum is simply one of semantics, not substance.\textsuperscript{41} Abbott admits that some asymptomatic HIV-infected plaintiffs might not be covered under the ADA, and Runnebaum seems to suggest that particular HIV-infected individuals theoretically could make an adequate factual showing of coverage.\textsuperscript{42} The dichotomy emerges from the analytical framework utilized by each court. Abbott examines the disability itself.\textsuperscript{43} Runnebaum focuses instead on the individual with the disability, concentrating on the specific array of symptoms (or lack thereof) actually possessed by the plaintiff.\textsuperscript{44} The Runnebaum court's insistence that holding HIV-positive status to be a disability per se would be inconsistent with the ADA ignores the concept of an "inherently substantially limiting" disability specifically embraced by the EEOC's guidance. Moreover, Runnebaum displays little hesitancy in suggesting that asymptomatic HIV infection may be per se excluded from ADA coverage.\textsuperscript{45}

The debate is not simply over whether asymptomatic HIV infection could ever meet the definition of disability. The deeper discord arises over whether the courts should ever hold as a matter of law that any disabilities are covered per se under the ADA.\textsuperscript{46} Under the current state of the case law, a national chain of department stores may not fire its Rhode Island employees because they are HIV positive, but may fire HIV-positive employees in Virginia, depending on whether those employees can demonstrate that they

\textsuperscript{39} See Runnebaum, 1997 WL 465301, at *7.
\textsuperscript{40} See id. at *5. The court claimed, somewhat cryptically, that some impairments, like blindness or deafness, will always be disabilities. Id. at *5 n.5.
\textsuperscript{41} In fact, one could distinguish the two cases on their facts, in that the individual with a disability in Runnebaum was a man, not a "fecund woman." See id. at *2; Abbott, 107 F.3d at 942.
\textsuperscript{42} See Runnebaum, 1997 WL 465301, at *8; Abbott, 107 F.3d at 943.
\textsuperscript{43} See Abbott, 107 F.3d at 944. The majority opinion in Runnebaum, however, comes close to barring all claims by plaintiffs with asymptomatic HIV infection. See Runnebaum, 1997 WL 465301, at *26 (Michael, J., dissenting).
\textsuperscript{44} See Runnebaum, 1997 WL 465301, at *6-9.
\textsuperscript{45} See id.
\textsuperscript{46} See Daugherty v. City of El Paso, 56 F.3d 695, 698 (5th Cir. 1995) (holding as matter of law, insulin-dependent diabetes renders individual not qualified to drive bus), cert. denied, 116 S. Ct. 1263 (1996). It is worth noting that courts show no comparable reluctance to uphold employer rules that discriminate on the basis of having a particular disease, regardless of the particularized medical condition of individuals adversely affected by the rule. See id.
possess some additional set of symptoms that are substantially limiting.\(^{47}\) But it is not simply the circuit split that produces the anomaly. Under an individualized approach to determining disability, theoretically, an employer in the Fourth Circuit could have an explicit policy of firing all employees who are HIV positive, but only those employees who could prove additional "substantially limiting" symptoms could make even a threshold showing of coverage under the ADA.\(^{48}\)

Could Congress reasonably have intended to make protection against discrimination contingent on detailed medical determinations about the underlying disability? Does the ADA really require ad hoc scrutiny of each individual plaintiff's medical condition before its protections may be invoked? These questions lie at the heart of the definitional dilemma posed by the ADA. One way to answer this question is to remember that Congress sought to eradicate prejudice against people with disabilities when it passed the ADA.\(^{49}\) By definition, prejudice against people with certain disabilities does not rest on a fact-specific inquiry.\(^{50}\) Prejudice is not tailored to a person's particular set of symptoms. Prejudice is not determined by the degree to which a medical condition substantially limits a major life activity. Prejudice stems from over generalizations, myths and stereotypes, unwarranted assumptions and fear.\(^{51}\) In short, prejudice by its very nature is not based on ad hoc reactions to particular individuals. Prejudice is inherently per se.

An employer who harbors myths or fears about an employee who is HIV positive is unlikely to calibrate its hostile actions to the

\(^{47}\) See Development in the Law—Employment Discrimination, supra note 10, at 1616 ("[W]ithout clear guidelines for determining the existence of a disability or an undue hardship, courts may render inconsistent, and therefore unfair, judgments."). The dissenting opinion in Runnebaum asserted that the decision "moves this circuit even further from the mainstream of ADA interpretation." Runnebaum, 1997 WL 465301, at *17 (Michael, J., dissenting).

\(^{48}\) See Daugherty, 56 F.3d at 1615 n.98 ("The ambiguity of many ADA terms complicates the task of employment lawyers who counsel employers on compliance with the [ADA].").

\(^{49}\) See H.R. Rep. No. 101-485, at 40 (1990) (stating that people with disabilities have been subject to discrimination "based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society").

\(^{50}\) See American Heritage Dictionary of the English Language 977 (2d ed. 1982) (defining prejudice as "[a]n adverse judgment or opinion formed beforehand or without knowledge or examination of the facts").

\(^{51}\) See School Bd. v. Arline, 480 U.S. 273, 284 (1987) ("[In the Rehabilitation Act], Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.").
particular manifestation of that illness. If Congress’s intent was to eradicate prejudice against people with disabilities, one must question whether the current judicial fixation on fact-sensitive medical analyses can ever achieve that objective. It is far more logical to conclude that Congress intended to afford broad protection to people with certain diseases against the myths, stereotypes and fears that have prevented them from achieving parity in the workplace.

It is equally logical to assume that the ADA contemplates the gradual evolution of a set of recognized medical conditions that meet, as a matter of law, the definition of disability per se.

This is not to say that all individuals with inherently substantially limiting impairments like HIV infection should automatically prevail in ADA litigation regardless of their particular symptoms. The appropriate analysis would be to consider the individualized conditions of plaintiffs when determining whether they are “qualified” under the ADA—that is, whether they can perform the essential functions of the job with or without reasonable accommodation. Under this methodology, a person with diabetes who requires insulin would have a disability under the ADA because diabetes is a physical impairment that substantially limits a major life activity. Whether the person was “qualified” to perform a particular job would require consideration of a number of factors, including whether the diabetes was adequately mitigated by the insulin. The concept of “reasonable accommodation” also necessarily requires case-by-case analysis. But the case-by-case approach to the determination of disability should be abandoned for impairments that are inherently substantially limiting.

Relying on individualized determinations of whether an individual is qualified would be fully consistent with the EEOC guidance on the issue. To the extent that the EEOC’s regulations

52. This is particularly true in light of the well-settled principle of statutory construction that civil rights statutes are to be liberally construed to achieve their broad remedial purpose. See Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (civil rights statutes should be given “sweep as broad as [their] language” (quoting United States v. Price, 383 U.S. 787, 801 (1966))); Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (stating that civil rights laws are to be broadly construed).

53. See Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L.J. 1, 4-5 (1996) (arguing that case-by-case approach to reasonable accommodation is preferable way for law to develop under ADA).

54. See 29 C.F.R. pt. 1630, app. A § 1630(2)(j) (1997) (“Of course, the determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis . . . . This case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs.”).
seem to suggest that an individualized assessment is necessary for every determination of disability, they merit reexamination because such a requirement is inconsistent with the concept of an "inherently substantially limiting" impairment. Careful review of the EEOC's approach to this issue may demonstrate instead that its emphasis on individualized assessment of impairment sought to prevent employers from treating as disabled those employees who are not in fact substantially impaired and not to enable employers to exclude employees with disabilities from ADA coverage because they are able to function despite their disability.

A recent district court opinion takes a more expansive approach to the definition of disability. In *Wilson v. Pennsylvania State Police Department*, Judge Rendell considered whether a plaintiff with myopia could state an ADA claim against the state police department, which requires that candidates for state trooper cadet have uncorrected vision of at least 20/70 in one eye and 20/200 in the other. The plaintiff's uncorrected vision did not meet the police department's requirements, although his vision was completely correctable with corrective lenses. The state police department moved for summary judgment on the ground that myopia that is correctable is not a substantial impairment under the ADA.

Judge Rendell denied the motion for summary judgment, relying heavily on the EEOC's guidance. Noting that the EEOC states that "the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices," she considered whether the EEOC guidance was consistent with the ADA. After an exhaustive review of

55. See id. § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.").
56. See id.
57. See id. ("Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.").
60. See id. at 900.
61. See id.
62. See id. at 901.
63. See id. at 905, 913.
64. Id. at 905 (quoting 29 C.F.R. § 1630.2(j) (1997)).
the legislative history on mitigating measures, she determined that "the legislative history of the ADA overwhelmingly supports the EEOC's interpretation" and deferred to the EEOC. Judge Rendell, therefore, permitted the plaintiff's claim to go forward, noting: "I do not find that the text of the statute unambiguously precludes a plaintiff from being considered disabled where he is substantially limited without mitigating measures but is able to use such measures to overcome the substantial limitations which would otherwise flow from his impairment."68

The Wilson case demonstrates how courts should analyze the threshold issue of disability. The court carefully analyzed congressional intent, examined the legislative history of the ADA and showed appropriate deference to the EEOC guidelines. More noteworthy is the court's sensitivity to the underlying principles of the ADA. The defendants argued in Wilson, as employers have in so many other cases, that the plaintiff was not sufficiently impaired to be covered under the ADA, but, at the same time, was too impaired to meet the requirements of the job.70 The court noted: "There is a certain irony inherent in defendants' argument: if, by virtue of his glasses or lenses, plaintiff is not substantially limited in seeing, how can he nonetheless be too visually impaired—based on his eyes without correction—to satisfy the position of state trooper?"71 Judge Rendell's perceptive comment illustrates how judges who construe the ADA in light of its sweeping antidiscrimination mandate will most faithfully adhere to congressional intent.

It may take Supreme Court intervention or a statutory amendment before the courts begin to harmonize the inconsistencies emerging in ADA litigation. In the meantime, the Villanova Law Review Symposium on the ADA represents a significant milestone in developing antidiscrimination law for people with disabilities. By concentrating on the deceptively narrow issue of "protected class" under the ADA, the Symposium has generated a number of thoughtful Articles that should provide fodder for further amplification. Each of the Articles in this Symposium issue provides not

65. See id. (discussing mitigating measures and assessment of disability under ADA).
66. Id. at 912.
67. See id. at 910.
68. Id. at 908.
69. See id.
70. See id. at 902.
71. Id. at 913.
only a scholarly analysis of the law, but also proposes potential avenues for additional research and litigation.

In their article, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, Peter Blanck and Mollie Weighner Marti provide a significant analysis of the state of empirical research on the effect of the ADA.\(^{72}\) In the absence of such data, courts and employers rely on their own intuitions, which are often tinged with bias, as to what Congress intended when it outlawed discrimination against people with disabilities. Some of the uncertainty surrounding the ADA's legal requirements might be eliminated by additional empirical research. Blanck and Marti demonstrate the need for additional empirical study of a number of aspects of disability discrimination. In particular, they suggest that further assessment of employer attitudes toward disabilities in the workplace and employer behavior with respect to such disabilities would facilitate development of the law.\(^{73}\) Their Article also suggests that unconscious judicial bias may be responsible for some of the recent developments in ADA case law.\(^{74}\) They note that empirical studies demonstrating how inexpensive most ADA accommodations tend to be might counteract judicial reluctance to construe the statute broadly.\(^{75}\)

Robert L. Burgdorf, Jr.'s article, "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, reiterates the concern about judicial "parsimony" in construing the antidiscrimination protections of the ADA and the Rehabilitation Act of 1973.\(^{76}\) Professor Burgdorf criticizes the creation of a special "protected class" model for disability discrimination, as this approach inevitably limits the scope of laws like the ADA to those who can demonstrate that they meet some threshold definition.\(^{77}\) After reviewing the historical evolution of the special treatment model, Professor Burgdorf identifies a number of areas in which the courts (and, at times, the EEOC itself) have strayed from the antidiscrimination principles of the ADA.\(^{78}\) In particular, his article shows how the definition of


\(^{73}\) See id. at 355-56.

\(^{74}\) See id. at 350.

\(^{75}\) See id. at 380.

\(^{76}\) See Burgdorf, supra note 12, at 439.

\(^{77}\) See id. at 568-72.

\(^{78}\) See id. at 451-59.
disability has been muddied by issues such as the "exclusion from one job" limitation, the emerging prohibition against coverage of "temporary" disabilities and the trend toward using "judicial estoppel" against plaintiffs who have also filed claims for social security disability. Professor Burgdorf's comprehensive treatment of the various misconstructions of disability that are emerging in the courts today should spark additional efforts in this area. Even more provocative is his argument for an alternative approach to the current focus on the so-called protected class of people with disabilities.

In her article, Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent, Arlene Mayerson suggests that many courts are hostile to the underlying principles of the ADA. In particular, she criticizes the courts for what she perceives as a narrowing construction of the "regarded as" prong of the ADA's definition of disability. She contends that many courts have erroneously required plaintiffs to prove actual physical impairment in order to meet the requirements of this prong, which is inconsistent with the purpose of the "regarded as" category. Mayerson also discusses the emerging "quagmire" over the so-called "single job" exclusion from ADA coverage, noting that an expansive reading of this exception will undermine the purposes of the ADA. Mayerson concludes that the courts should be more cognizant of congressional intent in construing the scope of the ADA.

In The New Genetic Age: Do Our Genes Make Us Disabled Individuals Under the Americans with Disabilities Act?, Mark S. Dichter and Sarah E. Sutor raise one of the issues likely to engage the attention of employers and courts in the future—discrimination on the basis of genetic predisposition to disability. Dichter and Sutor argue that plaintiffs seeking to raise such claims will have to show that they are "regarded as" having the disability to which they are genetically predisposed and contend that Congress did not intend that the

79. See id. at 439-89.
80. See id. at 571.
81. See Arlene B. Mayerson, Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent, 42 Vill. L. Rev. 587 (1997).
82. See id. at 591.
83. See id. at 592-93.
84. See id. at 605.
85. See id. at 609.
ADA be stretched so far. They conclude that there are adequate alternative statutory protections to guard against employer discrimination on the basis of genetic testing.

Stanley S. Herr also addresses the issue of mental health disabilities, but in the unique context of bar admissions. In Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities, Herr not only provides a theoretical analysis of the complex interrelationship between the ADA and the duty of bar examiners to ascertain fitness to practice law, but also describes a litigation strategy for challenging bar practices that violate the ADA. By carefully assessing whether various mental illnesses should be the subject of inquiry by bar examiners, his article further indicates the need for careful definition of which disabilities merit protection under the ADA.

Finally, Peggy R. Mastroianni and Carol R. Miaskoff focus their attention on Coverage of Psychiatric Disorders under The Americans with Disabilities Act, an area of particular difficulty for employers and the courts. Their Essay carefully analyzes the applicability of the disability definition to current psychiatric disorders. They note that some courts have correctly understood certain psychiatric disorders to be inherently substantially limiting, without parsing through the statutory definition. As part of this analysis, they examine the broader issue of whether the scope of the ADA’s protection should hinge on the effect of medication in alleviating or controlling otherwise disabling impairments. Their Essay is of particular value to scholars and litigants because it highlights potential legal problems with respect to disabilities that are increasingly becoming the subject of litigation.

As the federal courts grapple with the issue of coverage under the ADA, the absence of consensus on the meaning of disability will continue to create confusion for employers and litigants. Ad hoc decisionmaking in these cases simply cannot achieve the intent of Congress to provide “clear, strong, consistent, enforceable standards ad-

87. See id. at 618.
88. See id. at 633.
90. See id. at 655-65.
92. See id. at 725.
93. See id. at 738.
94. See id. at 733.
dressing discrimination against individuals with disabilities."95 The Villanova Law Review Symposium can only be a first step in encouraging additional scholarship in the area of disabilities discrimination. Without such effort, the ADA's bright promise of fairness to employees with disabilities may never come to fruition.