

“Working” With the ADA’s “Regarded as” Definition of a Disability

Thomas Simmons*

The Americans with Disabilities Act of 1990 prohibits discrimination against and mandates accommodations for individuals with disabilities. As a threshold matter, the Act requires the plaintiff to demonstrate that she is an individual with a disability; that is, that she has an actual disability or is “regarded as” having a disability as the statute defines it. This article discusses the threshold “regarded as” showing as refined by three Supreme Court cases decided in the summer of 1999. Although in the past the “regarded as” definition has often played “second fiddle” to the “actual disability” definition, the author suggests that there are several alternative means of meeting the definition, consistent with the statutory language, the legislative history, the regulations, and the case law.

I.	Introduction . . . . .	.28
II.	The Substance of the ADA / Prima Facie Case . . . . .	.34
	A. An Individual with a Disability—Three Definitions of Disability . . . . .	.34
	1. Definition # 1: Actual Disability . . . . .	.35
	a. Impairment . . . . .	.35
	b. Substantially Limiting . . . . .	.37
	i. Major Life Activity . . . . .	.38
	ii. Other Factors . . . . .	.40
	2. Definition # 2: “Regarded as” . . . . .	.42
	a. Case Law Interpreting the “Regarded as” Definition . . . . .	.44
	b. Impairment . . . . .	.47
	c. Substantially Limiting in Working . . . . .	.49
	d. Statutory Construction of the “Regarded as” Language . . . . .	.50
	3. Definition # 3: Record of . . . . .	.51
	B. A Qualified Individual . . . . .	.52
	C. Discrimination . . . . .	.53

* Law clerk for the Hon. Andrew Wendell Bogue, Senior United States District Judge for the District of South Dakota, Western Division. B.S., University of South Dakota, 1991; J.D., University of South Dakota, 1998. The views expressed in this article are solely those of the author in his personal capacity and should not be attributed to the federal judiciary or any of its members.

- 1. *Intentional Discrimination* 54
 - 2. *Failure to Make Reasonable Accommodations* . . . 54
 - D. *Notice* 55
- III. The “Regarded as” Definition Applied to the Major Life Activity of Working 56
 - A. *Murphy v. UPS* 56
 - B. *Albertsons v. Kirkingburg* 60
 - C. *Sutton v. United Air Lines* 63
 - D. *Analysis* 68
 - 1. *Perceived Impairments with Substantially Limiting Consequences* 69
 - 2. *Perceived Substantial Limitations* 72
 - 3. *Attitudinal Substantial Limitations* 74
- IV. Conclusion 79

*There is nothing either good or bad but thinking makes it so.***

I. Introduction

During the summer of 1999, the Americans with Disabilities Act¹ (“ADA”) received a great deal of attention in the summer of 1999 when the Supreme Court decided four milestone cases interpreting the civil rights statute.² Three of those cases will be discussed here, with a focus on a particular angle of the threshold issue in any ADA case: whether the plaintiff has a disability within the terms of the statute. Typically, the ADA plaintiff will seek to prove that he has a disability, defined as an impairment that substantially limits one or more major life activities.³

**WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2, *quoted in* Perkins v. Lake County Dep’t of Utilities, 860 F. Supp. 1262, 1278 n.19 (N.D. Ohio 1994) (holding in a Title VII case, that “it is the employer’s reasonable belief that a given employee is a member of a protected class that controls []”).

1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C.A. §§ 12101-12213 (1995)).

2. The fourth case, *Olmstead v. L.C. ex rel. Zimring*, was brought under Title II of the ADA, and held that two mentally disabled patients could proceed with their lawsuit in which they sought placement in a community residential program rather than in an institution. *Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176 (1999). The Court also decided *Kolstad v. American Dental Association*, in which it clarified the standard for punitive damages under the ADA and Title VII. *Kolstad v. American Dental Ass’n*, 119 S. Ct. 2118 (1999).

3. 42 U.S.C.A. § 12102(2)(A) (1995). For the exact statutory language, see *infra* accompanying text to note 39.

This statutory definition encompasses persons with conditions ranging from quadriplegia, learning disabilities, and asymptomatic HIV.⁴ Having established the existence of a condition that meets this definition of impairment entitles plaintiffs to seek redress for discrimination.

The goals of the ADA are thus twofold: first, to redress disability discrimination through legal and equitable relief; and second, to open doors for people with disabilities that have been unjustifiably closed.⁵ The ADA seeks to make whole victims of disability discrimination while penalizing and perhaps deterring any future occurrence of such discrimination; the statute's objective is bifurcated into restoring the victim and objurgating the wrongdoer.⁶ In order to achieve both aims, inquiry into both the extent of the plaintiff's injury and the defendant's culpability is required. The quantum of relief will turn on the quantity of harm suffered as well as the degree of fault assigned.⁷ These twin aims can be achieved when the specific harm alleged falls within the broad reach of the statute.⁸

4. See *Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1345 (S.D. Fla. 1999) (quadriplegia); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 134 (D. Mass. 1997) (learning disability); *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206 (1998) (HIV), *on remand*, 163 F.3d 87 (1st Cir. 1998), *and cert. denied*, 119 S. Ct. 1805 (1999). For a convenient grouping of impairments that have been recognized as disabilities in individual cases, see Amalia Magdalena Villalba, Comment, *Defining "Disability" under the Americans with Disabilities Act*, 22 U. BALT. L. REV. 357, 364-81 (1993).

5. John M. Vande Walle, Note and Comment, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI-KENT L. REV. 897, 897-99 (1998). Because the ADA's protections are reserved for individuals with a certain characteristic—individuals with disabilities—the Act is consistent with the concept of distributive justice. *Id.* at 897. "Distributive justice requires that the equitable distribution of goods as between parties be made on the basis of some external criterion measuring the relative merit of the parties." *Id.* "Corrective justice," on the other hand, "concerns itself with the equity of interactions between parties without reference to any external criterion that measures the relative worth of the parties." *Id.* at 898. Insofar as the ADA also provides refuge for those who are not actually disabled, but only "regarded as" disabled, Vande Walle concludes that it is consistent with the concept of corrective justice. *Id.* See generally Peter Benson, *The Basis of Corrective Justice and its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992). "In the first instance, the ADA protects the employee because she meets the definition of a disabled person. In the second instance, the statute protects the employee because it condemns the employer's behavior. Vande Walle, at 899.

6. See 42 U.S.C.A. § 12101 (1995) (listing congressional findings relative to the ADA). "[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion. . . ." 42 U.S.C.A. § 12101(a)(5) (1995). "[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C.A. § 12101(a)(7) (1995). Congress was also concerned about the cumulative effects of disability discrimination: "the continuing existence of unfair and unnecessary discrimination and prejudice . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C.A. § 12101(a)(9) (1995).

7. See *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2124-26 (1999) (discussing the "egregiousness" standard for punitive damages under the ADA); *Bizelli v. Parker Amchem*, 17 F. Supp.2d 949, 953-54 (E.D. Mo. 1998) (calculating compensatory damages under the ADA).

8. See 42 U.S.C.A. § 12102(2)(A)-(C) (1995) (providing three alternative but exclusive definitions of an individual with a disability).

The ADA prohibits a wide variety of discrimination against individuals with disabilities and offers a panoply of remedies for the aggrieved. Take for instance, the case of a firefighter with a severe, uncorrectable myopia who is denied employment because of the fire department's vision requirements.⁹ He can establish that he is substantially limited in the major life activity of working since, without extensive retraining, his impairment is one that effectively precludes him from a broad class of jobs.¹⁰ Assuming that he is otherwise qualified for the employment position, and that no defense bars his action, the firefighter will be entitled to remedies ranging from front pay, back pay, reinstatement, punitive damages, and attorney fees.¹¹ In addition, the secondary effects of his lawsuit may include deterring future discrimination against individuals with disabilities in the workplace or otherwise.¹²

This article concentrates on the threshold issue of determining when, and under what circumstances, a plaintiff who does *not* have a disability may nevertheless meet the statutory definition of an individual with a disability, and therefore invoke the protections of the ADA. This type of situation is statutorily authorized when the defendant's state of mind is tilted against the plaintiff.¹³ The difficulty is pinpointing the state of mind that triggers this modality under the Act.

The ADA's first and most cited definition of a disability is an actual disability manifested as an "impairment," such as blindness or schizophrenia, which places a "substantial limitation" on an individual's major life activities, such as seeing or learning.¹⁴ For an impairment to qualify as an ADA disability, it must have a substantially limiting effect on the afflicted individual.¹⁵ An individual that files a discrimination

9. *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1423 (N.D. Iowa 1996). In *Sicard*, the plaintiff's myopia was correctable and the court analyzed whether his impairment in its uncorrected state would substantially limit his ability to work. Because the Supreme Court held that impairments are to be viewed in their corrected state, the facts have been revised to reflect the current state of the law in this regard. *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133, 2137 (1999); *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2146 (1999); *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162, 2168-69 (1999).

10. *Sicard*, 950 F. Supp. at 1429.

11. 42 U.S.C.A. § 12117 (1995) (incorporating the remedies of the Civil Rights Act of 1964; 42 U.S.C.A. § 1981a (1994)).

12. William Booth, *Survival Under the ADA: The Federal Common Law Standard for Determining Survival Claims*, 2 DEPAUL J. HEALTH CARE L. 269, 274 (1998). Booth believes that the ADA's goal of redressing broad social ills is secondary to the Act's provision of "effective legal means for individual disabled persons to combat the discrimination they themselves have suffered." *Id.*; see also Vande Walle, *supra* note 5 (discussing a similar issue in the "regarded as" definition of a disability).

13. 42 U.S.C.A. § 12102(2)(C) (1995).

14. See *Bancalle v. Cox Lumber Co., Inc.*, 1998 WL 469863, *1 (M.D. Fla. 1998) (night blindness as impairment); *Clark v. Virginia Bd. of Bar Exam'rs*, 880 F. Supp. 430, 441 (E.D. Fla. 1995) (schizophrenia as impairment); *Bonitch v. Original Honey Baked Ham Co. of the East, Inc.*, 34 F. Supp.2d 154, 158 (E.D.N.Y. 1999), citing 45 C.F.R. § 84.3(j)(2)(i) (major life activity of seeing); *Merry v. A. Sulka & Co., Ltd.*, 953 F. Supp. 922, 925 (N.D. Ill. 1997) (major life activity of learning).

15. 42 U.S.C.A. § 12102(2)(A) (1995).

claim against an employer because of a hangnail does not qualify for the ADA's remedies because the individual does not appear, at least initially, to fall within the ambit of the Act's protected class.¹⁶ Temporary impairments without a long-term impact, generally speaking, are not disabilities.¹⁷ "Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza."¹⁸

A comparison might be drawn to the ADEA, which prohibits age discrimination, but only against individuals who are at least forty years of age.¹⁹ A thirty-nine year old ADEA plaintiff who is the victim of age discrimination will have his cause of action dismissed because he is not a member of the protected class; the defendant's conduct, however egregious, is never even considered because the plaintiff has no statutory cause of action.²⁰ Civil rights plaintiffs, including ADA plaintiffs, who are not members of the pertinent protected class as defined by Congress are simply not entitled to redress.²¹

Besides compensating victims of discrimination for the harm suffered, the ADA also strives to eliminate the sort of "wrong thinking" that operates to the unjustified disadvantage of individuals, whether or not those individuals can show an impairment that qualifies as a disability.²² Congress identified a policy goal of curbing discriminatory attitudes against persons with disabilities and consequently drafted an alternative definition of "disability."²³ After all, a defendant ought not to be relieved of liability upon learning that, fortuitously, the person he discriminated against on the basis of a disability was not actually "disabled" under the ADA. Therefore, although counterintuitive at first blush, an ADA disability means a disability, but also not a disability. That is, the statute provides an alternative definition whereby an "individual with a disability" includes those who are "regarded as

16. See A&P ADA COMM. PRINT 1990 (28A), *121 ("Persons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity.")

17. 29 C.F.R. app. §1630.2(j)(1998).

18. *Id.*

19. 29 U.S.C.A. § 631(a) (1999).

20. *Burke v. Township of Franklin*, 619 A.2d 643, 647 (N.J. Super. 1993), *overruled on other grounds in* *Bergen Commercial Bank v. Sisler*, 723 A.2d 944 (N.J. Super. 1998).

21. See, e.g., *Lyes v. City of Rivera Beach*, 166 F.3d 1332, 1337 (11th Cir. 1999) (en banc) (holding that women are a protected class under 42 U.S.C. § 1985(3), a civil rights conspiracy statute that had been held by the trial court to only prohibit conspiracies motivated by racial animus); *Kodish v. United Air Lines, Inc.*, 463 F. Supp. 1245, 1249 (D.C. Colo. 1979), *aff'm* 628 F.2d 1301 (10th Cir. 1980) (holding that a 32-year-old plaintiff does not have an ADEA cause of action). Under most civil rights statutes, however, whether the plaintiff is a member of a protected class is seldom challenged. 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, 423 (1997). Gender discrimination laws protect both males and females; racial discrimination laws protect all racial groups; and national origin discrimination prohibitions apply to people from any country of origin. *Id.*

22. See 136 CONG. REC. 11, 701 (1990) (stating that the goals of the ADA are to remove attitudinal barriers for persons with disabilities in American society).

23. 42 U.S.C.A. § 12102(2)(C) (1995).

having” impairments that substantially limit one or more major life activities.²⁴ Thus, a perfectly healthy individual has an ADA disability if the defendant thinks so.²⁵

The predominant premise of the “regarded as” definition of a disability is curtailing discriminatory attitudes and practices, even if the victim of such views is not actually disabled.²⁶ The aim of providing redress to the plaintiff in proportion to the harm suffered is also present. The employee who suffers lost wages as the direct result of illegal discrimination is no less harmed if his employer’s act was based on a mistaken belief about the plaintiff’s physical or mental condition.²⁷ Perhaps the plaintiff who is discriminated against because of an imagined disability suffers an even greater injustice than the person who suffers the same harm but actually *is* disabled. Fortunately, under the alternative “regarded as” definition, both plaintiffs may pursue the remedies of the ADA.

Disability theories demonstrate that often, societal and attitudinal obstacles impose greater barriers for persons with disabilities than the physical and mental manifestations of their impairments. Clearly, a person without legs has less physical mobility than most of us. Yet the greater part of the individual’s limitations arise not from this inherent physical restriction, but from the way in which others react to her disability.²⁸ These limitations may take the form of innocent misunderstandings about the individual’s abilities, fearful, pitiful or mean-spirited affronts, or architectural design innately hostile towards persons with disabilities.²⁹ It was to these avoidable external obstacles associated with disabilities that the ADA generally, and the “regarded

24. *Id.*

25. *Id.*

26. See *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37, 51 (D. Me. 1996), *aff’d* 105 F.3d 12 (1st Cir. 1997) (“The [regarded as] provision of the ADA was designed to combat invidious stereotypes regarding disabled members of society.”), quoting *Howard v. Navistar Int’l Transp. Corp.*, 904 F. Supp. 922, 929-30 (E.D. Wis. 1995).

27. See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1097 (D. Haw. 1980) (construing the Rehabilitation Act). “It is of little solace to a person denied employment to know that the employer’s view of his or her condition is erroneous. To such a person the perception of the employer is as important as reality.” *Id.*

28. Kenny Fries, *Introduction to STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT* 6-7 (Kenny Fries, ed., 1997). A disabled person must successfully negotiate “an often hostile society (whether the barriers be financial, physical, or discriminatory). . . .” *Id.* at 7. “[I]t is clear that it is the barriers, both physical and attitudinal, that need to be changed, not the impairments. . . .” *Id.*

29. See SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 40 (1996) (describing the “young adult, non-disabled male paradigm of humanity” with which much architecture has been planned). Wendell also notes the societal devaluation of “[w]eakness, illness, rest and recovery, pain, [and] death. . . .” *Id.* Furthermore, disability is constructed “by the failure to give people the amount and kind of help they need to participate fully in all major aspects of life in the society, including making a significant contribution in the form of work.” *Id.* “Thus disability is socially constructed through the failure or unwillingness to create ability among people who do not fit the physical and mental profile of ‘paradigm’ citizens.” *Id.* at 41.

as" prong specifically, were designed to combat.³⁰ The ADA acknowledges that disabilities impose certain bona fide limitations, but directs its remedial provisions to the host of unnecessary restrictions that invariably accompany the existence of a disability.

At this point, a caveat will be injected that will be repeated throughout this article's discussion of the "regarded as" definition:³¹ although the ADA is an extremely comprehensive remedial statute, its aims are specific, and, as with any civil rights statute, the plaintiff always bears the burden of demonstrating that she is entitled to complain of the harm alleged. The ADA performs the admirable task of redressing and deterring discrimination of a certain type—disability discrimination—and although the "regarded as" definition substantially widens the potential class of ADA plaintiffs, it does not abrogate the threshold showing of whether an individual's disability, real or imagined, conforms to the required statutory elements. The main question addressed here is how these elements can be established when the "regarded as" prong is in play.³²

The Supreme Court issued opinions in no less than three cases in the summer of 1999 in which the "regarded as" disabled definition was presented: *Murphy v. United Parcel Service*,³³ *Albertsons v. Kirkingburg*,³⁴ and *Sutton v. United Air Lines*.³⁵ As might be anticipated, numerous questions can arise in this context, the answers to which are not found within the provisions of the statute, or the regulations, or the case law. Instead, in large measure, answers may be formed by the courts on an ad hoc basis, or avoided entirely as attorneys and judges seek refuge in the less ticklish "actual disability" prong of the statute. This article contains a review of the issues raised when the task narrows to delineating the parameters of the "regarded as" definition, and attempts to penetrate the definition to discover analysis and proof schemes for future "regarded as" cases, consistent with prior case law and the statute itself. Although not all these questions were resolved by the Supreme Court, one advantage of a discussion of these three cases is their identification of the major issues for future decisions in this area.

Although the ADA's "regarded as" definition of a disability applies to all five titles of the Act, much of the litigation and reported

30. See A&P H.R. REP. 101-485, *30 (noting the "attitudinal barriers" Congress was attempting to combat with the "regarded as" definition); *Serrano v. County of Arlington*, 986 F. Supp. 992, 999 (E.D. Va. 1997) (stating that the rationale for the "regarded as" definition "is that the 'myths and fears' surrounding disabilities are just as limiting in an individual's search for meaningful work as are the constraints imposed by actual disabilities.").

31. 42 U.S.C.A. § 12102(2)(C) (1995).

32. Thus, the "regarded as" plaintiff must meet the "impairment" and "substantially limited" elements of the "actual disability" definition. See *infra* notes 250-56 and accompanying text for discussion of arguments to the contrary that were rejected by the Supreme Court.

33. *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999).

34. *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162, 2167 (1999).

35. *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999).

cases deal rather narrowly with employer-employee relationships under Title I.³⁶ In the interest of clarity, therefore, the discussion will be framed in this context. The next section provides an abbreviated overview of the threshold requirements of the ADA.

II. The Substance of the ADA / Prima Facie Case

A. *An Individual with a Disability—Three Definitions of Disability*

In any ADA case, the first inquiry is whether the plaintiff is an individual with a disability. To meet this requirement, the Act provides three alternative definitions from which to select:

- The term “disability” means, with respect to an individual—
- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment.³⁷

The first definition merits analysis in some detail, given the extent to which the remaining two definitions draw their shape from it.³⁸

36. The full scope of the ADA was drafted to combat “discrimination against individuals with disabilities . . . [in] employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services[.]” 42 U.S.C.A. § 12101(a)(3) (1995); see generally Brent Edward Kidwell, *The Americans with Disabilities Act of 1990: Overview and Analysis*, 26 IND. L. REV. 707 (1993). Title I concerns employment. See 42 U.S.C.A. § 12111 (1995); see generally PAUL R. GARRY & LISA A. MILLER, *EMPLOYMENT DISCRIMINATION BASED ON DISABILITY* (1996); Thomas H. Christopher & Charles M. Rice, *Americans with Disabilities Act: An Overview of the Employment Provisions*, 33 S. TEX. L. REV. 759 (1992). Title II deals with public services. See 42 U.S.C.A. § 12131 (1995); Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22 N.M. L. REV. 13, 25-49 (1992). Title III is the subchapter on public accommodations operated by private entities, such as restaurants, gas stations, and hotels. See 42 U.S.C.A. § 12181 ; 42 U.S.C.A. § 12181(7)(A), (B), (F) (1995); see generally Karen E. Field, Note, *Americans with Disabilities Act “Readily Achievable” Requirement for Barrier Removal: A Proposal for the Allocation of Responsibility Between Landlord and Tenant*, 15 CARDOZO L. REV. 569 (1993). Title IV concerns communication services for individuals who are hearing impaired. See 47 U.S.C.A. § 225, 611 (1991); see generally Stuart N. Brotman, *Telecommunications Aspects of the 1990 ADA*, 210 N.Y.L.J. 1, Sept. 3, 1993. Title V contains miscellaneous provisions such as an anti-retaliation section. See 42 U.S.C.A. § 12201 ; 42 U.S.C.A. § 12203(a) (1995); Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471, 487-89 (1991).

37. 42 U.S.C.A. § 12102(2)(A)-(C) (1995).

38. See *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1456 (7th Cir. 1995) (“record of” definition requires a substantially limiting impairment); *Zuppardo v. Suffolk County Vanderbilt Museum*, 19 F. Supp.2d 52, 56 (E.D.N.Y. 1998) (“regarded as” definition; same), *aff’d* 173 F.3d 848 No. 98-9503, 1999 WL 197205, at **1 (2d Cir. Apr. 1, 1999) (table decision) (citing *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 149-50) (2d Cir. 1998).

1. Definition # 1: Actual Disability

Under the first definition, a "disability" requires two elements: (1) an impairment; (2) which substantially limits a major life activity.³⁹ These elements will be discussed in the order listed.

a. Impairment

First, the plaintiff's condition must qualify as an impairment that is either mental or physical in nature.⁴⁰ The regulations further define an impairment as a "physiological disorder, or condition, cosmetic disfigurement, or anatomical loss," which affects one or more of the human body's systems,⁴¹ or a "mental or psychological disorder."⁴² Under this definition, impairments can include obesity, dyslexia, or carpal tunnel syndrome.⁴³ By statutory fiat, however, some conditions are per se excluded. These exclusions include persons engaged in the current and illegal use of drugs.⁴⁴ Homosexuality is also not an

39. 42 U.S.C.A. § 12102(2)(A) (1995). Although "major life activity" is sometimes considered as an element independent of its "substantially limited" modifier, whether a given life activity is "major" is purely a question of law. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999), *cert. denied*, 1999 WL 296892 (Oct. 4, 1999) (No. 98-1784); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 642 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1253 (1999); *see also Amanda C. Steele*, Note, *Bragdon v. Abbott: Stretching the Statutory Limits of the Americans With Disabilities Act*, 44 S.D. L. REV. 783, 819 (1999) (grouping the "substantially limited" and "major life activities" elements together for purposes of clarity). *But see Bragdon v. Abbott*, 118 S. Ct. 2196, 2214-15 (1998) (Rehnquist, C.J., concurring and dissenting) (reasoning that reproduction is not a major life activity for an individual who never even considered having children); *United States v. Happy Time Day Care Ctr.*, 6 F. Supp.2d 1073, 1080 (W.D. Wis. 1998) (noting that "there is something inherently illogical about inquiring whether" a three-year-old's major life activity of procreation is substantially limited). Therefore although it is not technically an element requiring independent proof, whether a given activity is a major life activity is often the subject of argument.

40. 42 U.S.C.A. § 12102(2)(A) (1995).

41. 29 C.F.R. § 1630.2(h)(1) (1998). The body systems listed by the EEOC are: "neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine[.]" *Id.* The EEOC regulations are entitled to varying degrees of deference in the federal circuits. *See, e.g., Pack*, 166 F.3d at 1305 n.5 (stating that the regulations are entitled to no "special deference.") (citation omitted); *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 784 n.3 (3rd Cir. 1998) (affording the regulations "a great deal of deference.") (citation omitted).

42. 29 C.F.R. § 1630.2(h)(2) (1998). Examples of mental and psychological disorders include "mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." *Id.*

43. *Morrow v. City of Jacksonville*, 941 F. Supp. 816, 822 (E.D. Ark. 1996) (obesity); *Price v. National Bd. of Med. Exam'rs*, 966 F. Supp. 419, 426-27 (S.D. W.Va. 1997) (dyslexia); *Smith v. Kitterman, Inc.*, 897 F. Supp. 423, 427 (W.D. Mo. 1995) (carpal tunnel). The EEOC, however, notes that obesity will seldom be an ADA disability. 29 C.F.R. app. § 1630.2(j) (1998).

44. 42 U.S.C.A. § 12114(a) (1995). However, former drug users who have been rehabilitated, who are in the process of rehabilitation and no longer use illegal drugs, or who are erroneously regarded as using drugs illegally are not excluded. 42 U.S.C.A. § 12114(b)(1)-(3) (1995).

impairment.⁴⁵ The regulations go on to exclude cultural and environmental characteristics, as distinguished from mental or physical conditions, such as a lack of education, poverty, or a prison record.⁴⁶ The regulations further attempt to draw a line between personality traits such as a quick temper, and traits that are symptoms of an underlying mental or psychological disorder.⁴⁷

If the plaintiff's condition is not subject to a per se exclusion, the condition is generally acknowledged to be an impairment with little or no argument. An "impairment" is an expansive term of art. Consistently, judicial attempts at drawing a line between impairments and non-impairments are disappointingly lacking in analytical rigor.⁴⁸ Since it is the effect of the impairment on the individual rather than the name or label of the impairment that ultimately controls whether or not the impairment amounts to an ADA disability, the better approach is to relax the definition to encompass any mental or physical condition not excluded by the Act.⁴⁹

45. 42 U.S.C.A. § 12211(a) (1995). Nor is bisexuality an ADA impairment. *Id.*

46. 29 C.F.R. app. § 1630.2(h) (1998).

47. *Id.* The regulations explain: "It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments." *Id.*; see also *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437, 1444 (D. Kan. 1996) (reasoning that a person who is easily angered is not disabled); *de la Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986) (*per curiam*) (holding under the Rehabilitation Act that left handedness is a physical characteristic rather than an impairment); see also AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 658-61, 673 (1994) (popularly known as the DSM-IV) (explaining that the main difference between a personality trait and a personality disorder is its negative functional impact on the individual). Also excluded are sexual behavior disorders such as voyeurism, exhibitionism, pedophilia, transsexualism, transvestism, certain gender identity disorders, compulsive gambling, kleptomania, pyromania. 42 U.S.C.A. § 12211(b) (1995); 29 C.F.R. § 1630.3(d)(1)-(3) (1998). For a discussion of the exclusion of such conditions from the definition of impairments, see Adrienne L. Hiegel, Note, *Sexual Exclusions: Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451 (1994).

48. Compare *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999) (holding that a person who is paranoid, suspicious, and unusual is not impaired), *Pouncy v. Vulcan Materials Co.*, 920 F. Supp. 1566, 1580-81 (N.D. Ala. 1996) (suggesting that a difficult personality is not an impairment), and *Greenberg v. New York*, 919 F. Supp. 637, 643 (E.D.N.Y. 1996) (holding that the inability to make decisions in emergencies or perform under stress is not an impairment), with *Hindman v. GTE Data Servs., Inc.*, 1994 WL 371396, *3 (M.D. Fla. 1994) (holding that poor judgment that is the symptom of a chemical imbalance is an impairment).

49. *Merry v. A. Sulka & Co., Ltd.*, 953 F. Supp. 922, 926 (N.D. Ill. 1997). *Merry* observes:

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. 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.

b. Substantially Limiting

Having established an impairment, the plaintiff must next demonstrate that the impairment "substantially limits one or more of the major life activities of such individual."⁵⁰ The operative linkage is "substantially limits," which means significantly restricted in the duration, manner, or conditions under which the individual can perform the particular activity.⁵¹ "Substantially," the Supreme Court has proclaimed, "suggests 'considerable' or 'specified to a large degree.'"⁵² The label of the impairment, whether it be lupus, attention deficit disorder, or diabetes, is less important than the effect of the impairment on the particular individual's lifestyle.⁵³ The question is whether the impairment is substantially limiting. Determining whether a given impairment poses a significant restriction on the way in which an activity is performed is often assisted by a comparison to the norm; that is, in the language of the Equal Employment Opportunity Commission ("EEOC") regulations, by comparing the way the plaintiff performs a task to the way in which "the average person in the general population can perform that same major life activity."⁵⁴ If an individual is significantly limited in the ability to perform a certain task or activity as compared to the general population, the courts will usually find a substantial limitation.

An activity might be affected by an impairment without being "substantially limited."⁵⁵ Take, for example, a woman who is able to

50. 42 U.S.C.A. § 12102(2)(A) (1995).

51. 29 C.F.R. § 1630.2(j)(1)(ii) (1998). The EEOC further instructs that:

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.

29 C.F.R. § 1630.2(j)(2) (1998).

52. *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2150 (1999). The Supreme Court also cited Webster's and the OED. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976) (defining "substantially" as "in a substantial manner" and "substantial" as "considerable in amount, value, or worth" and "being that specified to a large degree or in the main"); 17 OXFORD ENGLISH DICTIONARY 66-67 (2nd ed. 1989) ("substantial": "[r]elating to or producing from the essence of a thing; essential"; "of ample or considerable amount, quantity, or dimensions").

53. *Dotson v. Electro-Wire Prods., Inc.*, 890 F. Supp. 982, 987 (D. Kan. 1995) (citing 29 C.F.R. app. § 1630.2(j)). *See also* *Rodriguez v. Loctite Puerto Rico, Inc.*, 967 F. Supp. 653, 658 (D. Puerto Rico 1997) (lupus not substantially limiting); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 155 (1st Cir. 1998) (attention deficit disorder not substantially limiting); *Myers v. Hose*, 50 F.3d 278, 282 (4th Cir. 1995) (diabetes and associated disorders with substantially limiting effect).

54. *Myers*, 50 F.3d at 282; *see also* 29 C.F.R. 1630.2(j)(1)(i) (1998) (defining "substantially limits" as "[u]nable to perform a major life activity that the average person in the general population can perform"). Obviously, if an individual's impairment totally prevents them from undertaking a major life activity, that activity is substantially limited. 29 C.F.R. app. § 1630.2(j) (1998).

55. *Kirkendall v. United Parcel Serv., Inc.*, 964 F. Supp. 106, 109 (W.D.N.Y. 1997) (citation omitted).

walk extremely rapidly but who is afflicted with a physical impairment that limits her ability to walk at a speed that is moderately below average.⁵⁶ The woman would not qualify as an individual with a disability under the ADA because the activity of walking is not substantially limited, but only moderately restricted.⁵⁷ By comparison, a man who can only walk for brief periods of time due to an impairment would fall within the statute's definition of an individual with a disability because for him, walking is substantially limited.⁵⁸

i. Major Life Activity

To qualify as an individual with a disability, the plaintiff's substantially limited impairment must impact a major life activity.⁵⁹ Major life activities include walking, caring for oneself, seeing, hearing, speaking, breathing, learning, and working.⁶⁰ The Supreme Court has instructed that "'major' denotes comparative importance," suggesting "that the touchstone for determining an activity's inclusion under the statutory rubric is its significance."⁶¹ Activities such as skiing, yard work, and gardening, for example, have been held too negligible in importance to be termed major life activities under the ADA.⁶²

As noted above, it is well settled that working is a major life activity,⁶³ but the regulations frown on plaintiffs using on this particular

56. 29 C.F.R. app. § 1630.2(j) (1998).

57. *See Id.* *See also* *Nedder v. Rivier College*, 944 F. Supp. 111, 116 (D.N.H. 1996) (plaintiff not substantially limited in walking when he is capable of comfortably walking 500 yards).

58. *See* 29 C.F.R. § 1630.2(j) (1998).

59. 42 U.S.C.A. § 12102(2)(A) (1995). *See generally*, Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1435-68 (1999).

60. 29 C.F.R. § 1630.2(i) (1998). The list is illustrative rather than exclusive and courts have recognized additional major life activities such as standing, sitting, reaching and lifting. *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870 (2d Cir. 1998) (quoting UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMERICANS WITH DISABILITIES ACT HANDBOOK I-27 (1992)). *See also* *Saunders v. Horn*, 959 F. Supp. 689, 697 (E.D. Pa. 1996) (walking substantially limited by plaintiff's impairment of degenerative spinal disk disorder) (*adopted by* 960 F. Supp. 893 (E.D. Pa. 1997)); *Detko v. Blimpies Restaurant*, 924 F. Supp. 555, 557 (stuttering that substantially limits speaking, although inadequately pleaded, may qualify as a disability); *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1433 (N.D. Cal. 1996) (working substantially limited by plaintiff's back injury and chronic fatigue syndrome).

61. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998). In *Bragdon*, the Court held reproduction was a major life activity stating that, "[n]othing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word 'major.' The breadth of the term confounds the attempt to limit its construction. . . ." *Id.*

62. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1253 (1999). The court also rejected driving, golfing, painting, plastering, moving furniture, shoveling snow, and going shopping in the mall with one's wife as major life activities. *Id.*

63. 29 C.F.R. § 1630.2(i) (1998). *See* *Lessard v. Osram Sylvania, Inc.*, 175 F.3d 193, 197 (1st Cir. 1999); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 154 (2d Cir. 1998); *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 665 (3d Cir. 1999); *Cline v. Wal-Mart*

major life activity in their threshold showing of a disability.⁶⁴ When the plaintiff's theory is based on a substantial limitation of working, it is not enough to show that his impairment prevents him from performing a single job.⁶⁵ The average person is probably mentally or physically incapable of excelling in a number of isolated employment positions. For the activity of working to be substantially limited, an impairment must significantly restrict the individual's ability to perform an *entire class of jobs, or a broad range of jobs in various classes*.⁶⁶ The courts will also examine the nature, severity, duration, and long-term impact of the individual's impairment.⁶⁷ These factors and questions are designed to aid an assessment of the affect of an impairment on an individual's ability to work, that is, to determine whether working is substantially limited.⁶⁸

Stores, Inc., 144 F.3d 294, 302 (4th Cir. 1998); Robinson v. Global Marine Drilling Co., 101 F.3d 35, 36 (5th Cir. 1996); McKay v. Toyota Mfg., U.S.A., Inc., 110 F.3d 369, 371 (6th Cir. 1997); DePaoli v. Abbott Lab., 140 F.3d 668, 671-72 (7th Cir. 1998); Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1206-07 (8th Cir. 1997); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996); MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437, 1444 (10th Cir. 1996); Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907, 911 (11th Cir. 1996); Kalekristos v. CTF Hotel Mgmt. Corp., 958 F. Supp. 641, 656 (D.D.C. 1997), *aff'd*, 132 F.3d 1481 (D.C. Cir. 1997) (table decision).

64. 29 C.F.R. app. § 1630.2(j) (1998). "If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." *Id.* "Most individuals with physical or mental impairments will be limited in some major life activity other than working. For example, a person with severe arthritis may be limited in lifting and bending, a person with a stroke may be limited in walking and talking, and a person with esophageal fungal infections may be limited in eating." Brief of the American Civil Liberties Union as Amicus Curiae in support of Petitioners at *25-26, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999), 1999 WL 86517.

65. 29 C.F.R. § 1630.2(i)(3)(i) (1998).

66. *Id.* For example, when an individual's impairment restricts him from working with meat products in cold environments and from lifting more than twenty pounds, that individual is not substantially limited in working. Wooten v. Farmland Foods, 58 F.3d 382, 384 (8th Cir. 1995). Such a restriction only precludes the individual from "a narrow range of meatpacking jobs." *Id.* at 386. In another case, the plaintiff's strabismus (a visual impairment) prevented him from working more than an eight to ten hour shift. Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1450 (7th Cir. 1995). The court held that he was not substantially limited in working. *Id.* at 1454. One commentator claims that for a plaintiff to satisfy the EEOC's gloss on the "substantially limited in working" definition is "almost impossible." Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1446 (1999). *But see* Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 949 (8th Cir. 1999) (finding plaintiff with weak arms to be substantially limited in the "restaurant management business" class of jobs); Cochrum v. Old Ben Coal Co., 102 F.3d 908, 911 (7th Cir. 1996) (finding that an individual with an injured shoulder could be disqualified from a broad range of jobs in various classes); Valle v. City of Chicago, 982 F. Supp. 560, 565 (N.D. Ill. 1997) (finding an inability to engage in heavy lifting to disqualify a person from the "heavy labor" class of jobs).

67. 29 C.F.R. § 1630.2(j)(3)(ii) (1998). For a sensitive treatment of these factors, see Zupardo v. Suffolk County Vanderbilt Museum, 19 F. Supp.2d 52, 56 (E.D.N.Y. 1998), *aff'd* 173 F.3d 848 (2nd Cir. 1999) (table decision).

68. The class/broad range of jobs requirement is rationalized as a necessary predicate to the "substantially limited" language in the ADA's definition of a disability. 29 C.F.R. § 1630.2(j)(3) (1998). Alternatively, the class/broad range of jobs requirement can be thought of as subsumed within the "major life activity" (e.g., working) aspect of the definition. That is, "working," in the sense of a major life activity, encompasses more than a single job since the ability to perform one particular job is not sufficiently "major."

ii. Other Factors

As a further gloss on the substantially limited in working prong, the regulations offer the following additional factors to consider:

(A) The geographical area in which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).⁶⁹

The regulations emphasize, logically, that the substantial limitation inquiry should consider the plaintiff's particular job skills, education, training, and abilities.⁷⁰ Although individualized assessment is often lacking in judicial opinions, its inclusion sharpens the analysis considerably. For example, an individual whose impaired elbow disqualifies him from work as a professional baseball pitcher is not substantially limited in working because he is disqualified from a only narrow range of extremely specialized employment.⁷¹ But the production line worker who cannot make repetitive motions with her right hand is significantly restricted in the class of jobs for persons of her skills and education: assembly line work.⁷² The bar applicant with a reading impairment may face substantial limitations within his the

69. 29 C.F.R. § 1630.2(j)(3)(ii)(A)-(C) (1998).

70. 29 C.F.R. § 1630.2(j)(3)(ii)(B) (1998).

71. 29 C.F.R. § app. 1630(j) (1998). "[A]n individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent." *Id.* Thus, although it stands to reason that an impairment that directly interferes with an individual's ability to perform the jobs for which the individual's training, knowledge, skills, and abilities enable him or her to do, the regulations make it clear that being precluded from a narrow, specialized range of jobs is insufficient to demonstrate a disability. The individual who is trained to be an astronaut is not an individual with a disability merely because an impairment precludes this type of employment. *Cf. Knapp v. Northwestern Univ.*, 101 F.3d 473, 481 (7th Cir. 1996).

72. *DePaoli v. Abbott Labs.*, 140 F.3d 668, 673 (7th Cir. 1998). The plaintiff suffered from tendinitis and tenosynovitis. *Id.* at 670.

relevant class of jobs: the practice of law.⁷³ An individualized inquiry into the plaintiff's vocational aptitudes is less critical when the impairment can be said to limit a range, rather than a specific class of jobs.⁷⁴ Plaintiffs seldom assert a significant limitation in a broad range of jobs in various classes, probably because if an impairment poses such an across the board working restriction, in most cases, the impairment could be said to pose a substantial limitation on some major life activity besides working.

Usually, then, the plaintiff will allege that a "class of jobs" is restricted. In that case, the field of persons against whom the plaintiff is compared during the substantially limited inquiry is relatively small. As one court phrased the distinction, "[T]he Title I 'working' rubric provides for a comparison with a more narrow reference group—the population having 'comparable training, skills and abilities—in determining whether a limitation is substantial."⁷⁵ With other major life activities, by contrast, the plaintiff is compared to the general population.

An internal contradiction in the plaintiff's burden of proof helps explain the admonishment that a major life activity of "working" should be considered a last resort.⁷⁶ As will be discussed below, the second major element of proof in the plaintiff's case is to show that he is qualified for the position.⁷⁷ "Qualified" means, essentially, that the individual is not disqualified from the employment position by reason of his disability.⁷⁸ A person with severe visual impairments, for example, would not be qualified as a school bus driver because the unavoidable

73. *Bartlett v. New York State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1120-26 (S.D.N.Y. 1997), *aff'd in part, vacated in part on other grounds*, 156 F.3d 321 (2nd Cir. 1998), and *vacated and remanded*, 119 S. Ct. 2388 (1999). The Supreme Court remanded *Bartlett* for further consideration in light of the three Supreme Court cases discussed herein.

74. Some impairments may affect a wide assortment of employment opportunities in which case it is not necessary to define the particular plaintiff's applicable "class of jobs" for a person of like background and experience. The consideration of the plaintiff's particular vocational background is relevant to defining the relevant "class of jobs" from which the plaintiff must be significantly restricted. *Id.* This consideration is de-emphasized when the plaintiff asserts that an impairment restricts her ability to work at a broad range of jobs in various classes. 29 C.F.R. § 1630.2(j)(3)(ii)(C) (1998). Compare *Frix v. Florida Tile Indus., Inc.*, 970 F. Supp. 1027, 1033 (N.D. Ga. 1997) (holding that an impairment restricting heavy lifting does not bar the plaintiff from a class of jobs), with *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1439 (N.D. Iowa 1996) (holding that the plaintiff's vision impairment substantially limits the ability to work at a wide variety of jobs), and 29 C.F.R. app. § 1630.2(j) (1998) (explaining that an impairment that restricts a city dweller's ability to work in skyscrapers substantially limits working since it interferes with her ability to work at a great number of unrelated positions).

75. *Bartlett*, 156 F.3d at 328 (internal citation omitted), (quoting 29 C.F.R. § 1630.2(j)(3)(i)) (citations omitted).

76. See *supra* note 66 and accompanying text.

77. See *infra* notes 143-48 and accompanying text for a short description of the "qualified" element.

78. See 42 U.S.C.A. § 12111(8) (1995) (defining a "qualified individual with a disability" as "an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").

effects of the person's disability would prevent him or her from driving a bus.⁷⁹

The plaintiff who seeks to establish a substantial limitation in working is not relieved of the burden of showing that she is nonetheless qualified, and these two elements can work at cross purposes. The more profound the impairment, the less likely the individual is to be qualified, while milder impairments are less likely to substantially limit the plaintiff's ability to work.⁸⁰ This presents the plaintiff with a "Catch-22" in which a very fine line must be walked by plaintiffs, lest evidence presented to establish a substantial limitation erodes the showing that the plaintiff is qualified, and vice versa.⁸¹ The visually impaired applicant for the bus driver position, for example, may be substantially limited in working, but by the same token, she is not qualified for the position. Because one must be a "qualified individual with a disability" to bring suit under the ADA, the applicant would be barred at the threshold.⁸²

2. Definition #2: "Regarded as"

The second definition of a disability (actually the third listed in the statute) forms the subject of this article.⁸³ This definition is satisfied when the plaintiff is an individual who is "being regarded as having" an impairment as defined in the definition of an "actual disability."⁸⁴ The "regarded as" definition incorporates the first and more recognizable definition of disability (an impairment which substantially limits a major life activity).⁸⁵ Therefore, the plaintiff will still be required to reference

79. *White v. York Int'l Corp.*, 45 F.3d 357, 361-62 n.6 (10th Cir. 1995). Generally, a blind person is not qualified as a prison guard. *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1195 (7th Cir. 1997) (Posner, C.J.).

80. 1 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 282 (3rd ed. 1997); see also 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, 425-26 (1997) (noting this tension in the Rehabilitation Act).

81. Compare *Wilmarth v. City of Santa Rosa*, 945 F. Supp. 1271, 1277-79 (N.D. Cal. 1996) (holding that plaintiff's carpal tunnel syndrome did not render her substantially limited in working, though it did disqualify her from working as a typist) with *Fink v. Kitzman*, 881 F. Supp. 1347, 1377 (N.D. Iowa 1995) (plaintiff with carpal tunnel not substantially limited in working) and *Feliberty v. Kemper Corp.*, 1995 WL 35398, *3-4 (N.D. Ill. 1995) (plaintiff with carpal tunnel not a qualified individual).

82. 42 U.S.C.A. § 12112(a) (1995).

83. "In many ways, this prong is the most difficult one to satisfy." see Amalia Magdalena Villalba, Comment, *Defining "Disability" under the Americans with Disabilities Act*, 22 U. BALT. L. REV. 357, 386 (1993).

84. 42 U.S.C.A. §§ 12102(2)(C), 12102(2)(A) (1995).

85. The "regarded as" definition references "such an impairment," that is, the impairment described in the "actual disability" definition. 42 U.S.C.A. § 12102(2)(C) (1995). "Such" means "[o]f the character, degree, or extent described, referenced to, or implied in what has been said." XVII OXFORD ENGLISH DICTIONARY 101 (2nd ed. 1991). "Such" indicates "the quality or quantity of a thing by reference to that of another . . ." *Id.*

the two elements of impairment, and a resultant substantially limited major life activity.⁸⁶ The regulations provide three ways in which this definition can be met. A plaintiff can satisfy the "regarded as" definition by showing that she:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) Has [neither a physical or mental impairment] but is treated by a covered entity as having a substantially limiting impairment.⁸⁷

In its simplest terms, the "regarded as" definition simply replaces an underlying element of the first definition—that the plaintiff actually *has* the condition that qualifies as a disability—with a requirement that the defendant *regard* the plaintiff as possessing that condition.⁸⁸ The plaintiff's burden could be met, for example, by showing that the employer regarded him as possessing a physical impairment that substantially limited his ability to walk, to speak, or to see.⁸⁹ Similarly, a plaintiff might attempt to demonstrate that his employer regarded him as having an impairment that placed substantial limitations on his ability to work.⁹⁰ This particular theory was before the Supreme Court in each of the three cases discussed Section II.

The inquiry in any "regarded as" case focuses on the relevant decision maker's perceptions, and it makes no difference whether the plaintiff had an impairment (the first alternative under the regulations) or whether the perception that the plaintiff had an impairment was totally

86. See *supra* notes 40-82 and *infra* notes 114-29 and accompanying text for a description of these twin elements.

87. 29 C.F.R. § 1630.2(l)(1)-(3) (1998).

88. See 29 C.F.R. § 1630.2(l)(1), (3) (1998). Subsections (1) and (3) can be stated in the alternative: a plaintiff is "regarded as" having a disability when he is regarded as having an impairment that substantially limits a major life activity, whether the plaintiff actually has an impairment or not. *Id.* Subsection (2) is a different animal altogether and is discussed *infra* accompanying text to notes 298-318.

89. See *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2150 (1999) (suggesting the "obvious" "regarded as" argument that the visually impaired plaintiffs in that case would be substantially limited in the major life activity of seeing).

90. See, e.g., *Scharff v. Frank*, 791 F. Supp. 182, 187 (S.D. Ohio 1991) (plaintiff regarded as being an individual with a disability where she "would be precluded from performing a wide range of jobs if her ability to perform tasks was limited in the manner described by [the examining physician]"); *but see* *Pardlow v. Runyon*, 826 F. Supp. 40, 46 (D.N.H. 1993) (plaintiff not regarded as an individual with a disability where employer perceived that plaintiff's impairment precluded him from only a few jobs).

unfounded (the third alternative).⁹¹ Under either alternative, the plaintiff must prove that the defendant regarded the plaintiff as suffering from an impairment that substantially limited him in a major life activity.⁹²

The second alternative listed in the regulations, however, presents knottier analytical difficulties. A plaintiff satisfies the second “regarded as” prong “if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition.”⁹³ That is, the plaintiff may show an impairment, the substantial limitation of which is derived not from the physical or limitations of the impairment itself, but rather from the accompanying prejudices and negative reactions of others.⁹⁴ This attitudinal substantial limitation theory acknowledges the barriers imposed upon individuals with disabilities in the form of societal intolerance and nescience.

a. Case Law Interpreting the “Regarded as” Definition

The rationale for this alternative showing was articulated in *School Board of Nassau County v. Arline*.⁹⁵ *Arline* was brought under the Rehabilitation Act of 1973, a precursor to the ADA with an identical definition of “handicap” (now “disability”) as the ADA.⁹⁶ In *Arline*, the plaintiff, an elementary school teacher with tuberculosis, was discharged due to repeated recurrences of the disease.⁹⁷ The only relevant issue

91. See *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 195 (3rd Cir. 1999) (focusing on perceptions of “relevant decisionmakers” in a “regarded as” case); *Deas v. River West, L.P.*, 152 F.3d 471, 476 n.9 (5th Cir. 1998) (same); *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 172-74 (4th Cir. 1997) (en banc) (same). In one case, a plaintiff sued his employer, alleging that he was subjected to an extremely hostile work environment because of his coworkers’ unfounded belief that he had AIDS. *Maples v. General Motors Corp.*, No. 97-73524, 1999 U.S. Dist. LEXIS 7576 at *3-15 (E.D. Mich. Apr. 29, 1999). The court rejected his claim because the plaintiff had alleged that his coworkers, not his employer, regarded him as having AIDS. *Id.* at *20.

92. 42 U.S.C.A. § 12102(2)(C) (1995).

93. 29 C.F.R. app. § 1630.2(l) (1998).

94. Although the precise wording of the regulations do not provide for it, it can be assumed that the plaintiff may avail him or herself of the “disabling prejudice” option of proving a “regarded as” disability, whether or not the plaintiff’s impairment is real or imagined. See *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06, n.6 (1979) (stating that an individual who “is regarded as having an impairment may at present have no actual incapacity at all.”). Arguably, when the plaintiff’s impairment is real and the substantial limitation results from prejudices rather than inherent physical restrictions, a case could alternatively be articulated under the “actual disability” prong.

95. *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

96. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 366 (1973), codified as amended at 29 U.S.C.A. § 701-794 (West, 1999). The Rehabilitation Act provided the primary source for federal protection from disability discrimination prior to the ADA. See Richard F. Richards, *Handicap Discrimination in Employment: The Rehabilitation Act of 1973*, 39 ARK. L. REV. 1 (1985). Hereinafter when a Rehabilitation Act case is discussed, the word “disability” will be substituted for the word “handicapped” whenever applicable.

97. *Arline*, 480 U.S. at 276. See generally, Robert Lipshutz, Note, *Arline: Real Protection Against Discrimination for Society’s New Outcasts?*, 17 STETSON L. REV. 517 (1988).

presented to the Supreme Court was whether tuberculosis, as a contagious and infectious disease, could qualify as a handicap under the Act.⁹⁸ The district court ruled against the plaintiff based on the court's difficulty in conceiving "that Congress intended contagious diseases to be included within the definition of a handicapped person."⁹⁹ The court of appeals reasoned otherwise, stating, "Neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded from the definition of 'handicap.'"¹⁰⁰ The court of appeals therefore declined to create an exemption for contagious diseases.¹⁰¹ The Supreme Court, with Justice Brennan writing for the majority, affirmed.¹⁰² The Court agreed that the plaintiff stated a cause of action under the "regarded as" prong, which could not be dismissed solely by reason of her impairment's contagiousness.¹⁰³ In some of the decision's most quoted language, Justice Brennan wrote:

By amending the definition of "handicapped individual" to include not only those who are actually impaired, but also those who are regarded as impaired and, as a result, are substantially limited in a major life activity, Congress acknowledged that society's acculturated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairments. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.¹⁰⁴

E.E. Black v. Marshall,¹⁰⁵ predating *Arline* by seven years, was one of the first and most widely cited cases that dealt directly with a "regarded as" claim.¹⁰⁶ There, an apprentice carpenter with spina bifida occulta, a partially sacralized transitional vertebra, and a mild rotoscoliosis sought employment from and was rejected by a

98. The *Arline* court also examined whether the plaintiff was "qualified," but this is beyond the scope of the thrust of this article. *Arline*, 480 U.S. at 287-289.

99. *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 763 (11th Cir. 1985) (quoting the Hon. John H. Moore II, United States District Judge for the Middle District of Florida).

100. *Id.* at 764. "To the extent that the statute and regulations express any intent to limit the scope of section 504 [of the Rehabilitation Act], Congress' failure to exclude contagious diseases from coverage when it specifically excluded alcoholism and drug abuse implies that it harbored no similar disapproval about them." *Id.*

101. *Id.* "We would as a general matter be reluctant to create an exemption where there is not a scintilla of evidence that Congress had any intention of doing so." *Id.*

102. *Arline*, 480 U.S. at 285. "[An] exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and whether they were 'otherwise qualified.'" *Id.* Here, the Supreme Court emphasized the need for separate analyses of each independent element of a claim of disability discrimination.

103. *Id.*

104. *Id.* at 284 (footnotes omitted).

105. *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980).

106. See generally Andrew W. Haines, *E.E. Black, Ltd. v. Marshall: A Penetrating Interpretation of "Handicapped Individual" for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 LOY. L.A. L. REV. 527 (1983).

construction contractor, even though he was qualified for the position.¹⁰⁷ The district court considered opposing frameworks for the “regarded as” prong. First, it considered whether, as the plaintiff claimed, the rejection from a single job because of a real or imagined impairment fulfills the “regarded as” definition; next, it reviewed the defendants’ argument that the impairment must be perceived as likely to affect employability generally before a “regarded as” disability can be established.¹⁰⁸ The court rejected both readings and opted for a middle course.

“In evaluating whether there is a substantial handicap to employment,” the court wrote, “it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process.”¹⁰⁹ *E.E. Black*, then, allows the imputation of a single employer’s discriminatory policies to other employers to meet the “regarded as” prong’s “substantially limited” element in some, but not all instances, depending on the type of employer and type of discrimination involved.¹¹⁰ That is, the anti-impairment criteria of the rejecting employer-defendant may be generalized to similar employers only if the rationale for the criteria is capable of such generalization.¹¹¹ Although the rationale of *E.E. Black* has not been widely adopted, the opinion’s sensitive treatment of the “regarded as” prong’s language has ensured its longevity and influence.¹¹²

The imperfect fit between the “regarded as” prong when it is meshed with the major life activity of working was highlighted by the three Supreme Court cases discussed in Section III. A more comprehensive discussion will be deferred so that the issues can be examined within the context of the factual allegations in each case. At this juncture, however, it may be helpful to dissect a plaintiff’s proof of a “regarded as” disability and discuss the remaining elemental components of a *prima facie* case.

107. *E.E. Black*, at 1091. Spinal bifida occulta indicates a defective closure of the spinal cord; a partially sacralized transitional vertebra is an anomalous joint; rotoscoliosis involves a narrowing of the disc space in the spine. *Id.* at n.1.

108. *Id.* at 1099-1100.

109. *Id.* at 1100.

110. *Id.* at 1101.

111. *See id.* In some cases, “the reason an employer rejects an individual may have more to do with a particular location than a particular job. If that is the case, then for many employers the criteria used by the rejecting employer would be inapplicable.” *Id.*

112. *See Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1248-50 (6th Cir. 1985) (criticizing elements of *E.E. Black*’s analysis); *Tudyman v. United Airlines*, 608 F. Supp. 739, 745 n.6 (C.D. Cal. 1984) (rejecting *E.E. Black*’s imputation rule); *Padilla v. City of Topeka*, 708 P.2d 543, 548-50 (Kan. 1985) (quoting extensively from *Jasany*’s critique of *E.E. Black*). Courts have generally cited *E.E. Black* approvingly not for its imputation rule, but for its statement that “the inability to obtain a single job does not render one [disabled].” *E.E. Black*, 497 F. Supp. at 745. *See Forrissi v. Bowen*, 794 F.2d 931, 934-35 (4th Cir. 1986); *Eckles v. Consolidated Rail Corp.*, 890 F. Supp. 1391, 1398-99 (S.D. Ind. 1995), *cert. denied*, 520 U.S. 1146 (1997); *Tudyman*, 608 F. Supp. at 746; *State by Cooper v. Hennepin County*, 441 N.W.2d 106, 111 (Minn. 1989).

b. Impairment

The words of the statute require the plaintiff to establish "being regarded as having such an impairment,"¹¹³ such impairment referencing "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."¹¹⁴ Here, the focus is on the major life activity of working. One recurring inherent difficulty is the interaction of the modifier "being regarded as having" with the remaining dual elements of: (1) an impairment, which (2) substantially limits the plaintiff's ability to work.

As noted previously, in some cases the plaintiff might have an actual impairment. In others he might not. In either case, the plain words of the statute require that the plaintiff demonstrate that the defendant regards the plaintiff as having a mental or physical impairment, whether that perception happens to be accurate or not.¹¹⁵ Real or misperceived impairments that are neither mental or physical in nature do not qualify.¹¹⁶ In addition, the ADA's per se exclusions, including homosexuality and drug use, act to bar claims sounding in the "regarded as" definition.¹¹⁷ A plaintiff claiming that her employer

113. 42 U.S.C.A. § 12102(2)(C) (1995).

114. 42 U.S.C.A. § 12102(2)(A) (1995); *see also* *Bragdon v. Abbott*, 118 S. Ct. 2196, 2214 n.1 (1998) (Rehnquist, C.J., concurring and dissenting) (noting that under the "regarded as" definition, all three elements of an ADA disability are incorporated). Chief Justice Rehnquist, who was joined by Justices Scalia and Thomas, declined to consider whether the plaintiff in *Bragdon* satisfied the "regarded as" definition, but observed that:

In any event, the "regarded as" prong requires a plaintiff to demonstrate that the defendant regarded him as having "*such* an impairment" (*i.e.*, one that substantially limits a major life activity). 42 U.S.C. § 12102(2)(C). [The plaintiff] has offered no evidence to support the assertion that [the defendant] regarded her as having an impairment that substantially limited her ability to reproduce, as opposed to viewing her as simply impaired (emphasis added).

115. 42 U.S.C.A. § 12102(2)(A), (C) (1995).

116. *See* 29 C.F.R. app. § 1630.2(h) (1998) (excluding poverty or a prison record as potential impairments).

117. A&P HEARINGS H.R. 2273, *184-86. Transcripts reveal:

Ms. KIKO[:] Mr. Chairman, I just have one question The definition of disabled includes a term called, being regarded as having a disability. With respect to the definition, exclusion of homosexuality under the Senate-passed bill, I'm wondering if you believe that in fact, the exclusion of homosexuality from the definition of disabled is essentially usurped by the definition of disabled where it says, being regarded as, if an individual who is homosexual claims to be discriminated against on the basis of being regarded as having AIDS or HIV[-]positive reactions of some sort, could anybody address and answer?

Mr. ALLEN[:] . . . I don't see how that could be discerned as being someone who has a physical impairment—just being homosexual.

Ms. COOPER[:] . . . To the extent that the decision is based strictly on homosexuality, it's not covered explicitly by this bill. To the extent that the decision is based on the irrational fear that all homosexuals are HIV[-]positive, that's another matter altogether. . . .

regarded him or her as having an impairment of cultural origins, a strong accent, and bizarre attire should fail because such real or imagined characteristics do not qualify as mental or physical impairments.¹¹⁸ The proper analysis simply asks whether an impairment, whether actual or only perceived, is a mental or physical condition that falls at least somewhat outside the norm of human physiology or psychology.¹¹⁹ If the answer is “yes,” and no exclusion applies, then the plaintiff is regarded as having an ADA impairment.¹²⁰

Ms. KIKO[:] It just seems a fairly fine line. . . .

Ms. COOPER[:] . . . I don't see a fine line there at all. I mean, all we're doing is asking people to use their heads when they make hiring decisions. . . .

Id. Although engaging in the current illegal use of drugs cannot be an ADA impairment, there is an exception for individuals “erroneously regarded as engaging in such use,” but who are not in fact engaging in such use. 29 C.F.R. § 1630.3(b)(3) (1998).

118. *See, e.g.*, *Pouncy v. Vulcan Materials Co.*, 920 F. Supp. 1566, 1580-81 (N.D. Ala. 1996) (plaintiff not regarded as having an impairment where defendant regarded her as having a difficult personality, rather than a mental disease).

119. *Francis v. City of Meriden*, 129 F.3d 281, 284 (2nd Cir. 1997); *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37, 37 (D. Me. 1996), *aff'm* 105 F.3d 12 (1st Cir. 1997). The Fourth Circuit has rationalized that conditions must pose direct physical diminishing effects on the individual in order to qualify as impairments. *Runnebaum v. National Bank of Md., N.A.*, 128 F.3d 156, 169 (4th Cir. 1997) (en banc). This reasoning has been rejected by the Supreme Court. *See Bragdon v. Abbott*, 118 S. Ct. 2196, 2209 (1998) (holding that asymptomatic HIV-positive status is an impairment because the risk associated with passing the virus to an infant during childbirth substantially limits reproduction).

120. Although whether a condition is an impairment is a straightforward question, it has been muddled by the interpretative guidance. The regulations published by the EEOC to interpret the ADA confuse the issue where they seem to widen the definition of what can constitute an impairment when the “regarded as” definition is in play. *Compare* 29 C.F.R. app. § 1630.2(l) (1998) (stating that an individual with a scar could qualify as having a “regarded as” disability) *with* 29 C.F.R. app. § 1630.2(h) (stating that physical characteristics are not impairments). This presents an inconsistency. Yet the “regarded as” definition clearly incorporates the same “impairment” definition in either prong. *See* 42 U.S.C.A. § 12102(2)(A) (1995) (defining disability as “a physical or mental impairment. . . .”); 42 U.S.C.A. § 12102(2)(C) (1995) (alternatively defining disability as “being regarded as having such an impairment”). One student has offered the following unsatisfying explanation for the EEOC’s wider definition of an impairment under the “regarded as” definition than under the “actual disability” definition:

[T]he language . . . suggests that even a personal characteristic could be an impairment if it were (or were regarded as) abnormal. An employer would be regarding a given characteristic that is actually within the normal range as an impairment if he believed the characteristic was abnormal. For example, an employer might believe that a man who is five foot nine inches tall is abnormally short even though he is within the normal range of height for men. This is an entirely subjective test measuring what the employer believes, not what is objectively true. The definition of impairment has the potential of covering anything that might be seen as different.

John M. Vande Walle, Note and Comment, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA’s Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897, 905 (1998) (internal footnotes omitted). Vande Walle, in other words, would allow the definition of “impairment” to be satisfied when an employer perceives abnormality in an otherwise non-impairing physical characteristic. It is the position taken by this author that the condition, as the defendant perceives it, must qualify as an ADA impairment. Taking Vande Walle’s approach to its logical conclusion would allow the full range of excluded characteristics, such as a prison record or sexual orientation, to qualify as impairments if the defendant regards them as impairments. This approach is subversive of the statutory language that requires the finding of either an impairment (actual disability) or the perception of “such an impairment.” *See* Doukas v.

c. Substantially Limited in Working

Whatever mental or physical impairment the plaintiff is asserting, it must be regarded as substantially limiting the plaintiff's ability to work before it can qualify as an ADA disability.¹²¹ As noted earlier, a "substantial limitation" means that the plaintiff is regarded as significantly restricted in his ability to perform a class or broad range of jobs.¹²² A "class of jobs" means "jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area."¹²³

A plaintiff will satisfactorily demonstrate that he has a disability by showing that the employer regarded him as having an impairment that substantially limits his ability to work.¹²⁴ Again, such a perception may take two forms under the EEOC regulations: first, an employer may simply believe that the employee had an impairment that substantially limited his ability to work in a class or relatively broad range of employment positions.¹²⁵ For example, when an employer believes its employee is paralyzed, it follows that paralysis significantly restricts the ability to work a large number of jobs in various categories and classes.¹²⁶ In the alternative, the definition is also satisfied if the others' attitudes toward the impairment results in a substantial limitation in the plaintiff's ability to work.¹²⁷ An individual, for example, might have excessive difficulty finding work because of the fears and prejudices relating to his impairment. Thus, two options are presented: substantially limited by design, or a substantial limitation arising out of attitudes toward the impairment.¹²⁸ These two alternative means of satisfying the "regarded as" definition will receive detailed examination in Section III(D) of this article.

Metropolitan Life Ins. Co., 1997 WL 833134, at *4 n.3 (D.N.H. 1997) ("Because the presence of an impairment is a threshold requirement under the ADA, [plaintiffs] cannot qualify as disabled in the absence of a physical impairment or a perceived impairment."). The statute implies, instead, that an impairment is nothing more than a mental or physical condition which is somewhat abnormal or unusual. See *McGraw v. Sears, Roebuck & Co.*, 21 F. Supp.2d 1017, 1021 (D. Minn. 1998) (distinguishing menopausal infertility from AIDS-related infertility on the basis that menopause is "an entirely normal consequence of human aging.").

121. 29 C.F.R. §1630.2(j)(3) (1998).

122. 29 C.F.R. § 1630.2(j)(3)(i) (1998). See, e.g., *Maulding v. Sullivan*, 961 F.2d 694, 698 (8th Cir. 1992) (pharmacologist's sensitivity to chemicals which prevented her from doing lab work does not substantially limit working); A&P ADA COMM. PRINT 1990 (28A), *469 (painter with a mild allergy to a specialized paint used by one employer is not substantially limited in working).

123. 29 C.F.R. § 1630.2(j)(3)(ii)(B) (1998)

124. *Muller v. Hotsy Corp.*, 917 F. Supp. 1389, 1412 (N.D. Iowa 1996).

125. 29 C.F.R. § 1630.2(l)(1), (3) (1998).

126. Paralysis also substantially limits walking, another major life activity. *Vande Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995).

127. 29 C.F.R. § 1630.2(l)(2) (1998).

128. See 29 C.F.R. § 1630.2(l)(1), (3) (1998) (treated as substantially limited); 29 C.F.R. § 1630.2(l)(2) (1998) (substantially limited as a result of attitudes concerning the impairment).

d. Statutory Construction of the “Regarded as” Language

As a matter of statutory exegesis, the ADA recognizes a disability when an employer regards its employee as having (1) an impairment, which (2) substantially limits an activity such as working. Syntactically, “regards” modifies both “impairment” and “substantially limited in working.”¹²⁹ Logically, “regards” modifies both *or either* of these twin elements; a person is clearly no less disabled if she actually has the regarded impairment or is in fact substantially limited.¹³⁰ In some cases, the plaintiff may have an actual impairment that the defendant incorrectly believes is substantially limiting.¹³¹ In others, the defendant may only imagine the existence or severity of the impairment.¹³² The substantial limitation, whether perceived or actual, may result from the physical limitations of the impairment itself, or, according to the regulations, from the prejudices of society against the particular impairment which operate to impede and restrict the plaintiff’s opportunities.¹³³

In either case, the plaintiff’s *prima facie* showing of a disability can be accomplished by demonstrating, *first*, an impairment, that is: (a) an actual impairment; (b) an imagined impairment; or (c) an actual impairment that is perceived in an exaggerated dimension; and *second*, a substantial limitation of a major life activity by means of: (a) the impairment’s inherent physical or mental limitations on the individual; (b) societal limitations grounded in prejudice; or (c) the defendant’s belief in the substantially limiting effect—because of inherent or societal limitations—of the impairment.¹³⁴ In any case, the defendant’s

129. *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 172 (4th Cir. 1997) (en banc). “The ‘such an impairment’ language incorporates by reference subsection (A)’s description of the sort of impairment that qualifies as a disability.” *Id.*

130. *See Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 189 (3rd Cir. 1999) (holding that plaintiff may assert that he is both actually and regarded as disabled); A&P H.R. REP. 101-485, *31 (stating that when the “regarded as” definition is met, the plaintiff “is not required to show that the employer’s perception is inaccurate”).

131. *See, e.g., EEOC v. Texas Bus Lines*, 923 F. Supp. 965, 978 (S.D. Tex. 1996) (defendant perceived obesity as substantially limiting plaintiff’s ability to walk).

132. *Francis v. City of Meriden*, 129 F.3d 281, 284 (2nd Cir. 1997). “An individual need not actually have a physical impairment to state a claim under the ADA . . . as long as that individual is ‘regarded as having such an impairment.’” *Id.* (quoting 42 U.S.C. § 12102(2)(C)). *See, e.g., Pouncy v. Vulcan Materials Co.*, 920 F. Supp. 1566, 1581 (N.D. Ala. 1996) (unimpaired plaintiff perceived as impaired). A recently published article on the “regarded as” definition describes a fact pattern that the EEOC determined established a violation of the ADA wherein a mid-level sales manager was fired when his employer learned that his male domestic partner had been diagnosed with AIDS. Ronda B. Goldfein & Sara Velazquez, *AIDS and the ADA: Protection from Perception*, TRIAL, Oct. 1999, at 42. The employee was HIV-negative but nonetheless regarded as having HIV. *Id.* at 43.

133. *See infra* notes 272-313 and accompanying text for a fuller discussion of these two alternative means of meeting the “regarded as” definition’s “substantial limitation” requirement.

134. 42 U.S.C.A. § 12102(2)(C) (1995); 29 C.F.R. § 1630.2(l)(1)-(3); 29 C.F.R. app. § 1630.2(l) (1998). Some opinions have interpreted 29 C.F.R. section 1630.2(l)(2)’s “substantial limitation

perceptions can serve to cure any "actual" deficiency in the plaintiff's proof of a substantially limiting impairment.

3. *Definition #3: Record of*

When an employer discriminates against one of its employees based on the employee's record of a disability, liability may be incurred.¹³⁵ The third definition of the term "disability" is satisfied when the plaintiff can show a record of a disabling impairment.¹³⁶ Again, the "record of" definition incorporates the two elements from the first definition—an impairment, which substantially limits a major life activity—and adds a third; here, that the plaintiff show a record of such a condition.¹³⁷ A record of a disability means a history or a misclassification of a disability.¹³⁸ The term "record" includes educational, medical, or employment records.¹³⁹ Although this definition is rarely used, it can operate to protect individuals who have recovered from a disability, such as cancer or heart disease, or who have been misdiagnosed with a disability.

resulting from the attitudes of others" not as a disabling prejudice prong, but as a prejudicial causation theory. *See, e.g.,* Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1998) (stating that the plaintiff "presented no summary judgment evidence that workplace attitudes caused his symptoms, an alternative requirement for finding that an employee is regarded as having an impairment.") (emphasis supplied). This mendacious analysis looks to whether the attitudes of others have caused the plaintiff's physical symptoms. Because the ultimate source of an actual impairment's physical limitations is irrelevant under the ADA, this inquiry appears misdirected. In addition, such a reading of this regulation fails to recognize the limiting effects that societal prejudices can have on an individual. As *Arline* recognized, limitations arise both from an impairment's physical symptoms and from prejudice-imposed encumbrances. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987). It is therefore not necessary that the prejudice precedes the symptoms and their concomitant limiting effects.

135. *See* Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 815 (N.D. Tex. 1994) (multiple hospitalizations for a disease may constitute a "record of" disability); Mahoney v. Ortiz, 645 F. Supp. 22, 24 (S.D.N.Y. 1986) (four or five dislocations prior to corrective surgery is a "record of" disability); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1091 (D. Haw. 1980) (physical examination establishes "record of" disability); *but see* Pridemore v. Rural Legal Aid Soc'y, 625 F. Supp. 1180, 1184 (S.D. Ohio 1985) (no "record of" disability where cerebral palsy was not diagnosed until after job interview).

136. 42 U.S.C.A. § 12102(2)(B) (1995).

137. *See id.* "The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities." 29 C.F.R. app. § 1630.2(k) (1998).

138. 29 C.F.R. app. § 1630.2(k) (1998).

139. *Id.* In *Arline*, for example, the plaintiff satisfied the "record of" definition when she had been hospitalized for tuberculosis. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 281 (1987).

B. A *Qualified Individual*

The ADA prohibits employment discrimination on the basis of disability “against a qualified individual with a disability.”¹⁴⁰ The Act defines a “qualified individual” as one “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”¹⁴¹ The disjunctive “with or without reasonable accommodation” permits two alternative definitions of the term “qualified.” First, an employee may be qualified if she is capable of performing the job’s essential functions.¹⁴² Second, if the employee’s disability interferes with her ability to perform the essential functions of the position, she is nonetheless qualified if a reasonable accommodation from the employer would alleviate this difficulty.¹⁴³

As previously mentioned, the two elements of the plaintiff’s prima facie case present a classic “Catch-22” dilemma when relying on working as the major life activity limited by the impairment because the “qualified” element tends to defeat the plaintiff’s “substantially limited in working” showing, and vice versa.¹⁴⁴

In the “regarded as substantially limited in working” category, a similar onus is imposed on defendants. Defendants will usually try to overcome the plaintiff’s attempts to show that she is qualified.¹⁴⁵ In so doing, the defendant may attempt to establish that the plaintiff’s impairment prevented her from performing the essential functions of the job, and no reasonable accommodation could compensate for this deficiency.¹⁴⁶ This will entitle the defendant to summary judgment based on the plaintiff’s shortcomings of proof on the “qualified” element.¹⁴⁷ But if the defendant fails in its attempt to win the case on the “qualified” front, it will have exposed its flank to inferences that it regarded the

140. 42 U.S.C.A. § 12112(a) (1995).

141. 42 U.S.C.A. § 12111(8) (1995).

142. 29 C.F.R. app. § 1630.2(m) (1998). At the heart of the term “qualified” is the concept of an employment position’s “essential functions.” See generally ROBERT A. THRUSH, ADA ESSENTIAL FUNCTION IDENTIFICATION: A DEFINITIVE APPLICATION OF TITLE I (1993); W. Robert Gray, *The Essential-Functions Limitation of the Civil Rights of People with Disabilities and John Rawls’s Concept of Social Justice*, 22 N.M. L. REV. 295 (1992).

143. 29 C.F.R. app. § 1630.2(m) (1998).

144. See *supra* note 81.

145. A defendant may also argue that the plaintiff was objectively unqualified for the job in order to rebut a claim of pretext in an intentional discrimination case. If the plaintiff is unqualified, this provides an acceptable explanation for his termination.

146. For a defendant to refute the plaintiff’s “qualified” element based on these facts, the job must require, as an “essential function,” more than four hours of work per day. See 42 U.S.C.A. § 12111(8) (1995); 29 C.F.R. § 1630.2(n) (defining “essential functions”).

147. See *Burnett v. Western Resources, Inc.*, 929 F. Supp. 1349, 1356-57 (D. Kan. 1996) (plaintiff who can only work four hours per day is not qualified). “The ADA is broad in its scope, but it only protects individuals who can perform their job.” *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1048 (8th Cir. 1999).

plaintiff as substantially limited in the ability to work—that is, an individual with a disability. Such a defendant will find it difficult to argue that it did not regard the plaintiff's impairment as substantially limiting in the ability to work, when it has just concluded arguing how the plaintiff's impairment prevented her from performing the essential functions of the job.

C. Discrimination

The fourth and final element in any ADA employment discrimination case is that the employer engaged in unlawful discrimination. Because this element is peripheral to the subject of this article, this section only offers abridged mention of the peculiarities of "ADA discrimination." Title I prohibits, as a general rule, disability discrimination "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."¹⁴⁸ More specifically, Title I lists a non-exhaustive compendium of practices that constitute discrimination in the employment context.¹⁴⁹

Two main varieties of discrimination can be identified in the employment context.¹⁵⁰ They are intentional, "garden-variety" discrimination, and the failure to make reasonable accommodations.¹⁵¹ The easiest sort of discrimination to grasp is intentional, or disparate treatment discrimination, which occurs when a qualified individual with a disability is treated adversely because of his disability.¹⁵² Generally, a burden-shifting framework is employed whereby the burden of production shifts to the defendant once the plaintiff has made out a *prima facie* case that he has been intentionally discriminated against.¹⁵³ If the

148. 42 U.S.C.A. § 12112(a) (1995).

149. 42 U.S.C.A. § 12112(b)(1)-(7) (1995).

150. *Valle v. City of Chicago*, 982 F. Supp. 560, 562 (N.D. Ill. 1997).

151. 42 U.S.C.A. § 12112(a)(4) (1995). Disparate impact discrimination is another brand of discrimination that looks to whether a neutral, otherwise nondiscriminatory criteria, has the effect of discriminating on the basis of disability. In disparate impact discrimination cases, an intent to discriminate is not an element of the *prima facie* case; instead, the plaintiff must show "that uniformly applied criteria have an adverse impact on an individual with a disability, or a disproportionately negative impact on a class of individuals with disabilities." 29 C.F.R. app. § 1630.15(b) and (c) (1998); see also HONORABLE CHARLES R. RICHEY, *MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS* 2d, 6-29 to 6-30, 6-64 (1998) (providing more detail on disparate impact cases).

152. 29 C.F.R. app. § 1630.15(a) (1998). "Disparate treatment means, with respect to Title I of the ADA, that an individual was treated differently on the basis of his or her disability." *Id.* See generally RICHEY, *supra* note 151, at 6-63 to 6-64.

153. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The *McDonnell Douglas* burden-shifting rubric has been approved for ADA cases. See *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 145 n.7 (1st Cir. 1997) (intentional discrimination); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121 (5th Cir. 1998) (retaliation); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1085 (10th Cir. 1997) (association discrimination). See also Timothy Ogden, Note, *Shifting Burdens*

defendant meets its burden, the burden shifts back to the plaintiff to show that the defendant's explanation for its actions is pretextual.¹⁵⁴

1. *Intentional Discrimination*

Intentional discrimination is often alleged in the employment context.¹⁵⁵ In all three of the cases decided by the Supreme Court, the allegations sounded primarily in intentional discrimination. Because the subject of this article centers more on the threshold issue of whether the plaintiff is disabled, it will not delineate the legal difficulties of proof of discrimination, except to frame a showing of discrimination as the ultimate question of whether the employer treated its employee adversely on the basis of the employee's disability.¹⁵⁶ If this showing is made, the plaintiff's burden is satisfied.

2. *Failure to Make Reasonable Accommodations*

The second cardinal type of discrimination against employees with disabilities need merely be sketched for present purposes. Employees suffer cognizable discrimination when their employer fails to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual."¹⁵⁷ When an accommodation is

and the Americans with Disabilities Act: Why McDonnell Douglas Should Apply to the ADA, 29 IND. L. REV. 179 (1995) (supporting adherence to the *McDonnell Douglas* framework in ADA cases).

154. *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995). The plaintiff may meet this burden either "directly with evidence that [the employer] was more likely than not motivated by a discriminatory reason, or indirectly by evidence that the employer's explanation is not credible." *Id.* (quoting *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1039 (7th Cir. 1993)).

155. *See, e.g.*, *Patterson v. Downtown Med. and Diagnostic Ctr., Inc.*, 866 F. Supp. 1379 (M.D. Fla. 1994) (discriminatory discharge); *West v. Russell Corp.*, 868 F. Supp. 313 (M.D. Ala. 1994) (failure to hire); *Sarsycki v. United Parcel Serv.*, 862 F. Supp. 336 (W.D. Okla. 1994) (discriminatory transfer); *E.E.O.C. v. MTS Corp.*, 937 F. Supp. 1503 (D.N.M. 1996) (retaliation); *Colwell v. Suffolk County Police Dep't*, 967 F. Supp. 1419 (E.D.N.Y. 1997), *rev.*, 158 F.3d 635 (2d Cir. 1998), *and cert. denied*, 119 S. Ct. 1253 (1999) (failure to promote); *Tanzini v. Marine Midland Bank, N.A.*, 952 F. Supp. 937 (N.D.N.Y. 1997) (reduction in force); *Rodriguez v. Loctite Puerto Rico, Inc.*, 967 F. Supp. 653 (D. Puerto Rico 1997) (hostile work environment).

156. *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 441 (1997); *Quick v. Tripp, Scott, Conklin & Smith, P.A.*, 43 F. Supp.2d 1357, 1363 (S.D. Fla. 1999); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1317 (E.D. Pa. 1994). For example, a *prima facie* case of intentional discrimination is established if the employer admits it discharged an employee due to the employee's epileptic seizures. *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686 (4th Cir. 1997).

157. 42 U.S.C.A. § 12112(b)(5)(A) (1995); *see also* 42 U.S.C.A. § 12112(b)(5)(B) (1995) (defining the term "discriminate" to include "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental

necessary in order for a disabled employee to perform the position's functions, the employer is required to provide accommodation if it is reasonable to do so.¹⁵⁸ An accommodation is reasonable if its costs are not clearly disproportionate to the benefits it will produce.¹⁵⁹ The failure to provide a reasonable accommodation, such as furnishing certain equipment, or making certain modifications to the workplace environment, amounts to accommodation discrimination.¹⁶⁰

D. Notice

An employer's responsibilities under the ADA only take on a legal dimension when the employer has notice of a particular employee's disability. In an intentional discrimination case, discrimination on the basis of disability presupposes notice or knowledge of the disability.¹⁶¹ In a failure to accommodate case, it is the employer's awareness of the employee's disability that triggers the duty to provide reasonable accommodations.¹⁶² A showing of such an awareness can be met when the defendant has actual knowledge of a disability, or when circumstances are such that the defendant should have known of the disability.¹⁶³ In either case, the defendant's knowledge of the plaintiff's disability is critical to the plaintiff's case. Notice is thus an elemental (though often presumed) element of any *prima facie* Title I ADA claim.

impairments of the employee or applicant"). See generally, Leo T. Crowley, "Reasonable Accommodation"—*Initiating the Process*, 215 N.Y.L.J. 3, Feb. 29, 1996; Robert G. Fitzpatrick, *Reasonable Accommodation and Undue Hardship Under the ADA: Selected Issues*, 39 FED. B. NEWS 69 (1992).

158. See, e.g., *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1431-32 (N.D. Cal. 1996) (recognizing work from home and a reallocation of job functions as reasonable accommodations).

159. *Mohamed v. Marriott Int'l, Inc.*, 905 F. Supp. 141, 152 (S.D.N.Y. 1995). "'Reasonable' is a relative term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce." *Id.*

160. See *McGregor v. National R.R. Passenger Corp.*, 176 F.3d 1249, 1251-52 (9th Cir. 1999) (reassignment as reasonable accommodation); *Heise v. Genuine Parts Co.*, 900 F. Supp. 1137, 1153 (D. Minn. 1995) (flexibility in work schedule as reasonable accommodation); but see *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 751 (9th Cir. 1998) (purchase of robotics machine as not a reasonable accommodation). Employers may raise an undue hardship defense to a charge of failing to provide a reasonable accommodation. 42 U.S.C.A. §§ 12112(b)(5)(A), 12111(10) (1995).

161. *Morisky v. Broward County*, 80 F.3d 445, 448 (11th Cir. 1996); *Clapp v. Northern Cumberland Mem. Hosp.*, 964 F. Supp. 503, 505 (D. Me. 1997).

162. *Taylor v. Phoenixville Sch. Dist.*, 174 F.3d 142, 160 (3rd Cir. 1999); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir. 1996).

163. See, e.g., *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995) (frequent seizures made disability obvious to employer); see also *Powell v. Morris*, 35 F. Supp.2d 1011, 1015 (S.D. Ohio 1999) (stating that a prong of an ADA *prima facie* case is ". . . her employer knew or should have known about her disability."). ADA relief, however, "is not conditioned upon an applicant's giving precise notice of the disability." *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1456 n.16 (7th Cir. 1995) (citing *Blackwell v. United States Dep't of Treasury*, 830 F.2d 1183 (D.C. Cir. 1987)). The method by which the employer is appraised of the disability is irrelevant. *Susie v. Apple Tree Preschool and Child Care Ctr., Inc.*, 866 F. Supp. 390, 392 n.4 (N.D. Iowa 1994).

The foregoing suggests an additional parenthetical can be noted at this juncture: with all of the ADA's three alternative definitions of an individual with a disability, the defendant must be aware of the plaintiff's disability before liability will attach. Thus, whether the plaintiff is actually disabled or only perceived as such, a significantly limiting impairment must register in the defendant's mind before the ADA's anti-discrimination provisions can be invoked. Thus with respect to the "regarded as" definition of disability, mistake is no defense. An individual has a disability so long as the defendant thinks that this is so.¹⁶⁴ One view of the "regarded as" definition, is not as an alternative definition at all; rather, it is the nullification of any defense based on the inaccuracies of the employer's perceptions concerning its employee. Positing the "regarded as" prong in this manner may be helpful for purposes of analysis, but should otherwise give place to the more conventional statutory dialectic.

III. The "Regarded as" Definition Applied to the Major Life Activity of Working

With the foundation principles underlying this topic sufficiently articulated, this section will explore the factual particulars of the three 1999 Supreme Court cases, *Murphy*, *Sutton*, and *Kirkingburg*. These cases are briefed below with a description of the facts, procedures, issues, and conclusions by the Court. An analysis section follows that will attempt to distill and provide proposed solutions for the recurring questions raised in the "regarded as substantially limited in working" cases.

A. *Murphy v. UPS*

Vaughn Murphy worked as a mechanic for 22 years. He had severe and permanent hypertension that was partly controlled by

164. Often, of course, the plaintiff will find it easier to demonstrate the actual physical restrictions of his impairment than the defendant's beliefs about the same. This explains the greater frequency of "actual disability" claims than "regarded as" claims. It is much less to prove notice of an actual disability than the existence of the trilogy of disability elements existing within the defensive opponent's mind. Nonetheless, for purposes of analysis, it may be helpful to think of all ADA disabilities as impairments that substantially limit a major life activity. One must keep in mind, however, that it is no defense that although the defendant might have believed the plaintiff's impairment substantially limited his activities; even though, this was not the case. Truth, in other words, is not a defense under the "regarded as" prong.

medication.¹⁶⁵ He was unable to reduce his blood pressure to normal levels without suffering severe side effects, including stuttering, sleeplessness, irritability, and memory loss.¹⁶⁶ Even when Murphy took his medication, several activities such as exercising and lifting were affected by his high blood pressure.¹⁶⁷ He experienced ringing in the ears, "bubbles," which flashed across his vision, and gout that could leave him bedridden for days at a time.¹⁶⁸ His diet was restricted. Furthermore, he avoided strenuous exertions and manipulating objects above his head.¹⁶⁹ Murphy's hypertension put him at risk for serious health problems including heart and kidney damage and retinal hemorrhages, not to mention stroke.¹⁷⁰ Nevertheless, Murphy's only physician-imposed work restriction was to avoid repetitively lifting two hundred pounds or more.

In August of 1994, he applied for a job as a mechanic with United Parcel Service ("UPS").¹⁷¹ As a condition of employment, Murphy underwent a physical examination and was issued a Department of Transportation ("DOT") health card.¹⁷² This certification was required for times when Murphy would be required to drive commercial vehicles.¹⁷³ Murphy immediately began working the night shift at UPS's Topeka, Kansas facility where his duties included road calls on tractor-trailer trucks that suffered mechanical breakdowns and road tests on package cars that had been, or needed to be, repaired.¹⁷⁴ Occasionally during his shift, Murphy was the only mechanic on duty.¹⁷⁵

In mid-September, 1994, a UPS company nurse reviewing Murphy's file noticed that his blood pressure had been recorded at 186 over 124, and concluded that Murphy had been erroneously issued a DOT health card. The nurse who examined Murphy had never conducted an examination on a UPS mechanic and was unaware that

165. Petitioner's Brief at *6, *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999), 1999 WL 86488 [hereinafter *Murphy* Petitioner's Brief]. Murphy's unmedicated blood pressure was approximately 250 (systolic) over 160 (diastolic). *Id.* With daily doses of Tenormin and Zestril, his blood pressure was tested at 186/124. Respondent's Brief at *70aa, *Murphy*, 119 S. Ct. 2133, 1999 WL 164440 [hereinafter *Murphy* Respondent's Brief]. Normal blood pressure is less than 130 systolic over less than 85 diastolic. MAYO CLINIC FAMILY HEALTH BOOK 648 (David E. Larson, M.D., ed., 2nd ed. 1996).

166. *Murphy* Petitioner's Brief, *supra* note 165, at *6

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Respondent's Brief at *1, *Murphy*, 119 S. Ct. 2133, 1999 WL 164440.

172. Petitioner's Brief at *7, *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999), 1999 WL 86488. UPS required its mechanics to have a commercial drivers license (which Murphy possessed) and a DOT health card. *Id.*

173. *Murphy* Respondent's Brief, at *1. A valid DOT health card is required because the UPS trucks weigh between 12,000 and 55,000 pounds. *Id.* (citing 49 C.F.R. § 391.41(a)).

174. *Id.*

175. *Id.* At times, therefore, Murphy was the only mechanic who could perform road rests and road calls. *Id.*

UPS mechanics were required to drive commercial vehicles.¹⁷⁶ Murphy's blood pressure was retested at 160 over 102, the physician did not issue DOT certification, and Murphy was discharged.¹⁷⁷ Within three weeks, he secured another job as a mechanic.¹⁷⁸

Murphy sued UPS under the Americans with Disabilities Act.¹⁷⁹ Although the district court rejected Murphy's claim that he had a disability under the "actual disability" definition, Murphy argued in the alternative that UPS regarded him as having high blood pressure (an impairment) that substantially limited the major life activity of working.¹⁸⁰ UPS responded that it did not regard Murphy as disabled, only that he was un-certifiable under DOT regulations.¹⁸¹ The district court agreed with UPS.¹⁸² Since the district court found no genuine issue of material fact had been presented on whether Murphy was disabled, it granted summary judgment in favor of UPS.¹⁸³

Murphy appealed, and the Tenth Circuit Court of Appeals affirmed in a terse, unpublished decision.¹⁸⁴ The court of appeals agreed that Murphy's high blood pressure did not actually substantially limit a major life activity, and turned to Murphy's "regarded as" arguments.¹⁸⁵ Murphy argued that his discharge was grounded in discriminatory and stereotypical views that individuals with high blood pressure should not be employed because of the risk of heart attack or stroke.¹⁸⁶ The court rejected this argument, agreeing with the district court that an employer who terminates an employee for exceeding DOT requirements does not *a*

176. *Id.*

177. Petitioner's Brief at *7, *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999), 1999 WL 86488. Initially, Murphy sought a waiver of DOT requirements, but later he abandoned this request. *Murphy* Respondent's Brief, at *3-4.

178. *Id.* at *3.

179. *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872 (D. Kan. 1996).

180. *Id.* at 882.

181. *Id.*

182. *Id.* (citing *Campbell v. Federal Express Corp.*, 918 F. Supp. 912, 920 n.10 (D. Md. 1996)). In *Campbell*, the employer rescinded a conditional job offer to the plaintiff as a courier after it was determined that he was not DOT-certifiable. *Id.* at 916. The court held that the employer did not regard the plaintiff as disabled, "it regarded him as not certifiable under DOT regulations." *Id.* at 920 n.10.

183. *Murphy*, 946 F. Supp. at 884. The district court made several alternative holdings, none of which are relevant to the core discussion of this article.

184. *Murphy v. United Parcel Serv., Inc.*, 141 F.3d 1185 (10th Cir. 1998) (table decision), 1998 WL 105933.

185. *Id.* at *2. In the interim between oral arguments and the final decision, the Tenth Circuit decided *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997). *Sutton*, which was also appealed to the Supreme Court and is discussed *infra* notes 226-64 and accompanying text, held that the "determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual." *Id.* at 902. Therefore, the appellate court, like the district court, examined Murphy's condition in its medicated state and concluded that he was not substantially limited in a major life activity. *Murphy*, at *2.

186. *Id.*

fortiori regard its employee as substantially limited in the major life activity of working.¹⁸⁷

Murphy's petition for certiorari was granted by the Supreme Court.¹⁸⁸ The dominant issue presented to the Supreme Court was the precise frame of mind applicable under the rubric of *regarding* an individual as disabled.¹⁸⁹ Tracking the statute's language, Murphy attempted to present a triable issue of fact on the question of whether his employer regarded him as having an impairment that substantially limited the major life activity of working.

The Supreme Court, Justice O'Connor writing for the majority, held for UPS.¹⁹⁰ The Court was unmoved by the defendant's suggestions that the phrase "regarded as" should be limited to perceptions that are inaccurate, illegitimate, or based in myths or fears about disabilities.¹⁹¹ The sole relevant issue was whether Murphy's inability to obtain DOT certification raised a triable issue as to whether he was regarded as substantially limited in working.¹⁹² The Court found at most, Murphy demonstrated that UPS regarded him as unable perform mechanic's work that called for driving commercial vehicles in interstate commerce, a task requiring DOT certification.¹⁹³ Since the perception did not involve an inability to perform mechanic work generally, Murphy was not regarded as having a disability.¹⁹⁴ With this reasoning, the Supreme Court affirmed.

187. *Id.*

188. *Murphy v. United Parcel Serv., Inc.*, 141 F.3d 1185 (10th Cir. 1998), *cert. granted*, 66 U.S.L.W. 3800, 67 U.S.L.W. 3027 (U.S. Jan. 8, 1999) (No. 97-1992).

189. UPS argued that Murphy was discharged "solely because his blood pressure exceeded DOT limits. Respondent's Brief at *43, *Murphy*, 119 S. Ct. 2133, 1999 WL 164440. UPS continued: "[T]here is no evidence that UPS viewed petitioner as 'unfit to work' in general. Rather, the evidence shows only that UPS regarded petitioner as unqualified to work as a UPS mechanic because he did not have a valid DOT health card." *Id.*; see also *American Trucking Ass'n, et al. Amicus Curiae Brief at *22, Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999), 1999 WL 161030 [hereinafter *Murphy Trucking Ass'n Brief*] ("The termination of an employee for his failure to satisfy the objective requirements of a specific job simply does not give rise to any inference that the employer had a forbidden 'intent.'").

Murphy's counsel countered:

UPS 'regarded' Murphy as unfit to work precisely because of his high blood pressure. Whether that view was based on misperceptions of the medical risks of Murphy's condition, stereotypes about people with high blood pressure, or even a good faith legally justified belief that Murphy's blood pressure was too high for him to qualify for a DOT health card does not matter in making the threshold 'disability' determination.

Petitioner's Brief at *35, *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999), 1999 WL 86488. The EEOC joined Murphy in this argument, urging that an employer need not harbor animus toward its employee in order to regard the employee as disabled. E.E.O.C. Amicus Curiae Brief at *26, *Murphy* 119 S. Ct. 2133, 1999 WL 101591.

190. *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133, 2139 (1999).

191. *Murphy Trucking Ass'n Brief, supra* note 189, at *24.

192. *Murphy*, 119 S. Ct. at 2138.

193. *Id.* at 2138-39.

194. *Id.* at 2139. The Court implicitly concluded that mechanic's work was the relevant "class of jobs" for a person with Murphy's vocational background. See *id.* at 2138. Murphy had urged that

B. Albertsons v. Kirkingburg

Despite his impaired vision, commercial truck driver Hallie Kirkingburg held an impeccable twenty-year driving record of just one accident, for which he was not at fault, and no moving citations.¹⁹⁵ A condition called amblyopia caused nearly total blindness in one eye, rendering his vision monocular.¹⁹⁶ His condition was uncorrectable with lenses and caused a loss of peripheral vision and depth perception.¹⁹⁷ Nevertheless, his brain developed subconscious coping mechanisms that diminished the impairment's effects.¹⁹⁸ In 1990, Kirkingburg was hired by Albertsons, a grocery chain, as a driver at its Portland, Oregon distribution center.¹⁹⁹ A physician erroneously determined that his vision met the applicable DOT requirements, and after performing well on a eighteen mile road test, Kirkingburg was hired.²⁰⁰

In 1992, as part of a routine re-examination, Kirkingburg's vision was correctly determined have a visual acuity of 20/200 in his left eye.²⁰¹ The examining physician accordingly refused to certify him under DOT regulations that required a minimum of 20/40 or better with corrective lenses, and informed the employer of Kirkingburg's non-certification.²⁰² After being denied DOT certification, Kirkingburg applied for a waiver of the vision requirements under the Federal Highway Administration's

UPS, by disqualifying him because of applicable DOT regulations, necessarily regarded him as unsuitable for those jobs requiring DOT certification. *Murphy* Petitioner's Brief, at *35. "DOT certification is required for 'all employers, employees and commercial motor vehicles, which transport property or passengers in interstate commerce.'" *Id.* n.17 (quoting 49 C.F.R. § 390.3(a)). Therefore, Murphy had concluded, a class of jobs was implicated. *Id.* UPS emphasized that Murphy was trained as a mechanic, not a truck driver. Respondent's Brief at *46 n.26, *Murphy*, 119 S. Ct. 2133, 1999 WL 164440. "There is no evidence the ability to drive commercial vehicles in interstate commerce is a prerequisite for all or most jobs requiring 'training, knowledge, skills or abilities' similar to those required for a UPS mechanic's job." *Id.* Neither party argued or cited to evidence in the record that would have enabled the Court to determine the relevant "class of jobs" for Vaughn Murphy.

195. Respondent's Brief at *2, *Kirkingburg v. Albertsons*, 119 S. Ct. 2162 (1999), 1999 WL 164438 [hereinafter *Kirkingburg* Respondent's Brief].

196. *Id.* at *11. Amblyopia is commonly referred to as "lazy eye." *Id.* at *210aa. Amblyopia exists when corrected vision is 20/30 or worse. *Id.* at *3. Kirkingburg's right eye had a visual acuity rating of 20/20 with corrected lenses; his left eye was rated at 20/200. *Id.*

197. Petitioner's Brief at *6, *Kirkingburg v. Albertsons*, 119 S. Ct. 2162 (1999), 1999 WL 133026 [hereinafter *Kirkingburg* Petitioner's Brief].

198. *Kirkingburg* Respondent's Brief, *supra* note 195, at *3-5. Kirkingburg's impairment did not interfere with his ability to drive a car. However, his impairment did violate Albertsons' policy. *Id.* at *3.

199. *Id.* at *2.

200. *Id.* Kirkingburg's test vehicle was a Kenwood truck with a fifty foot trailer. *Id.*

201. Respondent's Brief at *5, *Kirkingburg v. Albertsons*, 119 S. Ct. 2162 (1999), 1999 WL 164438. Kirkingburg was injured in 1991 when he fell from a truck in a nondriving-related incident. *Id.* As a result, he did not work for nearly a year, and was required to secure re-certification upon his return to work. *Id.*

202. *Id.* (citing 49 C.F.R. § 391.41(b)(10)) (requiring operators of commercial motor vehicles to have a "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) with or without corrective lenses").

("FHA") vision waiver program, and informed Albertsons of his application.²⁰³ Albertsons explained that its policy was not to consider waivers; it required strict compliance with DOT minimum standards.²⁰⁴ Consequently, Kirkingburg was fired.²⁰⁵ When Kirkingburg obtained a valid waiver, he notified Albertsons and requested reconsideration of his termination.²⁰⁶ Albertsons refused, and Kirkingburg filed suit under the ADA.²⁰⁷

After the district court granted summary judgment in favor of Albertsons, Kirkingburg appealed.²⁰⁸ The Ninth Circuit Court of Appeals held that Kirkingburg had a disability because his impairment of amblyopia substantially limited the major life activity of seeing.²⁰⁹ Alternatively, the court held that Kirkingburg had presented a genuine issue of material fact on his contention that Albertsons regarded him as disabled.²¹⁰ The court stated that a genuine issue had been raised through the evidence that showed that Albertsons manager, Frank Riddle, had described Kirkingburg as "blind in one eye or legally blind."²¹¹ Therefore, the Ninth Circuit reversed.²¹²

Although the Supreme Court's grant of certiorari did not include consideration of the "regarded as" holding, both parties briefed the

203. *Kirkingburg* Respondent's Brief at *7. "Albertsons refused to assist Kirkingburg in obtaining the waiver." *Id.*

204. *Kirkingburg* Petitioner's Brief at *10, *Kirkingburg v. Albertsons*, 119 S. Ct. 2162 (1999), 1999 WL 133026.

205. *Kirkingburg* Respondent's Brief, *supra* note 201, at *7-8.

206. *Id.*

207. The District Court's opinion is not reported. It is reprinted at *Kirkingburg* Petitioner's Brief, at *115a, *et seq.*

208. *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998).

209. *Id.* at 1232. The court stated:

Kirkingburg's inability to see out of one eye affects his peripheral vision and his depth perception. Although his brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the manner in which he sees differs significantly from the manner in which most people see. To put it in its simplest terms, Kirkingburg sees using only one eye; most people see using two. Accordingly, under the statute and implementing regulations, if the facts are as Kirkingburg alleges, he is disabled.

Id. In so holding, the court rejected *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1997) (holding that a monocular-visioned individual did not have a disability because he was "able to perform normal daily activities.") and adopted the reasoning of the Eighth Circuit in *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998) (holding that an individual with glaucoma who could see only out of only one eye had a disability). The Ninth Circuit believed the correct inquiry was whether an impairment required an individual to perform a major life activity in a different manner than others, not "whether the individual can go about his daily business in spite of the impairment." *Kirkingburg*, 143 F.3d at 1232 n.4.

210. *Kirkingburg*, 143 F.3d at 1233.

211. *Id.* This evidence, the court wrote, "established a genuine issue as to whether [Kirkingburg's] employer believed he was disabled." *Id.* The court did not indicate whether it was basing its alternative holding on the theory that Albertsons regarded Kirkingburg as possessing an impairment that substantially limited his ability to see, his ability to work, or some other major life activity.

212. *Id.* at 1237. The Ninth Circuit also discussed whether Kirkingburg was qualified for the position. *Id.* at 1233-37. The Honorable Pamela Ann Rymer, Circuit Judge, dissented on the "qualified" issue. *Id.* at 1238-39 (Rymer, J., dissenting).

matter. Kirkingburg claimed that he was regarded as substantially limited in both seeing and working.²¹³ Several issues were imbedded in the Ninth Circuit's three sentences that dealt with Kirkingburg's "regarded as" claim. First, Kirkingburg argued the manager's statement that he was blind in one eye indicated that he was perceived as substantially limited in seeing. Although Kirkingburg was not actually blind, he was regarded as having a substantially limiting impairment, since he reasoned blindness substantially limits sight.²¹⁴

Alternatively, Kirkingburg asserted that summary judgment was inappropriate on the question of whether Albertsons regarded him as substantially limited in his ability to work.²¹⁵ "Albertsons' decision to terminate Kirkingburg as a result of his vision impairment and thus treat him as unable to perform any of its jobs, including all those involving driving, is evidence Albertsons treated Kirkingburg as substantially limited in the major life activity of working[.]" Kirkingburg's brief stated.²¹⁶ Therefore, Albertsons regarded him as having a disability.

Long after it terminated Kirkingburg, Albertsons attempted to frame its later offer of a tire mechanic position as establishing as a matter of law it did not regard Kirkingburg's impairment as substantially limiting his ability to work.²¹⁷ Kirkingburg countered that Albertsons had disqualified him from all driving jobs, thus showing a perceived substantial limitation in working at that type of job.²¹⁸

Albertsons responded with the contention that under the EEOC regulations, a "regarded as" claim must be rooted in "myths, fears, or stereotypes associated with disabilities."²¹⁹ Its perceptions, Albertsons continued, were based on safety concerns manifested as objective criteria.²²⁰ Therefore, its perception did not fit the prohibited category. Moreover, Albertsons claimed, "[a] causal connection must exist between the perception of disability and an ultimate employment decision to trigger a 'regarded as' claim."²²¹ According to Albertsons,

213. *Kirkingburg* Respondent's Brief at *28-34, *Kirkingburg v. Albertsons*, 119 S. Ct. 2162 (1999), 1999 WL 133026.

214. *Id.* at *29-30. Kirkingburg cited Rehabilitation Act precedent for the proposition that blindness is a disability. *Id.* at *30 (citing *Norcross v. Sneed*, 573 F. Supp. 533, 536 (W.D. Ark. 1983), *aff'd* 755 F.2d 113 (8th Cir. 1985); *Gurmankin v. Costanzo*, 411 F. Supp. 982, 989 (E.D. Pa. 1976), *aff'd* 556 F.2d 184 (3rd Cir. 1977)).

215. *Kirkingburg* Respondent's Brief at *29-30.

216. *Id.*

217. *Kirkingburg* Petitioner's Brief at *8-9, 26-27, *Kirkingburg v. Albertsons*, 119 S. Ct. 2162 (1999), 1999 WL 133026.

218. *Id.* at *27; *Kirkingburg* Respondent's Brief, *supra* note 213, at *31-32. "If an employer truly viewed an employee as being substantially limited in working, that employer would not offer other positions to the employee," Albertsons reasoned. *Kirkingburg* Petitioner's Brief at *27.

219. *Kirkingburg* Petitioner's Brief, *supra* note 217, at *25-26.

220. *Id.* at *26.

221. *Id.* at *28 (citing 29 C.F.R. app. § 1630.2(l)) (stating that "if an individual can show that an employer . . . made an employment decision because of a perception of disability based on 'myth, fear or stereotype,' the individual will satisfy the 'regarded as' part of the definition"). See also discussion *supra* at note 137 regarding this "causation" argument.

Kirkingburg was fired for safety reasons, therefore no causal connection existed between the decision to terminate and the perception of disability.²²²

When the Supreme Court decided Kirkingburg's case, it failed to reach the various "regarded as" questions.²²³ However, the issues raised in the parties' briefs are indicative of the complexities that crystalize when the "regarded as" prong is strained through the "major life activity of working" sieve. Unfortunately, authoritative resolution of those issues in *Kirkingburg*, was deferred. Writing for the majority, Justice Souter affirmed the Ninth Circuit by holding employers who require employees to meet applicable federal safety regulations need not justify the objective application of the regulation solely because it may be waived in individual cases.²²⁴ Because the Court held that Albertsons' policy was "job related, consistent with business necessity, and required to prevent employees from imposing a direct threat," it had no occasion to rule on whether Kirkingburg had an ADA disability.²²⁵

C. Sutton v. United Air Lines

A second case arising out of the Tenth Circuit involved twin sisters employed as regional commercial airline pilots, Karen Sutton and Kimberly Hinton.²²⁶ Both sisters held Federal Aviation Administration ("FAA") licenses and medical certificates that entitled them to fly any class of passenger airplane, and both wished to fly for a major global air carrier, such as United Air Lines.²²⁷ The sisters applied for pilot positions with United in 1992, boasting credentials and experience

222. *Id.* at *28.

223. *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999).

224. *Id.* at 2174.

225. *Id.* at 2175 (Thomas, J., concurring) (summarizing the majority's holding). Justice Thomas would have preferred to decide the case on the basis of whether Kirkingburg was qualified. *Id.* (Thomas, J., concurring). The Court, however, did think it "worthwhile to address [whether Kirkingburg is an individual with a disability] in order to correct three missteps the Ninth Circuit made in its discussion of the matter." *Id.* at 2167. First, the Court noted that a "substantial limitation" implies more than a "mere difference." *Id.* at 2168. Second, the Court reiterated that mitigating measures, including the individual's ability to compensate for the impairment, must be taken into account in making the substantially limited inquiry. *Id.* Finally, the Court emphasized "the statutory obligation to determine the existence of disabilities on a case-by-case basis." *Id.* at 2169. Although the Court opined that "people with monocular vision 'ordinarily' will meet the Act's definition of disability," it stressed the requirement that ADA plaintiffs demonstrate through competent evidence that "the extent of the limitation in terms of [the impaired individual's] own experience . . . is substantial." *Id.*

226. *Sutton v. United Airlines, Inc.*, No. 96-5-121, 1996 WL 588917 at *1 (D. Colo. 1996).

227. Petitioner's Brief at *3, *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 1999 WL 86487 [hereinafter *Sutton* Petitioner's Brief].

exceeding United's hiring standards.²²⁸ On their applications, they disclosed that their uncorrected vision was severely impaired.²²⁹

United invited both Hinton and Sutton to participate in interviews and flight simulator testing at its Denver Flight Training Center.²³⁰ Hinton performed exceptionally well on the flight simulator, but during the interview process, the sisters were informed that United had made a "terrible, terrible mistake."²³¹ United was referring to its policy requiring new applicants to have uncorrected vision of at least 20/100, a standard that both plaintiffs failed to meet.²³² While other airlines did not apply such a rigorous vision requirement, United believed it was necessary to alleviate safety concerns.²³³ United therefore rejected both Hinton and Sutton as potential candidates, and the two pilots brought suit under the ADA.²³⁴

Before the district court, United made a Rule 12(b)(6) motion to dismiss, averring that the pleadings failed to state a "disability."²³⁵ After rejecting the plaintiffs' contention that they stated a claim for an actual disability, the court went on to examine the plaintiffs' fallback position that they were "regarded as" having a cognizable impairment. The district court ruled against the plaintiffs on the ground that the plaintiffs had not pleaded United's perception included a belief that the plaintiffs' visual impairments would generally foreclose the *type* of employment involved.²³⁶ Given this deficiency, the court reasoned the plaintiffs would necessarily fall short of showing a substantial limitation.²³⁷ Therefore, the court concluded no cause of action under the ADA had been submitted because the plaintiffs could not conceivably establish that they were disabled.²³⁸

228. *Id.* at *3-4. "For example, United requires 350 hours flight experience in fixed-wing aircraft as pilot or co-pilot. By 1992, Ms. Sutton and Ms. Hinton had compiled over 3,400 hours and 4,700 hours, respectively." *Id.* at *4 n.4 (internal citations to the record omitted).

229. *Id.* at *4. The plaintiffs had uncorrected vision in their right eyes was 20/200 or worse, and 20/400 or worse in their left eyes. *Id.* at *3. With glasses or contact lenses, both sisters' vision is 20/20. *Id.*

230. *Id.* at *4.

231. *Sutton* Petitioner's Brief, *supra* note 227 at *4. Sutton was never allowed to take the flight simulator test because her interview had been scheduled before the flight simulator test. *Id.* at *4 n.5.

232. Petitioner's Brief at *4, *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 1999 WL 86487. "At one time, United required all of its new pilots to have 20/20 uncorrected vision. United later reduced its requirement to 20/70, then later to 20/100. These adjustments were not motivated by any medical evidence, but rather by market forces United faced in competing for qualified candidates." *Id.*

233. *Id.* The plaintiffs claimed that no data or evidence supported United's assertion that its vision requirement was a rational safety requirement. *Id.*

234. *Sutton v. United Air Lines, Inc.*, No. 96-5-121, 1996 WL 588917 (D. Colo. 1996).

235. *Id.* at *1.

236. *Id.* at *5.

237. *Id.* at *6. "At most, the Plaintiffs can establish that United regarded them as unable to satisfy the requirements of a particular passenger airline pilot position." *Id.*

238. *Id.*

Sutton and Hinton appealed to the Tenth Circuit Court of Appeals, which affirmed.²³⁹ When the Tenth Circuit reached the plaintiffs' "regarded as" pleadings, it posited the twin sisters' threshold burden: "Plaintiffs must establish United's disqualification of them from all pilot positions as a significant restriction on their ability to perform a *class* of jobs."²⁴⁰ The court focused on United's perception in determining whether this showing could be met.²⁴¹ At the same time, however, the court added, "we do examine the airline industry to assist in determining whether Plaintiffs' impairment substantially limits their employment generally in a 'class of jobs.'"²⁴²

With that seemingly contradictory formulation, the court turned its attention to whether the plaintiffs could conceivably show that they were precluded from a "class of jobs." The court concluded that the relevant class of jobs for the plaintiffs included all pilot positions at all airlines, including global airlines, national airlines, regional airlines, and cargo airlines.²⁴³ The court found that the plaintiffs could not present facts that would show a substantial restriction from this class of jobs, but failed to indicate whether it was relying on United's perceptions, or the airline industry's practices as a whole.²⁴⁴

Before the Supreme Court, the plaintiffs made several arguments that attempted to capitalize on this disjunction.²⁴⁵ While conceding that they were not *actually* disabled unless significantly restricted in working as airline pilots, the plaintiffs nonetheless asserted, "under the 'regarded as' prong, only the misperceptions of the specific employer are relevant."²⁴⁶ Because United disqualified plaintiffs with a blanket restriction on all United's pilot jobs within the relevant class, the plaintiffs concluded, it regarded them as substantially limited in working.²⁴⁷ Therefore, according to the plaintiffs, inquiry into the employment practices of other airlines was erroneous.²⁴⁸

239. Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997).

240. *Id.* at 904 (emphasis added).

241. *Id.* at 905. "It is the perception of the employer in this case, not the perceptions or practices of others in the industry, that matters." *Id.* (citing Cook v. Rhode Island Dep't of Mental Health, Retardation, and Hosps., 10 F.3d 17, 25-26 (1st Cir. 1993)).

242. *Id.*

243. *Id.*

244. *Id.*

245. The Supreme Court granted certiorari in January, 1999. Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3783, 67 U.S.L.W. 3008 (U.S. Jan. 8, 1999) (No. 97-1943).

246. Sutton Petitioner's Brief at *44, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999), 1999 WL 86487.

247. *Id.* at *46.

248. *Id.* at *43. The plaintiffs argued that "United is not relieved of responsibility under the ADA merely because some employers do not share its discriminatory attitudes." *Id.*; *accord*, AIDS Action, et al. Amicus Curiae Brief at *29, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999), 1999 WL 88763; *but see* Respondent's Brief at *44-45, Sutton v. United Air Lines, 119 S. Ct. 2139, 1999 WL 164436 (arguing that if "an employer by definition regards an employee as disabled whenever it deems the employee physically unfit for a particular job . . . [then] any employment

The plaintiffs also argued that the “regarded as” definition reached “discrimination on the basis of unfounded perceptions.”²⁴⁹ United had unquestionably discriminated against the plaintiffs on the basis of a physical characteristic—their visual impairments—and arguably United’s imposition of its requirement that its new pilots have uncorrected vision of at least 20/100 was at best tenuously related to the plaintiff-pilots’ actual work-related abilities.²⁵⁰ Therefore, the plaintiffs reasoned, since the employer’s safety concerns were unfounded, the court could infer discrimination rooted in myth, fear, and stereotype.²⁵¹

Sutton was the third Title I ADA case decided by the Supreme Court on June 22, 1999, in which the plaintiffs lost. As in *Murphy*, Justice O’Connor wrote the Court’s opinion.²⁵² First, the Court reaffirmed that an employer who regards an employee as precluded from a single job (here, that of global airline pilot) does not *ipso facto* regard the employee as substantially limited in working.²⁵³ Because the defendant regarded the plaintiffs as capable of performing other related jobs appropriate for persons with their skills, such as a regional pilot or a pilot instructor, it did not regard them as individuals with disabilities.²⁵⁴

The Court also confirmed that under the “regarded as” prong, a plaintiff may demonstrate either an imagined impairment or a mistaken belief in a substantial limitation:

There are two apparent ways in which individuals may fall within [the “regarded as”] statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.²⁵⁵

action made on the basis of any impairment, no matter how minor, would have to pass muster under the ADA”).

249. *Sutton* Petitioner’s Brief, at *42.

250. The plaintiffs emphasized the arbitrary flavor of United’s job criteria by averring that United applied its vision requirement only to new applicants. *Id.* “[M]any of United’s current pilots have uncorrected vision as poor or worse than Petitioners’”. *Id.*

251. *Id.* at *42-43. The plaintiffs’ brief also inserted a contention that although it was not necessarily the plaintiffs’ burden to show that the defendant’s discrimination was on the basis of myth, fear, and stereotype, such a showing was “in itself sufficient to demonstrate that United regarded the plaintiffs as disabled.” *Id.* at *43 (citing *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 144 (3rd Cir. 1998); 29 C.F.R. pt. 1630, app. § 1630.2(f), at 350 (1998)).

252. *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999).

253. *Id.* at 2151.

254. *Id.*

255. *Id.* at 2149-50. “In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment, when, in fact, the impairment is not so limiting.” *Id.* at 2150.

The Court noted these misperceptions will often be rooted in "stereotypic assumptions" about persons with disabilities.²⁵⁶ The purpose of the "regarded prong," the Court reiterated, was to reach disability discrimination because of such ungrounded fears, myths, and stereotypes.²⁵⁷

In copious dicta, however, the Court injected a briar patch of uncertainty into an already recondite area of law. First, the Court undermined the heretofore black letter law that working is a major life activity: "[T]here may be some conceptual difficulty in defining 'major life activities' to include work[.]" the Court offered.²⁵⁸ Instead of clarifying the ADA, the *Sutton* opinion can be expected to invite federal courts of appeals to reconsider this fundamental rule. The result of this language may have the effect of perpetrating, rather than mending, a split between the circuits.²⁵⁹

Second, *Sutton* includes a paragraph concerning the defendant's perception of the substantial limitation of the plaintiffs' impairments, which no doubt will generate numerous divergent interpretations among judges, practitioners, and commentators. Recall that the Sutton sisters argued that only the misperceptions of the defendant-employer were relevant in the "regarded as" inquiry.²⁶⁰ As shall be discussed in the section below, in most situations, this contention is incorrect.²⁶¹ Part of the plaintiffs' argument was buttressed with language from *E.E. Black*, which observed, "[I]t must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process."²⁶² The plaintiffs read *E.E. Black*, as holding that when the defendant rejects the plaintiff from a position because of the plaintiff's impairment, a presumption operates that similarly situated employers would do the same, and in this way, the plaintiff who is rejected from one job can be found to be substantially limited from working all jobs of that class.²⁶³ The Court rejected this reasoning, but in such cumbersome language that tumultuousness and confusion will surely result.²⁶⁴

256. *Id.* at 2150 (quoting 42 U.S.C. § 12101(7)).

257. *Id.* (quoting 29 C.F.R. app. § 1630.2(d)).

258. *Id.* at 2151.

259. *Sutton* and *Murphy* did resolve a split between the circuits as to the question of whether impairments should be considered in their mitigated or unmitigated condition for purposes of determining whether an impairment has a substantially limiting effect. *See supra* note 185.

260. *Sutton* Petitioner's Brief at *43-44, *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 1999 WL 86487.

261. *See infra* accompanying text to notes 273-80.

262. *Sutton* Petitioner's Brief, at 44-45 (quoting *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1100 (D. Haw. 1980)).

263. *See id.*

264. The Court stated:

Petitioners also argue that if one were to assume that a substantial number of airline carriers have similar vision requirements, they would be substantially limited in the major life activity of working. Even assuming for the sake of argument that the adoption of similar vision requirements by other carriers would represent a

D. Analysis

The aim of final section of this article is to expand and elucidate upon what has already been said up to this point concerning the two cardinal ways in which the “regarded as” definition may be satisfied, with illustrative examples to assist the reader. As outlined above, the regulations basically provide two alternative ways in which a plaintiff may satisfy the definition of having a disability under the “regarded as” definition: by being perceived as having an ADA disability;²⁶⁵ or by showing an impairment that is substantially limiting “only as a result of the attitudes of others toward such impairment.”²⁶⁶ First, a discussion of the former will be undertaken. Under the first alternative, the plaintiff is permitted to reconstruct the defendant’s incorrect perceptions. If the defendant believes that the plaintiff has an impairment that substantially

substantial limitation on the major life activity of working, the argument is nevertheless flawed. It is not enough to say that if the physical criteria of a single employer were imputed to all similar employers one would be regarded as substantially limited in the major life activity of working only as a result of this imputation. An otherwise valid job requirement, such as a height requirement, does not become invalid simply because it would limit a person’s employment opportunities in a substantial way if it were adopted by a substantial number of employers. Because petitioners have not alleged, and cannot demonstrate, that [the defendant’s] vision requirement reflects a belief that petitioners’ vision substantially limits them, we agree with the decision of the Court of Appeals affirming the dismissal of petitioners’ claim that they are regarded as disabled.

Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2151-52 (1999) (citations omitted).

265. 29 C.F.R. § 1630.2(i)(1), (3) (1998). Subsection (1) applies in the situation where the plaintiff has an impairment, but it is not substantially limiting; subsection (3) controls when the plaintiff does not have an impairment at all. *Id.* In either situation, it is the defendant’s perceptions that control. That is, the defendant must perceive the plaintiff to have a mental or physical impairment that substantially limits one or more major life activities. In the Analysis section of this article, it is taken as a given that an actual or perceived impairment has been established. Often, this element will not be contested. John M. Vande Walle, Note and Comment, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA’s Employment Protection for Persons Regarded as Disabled*, 73 CHI-KENT L. REV. 897, 904 (1998). Situations in which a defendant is unlikely to challenge a perceived impairment include instances in which the plaintiff’s injury occurred at work; an illness necessitated time off; the plaintiff told the employer of the impairment; the defendant’s own actions reveal that it perceived an impairment; or job-related medical examinations inform the defendant of an impairment. *Id.* at 905-10. The perceived severity of the impairment and its perceived substantially limiting effects are closely related issues. Although an employee should not be allowed to manufacture an ADA “regarded as” disability merely by concocting a fantastical debilitating impairment and informing the employer of this falsehood, a defendant might find it difficult arguing that it did not regard the plaintiff’s impairment as existing in the degree in which it was described to the defendant. When an employee informs its employer that she is paralyzed or blind when she clearly is not, a defendant might prevail on summary judgment on this issue. In closer cases, such as where the employer has been informed of an employee’s HIV status and no information presented to the employer refutes this contention, a fact question may be generated. *Cf.* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 193 (3rd Cir. 1999) (“If the employer is factually mistaken about the extent of an employee’s impairment, and the employee or his agent is responsible for the mistake, the employer is not liable under the ADA.”).

266. 29 C.F.R. § 1630.2(i)(2) (1998). There are actually three alternatives under the regulations, but they can be conveniently collapsed into two. *See supra* note 51; Dotson v. Electro-Wire Prods., Inc., 890 F. Supp. 982, 991 (D. Kan. 1995).

limits the plaintiff's ability to work, this alternative prong of the "regarded as" definition has been satisfied.²⁶⁷

1. *Perceived Impairments with Substantially Limiting Consequences*

Before embarking on a discussion of the first arm of the "regarded as" definition, frequent misconstructions surrounding the definition warrant brief emphasis on the limits of the statutory language. Keeping in mind the ADA's grand twin goals of deterrence and redress, one can see how easily the argument can flourish that the "regarded as" definition never requires consideration of circumstances outside the events that transpired between the plaintiff and the defendant. An employer who unjustifiably harasses and ultimately fires its employee because the employee limps or stutters has committed a moral wrong, a wrong deserving redress, a wrong that ought to be deterred. "Wrong thinking" based on nothing more than myths, prejudices, and even animus against individuals with disabilities harms individuals and contaminates our society.²⁶⁸ Surely, then, the wrong thinking of the individual defendant is actionable and allows the plaintiff to springboard into questions of discrimination, suggests a sensitive intuition.²⁶⁹ Such intuition is built on policy and morality rather than the language of the statute.²⁷⁰ Moral

267. 29 C.F.R. app. § 1630.2(l) (1998).

268. See 29 C.F.R. app. § 1630.2(l) (1998) (explaining the rationale for the "regarded as" definition articulated by Justice Brennan in *Arline*).

269. See *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 192-93 (5th Cir. 1996). In *Ellison*, the plaintiff-employee had undergone a lumpectomy for treatment of breast cancer. *Id.* at 189. Her employer made comments that the court found to be "beneath contempt": the employer suggested a mastectomy "because her breasts were not worth saving"; he observed that although the employee suffered nausea following her treatments, "that it had not affected her weight"; and instructed other employees to follow the plaintiff out of a building during a power outage because "[s]he's glowing." *Id.* at 192-93. The court found nonetheless that the plaintiff was not regarded as having an ADA disability. *Id.* at 193. See also *Hazeldine v. Beverage Media, Ltd.*, 954 F. Supp. 697, 705 (S.D.N.Y. 1997) (holding testimony that an employer told the plaintiff "she could work harder if she lost weight is not sufficient evidence for a reasonable jury to conclude that [the defendant] regarded her as substantially limited in her ability to work.").

270. This reading of the "regarded as" prong as it existed within the Rehabilitation Act was criticized a decade before the ADA was passed into law:

The Assistant Secretary of Labor] includes within the coverage of the Act any individual who is capable of performing a particular job, and is rejected for that particular job because of a real or perceived physical or mental impairment. Thus, for example, a worker who was offered a particular job by a company at all of its plants but one, but was denied employment at that plant because of the presence of plant matter to which the employee was allergic, would be covered by the Act. . . . The Court does not believe this was the result intended by Congress. If it were, Congress would not have used the terms substantial handicap or substantially limits—they would have said "any handicap to employment" or "in any way limits one or more of such person's major life activities." The Assistant Secretary's definition ignores the word substantial.

wrongs, it is often said, are not necessarily legal ones.²⁷¹ In this sense, the ADA's overarching aims can advance understanding, but should never substitute for careful statutory parsing, especially in such a metaphysical world as the "regarded as" theories.

Turning to the statute, the "substantially limited" modifier requires that the major life activity of working be restricted (or so perceived) in some significant degree in order to meet the definition of a disability. The regulations articulate this requirement as a showing that the plaintiff have difficulty performing a class or broad range of jobs, a requirement endorsed by the Supreme Court in both *Sutton* and *Murphy*.²⁷² It should now be clear that ordinarily, a single employer's refusal to hire or decision to terminate because of a given impairment does not impose this type of difficulty.²⁷³ Assume, for example, that one employer in town, whether for valid or invalid reasons, refuses to hire individuals with cleft palates. If unrelated to any legitimate safety concern, such a policy might very well be reprehensible.²⁷⁴ Yet if numerous other employers in the same town remain perfectly willing to hire individuals with cleft palates, the impairment does not significantly restrict the afflicted plaintiff's ability to gain employment in "a class of jobs or a broad range of jobs in various classes."²⁷⁵ Rather, the plaintiff is merely precluded from working for a single employer.²⁷⁶

Refining certain facts could dictate a different result, however, because in some situations the job offered by a single entity may represent an entire class of jobs within the relevant geographical market. Assume, for example, that the town is an isolated village with a population of two thousand and just one industrial employer. Assume further that the plaintiff's training and skills qualify him or her as an industrial laborer. A policy of that single employer, which for good reasons or bad, disqualifies the plaintiff based on a mental or physical impairment, ought to satisfy the definition of a disability under these

E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1099 (D. Haw. 1980).

271. See *United States v. Segna*, 555 F.2d 226, 232-33 (9th Cir. 1977) (discussing criminal responsibility).

272. 29 C.F.R. § 1630.2(j)(3)(i) (1998); *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133, 2138 (1999); *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2151 (1999).

273. See *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 905 (10th Cir. 1997) (noting that otherwise "anyone who failed to obtain a single job because of a single requirement of employment would become a 'disabled' individual"), *aff'd* 119 S. Ct. 2139 (1999).

274. Part of the confusion arises from a tendency to leap to the question of discrimination. Such a factual scenario begs us to reach that question. Yet the threshold inquiry of whether the plaintiff is "a qualified individual with a disability" cannot be passed over. See 42 U.S.C.A. §§ 12112(a), 12111(8) (1995).

275. 29 C.F.R. § 1630.2(j)(3)(i) (1998).

276. While regrettable, this is not a substantial limitation on the ability to work. As one court put it, "Congress clearly intended to protect individuals with impairments, but did not intend to include all impaired individuals. The requirement of a substantial limitation of a major life activity limits the class of impaired individuals whom the ADA protects." *Doukas v. Metropolitan Life Ins. Co.*, 1997 WL 833134, *4 n.3 (D.N.H. 1997).

facts.²⁷⁷ Given a restricted geographical base, the plaintiff's particular skills, and the absence of alternative employment for an individual with the plaintiff's background, the single employer's policy can significantly restrict the plaintiff's ability to work.²⁷⁸

Logically, when the plaintiff retains more employment options notwithstanding the defendant's anti-disability prejudices, the activity of working is less affected. In a situation where the plaintiff's vocational options are only peripherally affected by the impairment and there are a number of alternative employers in the area, a single employer's policy has only a minor impact on the affected individual's ability to find work. Therefore, as a general rule, a single employer's policy with regard to physical or mental impairments will not make for a substantial limitation. However, in the exceptional case where a single employer's policy substantially impedes the plaintiff's access to the relevant class of jobs, the substantially limited element may be met. (The foregoing statements apply with equal force whether the plaintiff has an actual impairment which he claims substantially limits his ability to work, or whether the employer incorrectly regards the plaintiff as being impaired.)²⁷⁹

Consider the plaintiff who has mild albinism, or no albinism at all, but whose potential employer regards as having severe, untreatable albinism. Assume further that the employer's policy is not to hire individuals with albinism. Because the plaintiff is not actually impaired (or only mildly impaired), he cannot show him that he is actually disabled. Under the "regarded as" definition, however, it is appropriate to imagine that the plaintiff is as the defendant imagines, and ask

277. The Supreme Court was unresponsive to any rule that an employer's anti-disability policy is insulated from use as evidence toward a "regarded as" showing if the policy is reasonable or even magnanimous. See *supra* notes 223-25 and accompanying text. Similarly, the Supreme Court refrained from suggesting that rancor, bitterness, or any such "forbidden intent" is a precondition to a successful "regarded as" claim. Therefore, whether the employer's policy is sensible or venal is of no weight in making the determination of whether an impairment substantially limits one's ability to work because of that policy. See *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 182 (3rd Cir. 1999) ("to successfully claim that he was wrongly regarded as disabled from working, a plaintiff need not be the victim of negligence or malice").

278. See 29 C.F.R. § 1630.2(j)(3)(ii)(A)-(C) (1998). The more restrictive the geographical area, the more highly skilled the employee, and the greater number of similar jobs from which the plaintiff is disqualified, the more the scales tip in favor of finding a substantial limitation in the major life activity of working. See *id.*; see also Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 125 (1997) (noting that less educated employees are disadvantaged in showing a substantial limitation in working compared to highly skilled individuals because courts assume that the more skilled workers "would not be satisfied with lesser paying or less mentally demanding jobs."). For example, an individual trained in restaurant management and living in a rural South Dakota town may be substantially limited in working due to weak arms. *Fjellestad v. Pizza Hut of America, Inc.*, No. 98-2071, 188 F.3d 944, (8th Cir. 1999) 1999 WL 642958, at *3 (Oct. 13, 1999).

279. See *Lessard v. Ostram Sylvania, Inc.*, 175 F.3d 193, 197 n.6 (1st Cir. 1999) (endorsing the reasoning that an employee could be protected under either or both the "actual disability" and "regarded as" definitions of a disability).

whether the plaintiff, in that condition, would be substantially limited in the major life activity of working.²⁸⁰

In the example put forth above, the defendant believes that the plaintiff suffers from albinism, and the defendant refuses to hire individuals with such impairments. If a sizable proportion of similar employers share this policy, or if few suitable alternative employers exist in the area, the plaintiff may be substantially limited in working, even though this limitation is based on a misperception of the plaintiff's actual limitations. The question is simply whether the plaintiff's impairment, in reality or as incorrectly assumed by the employer, significantly restricts the plaintiff's ability to work. Within this factual context, the plaintiff must put forth evidence to show that the employer regards him as having an impairment of a certain amplitude. Based on this perception, the practices and policies of the defendant and other like employers in the community are set forth and evaluated to determine whether the imagined impairment, if true, would substantially limit the plaintiff's ability to work.²⁸¹ Except in the case of an employer who dominates a large percentage of the regional job market, and a significantly restricted employee, the discriminatory practices of the defendant alone will not pose a significant hindrance in the plaintiff's ability to work.²⁸²

2. *Perceived Substantial Limitations*

One additional exception to this "single employer" general rule is proposed, an exception that would perhaps prove dauntingly difficult to prove; the case where the employer believes (accurately or falsely) that the plaintiff's impairment (imagined or true) would substantially limit his ability to work for other employers in the region, even when this is not, in fact, the case. As a matter of statutory syntax, it has been noted, "regarded" may modify the "substantially limited" element as well as the "impairment" element of a disability.²⁸³ Therefore, although few represented defendants can be expected to help prove the plaintiff's case, it ought to be possible to show a substantial limitation based on the defendant's beliefs alone, that is, by showing that the defendant believed that many of its competitors would also refuse to hire an individual with

280. *Scharff v. Frank*, 791 F. Supp. 182, 187 (S.D. Ohio 1991). In *Scharff*, the court denied summary judgment based in part on a vocational expert's testimony that "the plaintiff would be precluded from performing a wide range of jobs if her ability to perform physical tasks was limited in the manner described. . . ." *Id.*

281. *See, e.g., Muller v. Hotsy Corp.*, 917 F. Supp. 1389, 1412 (N.D. Iowa 1996) (denying summary judgment on whether plaintiff was regarded as substantially limited in working when employer restricted plaintiff to "light work," which by extension, would preclude him from a variety of jobs).

282. 29 C.F.R. § 1630.2(j)(3)(i) (1998); *Sorensen v. Univ. of Utah Hosp.*, 1 F. Supp.2d 1306, 1310 (D. Utah 1998); *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (Rehabilitation Act case).

283. *See supra* accompanying text to note 130.

the particular impairment described, regardless of the accuracy of such a belief.²⁸⁴

On the authority of the indirect proof schemes of other civil rights laws,²⁸⁵ inferential proof may be substituted for direct proof that the defendant not only regarded the plaintiff as having an impairment, but also regarded this impairment as substantially limiting the plaintiff's ability to work at a specific class of jobs.²⁸⁶ Consider, for example, a defendant that believed that, because of a real or imagined impairment, the plaintiff could not do the work required of him or her. Perhaps the defendant is an entity that believed the plaintiff suffered from depression, and that this prevented the plaintiff from doing her job in its public safety

284. See *Cook v. Rhode Island Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 26 (1st Cir. 1993) ("an applicant need not subject herself to a lengthy series of rejections at the hands of an insensitive employer to establish that the employer views her limitations as substantial."); but see *Green v. Rosemont Indus., Inc.*, 5 F. Supp.2d 568, 573 (S.D. Ohio 1998) (rejecting plaintiff's "regarded as" theory when plaintiff failed to allege that a hernia "is generally viewed, or viewed by [the defendant] as substantially limiting"). "If the rationale proffered by an employer in the context of a single refusal to hire adequately evinces that the employer treats a particular condition as a disqualifier for a wide range of employment opportunities, proof of a far-flung pattern of rejections may not be necessary." *Cook*, 10 F.3d at 26. This is not the same thing as arguing that a single employer's policy by itself can serve to impose a substantial limitation on the plaintiff's ability to work. Such a case would be rather rare because the plaintiff can usually seek comparable work nearby. If, however, the defendant regards the plaintiff's employment prospects to be substantially limited by virtue of the plaintiff's impairment, this quite clearly satisfies the definition of being regarded as having a substantially limiting impairment.

285. See *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 432-33 (1st Cir. 1996) (Bownes, J., concurring) (recognizing that on the question of whether the defendant had the intent to discriminate, "a certain amount of inference-drawing is necessary in any case"). Whether an employer regards its employee as having a disability is "a question of intent." *Francis v. City of Meriden*, 129 F.3d 281, 284 (2nd Cir. 1997). Therefore, inferential, indirect, or circumstantial evidence on whether the defendant regarded the plaintiff in a certain light ought to be sufficient to place the issue before a jury.

286. Such an argument was advanced but rejected in *Lessard v. Osrarn Sylvania, Inc.*, 175 F.3d 193, 197-99 (1st Cir. 1999). A broad reading of *Lessard's* holding would disallow indirect proof of the defendant's state of mind concerning the effects of the plaintiff's physical or mental condition. If the holding were interpreted this broadly, however, it would be in contravention of the general rule that discrimination (i.e. intent, state of mind or internal thought processes) may be proved by either direct or circumstantial evidence. *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995). An opposing party's state of mind will seldom, if ever, be provable by direct evidence. *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 186-87 (4th Cir. 1997) (en banc) (Michael, J., dissenting). However, testimony from the defendant might be elicited that the defendant in good faith believed that the plaintiff was not "qualified" for the position, an element of the plaintiff's prima facie case. See 42 U.S.C.A. § 12111(8) (1995) (defining "qualified"). Along this same line, the defendant might be encouraged to support its professed belief with testimony to the effect that it had no reason to doubt that other employers would reach a similar reasoned conclusion concerning the plaintiff's abilities to perform the same job functions at comparable positions. Although this approach leaves the plaintiff with the problem of demonstrating that he is qualified notwithstanding the defendant's testimony, that same testimony might serve to overcome the holding of *Lessard*. It should be noted that the defendant's incorrectness concerning the plaintiff's abilities is not conclusive on the question of whether the plaintiff is "qualified." See *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 193 (3rd Cir. 1999) ("If an employer believes that a perceived disability inherently precludes successful performance of the essential functions of a job, with or without accommodation, the employer must be correct about the affected employee's ability to perform the job in order to avoid liability; there is no defense of reasonable mistake."). Circuit Judge Michael's dissent in *Runnebaum* also approves of evidence that an employer's articulated reason for its actions was pretextual as probative indirect evidence on whether the employee was "regarded as" having a disability. *Runnebaum*, 123 F.3d at 187-88 (Michael, J., dissenting).

department. Public safety is a recognized “class of jobs.”²⁸⁷ By extension and inference, a reasonable fact finder might draw the conclusion that if the employer believed depression prevented the employee from performing satisfactorily as a public safety agent, it is more likely than not that the employer also believed that the plaintiff’s depression would not enable her to work in a similar capacity for other employers, as well.²⁸⁸ In other words, if an employer disqualifies an impaired individual from the relevant class of jobs at *its* place of business, a jury should be allowed to infer that the employer believed that its competitors would adopt a similar response.²⁸⁹ Thereby, an inference would arise that the employer regarded the employee as being significantly restricted in the ability to work at an entire “class of jobs” because of the impairment.²⁹⁰ Similarly, a large, diverse corporate employer’s decision to reject an employee as ineligible to satisfactorily perform in any capacity in any of its divisions might allow an inference that the employer regarded the employee as significantly restricted from “a broad range of jobs in various classes.”²⁹¹ Employers, of course, could rebut such circumstantial evidence by showing that it was aware that other employers did not share its policy.²⁹²

3. *Attitudinal Substantial Limitations*

Thus, with close attention to the defendant’s perceptions and the particular class of jobs impacted, a substantial limitation in working can be established, and an ADA disability thereby proven. The EEOC has promulgated an alternative “regarded as” theory that is somewhat less corporeal.²⁹³ It provides that a plaintiff is regarded as having a disability

287. See *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419-20 (10th Cir. 1992) (recognizing public safety as a specific “class of jobs”). A “class of jobs” for one plaintiff might not necessarily mean that another individual will be determined to have the same class of jobs, given vocational and experiential background variations.

288. Respondent’s Brief at *29-30, *Kirkingburg v. Albertsons*, 119 S. Ct. 2162 (1999), 1999 WL 164438.

289. See *Cook v. Rhode Island Dep’t of Mental Health, Retardation, and Hosps.*, 10 F.3d 17 (1st Cir. 1993).

290. 29 C.F.R. § 1630.2(j)(3)(ii)(B) (1998).

291. 29 C.F.R. § 1630.2(j)(3)(ii)(C) (1998). An extended employer such as Disney or General Motors offers such a wide variety of employment positions that one could argue that cumulatively, the corporation’s jobs encompass a broad range of employment positions in various classes.

292. This leads to the anomalous result of defendants arguing that its anti-impairment policy is odd, even arbitrary, so as to escape liability. For the less justifiable, and the more outlandish the policy, the less reasonable the inference that the employer believed other employers would follow a similar course. See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1100 (D. Haw. 1980) (“If such an approach were allowable, an employer discriminating against a qualified [disabled] individual would be rewarded if his reason for rejecting the applicant were ridiculous enough.”); *but see Tudyman v. United Air Lines, Inc.*, 608 F. Supp. 739, 745 n.6 (C.D. Cal. 1984) (noting that this rationale skirts the question of whether the applicant has a disability).

293. 29 C.F.R. § 1630.2(l)(2) (1998).

when he has an impairment that substantially limits a major life activity (such as working) "only as a result of the attitudes of others toward such impairment."²⁹⁴ Before attempting to flesh out this attitudinal limitation theory, it is important to examine the regulation's relevant commentary. The EEOC commentary to this variety of the "regarded as" definition should be discarded, as it cannot withstand close scrutiny and the example provided is misdirected:

[A]n individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk or the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled. . . .²⁹⁵

The regulations, relying on the magic language from Justice Brennan's *Arline* opinion, go on to state, "An individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perceptions were shared by others in the field. . . ."²⁹⁶

The EEOC would therefore seem to allow a certain variety of discrimination—that based on " 'myths, fears, and stereotypes' associated with disabilities" to do double-duty as proof of not only discrimination, but also of disability. In such cases it would seem that the EEOC would also omit any requirement that the plaintiff show a substantial limitation. Instead, the stereotypical practices of a single employer apparently would serve to fabricate a substantial limitation of the ability to work in all cases, regardless of the plaintiff's ability to find a job elsewhere.²⁹⁷ This rationale has the effect of removing the object (working) on which the modifying phrase (substantially limited in) is intended to operate. The EEOC's reading does more than stretch the statute's text, it blurs its meaning and vacates the substantially limited

294. *Id.*

295. 29 C.F.R. app. § 1630.2(l) (1998).

296. *Id.*

297. *See id.* Some commentators would take the "regarded as" definition even further, and allow courts to invalidate employers' disqualifying mental or physical criterion that are not made "on the basis of 'reasonable medical judgment.'" Ann Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 610 (1997) (quoting *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 (1987)); *see also* R. Bales, *Once is Enough: Evaluating When a Person is Substantially Limited in Her Ability to Work*, 11 HOFSTRA LAB. L.J. 203 (1993).

element of the definition of “disability.” Implicitly, if not explicitly, the Supreme Court rejected this theory in *Sutton*.²⁹⁸

This is not to suggest that 29 C.F.R. § 1630.2(D)(2) is itself flawed, only that the interpretative commentary thereto is ill conceived. Once the misleading commentary is pushed aside, the EEOC’s “attitudinal substantial limitations” provision can be grasped without much difficulty. As noted by Justice Brennan in *Arline*, people with disabilities are often more “handicapped” from society’s response—or lack thereof—to their impairments than by the physical or mental limitations imposed by the impairments themselves.²⁹⁹ Facial scarring, assuming that it is an impairment, will not pose a substantial physical or mental limitation on any recognized major life activity. Under certain facts, the individual with the prominent facial scar from the EEOC’s example ought to be able to qualify as an individual with a disability, but a defendant’s discriminatory intent should not relieve the plaintiff from satisfying a statutory element of her claim.³⁰⁰ The prejudiced reactions of others to a person with leprosy, facial scarring, or Tourette’s syndrome can indeed impose substantial limitations on the afflicted individual’s ability to work, limitations rooted in nothing more than biased fears, ugly stereotypes, and flagitious myths.³⁰¹ Substantial limitations can arise from societal attitudes just as readily as from the inherent effects of the impairment itself.³⁰² Testimony from vocational experts or other business owners from the community to the effect that the plaintiff’s impairment, as regarded by the defendant, would place great obstacles in the plaintiff’s ability to find a suitable job could establish a substantial limitation in the ability to work by reason of attitudes alone.

With consideration given to the geographical scope of the job market and the relevant types of jobs for which the plaintiff is qualified, plaintiffs will no doubt often succeed in establishing that the reactions of others to their perceived disability substantially limit the major life

298. *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2150 (1999). The Court found that the plaintiffs could not survive a 12(b)(6) motion even though they had alleged that the defendant had a vision requirement that excluded them from employment, and that the requirement was “based on myth and stereotype.” *Id.*

299. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987); *supra* notes 22-24 and accompanying text. “[S]ociety’s acculturated myths and fears about disability . . . are as handicapping as are the physical limitations that flow from actual impairments.” *Arline*, 480 U.S. at 284 (explaining Congressional intent behind the “regarded as” definition).

300. *See* 29 C.F.R. app. § 1630.2(I) (1998).

301. *See generally* ELAINE FANTLE SHIMBERG, *LIVING WITH TOURETTE SYNDROME* (1995) (discussing societal-imposed difficulties with Tourette’s Syndrome); OLIVER SACHS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES* 97 (1987) (describing a patient who was fired from dozens of jobs because of his Tourette’s syndrome symptoms); The Leprosy Mission Int’l, *What is Leprosy?* <<http://www.leprosymission.org/what.htm>> (visited July 28, 1999) (discussing myths associated with leprosy).

302. It would be difficult to dispute, for example, that a person with a shockingly disfiguring facial scar would face substantial difficulties in finding employment in a broad range of jobs in various classes.

activity of working.³⁰³ In other words, the plaintiff who can demonstrate, through competent evidence, that his impairment, as perceived, would place substantial limitations on the employment opportunities of a person of like training and skill, the "regarded as" definition should be found to have been satisfied.³⁰⁴ Such limitations are located not in the impairment itself, but rather in the manner in which society responds to the impairment.³⁰⁵ When limitations are not to be found in the physical limitations of the impairment (real or merely perceived), but rather in the all too real prejudices and fears of potential employers, the EEOC's phraseology is clearly applicable.³⁰⁶ Take, for example, an individual regarded as having a severe facial disfigurement. As a plaintiff, such an individual could satisfy the "regarded as" definition with proof that prejudices against persons with severe facial disfigurements are so commonplace among employers in the relative geographical market that these persons would find it very difficult to find and retain employment. With this proof, the plaintiff could satisfy the "regarded as" prong as applied in the "attitudes of others" EEOC sub-part.³⁰⁷ With an additional

303. See 29 C.F.R. § 1630.2(j)(3)(i) (1998) (defining "substantially limits" with respect to the major life activity of working as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities").

304. See Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 122 (1997) (noting that under the current standard, plaintiffs must "produce specific, quantitative employment data indicative of their significant restriction"). As noted *supra* at note 74, a careful assessment of the plaintiff's particular vocational options is less critical in determining whether a perceived impairment is regarded as disqualifying him or her from a broad range of jobs. See 29 C.F.R. § 1630.2(j)(3)(ii)(C) (directing an assessment of the "jobs *not* utilizing similar training, knowledge, skills or abilities, within that geographical area") (emphasis added).

305. See SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 40, 31 (1996). Wendell writes that individuals with disabilities face various types of social oppression including:

[V]erbal, medical, and physical abuse; neglect of the most basic educational needs; sexual abuse and exploitation, enforced poverty; harassment by public and private sector bureaucracies; job discrimination; segregation in schools, housing, and workshops; inaccessibility of buildings, transportation, and other public facilities; social isolation due to prejudice and ignorant fear; erasure as a sexual being; and many more subtle manifestations of disability-phobia, experienced as daily stress and wounds to self-esteem.

Id. at 31-32.

306. See 29 C.F.R. § 1630.2(l)(2) (1998).

307. A&P H.R. REP. 101-485, *30.

A person would . . . be covered [under the "regarded as" definition] if an entity perceived that the applicant had an impairment which prevented the person from working For example, severe burn victims often face discrimination in employment and participation in community activities which results in substantial limitation of major life activities. Those persons would be covered under this test because of the attitudes of others toward the impairment. . . .

Id. Presenting a "regarded as substantially limited in working because of attitudes" theory requires an appreciable shift from a "regarded as substantially limited in working" theory because of

showing of discrimination by the defendant and qualification of the plaintiff for the job in question, a *prima facie* case would be complete.³⁰⁸

When the “regarded as” definition is aligned on the “attitudes of others” axis, persons with the most-feared or frowned-on impairments should be allowed to show generalized job discrimination that amounts to a substantial limitation. Individuals suffering from obesity, for example, face employment discrimination in many forms.³⁰⁹ Individuals with contagious afflictions are often feared, segregated, and frequently terminated from job positions because of their impairments.³¹⁰ People with speech impairments or mental illnesses often find it extremely difficult to find work.³¹¹ These individuals, and others like them who face widespread discrimination in employment, may be shown to be substantially limited in their ability to work because of “the attitudes of others.”³¹²

A final parenthetical observation is appropriate here. When it is the commonplace prejudices and unfounded bigotry against an individual’s impairment that assist the plaintiff in meeting her burden of proving a disability, the plaintiff avoids the “Catch-22” problem of showing that her impairment substantially limits employment, but does not render her unqualified for the job.³¹³ That is, the plaintiff who argues that an employer’s unfounded policy substantially restricts working is not simultaneously undermining her showing that she is qualified for the position, the reason being that the substantial limitation arises not from

limitations residing in the impairment itself. In the latter instance, courts are accustomed to examining the extent to which the restrictions imposed by the impairment would interfere with the job’s requirements. *See, e.g., Zarzycki v. United Techs. Corp.*, 30 F. Supp.2d 283, 293-94 (D. Conn. 1998) (reviewing effect of back condition on ability to perform manual tasks in employment positions in “regarded as” case). In the former, however, the effects of the impairment are de-linked from the physical or mental condition, and considered in the context of how others react to the impairment.

308. *See Harris v. H&W Contracting Co.*, 102 F.3d 516, 519 (listing elements of an ADA *prima facie* case).

309. *See Cook v. Rhode Island Dep’t of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 25 (1st Cir. 1993) (plaintiff with obesity who is regarded as substantially limited in working); *E.E.O.C. v. Texas Bus Lines*, 923 F. Supp. 965, 978 (plaintiff perceived as obese who is regarded as having a substantially limiting impairment).

310. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).

311. *See Taylor v. Phoenixville Sch. Dist.*, 174 F.3d 142, 164 (3rd Cir. 1999) (noting the heavy stigmatization surrounding persons who have been committed to mental institutions); John M. Casey, Comment, *From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the Americans with Disabilities Act*, 17 U.PUGET SOUND L.REV. 381, 413 (1994) (noting that more phobias, “which differ dramatically from those traditionally acceptable [phobias], could conceivably create a substantial impediment to the normal functioning of the workplace”); Howard Fischer, *Discrimination Case Goes Forward Ex-Worker Cites Speech Impairment*, ARIZ. BUSINESS GAZETTE, Sept. 25, 1997 at 19 (describing employee’s contention that she was forced to resign from her job at a department store because of her dysarthria, or slurred speech).

312. 29 C.F.R. § 1630.2(l)(2) (1998). “The touchstone here is not a health condition that disables in the physical sense, but a health condition that stigmatizes in the value diminishment sense *Andrew W. Haines, E.E. Black, Ltd. v. Marshall: A Penetrating Interpretation of “Handicapped Individual” for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 LOY. L.A. L. REV. 527, 560 (1983).

313. *See supra* notes 78-80 and accompanying text.

the effects of the impairment, but from the associated bigotry of the defendant. In this sense, the "attitudinal substantial limitation theory" articulated by the regulations claims a significant strategical advantage for aggrieved plaintiffs.

IV. Conclusion

The ADA is a landmark civil rights statute in search of its outer limits. Some of those limits were mapped in the trilogy of Title I ADA Supreme Court cases decided in June, 1999. It is now clear that the adverse employment action by a single employer on the basis of an impairment does not automatically satisfy the "regarded as" definition. The Supreme Court was similarly unmoved by the suggestion that employees who are regarded by their employers as disabled because of fears, myths, or stereotypes are any more or less "individuals with disabilities" under the ADA than when "regarded as" perceptions can be linked to more justifiable reasons. Beyond these relatively straightforward pronouncements, the future of the "regarded as substantially limited in working" category is a matter of conjecture. Some tentative suggestions have been articulated, but one can only speculate about the federal courts' treatment of "regarded as" claims in the wake of three unanimous rejections of these claims by the Supreme Court. It remains to be seen whether judicial construction will allow the definition to become a sharpened cutlass in the fight against disability discrimination, or only a blunt, forgotten appurtenance to the "actual disability" definition.