Chapter 2

Who Is Protected under the Laws? Historical and Contemporary Perspectives

A. Introduction and Overview

This chapter introduces the student to protections for persons with disabilities under the United States Constitution and how the U.S. Supreme Court interprets the protection afforded by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. It also explains the coverage of the federal statutes that prohibit discrimination against persons with disabilities, with an emphasis on the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1974, the Court's narrowing interpretation of the coverage, and Congress's legislative response to broaden and reinforce the ADA and the Rehabilitation Act by means of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"). It also deals with the requirement that the individual with a disability be "otherwise qualified" to participate in the program or to be employed, and the requirement that the program or employer reasonably accommodate the individual with the disability.

[1] Chapter Goals

The goals for this chapter are to:

- Understand the protections granted by the Equal Protection Clause to some persons with disabilities
- Have a general sense of the various statutes that protect persons with disabilities, whom they cover, and how they are similar to and different from one another
- Recognize how the U.S. Supreme Court and lower federal courts narrowed the definition of "disability" under the ADA
- Understand how Congress broadened the definition of "disability" in the ADA and the Rehabilitation Act when it passed the ADAAA in 2008
- Know how the changes in the ADAAA have created leeway for representatives of individuals with disabilities to advocate for greater protections
- Have a preliminary understanding of the requirement that the individual with a disability be otherwise qualified and be reasonably accommodated

[2] Key Concepts and Definitions

Air Carrier Access Act

This federal law makes it illegal for an air carrier to discriminate against an otherwise qualified individual because of the person's disability.

Americans with Disabilities Act of 1990

Enacted in 1990, the ADA prohibits discrimination against a qualified person with a disability in employment, public services and programs, education, health care, transportation, and public accommodations. The ADA defines a person with a disability as an individual who: 1) has a physical or mental impairment that substantially limits a major life activity; 2) a record of such an

impairment; or 3) is regarded as having such an impairment. In determining whether a person is qualified, the court considers whether there is a reasonable accommodation that would permit the individual to qualify.

Americans with Disabilities Act Amendments Act ("ADAAA")

In 2008, Congress passed the ADAAA in order to overturn decisions of the U.S. Supreme Court that had narrowed the definition of "disability." The new ADAAA broadened the coverage of the ADA.

Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution

This constitutional provision protects persons with disabilities subjected to differential treatment by state or local regulation that is not rationally related to a legitimate state interest. The Supreme Court has held that requiring a permit for a group home for persons with intellectual disabilities who would live under closely supervised and highly regulated conditions rests on irrational prejudice.

Fair Housing Act

This federal act makes it illegal to discriminate in housing against a person with a disability, and requires that multi-unit housing remove architectural barriers under certain conditions.

Individuals with Disabilities Education Act (IDEA)

The IDEA creates procedural and substantive rights for children with specific intellectual, emotional, and physical disabilities who need special education and related services.

Otherwise qualified

Under the ADA and the Rehabilitation Act, an individual with a disability must be otherwise qualified for the job, service, or program either with or without reasonable accommodations.

Reasonable accommodations

Unlike most civil rights statutes, the ADA and the Rehabilitation Act require more than nondiscrimination. They also require reasonable accommodation. Some of the requirements are spelled out in regulatory and statutory language (although generally not as all inclusive listings). Reasonable accommodations include changes to workplace schedules, assignment to vacant positions, changes in physical surroundings, auxiliary aids and services (such as interpreters), waiving zoning requirements, and modification of policies, practices, and procedures (such as allowing assistance animals in places where they are ordinarily prohibited).

This requirement is not intended to require unduly burdensome (administratively or financially) accommodations. Nor is it intended to require that fundamental alterations to a program be made. Case law highlights that the burden is generally on the program or employer to demonstrate that a requested accommodation is not reasonable or an undue burden. It also demonstrates that federal statutes contemplate individualized determinations and an interactive process in determining what accommodations would be reasonable.

Individuals seeking accommodations are not entitled to their preferred or a best accommodation. The accommodation should be reasonable and effective. What is unclear at present is whether the accommodation must be "necessary" for it to be required.

Section 504 of the Rehabilitation Act

Section 504 prohibits discrimination against persons with disabilities in programs receiving federal financial assistance. Many ADA Title III programs that provide accommodations for the public receive federal financial assistance, and are therefore also covered by Section 504. Many programs subject primarily to Section 504 of the Rehabilitation Act and Title II (such as public

hospitals) may have within them entities subject to Title III, such as bookstores,.pngt shops, or Title II entities may lease or use or facilitate private programs. The determination of which requirements apply—Titles II, III, and Section 504—and how they relate can be complex and challenging.

B. Constitutional Protections

There is some protection for persons with disabilities under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. This protection, however, is limited to irrational classification by state law or irrational discrimination engaged in by state actors. It does not apply to private actors. And, there is some debate as to the extent that the federal Constitution protects persons with disabilities. Federal laws such as the Rehabilitation Act and the Americans with Disabilities Act (ADA), therefore, provide most of the protections enjoyed by persons with disabilities. There are, however, problems with liability against the states for damages under the ADA because of immunity created by the Eleventh Amendment to the Constitution. Chapter 3 will deal with those issues. A state or municipality's potential liability for disability-based discrimination under the federal Constitution is addressed in this chapter.

The following case involved the petition of the operator of a group home for individuals with intellectual disabilities (the case references the term no longer used—"mentally retarded"). The operator was denied a special use permit required by the city's zoning ordinance for "hospitals." The decision sets out the level of constitutional scrutiny that should apply based on the category of individuals seeking the permit. The district court found that persons with intellectual disabilities are not entitled to any special treatment, but the Fifth Circuit found them to belong to a quasi-suspect class entitled to intermediate-level scrutiny.

City of Cleburne v. Cleburne Living Center, Inc.

473 U.S. 432 (1985)

JUSTICE WHITE delivered the opinion of the Court.

* * *

I

[Lower court proceedings omitted.]

II

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such

discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution.

[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

III

Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. First, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

Second, the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.

Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable. It may be, as CLC contends, that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny. The relevant inquiry, however, is whether heightened scrutiny is constitutionally mandated in the first instance. Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all. Much recent legislation intended to benefit the retarded also assumes the need for measures that might be perceived to disadvantage them. Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts.

Third, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.

Fourth, if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who

cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.

IV

[This section discusses the application of the rational basis test to the facts. It includes a discussion of why the objections to the special use permit are not sufficient to justify the discriminatory treatment.]

The constitutional issue is clearly posed. The city does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and it does so, as the District Court found, because it would be a facility for the mentally retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted? ... Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.

* * *

The District Court found that the City Council's insistence on the permit rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.

Second, the Council had two objections to the location of the facility. It was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some

portion of the community to validate what would otherwise be an equal protection violation. The other objection to the home's location was that it was located on "a five hundred year flood plain." This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit. The same may be said of another concern of the Council—doubts about the legal responsibility for actions which the mentally retarded might take. If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.

Fourth, the Council was concerned with the size of the home and the number of people that would occupy it. The District Court found, and the Court of Appeals repeated, that "[if] the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance." Given this finding, there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state standards for group housing in the community; and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type.

The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

The judgment of the Court of Appeals is affirmed insofar as it invalidates the zoning ordinance as applied to the Featherston home. The judgment is otherwise vacated, and the case is remanded.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in the judgment in part and dissenting in part.

[The dissent believes that a higher level of scrutiny—intermediate scrutiny, which is used for sex-based classifications—should have been applied.] * * *

II

* * *

First, the interest of the retarded in establishing group homes is substantial. The right to "establish a home" has long been cherished as one of the fundamental liberties embraced by the Due Process Clause. For retarded adults, this right means living together in group homes, for as deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community.

Second, the mentally retarded have been subject to a "lengthy and tragic history," of segregation and discrimination that can only be called grotesque. During much of the 19th century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices. By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical

authorities and others began to portray the "feebleminded" as a "menace to society and civilization ... responsible in a large degree for many, if not all, of our social problems." A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded "unfit for citizenship."

Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the "basic civil rights of man"—the right to marry and procreate. Marriages of the retarded were made, and in some States continue to be, not only voidable but also often a criminal offense. The purpose of such limitations, which frequently applied only to women of child-bearing age, was unabashedly eugenic: to prevent the retarded from propagating. To assure this end, 29 States enacted compulsory eugenic sterilization laws between 1907 and 1931.

Prejudice, once let loose, is not easily cabined. As of 1979, most States still categorically disqualified "idiots" from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials. Not until Congress enacted the Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U. S. C. §1400 *et seq*., were "the [doors] of public education" opened wide to handicapped children. But most important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them.

The searching scrutiny I would give to restrictions on the ability of the retarded to establish community group homes leads me to conclude that Cleburne's vague generalizations for classifying the "feeble-minded" with drug addicts, alcoholics, and the insane, and excluding them where the elderly, the ill, the boarder, and the transient are allowed, are not substantial or important enough to overcome the suspicion that the ordinance rests on impermissible assumptions or outmoded and perhaps invidious stereotypes.

Notes and Questions

1. The *City of Cleburne* is known by Constitutional scholars for adopting a variation of the rational relationship test under the Equal Protection Clause that imposes more scrutiny than most classifications subject to the test. Justice Marshall's dissent (in part) challenges the Court as being somewhat disingenuous in its application of the test, and argues that the Court should apply heightened scrutiny to the classification in question. He also argues that the Court's scrutiny goes beyond that applied to other laws subject to the rational relationship test.

2. Justice Marshall refers to the history of segregation of persons with intellectual disabilities and to the eugenics movement. Why is this background important to his argument? Can the argument be made that persons with disabilities, and, in particular, those with intellectual disabilities, possess immutable characteristics that have caused them to suffer a history of unfair and discriminatory treatment and political powerlessness? Explain.

3. The Court notes that there has been a great deal of legislation to protect the rights of individuals with disabilities as evidence that this group is not politically powerless, and thus does not require special constitutional treatment. Why then are racial minorities, who are treated as a suspect class, considered to be politically powerless when there is a substantial body of civil rights legislation prohibiting race discrimination?

4. In the unedited version of the opinion, Justice Marshall refers to the case of *Buck v. Bell*, 274 U.S. 200 (1927). In that case, Carrie Buck was institutionalized because she was categorized by the state of Virginia as "feebleminded." According to the opinion, Carrie's mother was also

"feebleminded," and Carrie had an illegitimate "feebleminded" child. Under Virginia law, the state ordered the institution to sterilize Carrie. When she challenged the forced sterilization, the Supreme Court, in an opinion by Justice Holmes, held that the procedure would not violate Buck's federal constitutional rights. A famous portion of the opinion states:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.... Three generations of imbeciles is enough.

Id. at 207. Subsequently, there is a serious question as to whether Carrie Buck had an intellectual disability. In *Three Generations, No Imbeciles*, author Paul D. Lombardo notes that he found evidence that Carrie Buck and her "feebleminded" daughter had average or above average intellectual abilities, and that the state had "manufactured evidence to fit the state's case against Carrie Buck." See PAUL D. LOMBARDO, THREE GENERATIONS, NO IMBECILES, xi (2008).

5. Disagreement about the meaning of *Cleburne* continues. In *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), see Chapter 3, Section [H][2], *infra*, Chief Justice Rehnquist, who authored the majority opinion in *Garrett*, interpreted *Cleburne* as holding merely that minimum rational-basis review is required, and that no special scrutiny applies to classifications of persons with disabilities. He stated that no matter how hardhearted, states do not have to grant reasonable accommodations to persons with disabilities. Justice Breyer, in dissent in *Garrett*, however, interpreted *Cleburne* to hold that state laws that rest either on a desire to harm or on negative attitudes, fear or irrational prejudices would unconstitutionally discriminate against persons with disabilities. Which of these interpretations makes more sense? Does the interpretation of *Cleburne* depend on the composition of the Supreme Court? In what way?

As noted later in Section B, Congress enacted the ADA after this decision, and the findings include a recognition that "historically, society has tended to isolate and segregate individuals with disabilities," (42 U.S.C. §12101(a)(2)), that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion," (42 U.S.C. §12101(a)(5)), and that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." (42 U.S.C. §12101(a)(6)). It is likely that this language is a direct response to the *Cleburne* Court's analysis of why individuals with disabilities are not a suspect or quasi-suspect class. Since the 1985 opinion, the Supreme Court has not yet addressed whether individuals with disabilities as a group should be given heightened scrutiny under the Constitution.

In the next case, the Supreme Court addresses whether differing treatment between two different types of disabilities can withstand constitutional scrutiny. The decision was a result of a challenge by a class of persons with intellectual disabilities who had been involuntarily committed to institutions. In Kentucky, the standard for commitment of individuals who have mental illness is that there must be a showing that the individual is a danger to self, family, or others "beyond a reasonable doubt." The standard for committing individuals who have intellectual disabilities is that there must be a showing of danger to self, family, or others by "clear and convincing evidence," a lower proof requirement than that for the commitment of persons with mental illness.

The following is the Court's justification of the distinction between these two groups. Again, the Court uses the term "mental retardation" instead of the currently preferred term "intellectual disability."

Heller v. Doe

509 U.S. 312 (1993)

MR. JUSTICE KENNEDY delivered the opinion of the Court:

[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification."

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A statute is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it," whether or not the basis has a foundation in the record.

Kentucky argues that a lower standard of proof in commitments for mental retardation follows from the fact that mental retardation is easier to diagnose than is mental illness. That general proposition should cause little surprise, for mental retardation is a developmental disability that becomes apparent before adulthood. By the time the person reaches 18 years of age the documentation and other evidence of the condition have been accumulated for years. Mental illness, on the other hand, may be sudden and may not occur, or at least manifest itself, until adulthood. Furthermore, as we recognized in an earlier case, diagnosis of mental illness is difficult. Kentucky's basic premise that mental retardation is easier to diagnose than is mental illness has a sufficient basis in fact.

The differences between the two conditions justifies Kentucky's decision to assign a lower standard of proof in commitment proceedings involving the mentally retarded. In assigning the burden of proof, Kentucky was determining the "risk of error" faced by the subject of the proceedings. If diagnosis is more difficult in cases of mental illness than in instances of mental retardation, a higher burden of proof for the former tends to equalize the risks of an erroneous determination that the subject of a commitment proceeding has the condition in question.

There is moreover, a "reasonably conceivable state of facts," from which Kentucky could conclude that the second prerequisite to commitment—that "[t]he person presents a danger or a threat of danger to self, family, or others,"—is established more easily, as a general rule, in the case of the mentally retarded. Previous instances of violent behavior are an important indicator of future violent tendencies. Mental retardation is a permanent, relatively static condition, so a determination of dangerousness may be made with some accuracy based on previous behavior. We deal here with adults only, so almost by definition in the case of the retarded there is an 18 year record upon which to rely.

This is not so with the mentally ill. Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. Prediction of future behavior is complicated as well by the difficulties inherent in diagnosis of mental illness. It is thus no surprise that psychiatric predictions of future violent behavior by the mentally ill are inaccurate. For these reasons, it would have been plausible for Kentucky to conclude that the dangerousness determination was more accurate as to the mentally retarded than the mentally ill.

[I]t would have been plausible for the Kentucky legislature to believe that most mentally retarded individuals who are committed receive treatment which is different from, and less invasive than, that to which the mentally ill are subjected.

Kentucky's burden of proof scheme, then, can be explained by differences in the ease of diagnosis and the accuracy of the prediction of future dangerousness and by the nature of the treatment received after commitment. Each of these rationales, standing on its own, would suffice to establish a rational basis for the distinction in question.

Problems

1. Does the *Heller* decision indicate whether the Supreme Court would be likely to view the denial of the special use permit in a case involving a group home for persons with emotional or mental illness more or less favorably than their decision in *Cleburne*, *supra*?

2. Would the analysis be any different if a genetic predisposition to certain kinds of emotional or mental illness were discovered?

3. Does this analysis provide guidance on whether distinctions in health care insurance between mental and physical conditions are valid?

C. Defining Disability: Statutory Definitions and Judicial Interpretations

Congress passed the ADA Amendments Act in September 2008. The statute became effective January 1, 2009, and amends both the ADA and the Rehabilitation Act. The ADAAA was passed to reject the courts' narrow interpretation of the definition of "individual with a disability," and to ensure that more persons with serious impairments would be protected by the law. Most courts have held that the ADAAA does not apply retroactively to conduct occurring before the effective date of the ADAAA, unless the relief requested is limited to injunctive relief. Consequently, a number of cases are just reaching the courts under the ADAAA

This chapter includes historical and contemporary accounts of the statutory provisions, judicial interpretations and the Congressional override of Supreme Court cases that narrowly define those individuals who are protected by the ADA. When Congress first enacted the ADA, drafters of the statute erroneously believed that courts would look to the previous broad interpretations of the Rehabilitation Act to provide for a broad coverage of the ADA. Unfortunately, the Supreme Court significantly narrowed the definition of "individual with a disability" instead.

The ADAAA overturns those Supreme Court cases and instructs courts to broadly interpret the definition of individual with a disability and to focus attention more on the question of whether the covered entity discriminated against the individual based on his or her disability. While it is crucial for students to understand the history of the ADA, the Rehabilitation Act, and the ADAAA in order to interpret the definition of disability in the future, it is equally important for students to recognize that the law that is now in effect encourages more focus on causation and on the issue of whether the covered entity illegally discriminated against the individual. Those issues will be studied in subsequent chapters. This portion of this chapter focuses on the evolution of the definition of "individual with a disability" under the ADA and the Rehabilitation Act and introduces how the definition under other major federal statutes is similar or different.

[1] Statutory Definitions

The following is the statutory language of the five major federal disability discrimination statutes that provide substantive protection. In reading the statutes, note the similarity and differences among them. The Architectural Barriers Act of 1968, 42 U.S.C. §§4151–4157, is not discussed here because it relates primarily to physical aspects of federal buildings and has been subject to very little judicial interpretation. Some other statutes are not discussed here for similar reasons.

AMERICANS WITH DISABILITIES ACT

42 U.S.C. §12102(1) **Disability**

[Author's Note: This definition applies to all subchapters of the ADA.]

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities

of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Major Life Activity

The ADAAA of 2008 amended the 42 U.S.C. §12102 of the ADA to add a non-exhaustive list to the definition of "major life activity:"

> "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."

It also includes in the definition of "major life activity" the operation of a "major bodily function," including but not limited to:

> "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

The ADAAA amended Section 7 of the Rehabilitation Act of 1973, 29 U.S.C. §705, by granting it "the meaning given [major life activities] in ... the Americans with Disabilities Act of 1990." 122 Stat. 3558. *See* 29 U.S.C. §705(9).

On May 24, 2011, the Equal Employment Opportunity Commission Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, Amended, became effective. See 58 Fed. Reg. 16978–17017 (March 25, 2011), 29 C.F.R. Part 1630. The EEOC regulations apply specifically to employment, but are important guidance on the definition of disability as it would apply to Title II and Title III of the ADA and to the Rehabilitation Act. The regulations make clear that the purpose of the ADAAA is to make it easier for persons with disabilities to gain protection under the ADA and the Act should be interpreted to give the broadest coverage possible. 29 C.F.R. Part 1630.1(c)(4). For a series of questions and answers that offer an excellent short guide to the regulations, see U.S. Equal Employment Opportunity Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited June 11, 2012).

Title I (Employment)

42 U.S.C. §12111(8) **Qualified individual with a disability**

> The term "qualified individual with a disability" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. §12112(b)(4) **Construction**

> As used in subsection (a) of this section, the term "discriminate" ... includes—
>
> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

42 U.S.C. §12113(b) **Qualification standards**

> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. §12114(a) **Illegal use of drugs**

> For purposes of this title, the term "individual with a disability" does not include any employee

or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

42 U.S.C. §12114(b) **Rules of construction**

Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

Title II (Public Services)

42 U.S.C. §12131(2) **Qualified individual with a disability**

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Title III (Public Accommodations)

42 U.S.C. §12182(b)(1)(E) **Association**

It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

Title IV (Miscellaneous Provisions)

42 U.S.C. §12208 **Transvestites**

For purposes of this Act, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

42 U.S.C. §12210 **Illegal use of drugs**

(a) In general

For purposes of this Act, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) shall be construed as to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including, but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

42 U.S.C. §12211(a) **Homosexuality and bisexuality**

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this Act.

42 U.S.C. §12211(b) **Certain conditions**

Under this Act, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

REHABILITATION ACT

29 U.S.C. §705(20)

(A) Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who (i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapters I, II, III, VI, and VIII of this chapter.

(B) Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of [29 U.S.C. §§701, 714, 715, 760 et seq., 780 et seq.], any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. §12102).

(C)(i) For purposes of title V of [29 U.S.C. §791 et seq.], the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who—

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

(iii) Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under subchapters I, II and III [29 U.S.C. §§720 et seq., 760 et seq., 771 et seq.] of this chapter, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

(iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any student who is an individual with a disability and who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against students who are not individuals with disabilities. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary action.

(v) For purposes of sections 793 and 794 of this title as such sections relate to employment, the term "individual with a disability" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

(D) For the purpose of sections 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection is unable to perform the duties of the job.

(E) For the purposes of sections 791, 793, 794 of this title—

(i) for purposes of the application of subparagraph (B) to such sections, the term "impairment" does not include homosexuality or bisexuality; and

(ii) therefore the term "individual with a disability" does not include an individual on the basis of homosexuality or bisexuality.

(F) For the purposes of sections 791, 793, 794 of this title, the term "individual with a disability" does not include an individual on the basis of

(i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) compulsive gambling, kleptomania, or pyromania; or

(iii) psychoactive substance use disorders resulting from current illegal use of drugs.

FAIR HOUSING ACT

42 U.S.C. §3602(h)

Handicap means, with respect to a person—

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act).

The Note under Section 3602 states: "For the purposes of this Act ... neither the term 'individual with a handicap' nor the term 'handicap' shall apply to an individual solely because that individual is a transvestite."

AIR CARRIER ACCESS ACT

49 U.S.C. §41705

(a) In providing air transportation an air carrier including ... any foreign air carrier may not discriminate against an otherwise qualified individual on the following grounds:

(1) the individual has a physical or mental impairment that substantially limits one or more major life activities.

(2) the individual has a record of such an impairment.

(3) the individual is regarded as having such an impairment.

14 C.F.R. §382.3

As used in this definition, the phrase:

(a) Physical or mental impairment means:

(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardio-vascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.

14 C.F.R. §382.21

(a) You must not do any of the following things on the basis that a passenger has a communicable disease or infection, unless you determine that the passenger's condition poses a direct threat:

(1) Refuse to provide transportation ...;

(2) Delay the passenger's transportation ...;

(3) Impose on the passenger any condition, restriction, or requirement not imposed on other passengers; or

(4) Require the passenger to provide a medical certificate.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT

20 U.S.C. §1401(3) Child with a disability.

(A) In general. The term “child with a disability” means a child—

(i) with [intellectual disabilities],[1] hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to ... as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9.... The term “child with a disability” for a child aged 3 through 9 may, at the discretion of the State and the local educational agency, include a child—

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas; physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

20 U.S.C. §1401(30) Specific learning disability.

(A) In general. The term “specific learning disability” means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

(B) Disorders included. Such term includes such conditions as perceptual disabilities, brain

injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(C) Disorders not included. Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

[2] Prong One: A Physical or Mental Impairment That Substantially Limits a Major Life Activity

Historically, to be protected under federal disability discrimination law, one must be substantially limited in a major life activity. After the ADA Amendments Act of 2008, a person must still prove a substantial limitation in a major life activity in order to qualify for protection under prongs (A) and (B) of the statute. The individual no longer has to prove the substantial limitation or perceived substantial limitation to qualify for protection under prong (C) (the "regarded as" prong) of the statute so long as the person has an impairment or is perceived as having one.

In 1987, the Supreme Court decided *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), under Section 504 of the Rehabilitation Act. *Arline* broadly defined "substantially limits" and "major life activity." The Court held that Gene Arline, a school teacher with inactive tuberculosis, had a record of a disability and was regarded as having a disability and was therefore protected by the Rehabilitation Act. It rejected the defendant's argument that firing the plaintiff for her contagiousness was not firing her based on her disability.

After *Arline*, and the enactment of the ADA in 1990, *Bragdon v. Abbott*, 524 U.S. 624 (1998), raised the question of whether a woman who was HIV positive but was asymptomatic had a disability covered by the statute. *Bragdon* was important because it, like *Arline*, defined "person with a disability" broadly. Sidney Abbott was a young woman seeking dental treatment. Because of her status, the dentist agreed to provide the services only in a hospital setting, which would be substantially more expensive. In the *Bragdon* decision, the Court focused on the fact that being HIV positive was, for Sidney Abbott, a condition that substantially limited her major life activity of reproduction, noting the following:

> Our evaluation of the medical evidence leads us to conclude that respondent's infection substantially limited her ability to reproduce in two independent ways. First, a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected. The cumulative results of 13 studies collected in a 1994 textbook on AIDS indicates that 20% of male partners of women with HIV became HIV-positive themselves, with a majority of the studies finding a statistically significant risk of infection.
>
> Second, an infected woman risks infecting her child during gestation and childbirth, i.e., perinatal transmission. Petitioner concedes that women infected with HIV face about a 25% risk of transmitting the virus to their children. Published reports available in 1994 confirm the accuracy of this statistic.

The Court, however, in this decision, left unresolved how HIV positive status was to be treated in the context of an individual who because of age or other factors was not likely to engage in the major life activity of reproduction. For example, after *Bragdon*, would a gay man and older woman with asymptomatic HIV infection be able to prove that they are persons with disabilities?

Only a year after the *Bragdon* decision, the Court decided a number of cases that significantly narrowed the definition of disability. And, in response to these cases, the lower courts strictly limited the definition of disability. It is these later cases with which the drafters of the ADAAA took issue.

Notes and Questions

1. The ADAAA changed the definition of major life activity by adding bodily functions. See *supra* for the list of bodily functions. How would this change affect the arguments that could be made on

behalf of the gay or older client with asymptomatic HIV who does not intend to reproduce?

2. For an understanding of how courts are interpreting this definitional change with reference to HIV positivity, see *Horgan v. Simmons*, 704 F. Supp. 2d 814 (N.D. Ill. 2010) (under the ADAAA, HIV positive status may substantially limit major life activity because it impairs function of immune system).

In 1999, only one year after *Bragdon v. Abbott*, the Supreme Court decided three cases that had the effect of severely narrowing the definition of a person with a disability. The issue raised in these cases was, in determining whether a person's impairment substantially limits a major life activity, whether the court should take into account mitigating measures that may affect the impairment. These three cases, often referred to as the *Sutton* trilogy, because they were decided at the same time and applied similar reasoning, include *Sutton v. United Airlines, Inc.,* 527 U.S. 471 (1999), which involved twin sisters with correctable vision who were denied positions as airline pilots. The Court found that because there were "mitigating measures" (i.e., eyeglasses or contact lenses) that could correct the impairment, the individuals were not "disabled" and could not proceed to claim discrimination under the ADA. This conclusion required the Court to strike down the EEOC regulations that instructed courts not to take the effect of mitigating measures into account in determining whether the person had a disability.

In the decision, the Court included the following reasoning, which was much criticized and was the basis for some of the language amending the ADA in 2008.

> Finally, and critically, findings enacted as part of the ADA require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities. Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." This figure is inconsistent with the definition of disability pressed by petitioners.
>
> Although the exact source of the 43 million figure is not clear, the corresponding finding in the 1988 precursor to the ADA was drawn directly from a report prepared by the National Council on Disability. That report detailed the difficulty of estimating the number of disabled persons due to varying operational definitions of disability. It explained that the estimates of the number of disabled Americans ranged from an overinclusive 160 million under a "health conditions approach," which looks at all conditions that impair the health or normal functional abilities of an individual, to an underinclusive 22.7 million under a "work disability approach," which focuses on individuals' reported ability to work. It noted that "a figure of 35 or 36 million [was] the most commonly quoted estimate." The 36 million number included in the 1988 bill's findings thus clearly reflects an approach to defining disabilities that is closer to the work disabilities approach than the health conditions approach....
>
> Because it is included in the ADA's text, the finding that 43 million individuals are disabled gives content to the ADA's terms, specifically the term "disability." Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures.

527 U.S. at 484–87.

The 2008 amendments specifically deleted a portion of the 1990 language that had referenced the 43,000,000 statistic. That no longer appears in the ADA. 42 U.S.C. §12101(a)(1).

The Supreme Court used the mitigating measures reasoning in two other cases decided simultaneously with *Sutton*. *Albertson's, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999), involved an individual whose vision affected his binocular acuity. Mr. Kirkingburg was denied a truck driving

position at a grocery chain, based on his vision deficiencies. His ADA claim of discrimination failed because his brain had developed coping mechanisms for dealing with his limitations. These mitigating measures, when taken into account, meant that he was not "disabled" within the statute.

The third case also involved transportation related employment. In *Murphy v. United Parcel Service, Inc*., 119 S. Ct. 2133 (1999), a United Parcel Service mechanic was dismissed from his job because of high blood pressure. The position description required driving commercial motor vehicles. Because Mr. Murphy's condition was mitigated when he took medication, he was found not to be "substantially limited" in major life activities.

A fourth case, *Bartlett v. New York State Board of Law Examiners*, 527 U.S. 1031 (1999), was remanded on the same day that these cases were decided. *Bartlett* involved a learning disability and whether the condition substantially limited a major life activity. On remand, the lower court determined that her learning disability was substantially limiting to the major life activity of reading. *Bartlett v. New York State Bd. of Law Examiners*, 2001 U.S. Dist. LEXIS 11926, 2001 WL 930792 (S.D.N.Y. 2001).

After the Court's narrow definition of "disability" in the *Sutton* trilogy, there was a significant change in lower court decisions regarding whether a person had a disability. Whereas before the trilogy, courts had held that persons with conditions such as epilepsy, diabetes and cancer were persons with disabilities, after the trilogy, more restrictive rulings emerged from the lower courts. Courts now held that the following were not disabilities in most cases: epilepsy, muscular dystrophy, intellectual disabilities, hearing impairment, heart disease, and HIV infection. *See* Jonathan R. Mook, ADA Amendments Act of 2008 8–9 (2009 LexisNexis). Individuals with these conditions were much more likely to lose a defense motion to dismiss or for summary judgment based on noncoverage. For recent cases demonstrating this trend, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW, §4.8 (2012 and cumulative supplement).

The ADAAA overturned the reasoning of *Sutton* and the other cases in the trilogy, while maintaining an exception for persons wearing eyeglasses or contact lenses. The purposes section of the ADAAA states that one of the purposes of the ADAAA is "to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures" 110 P.L. 325(b)(2).

Notes

1. Section 3 of the ADA, 42 U.S.C. §12102, is amended to read:

(4) Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies:

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measure of ordinary eyeglasses and contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

Section 103 of the ADA, 42 U.S.C. §12113, is amended by adding the following:

> ... Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

For regulatory guidance on the issue of rules of construction, see 29 C.F.R. §1630.1(c).

2. If the Sutton sisters were to bring a lawsuit now against United Airlines, would the company be permitted legally to refuse to hire them based on their uncorrected vision? Would the Sutton sisters be able to allege that they were "regarded as" having a disability? Explain. If not, would there be another portion of the statute on which they could rely? What would United Airlines have to prove under the amended Section 12113? What if a law firm decided not to hire new associates unless their uncorrected vision is 20/40 or better? Would this be permissible? Explain.

3. What if the mitigation for the disease actually caused other problems? For example, what if a plaintiff who has cancer surgery is treated with radiation and chemotherapy that make her very sick and tired? After the ADAAA, would the court be permitted to take into account the harmful effects of the radiation and chemotherapy in determining whether her impairment substantially limits a major life activity? Check the language of the statute carefully. 42 U.S.C. §12102(4)(E)(i).

4. The Court in *Sutton* suggests that no agency has the authority to issue regulations implementing the generally applicable provisions of the ADA—those defining what a disability is. This is because the Act was divided into separate titles. In each Title, the Act gave authority to an agency to write regulations pursuant to the Act. Title I, for example, which is the employment section, authorized the Equal Employment Opportunity Commission to write regulations in Section 12116. The definition of the term "disability," however, applies to all titles and appears in a separate section that precedes Title I of the Act. The ADAAA corrects the problem that there was no agency designated to write regulations concerning the definition of the term "disability" by adding a new rule of construction that grants such authority:

> The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008....

ADAAA §6(a)(1).

For the regulations, see 58 Fed. Reg. 16978–17017 (March 25, 2011), 29 C.F.R. Part 1630.

As mentioned above, the *Sutton* trilogy resulted in more limited coverage of persons with impairments (before the enactment of the 2008 ADA Amendments) because with great frequency, the courts held that their impairments did not substantially limit a major life activity. Three years after the *Sutton* trilogy the Supreme Court further narrowed the definition of disability. It dealt with the issue of what demonstration a plaintiff must make to prove that she is substantially limited in the major life activity of performing manual tasks. *Toyota Motor Manufacturing v. Williams,* 534 U.S. 184 (2001), involved an individual who worked at an automobile manufacturing plant on an assembly line. After she received accommodations for her pain in lifting her arms when working on four shift assignments, the company determined that all employees should be able to rotate through all four work assignments and refused any further accommodation for her. A dispute about whether she was to be accommodated arose and resulted in the litigation that provided the pre-ADAAA Supreme Court standard for what it means to be substantially limited in performing a "major life activity."

> We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be

permanent or long-term.

> It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those "claiming the Act's protection ... to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience ... is substantial." That the Act defines "disability" "with respect to an individual," makes clear that Congress intended the existence of a disability to be determined in such a case-by-case manner.
>
> An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person. Carpal tunnel syndrome, one of respondent's impairments, is just such a condition. While cases of severe carpal tunnel syndrome are characterized by muscle atrophy and extreme sensory deficits, mild cases generally do not have either of these effects and create only intermittent symptoms of numbness and tingling. Studies have further shown that, even without surgical treatment, one quarter of carpal tunnel cases resolve in one month, but that in 22 percent of cases, symptoms last for eight years or longer. When pregnancy is the cause of carpal tunnel syndrome, in contrast, the symptoms normally resolve within two weeks of delivery. Given these large potential differences in the severity and duration of the effects of carpal tunnel syndrome, an individual's carpal tunnel syndrome diagnosis, on its own, does not indicate whether the individual has a disability within the meaning of the ADA.

534 U.S. at 198–99.

Notes and Questions

1. One finding of the ADAAA is that due to the *Sutton* trilogy and *Toyota*, the lower courts have incorrectly concluded that persons with substantially limiting impairments are not individuals with disabilities. The ADAAA further found that, in particular, *Toyota* interpreted the definition of "substantially limits" "to require a greater degree of limitation than was intended by Congress." It also found that the EEOC regulations interpreting "substantially limits" as "significantly restricted" sets too high a standard. P.L. 110-325(2)(a)(6), (7) & (8). One of the purposes of the ADAAA is to reject *Toyota*'s holding that the terms "substantially limits" and "major" be interpreting strictly in order to ensure a demanding standard for determining whether a person has a disability; another is to reject the holding that a person must demonstrate, in order to prove that an impairment substantially limits a major life activity, that the individual "must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." P.L. 110-325(2)(b)(4). Another purpose is to convey congressional intent that the primary issue should be whether a covered entity complied with its obligations under the ADA, and that the question of whether an individual's impairment constitutes a disability should "not demand extensive analysis." P.L. 110-325(2)(b)(5). Finally, the ADAAA states that Congress expects the EEOC to rewrite the part of its regulations that define "substantially limits" as "significantly restricted" in order to comply with the ADA and the amendments. P.L. 110-325(2)(b)(6).

2. The EEOC responded to Congress' directive in the ADAAA to promulgate new regulations clarifying that "the term 'substantially limits' shall be construed broadly in favor of expansive coverage" and that the term is "not meant to be a demanding standard." 29 C.F.R. Sec. 1630.2(j)(1)(i) (2013). The regulation also expressly provides that "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" for purposes of proving an actual disability. 29 C.F.R. Sec. 1630.2(j)(1)(ix). In *Summers v. Altarum Institute*, *Corp*., 740 F. 3d 325 (4th Cir. 2014), the court overturned a lower court's grant of the defendant's motion to dismiss the complaint on the basis that the plaintiff's impairment—fractured leg, fractured ankle, torn meniscus and ruptured patellar tendon—was temporary. It alluded to the EEOC's regulation and concluded that, given the ADAAA's instruction to construe the Act broadly, the EEOC's regulation on temporary disabilities is reasonable. Given the severity of the injuries alleged in *Summers*, the court concluded that the

complaint stated a cause of action under the ADAAA when it alleged that the plaintiff was "unable to walk for seven months, and without surgery, pain medication and physical therapy, he 'likely' would have been unable to walk for far longer." According to the court, this was the first appellate case decided under the new ADAAA's expanded definition of disability. The *Summers* court also chided the lower court for its alternative conclusion that the plaintiff was not a person with a disability because he could use his wheelchair to work. The court of appeals stated, "If the fact that a person could work with the help of a wheelchair meant he was not disabled under the Act, the ADA would be eviscerated." *Id*.

3. The ADAAA clarifies the meaning of "major life activity" in two ways. First, it makes a non-exclusive list of major life activities. See [B][1], *supra*. Second, it also defines bodily functions to be major life activities. See [B][1], *supra*.

For the regulatory clarification on the definition of disability, see 29 C.F.R. §1630.2(g)(1)(i)–(iii).

4. In addition to the rule of construction discussed above, concerning the effect of ameliorative methods on the definition of "substantially limits," the Act lists as rules of construction the following:

- The Act shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the Act;
- The term "substantially limits" shall be construed consistent with the findings and purposes of the ADAAA;
- An impairment that substantially limits one major life activity need not substantially limit another in order for the individual to have a covered disability;
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active

P.L. 110-325(4)(a).

For further discussion of the Rules of Construction, as interpreted by the EEOC, see Jana K. Terry, *The ADA Amendments Act Three Years After Passage: The EEOC's Final Regulations and the First Court Decisions Emerge at Last*, THE FEDERAL LAWYER 49, 50–51 (November/December 2011).

5. The EEOC regulations pursuant to the ADAAA provide clarification regarding both mitigating measures (29 C.F.R. §1630.2(j)) and major life activities (29 C.F.R. §1630.2(i)). They also provide guidance about the term "substantially limits." (20 C.F.R. §1630.2(j)).

Since the statute's amendments and new regulations were promulgated, several judicial opinions have interpreted the revised statutory and regulatory requirements. Courts have tended to find conditions such as HIV and cancer to be "per se" disabilities. See, e.g., *Horgan v. Simmons*, 704 F. Supp. 2d 814 (N.D. Ill. 2010) (under the ADAAA, HIV positive status may substantially limit major life activity because it impairs function of immune system); *Demarah v. Texaco Group, Inc.*, 88 F. Supp. 2d 1150 (D. Colo. 2000) (employee who underwent double mastectomy could be disabled under ADA when she had trouble walking and caring for herself); *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F. Supp. 2d 976 (N.D. Ind. 2010) (even though renal cell carcinoma was in remission, the ADAAA's clear language requires a finding of a disability where the condition would substantially limit a major life activity if it were active). Even before the amendment, some courts had reached broad interpretations of the definition when it came to physical disabilities like cancer. See, e.g., *Kennedy v. England*, 2006 U.S. Dist. LEXIS 24580, 2006 WL 1129405 (D.S.C. 2006) (cancer is per se disability). The decisions on mental health impairments and learning disabilities are mixed. See, e.g., *Kinney v. Century Services Corp. II*, 2011 U.S. Dist. LEXIS 87996, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011) (even though plaintiff's depression was "inactive" and did not impact her work performance, the fact that she had been hospitalized for the condition and her debilitating symptoms when active raised a genuine issue of fact as to whether she was a qualified individual under the

ADA); *Klute v. Shinseki*, 840 F. Supp. 2d 209 (D.D.C. 2012) (attorney with adjustment disorder alleged the federal government, his employer, denied him a reasonable accommodation, but the court concluded that even under the new ADAAA, the plaintiff's claim merely showed that he was unable to work only with a particular supervisor or in a particular workplace, and therefore, there was no genuine issue of fact whether there was a substantial limitation of the major life activity of working).

Questions

1. Assuming that the ADAAA were applicable, how would the Supreme Court decide the issue in the *Toyota* case today? How would the case be argued under the ADAAA for the plaintiff? For the defendant?

For a case applying the ADAAA where the plaintiff had carpal tunnel syndrome, see *Gibbs v. ADS Alliance Data Systems, Inc*., 2011 U.S. Dist. LEXIS 82540, 2011 WL3205779 (D. Kan. July 28, 2011) (genuine issue of material fact exists as to whether plaintiff's carpal tunnel syndrome constitutes a disability).

2. Does the ADAAA change the ADA's original directive that the courts should make an individual determination as to whether a person has a disability?

[3] Prong Two: A Record of Such an Impairment

The major federal statutes recognize that it would be inappropriate to deny protection to someone who does not currently have a disability, but who had a disability in the past. The goal of ensuring full participation by individuals who had been historically discriminated against would not be accomplished without including those with a history of disability.

In *Arline*, *supra* at [B][2], the Court held that the plaintiff had a record of an impairment that substantially limited a major life activity. Thus, even though the plaintiff no longer had an impairment that substantially limited a major life activity, Section 504 of the Rehabilitation Act protected her against discrimination based on her record of her impairment. While the ADA defined disability the same as the Rehabilitation Act, after the *Sutton* trilogy and *Toyota*, plaintiffs had difficulty proving that they had a record of a disability. While the ADAAA did not explicitly change the law concerning a "record of" a disability, the amendments strongly favor a broad definition of disability, so the "record of" language should be construed broadly as well.

In a case decided under the ADA before the effective date of the ADAAA, *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008), the plaintiff was a candidate for Foreign Service. After passing all the tests, the plaintiff found out that she had early stage breast cancer. She was treated with a mastectomy and later had her ovaries and fallopian tubes removed, but the State Department revoked her medical clearance because it believed that not all posts to which she could be assigned would have proper follow-up medical care for her. She sued alleging violation of the Rehabilitation Act. She alleged that she had a disability, was regarded as having an impairment, and had a record of an impairment.

The court of appeals held that because Adams' illness had been cured, she no longer had a disability, but it stated that having a record of an impairment does not necessarily require a document demonstrating an impairment. Rather, it requires only that the plaintiff prove that she had a history of an impairment, and that the impairment substantially limited a major life activity. This reasoning seems to be consistent with that in *Arline*. Would this be decided differently after the 2008 amendments?

The regulations under the ADAAA clarify what is meant by "record of." See 29 C.F.R. §1630.2(k)(1).

[4] Prong Three: Being "Regarded as" Having Such an Impairment

The ADAAA reversed the holding of *Sutton* on the definition of coverage, which held that in order to be "regarded as" having an impairment, the plaintiff would have to show that the impairment limits or was perceived to limit a major life activity. The amended ADA provides that:

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

42 U.S.C. §12102(3).

This prong does not apply, however, to transitory impairments under the ADAAA. A transitory impairment is defined as one with an actual or expected duration of six months or less. *Id*. For example, a broken leg or the flu would in most instances be a transitory impairment.

Notes and Questions

1. For the regulatory clarification on the definition of "regarded as," see 29 C.F.R. §1630.2(g)(3) and 1630.2(l). Whether an impairment is "transitory and minor" is an objective inquiry that does not depend on the employer's belief. See 29 C.F.R. §1630.15(f) and the accompanying appendix; *Gaus v. Norfolk Southern Ry. Co*., 2011 U.S. Dist. LEXIS 111089, 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011) (employee is "regarded as" having a disability even if the employer subjectively believed that the impairment was transitory and minor).

2. The following are examples of some post amendment decisions involving the issue of "regarded as": *Butle v. BTC Foods, Inc.*, 2014 U.S. Dist. LEXIS 11286, 2014 WL 336649 (E.D. Pa. 2014) (plaintiff's need to take leave for ongoing pain after a seven month leave post-surgery was sufficient evidence to raise genuine issue as to whether the employer regarded him as having a disability); *Sacks v. Gandhi Engineering, Inc.*, 999 F. Supp. 2d 629 (S.D.N.Y. 2014) (concluding that a lack of agility is a physiological condition that can be perceived as a disability after the ADAAA); *Mendoza v. City of Palacios*, 962 F. Supp. 2d 868 (S.D. Tex. 2013) (evidence that officer was regarded as disabled where exit interview form indicated that his resignation was demanded because of his "high blood pressure"; court stated that in "regarded as" cases, a plaintiff must show only that his employer perceived him as having an impairment; he does not have to show that the employer perceived him as substantially limited in a major life activity). But see *Valdez v. Minnesota Quarries, Inc*., 2012 U.S. Dist. LEXIS 174265, 2012 WL 6112846 (D. Minn., Dec. 10, 2012) (concluding that although after the ADAAA, a plaintiff merely has to show that the employer perceives him to have an impairment, the employer's belief that the employee had swine flu does not create a cause of action because the flu is transitory and minor). See Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993 (2010).

3. Why did Congress amend the statute in this way? What is the policy involved in holding an entity liable for discriminating against a person because of a perceived impairment without requiring proof that the entity believed that the perceived impairment substantially limited a major life activity? What are the policies supporting passage of the Act? What are the issues involved in proving the entity's state of mind concerning the perceived impairment and its effects?

4. To eliminate *all* discrimination based on disability, the ADA protects individuals who are *regarded as* or *perceived as* substantially impaired, in addition to those who are actually currently impaired. For example, an employer who believes that an individual has epilepsy and will thus be unable to do the job will probably be in violation of the law if the employer acts discriminatorily on that basis even if it turns out that the employee or job applicant does not in fact have epilepsy. Similarly, if an individual actually has a particular condition that is not substantially limiting, but the covered entity regards it as substantially limiting, that employee may be protected under the definition

of disability.

In Chapter 3, the use of drug tests and medical screening will be discussed. Assume that it is permissible to give a drug test to a job applicant, and that the drug test erroneously indicates that the applicant is taking dilantin (a drug used to control epilepsy), and that the employer does not hire the employee based on this condition. Even though this seems to be a clear violation of the ADA, as a practical matter, how does the job applicant prove that this was the basis of employment decision?

5. *Reasonable accommodation or modifications*. One important difference under the ADAAA is that Congress made clear that if the plaintiff's *only* means of qualifying as an individual with a disability is under the "regarded as" prong, the covered entity under Title I, the public entity under Title II, and the owner, lessor or occupier of a place of public accommodation under Title III are not required to provide a reasonable accommodation to the individual or reasonable modifications to policies, practices or procedures for the individual. P.L. 110-325(6). 42 U.S.C. §12201(h).

Hypothetical Problems Applying the ADAAA

Before and After. The following fact patterns describe what courts decided about an individual's coverage or lack of coverage by the ADA or the Rehabilitation Act after the *Sutton* trilogy and *Toyota*, but before the ADAAA. Read the descriptions carefully and using specific statutory provisions of the ADAAA predict how courts would decide the cases if they arose under the ADAAA. Explain the arguments that the plaintiffs' lawyers would use under the ADAAA. What arguments would the defendants use to rebut these arguments?

1. *Before*: Allen Epstein was an executive of an insurance brokerage firm. He was hospitalized for heart disease. His employer demoted him. Then he told his employer that he had been diagnosed with diabetes. The employer fired him. He sued, alleging that the company violated the ADA. Holding: Epstein was not an individual with a disability because he was able to manage his heart disease and his diabetes with medication. Therefore, the court granted summary judgment to the employer. See *Epstein v. Kalvin-Miller Int'l*, 100 F. Supp. 2d 222 (S.D.N.Y. 2000). *After?*

2. *Before:* Charles Littleton was a 29-year-old man with an intellectual disability. He lived with his mother and collected disability payments. He applied for a job at Wal-Mart and when the company called to schedule an interview, he requested that they permit a job coach to sit in on the interview. Wal-Mart refused and he went to the interview alone, which did not go well. Wal-Mart did not hire him. He sued alleging a violation of the ADA because Wal-Mart refused to accommodate him in the interview. He claimed that he was substantially limited in the major life activities of learning, thinking, and communicating. The court granted Wal-Mart summary judgment, holding that Littleton was not a person with a disability because he could drive, read, and talk. See *Littleton v. Wal-Mart Stores, Inc*., 231 Fed. Appx. 874 (11th Cir. 2007). *After?*

3. *Before*. Kent Furnish suffered from cirrhosis of the liver caused by Hepatitis B. He notified his employer of his illness and he was soon fired. When he sued under the ADA, the court granted the employer's motion for summary judgment, concluding that Kent had an impairment, but that it did not substantially impair a "major life activity." According to the court, "liver function" was not a major life activity, and therefore the plaintiff did not have a disability. See *Furnish v. SVI Systems, Inc*., 270 F.3d 445 (7th Cir. 2001). *After?*

4. *Before*. Dawn Holt was diagnosed with a form of cerebral palsy which affected her speech and her ability to chew and swallow, to button her clothes, etc. When her employer fired her, the court granted the defendant summary judgment, concluding that the plaintiff had not proved that she was a person with a disability because she was able to perform many manual tasks. See *Holt v. Grand Lake Mental Health Center, Inc*., 443 F. 3d 762 (10th Cir. 2006). *After?*

Notes on Other Issues Concerning Definition of Disability

1. *Known Disabilities:* While there is not much case law on this issue, it seems clear from what there is that a covered entity will not be found to have discriminated against someone on the basis of disability unless that entity knows or should know that the individual actually has a disability. If the individual has a disability and wants that to be taken into account in admissions, hiring, or other initial application process or after the individual is participating in the program, it is the responsibility of the individual to bring the disability to the attention of the covered entity. In certain situations, it will be the obligation of the individual to provide documentation to prove that the disability exists in order to qualify for accommodations or special consideration.

In demonstrating substantial limitation, appropriate documentation from qualified professionals must often be provided. While the issue of documentation can be disputed in other contexts, it often arises in cases involving learning disabilities and higher education and professional licensing. This is discussed in greater detail in Chapters 5 and 6. The issues include the credentials of the evaluator, what instruments were used to make the assessment, and how current the documentation should be. In addition, courts have grappled with the question of whether the evaluations by the treating professional or defendant's professional have greater weight.

2. *Individualized Assessments:* While certain conditions, such as total blindness and quadriplegia, will almost always be determined to be disabilities within the definitional requirements, other conditions must be evaluated on an individualized basis, taking into account the nature and severity of the condition for that person, and its long term effects.

As mentioned above, however, because the ADAAA adds to the definition of "major life activity" to include bodily functions, and because the immune system is listed as one of these bodily functions, it is likely that HIV positivity will be considered a per se disability. See, e.g., *Horgan v. Simmons*, 704 F. Supp. 2d 814 (N.D. Ill. 2010) (under the ADAAA, individual's HIV positive status may substantially limit major life activity because it impairs function of immune system).

3. *Requiring Special Education Because of Disability:* The definitional coverage under the Individuals with Disabilities Education Act (IDEA) differs somewhat from the other major statutes discussed above. This statute is intended to protect individuals not only from discrimination, but also to provide the basis for benefits and services that would exceed their entitlements under basic nondiscrimination statutes. The definition provides a specific listing of several disabling conditions. Not only must a child meet the label of one of those conditions, but the child must also require special education and related services because of the condition. For example, a child who uses a wheelchair, but who does not require any special education, probably does not fit within the definitional coverage of the IDEA. That child, however, probably would be protected from discrimination under the Americans with Disabilities Act and the Rehabilitation Act. E.g., *Wolff v. South Colonie Cent. Sch. Dist.*, 534 F. Supp. 758 (N.D.N.Y. 1982) (claim by high school girl with a limb deficiency that §504 was violated when she was prohibited from taking a school sponsored trip to Spain).

4. *Age Eligibility in Special Education:* While all of the other statutes referred to above include the concept of qualification by virtue of being able to carry out the essential or fundamental requirements of the program, the Individuals with Disabilities Education Act is unique in its age eligibility requirement. While assuming that all children with disabilities are able to benefit from education, the IDEA requires that the child fall within certain age eligibility requirements. This issue is discussed more fully in Chapter 7.

5. *Retroactivity of the ADAAA.* Most courts have held that the ADAAA does not apply to facts occurring before the effective date of the amendments (January 1, 2009), but at least one case in the Sixth Circuit applied the ADAAA retroactively where the plaintiff sought injunctive relief. In *Jenkins v. National Bd. Medical Examiners*, 2009 U.S. App. LEXIS 2660, 2009 Fed. App. 0117N (6th Cir. Feb. 11, 2009) (unpublished opinion), the plaintiff, a third year medical student, sought additional time on the United States Medical Licensing Exam because of a reading disability. On appeal, the

Sixth Circuit concluded that because the plaintiff sought only prospective relief and not damages, the law in effect at the time of the appeal—the ADAAA—would govern. The plaintiff's attorneys' fees request did not defeat the retroactivity of his claim. The court distinguished *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which held that a right to a jury trial and compensatory and punitive damages created by the 1991 Civil Rights Act would not apply retroactively to cases already pending on appeal.

The EEOC has taken the position that the ADAAA is not retroactive. S*ee* U.S. Equal Employment Opportunity Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited June 11, 2012).

[5] Exemptions for Stated Conditions

The ADA excludes individuals with specific stated conditions from coverage because Congress was concerned about some cases decided earlier under the Rehabilitation Act in which courts held that conditions such as compulsive gambling and kleptomania could potentially be disabilities. See, e.g., *Fields v. Lyng*, 705 F. Supp. 1134 (D. Md. 1988); *Rezza v. Department of Justice*, 698 F. Supp. 586 (E.D. Pa. 1988). The ADA specifically excludes homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, pyromania and psychoactive substance abuse disorders resulting from current illegal drug use. 42 U.S.C. §12208, 12211. The Rehabilitation Act was amended to incorporate similar language. 29 U.S.C. §705(20)(E) & (F). The Fair Housing Act does not protect persons based on transvestism. 42 U.S.C. §3606(b)(3).

[6] Special Situations

There are a number of special situations in which the definition of who is protected arises. For some of these situations, there is substantial judicial or regulatory guidance. For others there is not. The following are some of the most important or interesting of these situations.

Substance Use and Abuse: Individuals who use controlled substances and/or alcohol present some of the most complex questions. The statutory language of Title I of the ADA specifically precludes coverage of an individual *currently* engaged in the *illegal use* of drugs, when the entity acts on that basis. The ADA generally exempts as a disability psychoactive substance use disorders resulting from current illegal use of drugs.

The Rehabilitation Act and the ADA preclude from coverage in employment discrimination those individuals with alcoholism and whose *current* use of alcohol prevents them from performing the job or cause a threat to property or safety of others. With respect to drug usage, neither the Rehabilitation Act nor the ADA covers individuals currently using illegal drugs when the entity acts on the basis of that use. Individuals with a record of drug use, those regarded as being drug users, and those in rehabilitation who are currently not using are protected under the Rehabilitation Act and the ADA. Special provisions relating to drug and alcohol use in educational agencies are also included.

The Fair Housing Act statutory language refers to illegal use of or addiction to controlled substances. The statute states that an individual currently illegally using or addicted to controlled substances is not covered. Interestingly, the Air Carrier Access Act specifically defines drug addiction and alcoholism as impairments.

A unique issue was addressed by the Supreme Court in *Traynor v. Turnage*, 485 U.S. 535 (1988). The issue was whether the Veteran's Administration violated the Rehabilitation Act by providing differential treatment benefits for primary and secondary alcoholism. The plaintiffs claimed that treating primary alcoholism and secondary alcoholism differently in this context violated Section 504

of the Rehabilitation Act. The differential treatment was based on a determination that primary alcoholism was based on willful misconduct under Veterans Benefits regulations. Secondary alcoholism was treated as a manifestation of an acquired psychiatric disorder. Although, as the dissent noted, the plaintiffs had begun drinking as minors and their alcoholism should thus not be treated as a result of their own willful misconduct, the majority held that providing a governmental benefit on a differential basis was not impermissible discrimination. It should be noted, however, that discrimination on the basis of disability generally does not focus on whether the alcoholism is primary or secondary.

Problems

1. What if new research indicates a greater linkage between alcoholism and genes? Would this be a justification for genetic testing to determine the causation of the alcoholism in deciding whether an individual should receive Veteran's benefits? What are the potential dangers of such testing? See discussion about the Genetic Information Nondiscrimination Act (GINA), Chapters 3 and 9.

2. An individual is seeking a job at an automobile manufacturing plant. In the course of the preplacement medical assessment, the employer learns that the individual is carrying a gene that if passed on to her child (she has no children at this point), could result in the child's having cystic fibrosis, a condition that would probably result in substantial medical costs. The employer is concerned that hiring the woman would result in increased costs to the company insurance plan. The employer decides not to hire the applicant. Assuming the applicant can prove that this is the reason she was not hired, is she protected against disability discrimination based on her unborn (and unconceived) child's potential genetic condition? Under the ADA? Under GINA? What if the genetic condition were one where it is less certain that the condition would have substantial medical implications? For a comprehensive discussion of this issue, see Mark A. Rothstein, *Genetic Discrimination in Employment and the Americans with Disabilities Act*, 29 HOUS. L. REV. 23, 47–50 (1992).

For cases on this issue, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.8 (2012 and cumulative supplement). Generally, courts have permitted adverse action when based on misconduct, even if the misconduct is related to alcoholism or drug addiction. Some of the issues addressed by the courts include what it means to be in rehabilitation and the use of drug testing as the basis for determining whether someone is using drugs or alcohol.

Communicable Diseases and Infections: The presence of HIV infection in society has resulted in significant attention to how individuals with communicable diseases and infections are to be treated in employment and other settings. In some respects, the treatment is similar to drug and alcohol use and addiction, i.e., the condition is covered, but not if it poses a danger to others. There was a great deal of controversy over this issue during the Congressional debate about the ADA. The compromise was to include statutory language to study the issue. Indirectly, the ADA provision relating qualification standards for employment mentions that for an individual to be protected, there should be no direct threat to the health or safety of other individuals in the workplace. The key issue, then, is whether a particular communicable disease or infection poses such a danger. The ADA also includes language indicating that state and local requirements relating to food handling and infectious or communicable diseases are not to be preempted. 42 U.S.C. §12113(3).

The Rehabilitation Act, like the ADA, addresses this condition in the context of employment. It does so by exempting individuals whose current contagious disease or infection would constitute a direct threat to the health or safety of others, or whose condition results in the individual being unable to perform the job.

The Fair Housing Act does not address this in the statutory language. The Air Carrier Access Act refers to this condition in the context of when an individual might be refused transportation, required

to provide a medical certificate, or have some restriction or condition placed upon the right to transportation.

In *School Bd. v. Arline*, 480 U.S. 273 (1987), the Court held that tuberculosis is a "handicap" (the term used at the time and in the early versions of the Rehabilitation Act) under Section 504, but in footnote 7, the Court specifically noted that it was not deciding whether the carrier of a contagious disease such as AIDS would be covered by the Rehabilitation Act solely on the basis of "contagiousness." As earlier material noted, the Supreme Court later addressed the issue of disease in *Bragdon v. Abbott,* 524 U.S. 624 (1998), by deciding that the particular individual involved was substantially limited in the major life activity of reproduction because she was HIV positive. Subsequent amendments to the Rehabilitation Act and the initial definition of disability under the ADA seemed to clearly cover individuals with AIDS or who are HIV positive.

Following this decision and the statutory clarifications under the Rehabilitation Act and the ADA, individuals with HIV or AIDS and similar conditions were routinely found by courts to be individuals with disabilities under federal discrimination law. These decisions focused on the issue of whether the individual was otherwise qualified, particularly in cases involving medical care service providers. While many of these individuals ultimately lost their cases, they did not lose based on not being a person with a disability.

In 1998, the Supreme Court provided some guidance on this issue. In *Bragdon v. Abbott*, *supra*, the Court held that reproduction is a major life activity, and that the plaintiff had demonstrated that her HIV status, even though asymptomatic, had substantially limited her decision to reproduce. The Court left undecided whether a person with HIV who is asymptomatic is per se disabled under the "regarded as" prong of the definition.

After *Sutton*, and the narrowing of the definition, courts began to consider more closely whether an individual who was HIV positive, but asymptomatic was "substantially limited" in any major life activity. The ADAAA, which defines the immune system as a major life activity, should result in coverage of persons with HIV. One recent decision is *Horgan v. Simmons*, 704 F. Supp. 2d 814, 23 A.D. Cas. (BNA) 41 (N.D. Ill. 2010) (under the ADAAA, individual's HIV positive status may substantially limit major life activity because it impairs function of immune system).

Associational Disabilities: The Americans with Disabilities Act and the Fair Housing Act make it illegal to discriminate against individuals because of their association with someone who is disabled. There has been little judicial guidance on situations when this would apply. Case excerpts in Chapters 3 (Employment) and 9 (Health Care) include this issue. In one of the few cases on this issue, *Saladin v. Turner*, 936 F. Supp. 1571 (N.D. Okla. 1996), a waiter was able to establish that his association with his HIV positive partner was a motivating factor in his dismissal from employment as a waiter and was a violation of the ADA. AIDS advocacy was found not to be enough for an associational discrimination claim in *Oliveras-Sifre v. Puerto Rico Dept. of Health*, 214 F.3d 23 (1st Cir. 2000).

The judicial decisions seem also to indicate that there is no obligation to accommodate the disability of the person with whom the claimant is associating. For example, in *Den Hartog v. Wasatch Academy*, 129 F.3d 1076 (10th Cir. 1997), the court allowed the termination of an employee because of the conduct of his son who had an emotional disability. The court held that the employer was not required to accommodate the disability of the family member. This would probably mean, for example, that while a reasonable accommodation for a disability might require allowing time off for treatment, that the employer would not be required to allow the employee time off to assist with treatment for a family member with a disability. The ADAAA makes clear that an employer need not accommodate an employee who has an association with a person with a disability. There may be coverage for such accommodation for those covered under the Family and Medical Leave Act, which allows for 12 weeks unpaid leave to care for a loved one, but probably not under the Rehabilitation Act or the ADA.

Behavior Related Conditions: As was noted previously in this chapter, there are a number of behavior related conditions that have been specifically exempted from coverage by the Americans with Disabilities Act statutory language, and now by the Rehabilitation Act, as a result of a 1992 amendment. A number of conditions not exempted, such as bipolar disorder, depression, and other emotional or mental illnesses, often raise concerns in various settings because of myths and prejudices about emotional or mental conditions.

Learning Disabilities: In the early years of disability discrimination law, the issue of learning disabilities was addressed primarily in the context of special education (which has separate statutory definitional protection), higher education, and professional licensing. In the special education setting, the disputes were not primarily about whether the individual met the definition, but rather whether the educational programming was appropriate.

Substantial judicial attention to whether a learning disability (or other conditions such as attention deficit disorder or attention deficit and hyperactivity disorder) are substantially limiting to qualify as disabilities has been given in the higher education and professional licensing contexts. Numerous cases and Office for Civil Rights opinions have addressed questions related to whether the appropriate documentation of the condition has been provided. In the pre-*Sutton* cases, the courts tended to be more likely to find the person to be disabled within the statute, although many of the cases found the individual not to be "otherwise qualified." Simultaneous with deciding the *Sutton* trilogy, the Court remanded a case involving accommodations on the New York bar exam requested by an individual claiming a learning disability. The Court remanded for the lower court to consider the issue in light of the guidance on "mitigating measures."

More recently, attention to this issue has begun to occur in the employment setting. The trend, like that in higher education and professional licensing, has been that increasingly these individuals are found not to be substantially limited in major life activities. *See* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §4.9 (2012 and cumulative supplement).

Other: There are a number of other conditions that have given rise to interesting or unusual fact settings.

• *Facial Disfigurement*. A few judicial decisions have considered conditions that fall into the category of facial or other disfigurements. In most of these cases, the individual is not substantially limited in carrying out the requirements of the program. Prejudicial attitudes towards individuals with disfigurements, however, may place these individuals in the category of someone who is "perceived to be" or "regarded as" disabled. Someone with scars from a serious burn might be covered, but perhaps only where the disfigurement is serious, but not where there is a small scar. Two decisions applying state law demonstrate contrary results on this issue. In *Chico Dairy Co. v. West Virginia Human Rights Comm'n*, 181 W. Va. 238, 382 S.E.2d 75 (1989), the court upheld the refusal to promote an employee with a sunken eye socket to be manager of a restaurant. The court found that this was not a protected condition. In contrast, the court in *Hodgdon v. Mt. Mansfield Co.*, 160 Vt. 150, 624 A.2d 1122 (1992), found that a toothless chambermaid was protected under state law because her employer regarded her as having a disabling condition. Should it matter whether the employment involves a position where appearance is of greater concern to others? For example, should severe burn scars on the face of a waitress at an upscale restaurant be treated differently than the same condition on the face of a bus driver, or a clerical employee with his own office? One author has discussed this issue in depth. See Comment, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035 (1987).

In 2009, the EEOC settled a case on facial disfigurement for $95,000 and ADA training of its employees. The EEOC sued employer Extra Space Management, Inc. for violating the ADA when it fired its maintenance employee whose face was disfigured by burns. When the employee met the acting district manager, the manager fired him and said that "he was handicapped, deformed or

something" and that "it's clear he can't get the job done." See *Extra Space Management to Pay $95,000 for Disability Bias Against Employee with Cosmetic Disfigurement*, http://eeoc.gov/press/5-28-09.html.

• *Size, Obesity.* It is not always clear when size will constitute a disability under any of the statutes. In *Dexler v. Tisch*, 660 F. Supp. 1418 (D. Conn. 1987), the court held that dwarfism is a "handicap," while in *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984), the court found that being heavier than the maximum weight for flight attendants as a result of bodybuilding is not a "handicap" under §504. It is possible that the difference in these results stems from the obvious disparity in underlying causes.

When size might be a condition within the control of the individual, there are complex and unresolved questions about whether the condition is covered. The courts, the Equal Employment Opportunity Commission (EEOC), and the commentators are at odds about how obesity should be treated, how it should be defined, and whether it matters that the obesity is a result of a physiological or psychological condition or just that the person likes to eat. *Cook v. State of Rhode Island*, 10 F.3d 17 (1st Cir. 1993), involved a woman who was denied a job as an attendant in a state facility for individuals with intellectual disabilities. She was 5'3" tall and weighed 329 pounds, a condition that would be considered morbid obesity, i.e., weighing at least two times the normal amount for a person of that height. The federal court in its decision addressing whether the employer violated the Rehabilitation Act, stated the following:

> [T]he prophylaxis of section 504 embraces not only those persons who are in fact disabled, but also those persons who bear the brunt of discrimination because prospective employers view them as disabled.
>
> On the one hand, the jury could plausibly have found that plaintiff had a physical impairment; after all, she admittedly suffered from morbid obesity, and she presented expert testimony that morbid obesity is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory and cardiovascular systems. On the second hand, the jury could have found that plaintiff, although not handicapped, was treated by [the employer] as if she had a physical impairment. Indeed [its] stated reasons for its refusal to hire—its concern that Cook's limited mobility impeded her ability to evacuate patients in case of an emergency, and its fear that her condition augured a heightened risk of heart disease, thereby increasing the likelihood of workers' compensation claims—show conclusively that [the employer] treated plaintiff's obesity as if it actually affected her musculoskeletal and cardiovascular systems.
>
> Detached jurors reasonably could have found that [the employer's] pessimistic assessment of plaintiff's capabilities demonstrated that appellant regarded Cook's condition as substantially limiting a major life activity—being able to work.
>
> Accordingly, the district court appropriately refused to direct a verdict for the employer.

In *Cook v. Rhode Island*, the Equal Employment Opportunity Commission filed a brief arguing that obesity is a disability. The EEOC specifically rejected the assertion that obesity is not a disability because it is a voluntary condition subject to individual control. Furthermore, its position is that whether obesity is a disability should be decided on a case-by-case basis, and a finding of a disability should not be limited to situations where obesity results from a physiological condition that renders it an immutable condition. The EEOC suggested that duration of the condition and its long-term impact are relevant to determining coverage. With the national attention and concern about obesity in America, this will certainly continue to be an issue facing the courts. As *Cook* highlights, there is an unresolved question as to whether it makes a difference if the obesity is a voluntary condition.

In *Coleman v. Georgia Power Co.*, 81 F. Supp. 2d 1365 (N.D. Ga. 2000), the court held that obesity is an impairment under the ADA only where it is shown to affect a bodily system and is related to a

physiological disorder.

In some circumstances, an individual who is obese might be "regarded as" having a disability. Even after the ADAAA, however, many courts continue to require a physiological condition to be the cause of the obesity in order for the person to be regarded as disabled. Nonetheless, there are courts that have taken a broader view under the ADAAA. See *Whittaker v. Am.'s Car-Mart, Inc*., 2014 U.S. Dist. LEXIS 56919, 2014 WL 1648816, at *2 (E.D. Mo. 2014) (allegation that plaintiff was severely obese and that the defendant regarded him as having an impairment and as being substantially limited in one or more major life activities, including, but not limited to, walking, as a result of his obesity is sufficient to withstand a motion to dismiss); *E.E.O.C. v. Res. for Human Dev., Inc*., 827 F. Supp. 2d 688, 700 (E.D. La. 2011) (genuine issue of material fact as to whether plaintiff was discriminated against because her employer regarded her as disabled because of her obesity); *Lowe v. Am. Eurocopter, LLC*, 2010 U.S. Dist. LEXIS 133343, 2010 WL 5232523, at *7 (N.D. Miss. 2010) (plaintiff might be "regarded as" disabled due to obesity under the ADA if her employer perceived her weight as an impairment); but see *Morriss v. BNSF Ry. Co*., 817 F.3d 1104 (8th Cir. 2016) (morbid obesity must result from an underlying physiological disorder or condition; "regarded as" claim does not exist where the employer believes that the plaintiff's morbid obesity presents an unacceptably high risk of developing certain medical conditions in the future); *Taylor v. Burlington N. R.R. Holdings, Inc.*, 2016 U.S. Dist. LEXIS 19879, 2016 WL 632077, at *8 (W.D. Wash. 2016) (showing that the employer perceived the plaintiff as prone to developing future physiological disorders resulting from his obesity insufficient to prove a "regarded as" case).

There have been a number of other interesting cases involving conditions such as cancer, chemical and other environmental sensitivities, health impairments (such as diabetes and epilepsy), and back injuries. Several of the cases in subsequent chapters involve these conditions in the context of issues of reasonable accommodation and qualifications.

D. Otherwise Qualified and Reasonable Accommodation

The statutes in the previous section require that the individual meet the definition of having a disability, and either explicitly in the statute or implicitly through interpretation, the individual be otherwise qualified in order to be protected against discrimination. Although the Rehabilitation Act did not include the concept of reasonable accommodation in the statutory language, the Americans with Disabilities Act does incorporate the language directly. As the next case illustrates, this is a concept that was incorporated early on in the interpretation of the Rehabilitation Act.

The first Supreme Court decision to address any issue under the major federal disability discrimination statutes is the following case. It involves a nurse with a serious hearing impairment who was seeking admission into the clinical training program. This clinical training was required for her to become a registered nurse. During the admissions interview process, Ms. Davis had difficulty understanding questions, and upon inquiry it was learned that she had a history of hearing problems and needed a hearing aid. After examination it was determined that she would need to lip-read in addition to relying on her hearing aid support in order to have effective communication. The program was concerned with whether her disability would make it unsafe for her to practice as a nurse. The following excerpt examines the Supreme Court's analysis of how to determine whether someone is entitled to protection under the Rehabilitation Act. Section 504 of the Rehabilitation Act originally used the term "handicap." It was amended in 1992, and current statutory language uses "disability."

Southeastern Community College v. Davis

442 U.S. 397 (1979)

MR. JUSTICE POWELL:

Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.

The court below, however, believed that the "otherwise qualified" persons protected by §504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be "otherwise qualified." ... An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.

The regulations ... reinforce ... this conclusion. According to these regulations, a "[q]ualified handicapped person" is, "[w]ith respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity...." An explanatory note states:

> "The term 'technical standards' refers to *all* nonacademic admissions criteria that are essential to participation in the program in question." (emphasis supplied).

A further note emphasizes that legitimate physical qualifications may be essential to participation in particular programs.

The remaining question is whether the physical qualifications Southeastern demanded of respondent might not be necessary for participation in its nursing program. It is not open to dispute that, as Southeastern's Associate Degree Nursing program currently is constituted, the ability to understand speech without reliance on lipreading is necessary for patient safety during the clinical phase of the program. [T]his ability also is indispensable for many of the functions that a registered nurse performs.

Respondent contends nevertheless that §504, properly interpreted, compels Southeastern to undertake affirmative action that would dispense with the need for effective oral communication. First, it is suggested that respondent can be given individual supervision by faculty members whenever she attends patients directly. Moreover, certain required courses might be dispensed with altogether for respondent. It is not necessary, she argues, that Southeastern train her to undertake all the tasks a registered nurse is licensed to perform. Rather, it is sufficient to make §504 applicable if respondent might be able to perform satisfactorily some of the duties of a registered nurse or to hold some of the positions available to a registered nurse.

[The Court rejected these arguments.]

Notes

1. *Fundamental or Essential Requirements:* The nondiscrimination statutes are fairly consistent in requiring that the individual must be able to carry out the fundamental requirements of the program with or without reasonable accommodation. The factual disputes arise as to what constitutes a fundamental requirement. Fundamental requirements differ, depending on the context. For example, what is essential or fundamental in attending a higher education professional program such as law school may be different from what is fundamental in the practice of law.

As the statutory language in the Americans with Disabilities Act notes, employers will be given deference in determining what are essential requirements, particularly where they have prepared in advance a job description and qualifications. Nonetheless, courts do not necessarily accept the

employer's definition of essential requirements, especially if the plaintiff can demonstrate that others with the same job description do not perform the requirements listed in the job description. See the definition of "qualified individual with a disability" under Title I, *supra*, Section [C][1]. The courts have given particular deference to schools in establishing their educational programming requirements. Similarly, the courts have been reluctant to second guess the essential admission and academic requirements for institutions of higher education.

This aspect of nondiscrimination requirements is discussed in more detail in each context in later chapters. The following are some examples of typical judicial responses. In the context of education, the Supreme Court in *Board of Ed. v. Rowley*, 458 U.S. 176 (1982), noted that:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the [Individuals with Disabilities Education Act], to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to §1415(e)(2).

For higher education, the decision in *Southeastern Community College v. Davis* indicates the deference the courts give to institutions of higher education. Laura Rothstein, *The Story of* Southeastern Community College v. Davis: *The Prequel to the Television Series "ER,"* Chapter 7 of EDUCATION STORIES (2008) (discussing the impact of the *Davis* decision on higher education and students with disabilities).

Professional licensing agencies, many of which are not subject to the Rehabilitation Act because they do not receive federal financial assistance, but which are generally subject to Title II of the Americans with Disabilities Act because such agencies are state governmental entities, have recently been challenged with respect to their requirements. The Virginia Board of Education requirement that a teacher pass a national teacher examination was challenged under the Rehabilitation Act (because the state receives federal financial assistance). In *Pandazides v. Virginia Bd. of Ed.*, 804 F. Supp. 794 (E.D. Va. 1992), the court noted:

> Section 504 [of the Rehabilitation Act] does not prohibit minimum competency tests; nor does it mean that the handicapped are excused from reasonable standards of minimum competence.
>
> The Rehabilitation Act was not intended to eliminate academic or professional requirements that measure proficiency in analyzing written information by attaining a passing score on a multiple choice test.
>
> Courts are prohibited from requiring a fundamental alteration in a defendant's program to accommodate a handicapped individual.
>
> The ability to read intelligently, to comprehend written and spoken communication accurately, effectively and quickly, and to respond to written and spoken communication professionally, effectively and quickly, are "essential functions" of a special education, public school teacher in Virginia. Moreover, the ability to manage a classroom is an "essential function" for a public school teacher....

The court also noted that reasonable accommodations to take the test should be, and in fact, were provided.

In the area of employment, there is emerging judicial interpretation of what is meant by "essential requirements." These cases involve a variety of types of employment and a wide range of disabilities. The courts have been fairly consistent in requiring employees to meet job attendance requirements,

although employers may be obligated to consider scheduling adjustments in certain cases, and unpaid leave for medical or psychological treatment. For example, in *Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir. 1994), a housekeeping aide with rheumatoid arthritis was competent in performing his custodial tasks, but the court held that his unpredictable and excessive absences need not be excused. Attendance was an essential aspect of the job. See also *McMillan v. City of New York*, 711 F.3d 120 (2d Cir. 2013) (employee may be able to show that on-time attendance not essential function of job with evidence he was previously allowed to arrive late and employer had flexible policy about when employees could arrive to work).

Many cases involve whether a police officer must be able to perform the entire range of duties in order to meet the fundamental requirements of the program. Often these cases involve police officers who are no longer able to perform all of their previous duties because they were injured on the job. Generally, the courts have required that all duties must be performed. E.g., *Simon v. St. Louis County*, 735 F.2d 1082 (8th Cir. 1984); *Kees v. Wallenstein*, 973 F. Supp. 1191 (W.D. Wash. 1997) (employees unable to be in direct, physical contact with inmates unable to perform essential functions of corrections officer); *Karbusicky v. City of Park Ridge*, 950 F. Supp. 878 (N.D. Ill. 1997) (a police officer with hearing loss in one ear is not qualified); *Koessel v. Sublette County Sheriff's Dept*., 717 F.3d 736 (10th Cir. 2013) (employee with medical restriction against stress not qualified for work as deputy sheriff).

2. *Safety and Health Concerns:* Consistent with substantial judicial deference about fundamental requirements relating to safety in the area of health related professional programs, the courts have been deferential to the medical institutions in the employment context. Some of these are discussed later in Chapter 3. In *Bradley v. University of Texas M.D. Anderson Cancer Ctr.*, 3 F.3d 922 (5th Cir. 1993), the court addressed the issue of whether a surgical technician, who is HIV-positive, whose job requires him to be close to open wounds and handle surgical instruments, poses an undue risk of transmission of the virus to patients. The court found that Bradley was not otherwise qualified because of this risk.

School Board of Nassau County v. Arline

480 U.S. 273 (1987)

[Earlier in the Chapter, it was noted that in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Court considered whether discriminating against a person based on contagiousness of her tuberculosis is discrimination based on disability. After the Court decided that question in the affirmative, it went on to consider whether Arline is otherwise qualified for the job and what test should be used to determine whether Arline's contagiousness posed an unacceptable risk to the health and safety of others. Below is the Court's analysis of this issue.]

IV

The remaining question is whether Arline is otherwise qualified for the job of elementary schoolteacher. To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if §504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.[16] The basic factors to be considered in conducting this inquiry are well established. In the context of the employment of a person handicapped with a contagious disease, we agree with *amicus* American Medical Association that this inquiry should include:

> "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties)

and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." Brief for American Medical Association as *Amicus Curiae* 19.

In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. The next step in the "otherwise-qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry.

Notes and Questions

1. Safety and health concerns have been raised in a number of judicial decisions, not only in the context of medical professions. Individuals with disabilities such as diabetes, serious emotional or mental conditions, and epilepsy in settings such as driving, operating heavy equipment, law enforcement, working in hazardous environments such as construction or at a high altitude, and employment related to children have been the subject of several decisions. In most, if not all, of these decisions, the courts also consider whether reasonable accommodation could be made to eliminate or adequately reduce the risk. For example, in *Wood v. Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994), the court found that an insulin dependent school van driver could not be reasonably accommodated and would pose a risk of lost consciousness. Thus, it did not violate Section 504 of the Rehabilitation Act to demote the plaintiffs to non-driving positions. The court in *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), reached a similar decision with respect to city employees who had driving responsibilities. More recent decisions have reached other results. See, e.g., *Kapche v. City of San Antonio*, 304 F.3d 493 (5th Cir. 2002) (although city employees with driving responsibilities who have diabetes and are insulin-dependent or who have impaired vision may present risk to others so as not to be qualified, an individualized inquiry of plaintiff's ability to perform job was required); *Bates v. United Parcel Service, Inc.,* 511 F.3d 974 (9th Cir. 2007) (prima facie case of discrimination where employer used across-the-board safety standard to screen out applicants with deafness who can perform essential functions of job, with or without reasonable accommodation; direct threat defense not applicable where there was an issue of material fact as to whether driving trucks in excess of 10,000 lbs. was an essential function of position of package car driver and employee who had impaired hearing was denied promotion because she could not meet Department of Transportation requirement for driving such trucks), *But see Fahey v. City of New York*, 2012 U.S. Dist. LEXIS 15104, 2012 WL 413990 (E.D. N.Y. 2012) (firefighter with post traumatic stress disorder resulting from work during 9/11 did not inform city of condition before removal from firefighter duties after failing drug test; position involves public safety).

2. There have been a number of decisions involving safety issues where the Postal Service has been the employer, many of these involving psychological conditions. E.g., *Marino v. United States Postal Serv.*, 25 F.3d 1037 (1st Cir. 1994) (employee with psychiatric problems who had assaulted her supervisor was not qualified); *Mazzarella v. Postal Serv.*, 849 F. Supp. 89 (D. Mass. 1994) (employee with personality disorder was discharged because of destructive behavior and was not qualified). But in *Kupferschmidt v. Runyon*, 827 F. Supp. 570 (E.D. Wis. 1993), the court held that a Postal Service employee who had threatened to kill her supervisor and fellow employees must be allowed to prove that she is qualified. In *Lussier v. Runyon*, 1994 U.S. Dist. LEXIS 4668, 3 Am. Disabilities Cas. (BNA) 223 (D. Maine 1994), the court found that the Postal Service employee with post-traumatic stress disorder had been improperly discharged out of fear of violent behavior, not because the employee had actually done anything.

3. The courts have held that under Section 504 of the Rehabilitation Act, the definition of "qualified individual" also includes a personal safety requirement. An otherwise qualified individual is one who "can perform the essential functions of the position in question without endangering the health and safety of the individual or others." *Chandler v. City of Dallas*, 2 F.3d at 1393. Title I of the ADA has an explicit defense that states in Section 12113(b): "The term 'qualification standards' may

include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." The Supreme Court has interpreted this defense to include the situation in which the individual poses a direct threat to the health or safety of the individual him or herself as well. *Chevron U.S.A. v. Echazabal*, 536 U.S. 73 (2002).

In cases involving concerns about health and safety, what proof is required before a court decides that the individual is not otherwise qualified because of the risk? In the case of mental impairments, should it be enough that the employee has made threats? What if the employee's behavior occurs before the employee is diagnosed and begins treatment? Should the behavior be forgiven? Does it matter whether the behavior was violent towards a person where physical harm resulted or if it was minor property damage for which the employee has paid?

If there is concern about risk of contagion in the case of disease, does it matter what the resulting harm might be? Is the employee more likely to be found not qualified because of health risk concerns where the disease is HIV/AIDS as compared to tuberculosis? The mode and likelihood of transmission are also relevant considerations. For example, tuberculosis becomes airborne and is more highly transmissible compared to the HIV virus.

Does it matter whether the risk is to children or adults? Why or why not? Are there other vulnerable populations where there is a greater need to protect against risk because the individuals are not able to do so themselves?

E. Summary

Chapter 2 provides an overview of the constitutional and statutory protections granted to persons with disabilities and how the law has evolved over the years. It gives an overview of who is covered under the various disability anti-discrimination laws, with an emphasis on the historical and contemporary views of who is a person with a disability under the ADA, as interpreted by the courts and amended by the ADAAA in 2008. It deals specifically with the definition of "disability," "substantial limitations of major life functions," "qualified individual," "fundamental alteration," "essential function" of a job, and "direct threat to the health or safety of others," and explains how the new ADAAA amends the ADA and the Rehabilitation Act to overturn specific judicial interpretations of the ADA.

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1. In 1990, P.L.111-256, Rosa's Law, provided that federal law references to "mental retardation" should be changed to "intellectual disability."

16. A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee or requires "a fundamental alteration in the nature of [the] program."