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COVERAGE OF PSYCHIATRIC DISORDERS UNDER THE AMERICANS WITH DISABILITIES ACT

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I. INTRODUCTION

PSYCHIATRIC disorders have the unique distinction of being both prevalent and stigmatized in our society. Many individuals with such disorders, aware of this stigma from personal experience, face difficult decisions in the workplace. Disclosure of a disability to a supervisor or employer, often required to invoke the protections of the Americans with Disabilities Act of 1990 (ADA), may provoke the very discrimination the ADA is designed to de-

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1. See U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, PSYCHIATRIC DISABILITIES, EMPLOYMENT AND THE AMERICANS WITH DISABILITIES ACT 51-52 (1994) [hereinafter OTA DISABILITY REPORT] (discussing results of survey on mental disorders in United States). Recent statistics show that more than one of every five American adults have a diagnosable mental disorder in a given year. Id. With respect to the major mental disorders, approximately 9% of American adults have mood disorders (bipolar disorder, major depression, dysthymia); approximately 12% have anxiety disorders (phobic disorders, panic disorders, obsessive-compulsive disorder); and approximately 1% have schizophrenia. Id.

2. See Mark Clements, What We Say About Mental Illness, PARADE MAG., Oct. 31, 1993, at 4-5 (discussing results of survey and concluding that stigma against mental illnesses will hopefully be removed during 1990s). Of the 2503 men and women surveyed in a 1993 poll sponsored by Parade Magazine, 70% said there was a stigma attached to admitting to a mental illness and 55% felt that the same stigma applied to seeing a mental health professional. Id. Also, 85% of those surveyed believed that some people who needed treatment were not seeking it because of the stigma attached to mental illness. Id.

3. See Lisa W. Foderaro, Law School Grad Looks Ahead Despite His Schizophrenia, PORTLAND OREGONIAN, Nov. 16, 1995, at B11 (discussing stigma from psychiatric disorders in legal field). Michael Laudor, who has schizophrenia and applied for law school teaching jobs while he was a postdoctoral associate, recounted how "[s]ome people at Yale Law School told me not to tell anyone [about my schizophrenia] because mental illness is a career-killer." Id.

In an account of his experience with severe depression, the novelist William Styron wrote: "Curiously enough, it was [my psychiatrist] who told me once or twice during our sessions (and after I had hesitantly broached the possibility of hospitalization) that I should try to avoid the hospital at all costs, owing to the stigma I might suffer." WILLIAM STYRON, DARKNESS VISIBLE 67-68 (1990).

A better understanding of psychiatric conditions in general, and of the ADA's coverage of individuals with psychiatric disabilities in particular, may help to reduce such discrimination.

Under the ADA, the term “disability” means: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of . . . [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” This Article discusses the application of the definition of disability to persons with psychiatric disorders.

II. CURRENT DISABILITY

A. It Is Often Self-Evident That an Individual Currently Has a Psychiatric “Disability” Within the Meaning of the ADA

An individual currently has a disability within the meaning of the ADA if he or she has an “impairment that substantially limits one or more of the major life activities.” In many instances, courts have found it unnecessary to parse this statutory definition in order to conclude that an individual experiencing a severe psychiatric condition has a disability.

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

5. See Laura Mancuso, U.S. Dep't of Health & Human Servs., People with Psychiatric Disabilities, Employment, and the Americans with Disabilities Act: Turning Policy into Practice 5 (1995) (stating that disclosure of disability often leads to closer scrutiny). According to a Department of Health and Human Services report, “[s]ome mental health consumers report that they are more closely supervised after they disclose [a disability], even if their job performance is unchanged. Co-workers may also become less interested in socializing with them.”


The definition of the term disability in the ADA is comparable to that used in the Rehabilitation Act of 1973 (Rehabilitation Act) and its implementing regulations. See Rehabilitation Act of 1973, 29 U.S.C. § 701 (1994) (defining disability under Rehabilitation Act); see also Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 725 (5th Cir. 1995) (finding definition of disability in ADA “substantially equivalent” to that in Rehabilitation Act). “Congress intended that the relevant case law developed under the Rehabilitation Act be generally applicable to the term ‘disability’ as used in the ADA.” 29 C.F.R. § 1630.2(g).


8. See, e.g., Gardner v. Morris, 752 F.2d 1271, 1277 (8th Cir. 1985) (concluding, without legal analysis, that bipolar disorder treated by lithium is substantially
The correctness of these judicial judgments is borne out by a closer examination of diagnostic criteria for certain psychiatric disorders in the context of the ADA's definition of disability. The diagnostic criteria of some mental disorders, by their very terms, describe symptoms that are "substantially limiting" in that they are both severe and ongoing. For example, the diagnosis for schizophrenia is based on findings of two or more acute symptoms for a significant portion of time during a one-month period (including delusions, hallucinations, catatonic behavior and disorganized speech); ongoing functional impairment; and continuous signs of the disturbance for at least six months, including the period of acute symptoms, as well as other symptoms such as extreme apathy and lack of emotion. Similarly, the diagnosis for a chronic major depressive episode is based on a finding of five or more severe symptoms that are experienced continuously for at least two years. Such symptoms include an intensely sad mood, markedly diminished interest or pleasure in activities, insomnia or sleeping too much, and diminished ability to think, concentrate or make decisions. Other psychiatric conditions, like obsessive-compulsive disorder, similarly may rise to the level of a disability within the meaning of the ADA.

Extensive analysis of ADA disability is also unnecessary when an individual experiences severe symptoms of a mental impairment on an episodic basis. Some individuals have episodes of a major mental illness, like bipolar disorders, repeatedly over several years, and yet the impairment is substantially limiting under Rehabilitation Act); Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1408 (5th Cir. 1983) (concluding that plaintiff's depression and repeated suicide attempts were handicaps under section 504 of Rehabilitation Act); Franklin v. United States Postal Serv., 687 F. Supp. 1214, 1218 (S.D. Ohio 1988) (noting, without legal analysis, that paranoid schizophrenia may be handicap under Rehabilitation Act).

10. See id. at 285-86 (explaining diagnostic criteria for schizophrenia).
11. See id. at 327 (listing criteria for "chronic major depressive episode").
12. See id. at 327, 382 (listing criteria and chronic specifier for "major depressive episode").
13. See id. at 422-25 (discussing criteria for obsessive-compulsive disorders). A diagnosis of obsessive-compulsive disorder includes obsessions (such as recurrent and persistent thoughts, impulses or images that are experienced as intrusive and inappropriate) or compulsions (such as repetitive behaviors like hand washing or mental acts like repeating words soundlessly), when the obsessions or compulsions cause marked distress or significantly interfere with the person's normal routine, occupational functioning, or usual social activities or relationships. Id. In terms of duration, obsessive-compulsive disorder usually begins in adolescence or early adulthood and often continues on a chronic course of waxing and waning. Id.
months or several years. The course of such an impairment is not temporary or short-lived, although it may be unpredictable. The impairment may substantially limit a major life activity in a variety of ways, involving periodically acute symptoms as well as severe medication side effects and other self-limiting efforts designed to reduce the likelihood or intensity of the next episode. Under these circumstances, the severity and ongoing nature of the condition would clearly make it a disability for purposes of the ADA.

B. Situations in Which More Extensive Analysis Is Required

Of course, there are situations in which it is not readily apparent if an individual has a psychiatric disability within the meaning of the ADA. In these cases, the familiar ADA analysis for determining whether an individual currently has a disability is applied. The first step is to determine whether the individual has a “mental impairment.” Then, the next step is to determine whether one or more major life activities are substantially limited by that impairment.

1. Mental Impairment

The ADA regulations state that the phrase “mental impairment” includes “[a]ny mental or psychological disorder, such as...

14. See id. at 359-63 (discussing criteria for bipolar disorder). The diagnosis for bipolar disorder with recurrent episodes of major depression and hypomania involves “clinically significant distress” in important areas of functioning and a continuing course of depressions and hypomania, which may or may not be rapid cycling. Id.
15. See id.
16. See id.
17. See id.
18. See Pritchard v. Southern Co. Serv., 92 F.3d 1130, 1133 (11th Cir. 1996) (finding genuine issue of material fact whether engineer with depression had symptoms that substantially limited major life activity); Marschand v. Norfolk & W. Ry. Co., 876 F. Supp. 1528, 1538 (N.D. Ind. 1995) (concluding that plaintiff's post-traumatic-stress disorder undisputedly qualifies as mental impairment, but that it does not mean plaintiff is disabled under ADA). Recent cases suggest that whether an individual has a covered disability is generally a factual issue, and courts determine that issue on a case-by-case basis. See generally Olson v. General Elec. Aerospace, 101 F.3d 947, 952 (3d Cir. 1996) (stating that to determine if one has disability under ADA, court must assess whether impairment significantly restricts one's ability to perform); Kotelowski v. Eastman Kodak Co., 922 F. Supp. 790, 796-97 (W.D.N.Y. 1996) (holding plaintiff not disabled under ADA when plaintiff claimed depression as her disability).
emotional or mental illness." The most straightforward evidence that an individual has such a mental impairment is documentation of a diagnosis from the current edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).* The *DSM-IV* is a compendium of mental disorders that courts presently recognize and is now widely used by American mental health professionals for diagnostic and insurance reimbursement purposes. Commonly known mental disorders include depression, bipolar disorder, schizophrenia and anxiety disorders such as posttraumatic-stress disorder and obsessive-compulsive disorder.

Although the *DSM-IV* is widely used, it is not the only way for an individual to show mental impairment. Some people, because of concerns about stigma, may choose not to disclose their specific *DSM-IV* diagnosis to their employer. Because other forms of evidence may suffice to establish mental impairment, this choice in

22. See *DSM-IV*, supra note 9, at 285-86 (discussing criteria and effects of mental disorders). "[M]any experts contend that as a practical matter, a *DSM-IV* diagnosis will be necessary if not sufficient to cross the impairment threshold in the first prong of the ADA definition." *OTA Disability Report*, supra note 1, at 45-46.
24. Not all *DSM-IV* diagnoses support a finding of mental impairment or disability under the ADA. For example, *DSM-IV* covers a variety of sexual behavior disorders and other disorders like kleptomania and pyromania that Congress expressly excluded from the ADA's definition of disability. *See 42 U.S.C. § 12211(b) (1994).*
25. *Id.*

Congress also stated that the term "individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis" of that use. *Id.* § 12210(a).

The *DSM-IV* also includes conditions such as normal bereavement or problems with a spouse or child, which are not mental disorders and therefore are not mental impairments for purposes of the ADA. *See DSM-IV*, supra note 9, at 684-85 (discussing symptoms of bereavement).
itself is not a reason to automatically exclude these individuals from the protections of the ADA. Thus, individuals concerned about the consequences of disclosing a diagnosis may choose to give their employer a detailed note from a doctor or other mental health professional explaining, for example, the negative manifestations, severity and duration of their condition. Such a note provides circumstantial evidence of an underlying mental impairment, evidence that has sufficient persuasiveness if it is provided in a detailed and credible way by a doctor or mental health professional.\textsuperscript{25}

Individuals who cannot afford or do not have access to services for mental health assessment and treatment may be unable to produce either \textit{DSM-IV} or any other type of medical documentation. Again, this should not necessarily exclude an individual from ADA coverage. In some instances, statements from family and colleagues who are familiar with the individual and the course of his or her condition may provide persuasive evidence of impairment. For example, an explanation from a family member that an individual's tardiness is attributable to well-established compulsive behaviors (such as washing their hands precisely fifteen times before and after riding a public bus) may provide evidence of a mental impairment.\textsuperscript{26}

\textsuperscript{25.} See, \textit{e.g.}, Mobley v. Board of Regents, 924 F. Supp. 1179, 1186 (S.D. Ga. 1996) (looking to medical evidence, such as clinical findings, medical opinions or other medical documentation, to establish whether plaintiff has bona fide physical impairment). Such documentation is most persuasive if it is written by a doctor or mental health professional who has treated the individual on an ongoing basis. \textit{Id.}

\textsuperscript{26.} If an employer wants more definitive evidence of mental impairment and therefore requires a psychiatric examination or evaluation that is job related and consistent with business necessity, the employer should pay the entire cost of the evaluation. Any other approach would ultimately and wrongly result in the ADA reliably protecting only those with comfortable means or good mental health insurance coverage. Although the ADA is silent on the issue of payment for medical examinations, it recognizes "that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged... economically...." 42 U.S.C. \textsection 12101(a)(6).

The ADA allows covered entities to make "preemployment inquiries into the ability of an applicant to perform job-related functions." 42 U.S.C. \textsection 12112(d)(2)(B). Likewise, the ADA prohibits covered entities from requiring a medical examination or from making inquiries of an employee as to "whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." \textit{Id.} \textsection 12112(d)(4)(A). \textit{See, \textit{e.g.},} Yin \textit{v. California, 95 F.3d 864, 868 (9th Cir. 1996)} ("[T]he ADA does not prohibit the state from requiring [the plaintiff] to undergo the requested medical examination."); Clark \textit{v. Virginia Bd. of Bar Exam'rs, 880 F. Supp. 430, 430 (E.D. Va. 1995)} (recognizing board's duty to identify people suffering from mental conditions that would severely affect their ability to practice law, but cautioning that such mental health questioning also must comply with ADA).
Other people may choose simply to identify their condition in colloquial terms, such as being “stressed.” Equal Employment Opportunity Commission (EEOC) guidelines and case law clearly state that common personality traits and normal emotional reactions, including difficulty in responding to stress, are not, without more, impairments under the ADA. For some people, however, difficulty responding to stress in general, or to certain stresses in particular, may be truly linked to a mental impairment. Therefore, before assuming that an individual who complains of stress is not covered by the ADA, it is important to explore whether the individual has a mental impairment and, if so, whether his or her difficulty responding to the stress is actually linked to that impairment.

27. See Daley v. Koch, 892 F.2d 212, 214 (2d Cir. 1989) (holding that poor judgment, irresponsible behavior and poor impulse control in themselves were not mental impairments, absent “any particular psychological disease or disorder”); Hindman v. GTE Data Serv., No. 93-1046-CIV-T-17C, 1994 WL 371396, at *3 (M.D. Fla. June 24, 1994) (concluding “personality traits that are commonplace or characteristics within the ‘normal’ range are excluded from protection”); 29 C.F.R. § 1630.2(h) (1997) (defining “physical” and “mental impairment” under ADA); EEOC Compl. Man., supra note 6, § 902.2(c) (4) (stating that common personality traits, such as poor judgment and irresponsible behavior, are not impairments under ADA).

28. See, e.g., Wood v. County of Alameda, No. C 94 1557 CEM, 1995 WL 705139, at *16 (N.D. Cal. Nov. 17, 1995) (finding that clerical worker who, after being promoted to new department, requested “stress leave” and then reassignment, had depressive and anxiety disorders related to her promotion). This issue typically arises in the context of a request for reasonable accommodation, for example, where an employee asks for a reassignment because of work-related stress in his or her current position. The issues in such a case are whether the stress is associated with a mental impairment and whether reassignment would be an effective accommodation. Id. Both leave and reassignment are types of reasonable accommodation that may be required under the ADA. See 29 C.F.R. § 1630(2)(o).

A reasonable accommodation “is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.” Id. The ADA states that “reasonable accommodation” may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9). See, e.g., Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1049 (7th Cir. 1996) (“Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered.”); Miranda v. Wisconsin Power & Light Co., 91 F.3d 1011, 1016-17 (7th Cir. 1996) (“The ADA does not obligate an employer to provide a disabled employee every accommodation on his wish list.”); Daugherty v. City of El Paso, 56 F.3d 695, 699 (5th Cir. 1995) (stating that reassignment under reasonable accommodation of ADA applies to employees who were already employed when they became disabled); EEOC v. Alc. Investigations Ltd., 55 F.3d 1276, 1284 (7th Cir. 1995).
2. **Major Life Activities**

An impairment must substantially limit one or more major life activities to rise to the level of a disability under the ADA. Psychiatric impairments may affect major life activities such as learning, concentrating, thinking, interacting with others, caring for oneself, speaking, performing manual tasks and working. Sleeping and eating are also major life activities that may be significantly affected by a psychiatric impairment. This list, however, is not exhaustive. Indeed, the ADA’s emphasis on case-by-case analysis of

(“The ADA defines ‘reasonable accommodation’ to include restructuring a job, such as by removing non-essential functions from the job.”); Vande Zande v. Wisconsin, Dep’t of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995) (stating that ADA requires employer to make whatever accommodations reasonably possible in circumstances so as to allow employee to perform essential functions of job); Kuehl v. Wal-Mart Stores Inc., 909 F. Supp. 794, 803 (D. Colo. 1995) (“The ADA does not require that an employer provide the best accommodation possible to a disabled employee.”); Marschand v. Norfolk & W. Ry. Co., 876 F. Supp. 1528, 1543 (N.D. Ind. 1995) (“[T]he Railroad’s efforts to find [the plaintiff] alternative employment were more than a reasonable accommodation.”).

29. See 42 U.S.C. § 12102(2)(A); see also 29 C.F.R. § 1630.2(g), (i) (1997) (defining “major life activity” under ADA); EEOC Compl. Man., supra note 6, § 902.3 ("For an impairment to rise to the level of disability, it must substantially limit, have previously substantially limited, or be perceived as substantially limiting, one or more of a person's major life activities.").

30. See KAY REDFIELD JAMISON, AN UNQUIET MIND: A MEMOIR OF MOODS AND MADNESS 3-8 (1995) (recounting author's struggle with manic depression). For example, the ability to care for oneself may be substantially limited by mania. Id. The ability to care for oneself may also be limited by depression: “And, always, everything was an effort. Washing my hair took hours to do, and it drained me for hours afterward; filling the ice-cube tray was beyond my capacity, and I occasionally slept in the same clothes I had worn during the day because I was too exhausted to undress.” Id. at 111. William Styron also described the immobilizing affects of depression: “[A]fternoons were still the worst, beginning at about three o’clock, when I’d feel the horror, like some poisonous fogbank, roll in upon my mind, forcing me into bed. There I would lie for as long as six hours, stuporous and virtually paralyzed, gazing at the ceiling.” STYRON, supra note 3, at 58.

31. See STYRON, supra note 3, at 48 (describing how sleeping can be affected by psychiatric impairments). William Styron recounts how [t]he two or three hours of sleep I was able to get at night were always at the behest of the Halcion [tranquilizer]... [They] were usually terminated at three or four in the morning, when I started up into yawning darkness, wondering and writhing at the devastation taking place in my mind, and awaiting dawn, which usually permitted me a feverish, dreamless nap.

Id.

In her diary, Virginia Woolf described the nights when she was sick: “[H]ow I dry & shrivel: how I lie awake at night longing for rest... But know that I’m to be pitchforked up into the light & glare again next day.” VIRGINIA WOOLF, THE DIARY OF VIRGINIA WOOLF 118 (Anne Olivier Bell ed., 1982).

32. See 29 C.F.R. § 1630.2(i) (listing activities considered major life activities); see also Pritchard v. Southern Co. Serv., No. CV-94-N-0475-S, 1995 WL 538662, at *7 (N.D. Ala. Mar. 31, 1995) (“[T]he non-exhaustive list of ‘major life activities’ contained [in the regulations] is sufficiently expansive so as to preclude a determina-
disability requires the flexibility to identify major life activities that may not be listed in the EEOC guidelines, but may be significantly impacted by a particular individual's impairment.33

A common mistake in analyzing psychiatric disabilities under the ADA is to ask whether an individual is limited in working before considering whether he or she is limited in any other major life activity. Working should be analyzed last and only if no other major life activity is substantially limited by an impairment.34 If an individual is substantially limited in any other major life activity, no determination need be made as to whether the individual is substantially limited in working.35

33. See 29 C.F.R. pt. 1630, app. A § 1630.2(j) ("The ADA . . . [does] not attempt a 'laundry list' of impairments that are 'disabilities.' 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 the impairment on the life of the individual."). See generally Riel v. Electric Data Sys. Corp., 99 F.3d 678 (5th Cir. 1996) (finding genuine issue of fact existed whether to regard plaintiff's renal failure that lead to fatigue as disability under ADA); Mobley v. Board of Regents, 924 F. Supp. 1179, 1186 (S.D. Ga. 1996) (stating because plaintiff has impairment does not mean plaintiff is disabled under ADA); Shpargel v. Stage & Co., 914 F. Supp. 1468, 1474 (E.D. Mich. 1996) (finding that evidence not sufficient to prove plaintiff's carpal tunnel syndrome substantially limited plaintiff's ability to perform manual tasks); Marschand, 876 F. Supp. at 1538 (stating that because plaintiff has mental impairment does not mean plaintiff is disabled under ADA); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (stating that insulin-dependent diabetic does not have per se disability under ADA and "[p]laintiff must come forward with evidence sufficient to demonstrate a genuine issue of material fact").

The ADA defines the term "disability," for each of its subparts, "with respect to the individual" 42 U.S.C. § 12102(2) (emphasis added). The statute also specifically states that the underlying impairment must substantially limit a major life activity "of such individual." Id. (emphasis added).

34. See 29 C.F.R. § 1630.2(j) ("If an individual is not substantially limited with respect to any other major life activity, then one should consider whether the individual is substantially limited in working."); see also Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1174 (10th Cir. 1996) (finding genuine issue whether plaintiff was substantially limited in breathing made it unnecessary to consider other factors relating to substantive limitation in plaintiff's work).

35. See EEOC Compl. Man., supra note 6, § 902.4(c)(2) ("[O]ne need not determine whether an impairment substantially limits an individual's ability to work if the impairment substantially limits another major life activity.").
3. Substantial Limitation

An impairment must substantially limit a major life activity to rise to the level of a disability under the ADA.36 "Substantial limitation" is evaluated in terms of both severity and duration.37 An impairment is sufficiently severe to rise to the level of a disability if it prevents an individual from performing a major life activity or significantly restricts performance of a major life activity as compared to the average person in the general population.38 While temporary, nonchronic restrictions are generally not substantially limiting, an impairment does not have to be permanently limiting to be a disability. A severe condition whose duration is indefinite or unknowable and that has lasted or is expected to last at least several

36. See 42 U.S.C. § 12102(2); see also Pritchard, 1995 WL 338662, at *7 (stating that impairment "does not rise to the level of a 'disability' unless it substantially limits a major life activity"); Marschand, 876 F. Supp. at 1538 (stating that plaintiff must also show that mental impairment substantially limits one of plaintiff's major life activities to be disabled under ADA). See generally Mobley, 924 F. Supp. at 1186-87 (concluding that plaintiff did not prove she was substantially limited in one or more major life activities); Kotlowski v. Eastman Kodak Co., 922 F. Supp. 790, 797 (W.D.N.Y. 1996) ("[Plaintiff] must demonstrate that [her depression] substantially limited her ability to work at not only her then existing job, but any job."); Coghlan, 851 F. Supp. at 814 (referring to "substantially limits" prong as "constituent element" under ADA claim).

37. See 29 C.F.R. § 1630.2(j) (defining "substantially limits" under ADA). The regulations define the term "substantially limits" as follows:

(1) The term 'substantially limits' means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(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.

Id. See generally EEOC Compl. Man., supra note 6, § 902.4 (defining "substantially limits" as "comparative term that implies a degree of severity and duration").

38. See, e.g., 29 C.F.R. § 1630.2(j) (defining "substantially limits" and listing factors to be considered). Note that multiple impairments, standing alone, may not be severe, but if combined may substantially limit a major life activity. See EEOC Compl. Man., supra note 6, § 902.4(e) ("An individual may have two or more impairments that are not substantially limiting by themselves but ... together substantially limit one or more major life activities [and would be a disability].").
months rises to the level of a disability under the ADA.\textsuperscript{39} Moreover, a combination of impairments, mental or physical, that when taken together are severe and long-term (or expected to last at least several months), may also qualify as an ADA disability.\textsuperscript{40}

With the increasingly successful and widespread use of medications to treat psychiatric impairments, it is important to understand how the positive and negative effects of medication are assessed when analyzing substantial limitation under the ADA.\textsuperscript{41} First and most importantly, substantial limitation should be assessed \textit{without} regard to mitigating measures, including medications that control symptoms of the underlying impairment.\textsuperscript{42} Thus, an individual who takes medication to control the effects of a psychiatric impairment has an ADA disability if there is evidence that the impairment, when left untreated or without effective medication, substantially limits a major life activity. Any other approach would wrongly discourage people from maintaining their medication regimens, and would incorrectly exclude people from the ADA’s coverage even though they actually have ongoing and severe impairments.

Second, although the positive effects of medication should \textit{not} be considered when analyzing ADA disability, the negative side effects of some medications may be substantially limiting in them-

\textsuperscript{39} See EEOC Compl. Man., \textit{supra} note 6, § 902.4(d) (stating that conditions whose duration are unknown or indefinite rise to level of disability as long as they are severe).

\textsuperscript{40} See 29 C.F.R. § 1630.2(j) (listing factors, such as nature and severity of impairment, duration and long-term impact of impairment, to be considered in determining whether individual is substantially limited in major life activity). \textit{But see} Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1352 (9th Cir. 1996) (refusing to evaluate individual’s bladder cancer and subsequent depression as one disability and finding, instead, that because depression lasted less than four months, duration was insufficient to constitute disability under ADA).

\textsuperscript{41} See, \textit{e.g.}, Guice-Mills v. Derwinski, 967 F.2d 794, 797 (2d Cir. 1994) (considering side effects of anti-depressant medication and holding that plaintiff had disability); Fehr v. McLean Packaging Corp., 860 F. Supp. 198, 200 (E.D. Pa. 1994) (considering side effects of medication and concluding that there was factual issue whether plaintiff was substantially limited in breathing).

\textsuperscript{42} See H.R. Rep. No. 101-485, pt. 3, at 28 (1990), \textit{reprinted} in 1990 U.S.C.C.A.N. 451; S. Rep. No. 101-116, at 23 (1989); \textit{see also} Canon v. Clark, 883 F. Supp. 718, 721 (S.D. Fla. 1995) (holding that positive effects of medication must be disregarded when determining whether individual has disability under ADA); 29 C.F.R. § 1630.2(h) ("The existence of an impairment is to be determined without regard to mitigating measures such as medicines or prosthetic devices."). \textit{But see} Kotlowski v. Eastman Kodak Co., 922 F. Supp. 790, 798 (W.D.N.Y. 1996) (holding that plaintiff’s depression did not substantially limit her ability to work under ADA when plaintiff was taking antidepressant medication that caused drowsiness); Mackie v. Runyon, 804 F. Supp. 1508, 1510-11 (M.D. Fla. 1992) (holding that bipolar disorder stabilized with medication does not constitute handicap under section 501 of the Rehabilitation Act).
These negative side effects should be considered when deciding whether an individual is substantially limited in a major life activity. Thus, if an individual with major depression takes medication that causes severe morning grogginess, this side effect should be considered along with the underlying symptoms of major depression when determining whether this person has a disability for purposes of the ADA.

Finally, when medication clearly alleviates the symptoms of an individual's psychiatric impairment, the tasks of evaluating the severity of the person's limitations and of establishing a link between those limitations and the impairment itself is relatively straightforward. For example, suppose an individual who has had posttraumatic-stress disorder for several months did not sleep for more than one hour each night without medication, but now sleeps five or six hours with medication. He or she uses a medication known to alleviate symptoms of posttraumatic-stress disorder including severe anxiety and wakefulness. Without consideration of the corrective effects of this medication, it is obvious that this individual's sleeping pattern (one hour per night) is significantly restricted when compared to the average person's sleeping pattern in the general population. Moreover, the fact that this medication has ameliorated his or her severe sleep problems supports the conclusion that the sleep problems are, in fact, linked to the posttraumatic-stress disorder.

The use of medication, however, does not always mean that an individual's underlying impairment is sufficiently severe to rise to the level of a disability under the ADA. For example, an individual who often sleeps lightly may take a mild tranquilizer to help stay asleep. Without this tranquilizer, however, the individual's sleep may be slightly, but not significantly restricted as compared to that of the average person in the general population. Accordingly,

43. See Jamison, supra note 30, at 161 (stating that lithium carbonate, taken to control the effects of bipolar disorder, can make it seem as if sights and sounds "[have] been filtered through thick layers of gauze"). Describing the effect of his antipsychotic medication for schizophrenia, Michael Laudor told a reporter: "I feel that I'm pawing through walls of cotton and gauze when I talk to you now." Foderaro, supra note 3, at B11.

44. See Guice-Mills, 967 F.2d at 797 (finding that nurse had disability under Rehabilitation Act where her mental illness and antidepressant drug therapy interfered with her ability to arrive at work on time).

45. See EEOC Compl. Man., supra note 6, § 902.5 ("[T]he mere use of a mitigating measure does not automatically indicate the presence of a disability.").

46. See, e.g., Olson v. General Elec. Astrosepace, 101 F.3d 947, 952 (3d Cir. 1996) (stating that to determine if one has disability under ADA, court must assess whether impairment significantly restricts one's ability to perform); Mobley v. Board of Regents, 924 F. Supp. 1179, 1186 (S.D. Ga. 1996) (assessing substantial
Regardless of medication, sometimes the evidence plainly shows that a limitation is not severe or is not attributable to a mental impairment.\(^{47}\) Suppose an individual has a mental impairment, but the only symptom is that the individual has trouble concentrating when tired. In this situation, it may be fairly easy to establish that the individual does not experience restrictions that are significantly more severe than those experienced by the average person in the general population. In other cases, it may be apparent that an individual's functional limitations are not attributable to the alleged mental impairment. For example, if an individual's only substantial limitation is in working, and if this clearly results from a lack of job training rather than a mental impairment, then the individual would not have a disability.

In more complex cases, evaluating the issue of substantial limitation may require a few steps. First, the major life activity affected by the mental impairment may not be immediately apparent, especially if an individual describes extreme moods or other difficulties that are not clearly linked to a familiar major life activity. In such instances, an effort must be made to identify which major life activities are implicated by the person's problems. Suppose an individual describes sad and/or elevated moods, but does not identify quantifiable sleep problems or associate his or her moods with difficulty performing any other daily activities. In this situation, the major life activity of caring for oneself, both in terms of physical self-care and making responsible judgments, may be significantly impacted by the individual's extreme moods.

Second, the process of assessing substantial limitation obviously involves gathering information about the severity and duration of the limitation and about any indications that the limitation is associated with the impairment. Ultimately, however, this process depends on making a fair and informed judgment about how these

\(^{47}\) See, e.g., Kotowski v. Eastman Kodak Co., 922 F. Supp. 790, 798-99 (W.D.N.Y. 1996) (concluding that any depression plaintiff suffered did not substantially limit her ability to work based upon professional opinion); Muller v. Automobile Club, 897 F. Supp. 1289, 1297 (S.D. Cal. 1995) (finding no evidence that plaintiff's psychological problems rose to level of disability).
limitations compare to the abilities of the average person in the
general population.48 Such a judgment requires open-mindedness
in acknowledging the severity of some psychiatric symptoms and
the willingness to differentiate these limitations from "normal"
emotional problems that the average person may experience in
daily life (such as problems with a spouse or child). In making such
determinations, it is important to recognize and set aside one's own
prejudices about mental illness and about obtaining mental health
treatment.49 If these prejudices are not set aside, decisions about
ADA disabilities may be skewed, either by assuming disability where
it does not exist or by refusing to acknowledge that an individual's
limitations may, in fact, be manifestations of psychiatric impair-
ments rather than "normal" emotions.

III. RECORD OF A SUBSTANTIALLY LIMITING IMPAIRMENT

The second part of the statutory definition of disability under
the ADA applies to individuals who have a record of a substantially
limiting impairment.50 Because the very disclosure of psychiatric
conditions may prompt a negative reaction, this part of the defini-
tion of disability is particularly important. It covers individuals with
a history of disability who may have recovered totally or at least suf-
ficiently so that their impairment is no longer substantially limit-
ing.51 This second part of the definition of disability also covers
and protects people who have been misdiagnosed as having a sub-

48. See, e.g., Mobley, 924 F. Supp. at 1186 ("[T]he court must inquire whether
the individual is significantly restricted in the ability to perform either a class of
jobs or a broad range of jobs in various classes as compared to the average person
with comparable training, skills and abilities.").

49. See Foderaro, supra note 3, at B11 (describing how most people view
mental illness as "career-killer").

50. See 42 U.S.C. § 12102(2)(B) (1994). Compare Olson, 101 F.3d at 953 (find-
ing plaintiff did not have record of impairment even though plaintiff was hospital-
ized because plaintiff did not show impairment substantially limited major life
activity), and Mobley 924 F. Supp. at 1188 (concluding that doctor's letters regard-
ing plaintiff's asthmatic condition are "simply too sketchy and incomplete" to cre-
ate record of disability under ADA), with Coghlan v. H.J. Heinz Co., 851 F. Supp.
808, 815 (N.D. Tex. 1994) (acknowledging that plaintiff's hospitalization sufficed
to establish record of impairment).

51. See 42 U.S.C. § 12102(2)(B) (defining disability under ADA). For exam-
ple, an individual may experience a substantially limiting episode of major depres-
sion from which he or she recovers completely. Another individual may recover
from such an episode only partially, but enough that his or her depression is no
longer substantially limiting. Both of these individuals would have a record of a
substantially limiting impairment—major depression.
This prong of the definition may be implicated in any number of circumstances and need not involve the employer coming into possession of a written record of disability. \textsuperscript{53} For example, an employer may learn that an individual had a prolonged episode of major depression when the individual discloses that he or she was only able to obtain a conditional state certification to practice their chosen health care field (such as respiratory therapy). In such a case, the employer would be aware that the employee had a record of a disability, major depression. Similarly, if the employer learns that an employee had used a medication widely associated with a psychiatric disability, such as lithium carbonate, or had a psychiatric hospitalization in the past, there is a strong argument that the employer again would be aware of a record of psychiatric disability. In these instances, the records of medication and of hospitalization are so closely associated with psychiatric disability that they can substitute for an express statement about psychiatric disability.

\textbf{IV. Regarded as Having a Substantially Limiting Impairment}

The “regarded as” prong of the definition of disability is intended to combat discrimination based on myths, fears and stereotypes about disabilities that may come into play even when a person does not actually have a disability. \textsuperscript{54} Given the high level of fear and discomfort in American society about psychiatric disorders in general, \textsuperscript{55} this aspect of the definition is especially relevant when it comes to protecting individuals with mental disorders from discrimination.

People who are the target of employment discrimination based on genetic information are protected under the “regarded as” prong of the ADA’s definition of disability. \textsuperscript{56} There is increasing

\begin{itemize}
\item \textsuperscript{52} See id. For example, an individual may have been misdiagnosed during a hospitalization many years ago as having schizophrenia.
\item \textsuperscript{53} See, e.g., Pritchard v. Southern Co. Serv., 92 F.3d 1130, 1134 (11th Cir. 1996) (finding fact that plaintiff was placed on paid disability leave, followed by unpaid disability leave, was evidence of record of being impaired).
\item \textsuperscript{55} For a discussion of the present stigma surrounding psychological disabilities, see \textit{supra} notes 2-5 and accompanying text.
\item \textsuperscript{56} See EEOC Compl. Man., \textit{supra} note 6, § 902.8 (stating that “regarded as” part of definition of disability applies to individuals subjected to discrimination based on genetic information relating to illness, disease or other types of disorders).
\end{itemize}
evidence that severe mental illnesses, like bipolar disorder and schizophrenia, are linked to genetic factors. As the ability to obtain such genetic information increases and the public becomes more aware of this genetic link from media reports, the potential for employment discrimination on this basis also becomes greater. For example, suppose an employer were to learn, through inquiries and medical examinations after an offer had been made, that an individual carried a genetic marker that made the individual vulnerable to schizophrenia. The employer subsequently withdraws its offer of employment to this individual based on its concerns about escalating health insurance costs, attendance and behavior problems, and litigation. Because this employer is treating this individual as if he or she in fact had a substantially limiting mental impairment, the individual has a disability for purposes of the ADA.

Individuals who are the target of employment discrimination because they have an impairment that is not substantially limiting, but is perceived by the employer as substantially limiting, are also covered by this prong of the definition of disability. Thus, an individual would have a disability under this prong if he or she were denied high visibility "fast-track" assignments because the employer expressed doubts about his or her ability to work under stress and make complex decisions after learning that he or she was receiving therapy for mild depression. In this example, the employee is not substantially limited by mild depression, but the employer regards the employee as substantially limited in the ability to think and concentrate.

57. See OTA Disability Report, supra note 1, at 46.
58. See EEOC Compl. Man., supra note 6, § 902.8 (“Covered entities that discriminate against individuals on the basis of . . . genetic information are regarding the individual as having impairments that substantially limit a major life activity.”); see also Wagner v. Kester Solder Co., No. 94 C 6039, 1995 WL 399484, at *9 (N.D. Ill. June 28, 1995) (stating that “regarded as” prong “disabuse[s] people of myths about the disabled and prohibit[s] discrimination against those with an impairment that does not substantially limit major life activities”). See generally Olson v. General Elec. Astropace, 101 F.3d 947, 953 (3d Cir. 1996) (finding genuine issue of material fact exists on whether defendant regarded plaintiff as having disability); Duff v. Lobdell-Emery Mfg. Co., 926 F. Supp. 799, 805 (N.D. Ind. 1996) (alleging disability under ADA because employer regarded plaintiff as having impairment substantially limiting major life activity); Marschand v. Norfolk & W. Ry. Co., 876 F. Supp. 1528, 1540-41 (N.D. Ind. 1995) (stating test for “substantially limited in working” to be “whether the impairment, as perceived, would affect the individual’s ability to find work across the spectrum of same or similar jobs”).
59. See 29 C.F.R. § 1630.2(l) (1997) (stating that if individual has impairment that does not substantially limit major life activity, but is treated as such, then individual is regarded as having such impairment).
In other "regarded as" cases involving psychiatric issues, the individual may supply an employer with ambiguous documentation of mental health problems, suggesting the possibility of a mental impairment, but not necessarily substantial limitation. If the employer takes an adverse employment action based on this information, the action would be considered as regarding the individual as disabled. The employer also may come into possession of such information from other sources, such as from former colleagues or rumors. In some situations, the employer may then call the employee for a conference, inquire about his or her personal "problems," state that upper management views his or her behavior as overly emotional and unacceptable, and strongly encourage the employee to seek counseling through the company's "Employee Assistance Plan." Under these facts, there may be a factual issue whether management regarded this individual as having a substantially limiting impairment.60

This prong of the definition of disability also extends to individuals who have no impairment at all, but who are "perceived" by the employer as having a substantially limiting impairment. Thus, for example, this prong would cover a salesperson whose employment was terminated after the employer, upon learning that the employee obtained counseling, stated that "people who get therapy can't do sales." While this individual does not have a mental impairment—getting counseling is not evidence of a mental impairment here—the employer is assuming that counseling is associated with an impairment and that the impairment is so severe that the employee is substantially limited in working all sales jobs. This employer is regarding the employee as having a mental impairment that substantially limits his or her ability to interact with others or to work.

60. See Holihan v. Lucky Stores, Inc., 87 F.3d 362, 363 (9th Cir. 1996) (holding that genuine issue of material fact existed as to whether employer regarded employee as having mental disability where employer met with him to discuss "aberrational behavior," asked him if he had problems and encouraged him to seek counseling). But see Stewart v. County of Brown, 86 F.3d 107, 111-12 (7th Cir. 1996) (finding that deputy sheriff was not regarded as having disability where sheriff thought him excitable, psychologically unbalanced and temperamentally unfit and ordered psychological evaluations of him); Johnson v. Boardman Petroleum, Inc., 923 F. Supp. 1563, 1569 (S.D. Ga. 1996) (holding that store district supervisor was not regarded as having mental disability where manager told her to seek professional help, required release from doctor to return to work and told her at termination that she was physically and mentally incapable of continuing job).
V. Conclusion

The ADA is a powerful tool for combating discrimination against individuals with psychiatric disabilities because it protects people currently suffering from such conditions, in addition to those with records of severe psychiatric conditions or those who are regarded as having such conditions. Finding that an individual who currently has a psychiatric condition is disabled within the meaning of the ADA is, in many cases, a straightforward exercise because of the serious and ongoing nature of the severe mental disorders. In other instances, such as when an employer knows about an individual's past psychiatric hospitalization, it is similarly clear that the individual is covered by the ADA by virtue of his or her record. When more complex analysis is required, it can be achieved by following the familiar case-by-case, functional framework for assessing ADA disability and by moving beyond preconceptions to objective facts.