STARTING ANEW: THE ADA'S DISABILITY WITH RESPECT TO EPISODIC MENTAL ILLNESS

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Although lay people frequently conflate a diagnosis of mental illness with the existence of a disability, these concepts should properly be separated. The inclination towards conflation might be diminished by reference to the Americans with Disabilities Act (ADA) distinction between the existence of a disability and the legal ability to recover under the ADA. Specifically, under the ADA the claimant must not only establish a disability, which is a physical or mental impairment, but this impairment must "substantially limit one or more major life activities." A disability is "an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements, because of impairment." Impairment, on the other hand, is "seen as a purely medical judgment, whereas the disability created by the impairment is context specific." The consideration of illnesses borne not of the physical,
but of the mental, brings entirely distinct concerns. Indeed, the traditional model which is an “impairment-handicap-disability model does not adapt well to emotional and psychological difficulties. The fundamental sorrows, despair, grayness, and broken hearts do not fit well into models that divide the body into component parts and measure impairments or deficits one part at a time, assuming that the findings represent some truth that will last beyond the next day or week.” These issues are not mere fanciful mental gymnastics—the statistics for persons suffering from mental illnesses (which have been diagnosed) are significant. As will be discussed later, although stipulated in a racial vacuum, the figures below also cannot be abstracted from the reality of our racialized lives. Specifically, the President’s New Freedom Commission Report on Mental Health found that the public health burden of mental illness is more significant than many assume, with disparate effects and outcomes for racial minorities. The Report noted that an estimated 5% to 7% of adults suffer from “serious mental disorder” and that nearly 5% to 9% of children suffer from some form of “serious emotional illness.”

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4 STEFAN, HOLLOW PROMISES, supra note 2, at 46.
5 While over forty-nine million people in the United States suffer from mental illness, the Center for Mental Health Services estimates that approximately 4.8 million people in the United States suffer from severe or persistent mental illnesses, as opposed to 750,000 people in the United States who are blind, 2.5 million people who suffer from epilepsy, and 15.7 million people who have diabetes in STEFAN, HOLLOW PROMISES, supra note 2, at 48. See Paul Steven Miller, The Evolving ADA in Employment, Disability, and the Americans with Disabilities Act: Issues in Law, Public Policy, and Research 3 (Peter David Blank ed., 2000).


7 Id.
annual economic costs of these mental disorders has been estimated at a staggering $79 billion.\(^8\) Sixty-three billion dollars has been attributed to lost productivity due to mental illness.\(^9\) Additionally, incidental costs have been estimated at $12 billion for mortality costs due to lost productivity from premature death and $4 billion due to lost productivity from incarceration and lost time from the provision of family care.\(^10\) In 1997, despite the high costs attributed to mental disorders, the United States spent over $1 trillion on health care but only $71 billion of that on the treatment of mental illnesses.\(^11\)

Accordingly, for the mentally vulnerable the challenge of obtaining an appropriate diagnosis is but a preliminary matter in a long line of legal challenges to achieve compensation for discrimination. A higher hurdle must be met—the disability as diagnosed must negatively impact what is legally defined to be a significant life event. Thus the legal definition for "major life activities" becomes another point of contention by which those suffering from episodic mental illness are frequently barred from ADA inclusion.\(^12\)

The assessment of what constitutes a major life activity is not without controversy. While some courts believe the ability to get along with and work with others is a major life activity, others do not.\(^13\) However, in a racially, or sexually, toxic work

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\(^8\) Id. at 3.
\(^9\) Id.
\(^10\) Id.
\(^11\) See id.
\(^12\) See supra note 1.
\(^13\) See Breiland v. Advance Circuits, Inc., 976 F. Supp. 858, 863-64 (D. Minn. 1997) (stating that the ability to interact is not a major life activity due to its unworkable definition); Hook v. Georgia-Gulf Corp., 788 So. 2d 47, 55 (La. Ct. App. 2001) (stating that the ability to get along with others is not a major life activity due to its amorphous qualities as compared to other statutorily enumerated abilities). But see McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999) (holding that "[b]ecause interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity'"), quoted in Ann Hubbard, Meaningful Lives and Major Life Activities, 55 ALA. L. REV. 997, 1005 n.49 (2004). See also Susan Stefan, Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and
or school environment, the ability to get along and interact unproblematically with others may be very challenging, yet it may be the essential criteria on which employees are judged, especially normative outsiders. In my estimation, should any institutional environment be so destructive to one’s identity, the inability to get along with others should not be construed against the marginalized and, therefore, should be interpreted as a major life activity—in other words, the person excluded on the basis of constructed or ascribed identity should be entitled to claim disability based upon her inability to function alongside those who would do her harm. In such a context a duty to accommodate, and a justification to terminate, should arise.

Given this stance, the case of Benjamin v. New York City Department of Health is relevant. Ms. Benjamin, a nurse of Black Jamaican heritage claimed Title VII discrimination on the basis of national origin and ADA discrimination on the basis of physical injury and mental illness. Ms. Benjamin claimed that her supervisor mimicked her accent and cultural mannerisms in front of their colleagues, sabotaged her work.

the Americans with Disabilities Act, 52 ALA. L. REV. 271, 284 (2000). This article notes the contradiction that,

essential qualifications for employment have been deemed to include the ability to get along with others. This is ironic since courts have refused to recognize the ability to get along with others as a “major life activity” for purposes of determining whether a plaintiff who is substantially limited in the ability to get along with others is disabled.

Id. (citation omitted).

See Diggs v. Town of Manchester, 303 F. Supp. 2d 163, 166-74 (D. Conn. 2004). In this case, an African-American firefighter, claiming Title VII and ADA discrimination, was disciplined on a number of occasions based upon his interaction with colleagues or the public. Id. In denying his claims, the court found that “a few sporadic, racially derogatory remarks, [were] too isolated to constitute . . . a hostile work environment”; further, the court found that his “work related stress syndrome” did not support a claim for disability discrimination. Id. at 181-82, 185.


Id. at *2-3.
efforts, accused her of falsehoods, and impugned her professional reputation and credibility which led to Benjamin's becoming ill and suffering from both irritable bowel syndrome and post-traumatic stress syndrome. Ms. Benjamin was terminated after returning from her second medical leave.

The dismissal of this case can certainly be confined to narrow procedural grounds. Equally compelling, however, is the failure of the court to decipher and address an essential part of Benjamin's case. Specifically, the plaintiff alleged continuous discriminatory practices and conduct, which occurred regularly, and further alleged ongoing health effects as the basis of her claim of disability discrimination. In other words, any instances of racial harassment and harassment based upon national origin were likely the genesis of the plaintiff's mental and physical illness. Unfortunately, the court did not give much attention to these allegations, instead focusing on procedural issues. Perhaps this evinces some fundamental inadequacies of the lay interpretation of mental and physical disability generally and the limitations of the ADA specifically.

Presumably, part of the judicial challenge stems from the stigma and fear attached to mental illness. Professor Perlin has dubbed the prejudicial attitudes towards persons with mental impairments "sanism." Like other "isms," sanism is an irrational bias based upon an individual's emotional or mental impairment—it is "based predominantly upon stereotype, myth, superstition, and deindividuation." Also like other "isms" no one is immune from such prejudice. Indeed, as

18 Id. at *3-4.
Professor Perlin has noted, sanism "infects both our jurisprudence and our lawyering practices"—litigation strategy and outcome, therefore, are similarly negatively impacted. Although the ADA does not stipulate that only serious or severe mental illnesses are required for claimant consideration, a reasonable reading of the relevant jurisprudence would indicate that many courts are indeed using a "combination of certain diagnoses, duration of the condition, and level of functional impairment," traditional categories for consideration of severe and persistent mental illness, to avoid compensation under the ADA.

Despite this desire on the part of the judiciary to require what amounts to enhanced mental impairment—or bleeding for the court, as I will denominate the phenomenon—there is a contemporaneous disbelief attached to "invisible" illnesses, such as mental impairment. This "fear of fakery" is widespread and entails the belief that despite the negative societal consequences, such as profound stigma attaching to mental

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23 Id.

24 STEFAN, HOLLOW PROMISES, supra note 2, at 48 (discussing the definition of severe mental illness most utilized after deinstitutionalization).


Serious mental illness was defined as having one 12-month disorder from the follow disorders—mood disorder, anxiety disorder, substance use disorder, antisocial personality disorder, schizophrenia, schizophreniform disorder, other nonaffective psychoses, somatization disorder, or organic brain syndrome—and being seriously impaired with impairment defined as meeting any one of the following four criteria: (a) having a severe mental illness; (b) planned or attempted suicide; (c) substantially interfered with vocational capacity; (d) serious interpersonal impairment.

STEFAN, HOLLOW PROMISES, supra note 2, at 48.

26 Michael L. Perlin, "The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian, the Fear of Faking, and the Culture of Punishment, 82 IOWA L. REV. 1375, 1409 (1997) (stating that the "public's fear of feigned insanity defenses meshes with its fears of released insanity acquitees" where society fears a defendant successfully faking insanity "will likely be quickly released from confinement," escaping punishment and endangering the community).
illness, claimants manufacture mental sequelae in an attempt to mislead judges and jurors for their personal benefit. Such fear of faking has additional consequences for racialized persons, particularly Blacks, frequently stereotypically portrayed as sneaky, shiftless and untrustworthy.

Unfortunately, much of the work on disability rights fails to recognize overlapping identity variables. There is a tendency to analogize, as if the disability rights groups were entirely separate and distinct from the race-based civil rights groups. For instance, it is frequently pointed out that “both groups have historically been viewed as biologically inferior; blacks are seen as lazy and unintelligent, while the disabled are characterized as feeble, incapable, and are often objectified.”

Similarly, in recognizing that disability, like race, is a socio-political construct and in many ways a cultural manifestation, the concept of disability is posited as similarly problematic to the concept of race. As both race and disability are fluid, flexible and fluctuating concepts they problematically lack the definitiveness many would assume. Of course, such conceptual ambiguity leaves room for judicial definition and exploration of these identity variables.

While the disability rights work grounded in analogy to other traditional civil rights movements is very important, and indeed monumental, these analyses typically distinguish between the nature of the prejudice experienced by the racialized, as opposed to the discrimination experienced by


29 Id.

30 Id.
those perceived of as disabled—i.e. discrimination against African-Americans is animus based, whilst the patronizing discrimination experienced by the physically-challenged is pity based.\textsuperscript{31} There are societal norms of unacceptability insofar as racism is concerned, yet no corollary principle in terms of pity; moreover racism operates to exclude and segregate whilst considerations of including the disabled are seldom contemplated.\textsuperscript{32} Not meaning to diminish the value of such observations, there are a few additional matters of concern in need of exploration.

As a starting point, disability and race are not mutually exclusive categories of existence. Indeed, for much of American history these identity variables have bled into each other—race was partially defined as a failure of ability, be that mental or physical, and disability was partially defined by racialization. As Douglas Baynton has recognized, "[d]isability has functioned historically as a justification for inequality not just for disabled people, but covertly for women and minority groups as well."\textsuperscript{33} In seeking to justify discriminatory treatment of women and people of color, physical infirmity, psychological infirmity and mental infirmity have been articulated, that is, disability has been projected onto numerous constructed sites of human exclusion.\textsuperscript{34} For instance, in addition to casting the immigrant as an "undesirable ethnic" or the African-American as "feeble-minded," those in favor of restricting immigration or denying civil and political rights to racialized persons have always found solace in the ability to further taint the already marginalized by "disabling" them.\textsuperscript{35} In this way it is somewhat artificial to compare and contrast race, gender and disability as they have been constitutive of and mutually reinforcing of each other for some time. So when the new cultural studiers of "disability in the humanities"

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\textsuperscript{31} STEIN, supra note 27, at 52-53.
\textsuperscript{32} Id.
\textsuperscript{33} Baynton, supra note 28, at 403.
\textsuperscript{34} Id. at 378.
\textsuperscript{35} Id. at 404-08
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investigate the manner in which popular representations attach societal meanings to bodies and seek to frame "disability as a 'culture-bound physically justified difference to consider along with race, gender, class, ethnicity, and sexuality,''' I do not disagree, rather I simply wish to add one point. That is, in many cases, race is disability and in other cases, disability is race—these identity constructs are often defined by conscious, or unconscious, reference to one another.

Attempting to "move disability from the realm of medicine into that of political minorities, to recast it from a form of pathology to a form of ethnicity" is a worthwhile project but ignores the reality that ethnicity and race are often pathologized according to the "ability" of the subject, just as ability is often pathologized by reference to the ethnicity or race of the subject. As one infamous New York physician stated,

God has made the negro an inferior being... There never could be a negro equaling the standard Caucasian in natural ability. The same almighty creator made all white men equal—for idiots, insane people, etc. are not exceptions, they are the result of human vices, crimes, or ignorance, immediate or remote. (emphasis added).

As such, perhaps more than anything, how we define those beyond our boundaries of normalcy, whether by virtue of race, gender, sexual orientation, ethnicity or (dis)ability, defines those within the "normal"—by defining the outsider, we define the insider, the white, middle class, able-bodied, heterosexual man who is the norm.

Of course, such an analysis ignores the internal fluidity of identity concepts. Just as the demarcations between races are

36 Id. at 396 (quoting Rosemarie G. Thomson, Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature 5-6 (1997)).

37 Baynton, supra note 28, at 396 (quoting Rosemarie G. Thompson, Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature 5-6 (1997)).

38 Id. (quoting an unnamed doctor).

39 Id. at 397.
dynamic—what was once black is now white,\textsuperscript{40} so too there is a continuum of disability.\textsuperscript{41} For instance, eyesight, hearing, mobility and mental health are abilities which have a spectrum of functionality, it is just that some threshold is determined below which ability is arbitrarily cast as impairment.\textsuperscript{42} Particularly relevant for purposes of this essay, the mentally disordered are so cast by virtue of the way others respond and assess their behaviors, not from any actual functional impairment\textsuperscript{43}—that is we label their behavior as beyond the limits of normalcy. Insiders always have the privilege of labelling outsiders. As Susan Stefan stated,

Perversely, the "substantial limitations" clause of the disability definition provides the employer immunity to discriminate against the most stigmatized disabilities.... The requirement that an employee be substantially limited in major life activities, or to be regarded as substantially limited by the employer, is particularly problematic because it is often irrelevant to many disability-related prejudices, which arise primarily out of discomfort with difference.\textsuperscript{44}

The totality of meaning, given the flexibility of identity and the analogizing between race and disability, is unclear. However, this complexity implies that just as the construction of race and ability is possible, so too is the deconstruction of identity along various axes, including race and ability. The continuum of identity further problematizes the manner of our legal analysis which presumes fixity and concrete notions and ways of being.

Accepting this assumed fixity of identity for the moment,


\textsuperscript{41} Baynton, supra note 28, at 389.

\textsuperscript{42} Id.


\textsuperscript{44} Stefan, Delusions of Rights, supra note 13, at 298, 303.
what of persons who occupy several supposedly fixed identities—those of mixed-identities if you will? Typically persons of mixed identities are cast as mixed race, mixed race and gender, or mixed gender/race and sexual orientation. What of the experience of women and people of color who are not able-bodied? What of the experience of women and people of color triply stigmatized by intersecting realities of racism, sexism, and sanism—it is doubtful that the proposed pity-based discrimination articulated above as descriptive of our approach to the disabled squarely attaches to these mixed-identitied individuals. Instead, one finds instances of animus-based prejudice which seeks to entirely exclude persons of color with mental illness from gainful employment particularly, and from society more generally—in this way, the very purpose of the ADA, to “overcome the barriers that prevent [] full participation in American society” is usurped.45

By not receiving effective treatment, [people in the U.S. racialized as non-white] have greater levels of disability in terms of lost workdays and limitations in daily activities. Further, minorities are overrepresented among the Nation’s most vulnerable populations, which have higher rates of mental disorders and more barriers to care. Taken together, these disparate lines of evidence support the finding that minorities [however defined] suffer a disproportionately high disability burden from unmet mental health needs.46

Accordingly, comments such as “[l]ike women, people of color, and religious minorities, people with disabilities have

45 Blackmon v. Unite!, No. 03 Civ.9214 GWG, 2005 WL 2038482, at *1 (S.D.N.Y. Aug. 25, 2005). (“Blackmon alleges that Unite’s ‘mistreatment’ of herself and ‘blacks in general . . . has created a hostile work environment in which there exists a culture that serves to exclude[] blacks from positions of power with the union . . . .’); Baber v. McGriff Tire, Inc., No. 3:04 CV 00195 GH, 2005 WL 1926652 *1-*3 (E.D. Ark. Aug. 12, 2005) (denying defendant’s motion in limine to exclude “incidents where black employees were forced to keep their shop area clean, and incidents where black customers were charged higher labor rates than whites” in a suit alleging a hostile working environment, in part, due to the race of the plaintiff); see also Miller, supra note 5, at 3.
46 Surgeon General’s Report, supra note 5.
had to fight for the recognition of their civil rights, battle to get legal protections, and struggle to become integrated in society, while insightful, do not recognize the intersecting reality of disability as an identity construct which coincides with all identity markers, including, but not limited to race, gender, ethnicity, sexual orientation, class and religion. Indeed, in the realm of mental disability, women and people of color are disparately impacted by mental health concerns, partly due to health care access issues and partly due to socio-economic factors which place such individuals in "high need sub-groups such as persons who are homeless, incarcerated, or institutionalized. People in these groups have higher rates of mental disorders." Increased exposure to racism, discrimination, violence and poverty are some of the societal and economic inequalities facing racial and ethnic minorities in the United States which significantly tax their mental well-being, producing poor mental health. The heightened burdens that racial and ethnic minorities face due to their mental illnesses is attributed more to these minorities receiving insufficient or lesser quality of care, than from their illnesses being of increased severity or societal prevalence.

The reality of identity politics in the United States is that it behooves us to pay particular attention to these sub-groups since persons racialized as non-white are overrepresented in these vulnerable "high need" groups yet receive inadequate or poor quality mental health services. For instance, persons of color in the U.S. "have less access to, and availability of, mental health services, are less likely to receive needed mental health services, receive poorer quality of mental health care and are underrepresented in mental health research. These issues are particularly acute for persons of color living with physical or mental illness due to a knowledge and

47 Miller, supra note 5, at 4.
48 Surgeon General's Report, supra note 5.
49 Id.
50 Id.
51 Id.
52 Id.
information gap with respect to the ADA. While all persons living with disabilities likely have insufficient knowledge about the ADA disseminated to them, this issue is particularly worrisome for people of color with disabilities who are "underreached by current ADA information and technical assistance efforts." Similarly, there is a corresponding employment gap disparately impacting persons of color with disabilities.

The ADA additionally imposes a difficult causal standard. Specifically, even if the Plaintiff can meet the requirement and establish that she is able to perform the essential functions of her job (either with or without accommodation), she will lose her claim if she fails to show that the discrimination or harassment was causally connected to her disability. As such, in order to make out an ADA claim, Plaintiff must prove that the discrimination she experienced was exclusively "because of [her] disability." As explained above, the mutually constitutive construction of identities, including disability, is important. But denying for the moment the fluidity of identity constructs, like disability, the difficulty is that some disabilities, particularly mental challenges, may be invisible, or at least not consistently evident—they may be episodic. The challenges presented by this threshold causation test are, at least, threefold.

First, outing oneself in the employment context, or any other societal context with unclear safe-spaces, may be hazardous not only to one's (mental) health, but to one's employment status and employability. Like outing oneself on the basis of

54 STEIN, supra note 27, at 55 (quoting ADA WATCH YEAR ONE: A REPORT TO THE PRESIDENT AND CONGRESS ON PROGRESS, IN NATIONAL COUNCIL ON DISABILITY, IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT at 5 (1993)).
55 See Hanna & Rogovsky, supra note 53, at 39–45 and accompanying text.
sexuality, where dictates of heteronormativity prevail to ostracize in many cases,\(^5\) detailing one's mental health issues to fellow employees or employers seems a recipe for disaster, given the prevailing stigma many attach to mental illness.\(^5\) It seems perverse that "a key part of the Plaintiff's ADA case is showing that the employer had knowledge of the handicap and that there was a causal relationship between the handicap and adverse event."\(^6\) In other words, the mentally vulnerable must either invite the discrimination by (1) divulging what might otherwise be confidential (mental) health information just in case adverse treatment follows, or (2) being obviously mentally disturbed in some way—that is, performing their mental illness such that it can be noted, recognized as illness and negatively acted upon. Thus by claiming the identity of disability, in advance, so as not to pass as (mentally) abled, or by acting out (mental) disability in an externally cognizable, likely essentialized manner, the ADA Plaintiff paves the way for the finding of a causal connection between her mental disability and ensuing discrimination.

Second, the temporal requirements of the ADA are curious given the focus of the legislation—to be a beacon of freedom, or the equivalent of the Declaration of Independence for millions of Americans who have mental or physical disabilities.\(^6\) In


\(^6\) See S.S., ex rel Stuts v. Eastern Kentucky Univ., 307 F. Supp. 2d 853, 855 (E.D. Ky. 2004) ("Plaintiff alleges . . . that other students threw urine-soaked paper towels at him in the bathroom, threw bleach at him in the chemistry lab, assaulted him in the halls and the library, grabbed his genitals in the boys’ locker room, ‘extorted’ money from him, and called him a ‘mental retard,’ ‘gay,’ and ‘queer’ because of his disabilities.").

\(^6\) Gulfstream Aerospace Corp., 905 F. Supp. at 1081.

\(^6\) See Ann Hubbard, Meaningful Lives and Major Life Activities, 55 ALA. L.
terms of timing, if discrimination is what precipitates or exacerbates mental illness, it would seem that the ADA claimant would be out of luck. This scenario is not an academic frolic, but rather a real question as there are work environments that are distressing or toxic which themselves precipitate mental illness. In this way the causal test seems to presuppose an identity grounded exclusively in (dis)ability which subjects one to adverse treatment because of that solitary disability identity, versus adverse treatment, on whatever basis, which results in mental disability. The mental illness, as identity construct, must temporally precede the ADA finding of disability and discrimination. If negative societal reaction to another identity status precedes, indeed causes the mental disability, it is unlikely that an ADA finding of discrimination will be forthcoming. Accordingly, by leaving mentally disordered claimants out in the cold for lack of the stipulated temporal manifestation of a mental illness based identity, the ADA seems not to be the beacon of hope which the Legislators and President H.W. Bush had hoped for.

Third, a connected matter relates to the springboard from which the ADA becomes operative. Just as some disabilities are invisible or are hidden, other potential identity markers are more out in the open and obvious. For instance, often sex, race, language and ethnicity are, somewhat, discernable, albeit with imprecision. Even if incorrect ascriptions of identity are made along these lines, they are made nonetheless and reactions follow. If the discrimination is initially related to one of these more obvious identity markers, not because of the (mental) disability, the ADA claimant subsequently suffering mental health sequelae will not prevail. This is particularly troublesome given the reality of sexual and racial harassment, which takes a huge mental toll on those so victimized.

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63 See WILLIAM E. FOOTE & JANE GOODMAN-DELAHUNTY, EVALUATING SEXUAL
The intersectional reality of many individuals living with physical or mental disability seems largely irrelevant for purposes of the ADA. Indeed, the Surgeon General's Report insightfully addresses these issues:

A constellation of barriers deters minorities from reaching treatment. Many of these barriers operate for all Americans: cost, fragmentation of services, lack of availability of services, and societal stigma toward mental illness (DHHS, 1999). But additional barriers deter racial and ethnic minorities; mistrust and fear of treatment, racism and discrimination, and differences in language and communication. The ability for consumers and providers to communicate with one another is essential for all aspects of health care, yet it carries special significance in the area of mental health because mental disorders affect thoughts, moods, and the highest integrative aspects of behavior. The diagnosis and treatment of mental

disorders greatly depend on verbal communication and trust between patient and clinician. More broadly, mental health care disparities may also stem from minorities' historical and present day struggles with racism and discrimination, which affect their mental health and contribute to their lower economic, social, and political status. The cumulative weight and interplay of all barriers to care, not any single one alone, is likely responsible for mental health disparities.64

Additionally, critical race and critical legal theorists have provided tremendous scholarship informing the holistic modes of existence of legal subjects such that we might more fully appreciate the multiple identity realities which people simultaneously occupy and navigate.65 This body of scholarly inquiry recognizes that by engaging in anti-discrimination work it is instructive and informative to use analytical paradigms which recognize that greater negativity flows to those sites where multiple forms of oppression converge—identity work should not proceed on the basis of mutual exclusivity. Rather a contextual and holistic appreciation of the way in which discrimination and prejudice operate recognizes that systems of domination, be that racism, sexism, homophobia, classism, or sanism, whatever form of intolerance, are interlocking, intermingling, mutually reinforcing, and constitutive of each other.

64 Surgeon General's Report, supra note 5 (Executive Summary, Main Findings) (emphasis added).
Accordingly, the singularity of discrimination recognized by the ADA, the most recently introduced wide scale antidiscrimination legislation, and its jurisprudential interpretation, is disappointing, in light of the breadth and depth of contemporary understandings of intersecting identities. By conceiving of disability as narrowly running along an isolated axis, ADA jurisprudence oversimplifies reality, essentializes, and requires identity splitting.\textsuperscript{66} The ADA forces a reliance on and claiming of dominant identities (by displaying a record of impairment), the performance of illness (by requiring "mental impairment that substantially limits major life activity"), and deference to external ascriptions of disabled identities (the "regarded as having an impairment" test).

For instance in the case of \textit{Mears v. Gulfstream Aerospace Corp.}\textsuperscript{67} the court goes to great lengths to point out that the claimant, a woman suffering from work related stress, including allegations of sexual harassment and its mental health sequelae, who consequently developed agoraphobia and dysthymia, failed to show that any activity undertaken by her former employer was "because" of her disability.\textsuperscript{68} A main reason for the dismissal of Plaintiff's case was that "[s]he at no time told anyone she had a disability."\textsuperscript{69}

Appropriately, after she was diagnosed the company approved a short term disability leave. However, if one's disability is invisible, it behooves a potential ADA claimant to ensure the appropriate evidentiary thresholds are met—a diagnosis is necessary, in the absence of obvious disability—mental disability must be authenticated for the court by deference to the appropriate expert and such authentication must be temporally located. But the decision of the court in \textit{Mears} is even more

\textsuperscript{66} Identity splitting is the phenomenon of treating identities as singular, parallel and separate—one is forced to identify along a single axis, thereby splitting oneself into incomplete, yet legally digestible, subparts.


\textsuperscript{68} This case evinces the struggle of courts in determining whether to frame the case as a civil rights, workman's compensation, or ADA matter. \textit{Id.}; see also STEFAN, HOLLOW PROMISES, supra note 2, at 32.

\textsuperscript{69} \textit{Gulfstream Aerospace Corp.}, 905 F. Supp. at 1081-82.
disconcerting in its unwillingness to attribute the genesis of the disability to the source in a legally compensable way. Furthermore, Sheila has shown that it is all of the stress related events that occurred while she was employed that caused the disability with which she has been formally diagnosed. If the job itself caused the disability, the employer cannot fairly be accused of discrimination because of that disability, at least in cases such as this one, where the Plaintiff essentially stopped working because of a job-caused disability, then never came back. In that sense, *she never gave the employer a “chance” to discriminate because of the disability.*

The creation of such a curious jurisprudential opportunity is disconcerting—indeed, the creation of the chance to discriminate might be judicial folly. Surely it should suffice that discrimination actually took place with detrimental (mental health) sequelae. It might be that such a ruling does not make sense in light of the aims of the ADA—to be a source of liberation for persons with mental and physical illness. The court acknowledged that the employment situation caused the disability—the disability existed and had been appropriately authenticated by a psychiatrist, an expert. What is missing is the quintessential chicken and egg debate—Ms. Mears’s identity as mentally disabled did not come before the alleged sexual harassment and alleged inappropriately stressful employment situation. Any allegedly adverse employer behavior must be grounded in the singularity of constructed disability—discrimination must exist solely because of the disability. The disability cannot find its genesis from adverse treatment grounded in alternative or mixed identity constructs. In the words of the court, “[t]here is not a scintilla of evidence in the record that anything Gulfstream or its employees did while Plaintiff worked there was because of, directed at, or related to any disability she might have had.”

Of course, we now know that prejudice travels in

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70 *Id.* at 1081 (emphasis added).
71 *Id.* at 1082.
packs—like predators, those who would prey upon others do not parse identity with nicety, articulating with precision the basis upon which they seek to disempower. Instead, the reality of any form of discrimination is that they blend into each other, reinforce and constitute each other and absorb each other. Like a lava-lamp, forms of discrimination morph, merge, emerge from, and fold into each other—discrimination is constantly evolving and is never static. Accordingly, any legally cognizable sexual harassment claim should have been reinforced by the disability claim, and any disability claim should have been reinforced by the harassment claim—this would have been more consistent with a reality of interlocking trajectories of discrimination. Instead, the court held, “[s]ince Plaintiff does not allege this harassment was directed at her because of her disability, it has no relevance to her ADA claim.” Thus, if the stresses of racial or sexual harassment lead to the development of a disability, the remedy lies elsewhere.

Unfortunately, this reality of toxic work and school environments is indeed the case for many women and people of color. As the ADA clearly “only prohibits discrimination because of a person’s disability,” many claimants with multiple identities, which include a disability, will be shut out in the absence of their being able to previously access treatment which diagnoses their illness, or adequate performance of their illness—either expert authentication of the existence of the identity construct is required, or external, supposedly objective, lay recognition of manifested mental disability is required. In either case, bleeding for the court is a prerequisite to recovery.

There, however, is some hope to be gleaned from Sanders v. City of Chicago. Joseph Sanders, a former Chicago Police Officer, brought a suit for employment discrimination based

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73 Id.
74 Id. “The ADA . . . is not a catch-all remedy for sexual harassment claims on which the statute of limitations has run... If the stresses of her job caused Plaintiff to develop a disability, then her remedy lies elsewhere in the law.” Id.
upon race discrimination and hostile work environment under Title VII of the Civil Rights Act, but he also alleged disability discrimination and retaliation under the ADA against the Defendant City of Chicago. Specifically, Sanders, a Black man, was diagnosed with "emotional stress syndrome" by the city of Chicago's doctor and was moved from his post as a patrolman, to the Canine Unit and finally to the Call Back Unit before he resigned. Sanders alleged being subjected to racial slurs and to being racially excluded from work functions.

In rejecting the defendant's motion to dismiss Sanders's Title VII and ADA claims the court emphasized that Sanders "has plead sufficient facts to allege a materially adverse employment action," and that the police department had "regarded Sanders as having a disability" and, accordingly, Sanders had established the existence of a disability as required by the ADA.

While strongly encouraging the parties to discuss settlement possibilities, at least the court was not dismissive of the possibility of a Title VII and ADA claim functioning in tandem. Additionally, the court recognized that if the plaintiff suffered from emotional stress syndrome, the police department had a duty to accommodate him. Two matters are important at this point. First, emotional stress syndrome is not even "defined as a disability under the ADA and has not been offi-

76 Id. at *2.

77 The DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS defines acute stress disorder as the "development of characteristic anxiety, dissociative, and other symptoms that occurs within one month after exposure to an extreme traumatic stressor." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 429 (4th ed. 1994).

78 Sanders, 2000 U.S. Dist. LEXIS 1753, at *3.

79 Sanders claimed that a Police Commander referred to him as a "Boy" and told him that "[his] type should be put in [his] place." Id., at *5.

80 Sanders claimed that he was not allowed to attend a police department-sponsored retirement party, while non-Black retiring officers were allowed to attend. Id. at *4.

81 Id. at *19, *21.

82 Id. at *19, *21.

83 Id. at *19.

84 The regulations implementing Title I of the ADA define mental impairment
cially interpreted as such by any courts. The fact that the court, nonetheless took an expansive view of mental disability necessitating accommodation is admirable. Indeed, this is the type of diagnosis one might expect for the many racialized persons suffering in toxic work or study environments, given the reality of racial harassment.

Secondly, the court articulated the usual test for the requirement of accommodation. Namely, the plaintiff must allege:

(1) he was or is disabled; (2) Defendant was aware of his disability; (3) he was otherwise qualified for his job; and (4) the disability caused the adverse employment action (a factor which is implied if not stated).

It is the last criteria with which I am most concerned. In conceding that the potentially racially informed diagnosis of emotional stress syndrome caused the negative employment action, the court might well be taking the first step towards an intersectional approach to the ADA. By expanding the conceptualization of a mental disability sufficient to trigger ADA application, the United States District Court for the Northern District of Illinois, Eastern Division might be allowing for an unfolding of the critical race perspective on interlocking, interconnected, constitutive identity variables so often ignored in American jurisprudence.

Further, given that there are three ways in which an ADA plaintiff might establish the existence of a disability—having a physical or mental impairment that substantially limits at least one major life activity, having a record of impairment or being regarded as having an impairment—it is reassuring that the court did not require that Sanders “out” himself unnecessarily by disclosing his particular mental vulnerabilities or as including “any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” Courts have interpreted the language of mental impairment to include the most readily recognized DSM diagnoses, including schizophrenia, depression, and bipolar disorder. STEFAN, HOLLOW PROMISES, supra note 2, at 47.

86 Id. at *19.
87 Indeed, upon notification that Mr. Sanders had fainted whilst off-duty, he
that Sanders perform his mental disability to claim recourse under the ADA. Instead, the court properly looked at the treatment inflicted upon Mr. Sanders and surmised that the underlying reason for the ill-treatment was likely the perception others had of him based upon his being (a Black man) with an emotional disturbance.\textsuperscript{58} In this way the court properly treated Sanders's mental disability as other identity constructs are judicially assessed, as a construct triggering adverse treatment, and not driven by a record of i.e., Blackness, being regarded as Black, or performing Blackness.

An examination of the treatment of the mentally and physically ill, in my opinion, should be the essential test for whether discrimination on the basis of (dis)ability has taken place—the ascription of otherness by an external observer with detrimental consequence should be paramount, not whether the file has been papered sufficiently to show a record of mental illness, nor whether the claimant is limited in their essential functioning (but of course not too limited as to be incapable of accommodation). As with other discriminatory perpetrators, those operating with animus against persons with mental or physical disabilities do not parse their prejudice that finely—they do not undertake the calculus of how much their target is able to accomplish nor do they necessarily examine their medical or employment records to discern their record of impairment. Rather it is sufficient that they perceive their victim sufficiently unlike them—they "other" their victim, to the point of dehumanization if necessary. As discussed above, such marginalization is easier the more identity variables of departure one strays from the norm of the heterosexual, white, able-bodied, middle class man. It is my hope, therefore, that as we celebrate the fifteenth anniversary of this seminal legislation, new life is breathed into ADA jurisprudence which reflects upon some of the matters discussed above. If so, we might start anew towards achieving the fullness and rich possibilities for

\textsuperscript{58} Sanders, 2000 U.S. Dist. LEXIS 1753, at *20.
which the ADA was originally enacted.