Washington Law Review

Volume 73 | Number 3

7-1-1998

Controlled Impairments under the Americans with Disabilities Act: A Search for the Meaning of "Disability"

Erica Worth Harris

CONTROLLED IMPAIRMENTS UNDER THE AMERICANS WITH DISABILITIES ACT: A SEARCH FOR THE MEANING OF "DISABILITY"

Erica Worth Harris*

Abstract: The Americans with Disabilities Act (ADA) protects individuals with disabilities from discrimination. Since its passage in 1991, the number of individuals seeking protection under the Act has steadily increased and the types of impairments claimed to qualify as disabilities have dramatically expanded. Many disability claims test the boundaries of the Act and reveal a muddied conception of what constitutes a disability for purposes of the ADA. This Article investigates the meaning of the term disability to define more clearly who should benefit under the Act. By focusing on controlled impairments, a group of disability claims that has produced a split among lower courts, this Article analyzes the term "disability" in light of the ADA's stated goals and proposed justifications. The Article concludes that the lack of understanding about the meaning of the term "disability" allows unintended and undeserving beneficiaries to expand the ADA's scope beyond any justifiable boundary.

Should a person who can see perfectly with glasses, but who is legally blind without glasses, be considered to have a disability for purposes of the Americans with Disabilities Act (ADA)? The Equal Employment Opportunity Commission (EEOC) answers yes,[1] but the courts are divided on the issue.[2] Although the question is discrete, it raises a broader, more important concern: what is the meaning of "disability" under the ADA?

The ADA prohibits employers from discriminating against individuals with disabilities. The key to the ADA, therefore, is its definition of

---

* Olin Fellow and Visiting Lecturer in Law, University of Virginia School of Law. The author thanks Dagobert Brito, Richard Epstein, Mark Grady, Charles Harris, John Hasnas, Samuel Issacharoff, Andrew Morriss, Mark Parenti, George Rutherglen, and Eugene Volokh for their comments and the John M. Olin Foundation and the University of Virginia School of Law for their generous assistance. The views expressed are the author's alone.

1. *See infra* text accompanying notes 19–21.

2. *See* Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993) (declaring that persons are not handicapped if their vision can be corrected to 20/200); Fallacaro v. Richardson, 965 F. Supp. 87, 92 (D.D.C. 1997) (holding plaintiff's disability must be measured without considering benefit of her contact lenses); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1424, 1430 (N.D. Iowa 1996) (holding determination of whether plaintiff's myopia constituted disability under ADA should be made without regard to corrective lenses even when plaintiff's vision was corrected to 20/20); Sweet v. Electronic Data Sys., Inc., No. 95 Civ. 3987 (S.D.N.Y. Apr. 26, 1996) (holding plaintiff with corrected vision of 20/80 does not have disability); Joyce v. Suffolk County, 911 F. Supp. 92, 96 (E.D.N.Y. 1996) (looking at plaintiff's need to wear corrective lenses to determine whether he had disability).

"disability." The Act defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; . . . a record of such an impairment; or . . . being regarded as having such an impairment."[3]

The issue of what constitutes a disability has not been adequately explored. Instead, the debate has centered largely on the Act's requirement that employers make reasonable accommodations for individuals with disabilities. In their rush to determine what protection is due, courts and commentators have generally ignored the first inquiry of who deserves protection.[4]

This failure has left the question of what constitutes a disability unresolved. Courts have struggled to determine whether obesity[5] and infertility[6] are disabilities. The question of whether a controlled impairment—such as corrected vision—is a disability has created a split in the case law,[7] and the popular press has highlighted confusion over

3. 42 U.S.C. § 12102(2) (1994).

4. *See* Mark C. Weber et al., *A Symposium on Individual Rights and Reasonable Accommodations Under the Americans with Disabilities Act* 871 (1997); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1, 14 (1996); Matthew Graham Zagrodzky, *When Employees Become Disabled; Does the Americans with Disabilities Act Require Consideration of a Transfer as a Reasonable Accommodation?*, 38 S. Tex. L. Rev. 939 (1997); *see also* Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 151–52 (1st Cir. 1998) (assuming that plaintiff had disability and determining that requested accommodations were reasonable); Terrell v. USAir, 132 F.3d 621, 624 (11th Cir. 1998) (assuming that plaintiff made prima facie showing of disability and moving to issue of what constituted reasonable accommodation); Marshall v. Federal Express Corp., 130 F.3d 1095, 1100 (D.C. Cir. 1997) (assuming without deciding that plaintiff made prima facie case of disability and moving to question of whether plaintiff had raised fact issue as to pretext); Aramburu v. Boeing Co., 112 F.3d 1398, 1412 n.11 (10th Cir. 1997) (assuming without deciding that plaintiff had disability and considering whether defendant had shown legitimate, nondiscriminatory reasons for plaintiff's discharge).

5. *See, e.g.*, Francis v. City of Meriden, 129 F.3d 281, 285–87 (2d Cir. 1997); Cook v. Rhode Island Dept. of Mental Health, Retardation, and Hosp., 10 F.3d 17, 25 (1st Cir. 1993); Motto v. Union City, No. CIV.A.95-5678, 1997 WL 816509, at *10–11 (D.N.J. Aug. 27, 1997).

6. *See, e.g.*, Krauel v. Iowa Methodist Med. Ctr., 915 F. Supp. 102, 106–08 (S.D. Iowa 1995); Erickson v. Board of Governors, 911 F. Supp. 316, 321–23 (N.D. Ill. 1995); Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 243–44 (E.D. La. 1995).

7. Only the Sixth and Eleventh Circuits have expressly addressed whether controlled impairments constitute disabilities. Two of three panel members of the Sixth Circuit held that they do not. *See* Gilday v. Mecosta County, 124 F.3d 760, 766–68 (6th Cir. 1997) (Kennedy, J., concurring). The Eleventh Circuit has held that they do. *See* Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996). Although not directly addressing the issue, the Fifth Circuit has suggested that it would not recognize a controlled impairment as a disability. *See* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 n.3 (5th Cir. 1996).

The lower courts are similarly divided on the issue. *Compare* Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 882 (D. Kan. 1996), *and* Schulter v. Industrial Coils, Inc., 928 F. Supp. 1437,

whether, and to what extent, back pain, alcoholism, and mental illness are disabilities.[8] After seven years of litigation under the ADA, the meaning of disability remains unclear.

This Article seeks to clarify the meaning of disability and demonstrate the effect that definition has upon the scope of the ADA. Using the controlled impairment cases as a basis for discussion, the Article explores the statutory definition of disability and discusses how the ADA's conception of disability limits the kinds of impairments that qualify as disabilities. Examining the justifications that have been offered for the ADA, the Article illustrates how failing to understand the meaning of disability allows undeserving claimants to expand the scope of the ADA beyond any justifiable boundary.

Part I of this Article provides a brief background on the ADA and the definition of "disability" found in the statute and EEOC interpretive guidelines. Part II discusses how the EEOC guideline allows controlled impairments to qualify as disabilities. Part III argues that allowing controlled impairments to qualify as disabilities neither solves the problem of disability discrimination nor furthers the goals of the ADA. Part IV considers whether courts are bound to enforce the EEOC guideline allowing controlled impairments to qualify as disabilities, and explores what possible harmful effects it may have on the future of litigation under the ADA. This Article concludes that allowing controlled impairments to qualify as disabilities results in an undesirable and unnecessary expansion of the scope of the ADA.

1445 (W.D. Wis. 1996) (refusing to recognize controlled impairment as disability), *with* Sicard v. City of Sioux City, 950 F. Supp. 1420, 1438 (N.D. Iowa 1996) (recognizing controlled impairments as disabilities).

8. *See, e.g.*, Mark Johnson, *What an Act: Americans with Disabilities Act Lawsuits are Clogging the Courts, but 'Non-Traditional' Claims Range from Backaches to Infertility*, Buffalo News, Aug. 31, 1997, at H1 (criticizing recognition of non-traditional disabilities under Act); Walter Olson, *Life, Liberty, and the Pursuit of a Good Beer: How the ADA has Turned Alcoholism into a Right*, Wash. Monthly, Sept. 1, 1997, at 26, 26 (discussing alcoholism as disability); Joseph Perkins, *Going Too Far with ADA and Phony Disabilities*, San Diego Union-Trib., May 9, 1997, at B7 (discussing mental impairments that constitute disabilities); Daniel Seligman, *Privacy Rights in High Schools, Ego in the Workplace, and Other Related Matters*, Fortune, Oct. 28, 1996, at 56, 56 (criticizing EEOC's new mental illness guidelines that define narcissism and antisocial behavior, for example, as disabilities); Jill Smolowe, *Noble Aims, Mixed Results*, Time, July 31, 1995, at 54, 54 (noting that frivolous claims of non-traditional disabilities are "clouding" concept of disability).

I. BACKGROUND

A. The Americans with Disabilities Act

The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[9] The Act prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[10] The Act provides a three-prong definition of the term "disability." Individuals who qualify under any prong are considered to have a disability. The first prong defines "disability" as any impairment that "substantially limits" a "major life activity."[11] The second prong defines "disability" as having a "record of such an impairment."[12] The third prong defines "disability" as being "regarded as having such an impairment."[13]

Although Congress did not define "physical or mental impairment," "substantially limits," or "major life activities" in the Act, it vested in the EEOC the authority and responsibility to promulgate regulations interpreting the Act.[14] The EEOC regulations define "physical or mental impairment" to include "[a]ny physiological disorder . . . affecting one or more of the . . . body systems" or "[a]ny mental or psychological disorder."[15] The regulations provide that a disability "substantially limits" a major life activity if the person with the disability is:

> (1) [u]nable to perform a major life activity that the average person of the general population can perform; or (2) [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average

9. 42 U.S.C. § 12101(b)(1) (1994).
10. 42 U.S.C. § 12112(a) (1994).
11. 42 U.S.C. § 12102(2)(A) (1994).
12. 42 U.S.C. § 12102(2)(B) (1994).
13. 42 U.S.C. § 12102(2)(C) (1994).
14. 42 U.S.C. § 12116 (1994).
15. 29 C.F.R. § 1630.2(h)(1) (1997).

person in the general population can perform that same major life activity.[16]

Whether an impairment "substantially limits" a major life activity is determined in light of "(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[17] Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[18]

The EEOC has issued guidelines in the appendix to the Code of Federal Regulations.[19] The interpretive guideline with which this Article takes issue states "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[20] This guideline will be referred to as the "no mitigating measures guideline" and will serve as the practical basis for a theoretical discussion of what disability means under the ADA.

B. The Problem

In its interpretive guidance manual, the EEOC illustrates the meaning of the no mitigating measures guideline with the following examples:

> An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.[21]

In the context of these examples, the no mitigating measures guideline may have some intuitive appeal. It may seem correct to say that an amputee has a disability whether or not he has a set of prosthetic legs. Similarly, the notion that an insulin dependent diabetic has a disability,

16. 29 C.F.R. § 1630.2(j) (1997).
17. 29 C.F.R. § 1630.2(j)(2)(i)–(iii).
18. 29 C.F.R. § 1630.2(i) (1997).
19. 29 C.F.R. app. § 1630 Intro. (1997).
20. 29 C.F.R. app. § 1630.2(j).
21. 29 C.F.R. app. § 1630.2(j).

while not altogether intuitive (as many would say that diabetes is more of a disease than a disability), is not wholly surprising.

As often happens, problems arise when the guideline is removed from this narrow context. When applied to cases of controlled impairments, the no mitigating measures guideline produces counterintuitive results. A "controlled impairment" is one that would substantially limit a major life activity if untreated, but that does not limit any such activity when treated with some mitigating measure. In the majority of reported controlled impairment cases, the plaintiff challenged termination of employment or failure to accommodate that contributed to or caused the termination.[22] The employer challenged the plaintiff's standing under the Act, asserting that the individual did not have a disability because the individual was not substantially limited in any major daily life activity. In each case, the individual's impairment was actually controlled by some mitigating measure.

Under the no mitigating measures guideline, individuals with controlled impairments have disabilities even if they do not experience a substantial limitation in any major life activity. Thus, an individual who can see perfectly with corrective lenses, but is legally blind without those lenses, has a disability.[23] Similarly, an individual with hypertension who controls his condition with oral medication has a disability because the hypertension could cause a stroke or death if unmedicated.[24] According to the guideline, such individuals have disabilities even if they do not experience, and have never experienced, any limitation from their condition.

---

22. *See, e.g.*, Gilday v. Mecosta County, 124 F.3d 760, 761 (6th Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516, 518 (11th Cir. 1996); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 189 (5th Cir. 1996); Sweet v. Electronic Data Sys., Inc., No. 95 Civ. 3987 (D.C.N.Y. Apr. 26, 1996); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 873 (D. Kan. 1996); Ferguson v. Western Carolina Reg'l Sewer Auth., 914 F. Supp. 1297, 1298 (D.S.C. 1996); Canon v. Clark, 883 F. Supp. 718, 720 (S.D. Fla. 1995); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 810 (N.D. Tex. 1994).

23. Sicard v. City of Sioux City, 950 F. Supp. 1420, 1438 (N.D. Iowa 1996) (holding that uncorrected vision of 20/200 raised material issue of fact as to disability, despite fact that it could be corrected to 20/20).

24. *See Murphy*, 946 F. Supp. at 880 (acknowledging that under EEOC guideline plaintiff's unmedicated high blood pressure may constitute disability, although not deciding for plaintiff).

II. EFFECTS OF THE NO MITIGATING MEASURES GUIDELINE

A. Creating a Hypothetical

The most apparent difficulty with the EEOC's no mitigating measures guideline is that it requires courts and employers to consider disability in the hypothetical. The guideline asks whether an individual is substantially limited in a major life activity "without regard to mitigating measures," even if some mitigating measure is present.[25] Using the EEOC's interpretation, the here and now is irrelevant. Rather, employers and courts must consider the effects of an individual's impairment in a hypothetical world where there are no mitigating measures.[26] Under the guideline, the pertinent question is a "what if" question. What if she did not wear glasses? What if he did not take medication? What if she did not have a pacemaker or had not undergone chemotherapy?

This hypothetical approach is counterintuitive; legislative history and statutory provisions of the ADA do not support it. The ADA's framers intended the definition of disability to be functional.[27] Recognizing that impairments have different effects on different people, Congress expressly disavowed an intent to make disability dependent on medical diagnoses.[28] Instead of creating a list of qualifying disabilities, Congress chose a multi-pronged definition that would sufficiently narrow the class of protected beneficiaries without leaving some disabilities off a magic list. The statutory provisions reflect these intentions. The Act requires that the effect an impairment has on an individual substantially limit a major life activity in order to qualify as a disability.[29]

In contrast, the EEOC interpretation requires courts and employers to contemplate potential medical diagnoses of a disability's effect in a hypothetical world where the plaintiff is without medication or other mitigating measures. The reality of an individual's functional ability is

---

25. 29 C.F.R. app. § 1630.2(j).

26. *Gilday*, 124 F.3d at 767 (Kennedy, J., concurring) ("Under the interpretive rule, we do not make an individualized comparison to the average person in the general population but, rather, we consider how a hypothetical person who did not take medication would compare.").

27. *See, e.g.*, 136 Cong. Rec. 9072 (daily ed. May 1, 1990) (statement of Rep. Bartlett) ("The ADA does not cover 900 classes of disability. The ADA includes a functional rather than a medical definition of disability. An individual with a disability is one who—has, has a record of, or is regarded as having—a physical or mental impairment that substantially limits a major life activity.").

28. *See supra* note 27.

29. 42 U.S.C. § 12102(2) (1994).

disregarded in favor of a medical diagnosis and medical testimony describing the disability's effect absent the mitigating measure. The EEOC recasts the definition of disability from the functional to the hypothetical.

B. Lightening the Plaintiff's Burden

An impairment must satisfy one prong of the three-prong test in order to qualify as a "disability" in the employment context: (1) the impairment must substantially limit a major life activity, (2) a record of such an impairment must exist, or (3) the employer must regard the employee as having the impairment.[30]

The first prong requires that an individual have an impairment that "substantially limits a major life activity." The second prong requires a "record of such an impairment," which must be one that substantially limits a major life activity. The third prong requires that an individual "be regarded as" having a disability. An individual may satisfy this prong by demonstrating that he or 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 none of the impairments defined in paragraph . . . (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.[31]

Under the third prong, individuals must demonstrate that they are regarded as having disabilities, even if those disabilities are not substantially limiting.

Without the no mitigating measures guideline, individuals with controlled impairments could not be considered to have "substantially limiting" disabilities (or a record of such disabilities) because their impairments are controlled and they are therefore not substantially limited by their disabilities. Therefore, they would qualify as having disabilities only where they could show their employers regarded them as having disabilities under the third prong. The no mitigating measures guideline allows individuals with controlled impairments to demonstrate

30. *See supra* notes 11-13 and accompanying text.

31. 29 C.F.R. § 1630.2(l) (1997).

that their impairments are "substantially limiting" because the guideline commands that the determination of whether an individual is substantially limited be made without regard to mitigating measures.[32]

By allowing individuals who would otherwise have to qualify under the third prong to demonstrate a disability, the EEOC permits a new class of plaintiffs to establish a case under the ADA. Individuals whose impairments have the *potential* to substantially limit a major life activity qualify as having a disability under the first prong definition.[33]

The no mitigating measures guideline lightens the evidentiary burden for individuals with controlled impairments because proceeding under the first prong is easier than proceeding under the third prong. To qualify as having a disability under the third prong, plaintiffs must show that their employers regarded the impairment as substantially limiting.[34] They must produce some evidence that the employer knew of the impairment and believed it was substantially limiting of a major life activity.[35] This burden is more difficult to meet that the burden required under the first prong, a mere showing of a substantially limiting impairment.

Without the EEOC's interpretive gloss, individuals with controlled impairments would rarely qualify as having disabilities under the third prong because the common observer cannot detect such "disabilities." Individuals with medication or treatment experience no limitations in their daily activities; therefore, their employers and coworkers cannot observe the "disability." To the unsuspecting eye there is no disability. Because these disabilities are usually "non-traditional," in the sense that they are not what an average person would recognize as a disability, employers will not stereotype these disabilities. For example, most individuals are not familiar with Graves disease and, therefore, do not have an opinion on what limitations it might entail, even when unmedicated. Because individuals with controlled impairments are the

---

32. *Supra* notes 19–21 and accompanying text.

33. At least one court has noted that this was not the intent of Congress. *See* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191–92 n.3 (5th Cir. 1996) ("[H]ad Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the *potential* to substantially limit a major life activity.").

34. For example, a claimant under the ADA could produce deposition testimony of the employer that the employer regarded the employee as impaired. *See* Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 807 n.10 (5th Cir. 1997); Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996); Cook v. Rhode Island Dept. of Mental Health, Retardation, and Hosp., 10 F.3d 17, 25 (1st Cir. 1993); Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993).

35. Hamm v. Runyon, 51 F.3d 721, 725 (7th Cir. 1995).

least likely to be able to establish a disability under the third prong, the EEOC interpretation would allow individuals normally unable to establish standing to sue under the ADA.

Making it easier to establish a disability under the ADA removes a significant barrier to suit. While class membership is essentially assumed under other anti-discrimination schemes such as Title VII, one must actually establish class membership to sue under the ADA. As one commentator has observed, a plaintiff in a sex discrimination suit "need not prove (in the sense of bringing forward evidence to substantiate the claim) that she is a woman.... [But under] the ADA, whether the plaintiff is a member of the protected class may well be the only contested issue."[36] The EEOC lightens the burden for individuals with controlled impairments.

C. *Granting Coverage Benefits*

Expansion of the term "disability" effectively entitles beneficiaries to "just cause" protection from termination and allows individuals with disabilities to demand affirmative relief from their employers. Like all other anti-discrimination statutes, the ADA requires employers to rebut claims of discrimination by showing that their employment decision was based on legitimate, nondiscriminatory reasons.[37] This offers just cause protection to a select group in a nation that has, with few exceptions, adhered to its common law rule of at-will employment. Just cause protection is valuable even before litigation ensues because it makes every adverse employment action more expensive to the employer. An illustration is helpful. Suppose an employee senses he is about to be fired. If the employee notifies the employer that he is protected under the ADA, he forces the employer to accumulate a documented record supporting a just cause dismissal before the employer can take action against him. When creating a record for just cause termination is too difficult, costly, or time consuming, an employer may abandon or delay a decision to discharge the employee. Thus, the power to claim protection amounts to extra protection from adverse employment action.

---

36. Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Framework Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act*, 18 Berkeley J. Emp. & Lab. L. 98, 131 (1997).

37. *See infra* Part II.D.

Unlike other anti-discrimination statutes, the ADA mandates that employers take affirmative action on behalf of their employees with disabilities.[38] Under the ADA, an individual can demand special treatment on the basis that such treatment is a "reasonable accommodation" of his alleged disability. For example, in *Murphy v. United Parcel Service, Inc.*, the plaintiff, who suffered from hypertension and therefore could not pass the physical exam required by the state licensing agency, claimed that he should be exempt from the requirement that he be able to drive a truck.[39] In *Sweet v. Electronic Data Systems, Inc.*, the plaintiff demanded that his employer pay for audio and video tapes to accommodate his eye strain from reading sales materials.[40] In *Gilday v. Mecosta County*, the plaintiff, an emergency medical technician, asserted a right to be transferred to a "less chaotic situation" because, due to his diabetes, he was unable to deal with the stress of his current position without being rude to patients.[41]

Similarly, individuals with controlled impairments may demand reasonable accommodations for their mitigating measure. For example, in *EEOC v. Union Carbide*, the plaintiff, who controlled his bi-polar disorder with lithium, sued his former employer for failing to provide him with a nine to five weekday shift as an accommodation to his need to take lithium.[42] The defendant employer operated its manufacturing plant on a changing shift schedule that required employees to work varying days and varying twelve hour shifts in order to maintain twenty-four hour operations. In order to accommodate the plaintiff-employee's request, the employer would have had to hire another employee to work the night shifts and the last four hours of each shift for the plaintiff-employee or, alternatively, restructure its entire workforce. The employer's refusal to provide the employee with this alleged "accommodation" resulted in a lawsuit.

Both just cause protection and the right to demand reasonable accommodation serve as powerful incentives for individuals to seek protection under the ADA. Employees can obtain protection before their

38. *See* Karlan & Rutherglen, *supra* note 4, at 14 (describing ADA requirement of reasonable accommodation as "affirmative action").

39. 946 F. Supp. 872, 880 (D. Kan. 1996). Although the court did not accept plaintiff's argument, the fact that employees are asserting such demands under the ADA illustrates how undeserving claimants can manipulate the Act's requirement of reasonable accommodation.

40. 1996 WL 204471, at *5 (S.D.N.Y. Apr. 26, 1996).

41. 124 F.3d 760, 761 (6th Cir. 1997).

42. No. CIV.A.94-103, 1995 WL 495910 (E.D. La. Aug. 18, 1995).

employers have taken adverse employment action. Although each of the cases discussed above resulted in litigation, many claims never reach the courts. The circumstances are not difficult to envision. Suppose an employer announces an intention to implement a reduction in force. Suppose also that an employee with a controlled impairment notifies the employer of his condition, hoping to avoid losing his job. Instead of trying to create a record showing just cause, the employer might not discharge the employee. Suppose an employee with a controlled impairment wishes to be transferred to a more desirable route. He then informs his employer of his controlled impairment and alleges that the stress of his current route is complicating his condition. Fearing an ADA challenge should he refuse to grant the accommodation, the employer might accommodate the employee's preference.[43]

By providing both a flexible definition of disability and extraordinary benefits, the ADA encourages creative employees to search for a basis to claim disability protection. As explained above, the opportunity to manipulate the coverage issue is unique to the ADA. No other anti-discrimination statute contains a flexible definition of the class it protects. Race, sex, and age, discrimination on the basis of which is prohibited by statute, are all immutable characteristics. Plaintiffs either are or are not within the protected class. In contrast, the protected class of the ADA is ambiguous. Because the benefits of reasonable accommodation and just cause protection are considerable, they serve as tremendous incentives for employees to manipulate the ADA's definition of disability.

Before turning to the issue of whether individuals with controlled impairments deserve the ADA's benefits, it is important to understand why expanding coverage can work to increase the value of a nuisance suit for some undeserving claimants.

D. Surviving Summary Judgment

It may appear that allowing some unintended beneficiaries to claim protection under the Act is of no consequence because false claims will be eliminated at the summary judgment stage. However, there are

43. Although this accommodation may be cost-free to the employer, it may impose a significant cost on other employees who are precluded from obtaining desirable routes based on their merit or by lottery.

circumstances where frivolous claims will survive summary judgment due to the peculiarities of anti-discrimination law.

Granting coverage under the ADA sometimes equates to granting the plaintiff the right to go to trial even though no substantive evidence of disability discrimination exists. As explained above, establishing a prima facie case by demonstrating possession of a physical or mental impairment that substantially limits a major life activity is easier than showing that the employer regards the employee as having a disability. This fact, combined with the peculiarities of the burden-shifting framework in ADA claims, allows frivolous claims to survive the summary judgment stage and thus increases the nuisance value of an ADA suit.

In *McDonnell Douglas Corp. v. Greene*, a Title VII discrimination case, the U.S. Supreme Court articulated a burden shifting analysis that has been applied to ADA claims where employers deny relying on employees' disabilities as a reason for adverse employment actions.[44] The *McDonnell Douglas* proof scheme involves a three-step process. First, the plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence.[45] By establishing a prima facie case, the plaintiff creates a rebuttable presumption that the employer unlawfully discriminated against him, and the burden of production shifts to the employer.[46] Second, the employer then must "rebut the presumption of discrimination by producing evidence that the plaintiff was [discharged] . . . for a legitimate, nondiscriminatory reason."[47] The employer "'must clearly set forth, through the introduction of admissible evidence,' reasons for its action which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause

44. 411 U.S. 792 (1973). Nearly every circuit has applied the *McDonnell Douglas* analysis to ADA claims "when 'the defendant disavows any reliance on discriminatory reasons for its adverse employment action'" and where there is no direct evidence of discrimination. Halperin v. Abacus Tech. Corp., 128 F.3d 191, 196 n.6 (4th Cir. 1997) (citing Ennis v. National Ass'n of Bus. and Educ. Radio, Inc., 53 F.3d 55, 57–58 (4th Cir. 1995)); Gleason v. Mesirow Fin., Inc., 118 F.3d 1134, 1142 (7th Cir. 1997); Walker v. Consolidated Biscuit Co., 116 F.3d 1481 (6th Cir. 1997); Miners v. Cargill Communications, Inc., 113 F.3d 820, 823 (8th Cir. 1997); Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 162 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 586 (1996); McNemar v. Disney Store, Inc., 91 F.3d 610, 619 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997).

45. *McDonnell Douglas*, 411 U.S. at 802.

46. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

47. *Id.*

of the employment action."[48] If the employer fails to produce some evidence that the action was based on legitimately nondiscriminatory motives, a discriminatory purpose is presumed.[49] Finally, if the employer meets its burden of production, the presumption raised by the prima facie case is rebutted and "drops from the case,"[50] and the plaintiff bears the ultimate burden of proving—or raising a fact issue—that he or she has been the victim of intentional discrimination.[51]

A plaintiff's burden of establishing a prima facie case of discrimination "is not onerous."[52] Although the elements of a prima facie case may vary depending upon the facts,[53] establishing a prima facie case under Title VII requires a showing that: (1) the claimant is a member of the protected class; (2) the claimant is qualified for the position; and (3) the employer replaced the claimant with a nonmember of the class or continued to hold the position open after rejecting the claimant.[54]

In a discharge or refusal to hire case under the ADA, the prima facie case is nearly identical to that under Title VII law. The ADA plaintiff must establish that he: (1) is a member of the protected class of individuals with disabilities; (2) is qualified for the position with or without reasonable accommodation or is currently performing the job to the employer's reasonable expectations; (3) has suffered an adverse employment decision; and (4) was replaced by or treated less favorably than a person without a disability, or can demonstrate that the employer continued to advertise the position after rejecting the applicant with a disability.[55] Because it is often difficult to prove who has a disability,[56]

---

48. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) (quoting *Burdine*, 450 U.S. at 254–55).

49. *Burdine*, 450 U.S. at 254.

50. *Id.* at 255 n.10.

51. *Hicks*, 509 U.S. at 506–11.

52. *Burdine*, 450 U.S. at 253.

53. McDonnell Douglas Corp. v. Greene, 411 U.S. 792, 802 n.13 (1973).

54. *See id.* at 802.

55. The following cases essentially provide that plaintiffs must show they (1) belong to a protected class, (2) are qualified for the position, and (3) suffered an adverse employment action. The fourth part varies among the cases. *Compare* Lawrence v. National Westminster Bank of N.J., 98 F.3d 61, 68 (3d Cir. 1996) (holding that to create inference of discrimination, plaintiff must show he was ultimately replaced by person outside protected class), *with* Rothman v. Emory Univ., 123 F.3d 446, 451 (7th Cir. 1997) (holding that plaintiff must show others not in protected class were treated more favorably), Olson v. General Elec. Astrospace, 101 F.3d 947, 951 (3d Cir. 1996) (holding that plaintiff must show that "after his rejection, the position remained open and the employer continued to seek applicants"), Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 882

some courts have allowed plaintiffs to establish prima facie cases by showing that the adverse employment action was taken under circumstances that infer that the termination was based on discrimination[57] or, alternatively, by demonstrating that the adverse employment action was based on the disability.[58] In those courts, plaintiffs can establish a prima facie case by bringing forth some evidence that, if believed, would entitle them to judgment if the employer produced no evidence on its own behalf.

(6th Cir. 1996) (requiring plaintiff to show that person without disability replaced her or was selected for position), Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 511 (1st Cir. 1996) (requiring plaintiff to demonstrate he was replaced by person without disability or was treated less favorably than such employees and suffered damages as result), *and* Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 162 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 586 (1996) (holding that plaintiff must show she was replaced by, or treated less favorably than, person without a disability).

56. The Fourth Circuit has explained that:

> [W]here disability, in contrast to race, age, or gender, is at issue, the plaintiff in many, if not most, cases will be unable to determine whether a replacement employee is within or without the protected class, that is, whether or not that person has a disability or associates with a disabled person.... Second, even if the plaintiff could obtain such information, requiring a showing that the replacement was outside the protected class would lead to the dismissal of many legitimate disability discrimination claims, since most replacements would fall within the broad scope of the ADA's protected class—the enormous number of Americans with disabilities, as defined by the Act, exponentially increased by those persons who are associated with individuals who are disabled, as so defined.

Ennis v. National Ass'n of Bus. and Educ. Radio, Inc., 53 F.3d 55, 58–59 (4th Cir. 1995) (citation omitted).

57. *See* Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (holding plaintiff must establish "the employer discharged her employment under circumstances which give rise to an inference that the termination was based on her disability"); *Ennis*, 53 F.3d at 58 (requiring plaintiff to prove "her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination").

58. Each circuit phrases its requirements for the prima facie case with slight variation. Although the following cases all require plaintiffs to establish that they (1) have a disability and (2) are qualified to perform the job, the cases differ as to what plaintiffs must show to establish that their employers discriminated against them. *Compare* Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1224 (11th Cir. 1997) (holding that plaintiffs must establish they were subjected to unlawful discrimination because of disability), *with* Weigel v. Target Stores, 122 F.3d 461, 465 (7th Cir. 1997) (holding that plaintiff must show she was discharged or subjected to some other adverse employment action, and that "the circumstances surrounding [the adverse action] indicate that it is more likely than not that her disability was the reason for these adverse actions"), Leffel v. Valley Fin. Servs., 113 F.3d 787, 794 (7th Cir. 1997) (same), EEOC v. Amego, Inc., 110 F.3d 135, 141 n.2 (1st Cir. 1997) (requiring plaintiffs to establish that their employers discharged them in whole or in part because of disability), Martinson v. Kinney Shoe Corp., 104 F.3d 683, 686 (4th Cir. 1997) (same), MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437, 1443 (10th Cir. 1996) (same), *and* Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996) (same).

The table below indicates the difference in the plaintiff's burden of proof in establishing an ADA claim under the first and third prongs:

	Under the First Prong	Under the Third Prong
1.	The employee has a substantially limiting impairment not ameliorated by some mitigating measure.	The employer regards the employee as having a disability.
2.	The employee is qualified for the position with or without reasonable accommodation.	The employee is qualified for the position with or without reasonable accommodation.
3.	The employee was replaced by, or treated less favorably than, a person without a disability or other circumstances raise a fact issue as to whether the adverse employment action was based on the disability.	The employee was replaced by, or treated less favorably than, a person without a disability or other circumstances raise a fact issue as to whether the adverse employment action was based on the employer's perception of a disability.

As indicated above, it is more difficult to proceed under the third prong at both the first and third stages of the prima facie case. The third prong requires that the plaintiff show the employer *regarded* the individual as having a disability and evidence that the employment action was motivated *by that perception*. In comparison, the first prong requires only that the plaintiff show a potentially limiting impairment and demonstrate that the disability was a factor in the employment decision.

Eliminating the requirement that the plaintiff prove her employer regarded her as having a disability at the first stage of the *McDonnell Douglas* test may allow a plaintiff to survive summary judgment, despite a lack evidence showing her employer regarded her as having a

disability.[59] It is very easy for a plaintiff to raise a disputable issue of fact about the employer's motives for an adverse employment action.[60] At the final stage of the burden-shifting analysis, to avoid summary judgment the courts require only that the plaintiff produce some evidence from which a reasonable jury could infer a discriminatory motive.[61] Some commonly occurring sets of circumstances provide a reasonable basis for an inference of discrimination even where no discrimination has actually occurred. An example of one set of such circumstances is illustrative.

Suppose Sarah, an employee of Widgets, Inc., has a hyperthyroid condition that is completely controlled by medication. Sarah has worked at Widgets, Inc. as a widget assembler for over a year, during which time she was a good worker. One day, Sarah's supervisor, Harold, notices Sarah taking a pill and asks Sarah whether she has a headache. Sarah responds that she does not and explains that the pill is for her hyperthyroid condition. Four days later, Harold calls Sarah into his office and tells her that he has heard rumors that Sarah has been stealing widgets from the company. Sarah denies this but cannot explain why the number of widgets resulting from her station is less than the number of widgets reportedly being delivered to her station. Finding that Sarah does not have any plausible explanation for the discrepancy, Harold discharges Sarah.

Two weeks later, Harold hires Bob to replace Sarah on the line. Bob does not have a disability. Six months later, Sarah sues Widgets, Inc., asserting that she was discharged due to her hyperthyroid condition. During discovery, evidence arises that other stations along the line were producing fewer widgets than were being delivered to those stations, and

---

59. Establishing that an employer regarded the employee as having a disability is not sufficient to raise an inference of discrimination in the challenged action. The plaintiff must produce other evidence that could lead to an inference that the challenged action was taken on the basis of the perception of disability.

60. *See, e.g.*, McIntyre v. OK Trapper Smoke Prod., Inc., 1 F.3d 1246, 1247 (9th Cir. 1993) (finding that fact that discharge occurred just ten days after employer learned of disability was sufficient to raise inference of discrimination); DeJoy v. Comcast Cable Communications, Inc., 968 F. Supp. 963, 987 (D.N.J. 1997) (holding that decision to demote plaintiff four days after plaintiff experienced symptoms of his disability was sufficient to defeat employer's motion for summary judgment); Shirley v. Westgate Fabrics, Inc., No. 3:95-CV-2550-D, 1997 WL 135605, at *5 (N.D. Tex. Mar. 17, 1997) (finding that plaintiff had raised fact issue as to discriminatory motive behind her selection for layoff where there was evidence that employer had asked claimant to use different bathroom, asked about doctor's appointments, and commented that claimant was too thin and pale).

61. *Ennis*, 53 F.3d at 58 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

there is a question about whether the quantity supply counter was accurately recording the number of widgets delivered to the stations. During his deposition, Harold admits he should have investigated the situation further, but denies considering Sarah's hyperthyroid condition when deciding to discharge her. Harold testifies that he did not know what a hyperthyroid condition was and did not regard Sarah as substantially limited in any aspect. After discovery is complete, Widgets, Inc. and Sarah file cross-motions for summary judgment.

Consider how Sarah's suit would progress without the EEOC no mitigating measures guideline. Sarah would first have to show she had a disability under the third prong of the Act, because there is no record of her hyperthyroid condition and her medicated hyperthyroid condition does not limit her major life activities. Sarah must also produce evidence that Harold regarded her as having a disability because of a misperception that her hyperthyroid condition was substantially limiting in some way. Under our set of facts, the summary judgment motion filed by Widgets, Inc. would be granted because no evidence that Harold regarded Sarah as substantially limited exists.

Now assume the EEOC guideline is applicable. Sarah would submit an affidavit from her doctor stating that she has been diagnosed with a hyperthyroid condition, and that without medication her hyperthyroid condition would substantially limit her ability to drive, see, and sleep. Sarah would satisfy the first step of her prima facie case: demonstrating a disability.[62] The second and third steps of the prima facie case—that Sarah was qualified for the position of widget assembler and that Sarah was replaced with an individual without a disability—are undisputed. Sarah has established a prima facie case and thus has raised a rebuttable inference of discrimination.

If Widgets, Inc. does not produce any evidence, Sarah's motion for summary judgment will be granted.[63] However, suppose that Widgets, Inc. submits the deposition testimony of Harold, which states that he fired Sarah because he believed she was stealing from the company, and the records from the Widget Counter division, which show a discrepancy in the number of widgets handled by Sarah. At this point, the inference of discrimination disappears and Sarah has to produce evidence that

62. *See* Harris v. H & W Contracting Co., 102 F.3d 516, 522 (11th Cir. 1996) (holding that plaintiff with controlled Graves disease had disability because without medication Graves disease—endocrine disorder affecting thyroid gland—would substantially limit her major life activities).

63. *See* 29 C.F.R. app. § 1630.2(i) (1997).

raises a fact issue as to whether she was discriminated against on the basis of her disability. The fact that Harold's decision to discharge Sarah came just four days after Harold learned of Sarah's condition would be sufficient in most courts to raise a fact question as to whether the company's proffered nondiscriminatory reasons were merely pretext for disability discrimination.[64] The court would deny Widgets, Inc.'s summary judgment motion.

This hypothetical illustrates only one set of circumstances that may work to allow an unmeritorious claim to survive summary judgment. There are many others. For example, some courts believe that evidence of poor work performance is insufficient justification for an adverse employment action when the poor performance had been accepted for a long time before the action was taken.[65] In other cases, judges simply refuse to resolve discrimination claims on summary judgment because

64. In those courts that require a showing of discriminatory intent as part of the prima facie case, it is unclear whether the timing of the termination decision would suffice to establish a prima facie case and meet the plaintiff's secondary burden of raising a fact issue as to the employer's proffered nondiscriminatory reasons. The proximity in time inference of discrimination is widely implemented throughout the range of employment discrimination cases. *See, e.g.*, Stever v. Independent Sch. Dist. No. 625, 943 F.2d 845 (8th Cir. 1991) (noting that close proximity in time between last complaint of nurse and retaliatory transfer shows causal connection); Pontarelli v. Stone, 930 F.2d 104 (1st Cir. 1991) (finding that circumstantial evidence that superior was aware of complaint and that adverse action was taken shortly thereafter created inference of discrimination); Holland v. Jefferson Nat'l Life Co., 883 F.2d 1307 (7th Cir. 1989) (observing that close temporal proximity between worker's sexual harassment complaint and adverse employment action can show causal connection); Taitt v. Chemical Bank, 849 F.2d 775 (2d Cir. 1988) (holding that close proximity creates inference of retaliation in Title VII case); Schwartzman v. Valenzuela, 846 F.2d 1209 (9th Cir. 1988) (holding that close proximity in time between exercise of First Amendment rights and firing creates presumption that firing related to speech); DeCintio v. Westchester County Med. Ctr., 821 F.2d 111 (2d Cir. 1987) (finding that adverse action taken within one year of employer's notification of disability creates presumption of retaliation).

65. *See, e.g.*, Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 332 (3d Cir. 1995) (finding it "questionable" why company would fire only salesperson to receive consecutive annual bonuses in response to organizational deficiencies employer had tacitly accepted for over two decades); Levin v. Analysis & Tech., 960 F.2d 314, 317 (2d Cir. 1992) (holding that employer's claim that plaintiff was discharged for poor attitude did not provide basis for summary judgment where there was evidence employee's attitude had been accepted for years); Giacoletto v. Amax Zinc Co., 954 F.2d 424, 426–27 (7th Cir. 1992) (holding that evidence supported finding of pretext despite employer's claim that plaintiff had "poor interpersonal skills" where plaintiff had been employed for 14 years); Blalock v. Metals Trades, Inc., 775 F.2d 703, 709 (6th Cir. 1985) (holding that employer's legitimate concerns with plaintiff's performance were not determinative where that "same level of performance" had been acceptable to employer in past).

they necessarily involve a determination of intent, which is traditionally thought to be the role of the fact finder.[66]

To the extent that the EEOC's interpretation of "substantially limited" increases the probability of surviving the summary judgment stage, it significantly increases the settlement value of nuisance suits and encourages individuals with controlled impairments to sue under the ADA. These results indicate that the scope of the ADA is being expanded beyond justifiable boundaries.

III. JUSTIFICATIONS

A. The Anti-Discrimination Principle

Although Congress did not intend to limit the ADA to individuals with traditional disabilities, it is not clear whether individuals with controlled impairments should benefit from the Act's protections. The ADA states in its findings and purposes that:

> [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.[67]

This passage embodies the traditional expression of the anti-discrimination principle. In the original context of race discrimination, the anti-discrimination principle postulated that "black equals white, but

---

66. *See, e.g.*, Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1071 (3d Cir. 1996) ("The role of determining whether the inference of discrimination is warranted must remain with the province of the jury, because a finding of discrimination is at bottom a determination of intent."); *Brewer*, 72 F.3d at 331 (3d Cir. 1995) ("On summary judgment, it is not the court's role to weigh the disputed evidence and decide which is more probative."); Sempier v. Johnson & Higgins, 45 F.3d 724, 731 (3d Cir. 1995) ("It is neither our role nor the district court's role on summary judgment to compare the testimony of various affiants and decide who is more credible."); Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1224 (2d Cir. 1994) (stating that summary judgment is "drastic provisional remedy" and that "trial court must be cautious about granting summary judgment to an employer when, as here, its intent is at issue"). *See generally* Jeffrey S. Klein & Nicholas J. Pappas, *Summary Judgment in Discrimination Cases*, N.Y. L.J., Nov. 10, 1994, at 3 (discussing trend in Second Circuit that disfavors entry of summary judgment for defendants in employment discrimination cases).

67. 42 U.S.C. § 12101(a)(7) (1994).

for discrimination." The corresponding postulate in the disability context is that "disabled equals abled, but for discrimination." In short, because discrimination is the only barrier to equality, government intervention is proper.

The anti-discrimination principle presupposes an animus-based form of disability discrimination. Animus-based disability discrimination includes the distaste for, discomfort with, and stereotype of individuals with disabilities. The ADA's definition of disability reflects an understanding of this concept of discrimination. What gives rise to discriminatory animus against people with disabilities is the fact that they are substantially limited in some fundamental aspect of living compared with the average person. This "difference in living" creates the discrete and insular group, makes individuals with disabilities a historically powerless group, and gives rise to the average person's discomfort with individuals who have disabilities. The "difference in living" creates a basis for stereotypes about the limitations of disabilities. The Act's focus on the effects of the impairment on the individual's life is no accident; it was carefully constructed to reflect what is at the heart of discrimination against people with disabilities.

Not surprisingly, individuals with controlled impairments do not fit within this animus-based conception of disability discrimination. Individuals with controlled impairments do not suffer from a fundamental difference in living historically and have not been subjected to discrimination. No social stigmas attach to controlled impairments precisely because they are controlled. No stereotypes or misperceptions attach to controlled impairments because they have no obvious effect on the daily activities of the individuals. Individuals with controlled impairments do not suffer from discrimination on the basis of characteristics they cannot control because they can and do control their impairments. No evidence or objective reason supports the belief that individuals with controlled impairments are the subject of invidious discrimination.

B. The Insurance Rationale

Individuals with controlled impairments do not fit within the proposed "insurance" rationale for the ADA.[68] The traditional anti-discrimination principle is a sufficient justification for only part of the ADA's anti-

68. *See infra* note 69 and accompanying text.

discrimination mandate. Where an individual with a disability is qualified to perform a job without any need for accommodation, but is nonetheless refused the position due to an employer's misperceptions, the individual is a victim of traditional discrimination and the traditional anti-discrimination model is appropriate. However, where an individual with a disability can perform the job only with some accommodation, the "discrimination" may not be based on any animus but rather on cost considerations; thus, the traditional anti-discrimination model is an insufficient explanation. The ADA's reasonable accommodation requirement recognizes that an individual with a disability does not always perform the same as an individual without a disability; such an individual must be treated differently (given some small accommodation) to be treated equally.

Professors Karlan and Rutherglen have suggested that the ADA's reasonable accommodation mandate is justified as a form of supplemental disability insurance intended to provide people with disabilities "equal opportunities" rather than equal treatment.[69] This suggests that the ADA attempts to ensure that individuals with disabilities remain in the workforce by requiring employers to expend resources to keep them working.

The insurance justification does not explain why individuals with controlled impairments should be protected under the ADA. These individuals would not be unemployed without the ADA. They do not face any barriers (physical or intangible) to equal opportunity in the workplace. Their impairments do not impede them because their impairments are controlled. Because they suffer no substantial limitation on any major life activity, individuals with controlled impairments are not precluded from full and equal opportunity in employment.

Why are individuals with controlled impairments given the benefits of the ADA? Possibly, their inclusion is a necessary evil for accomplishing the ADA's broader purpose. The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[70] If the no mitigating measures guideline is necessary to accommodate this broad purpose, then the costs associated with this guideline may be justified. This guideline, which extends ADA protection to individuals with

69. Karlan & Rutherglen, *supra* note 4, at 26.

70. 42 U.S.C. § 12101(b)(1) (1994).

controlled impairments, may be necessary to eliminate some other form of pernicious disability discrimination that the Act seeks to eliminate. The question is whether certain concerns can be addressed only through adoption of the no mitigating measures guideline.

C. *Unmedicated Conditions*

The no mitigating measures guideline is superfluous to the extent that it was adopted to prevent employers from discriminating on the basis of unmedicated conditions. Where an employer requires an employee's uncorrected or untreated condition to satisfy a particular standard, the disability determination will be made without regard to corrective or mitigating measures, regardless of the EEOC guideline. Courts and employers simply address the reality of the current employment context. When an employer requires an employee's uncorrected or uncontrolled condition to meet a standard, the question is whether the employee's condition is a substantially limiting impairment. If so, the employee may have the right to demand a reasonable accommodation. For example, where an employer requires an employee's uncorrected vision to meet some minimal visual acuity, the existence of a disability will be determined by looking at the employee's uncorrected vision.[71] If the employee's uncorrected vision would qualify as a disability, then the employee has the right to demand a reasonable accommodation of wearing glasses. If the employer insists on maintaining the uncorrected visual acuity standard, the employer will have to show the court that the uncorrected visual acuity standard is a bona fide occupational qualification. This analysis simply reflects the reality of the actual employer-employee relationship.

Where the employer discriminates against an employee because of *potential* limitations of the employee's unmedicated condition, the employee is protected under the third prong of the definition of disability: being "regarded as having an impairment." By including "regarded as" in the statutory definition, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[72] As discussed above, the regulation interpreting the third

71. *See, e.g.*, Fallacaro v. Richardson, 965 F. Supp. 87, 90 (D.D.C. 1997) (discussing IRS requirement that candidates for special agent have uncorrected visual acuity of 20/200).

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

prong provides that an individual who is *not* substantially limited, but is regarded as being so limited, has a disability. Thus, the third prong definition of disability already addresses any concern that employers will discriminate against individuals because of the potential effects of their unmedicated conditions.[73]

D. Traditional Impairments

Under the no mitigating measures guideline, individuals with traditional disabilities[74] will be protected by the Act, even when the effects of their medication or other mitigating measures are taken into consideration.[75] They are substantially limited in a major life activity despite the ameliorative effects of their medication or other mitigating measures. For example, a blind person with a seeing eye dog still cannot see. An insulin dependent diabetic who, even with the help of insulin, must avoid the slightest levels of stress is substantially limited in the major life activity of working.[76] An epileptic who experiences rare seizures is substantially limited in the major life activity of working because federal and state safety regulations exclude her from a wide range of jobs.[77] A man with a prosthetic leg has a disability because the

---

73. The legislative history also reflects a similar concern that cancer patients who have recovered after undergoing treatment will be discriminated against because of their potential for a re-occurrence of the disease. This concern is addressed by the second prong definition of disability, which protects individuals with a record of an impairment that substantially limited their major life activities. 42 U.S.C. § 12102(2)(b) (1994).

74. Examples include insulin dependent diabetics, amputees, and epileptics.

75. *See supra* notes 19–21 and accompanying text.

76. *See* Gilday v. Mecosta County, 124 F.3d 760, 768 (6th Cir. 1997) (Kennedy, J., concurring and dissenting) (noting that even with medication, diabetic plaintiff could not handle stress without suffering increased blood sugar levels and stating that "a condition which makes one unable to deal with stress may well substantially limit one in the major life activity of working").

77. *See* Reynolds v. Brock, 815 F.2d 571, 574 (9th Cir. 1987) ("[Plaintiff's] epilepsy substantially limits her ability to work. Even though medication controls her seizures, federal and state regulations and policies restrict the types of jobs available to her.").

Epileptics are not allowed to drive even when their conditions are controlled by medication. *Id.* Many courts have held that an inability to drive substantially limits the ability to take care of oneself or work. *See, e.g.*, Best v. Shell Oil Co., 107 F.3d 544, 546 (7th Cir. 1997) (finding that inability to drive could constitute substantial limitation on major life activity of working); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir.1995) (considering whether plaintiff could drive when determining whether plaintiff was substantially limited in major life activity other than working); Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1433 n.13 (N.D. Cal. 1996) (holding that jury could find driving is major life activity); Ouzts v. USAir, Inc., 1996 WL 578514 (W.D. Pa. July 26, 1996) (considering that plaintiff could drive car as evidence that she was not substantially

prosthetic limb permits only limited standing and walking.[78] Because the mitigating measure does not erase all limiting aspects of the impairment, the individual is regarded as having a disability under the first prong of the definition of disability.[79]

Similarly, where the medication or mitigating measure is itself substantially limiting, the individual will be deemed to have a disability under the first prong definition.[80] For example, if an individual's medication for schizophrenia produces severe dyslexia, the medication itself would substantially limit the individual's ability to learn, and the individual would be regarded as having a disability under the first prong definition of disability.

If sometime in the future medical science progresses to the point that these impairments are completely controlled by means that are themselves not substantially limiting, then these individuals would not be considered as having disabilities under the first prong definition of disability. In the 1970s television series, The Six Million Dollar Man, scientists rehabilitated a severely injured astronaut with bionic prosthetic limbs, including two legs, one arm, and a bionic prosthetic eye. The result is that the astronaut can run faster, see farther, and lift more than any "normal" man. If and when we are able to create the Six Million

---

limited in performing manual tasks); *see also* EEOC Technical Assistance Manual, at II-4 to 5 (providing example of individual with disability as one unable to drive).

78. 29 C.F.R. app. § 1630.2(j) ("[An] individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking."); 2 EEOC Compliance Manual § 902, at 902-18 ("[I]f an individual's arthritis makes it unusually difficult (as compared to most people or to the average person in the general population) to walk, then the individual is substantially limited in the ability to walk."); *see also In re* Dockery, 36 B.R. 41, 42 (E.D. Tenn. 1984) (recognizing that artificial leg permitted debtor to stand for only short periods of time); Belieu v. Murray, 231 F. Supp. 579, 581 (E.D.S.C. 1964) (finding that artificial limb allowed only limited walking and standing); Henson v Workmen's Compensation Appeals Bd., 103 Cal. Rptr. 785, 790–91 (Cal. App. 1972) (finding that man with artificial leg could not care for himself and required daily assistance of his wife).

Individuals with prosthetic legs are also substantially limited from running, which some courts have held to be a major life activity. *See, e.g.*, McKey v. Occidental Chem. Corp., 956 F. Supp. 1313, 1318 (S.D. Tex. 1997); Banks v. Hit or Miss, Inc., 946 F. Supp. 569, 571 (N.D. Ill. 1996).

79. In *Gilday v. Mecosta County*, Judge Moore upheld the validity of the EEOC guideline, stating that "[t]o put a condition on the activity of, for example, hearing, limits that ability, in the same way that putting a condition on the exercise of a right impairs that right." 124 F.3d 760, 763 (6th Cir. 1997). This analysis misses the point. The ADA requires a *substantial* impairment.

80. *Gilday*, 124 F.3d at 767 (Kennedy, J., concurring and dissenting) ("[I]t may well be in some instances that the controlling medication (or other mitigating measure) will itself impose a substantial limitation on an individual's major life activities. In such cases, the individual will be 'disabled' under the ADA.").

Dollar Man, he should not be deemed to have a disability under the first prong definition of disability because he is not substantially limited from any major life activity.

This functional approach to the concept of disability is consistent with the legislative purpose and realistically accommodates the miraculous realities of scientific progress. A functional approach takes into account the changes in world health care, both good and bad. Under the no mitigating measures guideline, the number of ADA plaintiffs is ever increasing.[81] As the world's population grows older and experiences more widespread age-related impairments and as new impairments and diseases surface, more individuals will qualify as having disabilities even though medical science is simultaneously discovering new ways to manage and cure such impairments.

E. Malingerers

Individuals who believe they can qualify as having a disability despite their ability to control their impairments may seek the advantages of the ADA's protection because such opportunistic behavior carries no costs. Without the no mitigating measures guideline, these individuals must live with the substantially limiting effects of their impairments if they manipulate the Act's protection. With the guideline, these individuals may benefit from ADA protection while still remaining free of substantially limiting life effects.

Inciting "malingerers" could be a potential cost of eliminating the no mitigating measures guideline.[82] To the extent that eliminating the no mitigating measures guideline would leave individuals with controlled impairments less protected under the ADA, it might encourage some individuals to stop investing in the management of their illnesses so they can qualify for protection.

Yet, there are several disincentives to underinvesting in mitigating measures. Most obviously, rational people will not cease to mitigate their impairments because the cost of living with an impairment that

---

81. *See supra* Part II.B (arguing that lightening of plaintiffs' evidentiary burden will lead to more plaintiffs).

82. Generally, malingerers should not be the focus of a legislative scheme. Because law is structured for the masses, law should focus on the average rational person rather than on the malingerers, who are outside the system. However, the ADA creates a unique set of incentives for rational individuals to malinger, which makes the malingerer problem important for the ADA to address.

substantially limits a major life activity, even when combined with the added benefit of more generous ADA protection, is far greater than the cost of undertaking such measures. Rational individuals would pay a hundred dollars per month for medication that would enable them to live free of severe pain rather than sit at home in pain to save a thousand dollars per month and receive the benefit of ADA protection.[83]

Additionally, because the ADA requires that the employee be able to perform the essential functions of the job with or without reasonable accommodation, most malingerers will not be able to keep their jobs without controlling their impairments. Were our hypothetical individual to cease taking medication, he would be unable to perform the essential functions of his job like showing up to work and sitting at a desk.

Finally, employees who refuse to take reasonable mitigating measures to manage controllable impairments may not be able to demand that employers accommodate their disabilities. In *Siefken v. Village of Arlington Heights*, the Seventh Circuit held that employees do not have a cause of action under the ADA if they are discharged due to their own failure to manage controllable disabilities.[84] In short, an individual who "voluntarily" has a disability is not entitled to ADA protection. Other courts have endorsed this view,[85] and this rule is consistent with the established principle that an individual cannot demand that an employer pay for mitigating measures such as medication, glasses, and hearing

83. There may be some impairments for which the cost of living with the impairment is low and the advantage of obtaining reasonable accommodation for it is high. Although unlikely, this situation would induce a rational individual to underinvest in available methods for controlling his impairment. For example, a law school student with dyslexia might refuse to pay for medication that would control the impairment in order to demand more time on a law school exam, believing that the advantage of having more time on the exam outweighed the burden of living with dyslexia.

84. 65 F.3d 664, 667 (7th Cir. 1995).

85. *See* Van Stan v. Fancy Colours & Co., 125 F.3d 563, 570 (7th Cir. 1997) ("A plaintiff cannot recover under the ADA if through his own fault he fails to control an otherwise controllable illness."); Keoughan v. Delta Airlines, Inc., 113 F.3d 1246, 1247 (10th Cir. 1997) (noting without disapproval district court's reasoning that "a disabled individual is not 'qualified' if she needs accommodation precisely because she failed to manage an otherwise controllable disorder"); Pangalos v. Prudential Insur. Co. of Am., 5 A.D. Cases 1825 (BNA) (E.D. Pa. Oct. 15, 1996), *aff'd on other grounds*, 118 F.3d 1577 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 587 (1997) (holding that plaintiff's colitis was not disability where it could be remedied by colostomy or diaper); Crane v. Lewis, 551 F. Supp. 27, 28 (D.D.C. 1982) (finding that if hearing impaired employee fails to use hearing aid or telephone amplification device offered by employer, employer would not have to provide other accommodation under ADA); Brundage v. Hahn, 66 Cal. Rptr. 2d 830, 838 (Cal. App. 1997) ("'Reasonable accommodation' does not include excusing a failure to control a controllable disability or giving an employee a 'second chance' to control the disability in the future.").

aids.[86] Denying standing to individuals with such "voluntary" impairments removes any incentive for employees to underinvest or cease to invest in mitigating measures in order to gain protection under the ADA.[87] Courts that wish to abandon the no mitigating measures guideline should consider adopting this approach to avoid inciting malingerers. Furthermore, the high costs associated with malingering behavior, combined with courts' refusal to recognize rights of those who "voluntarily" have disabilities, indicate that the no mitigating measures guideline should be abandoned.

IV. CONSEQUENCES

A. Correcting a Mistake

For those courts that find the no mitigating measures guideline deleterious, the question is whether the guideline binds the courts. Lower courts have split on this question.[88] When deciding whether to defer to an agency interpretation like the guideline, courts must determine whether the guideline is a legislative rule or an interpretive rule.[89] Legislative rules carry the force of law,[90] while interpretive rules are only persuasive.[91] Courts that have found the guideline to be a legislative rule have given it the weight of law absent a finding that the interpretation conflicts with the plain meaning of the statute.[92] In contrast, courts that

86. 29 C.F.R. § 1630.9 (1997).

87. *See* Lisa E. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations,"* 48 Hastings L.J. 75, 95–98 (1996); *see also* Andrea M. Bucoli, *Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals: Morbid Obesity as a Protected Disability or an Unprotected Voluntary Condition*, 28 Ga. L. Rev. 771, 798, 800 (1994) (arguing that although voluntariness of initial cause of impairment should not affect determination of whether individual is protected under ADA, current voluntary mutability of impairment should be relevant); Daniel Seligman, *Growth Situation*, Fortune, Dec. 13, 1993, at 195, 197–98 (distinguishing between impairments that individual brought on himself and impairments that are now correctable, and questioning why government should be providing protection in latter case).

88. *See infra* notes 92–93.

89. A full discussion of interpretive rules and legislative rules is beyond the scope of this Article. For more discussion, see generally 1 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise chs. 6–7 (3d ed. 1994).

90. Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977).

91. Skidmore v. Swift, 323 U.S. 134, 140 (1944).

92. The leading case regarding weight given to legislative rules is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Most courts that have adjudicated this issue have found the guideline to be a legislative rule. *See* Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1435 (N.D. Iowa 1996)

have found the guideline to be merely interpretive have given it only persuasive weight, based on their conclusion that the guidelines are not part of the regulations, but merely part of the appendix.[93]

The competing standards of judicial deference are not determinative. Even accepting that the EEOC guideline is a legislative rule and thereby deserves heightened deference, the guideline does not bind the courts.

Courts must give effect to statutory meaning when statutory language is unambiguous.[94] The ADA's language is not ambiguous. The statute defines disability as including an "impairment that substantially limits a major life activity." Although the statute does not expressly state what time frame is to be used, the tense of the phrase "substantially limits" clearly indicates the determination is to be made with regard to the present reality. The definition is written in the present tense and contemplates that the impairment at the present time substantially limits a major life activity.

Even if the ADA's language were ambiguous, the EEOC guideline may not be given the weight of law if it is inconsistent with the plain language of the statute.[95] The EEOC interpretation of the phrase "substantially limits" is inconsistent with the plain statutory language. The phrase "impairment that substantially limits" does not imply that "disability" includes an impairment that *may* substantially limit a major life activity. Nor does the statute include impairments that *could* substantially limit a major life activity. Yet, the EEOC guideline

---

(finding interpretive guideline to be consistent with statutory language and according guideline judicial deference); *see also* Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 881 (D.C. Kan. 1996) (concluding that because plain language of ADA conflicts with EEOC's Interpretive Guidance, court should evaluate plaintiff's impairment in its medicated state); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) (rejecting guideline as contrary to plain language of the ADA); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (rejecting EEOC's guideline as inconsistent with ADA because it would render phrase "substantially limits" meaningless).

93. *See, e.g.*, Gilday v. Mecosta County, 124 F.3d 760, 763 (6th Cir. 1997) (noting that EEOC's no mitigating measures guideline constitutes interpretive, not legislative, rule, so reviewing court must conduct independent evaluation of guideline); *see also* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 n.3 (5th Cir. 1996); Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997); Moore v. City of Overland Park, 950 F. Supp. 1081, 1088 (D. Kan. 1996); *Coghlan*, 851 F. Supp. at 812.

94. *Chevron*, 467 U.S. at 843.

95. Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989); *see also* Thomas Jefferson Univ. Hosp. v. Shalala, 512 U.S. 504, 512 (1994) (statutory interpretation given by agency charged with administering statute is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation") (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)).

necessarily changes the plain and ordinary meaning of the phrase "substantially limits" to "would, could, or might substantially limit." Under the EEOC interpretation, the phrase "substantially limits" is posed in a hypothetical rather than present reality.

Because the no mitigating measures guideline is inconsistent with the plain language of the statute, courts are not required to defer to the agency's interpretation, regardless of whether the guideline is a legislative or interpretive rule. Instead, courts must give the statutory language its plain and ordinary meaning. The plain and ordinary meaning of the phrase "substantially limits" requires courts and employers to determine whether the impairment substantially limits a major life activity in the reality of the present circumstance. If individuals control their impairments with mitigating measures so that they are not substantially limited, then they do not have disabilities according to the first prong definition of disability.

B. Masking a Larger Problem

To the extent that the guideline's consequences were merely overlooked, the courts can easily correct the EEOC's mistake. However, to the extent that the guideline reflects a lack of understanding of the core concepts of disability and disability discrimination, the guideline predicts a troubling future for the ADA.

One example of the potential for future abuse makes the point aptly. Several legal commentators have noted that an individual with a genetic defect could be construed to have a disability under the ADA if courts determine that (1) reproduction is a major life activity and (2) the risk of transmitting a dreaded genetic defect amounts to a substantial limitation on an individual's ability to reproduce.[96] In *Bragdon v. Abbott*, the U.S. Supreme Court recently opened the Act to this very interpretation.[97]

In *Bragdon*, the plaintiff, an asymptomatic individual infected with HIV, sued her dentist for disability discrimination when he insisted on filling her cavity in a hospital rather than in his office.[98] The Court

96. *See, e.g.*, Brian R. Gin, *Genetic Discrimination: Huntington's Disease and the Americans with Disabilities Act*, 97 Colum. L. Rev. 1406, 1417–19 (1997); Mark A. Rothstein, *Genetic Discrimination in Employment and the Americans with Disabilities Act*, 29 Hous. L. Rev. 23, 43 (1992).

97. No. 97-156 (U.S. June 25, 1998).

98. *Id.* at 2.

explained that even if the risk of transmitting the disease was as little as eight percent, the risk could amount to a substantial limitation on a major life activity: the woman's ability to reproduce.[99] This case indicates that asymptomatic individuals infected with HIV may receive ADA protection.

Using this analysis, any individual with a genetic defect that can be easily transmitted to the next generation and predicts the later onset of a debilitating or fatal disease has a disability. Thus, an individual with the gene for Huntington's disease, a debilitating and ultimately fatal disease that is triggered with near certainty by a gene defect and is easily transmitted to offspring, has a disability at age twenty even though he will not experience any effects of the disease for two decades.[100]

The implications of such an approach are tremendous because every human being has approximately five to ten genetic defects[101] and thousands of gene defects are tied to disease. Although still in the early stages of the Human Genome Project, scientists have identified single gene defects for sickle cell anemia,[102] spina bifida,[103] Tay-Sachs disease,[104] cystic fibrosis,[105] neural tube defects,[106] phenylketonuria,[107] colon cancer,[108] Lou Gehrig's disease,[109] Alzheimer's disease,[110] and

---

99. *Id.* at 2.

100. *See* John Carey et al., *The Genetic Age*, Bus. Week, May 28, 1990, at 68, 68 (individuals carrying genetic defect that causes Huntington's disease have ninety percent chance of contracting disease in midlife and fifty percent chance of transmitting disease to offspring).

101. *See id.* at 71. *Compare* Gina Kolata, *Studies Suggest That Genes Define a Person's Nutrient Needs*, N.Y. Times, Oct. 26, 1995, at A13 (quoting one researcher as commenting that "it will turn out that 'there aren't any normal people'"), *with* Susan O'Hara, Comment, *The Use of Genetic Testing in the Health Insurance Industry: The Creation of a "Biologic Underclass,"* 22 Sw. U. L. Rev. 1211, 1224 (1993) (reporting that "[e]very human being has between four and eight defects").

102. *See* Marvin R. Natowicz et al., *Genetic Discrimination and the Law*, 50 Am. J. Hum. Genetics 465, 466 (1992).

103. *See* Kolata, *supra* note 101, at A13.

104. *See* Laurie Garret, *Birth Announces Healthy Embryos Implanted in Mom to Avert Deadly Tay-Sachs Syndrome*, Newsday, Jan. 28, 1994, at 4 (noting that two genes for Tay-Sachs signals certain onset of incurable disease).

105. *See* Judy Berlfein, *Genetic Testing: Health Care Trap*, L.A. Times, Apr. 30, 1990, at B2; Kitta MacPherson, *Scientists Release Roadmap of Genes*, Star-Ledger, Sept. 28, 1995, at A1.

106. *See* Kolata, *supra* note 101, at A13.

107. *See* Natowicz, *supra* note 102, at 465.

108. *See* Bill Dietrich, *Ethics Keeping Pace with Gene Mapping*, Seattle Times, May 26, 1994, at B2 (finding that estimated one million Americans with defect have "an 80% risk of getting this kind of cancer" unless preventative measures are taken).

Duchenne muscular dystrophy.[111] Some gene defects indicate a strong likelihood for diseases, such as breast cancer,[112] heart disease,[113] hypertension,[114] and emphysema,[115] and warn against propensities for diseases like rheumatoid arthritis,[116] mental illness,[117] and alcoholism.[118] These defects tend to be single-gene disorders, easily identified and reasonably reliable.[119] In addition, a host of other gene defects, in combination, may predict debilitating diseases. As medical science progresses and genetic screening becomes more commonplace, an ever increasing number of individuals will carry a gene defect predicting the strong likelihood (greater than eight percent) of a debilitating disease or illness that can be transmitted to offspring.

Thus, the Supreme Court's analysis has opened up the ADA to a new class of unintended beneficiaries—individuals with genetic defects. Not surprisingly, genetic defects do not fit within the ADA's concept of disability. Like individuals with controlled impairments, individuals with genetic defects (who are not yet suffering from the predicted disease or illness) do not experience any difference in living. They do not need accommodations to increase their ability to function in the workplace because they do not suffer from inability to function. Individuals with genetic defects are not discrete or insular because all human beings have genetic defects. Nor are they a historically segregated group. The identification of gene defects is a relatively new practice and, while there is anecdotal evidence of discrimination against gene defect carriers by insurance companies, no evidence shows they are systematically excluded from the workplace. Finally, any "discrimination" against

---

109. *See* Natalie Angier, *Gene Hunters Pursue Elusive and Complex Traits of Mind*, N.Y. Times, Oct. 31, 1995, at C2; MacPherson, *supra* note 105, at A1.

110. *See* MacPherson, *supra* note 105, at A1.

111. *See* Berlfein, *supra* note 105, at B2; Carey, *supra* note 100, at 68; Natowicz, *supra* note 102, at 467.

112. *See* Gina Kolata, *Research Links One Gene to Most Breast Cancers: New Hope for Predicting and Treating Disease*, N.Y. Times, Nov. 3, 1995, at A1.

113. *See* MacPherson, *supra* note 105, at A1; *see also*, Kolata, *supra* note 101, at A1 (noting that scientists suspect adults with two copies of "aberrant gene are three times as likely to develop heart disease").

114. *See* MacPherson, *supra* note 105, at A1.

115. *See* Carey, *supra* note 100, at 68.

116. *See* O'Hara, *supra* note 101, at 1214.

117. *See id.*

118. *See id.*

119. *See* Angier, *supra* note 109, at C2.

individuals with genetic defects is not based on stereotypes, but rather on the costs associated with the future diseases. "Genetic discrimination" is not based on a discriminatory animus or a stereotypical assumption, but rather on cost considerations. While genetic discrimination may be deserving of some redress, it does not fit within the conceptual scope of the ADA, and it is not clear whether the anti-discrimination model is the proper vehicle for addressing the problem.[120]

The possibility that individuals with genetic defects may be considered as having disabilities under the ADA illustrates the danger of the current trend. By ignoring the ideological foundations of the ADA, the term "disability" can be continuously manipulated and expanded until it loses any coherent meaning or practical limit.

V. CONCLUSION

Individuals with controlled impairments should not be considered to have disabilities under the ADA. By expanding the definition of disability to include controlled impairments, the EEOC redefines who benefits under the Act, allows a new class of plaintiffs to claim discrimination under the first prong of the disability definition, and forces courts and employers to ignore reality. This redefinition reflects a fundamental lack of understanding of the meaning of "disability" and seriously damages the bridge between the Act's definition of "disability" and the concept of disability discrimination.

Certainly, the ADA advances the cause for individual rights by helping integrate individuals with disabilities into the workplace and society. However, the ADA, like all anti-discrimination legislation, is extremely costly. The costs of implementing the ADA have been rationalized as necessary to eliminate animus-based disability discrimination and provide supplemental disability insurance. However, neither of these rationales justifies including individuals with controlled impairments under the ADA. Such individuals are not subjected to any

120. *See generally* George Rutherglen, *Discrimination and Its Discontents*, 81 Va. L. Rev. 117 (1995) (discussing extension of anti-discrimination principles to new contexts and questioning whether concept of discrimination is correct mechanism for addressing inequities in society).

One could imagine that a solution to the problem of genetic discrimination in health insurance would resolve the problem of genetic discrimination in employment. *See* Alexander Tabarrok, *Genetic Insurance and Testing: Problems and Solutions*, Ball State Univ., Aug. 15, 1997 (working paper, on file with author) (noting that resolution to health insurance problem would largely eliminate any incentives for employers to discriminate against individuals with genetic defects).

form of animus-based discrimination and suffer no barrier to employment that would justify subsidization. Moreover, the inclusion of individuals with controlled impairments does not serve any practical purpose. Without any ideological or practical justification for its existence, the EEOC's no mitigating measures guideline represents a costly extension of ADA protection to an unintended and undeserving group of beneficiaries.

As Congress continues to venture outward from the original model of anti-discrimination legislation to extend protection to other groups, the dangers of losing sight of the ideological foundations of the legislation increases. In the controlled impairments cases, it was not Congress, but rather the EEOC, that lost sight of its ideological load-bearer. The no mitigating measures guideline powerfully demonstrates that the cost of obscuring the concept of disability gives an economic windfall to an undeserving class. In addition, the guideline caused a law originally enacted to enhance individual rights to lose its ideological coherence and expand its protection beyond any justifiable boundary.