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The ADA Prima Facie Plaintiff: A Critical Overview of Eighth Circuit Case Law

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THE ADA PRIMA FACIE PLAINTIFF: A CRITICAL OVERVIEW OF EIGHTH CIRCUIT CASE LAW

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At our best, we create opportunities.
Maya Angelou

I. INTRODUCTION

The Americans with Disabilities Act of 1990[1] was passed to address the grave prejudices and discrimination against individuals with disabilities that, despite some improvements, continue to be a serious social problem in the United States.[2] Those with prejudiced beliefs against individuals with disabilities often regard disabled persons as incomplete or even defective.[3] The sanctioned segregation and virulent bigotry against individuals with disabilities can even be compared to Jim Crow laws.[4] Facing an almost universal conspiracy to shun them from the mainstream of society, individuals with disabilities have

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1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)).

2. 42 U.S.C. § 12101(a)(2). The Congressional findings which precede the Americans with Disabilities Act (ADA) state that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.*

3. Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 LAB. LAW. 1, 1 (1991). The more correct terminology is "individuals with disabilities" rather than "disabled individuals" because the former reflects an understanding that those with disabilities are individuals first and foremost; they are not cripples or even disabled people, but individuals. *See* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 411 n.1 (1997) (explaining the preference for noun plus prepositional phrase formulations—such as "person with a disability"—rather than adjective plus noun phrasing—such as "mentally retarded children"). While it is necessary to group the class of people covered by the lay and legal definitions of people with a "disability," this sensitivity of terminology reminds us that this group is a group of individual people first, and a group identified by a common characteristic second. Nevertheless, it must be conceded that at times the term "individual with a disability" is somewhat clumsy. The author adheres to the more sensitive terminology whenever possible, but deviates occasionally in the interest of avoiding ungainly language. The term "handicaps" is also intentionally avoided herein, although earlier cases interpreting the Rehabilitation Act employed that term, following the statutory language which has since been amended to reflect the consensus that the term "handicaps" should be replaced with "disabilities."

4. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 462 (1985) (Marshall, J., concurring).

constantly been denied the opportunities available to others.[5] That the cost of this prejudice and discrimination is a high one for individuals with disabilities is self-evident, but the cost is also staggering for the country as a whole.[6] When individuals with disabilities are foreclosed from jobs, from the enjoyment of the services of government, and from public life in general for no reason other than wrongly conceived prejudices, the country itself is shortchanged. In enacting the ADA, Congress declared that the nation's proper goals with regard to individuals with disabilities are to ensure equal opportunities, independence, and full participation.[7] As a means of achieving these goals, the 101st Congress passed and President George Bush signed the ADA.[8]

The ADA is a landmark piece of civil rights legislation, perhaps the most far-reaching since the Civil Rights Act of 1964.[9] With the ADA, Congress cut a very wide swath, invoking the full sweep of its authority under the commerce clause and the power to enforce the Fourteenth Amendment.[10] The legislation, despite its name, applies not only to Americans; it safeguards the rights of all individuals with disabilities in the country regardless of status or national origin.[11]

In the Eighth Circuit, a great number of ADA cases have been decided and reported. The aim of this Article is to provide the practitioner with a basic framework of the ADA, relying primarily upon case law from the Eighth Circuit. Supreme Court decisions will also be discussed and cases from other circuits will be cited in instances where the Eighth Circuit has not yet spoken or has spoken differently than its sister circuits. An exhaustive overview of the ADA could

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5. Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 389 (N.D. Iowa 1995) (quoting ROBERT L. BURGDORF, JR., THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT 51 (1980)).

6. *See* 42 U.S.C. § 12101(a)(9) (stating that "prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity"). Here, Congress intimates that the costs associated with discrimination against individuals with disabilities include a toll on freedom as well as the more assessable financial costs resulting from unemployment and idleness.

7. 42 U.S.C. § 12101(a)(8).

8. Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471, 475 (1991).

9. Mayerson, *supra* note 3, at 1. "The ADA is the most comprehensive piece of disability civil rights legislation ever enacted, and the most important piece of civil rights legislation since the 1964 Civil Rights Act." *Id.*

10. 42 U.S.C. § 12101(b)(4); U.S. CONST. art. I, § 8; *id.* amend. XIV, § 5; *see also* Autio v. AFSCME, Local 3139, 140 F.3d 802, 804 (8th Cir.) (upholding the authority of Congress to enact the ADA under the power to enforce the Equal Protection Clause of the Fourteenth Amendment), *aff'd by an evenly divided en banc panel*, 157 F.3d 1141 (8th Cir. 1998).

11. H.R. REP. NO. 101-485(II), at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 333.

easily exceed several thousand pages. This Article will not address in any detail the lesser-litigated provisions of the ADA, nor the full range of defenses or remedies, and only abbreviated coverage will be devoted to much of the ADA in order to provide more discussion on issues which the Eighth Circuit has examined.[12] A plaintiff-oriented viewpoint has been adopted with the objective of enunciating what is necessary, consistent with Eighth Circuit case law, to establish a prima facie case under the ADA. As will become evident, the Eighth Circuit has in many cases adopted a narrower reading of the ADA than the broad remedial scope of the ADA seems to mandate. Given this Article's plaintiff-orientation, a critical tone of Eighth Circuit jurisprudence is at times necessitated.

In order to provide a perspective of the ADA, the section which follows briefly reviews the enactment of the ADA and the Act's forerunners including the Rehabilitation Act of 1973. The next section offers a truncated outline of the ADA and its five titles. Title I is by far the most litigated; Title II also finds its way into the courts. Titles III, IV, and V, while important, will receive less coverage. Finally, an exploration of the prima facie case will be undertaken. Although the requirements differ depending on the specific title and theory relied upon, at its most basic, a prima facie case consists of establishing that the plaintiff has a disability and has been discriminated against for that reason. Elaboration of these elements as they apply to different provisions of the ADA will form the central theme of this Article.

II. History

A. *Before the ADA*

The area of civil rights legislation for individuals with disabilities boasts a relatively long history. The paragraphs below contain brief mention of the six most cited pieces of pre-ADA legislation which offered protection for people with disabilities.[13] Case law interpreting these statutes may at times prove useful to the researcher foraging for precedent applicable to the ADA, but the most obvious characteristic of these statutes is their carefully circumscribed application. These forerunners to the ADA are in marked contrast to the extremely broad provisions of the ADA itself.

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12. A full examination of the subtleties of the historic vehicle exception to the accessibility requirements for vehicles operated by public entities on fixed route systems, for example, is beyond the scope of this Article. *See* 42 U.S.C. § 12142(c)(2)(A); 49 C.F.R. § 37.75(d) (1998).

13. For an examination of the congressional history in attacking disability discrimination, see *Helen L. v. DiDario*, 46 F.3d 325, 330 (3d Cir. 1995).

In 1920, President Woodrow Wilson signed legislation aimed at rehabilitation services for disabled World War I veterans.[14] The Act provided for limited services to veterans as well as civilians with physical disabilities.[15] Later, the Vietnam Era Veterans' Readjustment Act (VEVRA)[16] mandated government contractors to undertake affirmative efforts to hire and promote disabled veterans.[17] VEVRA was passed to address unemployment and underemployment of disabled American veterans.[18] The Act is of limited utility to aggrieved disabled veterans, however, because no private right of action was created.[19] In 1968, Congress enacted the Architectural Barriers Act[20] that required buildings, which were built or financed by the federal government, to be accessible by individuals with disabilities.[21] Then in 1975 Congress passed the Education of All Handicapped Children Act,[22] guaranteeing children with disabilities equal access rights to public education.[23] That Act required students with disabilities to be "mainstreamed" into the nation's school systems, guaranteeing placement of children in the least restrictive setting.[24] The Developmentally Disabled Assistance and Bill of Rights Act,[25] which expanded the rights of individuals with developmental disabilities and increased the number of programs available, was passed the same year.[26]

The most significant piece of disability civil rights legislation passed in the 1980s was the Fair Housing Amendments Act of 1988 (FHAA).[27] The FHAA prohibits discrimination in the sale, rental, financing, or brokerage of private

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14. Smith-Fees Act of 1920, Pub. L. No. 66-236, 41 Stat. 735, *repealed by* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 390.

15. *Id.*

16. Vietnam Era Veterans' Readjustment Act of 1972, Pub. L. No. 92-540, 86 Stat. 1074 (codified as amended at 38 U.S.C. §§ 4100-4110A, 4212).

17. 38 U.S.C. § 4212(a). Contracts in the amount of $10,000 or more must contain an affirmative action provision with regard to qualified special disabled veterans. *Id.*

18. *Id.* § 4100(1).

19. Wilson v. Amtrak Nat'l R.R. Corp., 824 F. Supp. 55, 58 (D. Md. 1992).

20. Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151-4157).

21. 42 U.S.C. §§ 4152-4154a.

22. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1232, 1401, 1404-1420, 1453).

23. *See id.*

24. *See* 20 U.S.C. § 1412(5)(B); Dick Thornburgh, *The Americans with Disabilities Act: What It Means to All Americans*, 64 TEMP. L. REV. 375, 377 (1991).

25. Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975) (codified as amended at 42 U.S.C. §§ 6000-6083).

26. *See id.*

27. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601-3619); Mayerson, *supra* note 3, at 3.

housing and provides for federal enforcement.[28] Liability can attach irrespective of any receipt of federal funding. The FHAA includes a definition of handicap which is identical to the ADA's definition,[29] and prohibits not only discriminatory acts against individuals with disabilities, but also requires active accommodation and accessibility features.[30]

B. *The Rehabilitation Act*

The Rehabilitation Act of 1973[31] was the primary source for federal protection of persons with disabilities prior to the ADA.[32] The Rehabilitation Act challenged the accepted societal views of individuals with disabilities and gave birth to an active and highly visible disability rights movement.[33] It continues to have application today when a federal nexus is present.[34] The Act contains three key provisions: sections 501, 503, and 504, the most important of which is section 504.[35]

First, section 503 addresses employment discrimination by businesses which enter certain types of contracts with the federal government, or who subcontract with federal contractors.[36] Section 503 requires a sort of affirmative action program in favor of the training and recruitment of individuals with disabilities.[37] Thus, an affirmative duty is imposed on federal contractors to

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28. Williams v. Matthews Co., 499 F.2d 819, 825 (8th Cir. 1974); Otero v. New York City Hous. Auth., 484 F.2d 1122, 1133-34 (2d Cir. 1973).

29. *Compare* 42 U.S.C. § 3602(h), *with id.* § 12102(2).

30. *Id.* § 3604(f)(3).

31. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-794e). For an overview of the Rehabilitation Act and its limitations, see NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES A-6 to A-14 (1986); Honorable Judge Charles R. Richey, Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts 6-1 to 6-49 (1998) [hereinafter Richey]; Senator Birch Bayh, *Foreward to the Symposium Issue on Employment Rights of the Handicapped*, 27 DEPAUL L. REV. 943, 944-52 (1978); Richard F. Richards, *Handicap Discrimination in Employment: The Rehabilitation Act of 1973*, 39 ARK. L. REV. 1, 1-4 (1985).

32. R. Bales, *Once Is Enough: Evaluating When a Person Is Substantially Limited in Her Ability to Work*, 11 HOFSTRA LAB. L.J. 203, 209 (1993).

33. Mayerson, *supra* note 3, at 1-2.

34. Richey, *supra* note 31, at 6-1.

35. 29 U.S.C. §§ 791, 793-794.

36. *Id.* §§ 793-794. Only contracts in excess of $10,000 "for the procurement of personal property and nonpersonal services (including construction) for the United States" are covered by the statute. *Id.* § 793(a).

37. *Id.*

"employ and advance" qualified individuals with disabilities.[38] Although there is no explicit private right of action under the statute, some authority for an implied private cause of action exists.[39] The Eighth Circuit, however, has determined that no private right of action can be brought under section 503.[40]

Section 501 pertains to job discrimination against individuals with disabilities who are employed by the federal government.[41] Like section 503, it requires all federal agencies to adopt affirmative action plans for the hiring, placement, and advancement of individuals with disabilities.[42] Federal employers must, therefore, reasonably accommodate employees and applicants with disabilities.[43] (While sections 501 and 503 require active accommodations of individuals with disabilities, this is in contrast with section 504 which, under a narrow reading of the statutory language, does not impose any affirmative action duties on the government.)[44] In addition to imposing an affirmative duty, section

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38. *Id.* The affirmative action provision must be contained in the contract with the government. *Id.* By contrast, the ADA does not require affirmative action with regard to the recruitment of individuals with disabilities. *See generally* 42 U.S.C. §§ 12101-12112.

39. *See, e.g.*, Davis v. Modine Mfg. Co., 526 F. Supp. 943, 953 (D. Kan. 1981); Hart v. County of Alameda, 485 F. Supp. 66, 75 (N.D. Cal. 1979); Eugene A. Schoon, Note, *Private Rights of Action for Handicapped Persons Under Section 503 of the Rehabilitation Act*, 13 VAL. U. L. REV. 453, 487-92 (1979). Most enforcement of section 503 is by the Department of Labor Office of Federal Compliance Programs. *See* 29 U.S.C. § 793(b).

40. Simon v. St. Louis County, Mo., 656 F.2d 316, 319 (8th Cir. 1981). The court recognized a split among the circuits on this issue, but after examining the *Cort v. Ash* factors, determined that no private right of action under section 503 exists. *Id.* at 319 & n. 5 (examining the factors in *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

41. 29 U.S.C. § 791(b). *See generally* Daniel J. Adelman, *Employment Discrimination—Section 501 of the Rehabilitation Act of 1973: Finally, a Legal Standard*—Mantolete v. Bolger, *767 F.2d 1416 (9th Cir. 1985)*, 1986 ARIZ. ST. L.J. 147 (discussing the Ninth Circuit's interpretation of section 501).

42. 29 U.S.C. § 791(b); Gardner v. Morris, 752 F.2d 1271, 1277 (8th Cir. 1985) (stating that section 501 "requires the federal government . . . to develop and implement affirmative action plans on behalf of handicapped employees").

43. Rhone v. United States Dep't of the Army, 665 F. Supp. 734, 742 (E.D. Mo. 1987); *see* Gardner v. Morris, 752 F.2d at 1278.

44. Southeastern Community College v. Davis, 442 U.S. 397, 411-12 (1979); Gardner v. Morris, 752 F.2d at 1278. In *Gardner*, the plaintiff brought his case under both section 501 and section 504. Gardner v. Morris, 752 F.2d at 1277. The court stated that it had "considered carefully the scope of protection and the allocation of burdens under both sections and we conclude that the relief afforded a successful plaintiff under § 501 is equal to or greater than that provided under § 504." *Id.*; *cf.* Harrison v. Marsh, 691 F. Supp. 1223, 1228 (W.D. Mo. 1988) ("The Rehabilitation Act constitutes a federal employee's exclusive remedy for claims of handicap discrimination in employment.") (citations omitted). *Davis* recognized that section 504 does not require affirmative action programs by employers receiving federal funding. Southeastern Community College v. Davis, 442 U.S. at 411-12. A college nursing program, therefore, had no liability under that section for failing to give an applicant who was hard of hearing individual supervision by faculty members because that would constitute substantial adjustments in the

501 implicitly prohibits the federal government from discriminating on the basis of disability.[45] For this reason, if a federal government employer is the defendant, the plaintiff ought to rely on section 501.[46] With section 501, however, there is no real question of the exclusivity of remedy.[47]

Section 504 is regarded as the most far-reaching section of the Rehabilitation Act because its coverage extends to programs funded by the federal government.[48] A private right of action against such entities is guaranteed.[49] Section 504 provides that:

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program. *Id.* at 410. At the same time, the Court recognized that "the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons [will not always] be clear." *Id.* at 412.

45. Gardner v. Morris, 752 F.2d at 1278 (citing Shirley v. Devine, 670 F.2d 1188, 1200-01 (D.C. Cir. 1982)).

46. Section 501 has been interpreted to require the federal government to behave as a "model employer" in contradistinction to the level of accommodations required from non-government employers under section 504. Harrison v. Marsh, 691 F. Supp. at 1229 (quoting 29 C.F.R. § 1613.703 (1998)). "[A]s a representative of . . . the Federal Government, the defendant has a high burden to meet when confronted with the need to accommodate a handicapped employee." *Id.* "[T]he Government should bend over backwards to accommodate the handicapped." Arneson v. Heckler, 879 F.2d 393, 400 (8th Cir. 1989) (Whipple, J., dissenting), *modified sub nom.* Arneson v. Sullivan, 946 F.2d 90 (1991). "[W]ith respect to the employment of handicapped individuals, Congress expected the Federal Government should be a leader." Crewe v. United States Office of Personnel Management, NACI, 834 F.2d 140, 142 (8th Cir. 1987) (quoting 124 CONG. REC. S15591 (daily ed. Sept. 20, 1978) (statement of Sen. Cranston) as quoted in Prewitt v. United States Postal Serv., 662 F.2d 292, 302 (5th Cir. 1981)).

47. *See* DiPompo v. West Point Military Academy, 708 F. Supp. 540, 544 (S.D.N.Y. 1989) (holding that section 501 is exclusive remedy; section 503 and section 504 claims dismissed); Rattner v. Bennett, 701 F. Supp. 7, 9 (D.D.C. 1988) (holding that section 501 is exclusive remedy; Fifth Amendment and tort claims dismissed). The Eighth Circuit has not specifically held that section 501 is a remedy to the exclusion of section 504, but has indicated that plaintiffs will gain little from suing under both sections and may rely solely on section 501. Gardner v. Morris, 752 F.2d at 1277-78.

48. *See* Harrison v. Marsh, 691 F. Supp. at 1227 ("Most of the cases in the area of handicap discrimination involve the interpretation of Section 504."). As noted above, however, section 504 only prohibits employment discrimination, it does not mandate affirmative action. *See* Norcross v. Sneed, 755 F.2d 113, 119 (8th Cir. 1985) (citing Southeastern Community College v. Davis, 442 U.S. at 411; Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982)) ("Section 504 does not impose an affirmative action obligation on all recipients of federal funds."). In *Norcross*, a blind librarian argued unsuccessfully that a school failed to "thoroughly investigate" her abilities before denying her employment. Norcross v. Sneed, 755 F.2d at 120. Because she was not prevented from presenting her qualifications, the court concluded that "Norcross has failed to demonstrate a failure to abide by any 'affirmative action' obligation that may exist under section 504." *Id.*

49. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630 n.7 (1984).

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[50]

In *Carmi v. Metropolitan St. Louis Sewer District*,[51] the Eighth Circuit held that a plaintiff only has standing to bring a private right of action under section 504 if a primary objective of the government entity's funding was to provide for employment.[52] The Supreme Court rejected this threshold requirement in *Consolidated Rail Corp. v. Darrone*.[53] The plaintiff who relies on section 504, however, will still need to establish that the defendant received some sort of federal funding.[54]

Section 504 is significant in that it used the term "discrimination" to describe, for the first time, the exclusion and segregation of individuals with disabilities.[55] A prima facie case under section 504 is established by showing the following: (1) The plaintiff is an individual with a disability; (2) who is qualified, but for his disability; (3) and was denied a job, promotion, or raise; (4) solely because of his disability.[56] The plaintiff may have been discriminated

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50. 29 U.S.C. § 794(a) (1994).

51. Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 675 (8th Cir. 1980); *see also* Simon v. St. Louis County, 656 F.2d 316, 319 n.6 (8th Cir. 1981) (applying *Carmi*).

52. Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d at 674-75.

53. Consolidated Rail Corp. v. Darrone, 465 U.S. at 634; *see also* United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986) (holding that only those entities which actually receive federal financial assistance are covered by section 504). The Court in *Consolidated Rail* noted that the language of section 504 itself did not contain any such limitation as the Eighth Circuit had imposed. Consolidated Rail Corp. v. Darrone, 465 U.S. at 632. However, as Judge Richey has noted, a potential bone of contention still exists on whether the employer is the *direct* recipient of federal financial assistance. Richey, *supra* note 31, at 6-7 to 6-10 (1998). *But see* Thomlinson v. City of Omaha, 63 F.3d 786, 788-89 (8th Cir. 1995) (rejecting defendant's argument that Rehabilitation Act did not apply because Omaha Public Safety Department's Fire Division did not directly receive federal funding, when other divisions did); *see also* Schroeder v. City of Chicago, 715 F. Supp. 222, 225-26 (N.D. Ill. 1989) (reasoning that an entire municipality was not subject to section 504).

54. 29 U.S.C. § 794(a).

55. Mayerson, *supra* note 3, at 2. "This terminology changed the focus away from the limitations imposed by a disability, and turned it toward the limitations posed by society through attitudinal and architectural barriers." *Id.*

56. Arneson v. Heckler, 879 F.2d 393, 396 (8th Cir. 1989), *modified sub nom.* Arneson v. Sullivan, 946 F.2d 90 (1991); Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985). The Eighth Circuit has held that the plaintiff does not have "'the initial burden of establishing that he is an "otherwise qualified individual," that is, one who with reasonable accommodations, is able to perform the requirements of his job despite his handicap.'" Arneson v. Heckler, 897 F.2d at 396

against because of his disability on the job, or the plaintiff may have been discriminated against in that his employer failed to reasonably accommodate the limitations imposed by his disability. In either case, the plaintiff, as a qualified individual with a disability,[57] must show that he was adversely treated on the basis of his disability.[58] If the plaintiff's particular disability would impair job performance without an employer's modifications, the inquiry turns to whether the employer can reasonably accommodate the employee-plaintiff. A burden-shifting framework is utilized: after the plaintiff brings forth sufficient evidence

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(quoting trial court slip opinion). Instead, the plaintiff "is only required to provide evidence sufficient to make 'at least a facial showing that reasonable accommodation is possible.'" *Id.* (quoting Gardner v. Morris, 752 F.2d at 1280). Judge Whipple dissented in *Arneson*, and pointed out that neither the United States Supreme Court in *Davis* nor the Eighth Circuit in *Gardner* addressed the burden of proof with regard to showing that an employee is otherwise qualified. Arneson v. Heckler, 897 F.2d at 398 (Whipple, J., dissenting). The holding of *Arneson* is clearly favorable to ADA plaintiffs, but its reasoning is suspect. *See* Norcross v. Sneed, 755 F.2d 113, 117 (8th Cir. 1985) ("[T]he court properly required [the employee] to prove that she was an otherwise qualified handicapped individual rejected solely because of her handicap.").

57. The first step is establishing that the plaintiff has a disability—or is "handicapped" under an earlier version of the Rehabilitation Act. *See, e.g.*, Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445 (8th Cir. 1998) (holding that Crohn's disease is a disability); Demming v. Housing & Redevelopment Auth., 66 F.3d 950, 955 (8th Cir. 1995) (holding plaintiff not disabled by virtue of having been hospitalized for thyroid cancer); Maulding v. Sullivan, 961 F.2d 694, 698 (8th Cir. 1992) (holding plaintiff's sensitivity to chemicals prevented her only from lab work and thus did not substantially limit her major life activity of employment); Oesterling v. Walters, 760 F.2d 859, 861 (8th Cir. 1985) (holding that an employee with varicose veins was not substantially limited in major life activities of standing and sitting so as to render her disabled); Gardner v. Morris, 752 F.2d at 1277 (finding manic depression a disability); Hunt v. St. Peter Sch., 963 F. Supp. 843, 850 (W.D. Mo. 1997) (holding asthma a disability); Carlson v. Inacom Corp., 885 F. Supp. 1314, 1320 (D. Neb. 1995) (finding migraines a disability); Harrison v. Marsh, 691 F. Supp. 1223, 1229 (W.D. Mo. 1988) (finding a disability resulting from radical mastectomy); Rhone v. United States Dep't of the Army, 665 F. Supp. 734, 742 (E.D. Mo. 1987) (finding sarciodosis a disability).

The second step is establishing that the plaintiff is "otherwise qualified." *See, e.g.*, Mason v. Frank, 32 F.3d 315, 318 (8th Cir. 1994) (holding that a postal worker with poor balance, a twenty-pound lift restriction, and limited ability to stand for more than an hour a day could not perform functions of postal distribution clerk); Little v. FBI, 1 F.3d 255, 259 (8th Cir. 1979) (holding that an FBI agent suffering from disease of alcoholism and who was intoxicated while on duty not otherwise qualified); Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768, 771 (8th Cir. 1987) (observing plaintiff admitted she could not perform the essential functions of the position). These two basic requirements form the backbone of the plaintiff's prima facie case and are discussed at length in *infra* notes 123-268 and accompanying text.

58. The plaintiff will have to overcome the employer's arguments that the employee was terminated or denied employment because of poor work performance or misconduct. *See, e.g.*, Demming v. Housing & Redevelopment Auth., 66 F.3d at 955 (affirming summary judgment for employer when record was "replete with performance related evidence unrelated to her alleged disability"); Little v. FBI, 1 F.3d at 259 (finding that FBI agent who was fired because he was intoxicated while on duty was not terminated solely because of his disability of alcoholism).

to make a facial showing that reasonable accommodations are possible, the burden shifts to the employer to prove an inability to accommodate.[59] A detailed examination of how these elements must be established will be deferred in light of the similar manner in which an ADA plaintiff must meet his burdens.

C. *Enactment of the ADA and Appropriate Use of Rehabilitation Act Precedent*

The ADA endured a long and harrowing journey on its way to enactment.[60] Before becoming law, the ADA had to be "shepherded . . . through a procedural and jurisdictional labyrinth."[61] Its genesis was a 1987 proposal from the National Council on Disability, an independent federal agency whose duties include providing recommendations to Congress regarding the rights and needs of individuals with disabilities.[62] Although ADA legislation was first introduced in the 100th Congress,[63] no further action was taken prior to adjournment.[64] Due to the bill's wide-ranging subject matter, referral to multiple committees was necessary when the 101st Congress met to consider the legislation.[65] Debate was lively, and multitudinous amendments were offered—but, largely due to strong bipartisan backing and key support from Representative Bartlett and Senators Harkin, Kennedy, and Dole, the ADA passed both the House and Senate by July 13, 1990 and was signed into law thirteen days later.[66]

Section 107 of the ADA commands coordination between actions filed under the ADA and the Rehabilitation Act.[67] Additionally, the Rehabilitation Act states that the same standards should apply to Title I of the ADA as to the

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59. Mason v. Frank, 32 F.3d at 319. One factor in determining the reasonableness of an accommodation is its cost. Arneson v. Heckler, 879 F.2d 393, 397 (8th Cir. 1989), *modified sub nom.* Arneson v. Sullivan, 946 F.2d 90, 92 (1991) (citing 29 U.S.C. § 794(a)(1) (1994)).

60. For a more detailed history of the enactment of the ADA, see Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471, 472-75 (1991); Mayerson, *supra* note 3, at 3-6.

61. Julie Rovner, *Steny Hoyer: A Tireless Shepherd*, 48 CONG. Q. WKLY. REP. 1658 (1990) at 1, *available in* 1990 WL 3653767.

62. Jones, *supra* note 60, at 472-73. The report, entitled "Toward Independence," was generated after forums were held in all fifty states. Mayerson, *supra* note 3, at 3-4. The Council's follow-up report, "On the Threshold of Independence," included a draft of the ADA bill. *Id.* at 4. An influential Harris Poll released about the same time also spurred legislative action. *Id.* The report found that two-thirds of all Americans with disabilities between the ages of 16 and 64 were unemployed, but most of them wanted to work. *Id.*

63. S. 2345, 100th Cong., 2d Sess. (1988); H.R. 4498, 100th Cong., 2d Sess. (1988).

64. Jones, *supra* note 60, at 473.

65. *Id.*

66. 136 CONG. REC. H4629 (daily ed. July 12, 1990); 136 CONG. REC. S9695 (daily ed. July 13, 1990); *see* Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 391 (1991).

67. 42 U.S.C. § 12117(b) (1994).

Rehabilitation Act.[68] Moreover, courts intentionally construe the ADA to be in harmony with the Rehabilitation Act.[69] For these reasons, ADA plaintiffs may to a large extent rely upon favorable Rehabilitation Act precedent in their briefs and arguments.[70] Some limitations, however, should be noted.

Professor Barbara Lee has identified several differences between the ADA and the Rehabilitation Act and similar federal and state laws which bear repeating.[71] First, ADA trials can be decided by a jury.[72] Second, under the ADA, plaintiffs may be entitled to damages for pain and suffering or emotional distress.[73] Such damages are not available under the Rehabilitation Act.[74] Third, the ADA incorporates a definition of "undue hardship" which requires a significantly higher showing by defendants than other civil rights discrimination cases.[75] Undue hardship is a defense that a proposed accommodation is infeasi-

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68. 29 U.S.C. § 793(d).

69. *See, e.g.*, Collings v. Longview Fibre Co., 63 F.3d 828, 832 n.3 (9th Cir. 1995); Wooten v. Farmland Foods, 58 F.3d 382, 385 n.2 (8th Cir. 1995).

70. One commentator has argued that the legislative history of the ADA evidences a clear repudiation of some of the more restrictive judicial interpretations of the Rehabilitation Act and that the "fresh start offered by the ADA's passage should cause courts to take a hard look at the case law developed under the Rehabilitation Act in order to rid it of bias against people with [psychiatric] disabilities." Stephanie Proctor Miller, Comment, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CALIF. L. REV. 701, 704 (1997).

71. Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201, 206-08 (1993). One seeming difference between the Rehabilitation Act and the ADA arises from the statutory language in the Rehabilitation Act which arguably requires a closer nexus between discriminatory intent and deed before conduct is actionable. *Compare* 42 U.S.C. § 12132 (stating that no qualified individual with a disability "shall, by reason of such disability" be subjected to discrimination), *with* 29 U.S.C. § 794(a) (stating that no qualified individual with a disability shall be subjected to discrimination "*solely by reason of* her or his disability") (emphasis added). The case law, however, has defined the standards in the two statutes to be identical. Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1036 (6th Cir. 1995); Hamlyn v. Rock Island County Metro. Mass Transit Dist., 986 F. Supp. 1126, 1131-32 (C.D. Ill. 1997).

72. *See* 42 U.S.C. § 12117(a) (incorporating the rights and remedies of the Civil Rights Act of 1964). Under the 1991 amendments to the Civil Rights Act, a party may demand a trial by jury if compensatory or punitive damages are sought. *Id.* § 1981(c). Compensatory and punitive damages are authorized for violations of the ADA. *Id.* § 1981(a)(2). Therefore, ADA plaintiffs are entitled to a jury trial.

73. *Id.* § 12117(a) (incorporating § 1981A). Section 1981A authorizes the award of compensatory and punitive damages for employment discrimination or for failure to make reasonable accommodations. *Id.* § 1981A(a)(2); *see also* Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300, 1301-03 (8th Cir. 1995) (discussing availability of remedies).

74. Turner v. First Hosp. Corp., 772 F. Supp. 284, 288 (E.D. Va. 1991).

75. Lee, *supra* note 71, at 206; Alan D. Schuchman, Note, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745, 752-55 (1998). When an employer mounts an

ble. Defendants must demonstrate that a proposed accommodation would constitute "significant difficulty or expense" in order to present a valid undue burden defense under the ADA.[76] Finally, the last major difference between the ADA and the Rehabilitation Act is that the ADA includes reassignment of an employee as a potential accommodation.[77] The ADA also lists adjustment or modification or training programs, policies, or examinations as potential accommodations.[78] The Rehabilitation Act, conversely, does not list reassignment or other types of these modifications as potential accommodations.[79] Plaintiffs suing under the Rehabilitation Act should be aware of more recent cases, however, which suggest that reassignment might be considered a possible accommodation in the Eighth Circuit.[80]

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undue burden defense, a de minimus cost to the employer is an insufficient showing. Lee, *supra* note 71, at 206. The ADA expressly rejects the de minimus definition of undue hardship articulated in an earlier religious discrimination case. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (requiring TWA to bear more than a de minimus cost in order to give respondent Saturdays off would be an undue hardship). *See* H.R. REP. NO. 101-485, pt. 2, at 68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 350 (explaining the rejection of the *Hardison* standard). Congress felt this change was necessary because of the "crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities." H.R. REP. NO. 101-485, pt. 2, at 68, *reprinted in* 1990 U.S.C.C.A.N. 303, 350.

76. 42 U.S.C. § 12111(10)(A).

77. *Id.* § 12111(9).

78. *Id.* § 12111(9)(B); 29 C.F.R. § 1630.2(o)(ii) (1998); 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 272 (3d ed. 1996).

79. Lee, *supra* note 71, at 206 n.25 (citing School Bd. v. Arline, 480 U.S. 273, 289 n.19 (1986)). Some courts, however, have held otherwise. *See, e.g.*, Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993) (rejecting government's contention that there is a per se rule that a transfer is not a reasonable accommodation); Coley v. Secretary of the Army, 689 F. Supp. 519, 522-23 (D. Md. 1987) (inferring a duty to reassign from a personnel manual); *see also* Arlene Mayerson, *Title I—Employment Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 499, 514 (1991) [hereinafter Mayerson II].

80. Arneson v. Heckler, 879 F.2d 393, 398 (8th Cir. 1989) (remanding for a determination of the reasonableness of reassigning employee to new location); Rhone v. United States Dep't of the Army, 665 F. Supp. 734, 742-46 (E.D. Mo. 1987) (holding that federal employer's efforts to accommodate were insufficient when employee was temporarily reassigned to an unsuitable position and little effort was made to find employee a permanent position). Quoting from the federal employee handbook, the *Rhone* court stated that one alternative to retiring an employee who becomes disabled is reassignment, and "[r]eassignment need not necessarily be limited to positions of the same grade or series." *Id.* at 744 (quoting UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, HANDBOOK ON REASONABLE ACCOMMODATION 10 (1980)); *see also* Harrison v. Marsh, 691 F. Supp. 1223, 1230-31 (W.D. Mo. 1988) (holding that government did not reasonably accommodate an employee by offering a position which was more physically demanding than her previous duties).

III. OVERVIEW

A. *Title I: Employment*

Title I of the ADA prohibits covered entities from discriminating against qualified individuals with disabilities in the context of employment.[81] Discrimination is prohibited in job application procedures, hiring, firing, training, compensation, or in "other terms, conditions, and privileges of employment."[82] These "other terms, conditions, and privileges" include items such as sick leave and other fringe benefits, job descriptions, and even social activities, such as picnics which are sponsored by the employer.[83] Given the breadth of the list of covered items and the fact that the list is nonexclusive, practically any act by a covered entity which is related to employment could potentially be the subject of a lawsuit if executed with discrimination because of disability.[84]

The definition of a covered entity under Title I is somewhat more narrowly drawn than the breadth of activities which are covered. Usually, the covered

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81. 42 U.S.C. §§ 12111-12117. For a more detailed overview of Title I, see Thomas H. Christopher & Charles M. Rice, *The Americans with Disabilities Act: An Overview of the Employment Provisions*, 33 S. TEX. L. REV. 759 (1992); Harvey S. Mars, *An Overview of Title I of the Americans with Disabilities Act and its Impact upon Federal Labor Law*, 12 HOFSTRA LAB. L.J. 251 (1995); Mayerson II, *supra* note 79, at 499-520; John J. Murphy, Jr., *The Employment Provisions of the Americans with Disabilities Act*, 81 ILL. B.J. 236 (1993).

82. 42 U.S.C. § 12112(a).

83. 29 C.F.R. § 1630.4. The EEOC's list also includes, but is not limited to, the following acts which must be free of discrimination because of an individual's disability:

(a) Recruitment, advertising, and job application procedures;
(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
(c) Rates of pay or any other form of compensation and changes in compensation;
(d) Job assignments, job classifications, organizational structures, position descriptions, lines or progression, and seniority lists;
(e) Leaves of absence, sick leave, or any other leave;
(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;
(g) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;
(h) Activities sponsored by a covered entity including social and recreational programs; . . . .

Id. The Eighth Circuit has also suggested that it might recognize a hostile work environment ADA claim. Wallin v. Minnesota Dep't of Corrections, 153 F.3d 681, 688 (8th Cir. 1998).

84. *See* 29 C.F.R. § 1630.4(i) (stating that the "terms, conditions, and privileges" which must be free of discrimination, in addition to the list of items in *supra* note 83, includes "any other term, condition, or privilege of employment").

entity will be an employer, but the definition also extends to labor organizations, employment agencies, and joint labor-management committees.[85] Employers are only subject to the anti-discrimination provisions of Title I if they are engaged in an industry which affects commerce and has at least fifteen employees.[86] "Employers," however, does not include Indian tribes, the United States, or tax-exempt private clubs,[87] and "employees" does not include independent contractors.[88]

Title I prohibits employers (or any covered entity) from denying otherwise qualified individuals[89] with disabilities equal jobs or benefits because of their disabilities.[90] At the same time, the ADA affirmatively requires employers to take an individual's physical and mental limitations into consideration and imposes a duty to take steps to reasonably accommodate those limitations.[91] Reasonable accommodations can include making alterations to the employer's facilities or equipment, job restructuring, or providing interpreters or devices to aid the employee with a disability.[92] Employers are relieved of this duty only by proving that the reasonable accommodations would impose an undue hardship.[93]

Herein lies the twist of the ADA. On one hand, employers are prohibited from treating individuals with disabilities differently than other employees on account of their disabilities. In this vein, the ADA parrots Title VII's prohibition

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85. 42 U.S.C. § 12111(2).

86. *Id.* § 12111(5)(A). To qualify as an employer, the minimum number of employees must be met in at least 20 weeks of the current or preceding year. *Id.* For actions accruing between July 26, 1992 and July 26, 1994, the definition of an employer is only satisfied if 25 or more employees were employed during at least 20 weeks of the current or preceding year. *Id.*; 29 C.F.R. § 1630.2(e)(1); *see also* Doe v. William Shapiro, Esquire, P.C., 852 F. Supp. 1246, 1251-52 (E.D. Pa. 1994) (consolidating law firm and five corporate entities to meet 25 employee floor). The definition also includes any agent of an employer. 42 U.S.C. § 12111(5)(A); *see also* Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 17 (1st Cir. 1994) (holding that association and trust may be agents of a covered entity).

87. 42 U.S.C. § 12111(5)(B); *see also* Giedash v. Little Wound Sch. Bd., 995 F. Supp. 1052, 1059 (D.S.D. 1997) (holding school board to be an Indian tribe and thus exempt from Title I). Nor does the term include corporations wholly owned by the United States. 42 U.S.C. § 12111(5)(B).

88. Birchem v. Knights of Columbus, 116 F.3d 310, 312-13 (8th Cir. 1997). "Applicants" are also afforded protection under Title I. *See* 42 U.S.C. § 12112(b).

89. The definition of a "qualified" individual is "an individual . . . who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8).

90. *Id.* § 12112(b)(4).

91. *Id.* § 12112(b)(5)(A).

92. *Id.* § 12111(9).

93. *Id.* § 12112(b)(5)(A). The statute clearly places the burden on the employer to demonstrate that an accommodation would constitute an undue hardship on the employer's business operations. *Id.*

of discrimination on the basis of sex, race, color, national origin, or religion.[94] Employers must not treat their disabled employees any differently from non-disabled employees because of their disability.[95] On the other hand, employers, as soon as they learn of an employee's disability, must put forth efforts to treat that employee differently from other employees by devising reasonable accommodations specifically for the disabled employee's unique physical or mental limitations.[96] Employers must wear "disability blinders" at all times, except when it is reasonable for an employer to provide some sort of aid for one of its employees with a disability. Thus, an employer must sometimes treat all employees equally regardless of disability, and at other times make special efforts to treat disabled employees differently than non-disabled employees. Failure of an employer which is a "covered entity" to refrain from discriminating in one instance or from providing reasonable accommodations in the next will give rise to a cause of action under Title I. Despite this bipolar definition of discrimination, the goal is the same: eliminating discrimination against—and providing equal opportunities for—individuals with disabilities.[97]

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94. *Id.* § 2000e-17.

95. *See id.* § 12112(b)(1) (stating that discrimination includes "limiting . . . [an] employee in a way that adversely affects the opportunities or status of such . . . employee because of the disability"); *id.* § 12112(b)(2) (stating that discrimination includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to . . . discrimination"); *id.* § 12112(b)(3) (stating that discrimination includes "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability").

96. *See id.* § 12112(b)(5)(A) (stating that discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability").

97. *Id.* § 12101(b). This bipolar definition of discrimination as it applies against individuals with disabilities is necessitated by the fact that in order to be treated equally, disabled persons often must be treated differently. An individual who uses a wheelchair, for example, might require a ramp in order to enter the workplace with the same ease that non-disabled individuals use stairs. An individual who is hard of hearing might require special devices in order to communicate on the same level as hearing individuals. By providing these accommodations, the individuals with disabilities attain equality. Without them, disabled individuals face unnecessary difficulties compared with their non-disabled peers. It is therefore necessary to treat individuals with disabilities differently at times in order to achieve equality of access and opportunity. Individuals of different national origins or races, conversely, are disadvantaged only by attitudes of prejudice.

As Nancy Lee Jones has written: "Seldom do race, sex, or national origin alone prevent an individual from performing a job or participating in a program. Disabilities, however, by their very nature may make certain jobs or types of participation impossible." Jones, *supra* note 60, at 476. Thus, the law need only prohibit unequal treatment in order to achieve equality for those individuals who differ by virtue of their accent, appearance, or religious beliefs. For individuals with disabilities, however, the law seeks to achieve equality through the implementation of reasonable aid while simultaneously prohibiting stereotypic exclusion because of actual or perceived disabilities.

What constitutes a "reasonable accommodation,"[98] or when an accommodation will be deemed reasonable, and, therefore, required, is often vigorously litigated.[99] A reasonable accommodation might include providing reserved parking spaces, providing leave for medical treatment, or permitting an employee to use a guide dog at work.[100] Accommodations must be tailored to match the individual with a disability and the specific requirements of the job.[101] However, even if a plaintiff establishes that the defendant knew of the plaintiff's disability and failed to make a reasonable accommodation, the defendant can escape ADA liability by showing that the accommodation would impose an "undue hardship on the operation of the business" of the defendant.[102]

B. *Title II: Public Entities*

Public entities, such as state or local governments, are prohibited from excluding or discriminating against qualified individuals with disabilities under Title II.[103] Programs operated by public entities must be readily accessible to individuals with disabilities.[104] Perhaps the most visible manifestation of Title II is the requirement that all newly constructed roads contain curb ramps at appropriate intervals.[105] The title contains specific requirements for public

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98. *See* 42 U.S.C. § 12111(9). The statute states that:

> The term 'reasonable accommodation' may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id.

99. *See generally* Christopher & Rice, *supra* note 81, at 759 (containing an overview of the general principles of the ADA and the affect the reasonable accomodations provision has had on employers); Lee, *supra* note 71, at 201 (discussing judicial interpretation of the ADA by reviewing federal and state cases); Lawrence P. Postol & David D. Kadue, *An Employer's Guide to the Americans with Disabilities Act: From Job Qualifications to Reasonable Accomodations*, 24 J. MARSHALL L. REV. 693, 711-18 (1991) (concluding that the reasonable accomodations requirement is the heart of the ADA).

100. 29 C.F.R. § 1630.2(o) (1998).

101. *Id.* pt. 1630, app., at 345. "This case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs." *Id.*

102. 42 U.S.C. § 12112(b)(5)(A).

103. *Id.* §§ 12131(1), 12132.

104. 28 C.F.R. § 35.150(a) (1998).

105. *Id.* § 35.151(e)(1).

transportation by rail and other means.[106] Title II also mandates that public entities take steps to ensure that communication with members of the public with disabilities is as effective as communication with others by furnishing, when necessary, auxiliary aids and services.[107]

C. *Title III: Public Accommodations*

A public accommodation is a private entity which owns, leases, or operates a place of public accommodation such as a motel, restaurant, or service establishment.[108] Title III prohibits discrimination on the basis of disability in "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[109] Like Title I, Title III contains an expansive definition of discrimination which includes a failure to implement reasonable modifications or remove architectural barriers, a failure to take steps to ensure that no individual with a disability is excluded or treated differently, and the imposition of criteria which tend to screen out individuals with disabilities.[110] For example, facilities must be designed in such a way as to be readily accessible by people with disabilities.[111] Liability for violation of Title III may extend not only to the operator of the public accommodation, but also to architects and franchisors who retain substantial control over a facility.[112]

D. *Title IV: Telecommunications*

Title IV prohibits telecommunications systems from discriminating against individuals who are hard of hearing. It requires the FCC to ensure that indi-

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106. *See* 42 U.S.C. §§ 12141-12150, 12161-12165.

107. 28 C.F.R. § 35.160(a).

108. 42 U.S.C. §§ 12181(7), 12182(a); 28 C.F.R. § 36.104; *id.* pt. 36, app. B, at 580. A place of public accommodation is a facility which is operated by a private entity and whose operations affect commerce. 42 U.S.C. § 12181(7). It may, for example, be a park, a funeral parlor, a bowling alley, or an art gallery. *See id.*; *see also* Tatum v. NCAA, 992 F. Supp. 1114, 1119 (W.D. Mo. 1998) (holding the NCAA to be a place of public accommodation).

109. 42 U.S.C. § 12182(a).

110. *Id.* § 12182(b)(2)(A).

111. *Id.* § 12183(a).

112. *Compare* United States v. Days Inns of Am., Inc., 151 F.3d 822, 827 (8th Cir. 1998) (holding a franchisor with significant control over design and construction of motel liable for not building an elevator to accommodate individuals with disabilities), *with* Pona v. Cecil Whittaker's, Inc., 155 F.3d 1034, 1036 (8th Cir. 1998) (holding a mere franchisor with no right to control entry to a pizzeria not liable for excluding a disabled patron with a service dog). *See also* United States v. Ellerbe Becket, Inc., 976 F. Supp. 1262, 1266-68 (D. Minn. 1997) (holding that architects are not excluded from Title III liability).

viduals with speech and hearing impairments have access to a telecommunication relay service.[113] The FCC must enforce compliance and resolve complaints within a 180 day time frame.[114] The Title also mandates close captioning of public service announcements funded by the government.[115]

E. *Title V: Miscellaneous*

Title V contains a sundry of provisions, some of which are quite controversial.[116] Only section 503 merits discussion here.[117] That section contains a prohibition against retaliating against individuals who have exercised or enjoyed their rights under the ADA or participated in any ADA investigation.[118] A prima facie case of retaliation is present when a plaintiff has engaged in a protected activity, and suffered an adverse employment action as a causal result.[119]

IV. THE PRIMA FACIE CASE

A. *"Accommodation Discrimination"*

The first type of prohibited discrimination under Title I of the ADA is a failure of an employer or other covered entity to provide reasonable accommo-

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113. 47 U.S.C. § 225. Title IV of the ADA amends Title II of the Communications Act of 1934. 136 CONG. REC. H4629 (daily ed. July 12, 1990). *See generally* Karen Peltz Strauss & Robert E. Richardson, *Breaking Down the Telephone Barrier—Relay Services on the Line*, 64 TEMP. L. REV. 583 (1991) (discussing the evolution of telecommunications services for communication-impaired individuals). Telecommunications relay services provide those with speech or hearing impairments to communicate by wire or radio with hearing individuals by means of devices such as TDDs (telecommunications device for the deaf; a machine which displays graphic communications). 47 U.S.C. § 225(a)(3). "Title IV of the ADA offers deaf, hard of hearing, and speech-impaired individuals a critical tool with which to exercise the civil rights promised them in other titles of the ADA." Strauss & Richardson, *supra* at 607.

114. 47 U.S.C. § 225(e)(2).

115. *Id.* § 611.

116. Jones, *supra* note 60, at 488. For example, one provision in Title V concerns the application of the ADA to Congress and its instrumentalities. 42 U.S.C. § 12209. This raised separation of powers questions given the immunity of members of Congress under the Speech and Debate Clause. Jones, *supra* note 60, at 488 (citing U.S. CONST. art. I, § 6, cl. 1; Forrester v. White, 484 U.S. 219, 224 (1988)).

117. 42 U.S.C. § 12203.

118. *Id.*

119. Kiel v. Select Artificials, Inc., 1999 WL 107986 at *3 (8th Cir. Mar. 4th 1999) (en banc), *to be reported at* 169 F.3d 1131. A plaintiff must demonstrate a "good faith, reasonable belief that his activity was statutorily protected." *Id.*; *see also* Wallin v. Minnesota Dep't of Corrections, 153 F.3d 681, 688-89 (8th Cir. 1998) (rejecting retaliation claim not alleged in EEOC charge when it did not arise out of plaintiff's filing of the EEOC charge).

dations for a qualified individual with a known disability.[120] Because the vast majority of cases brought under the ADA have been and will presumably continue to be employment cases, the bulk of discussion which follows focuses on what is herein termed "accommodation discrimination" on the job; that is, a failure by an employer to provide reasonable accommodations to an employee with a disability. To make out a prima facie case of accommodation discrimination under the ADA, the plaintiff must first establish that she is a qualified individual with a disability, and second, that she has been discriminated against by an employer which has not provided reasonable accommodations for her to perform her job.[121] More accurately, the plaintiff's prima facie case consists of showing that an employer did not make reasonable accommodations for a known disability of a qualified individual.[122] First, then, an analysis of the meaning of "disability" under the ADA must be undertaken.

1. *An Individual with a Disability*

Oftentimes, an ADA plaintiff will encounter the most difficulty in establishing, as an initial matter, a disability. There are three alternative definitions of disability in the ADA, but most plaintiffs resort to the first, which defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[123] The definition contains three separate elements.[124] The alleged disability must be (1) an impairment; (2)

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120. *See* 42 U.S.C. § 12112(b)(5)(A). To discriminate in the employment context means, inter alia, "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." *Id.* There is a similar definition of this type of discrimination in Title III. *See id.* § 12182(b)(2)(A)(ii) (stating that discrimination can mean "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities").

121. Showing that the plaintiff is a qualified individual with a disability is also a threshold requirement of "intentional discrimination" or a Title II case and so the discussion which follows has application in those areas as well.

122. Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1515 (2d Cir. 1995). A plaintiff states a claim for discrimination based on a failure to accommodate by showing that the employer was a covered entity under the ADA, that the plaintiff has a disability, that the plaintiff could perform the essential functions of the job with or without reasonable accommodation, and that the employer knew of the plaintiff's disability and failed to provide reasonable accommodations. *Id.*

123. 42 U.S.C. § 12102(2)(A). Readers will notice that the ADA definition of disability is identical to the Rehabilitation Act's definition, as well as the FHAA definition. Prior construction of the Rehabilitation Act definition of disability is generally applicable to the ADA's definition. Wooten v. Farmland Foods, 58 F.3d 382, 385 n.2 (8th Cir. 1995).

124. *See generally* Mark D. Laponsky, *Defining "Disability": A Look at the Term Within the Context of the Americans with Disabilities Act*, FED. B. NEWS & J., Jan. 1992 at 44, 44 (listing three alternatives for establishing the existence of a "disability").

which substantially limits; (3) a major life activity. The elements of the definition demonstrate that individuals that, to the lay eye, hardly seem disabled nevertheless will qualify as having an ADA disability under the terms of the statute.[125] As one court stated, "One can have one of the statutorily enumerated disabilities without being 'disabled' in the usual, common, lay sense of the word."[126] A case-by-case individualized inquiry is called for.[127] Each of these prongs, of an otherwise simplistic definition, is plagued by subtleties and elusive contours. They will be examined in the order listed, beginning with "impairment."

a. *Impairment.* An impairment can be either a physical or a mental limitation.[128] Generally, "impairment" should be construed broadly.[129] The statute does not define impairment, however, except to exclude a number of certain types of conditions. The ADA list of per se exceptions which can never be impairments includes homosexuality and bisexuality.[130] The following conditions are also excluded: disorders resulting from the current illegal use of drugs, pyromania, kleptomania, compulsive gambling, and sexual behavior disorders such as pedophilia and exhibitionism.[131] Individuals currently engaging in the illegal use of drugs may be discriminated against on the basis of such use

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125. Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1319 (E.D. Pa. 1994).

126. *Id.* "For example, the statute would apply to people who have high blood pressure, that being a hemic disorder, a proclaimed disability." *Id.*

127. Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

128. 42 U.S.C. § 12102(2)(A). The regulations offer a gloss on the meaning of impairment:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskelatal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
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> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (1998).

129. Bales, *supra* note 32, at 218; *see* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Haw. 1980) (defining impairment as "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity"); Salt Lake City Corp. v. Confer, 674 P.2d 632, 635 (Utah 1983) (same); *see also* Bragdon v. Abbott, 118 S. Ct. 2196, 2204 (1998) (holding that, in light of the severity and immediacy with which HIV attacks the infected person's white blood cells, "it is an impairment from the moment of infection," even during the early asymptomatic phase of the disease).

130. 42 U.S.C. § 12211(a).

131. *Id.* § 12211(b); *see* Harris v. Polk County, Iowa, 103 F.3d 696, 697 (8th Cir. 1996) (rejecting the argument that plaintiff's shoplifting resulted from a mental impairment).

without violating the ADA.[132] However, the drug use exclusion does not apply to individuals who have been successfully rehabilitated and no longer use illegal drugs.[133] While the sensibility in excluding drug users[134] and individuals with sexual disorders—some of the most marginalized members of society—can be questioned, the clear language of the statute severs such individuals from the ADA's protection.[135]

The determination of whether an individual has an impairment under the ADA cannot include consideration of mitigating measures such as prosthetic devices or medicine.[136] In other words, an individual has an impairment even

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132. *Id.* § 12114(a).

133. *Id.* § 12114(b)(1)-(2). Logically, individuals who are only erroneously regarded as using illegal drugs are not per se excluded from the ambit of the ADA. *Id.* § 12114(b)(3).

134. The ADA makes no distinction between drug use and drug abuse.

135. *See* Adrienne L. Hiegel, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1453 (1994). Hiegel notes that the ADA's

> per se exclusion from its definition of a disability of what it calls "sexual behavior disorders" and "gender identity disorders" reifies the moral grid that lies beneath the notion of a disability. Rather than changing the ethical significance of all disabilities, the Act carves out a new class of untouchables defined by sexuality and sex behaviors.

Id. at 1452-53 (footnote omitted).

One point of contention might be whether an individual's illegal drug use is "current." *See, e.g.*, Wormley v. Arkla, Inc., 871 F. Supp. 1079, 1084 (E.D. Ark. 1994) (finding an employee's cocaine use to be current even though employee was discharged on date of release from drug rehabilitation program and was not using cocaine on that date). *But see, e.g.*, Dauen v. Board of Fire and Police Comm'rs, 656 N.E.2d 427, 430 (Ill. App. Ct. 1995) (holding relevant time frame for determining current use is actual date of discharge).

136. 29 C.F.R. pt. 1630, app., at 347 (1998). Controversy exists as to whether this regulatory guideline is correct. *See* Wilking v. County of Ramsey, 983 F. Supp. 848, 854 (D. Minn. 1997) (considering the beneficial effects of medication on plaintiff's impairment of depression), *aff'd on other grounds*, 153 F.3d 869 (8th Cir. 1998). *But see* Smith v. Horton Indus., Inc., 17 F. Supp. 2d 1094, 1099 (D.S.D. 1998) (holding that an impairment should be examined without regard for prosthetic devices or mitigating measures); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1438 (N.D. Iowa 1996) (concluding, after a lengthy discussion, that there were no sound reasons for disregarding the agency's interpretation the definition of disability as meaning an impairment without regard to mitigating measures). Judge Kornmann expressed his preference for disregarding the agency rule, but felt bound by the Eighth Circuit's decision in *Doane v. City of Omaha*. *See* Smith v. Horton Indus., Inc., 17 F. Supp. 2d at 1099. Judge Kornmann wrote:

> I cannot read at all, hunt successfully or play tennis successfully without the use of eye wear. It would seem to be unfair, if you will, to conclude that uncorrected vision due to the aging process would translate to a disability within the meaning of the ADA. That seems, however, to be the import of *Doane*.

Id. (construing Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997)), *cert. denied*, 118 S. Ct. 693 (1998). *Doane* is discussed at text accompanying notes 159-64, 250-52. The question of whether to consider the effects of mitigating measures on an individual's impairment and whether that

though the impairment is compensated for through the use of external modifications. For example, an individual with epilepsy has an impairment regardless of the extent to which the seizures are controlled by medication, and a person who is hard of hearing qualifies as having an impairment even though the condition is corrected by a hearing aid.[137]

The ADA regulations distinguish as non-impairments conditions which are environmental, cultural, or economic.[138] A lack of education, for example, is not an impairment because it is not a "mental or physical" condition.[139] The regulations also exclude personality traits such as poor judgment or a quick temper from the definition of impairment when such conditions are not symptoms of an underlying mental or psychological impairment.[140] The regulations go on to exclude a myriad of conditions such as hair color, left-handedness, or a characteristic predisposition to certain diseases.[141]

While the courts commonly give great deference to the ADA regulations,[142] some skepticism is in order. Categorizing an alleged impairment as either a physical characteristic (non-impairment) or a physical disorder (impairment), while comporting with the ordinary use of the term "impairment," ultimately offers little in the way of practical application.[143] The distinction between personality traits and personality disorders, for example, is a flimsy one.[144] A lack of education, on the other hand, could not be termed an

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impairment is substantially limiting will be decided in the Supreme Court's 1999 term. Murphy v. United Parcel Serv., 141 F.3d 1185 (10th Cir. 1998), *cert. granted*, 66 U.S.L.W. 3800, 67 U.S.L.W. 3027 (Jan. 8, 1999) (No. 97-1992); Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3783, 67 U.S.L.W. 3008 (Jan. 8, 1999) (No. 97-1943).

137. 29 C.F.R. pt. 1630, app., at 347.

138. *Id.*

139. *See* 42 U.S.C. § 12102(2)(A) (1994); 28 C.F.R. pt. 35, app. A, at 441 (1998); 29 C.F.R. pt. 36, app. B, at 467; *id.* pt. 1630, app., at 347.

140. 29 C.F.R. pt. 1630, app., at 346-47.

141. *Id.*

142. *See, e.g.*, Olson v. Dubuque Community Sch. Dist., 137 F.3d 609, 612 (8th Cir. 1998) (stating that "the EEOC interpretation of the ADA is entitled to deference"); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996) (turning to EEOC regulations for definition of major life activity).

143. *See* Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2036-37 (1987) (describing the difficulty in defining precisely what criteria are illegitimate under anti-discrimination laws). "It . . . seems an arbitrary distinction to say that an employer cannot refuse to hire a person who has a disfiguring scar on his chin, for example, but can refuse to hire someone whose chin is jutting or unusually shaped." *Id.* at 2044-45; *see* 45 C.F.R. § 84.3(j)(2)(i) (1998) (including people with disfiguring scars within the scope of the Rehabilitation Act).

144. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 630 (4th ed. 1994) [hereinafter DSM-IV]. "Only when personality traits are inflexible and maladaptive and cause significant functional impairment or subjective distress do

impairment even under the broadest definition as it is purely a condition of experience, knowledge, and training, rather than a mental characteristic. This is not to say, however, that an ADA mental impairment can never be linked to an environmental trigger, or that the cause of an impairment may not be traced to something which is partly or wholly within the personal responsibility of the individual.[145] The ADA makes no distinction as to whether an impairment arose from the individual's bad luck, a high risk environment, or even the individual's own volition.[146] Other per se exclusions under the regulations, such as hair or

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they constitute Personality Disorders." *Id.* In other words, in mapping out the definition of impairment, the ADA regulations distinguish between mere traits and disorders, and DSM-IV explains that a trait is only a disorder when it is an impairment. This sort of circular analysis would appear to have little utility for the courts. For example, the DSM-IV states:

> The essential features of Narcissistic Personality Disorder are a pervasive pattern of grandiosity, need for admiration, and lack of empathy that begins by early adulthood and is present in a variety of contexts. . . . [Such individuals] tend to discuss their own concerns in inappropriate and lengthy detail, while failing to recognize that others also have feelings and needs. . . . They may begrudge others their successes or possessions, feeling that they better deserve those achievements, admiration, or privileges.

Id. at 658-59. The main characteristic which distinguishes this personality disorder from mere personality traits under the DSM-IV is its negative functional impact on the individual; narcissism becomes a disorder when it starts to have tangible negative effects on the individual, for example, in the occupational sphere. *See id.* at 658-61, 673. If a plaintiff's personality traits have caused them such difficulties at work that they have retained a lawyer to help sort out their problems, most will, ipso facto, manifest a personality disorder under the DSM-IV. Thus, the regulations' attempt to distinguish personality traits from personality disorders will seldom be of much utility. *See, e.g.*, Hindman v. GTE Data Servs., Inc., No. 93-1046-CIV-T-17C, 1994 WL 371396, at *3 (M.D. Fla. June 24, 1994) (stating that a negative personality trait may constitute a disability when it is a symptom of a mental or psychological disorder).

145. Cancer, for example, has been linked to many environmental factors, but this does not exclude it as an impairment under the ADA. *See* Henderson v. Bodine Aluminum, Inc., 70 F.3d 958, 960-61 (8th Cir. 1995) (per curiam) (finding breast cancer a disability). The same could be said of alcoholism, which, though to some degree mutable, can qualify as a disability under the ADA. *See, e.g.*, Miners v. Cargill Communications, Inc., 113 F.3d 820, 823 n.5 (8th Cir.) (finding alcoholism a disability) (citing Crewe v. United States Office of Personnel Management, 834 F.2d 140, 141 (8th Cir. 1987)), *cert. denied*, 118 S. Ct. 441 (1997). Moreover, the extent to which an individual is to blame for his disability is not a proper subject of inquiry. *See* Cook v. Rhode Island Dep't of Mental Health, Retardation, & Hosp., 10 F.3d 17, 24 (1st Cir. 1993) (holding that obesity can be a disability even if caused by voluntary conduct). *But see* Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995) (holding that an employee with diabetes who did not meet his employer's legitimate expectations by failing to monitor his condition did not state a cause of action under the ADA); Tudyman v. United Airlines, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (holding that overweight condition is not an impairment when it results from body building activities).

146. *See* Cook v. Rhode Island Dep't of Mental Health, Retardation, & Hosp., 10 F.3d at 23 (calling defendant's argument that mutable conditions are not impairments under the Rehabilitation Act a suggestion "as insubstantial as a pitchman's promise"). *Cook* also rejected an

eye color, are without statutory basis unless an impairment by definition must exclude "normal" conditions and characteristics—another unsatisfying distinction, for by what criteria is a court to determine whether a condition is "normal?"[147] Ultimately, these per se exclusions are of little practical concern, however, because a plaintiff with strangely hued eyes could rarely satisfy the remaining prongs of the definition of disability; the plaintiff could not, except under the most imaginative hypotheticals, conceivably establish that she was substantially limited in a major life activity by virtue of the bizarre color of her eyes.[148]

The confusion in the regulations seems to arise out of a tangling of two of the distinct components of the ADA's definition of a disability: "impairment" and "substantially limited."[149] This imprecision also occurs in the case law.[150]

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argument that conditions caused or exacerbated by voluntary conduct cannot constitute impairments. *Id.* at 24. This was an argument raised by the defendant's brief to the United States Supreme Court in *Bragdon v. Abbott.* Brief for Petitioner at 36, Bragdon v. Abbott, 118 S. Ct. 2196 (1998), *available in* 1998 WL 4678. The plaintiff asked rhetorically, "Are men and women who undergo voluntary sterilization for family planning purposes 'disabled?' A person who intentionally blinds himself is just as disabled as one who was accidentally blinded. So why would a person who was voluntarily sterilized not be disabled?" *Id.* The Court there held that an individual whose major life activity of reproduction is substantially limited is in fact disabled within the meaning of the ADA and made no distinction based on whether the impairment arose from bad judgment or spontaneous affliction. Bragdon v. Abbott, 118 S. Ct. 2196, 2206 (1998); *see infra* notes 165-68 and accompanying text.

147. *But see infra* note 152 for a case which attempts to make a normal/abnormal distinction.

148. Perhaps, however, a case could arise in which an individual's hair or eye color was so outside the norm that the individual could satisfy the third definition of disability; that is, being regarded as having an impairment which substantially limits a major life activity. *See* 42 U.S.C. § 12102(2)(C) (1994). See, for example, the film, THE BOY WITH GREEN HAIR (RKO 1948) (an allegorical tale of an orphan who is shunned by society because of the color of his hair); *see also* Cook v. Rhode Island Dep't of Mental Health, Retardation, & Hosp., 10 F.3d at 25 (stating hypothetically that "suit can be brought against a warehouse operator who refuses to hire all turquoise-eyed applicants solely because he believes that people with such coloring are universally incapable of lifting large crates"). Granted, such situations seldom arise, but the point is that several of the regulations' exclusions run counter to the sort of individualized inquiry required by the ADA.

149. *See* 42 U.S.C. § 12102(2)(A).

150. *See, e.g.*, Glowacki v. Buffalo Gen. Hosp., 2 F. Supp. 2d 346, 351 (W.D.N.Y. 1998) (noting that Bipolar Affective Disorder is a recognized ADA "disability" but that the disorder must be substantially limiting in order to qualify as a disability). The petitioner in *Bragdon v. Abbott* insisted that the list of ADA exclusions such as pedophilia and compulsive gambling "evinces Congress' lack of concern for the specifics of the definition, confusion as between impairments and disabilities, and above all else, an absolute political desire to exclude certain classes of people no matter what the definition may be." Brief for Petitioner at 31 n.26, Bragdon v. Abbott, 118 S. Ct. 2196 (1998), *available in* 1998 WL 4678.

Clarity will be better served by analyzing the two elements separately; because "impairment" is so broad a term it should nearly always be satisfied so long as a condition can be rationally termed a disorder that is either mental or physiological in nature and is not per se excluded under the statute.[151] A disorder merely implies a physical or mental condition or characteristic which is perhaps somewhat irregular, and not an expected and predictable consequence of human physiology.[152] The second, more difficult element to satisfy is whether that impairment is substantially limiting.[153] Keeping these elements distinct will result in more persuasive arguments and more accurate results.

b. *Substantially Limits.* Assuming that the plaintiff has a mental or physical condition which qualifies as an impairment (*i.e.,* is not per se excluded under the statute), the next step is to determine whether the impairment substantially limits a major life activity.[154] Whether an individual's activities are substantially limited by an impairment turns on the severity, expected duration, and permanent

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151. The definition proposed here is that an impairment is a mental or physical characteristic, symptom, injury, or dysfunction which has a negative, restrictive effect on the individual's ability to do certain tasks or functions. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1131 (1966) (defining to impair as "to make worse: diminish in quantity, value, excellence, or strength"). As an observational (rather than a definitional) matter, an ADA disability will generally mean that the individual is functionally limited to a range which is below that of the majority of the population; that is, most individuals with disabilities are below average in the activity affected. That a characteristic limits a person to operating below the mean in order to qualify as an impairment, however, is not statutorily required. Rather, the extent to which the individual is restricted becomes relevant only upon consideration of the "substantially limits" prong. *See* Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1207 (8th Cir. 1997) (terming plaintiff's assertion of a disability "unconvincing" where she advanced no evidence that she was precluded from performing a class or broad range of jobs compared to an average person in the general population); 29 C.F.R. pt. 1630, app., at 348 (1998) ("An individual who was once able to walk at an extraordinary rate of speed is not substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she is only able to walk at an average speed, or even at moderately below average speed.").

152. *See* McGraw v. Sears, Roebuck & Co., 21 F. Supp. 2d 1017, 1021 (D. Minn. 1998) (distinguishing an impairment of infertility linked to menopause from AIDS-related infertility on the ground that menopause is "an entirely normal consequence of human aging"); *see also infra* note 157 for more on the physical condition of pregnancy. Webster's defines a disorder as "to disturb the regular or normal functions of (the body or the mind)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, *supra* note 151, at 652.

153. *See* 42 U.S.C. § 12102(2)(A).

154. *See, e.g.*, Aucutt v. Six Flags Over Mid-Am., Inc., 869 F. Supp. 736, 744 (E.D. Mo. 1994), *aff'd*, 85 F.3d 1311 (8th Cir. 1996) (rejecting the argument that plaintiff's high blood pressure, angina, and coronary heart disease amounted to a disability in the absence of any evidence "which connects plaintiff's alleged disability to any impairment of normal everyday activities or impairment of job-related duties").

or long-term impact of the impairment.[155] An analysis considering these three factors can establish that an individual is substantially limited by an impairment. Temporary impairments, while not automatically excluded, are not generally considered disabilities under the ADA when they entail little or no long-term or permanent impact.[156] Pregnancy, for example, even when accompanied by complications, is seldom if ever a disability because of its inherent limited duration.[157] Generally, an impairment is to be measured against the capabilities of an average person in determining whether the plaintiff's limitation is substantial.[158]

An illustrative case is *Doane v. City of Omaha*[159] where the plaintiff had total blindness in one eye due to glaucoma.[160] Although his depth perception and peripheral vision were limited due to this impairment, his corrected vision was

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155. 29 C.F.R. § 1630.2(j)(2)(i)-(iii). The term "substantially limits" is defined by the regulations as:

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

Id. § 1630.2(j)(1).

156. 28 C.F.R. pt. 35, app. A, at 441; 29 C.F.R. pt. 1630, app., at 347. The duration and extent of the condition must be carefully analyzed. 28 C.F.R. pt. 35, app. A, at 442; 28 C.F.R. pt. 36, app. B, at 583. Appendicitis or a broken arm, for example, may qualify as an impairment, but will seldom meet the definition of a disability. *See* 29 C.F.R. pt. 1630, app., at 347-48. *But see* Aldrich v. Boeing Co., 146 F.3d 1265, 1269-70 (10th Cir. 1998) (rejecting employer's argument that it had no duty to accommodate an employee until the employee's doctor had issued a permanent disability rating), *petitition for cert. filed*, 67 U.S.L.W. 3376 (U.S. Nov. 23, 1998) (No. 98-85). For a careful and convincing criticism of case law which excludes short-term impairments from the ambit of the ADA, see Burgdorf, *supra* note 3, at 469-88. Burgdorf points out: "The legislative history of the ADA does not contain a single reference to any duration limits on disabilities, nor any suggestion that 'temporary' conditions are not covered." *Id.* at 475.

157. The regulations state that pregnancy is not a physical impairment. 29 C.F.R. pt. 1630, app., at 347. The reasoning is that pregnancy is a physiological condition; a natural consequence of a properly functioning reproductive system which is not a disorder and, therefore, not an impairment. Richards v. City of Topeka, 934 F. Supp. 378, 382 (D. Kan. 1996) (citing Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465, 473 (D. Kan. 1996)). When pregnancy is accompanied by complications, however, the result may be a disabling impairment. Hernandez v. City of Hartford, 959 F. Supp. 125, 130 (D. Conn. 1997).

158. Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1206 (8th Cir. 1997) (citing 29 C.F.R. pt. 1630, app., at 345).

159. Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

160. *Id.* at 627.

20/20.[161] In addition, he had learned to compensate for the loss of peripheral vision by adjusting his head position, and his brain had learned to work from environmental cues to develop a sense of depth perception.[162] Nonetheless, the court held that because the manner in which the plaintiff Doane sensed depth perception and peripheral vision was different from the manner in which an average person with normal vision would, he was substantially limited in the activity of seeing.[163] The court noted that its analysis of whether the plaintiff was disabled did not include consideration of mitigating measures.[164]

The Supreme Court has also offered some guidance on the precise parameters of the term substantially limited. In *Bragdon v. Abbott*,[165] the Court held that asymptomatic HIV substantially limited the activity of reproduction even when antiretroviral therapy could lower the risk of perinatal transmission of the virus to just eight percent.[166] "The Act addresses substantial limitations on major life activities, not utter inabilities," the Court maintained.[167] Consequently, the Court held that an eight percent risk of transmitting a fatal virus represented a substantial limitation on the activity of reproduction.[168] The deci-

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 627-28 (rejecting Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993)) (holding that "a person is not handicapped if his vision can be corrected to 20/200")). The court stated that the plaintiff's "personal, subconscious adjustments to the impairment do not take him outside of the protective provisions of the ADA." *Id.* For more on the consideration of mitigating measures in the substantially limited prong, see *supra* notes 136-37 and accompanying text.

165. Bragdon v. Abbott, 118 S. Ct. 2196 (1998).

166. *Id.* at 2206.

167. *Id.*

168. *Id.* The Court stated:

> Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation. The decision to reproduce carries economic and legal consequences as well. There are added costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child who must be examined, and, tragic to think, treated for the infection. The laws of some States, moreover, forbid persons infected with HIV from having sex with others, regardless of consent.

Id. (citations omitted).

The Supreme Court analyzed the degree of risk in conjunction with the potential for harm in determining whether an activity is substantially limited. The Eighth Circuit recently declined to follow this analysis. *See* Land v. Baptist Med. Ctr., 164 F.3d 423, 425 (8th Cir. 1999) (holding that an allergy triggered by peanuts and peanut derivatives does not substantially limit the major life activities of breathing or eating). In *Land*, young Megan Land was refused services by a daycare. *Id.* at 424. Although her ability to breathe was generally unrestricted, she was dropped from her daycare after experiencing two allergic reactions. *Id.* The court held she could not satisfy

sion in *Bragdon* heralds a more relaxed construction of the "substantially limited" element, at least where the asserted limitation entails a risk of adverse consequences if the plaintiff engages in the activity at issue.

c. *Major Life Activity.* The ADA plaintiff, in establishing a disability, must show that an impairment substantially limits a "major life activity."[169] A major life activity is one which an average person can perform with little or no difficulty.[170] Major life activities include walking, seeing, hearing, speaking, caring for oneself, and working.[171] The regulations state, and the courts recognize, that the list is not an exhaustive one.[172] Thus, the question arises whether certain additional activities can be subsumed under the phrase "major life activities."[173]

In *Krauel v. Iowa Methodist Medical Center*,[174] the Eighth Circuit held that reproduction and caring for others were not major life activities, reasoning that those activities were inconsistent with the illustrative list.[175] In *Bragdon*, the Supreme Court reversed that holding of *Krauel*, at least with regard to reproduc-

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the "substantially limited" prong. *Id.* at 425. Judge Richard Arnold dissented, noting that Megan and her care-givers must exercise great care in order to avoid peanut products, and if a mistake were made, Megan could experience anaphylactic shock and die if she was not promptly treated. *Id.* at 426 (Arnold, J., dissenting). Therefore, her impairment substantially limited the activity of eating. *Id.* Judge Arnold concluded by stating that the risk "that Megan may accidentally ingest peanuts (a risk that may be slight, if labels are accurate and those responsible for her care are vigilant) must be understood in light of the potential for serious injury." *Id.* The majority, however, did not undertake a weighing of the risk to the plaintiff's health in conjunction with the potential for severe injury. *See id.* at 424-25. *Compare* Bragdon v. Abbott, 118 S. Ct. at 2206 ("It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction.").

169. 42 U.S.C. § 12102(2)(A) (1994).

170. 29 C.F.R. pt. 1630, app., at 347 (1998). For example, major life activities include lifting, standing, reaching, or sitting. *Id.*

171. 28 C.F.R. §§ 35.104, 36.104 (1998); 29 C.F.R. § 1630.2(i); 49 C.F.R. § 37.3 (1998). The list also includes performing manual tasks, breathing, learning, and working. Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (citing 29 C.F.R. § 1630.2(i)). Because the ADA does not define "major life activities," the courts are guided by the implementing regulations. *Id.*

172. 29 C.F.R. pt. 1630, app., at 350. "For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching." *Id.*

173. *See, e.g.*, Breiland v. Advance Circuits, Inc., 976 F. Supp. 858, 863 (D. Minn. 1997) (holding that the ability to get along with others is not a major life activity).

174. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996).

175. *Id.* at 677. The Eighth Circuit pointed out that the plaintiff could "care for herself, perform manual tasks, walk, see, hear, speak, breathe, learn," and perform her job as a respiratory therapist. *Id.* Therefore, the court reasoned, "to treat reproduction and caring for others as major life activities under the ADA would be inconsistent with the illustrative list of activities in the regulations, and a considerable stretch of federal law." *Id.* (citation omitted).

tion as a major life activity.[176] In so doing, the Court emphasized the breadth of the phrase "major life activity," and specifically declined to limit its construction to activities of "a public, economic, or daily dimension."[177] The word "major," the Court noted, "'denotes comparative importance' and 'suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance.'"[178]

One question in this regard, which was not expressly resolved in *Bragdon*, is whether an activity must have major importance to the specific plaintiff involved in order to be termed a major life activity, or whether the activity need only have generalized importance. For example, is reproduction a major life activity for someone who has no desire whatsoever to have children? The court below had postponed a definite resolution of this question.[179] While the majority opinion failed to discuss the issue, Chief Justice Rehnquist's and Justice O'Connor's separate dissents and concurrences both agreed that the ADA plaintiff must show that the specific activity is of major importance to the plaintiff himself.[180] This inquiry is not mandated by the statute, however.[181] Furthermore, the majority in *Bragdon* conspicuously declined to undertake an inquiry of any nexus between the particular plaintiff and the major life activity relied upon. This conspicuous silence suggests that plaintiffs do not carry any burden of demonstrating the importance of a major life activity to them.

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176. Bragdon v. Abbott, 118 S. Ct. 2196, 2205 (1998). The Court had "little difficulty concluding that" reproduction is a major life activity. *Id.* That the Supreme Court expressly rejected limiting major life activities to activities in the public sphere leaves doubt as to the Eighth Circuit's holding that caring for others is not a major life activity. *See id.* (citing Krauel v. Iowa Methodist Med. Ctr., 95 F.3d at 677).

177. *Id.*

178. *Id.* (quoting Abbott v. Bragdon, 107 F.3d 934, 939-40 (1st Cir. 1997), *aff'd in part and remanded in part*, 118 S. Ct. 2196 (1998)).

179. Abbott v. Bragdon, 107 F.3d at 941. The court assumed an inquiry was required "into the connection between the plaintiff and the major life activity," and found that reproduction was a major life activity for the plaintiff. *Id.*

180. Bragdon v. Abbott, 118 S. Ct. at 2214 (Rehnquist, C.J., concurring in part, dissenting in part); *id.* at 2217 (O'Connor, J., concurring in part, dissenting in part). The plaintiff had argued, "Congress could not have intended that the statute be interpreted in such a way that an HIV-positive school child . . . could not make an individualized showing as to how his or her own HIV substantially limited major life activities." Brief for Respondent at 32, Bragdon v. Abbott, 118 S. Ct. 2196 (1998), *available in* 1998 WL 47514. Chief Justice Rehnquist, joined by Justices Thomas and Scalia, would have reversed since they could find no evidence that the plaintiff ever considered having children absent her HIV infection. Bragdon v. Abbott, 118 S. Ct. at 2215 (Rehnquist, C.J., concurring in part, dissenting in part).

181. *See* Abbott v. Bragdon, 107 F.3d at 941 (stating that a case-by-case inquiry "does not necessarily require a corresponding case-by-case inquiry into the connection between the plaintiff and the major life activity"). "Speaking is undoubtedly a major life activity, but there are those (say, monks who have taken vows of silence) who choose to eschew it." *Id.*

Bragdon is a far-reaching decision and deserves careful study. It would seem to dramatically enlarge the pool of potential ADA plaintiffs. Under *Bragdon*, for example, there can be little doubt that some men with low sperm counts can satisfy the statutory definition of disability: because reproduction is a major life activity, a physical impairment which substantially limited that activity would constitute a disability.[182] By extension, if procreation is held to be a major life activity,[183] then men afflicted with premature ejaculation or women suffering from orgasmic disorders could also potentially fall within the definition of disabled.[184] Courts may be expected to resist these sorts of results as counterintuitive, but these are the sorts of results demanded by *Bragdon*.[185]

With the specific major life activity of working, a more defendant-friendly analysis applies than with other major life activities. Accordingly, plaintiffs' attorneys should only resort to the theory that their client's impairment substantially limits working when they cannot prove that the individual is substantially limited in any other major life activity such as walking, lifting, or taking care of oneself.[186] Although the factors in each case must be considered on an individualized basis,[187] to succeed in establishing that a plaintiff is substantially limited

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182. *See* 42 U.S.C. § 12102(2)(A) (1994).

183. *Doe v. Kohn, Nast & Graf, P.C.* has so held. Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1320 (E.D. Pa. 1994).

184. *See* DSM-IV, *supra* note 144 § 302.72, at 502-04 (explaining male erectile disorder); *id.* § 302.73, at 505-06 (explaining female orgasmic disorder); *id.* § 302.75, at 509-11 (explaining premature ejaculation).

185. Of course, such plaintiffs, while quite probably meeting the definition of having a disability under the ADA, would face difficulty in showing discrimination. Because discrimination in whatever form is a more factually-intensive inquiry, courts may feel inclined to short-circuit this determination by finding that an individual is not disabled. Nonetheless, congressional will and Supreme Court authority indicate that fewer cases will be capable of resolution at the threshold and courts will, by necessity, need to undertake the more difficult exploration of discrimination.

186. 29 C.F.R. pt. 1630, app., at 348 (1998). The plaintiff should not consider the impact of an impairment on her ability to work if she can show, instead, that any other major life activity is affected because the ability to work would be affected, a fortiori, by an inability to see, hear, or breathe. *See id.*; *see also* Reed L. Russell, Comment, *Arguing for More Principled Decision Making in Deciding Whether an Individual Is Substantially Limited in the Major Life Activity of Working Under the ADA*, 47 CATH. U. L. REV. 1057, 1058 (1998) (discussing same).

187. *See* 29 C.F.R. § 1630.2(j)(3)(ii), *cited in* Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996). The factors include:

> (A) The geographical area to which the individual has reasonable access;
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> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar

in working, the court will require a significant restriction "in the ability to perform either a *class of jobs* or a *broad range of jobs in various classes.*"[188] The flex in this standard which operates to the disadvantage of plaintiffs suing in the Eighth Circuit is the breadth given to the adjective "broad" in "the broad range of jobs" from which the plaintiff's impairment must operate to disqualify him.[189]

In determining whether an individual is substantially limited in the major life activity of working, three factors should be considered.[190] First, the court will examine the geographical area that the plaintiff can reasonably travel to and from work.[191] Next, the court will compare the job from which the plaintiff was disqualified with the number and types of similar jobs within that geographical area that the plaintiff would also be disqualified because of her disability.[192] Finally, the job from which the plaintiff was disqualified will be compared with the broad range of jobs in various classes within the geographical area that the plaintiff would also be disqualified from because of her disability.[193]

An illustrative Eighth Circuit case is *Wooten v. Farmland Foods*.[194] There, a worker named Wooten who was employed as a ham boner sustained a shoulder injury which resulted in a diagnosis of bilateral carpal tunnel syndrome and generalized inflammation.[195] His doctor restricted his work duties to "light

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> training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii).

188. Robinson v. Neodata Servs., Inc., 94 F.3d 499, 501 (8th Cir. 1996) (quoting 29 C.F.R. § 1630.2(j)(3)(i)) (emphasis supplied by the court). In *Robinson*, the court found that a mail processing clerk's injury to her right arm was an impairment, but not one which "significantly restricted [her] in her ability to work, but merely" prevented her from performing the primary function of her position. *Id.* at 501-02; *see also* Perkins v. St. Louis County Water Co., 160 F.3d 446, 448 (8th Cir. 1998) (finding that a medical condition which caused an employee to miss two-and-a-half weeks of work in a three-year period was insufficient to render the employee disabled); Olson v. Dubuque Community Sch. Dist., 137 F.3d 609, 612 (8th Cir. 1998) (finding no disability of depression when employee's interaction with her supervisors was marked by conflict, but not at high, consistent levels of hostility). Professor Burgdorf notes that medical, vocational, or rehabilitation experts are useful in establishing that the plaintiffs' impairments substantially limit their ability to work. Burgdorf, *supra* note 3, at 467-68.

189. *See generally* Perkins v. St. Louis County Water Co., 160 F.3d at 448; Olson v. Dubuque Community Sch. Dist., 137 F.3d at 609; Robinson v. Neodata Servs., Inc., 94 F.3d at 501.

190. *See* 29 C.F.R. § 1630.2(j)(3)(ii).

191. *Id.* § 1630.2(j)(3)(ii)(A).

192. *Id.* § 1630.2(j)(3)(ii)(B). That is, an examination of the class of jobs from which the individual is disqualified must be made. *Id.*

193. *Id.* § 1630.2(j)(3)(ii)(C).

194. Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995).

195. *Id.* at 384.

duty—no work with meat products—no work in cold environment—lifting 10 lbs. frequently 20 lbs. maximum."[196] Wooten was discharged and a month later when a smokehouse operator position became available at his former employer's business, he applied, believing that the position could accommodate his physical limitations.[197] Instead of rehiring Wooten, however, the employer hired a worker with less seniority from the same department that Wooten had worked in.[198]

Wooten sued under the ADA, but summary judgment was granted in favor of his employer when the district court found that he was not a qualified individual with a disability.[199] The court of appeals affirmed.[200] The court found that Wooten's impairments "only appeared to prevent him from performing a narrow range of meatpacking jobs."[201] "Working," the court emphasized, "does not mean working at a particular job of that person's choice."[202] Rather, the court's opinion suggests, an impairment must considerably restrict an individual from working in a broad range of jobs in order to satisfy the "substantially limits" element when it is applied to the major life activity of working. Unfortunately, *Wooten* appears to apply an even higher standard than the ADA's regulations in this regard.[203] A later case announced that the plaintiff's impairment must con-

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196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 384-85.
200. *Id.* at 386.
201. *Id.*
202. *Id.* (citing Welsh v. City of Tulsa, 977 F.2d 1415, 1417 (10th Cir. 1992); Maulding v. Sullivan, 961 F.2d 694, 698 (8th Cir. 1992)). "'An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one.'" *Id.* (quoting Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 723 (2d Cir. 1994)); *see also* McKay v. Toyota Motor Mfg. U.S.A., Inc., 110 F.3d 369, 374 (6th Cir. 1997) (holding a plaintiff is not substantially limited by a carpal tunnel syndrome condition which limits her from only a narrow range of repetitive motion jobs rather than from the broad class of manufacturing positions); Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (holding that a 25 pound weight restriction was not substantially limiting). Effectively, these decisions can be interpreted as enlarging the definition of "work" which must be impaired as well as ratcheting up the threshold of "substantially limits" when it is applied to the activity of working. Other courts, however, have not defined "work" so broadly. *See, e.g.*, Frix v. Florida Tile Indus., Inc., 970 F. Supp. 1027, 1034 (N.D. Ga. 1997) (reasoning that an individual is disabled when he is precluded from performing jobs which require employees to lift more than 25 pounds because the impairment prevented the individual from performing heavy and medium labor jobs).
203. *See* 29 C.F.R. § 1630.2(j)(3)(i) (1998). "Substantially limits" as applied to the major life activity of working means:

> [S]ignificantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working.

stitute "a significant barrier to employment."[204] The restrictive *Wooten* analysis was wielded again in *Miller v. City of Springfield*[205] where the Eighth Circuit held that the denial of employment as a police officer was not a substantial limitation of the activity of working.[206] The Eighth Circuit standard states that one is not substantially limited in working unless one's "overall employment opportunities are limited."[207]

The attentive reader will have perceived another hazard inherent in the major life activity of the working realm—that is, the plaintiff must be careful his evidence does not prove too much. The plaintiff will assert that his impairment is restrictive to the point of substantially limiting his ability to work. But he must not overdo it lest he inadvertently provide support for the defendant's contention that his impairment, such as it is, prevents him from performing the essential functions of the job, rendering him unqualified.[208] Putting forth major life activity of working contentions involves walking a fine line between showing that the plaintiff's job skills are substantially limited and not showing that

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Id.; *see also* Gutridge v. Clure, 153 F.3d 898, 900-01 (8th Cir. 1998) (reasoning impairments which rendered plaintiff unable to perform specific job as computer service technician did not prevent him from working as a computer repair technician for other employers who did not require lifting or who could provide assistance); Heintzelman v. Runyon, 120 F.3d 143, 145 (8th Cir. 1997) (rejecting argument that plaintiff was substantially limited in working when plaintiff's impairment was of a limited duration of just two weeks).

204. Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996) (quoting Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986)). In *Webb*, however, the court made it clear that an individualized assessment was required, and remanded for further analysis of whether the plaintiff's pain in his hand, which prevented him from handwriting and other repetitive hand motion tasks, substantially limited his ability to work. *Id.* at 486, 488. The court was unwilling to go so far as to say that a plaintiff "can never demonstrate disability as long as there is any other job that she can perform." *Id.* at 487.

205. Miller v. City of Springfield, 146 F.3d 612 (8th Cir. 1998).

206. *Id.* at 615; *see also* Smith v. City of Des Moines, 99 F.3d 1466, 1474 (8th Cir. 1996) (reasoning the fact that a firefighter was unable to perform the duties of a firefighter did not mean he was unable to perform other jobs).

207. Miller v. City of Springfield, 146 F.3d at 614 (citing Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d at 1319). *But see* Smith v. Kitterman, Inc., 897 F. Supp. 423, 427-28 (W.D. Mo. 1995) (finding a disability when plaintiff's condition disqualified her from only one particular job when she had few options for other employment).

208. Lindemann and Grossman call this the plaintiff's "Catch-22." Lindemann & Grossman, *supra* note 78, at 282; *see also* Burgdorf, *supra* note 3, at 425-26 (noting the same tension in Rehabilitation Act cases). *Compare* Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445-46 (8th Cir. 1998) (frequent absences, as many as 44 days in one year and 175 in the next, render an employee unqualified), *with* Perkins v. St. Louis Water Co., 160 F.3d 446, 448 (8th Cir. 1998) (an employee whose impairment of Meniere's disease causes him to miss only two and one half weeks of work in a three-year period is not disabled). See *infra* notes 267-68 and accompanying text for a discussion of when an individual's disability can disqualify them for a position.

the plaintiff is unable to do the core duties of the job, with or without accommodation.[209]

d. *Alternative Definitions of Disability.* When a plaintiff cannot establish that an impairment substantially limits a major life activity, the two alternative definitions of disability should be considered: the "record of" definition and the "regarded as" definition.[210] The first alternative definition is that an individual has a disability if she has a record of an impairment which substantially limits a major life activity.[211] Few cases have interpreted this definition,[212] but the regulations explain that the definition applies to people that had an impairment in the past, but who have now recovered.[213]

The second alternative defines disability as being regarded as having an impairment which substantially limits a major life activity.[214] Two possible interpretations of this "regarded as" definition can be advanced. First, and most logically, the definition requires a plaintiff to show that others wrongly perceive him as having an impairment which would qualify as a disability if the plaintiff actually had a such a condition.[215] For example, the plaintiff would establish

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209. *See, e.g.*, Criado v. IBM Corp., 145 F.3d 437, 442-44 (1st Cir. 1998) (affirming a jury verdict in favor of an employee suffering from depression which "substantially limited her ability to work, sleep, and relate to others," but which could have been reasonably accommodated by giving her significant leave so she could adjust and experiment with medication).

210. 42 U.S.C. § 12102(2)(B)-(C) (1994).

211. *Id.* § 12102(2)(B); *see also* Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1206 (8th Cir. 1997) (stating under this prong a plaintiff may prove a disability by showing that she suffers from a history of a disability); Christopher & Rice, *supra* note 81, at 770-71.

212. *But see* School Bd. v. Arline, 480 U.S. 273, 281 (1987) (holding, under the Rehabilitation Act, that a school teacher's hospitalization for tuberculosis established a record of impairment); Gutridge v. Clure, 153 F.3d 898, 901-02 (8th Cir. 1998) (rejecting plaintiff's argument that five surgeries, "wraps, splints, medication, work restrictions, and inability to perform simple manual tasks" constituted a record of impairment); Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 508-10 (7th Cir. 1998) (ruling plaintiff with attention deficit disorder was not substantially limited in a major life activity but leaving open the question of whether she could prove a record of impairment); Bizelli v. Amchem, 981 F. Supp. 1254, 1257 (E.D. Mo. 1997) (concluding plaintiff established a record of an impairment when he had been on a leave of absence and receiving disability benefits since being diagnosed with cancer and his employer was aware of his chemotherapy and surgery); Mastio v. Wausau Serv. Corp., 948 F. Supp. 1396, 1414 (E.D. Mo. 1996) (holding an employee cannot show a record of impairment without a significant restriction in her ability to work); Kelly McMurry, *ADA Plaintiff with 'Record' of Impairment Can Sue*, TRIAL, Apr. 1998, at 17, 17 (discussing *Davidson v. Midelfort Clinic*).

213. 29 C.F.R. pt. 1630.2(k), app., at 349 (1998). "For example, this provision protects former cancer patients from discrimination based on their prior medical history." *Id.* Persons misclassified as disabled may also rely on this provision. *Id.*

214. 42 U.S.C. § 12102(2)(C).

215. 29 C.F.R. pt. 1630.2(l), app., at 350. Being regarded as having an impairment means that "the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting." *Id.*

that others believed that he had epilepsy that would substantially limit a major life activity if he actually had such an impairment, and to such a degree, as others erroneously believe. A second reading of the definition would allow a plaintiff to show that it was the belief and accompanying prejudice of others that he had an impairment which substantially limited his major life activities.[216] Under this interpretation, the plaintiff proves up a disabling prejudice of an impairment which others regard him as having.[217] The underlying rationale is that myths and stereotypes can be disabling in and of themselves. Thus, plaintiffs may rely on an imagined disability by others which, if true, would substantially limit a major life activity, or in the alternative plaintiffs may establish that the prejudicial attitudes accompanying a falsely perceived impairment were substantially limiting. As Chai Feldblum points out, these alternatives are actually two sides of a single coin: "The underlying, common theme is that the law prohibits discrimination against an individual who is being treated as if he or she was disabled."[218] The provision is intended to combat "'archaic attitudes,' erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities."[219]

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216. 29 C.F.R. pt. 1630.2(l)(2), app., at 350 (stating that being regarded as having an impairment means that an individual has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment). "[S]ociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers." *Id.*

The regulations also permit a third way in which to establish that a plaintiff is "regarded as" having a disability. An inference of a "regarded as" disability may be drawn where the defendant cannot articulate a nondiscriminatory reason for its actions. "If the employer cannot articulate a nondiscriminatory reason for the employment action, an inference that the employer is acting on the basis of 'myth, fear, or stereotype' can be drawn." EEOC v. Texas Bus Lines, 923 F. Supp. 965, 975 (S.D. Tex. 1996) (quoting 29 C.F.R. pt. 1630.2(l), app., at 350). In *Texas Bus Lines*, the court held that the plaintiff was regarded as having a disability when the employer could not articulate any reason for refusing to hire her, other than her obesity. *Id.* at 978.

217. Of course, if the plaintiff claims that others regarded her as impaired because of previous treatment or diagnosis for a condition, she must also produce evidence that the defendant was actually aware of this treatment or diagnosis. Webb v. Mercy Hosp., 102 F.3d 958, 960 (8th Cir. 1996).

218. Chai R. Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7 LAB. LAW. 11, 16 (1991).

219. Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995) (quoting School Bd. v. Arline, 480 U.S. 273, 279, 285 (1987)). For example, an individual with a prominent facial scar, or a condition which causes periodic involuntary jerks of the head may satisfy the "regarded as" prong if his employer takes adverse action because of customers' negative reactions. 29 C.F.R. pt. 1630.2(l), app., at 350.

Significantly, a more relaxed standard for plaintiffs is appropriate under the "regarded as" alternative definition. First of all, a plaintiff need not establish an actual impairment; it is enough that she is regarded as having an impairment.[220] Secondly, the hurdle of showing a substantial impairment in working ought not to be as onerous because, as Feldblum reasons, "a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third [prong of the definition of disability], whether or not the employer's perception was shared by others in the field."[221] Thus, the plaintiff should only have to show she was rejected from one particular job rather than showing she would otherwise be disqualified from a broad class of jobs.[222] Because the focus is on the one employer who regarded its employee as disabled, there would seem no logical reason to require the employee to show the effect of being regarded as disabled by other hypothetical employers.

The Eighth Circuit has held otherwise, however; it applies the same requirement that the plaintiff must show his "regarded as" impairment disqualified him from more than a single or narrow range of jobs.[223] Further-

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220. Bridges v. City of Bossier, 92 F.3d 329, 332 (5th Cir. 1996), *cert. denied* 519 U.S. 1093 (1997); *see also* Gerdes v. Swift-Eckrich, Inc., 125 F.3d 634, 637 n.5 (8th Cir. 1997) ("Gerdes does not assert that he is actually disabled, but rests his ADA claim on the premise that Armour regarded him as such.").

221. Feldblum, *supra* note 218, at 18 (quoting REPORT OF THE HOUSE COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 101-485, pt. 3, at 30 (1990) (alterations in original)); *see also* 29 C.F.R. pt. 1630.2(1), app., at 350 (implying a broad construction of the "regarded as" prong).

222. Feldblum, *supra* note 218 at 18; Robert L. Burgdorf, Jr., "Legal Analysis," *The Americans with Disabilities Act: A Practical and Legal Guide to Impact, Enforcement, and Compliance*, BNA Special Report (1990) at 99-104.

223. Wooten v. Farmland Foods, 58 F.3d at 386. The court stated that the plaintiff's "impairments, whether regarded as permanent or temporary, only appeared to prevent him from performing a narrow range of meatpacking jobs." *Id.*; *accord* Gerdes v. Swift-Eckrich, Inc., 125 F.3d at 637-38; Smith v. City of Des Moines, 99 F.3d 1466, 1474 (8th Cir. 1996); *see also* Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d 1311, 1319-20 (8th Cir. 1996) (stating that an employer's knowledge of its employee's inability to perform a mandatory obstacle course without experiencing severe pain, and the employee's need for an air-conditioned vehicle on warm days to accommodate his angina, high blood pressure, and coronary artery disease is insufficient to establish that the employee was regarded as disabled). *But see* Miners v. Cargill Communications, Inc., 113 F.3d 820, 823 (8th Cir.) (holding that evidence that employer regarded employee as being an alcoholic was sufficient to establish an ADA disability), *cert. denied*, 118 S. Ct. 441 (1997). Unfortunately, some circuits agree with the narrow reading of the "regarded as" prong as applied to the major life activity of working. *See, e.g.*, Chandler v. City of Dallas, 2 F.3d 1385, 1391-93 (5th Cir. 1993); Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989); Scharff v. Frank, 791 F. Supp. 182, 187 (S.D. Ohio 1991); Bales, *supra* note 32, at 223-24. There is a split in authority on the issue, however, and decisions from the First and Ninth Circuits incorporate a more lenient approach, requiring the plaintiff to show disqualification only from the current job when relying on the "regarded as" being disabled prong. *See* Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (reversing

more, the Eighth Circuit has imposed an inexplicably difficult burden to overcome in terms of showing the state of mind of the employer. In *Cody v. CIGNA Healthcare of St. Louis, Inc.*,[224] for example, the employer's knowledge of the employee's treatment by a psychotherapist and unusual workplace behavior such as sprinkling salt in front of her cubicle to ward off evil spirits, staring into space for an hour at a time, talking about a gun, drawing pictures of a sperm, and making gifts of voodoo dolls to coworkers did not show that she was regarded as disabled when she was offered medical leave.[225] The court in *Cody* appears to require that for a plaintiff to be regarded as having a disability, the defendant must not only have believed her to be disabled, but must also have treated her inappropriately.[226] In other words, the court seems to be grafting on an "inappropriately treated as" requirement to the "regarded as having a disability" prong.[227]

This additional requirement is clearly at odds with the statute.[228] Such a requirement is also inconsistent with the rationale of *Miners v. Cargill Communications, Inc.*,[229] an earlier case where an employee satisfied the

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summary judgment for defendant when plaintiff had presented evidence that his employer discussed plaintiff's aberrational behavior, questioned whether he had any "problems," and suggested counseling before terminating him), *cert. denied*, 117 S. Ct. 1349 (1997); Katz v. City Metal Co., Inc., 87 F.3d 26, 32-34 (1st Cir. 1996) (reversing a judgment as a matter of law for defendant when plaintiff had presented evidence that he was fired after his employer viewed the difficulty with which he climbed stairs following a heart attack); Burgdorf, *supra* note 3, at 457-60 (noting the split). It is anticipated that the Supreme Court will resolve this split in its 1999 term. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3783, 67 U.S.L.W. 3008 (Jan. 8, 1999) (No. 97-1943).

224. Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595 (8th Cir. 1998).

225. *Id.* at 597 & n.4. The plaintiff had been diagnosed with schizotypal personality disorder. *Id.* at 598.

226. *Id.* at 598-99. The court reasoned:

> A person is regarded as having a such [sic] an impairment if others treat her as if she is disabled. Cody contends that Cigna viewed her as disabled. In support she cites Cigna's offering her paid medical leave and requiring that she see a psychologist before returning to work. An employer's request for a mental evaluation is not inappropriate if it is not obvious that an employee suffers from a disability.

Id. at 599 (citations omitted).

227. *Cf.* Schnake v. Johnson County Community College, 961 F. Supp. 1478, 1482 (D. Kan. 1997) (finding that employer that perceived employee as having an altered perception of reality regarded employee as having a disability); Muller v. Hotsy Corp., 917 F. Supp. 1389, 1411 (N.D. Iowa 1996) (finding issue of material fact as to whether employer regarded employee as disabled when, although employer claimed he thought employee's injury was only temporary, employer expressed concern about employee's potential for re-injury if he returned to work).

228. *See* 42 U.S.C. § 12102(2)(C) (1994).

229. Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir.), *cert. denied*, 118 S. Ct. 441 (1997).

"regarded as" definition when her employer was aware of her drinking problem and offered treatment options.[230] Whereas an employer's *treatment* of an employee as if that employee were disabled will do much to support an inference that the employer *regarded* its employee as disabled, the statute clearly omits any showing of unequal treatment as a prima facie element of the "regarded as" alternative definition.[231] After all, the "regarded as" prong merely satisfies the definition of "disability." The alleged discrimination remains unexamined at this stage. At any rate, *Cody* indicates that plaintiffs may not be able to simply rest on a showing of the employer's mere awareness of the plaintiff's mental or physical condition when proving an employer regarded its employee as having a disability.[232]

2. *Qualified Individual*

At this point, it is assumed that the plaintiff has demonstrated a disability within the terms of the statute. Once it has been established that a plaintiff has a disability, the next step is showing that the plaintiff is qualified. "A 'qualified individual with a disability' is a person 'with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position.'"[233]

There are three interrelated concepts here: "qualified," "reasonable accommodation," and "essential functions." The plaintiff will first have to show that his credentials were adequate, and second, that he could perform the essential functions of the position, with or without reasonable accommodation.[234] That is, having established that he is "qualified" for the job in the ordinary sense

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230. *Id.* at 823.

231. 42 U.S.C. § 12102(2)(C).

232. Richey, *supra* note 31, at 6-62 (citing Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595, 599 (8th Cir. 1998)). Language from the *Olson* case is instructive:

> Ms. Olson maintains finally that she was disabled . . . because her employer regarded her as being disabled. It is true, as we have said, that [the employer] was generally aware of Ms. Olson's condition [of depression], including the fact that she had sought and received medical treatment. Such an awareness is necessary for Dubuque to have regarded her as disabled, but it is not sufficient. *There must be more* before a plaintiff can survive summary judgment.

Olson v. Dubuque Community Sch. Dist., 137 F.3d 609, 612 (8th Cir. 1998) (emphasis added) (citations omitted).

233. Webb v. Mercy Hosp., 102 F.3d 958, 959 (8th Cir. 1996) (quoting 42 U.S.C. § 12111(8)). To be considered "qualified," an individual must also have "the requisite skill, experience, educational background, and other job-related requirements" of the position. 29 C.F.R. § 1630.2(m) (1998).

234. Doane v. City of Omaha, 115 F.3d 624, 628 (8th Cir. 1997) (citing 29 C.F.R. § 1630.2(m)), *cert. denied*, 118 S. Ct. 693 (1998).

of the term (*i.e.*, having the requisite education, skill, and experience), the plaintiff must go on to show that he is not disqualified by virtue of his disability.[235] He must show that even if his disability prevented him from performing the major duties of the position, there was something his employer could have reasonably done which would enable him to do the work.[236]

The interdependence and circularity of whether an individual is qualified and what accommodations would have been reasonable leads to some overlap, as Professor Barbara Lee explains:

> Although the determination of whether an individual is "qualified" is the threshold issue for ADA coverage (in addition to whether the individual has a disability that meets the ADA's definition), the definition of "qualified" includes persons who can perform the essential functions of the position only if provided with reasonable accommodation. This means that courts may require employers to first determine whether there is a reasonable accommodation that permits the individual to perform the essential functions of the job. If the person cannot perform the job even with a reasonable accommodation, then the individual is not "qualified" under the Act. Given the circularity and overlap of these statutory definitions, courts could require employers to perform the accommodation analysis for any individual with a disability who may, after the analysis is complete, be found not "qualified."[237]

For purposes of clarity, the terms will be examined in the following order: First, after determining the essential functions of the job, it will be asked whether the employee was capable of performing those essential functions. If the answer here is yes, the "qualified analysis" is complete, for the plaintiff is qualified.[238] If the employee cannot perform the essential functions without

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235. *Id.*

236. *See* 29 C.F.R. pt. 1630.2(m), app., at 351 (stating that the qualified inquiry is composed of two parts: first whether the employee meets the job's requirements, and second whether she can perform the job's essential functions).

237. Lee, *supra* note 71, at 218 (footnotes omitted); *see also* Alexander v. Choate, 469 U.S. 287, 299 n.19 (1985) (stating that the question of whether an individual is qualified and whether an individual has suffered disability discrimination "would seem to be two sides of a single coin"). Instead, the ultimate inquiry is whether the defendant is required to provide reasonable accommodations.

238. *See, e.g.*, Doane v. City of Omaha, 115 F.3d at 628-29. *Doane* is discussed *supra* notes 159-64 and accompanying text, and *infra* notes 250-52 and accompanying text.

It should be noted that when an individual can perform the essential functions of the job without any accommodations from the employer, "accommodation discrimination" might still be a viable theory. *See, e.g.*, 29 C.F.R. pt. 1630, app., at 353 (stating that situations may exist where the individual can perform the job's essential functions without any reasonable accommodations, but where the employer is nonetheless obligated to supply a reasonable accommodation, such as a ramp

accommodation, then the analysis continues with an examination of the reasonable accommodations that would allow the worker to perform the duties of the position. Once a reasonable accommodation is identified, the court's attention must again be turned to the qualification issue, and, if a reasonable accommodation would permit the individual to do the job, then the individual is qualified.

To restate: the following steps are suggested in establishing that an employee is qualified. First, the essential functions of the job must be ascertained. It will then be asked whether the individual could perform those functions. If the individual can, she is qualified—this is the "Qualified (Part I)" analysis. If she would require some accommodations in order to perform the functions, it must be asked what accommodations would allow the employee to do so, and whether the proposed accommodations would be reasonable for the employer to provide. Thus, a reasonable accommodation analysis becomes necessary. Once a reasonable accommodation has been identified, the "Qualified (Part II)" analysis asks whether the individual could perform the job's essential functions *with* the identified reasonable accommodation, and if she is able to, she then meets the definition of a qualified individual.[239] In a sense, the plaintiff gets "two bites at the apple" in attempting to establish qualification for the job: the plaintiff can be qualified simply by virtue of being able to perform the job's essential functions, or the plaintiff can be qualified in conjunction with a consideration of reasonable accommodations. With this framework, it can be determined whether an employee "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[240]

a. *Essential Functions of Job.* Although much deference is given to an employer's good faith establishment of a position's essential functions,[241] the term does not include the marginal functions of a position.[242] Inquiry into

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to the employee break room for a nonambulatory employee). A plaintiff relying on an "accommodation discrimination" theory who is qualified without accommodation, however, will have bypassed "reasonable accommodation analysis" under the "qualified analysis" and, therefore, a separate inquiry is required into whether a proposed accommodation would have been reasonable.

239. Case law supports this bifurcation of the qualified analysis. *See* Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 391-92 (N.D. Iowa 1995) (quoting Chandler v. City of Dallas, 2 F.3d 1385, 1393-94 (5th Cir. 1993) (formulating a two-pronged qualified test)).

240. 42 U.S.C. § 12111(8) (1994).

241. *Id.* § 12111(8). "[C]onsideration 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." *Id.*

242. 29 C.F.R. pt. 1630, app., at 351-52 (1998).

whether a particular duty is fundamental to the job turns on a number of factors articulated by the regulations.[243] A function will not be deemed essential, however, if employees in the position are not actually required to perform the duties which the employer asserts are essential.[244] And even duties which are required of all employees will not necessarily be deemed essential if their elimination would not fundamentally alter the position.[245] The question is whether the functions are essential, or merely peripheral. If the functions could easily be performed by a co-worker on an infrequent basis, the conclusion should be that the functions are non-essential.[246] The burden rests on the employer to establish a position's essential functions when it disputes the employee's qualifications.[247]

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243. *See* 29 C.F.R. § 1630.2(n). The regulations state:

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform the function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Id. § 1630.2(n)(2). Evidence relevant to whether a function is essential may include:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

Id. § 1630.2(n)(3). *See, e.g.*, Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 787 (8th Cir. 1998) (finding passenger assistance an essential function of an airline employer's position).

244. 29 C.F.R. pt. 1630, app., at 351. "The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential." *Id.* A job's requirements are not essential if the employer does not apply them uniformly to all employees. Simon v. St. Louis County, 656 F.2d 316, 321 (1981), *appeal after remand*, 735 F.2d 1082 (8th Cir. 1984).

245. 29 C.F.R. pt. 1630, app., at 351-52.

246. Lee, *supra* note 71, at 211.

247. Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995). The reason for this is the reality that much of the information which determines which functions are essential "lies uniquely with the employer." *Id.* The employee, however, retains ultimate burden of showing that he is qualified. *Id.*; *see also* Wilking v. County of Ramsey, 153 F.3d 869, 873 (8th Cir. 1998) (stating that an ADA plaintiff has the burden of showing that "'his work performance met the employer's legitimate job expectations'") (citation omitted).

Regular attendance, for example, is frequently determined to be an essential function.[248] Even when the court has accepted a particular function as essential, however, issues of fact may remain as to the amount and frequency of the function which is essential.[249]

b. *Qualified (Part I).* Once the essential functions of the position have been settled, the plaintiff must show that she is qualified to perform them. If possible, the plaintiff should prove that she can perform the essential functions without any accommodations whatsoever from her employer—this is in essence the "Qualified (Part I)" analysis. In *Doane*, for example, where the employee's disability did not inhibit his ability to do the position's fundamental duties, the employee was qualified.[250] The employee had learned to compensate for his visual impairments and could perform all the essential duties of a police officer, even without any accommodation from his employer.[251] Thus, he was qualified.[252] Further analysis is required, however, if the individual's disability interferes with his ability to perform the position's essential functions. It then becomes necessary to determine whether reasonable accommodations from the employer would have alleviated this difficulty.

c. *Reasonable Accommodation.* When accommodation from the employer is necessary in order to allow the plaintiff-employee to perform a job's essential functions, the ADA plaintiff must carefully map out the type and reasonableness of specific accommodations.[253] The regulations define an accommodation as

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248. Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445 (8th Cir. 1998); Carlson v. Inacom Corp., 885 F. Supp. 1314, 1320-21 (D. Neb. 1995). In *Carlson*, however, the court found that attendance was not an essential function when the employer had no policy on unscheduled absenteeism. Carlson v. Inacom Corp., 885 F. Supp. at 1321; *see also* McDaniel v. AlliedSignal, Inc., 896 F. Supp. 1482, 1489-90 (W.D. Mo. 1995) (holding security clearance to be an essential function).

249. Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1153 (D. Minn. 1995). In *Heise*, the court accepted the employer's contention that customer contact was an essential function of a sales representative's position, but concluded that factual questions remained "as to the amount and timing of customer contact that is an essential function of the job." *Id.* The Supreme Court has granted certiorari on a case involving the "qualified" issue. Albertsons, Inc. v. Kirkingburg, 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3271, 67 U.S.L.W. 3306, 67 U.S.L.W. 3424, 67 U.S.L.W. 3433 (Jan. 8, 1999) (No. 98-591).

250. Doane v. City of Omaha, 115 F.3d 624, 628 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

251. *Id.*

252. *Id. Compare id.*, *with* Mathews v. Trilogy Communications, Inc., 143 F.3d 1160, 1165 (8th Cir. 1998) (holding an uninsurable diabetic not qualified as a traveling sales representative).

253. Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112-15 (8th Cir. 1995); Heise v. Genuine Parts Co., 900 F. Supp. at 1153. The plaintiff should be prepared to prove that she requested an accommodation from her employer prior to the litigation. *See* Rossomando v. Board of Regents, 2 F. Supp. 2d 1223, 1230 (D. Neb. 1998). *See generally* James A. Burstein, *What Is*

"any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[254] A reasonable accommodation might include job restructuring, policy changes, providing certain equipment or devices, or making facilities readily accessible to individuals with disabilities.[255] Both work and non-work areas used by employees may be required to undergo remodeling so they are accessible.[256] Job restructuring as a reasonable accommodation might entail the reallocation of some of the nonessential, marginal duties of the position.[257] Another common reasonable accommodation is reassigning an individual to another, more accommodating but otherwise equivalent position.[258]

While employers will predictably argue that a proposed accommodation would constitute an undue hardship, the undue hardship defense is just that—a defense—and the burden of establishing it rests wholly with the defendant.[259] Much of the case law is confusing on this allocation of proof.[260] This confusion is aggrandized by the fact that evidence probative on whether an accommodation

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"Reasonable Accommodation" Under the Americans with Disabilities Act?, 38 PRACTICAL LAW. 63 (July 1992); Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423 (1991); Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. CALIF. L. REV. 1607 (1991); Elliot H. Shaller, *"Reasonable Accommodation" Under the Americans with Disabilities Act—What Does It Mean?*, 16 EMP. REL. L.J. 431 (1991); Margaret E. Stine, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act of 1990*, 37 S.D. L. REV. 97 (1992); C. Geoffrey Weirich, *Reasonable Accommodations Under the Americans with Disabilities Act*, 7 LAB. LAW. 27 (1991).

254. 29 C.F.R. pt. 1630, app., at 352 (1998).

255. 42 U.S.C. § 12111(9) (1994). *But see* Scheer v. City of Cedar Rapids, 956 F. Supp. 1496, 1502 (N.D. Iowa 1997) (holding that placing an employee on indefinite leave is not a reasonable accommodation).

256. 29 C.F.R. pt. 1630, app., at 352-53. For example, accessible break rooms might be required. *See* 29 C.F.R. § 1630.2(o)(1)(iii) (1997).

257. 29 C.F.R. pt. 1630, app., at 353.

258. Nesser v. Trans World Air Lines, Inc., 160 F.3d 442, 446 (8th Cir. 1998) (citing 42 U.S.C. § 12111(9)(B)). It is up to the employee to present evidence of an available vacant position. *Id.*

259. 42 U.S.C. § 12112(b)(5)(A).

260. *See* Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (citing Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995)). That court stated:

> We know that some courts have required the plaintiff (as part of her initial burden of production) to introduce evidence of the existence of an accommodation, but have combined the questions of (a) whether the accommodation is reasonable and (b) whether it will impose an undue hardship on the employer into one question.

Id.; *see also* Gardner v. Morris, 752 F.2d 1271, 1284 (8th Cir. 1985) (holding that the plaintiff's proposed accommodation was both unreasonable and constituted an undue burden).

is reasonable may also be probative on whether an accommodation results in an undue hardship.[261] This should not result in mis-allocations of proof, however. The plaintiff's burden of establishing a reasonable accommodation is a rather generalized inquiry which focuses on the method of accommodation.[262] Establishing that a proposed accommodation is reasonable simply depends on whether the accommodation is of a type listed by the statute,[263] and whether the plaintiff has made at least a facial showing of the reasonableness of the cost and other burdens associated with the accommodation.[264] A reasonable accommodation as defined by a model jury instruction is simply "any effective modification or adjustment to the workplace that makes it possible for a person with a disability to enjoy the same benefits and privileges of employment that are available to any person without a disability."[265] The defendant's burden of showing that a reasonable accommodation constitutes an undue hardship depends more upon the particular hardships imposed by the proposed accommodation on the defendant's operations.[266]

d. *Qualified (Part II).* Whether the individual is qualified must be reevaluated once reasonable accommodations have been identified. The "Qualified (Part II)" analysis asks whether the plaintiff would be qualified *with* an accommodation. Once the plaintiff has established what accommodations the employer could have provided that would have been reasonable, the plaintiff will successfully show herself to be "qualified" if those accommodations would have

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261. Willis v. Conopco, Inc., 108 F.3d at 286. Undue hardship and reasonableness are in a sense two sides of the same coin. Lindemann & Grossman, *supra* note 78, at 310. The cost of an accommodation becomes relevant in both the undue hardship and the reasonableness inquiries. *See, e.g.*, Wood v. Omaha Sch. Dist., 985 F.2d 437, 439 (8th Cir. 1993) (finding a genuine issue of fact on whether proposed accommodations of self-testing of blood sugar levels and allowing diabetic bus drivers to carry snacks would be reasonable); Arneson v. Sullivan, 946 F.2d 90, 92 (8th Cir. 1991) (finding that employee with apraxia could be reasonably accommodated with private work space to address employee's need for distraction-free environment); Gardner v. Morris, 752 F.2d at 1281-84 (finding a district court's findings that the Corps of Engineers could have reasonably accommodated a manic depressive technician in Saudi Arabia to be clearly erroneous).

262. Willis v. Conopco, Inc., 108 F.3d at 286 n.2 (quoting Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir. 1993)); *see also* 42 U.S.C. § 12111(9) (defining reasonable accommodations by listing applicable methods of accommodating such as restructuring jobs or providing interpreters).

263. *See* 42 U.S.C. § 12111(9).

264. *See* Elitt v. U.S.A. Hockey, 922 F. Supp. 217, 224 (E.D. Mo. 1996) (stating that reasonable accommodations do not include "'undue financial and administrative burdens' or 'a fundamental alteration in the nature of [the] program'") (citation omitted).

265. MODEL JURY INSTRUCTIONS: EMPLOYMENT LITIGATION 54 (1994).

266. Willis v. Conopco, Inc., 108 F.3d at 286 n.2 (quoting Barth v. Gelb, 2 F.3d at 1187); *see also* 42 U.S.C. § 12111(10)(B) (listing factors to be considered in determining an undue hardship such as the cost of the accommodation and the overall financial resources and size of the employer's operations).

allowed her to perform the job's essential functions. This is simply a straightforward application of the identified accommodation to the individual's limitations; assuming that a reasonable accommodation would permit the individual to perform at work satisfactorily, she is qualified.[267] In some cases, however, the plaintiff's disability will be such that even with reasonable accommodations, she will be unable to perform the job's essential functions, wherefore she would not be qualified.[268] This, of course, would be fatal to the plaintiff's case.

e. *Notice.* The three main facets of a plaintiff's prima facie case of "accommodation discrimination" are that the individual is qualified; has a disability; and has not been provided with a reasonable accommodation by an employer who knew of the plaintiff's disability.[269] Applying the outlined framework to establish that the plaintiff is a qualified individual with a disability will usually involve an identification of reasonable accommodations within the

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267. *See, e.g.*, Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1431 (N.D. Cal. 1996) (finding that plaintiff's disability could have been accommodated with a part-time at-home work schedule, therefore qualifying her for the position).

268. *See, e.g.*, Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 788 (8th Cir. 1998) (holding that an airline employee with multiple sclerosis who could not assist passengers in boarding planes was not qualified); Moore v. Payless Shoe Source, Inc., 139 F.3d 1210, 1213 (8th Cir. 1998) (finding that employee who re-injured herself and took an extended leave of absence each time she returned to work to be not qualified). To be "otherwise qualified," the plaintiff must be able to perform the essential functions of the position in spite of the disability. Little v. FBI, 1 F.3d 255, 257 (4th Cir. 1993) (quoting Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979)). Reasonable accommodations that will permit the plaintiff to perform the essential functions of a job must exist in order for the plaintiff to be qualified. *See, e.g.*, Crewe v. United States Office of Personnel Management, 834 F.2d 140, 143 (8th Cir. 1987) (finding rehabilitative treatment of an individual with a disability of alcoholism to be unreasonable in the absence of "even a scintilla of evidence that would suggest that [the employee's] future efforts to control her drinking would be pursued or would succeed").

269. Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1515 (2d Cir. 1995). *Lyons* actually states four elements, the fourth of which includes "notice" as explained *infra* accompanying text to notes 274-75:

> [A] plaintiff can state a claim for discrimination based upon her employer's failure to accommodate her handicap by alleging facts showing (1) that the employer is subject to the statute under which the claim is brought, (2) that she is an individual with a disability within the meaning of the statute in question, (3) that, with or without reasonable accommodation, she could perform the essential functions of the job, and (4) that the employer had notice of the plaintiff's disability and failed to provide such accommodation.

Id. The reader will note that the first element—that the employer is a covered entity—has been omitted. The reason for this is that under the ADA, though not under the Rehabilitation Act, it is fairly straightforward to establish that the employer is subject to the statute. *See supra* note 86.

context of the term "qualified."[270] Thus, the analytical ballast of the plaintiff's case has now been presented: once the plaintiff has established that he is a qualified individual with a disability, a prima facie "accommodation discrimination" case on the basis of ADA section 102(b)(5)(A) will be substantially complete.[271] This is so because of the circularity of the elements as noted above.[272] Only two additional facts must be presented to complete a prima facie "accommodation discrimination" case: first, and most obviously, that the employer did not actually provide an accommodation; and second, that the employer had notice of the plaintiff's disability.[273]

The requirement that the plaintiff's disability be "known" to the employer rests on the rationale that an employer cannot be required to provide accommodations when he has no reason to believe that they might be helpful to the employee. It is the employer's awareness of the employee's disability which triggers the employer's duty to consider an accommodation.[274] The notice requirement can be satisfied when the employer is actually apprised of the disability, or when the circumstances should have alerted the employer to the employee's disability.[275]

B. *"Intentional Discrimination"*

The second cardinal type of discrimination under the ADA is "intentional discrimination." Proof of this type of discrimination does not rest on a failure to

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270. *See supra* notes 233-40 and accompanying text for a description of how an analysis of reasonable accommodations becomes necessary in determining if an individual is qualified.

271. 42 U.S.C. § 12112(b)(5)(A). The duty to make reasonable accommodations has also been termed "surmountable barrier discrimination." Prewitt v. United States Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981).

272. See *supra* note 237 and accompanying text for the overlap of the elements of qualified and reasonable accommodation.

273. *See* 42 U.S.C. § 12112(b)(5)(A) (defining to "discriminate" as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual who is an applicant or employee"); Miller v. National Cas. Co., 61 F.3d 627, 629 (8th Cir. 1995) ("Before an employer must make accommodation for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists.").

274. Even if the employer does not learn of the employee's disability without notice from the employee, this duty is still triggered. Susie v. Apple Tree Preschool & Child Care Ctr., Inc., 866 F. Supp. 390, 392 n.4 (N.D. Iowa 1994). The method by which the employer learns of the employee's disability is irrelevant. *Id.*

275. Miller v. National Cas. Co., 61 F.3d at 630. The employee's symptoms might make the disability evident to the employer. *Id.* (citing Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 932 (7th Cir. 1995)). For example, frequent seizures might make an employee's disability obvious to the employer. Hedberg v. Indiana Bell Tel. Co., 47 F.3d at 934. Furthermore, *Hedberg* states that when an employee requests an accommodation from his employer, there can be no question that the employer had knowledge of the disability. *Id.* at 932.

provide reasonable accommodations, but rather the more recognizable, garden-variety type of discrimination familiar to Title VII and ADEA practitioners. Intentional discrimination might include adversely limiting or segregating an employee because of the employee's disability,[276] denying equal jobs or benefits to an individual because of the individual's disability,[277] or using standards or criteria which have the effect of discriminating on the basis of disability.[278] Because these provisions are all contained within Title I, the preliminary elements of proof as outlined above will apply. Therefore, as a threshold matter, the plaintiff must demonstrate that he is a qualified individual with a disability.[279] To make out a prima facie case of intentional discrimination, an additional element of proof must be satisfied in order to show that the plaintiff was adversely treated because of his disability.[280]

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276. 42 U.S.C. § 12112(b)(1).

277. *Id.* § 12112(b)(4).

278. *Id.* § 12112(b)(3)(A).

279. *See supra* accompanying text to notes 128-268 for the elements of "disability" and "qualified." A complication arises in the intentional employment discrimination milieu with regard to showing that the plaintiff is qualified to perform the essential functions of the position. The Eighth Circuit has restated this element of the plaintiff's case as a requirement that the plaintiff show that "his work performance met the employer's legitimate job expectations." Wilking v. County of Ramsey, 153 F.3d 869, 873 (8th Cir. 1998) (citations omitted). Rephrasing the qualified test as "meeting an employer's expectations" puts the focus on the employer's satisfaction with the employee. This is obviously a much more subjective assessment which is more susceptible to abuse "and more likely to mask pretext." Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 938-39 (3d Cir. 1997) (citations omitted). For these reasons, the Third Circuit has rejected satisfaction of an employer's expectations as a requisite element of an employment discrimination prima facie case. *Id.* at 938. In the Eighth Circuit, however, it remains a snag for plaintiffs. *See* Burroughs v. City of Springfield, 163 F.3d 505, 509 (8th Cir. 1999) (holding that "when an employee knows that he is afflicted with a disability, needs no accommodation from his employer, and fails to meet the employer's legitimate job expectations, due to his failure to control a controllable disability, he cannot state a cause of action under the ADA") (quoting Siefken v. Village of Arlington Heights, 65 F.3d 664, 667 (7th Cir. 1995)).

280. The ADA plaintiff's prima facie case for intentional discrimination is generally formulated thus: the plaintiff must establish

> (1) that he or she is a disabled person within the meaning of the ADA; (2) that he or she is qualified, that is, with or without reasonable accommodation (which the plaintiff must describe), he or she is able to perform the essential functions of the job; and (3) that the employer terminated the plaintiff, or subjected the employee to adverse decision, "because of" the plaintiff's disability.

Muller v. Hotsy Corp., 917 F. Supp. 1389, 1408 (N.D. Iowa 1996) (citations omitted). A second phrasing of the prima facie case is a showing by the plaintiff

> (1) that he or she is disabled within the meaning of the ADA; (2) he or she is a "qualified individual" within the meaning of the ADA; (3) the plaintiff was subject to an adverse employment decision; and (4) the plaintiff was replaced

Borrowing from the doctrines of Title VII, there are two possible ways of meeting the burden of showing discrimination; either by showing discriminatory treatment or by showing a discriminatory effect.[281] First, a plaintiff may bring a disparate treatment case by alleging that she was treated adversely because of her disability.[282] In a disparate treatment case, the plaintiff must prove that a discriminatory intent or animus accompanied the adverse employment action.[283] The second available theory is disparate impact in which the plaintiff alleges that a facially neutral practice "fall[s] more harshly on one group than another and cannot be justified by business necessity."[284] In a disparate impact case, proof of an impermissible motive is not required.[285] Both of these theories will be examined in turn. Because of the speed at which courts typically advance through the *McDonnell Douglas Corp. v. Green*[286] burden-shifting framework,[287] even at the summary judgment phase, the discussion which follows goes beyond the plaintiff's prima facie case to examine the full range of the allocations of proof and shifting burdens of production.

> by a non-disabled person or was treated less favorably than non-disabled employees.

Id. at 1410 (citations omitted). The Eighth Circuit Court of Appeals has favored the former formulation. *See* Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir. 1996); Benson v. Northwest Airlines, 62 F.3d 1108, 1112 (8th Cir. 1995). In *Muller*, the district court applied the latter test, stating that at the prima facie case phase, the plaintiff need not show that he was treated adversely "because of" his disability. Muller v. Hotsy Corp., 917 F. Supp. at 1410. However, the court also opined that the plaintiff was required to show that he was treated less favorably than a non-disabled person. *Id.* The court stated:

> A plaintiff has been terminated "because of" his or her disability just as surely where the employer terminates the plaintiff in favor of another who also fits within the ADA's definition of "disabled," but whose disability is more cheaply or easily accommodated, as when the plaintiff is terminated in favor of a non-disabled person.

Id.

281. *See* Thomas Fusco, Annotation, *What Constitutes Sex Discrimination in Termination of Employee so as to Violate Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.)*, 115 A.L.R. FED. 1 (1993 & Supp. 1998).

282. *Id.* at 31-32.

283. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-11 (1993).

284. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).

285. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Proof of a discriminatory motive is not required in a disparate impact case because the concern is with the consequences of employment practices rather than simply the motivation behind them. *Id.*

286. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

287. *See id.* at 801-07.

1. *Disparate Treatment*

Under Title I, disparate treatment means that the plaintiff was deliberately treated differently on the basis of his disability.[288] Generally speaking, in a disparate treatment case, the burden-shifting framework from *McDonnell Douglas* will apply. Under this rubric, the plaintiff first makes a prima facie case that he has been discriminated against, whereupon the burden shifts to the defendant to rebut the inference of illegality.[289] Disparate impact cases are the most common type of discrimination claims.[290]

A prima facie case of intentional discrimination by a qualified individual with a disability is established upon showing that the individual suffered adverse employment action under circumstances which give rise to an inference of an unlawful motive on the part of the employer.[291] Such an inference can be raised, for example, when the plaintiff was treated less favorably than non-disabled employees.[292] The threshold of proof required to establish the initial prima facie case is minimal and, generally speaking, easily established.[293]

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288. 29 C.F.R. pt. 1630, app., at 365 (1998). The regulations explain:

> Disparate treatment means, with respect to title I of the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude towards his or her perceived disability.

Id.

289. *See* Brousard-Norcross v. Augustana College Ass'n, 935 F.2d 974, 975 (8th Cir. 1991); Johnson v. Legal Servs., Inc., 813 F.2d 893, 895-96 (8th Cir. 1987) (Rehabilitation Act cases). It should be noted that the phrase "prima facie case" here is given a narrow meaning; "it is intended merely to be a legally mandatory, rebuttable presumption" rather than the sense in which it has been used thus far in this Article, as a description of the "'plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue.'" Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1332 n.6 (8th Cir. 1996) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981)). In the *McDonnell Douglas* context, the purpose of a plaintiff's prima facie case within the burden-shifting scheme is simply "'to sharpen the inquiry into the elusive factual question of intentional discrimination.'" *Id.* (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 255 n.8).

290. Richey, *supra* note 31, at 1-18.

291. Wallin v. Minnesota Dep't of Corrections, 153 F.3d 681, 687 (8th Cir. 1998); Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1024 (8th Cir. 1998); Cody v. CIGNA Healthcare, Inc., 139 F.3d 595, 598 (1998).

292. Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir. 1996).

293. Young v. Warner-Jenkinson Co., 152 F.3d at 1022; *see also* Rose-Maston v. NME Hosps., Inc., 133 F.3d 1104, 1109-10 (8th Cir. 1998); Landon v. Northwest Airlines, Inc., 72 F.3d 620, 624 (8th Cir. 1995); Davenport v. Riverview Gardens Sch. Dist., 30 F.3d 940, 944 (8th Cir. 1994); Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994). *But see* Price v. S-B

Once the plaintiff has produced a modicum of circumstantial or indirect evidence sufficient to raise an inference of discrimination, her prima facie case is made out and a rebuttable presumption of discrimination arises.[294] The burden of production then shifts to the defendant who must articulate a legitimate, nondiscriminatory reason for its actions.[295] For example, the employer may claim that the employee was treated differently not because of her disability, but for a nondiscriminatory reason such as poor work performance unrelated to the disability.[296] Defendants seldom have much difficulty in advancing some legitimate explanation for the adverse employment action against the plaintiff.[297] When the defendant has done so, the presumption raised by the plaintiff's inference vanishes and the burden of production shifts again, back to the plaintiff, who must demonstrate that the employee's proffered legitimate reason is merely a pretext; that the employer's real motive was based upon the employee's disability.[298]

Once the defendant has met its burden of production by articulating a nondiscriminatory reason for the adverse employment decision, the *McDonnell Douglas* framework disappears.[299] This is the typical situation.[300] For example, an inference of discrimination can arise from the fact that the employer regarded its employee as disabled, but the employer may meet its burden of production by

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Power Tool, 75 F.3d at 365 (finding no inference of discrimination when plaintiff's claim that she was treated differently from non-disabled employees was not supported by her own evidence).

294. Young v. Warner-Jenkinson Co., 152 F.3d at 1022.

295. *Id.*

296. 29 C.F.R. pt. 1630, app., at 365 (1998).

297. *See, e.g.*, Price v. S-B Power Tool, 75 F.3d at 365-66 (reciting employer's advanced reason for employee's termination; poor attendance).

298. Young v. Warner-Jenkinson Co., 152 F.3d at 1021 (citing Rose-Maston v. NME Hosps., Inc., 133 F.3d at 1107). "The plaintiff retains at all times the ultimate burden of proving that the adverse employment action was motivated by intentional discrimination." *Id.*; *see also* Valentine v. American Home Shield Corp., 939 F. Supp. 1376, 1401 (N.D. Iowa 1996) (finding an ultimate inference of discrimination sufficient to defeat summary judgment from an offer of part-time employment and subsequent withdrawal of the offer). *But see* Matthews v. Trilogy Communications, Inc., 143 F.3d 1160, 1165-66 (finding unspecific expressions of discriminatory bias such as calling the plaintiff a "diabetic poster boy" and other evidence insufficient to show pretext).

299. Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1334 (8th Cir. 1996).

300. *See, e.g.*, Smith v. Horton Indus., Inc., 17 F. Supp. 2d 1094, 1099-1100 (D.S.D. 1998) (holding that evidence that non-disabled employees were treated differently than the plaintiff supports an inference of discrimination and that the employer's proffered reasons were pretextual); Mastio v. Wausau Serv. Corp., 948 F. Supp. 1396, 1417 (E.D. Mo. 1996) (holding that when employer's proffered reasons for its employment decision are not supported by the record, the employee's claim must survive a summary judgment motion); Valentine v. American Home Shield Corp., 939 F. Supp. at 1401-02 (holding that inference of pretext and discriminatory animus from withdrawal of reasonable accommodation offer after it had been accepted precluded summary judgment for employer).

asserting that it took action against the employee for violating a company rule.[301] The inquiry then becomes extremely fact sensitive and reaches a high level of specificity, refocusing on the ultimate issue, that is, whether the employer discriminated on the basis of disability.[302] At this stage, then, the issue is a simple a question of fact which demands a detailed examination of all the circumstances—were the employer's actions carried out because of the employee's disability?[303] The *St. Mary's Honor Center v. Hicks*[304] Supreme Court case makes it clear that a plaintiff's demonstration of the falsity of the employer's explanation for its actions does not automatically entitle the plaintiff to judgment; the fact that the employer's conduct was not motivated by its proffered reason does not necessarily require the conclusion that the employer intended to discriminate on the basis of disability.[305] The employer could just have well been motivated by another non-articulated, but non-discriminatory incentive.[306] At the same time, *Hicks* rejected a "pretext-plus" rule which would have required employees to show pretext, and in addition, evidence of a discriminatory animus.[307] Instead, the Supreme Court held that the evidence, viewed as a whole, must be such that can sustain a finding of discrimination.[308]

A typical case is *Christopher v. Adam's Mark Hotels*.[309] There, Cheryl Christopher applied and was hired for a job as a sales secretary, listing as her qualifications a master's degree in computer science and considerable experience with the word processing program WordPerfect.[310] Once she began training, however, it quickly became evident that she lacked familiarity with WordPerfect.[311] After a review of her file, which revealed her diagnosis with bipolar disorder, she was terminated.[312]

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301. Miners v. Cargill Communications, Inc., 113 F.3d 820, 824 (8th Cir.), *cert. denied*, 118 S. Ct. 441 (1997).

302. Rothmeier v. Investment Advisers, Inc., 85 F.3d at 1332.

303. *Id.* at 1335.

304. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

305. Rothmeier v. Investment Advisers, Inc., 85 F.3d at 1334. "[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 515 (emphasis supplied by the court)).

306. *See id.*

307. *Id.* at 1333-34. "Pretext-plus courts demanded that an employee show discriminatory animus in addition to pretext." *Id.* at 1333.

308. St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 510-11.

309. Christopher v. Adam's Mark Hotels, 137 F.3d 1069 (8th Cir. 1998).

310. *Id.* at 1070-71.

311. *Id.* at 1071. She also acted combatively at the office. *Id.*

312. *Id.*

Christopher succeeded in making out her prima facie case; that she was a qualified individual with a disability terminated because of her bipolar disorder.[313] Next, because the burden of production had shifted to the employer, the employer advanced nondiscriminatory reasons for Christopher's discharge, including evidence that Christopher lacked the skills she claimed on her resume, and was unable or unwilling to learn the duties required of her.[314] At the third stage of the burden-shifting framework, the burden of production shifted back again to Christopher to show that the articulated reasons were a pretext for discrimination based on her disability.[315] This she was unable to do. [316]

Christopher advanced three arguments which were supported by evidence in her attempt to show pretext.[317] First, she pointed out that she had worked for less than a week before she was terminated when the typical training period was three weeks, although it was true that her employer expected new secretaries to be proficient in word processing when they started work.[318] Second, she contended that other secretaries were given additional assistance, but her employer admitted only to minimal additional training of one secretary who had demonstrated a commitment to learn.[319] Finally, Christopher relied on the fact that her supervisor had examined her personnel file which disclosed her bipolar disorder before terminating her.[320] The court found this evidence insufficient to show pretext and affirmed summary judgment in favor of the employer.[321]

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313. *Id.* at 1072. "[W]e will assume that Christopher has established the elements required to make out a prima facie case of discrimination." *Id.*

314. *Id.* The employer also asserted that Christopher's termination resulted from her resentful, combative attitude towards supervisors and co-workers. *Id.*

315. *Id.*

316. *Id.* at 1072-73.

317. *Id.* Christopher's fourth argument that previous secretaries with less experience had been given more training was belied by the record. *Id.* at 1072.

318. *Id.* at 1072.

319. *Id.* at 1073.

320. *Id.*

321. *Id.* The court held that a showing of the employer's knowledge of an employee's disability was insufficient to show pretext. *Id.* For a case in which the plaintiff was able to refute the employer's legitimate explanation for its actions, see *Kiel v. Select Artificials, Inc.*, 142 F.3d 1077 (8th Cir. 1998). In *Kiel*, a deaf billing clerk requested a TDD (a telecommunication device for the deaf that would allow him to make and receive telephone calls without assistance) from his employer. *Id.* at 1079. As he was pursuing this request, his supervisor confronted him, and when the employee Kiel became frustrated, he raised his voice, calling the supervisor selfish. *Id.* Although he apologized and stated he had not realized that he was shouting, he was terminated later that same day. *Id.* The court found that the facts made out a prima facie retaliation case under the ADA, then proceeded with the burden-shifting analysis. *Id.* at 1080. The court found the employer's proffered reason for termination—insubordination—to be too suffused with factual dispute to be appropriate for summary judgment. *Id.* at 1081. Judge Wollman dissented.

This is not to say, however, that the plaintiff must always marshal one bulk of evidence to raise an inference of discrimination—which most defendants will easily rebut by mouthing a nondiscriminatory explanation for their actions—and present separate allotments of evidence to demonstrate that the defendant's explanation was pretextual and that the defendant's motives were actually discriminatory. The *McDonnell Douglas* framework is not inflexible, and can be modified to fit the facts of the particular case.[322] Thus, in some cases, which the Eighth Circuit calls "double-duty cases," the evidence which supports an inference of discrimination might be persuasive enough to also support an inference that any articulated explanations by the employer are merely pretextual.[323] In the same vein, evidence which shows pretext can sometimes show that the defendant's explanations for its actions are so obviously contrived as to support an ultimate inference of illegal discrimination.[324] If the evidence is of this nature,

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Kiel was vacated upon a rehearing en banc; this time, Judge Wollman wrote for the majority. Kiel v. Select Artificials, Inc., 1999 WL 107986 (8th Cir. Mar. 4th 1999) (en banc), *to be reported at* 169 F.3d 1131. Judge Wollman wrote that "the ADA confers no right to be rude" and that Kiel's angry outburst "eroded any causal connection that was suggested by the temporal proximity of his protected conduct and termination." *Id.* at *4. Judge Morris Arnold, joined by Judges Heaney, Bright, and McMillian, dissented. *Id.* at *5 (Arnold, J., dissenting). The dissent agreed that "opposing the denial of a reasonable accommodation request by declaring that an employer is selfish is unreasonable as a matter of law." *Id.* at *6. The dissent also observed that the majority had resolved a disputed matter of fact—whether Kiel had intentionally raised his voice—in favor of the employer, the movant for summary judgment. *Id.*

322. Miners v. Cargill Communications, Inc., 113 F.3d 820, 824 n.7 (8th Cir.) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)), *cert. denied*, 118 S. Ct. 441 (1997).

323. *See* Miners v. Cargill Communications, Inc., 113 F.3d at 823 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981)); Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1336 (8th Cir. 1996); *see also* Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 34 (1st Cir. 1998) (stating that a plaintiff "may rely on the same evidence to prove pretext and discrimination" in a Title VII case, citing *Udo v. Tomes*, 54 F.3d 9, 13 (1st Cir. 1995)).

324. Rothmeier v. Investment Advisers, Inc., 85 F.3d at 1336 (citing Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796, 801 (8th Cir. 1994)). To cite a further example of the flexibility of the *McDonnell Douglas* framework, in *Miners*, the plaintiff established that she was disabled under the "regarded as disabled" prong. Miners v. Cargill Communications, Inc., 113 F.3d at 823. The court found that the evidence she presented to establish that her employer regarded her as disabled compelling enough to carry her initial burden of showing that she was discriminated against on the basis of disability. *Id.* at 823-24. This satisfaction of proof can also work in the reverse as demonstrated by *Rhone v. United States Department of the Army* where the fact that the employee was terminated because of his disability also established that he was disabled under the "regarded as" prong. Rhone v. United States Dep't of the Army, 665 F. Supp. 734, 742 n.16 (E.D. Mo. 1987) (Rehabilitation Act case).

no additional proof of discriminatory animus is required.[325] Such a case can be found in *Young v. Warner-Jenkinson Co.*[326]

Young is also significant for its implicit rejection of a troubling earlier case, *Birchem v. Knights of Columbus*.[327] Both cases involve a common fact pattern: the employer's initial legitimate explanation for its actions against its employee is belied by other evidence. In *Birchem*, the employee disputed that he had been terminated because of allegedly inadequate work performance and untrustworthiness.[328] Instead, some evidence indicated that the reason for the employee's discharge might have been his complaints about his employer's unfair trade practices.[329] Similarly, in *Young*, the employer's initial explanation for the employee's termination was inadequate performance, but later the employer changed its story and justified its actions on a lack of available work.[330]

While *Young* correctly saw evidence of a contrived explanation as probative on the ultimate question of discriminatory intent, the *Birchem* court actually used the evidence of pretext against the employee: "if Birchem did have bona fide evidence of pretextual action by [his employer], it would tend to prove that [his employer] fired Birchem because he complained of [his employer]'s improper trade practices, not because of Birchem's bipolar disorder."[331] In *Young*, by contrast, the court correctly observed that evidence that an employer's original explanation has been manufactured also supports a reasonable inference that any other explanation is also contrived, and that successive pretextual reasons were advanced to cover up discriminatory motives.[332] The rationale is that evidence that an employer was covering up or even lying about why certain action was taken supports an inference of underlying discriminatory intent. The

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325. Rothmeier v. Investment Advisers, Inc., 85 F.3d at 1336 (citing Nelson v. Boatmen's Bancshares, Inc., 26 F.3d at 801).

326. Young v. Warner-Jenkinson Co., 152 F.3d 1018 (8th Cir. 1998).

327. Birchem v. Knights of Columbus, 116 F.3d 310 (8th Cir. 1997).

328. *Id.* at 314.

329. *Id.* at 312.

330. Young v. Warner-Jenkinson Co., 152 F.3d at 1022.

331. Birchem v. Knights of Columbus, 116 F.3d at 314 (citing Rothmeier v. Investment Advisers, Inc., 85 F.3d at 1337). *Rothmeier* is not on point. In *Rothmeier*, the court found insufficient evidence to determine that an impermissible motive actually motivated the employer's decision to discharge its employee when the employee himself acknowledged he had been discharged to cover up SEC violations and a host of work-related personality conflicts were present. Rothmeier v. Investment Advisers, Inc., 85 F.3d at 1337. While it may be that the plaintiff in *Birchem* would have ultimately been incapable of advancing sufficient evidence to create a reasonable inference that the determinative factor in his termination was his disability, *id.* at 1336-37, it was fallacious for the court in *Birchem* to hold that the evidence of pretext actually served to weaken the plaintiff's case. *See* Birchem v. Knights of Columbus, 116 F.3d at 314.

332. Young v. Warner-Jenkinson Co., 152 F.3d at 1022.

fact that an employer has been insincere in explaining its actions tends to show that a second explanation might also be insincere, and that the reason for the employer's insincerity is illegal discrimination. After *Young*, an alternative explanation for the employer's actions which is at odds with the employer's original explanation should not be rejected as evidence of pretext merely because the alternative explanation is not necessarily grounded in discriminatory rancor.

In other situations, the *McDonnell Douglas* allocation of burdens framework will not apply at all. Most commonly, the burden-shifting framework is inapplicable when the plaintiff can come forward with direct evidence of a discriminatory motive.[333] Direct evidence can include comments by employers or supervisors which demonstrate discriminatory malevolence in the decision-making process.[334] Direct evidence should provide a clear link between the discriminatory attitude and the adverse employment action. For example, ideal direct "evidence would take the form . . . of an employer telling an employee, 'I fired you because you are disabled.'"[335] In order to avoid the burden-shifting framework, the direct evidence must be "so revealing of discriminatory animus that it is not necessary to rely on any presumption from the prima facie case to

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333. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989). *Price Waterhouse* cases are sometimes termed "mixed motive" cases. Richey, *supra* note 31, at 1-32. Under *Price Waterhouse*, once the plaintiff has established that her disability was a motivating factor in the employer's decision, the burden shifts to the employer to show that "'it would have made the same decision even if it had not taken the [illegitimate criterion] into account.'" Beshears v. Asbill, 930 F.2d 1348, 1353 (8th Cir. 1991) (ADEA case) (quoting Price Waterhouse v. Hopkins, 490 U.S. at 258); *see also* Kelly v. Drexel Univ., 907 F. Supp. 864, 871-72 (E.D. Pa. 1995) (applying the mixed motive framework to an ADA case), *aff'd*, 94 F.3d 102 (3d Cir. 1996); Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 399 (N.D. Iowa 1995) (recognizing the applicability of *Price Waterhouse* in ADA cases).

If the plaintiff is faced with a reduction-in-force situation where the employer was discharging a number of employees, the intent standard is satisfied by showing that the employer's disability was a "determining factor" in the employer's decision to terminate. Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d 1311, 1318 (8th Cir. 1996) (citing Johnson v. Minnesota Historical Soc'y, 931 F.2d 1239, 1243 (8th Cir. 1991)); *see also* Leichihman v. Pickwick Int'l, 814 F.2d 1263, 1269 (8th Cir. 1987) (outlining the prima facie elements of a reduction in force case).

334. Beshears v. Asbill, 930 F.2d at 1354 (quoting Price Waterhouse v. Hopkins, 490 U.S. at 278. Direct evidence does not include "stray remarks in the workplace" or "statements by decisionmakers unrelated to the decision process itself." Reiff v. Interim Personnel, Inc., 906 F. Supp. 1280, 1287 (D. Minn. 1995) (quoting Beshears v. Asbill, 930 F.2d at 1354 (citing Price Waterhouse v. Hopkins, 490 U.S. at 277)). However, direct evidence "may include evidence of actions or remarks of the employer that reflect a discriminatory attitude." *Id.* (citations omitted).

335. Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998); *see also* Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1318, 1320-21 (8th Cir. 1994) (finding direct evidence of sex discrimination in supervisor's comment that "women . . . were the worst thing that had happened to this company").

shift the burden of production."[336] When the plaintiff can do so, the defendant is reduced to putting forth an affirmative defense that it would have made the same decision even in the absence of discriminatory intent.[337] Although this defense will not relieve the employer of all liability, when successfully mounted it does restrict the availability of remedies.[338] The *McDonnell Douglas* framework is based on an inferential proof scheme, so when the plaintiff does not need to rely upon inferences from circumstantial evidence, there is no need for burden-shifting.[339] However, because of the increasing savvy of employers who are becoming more and more aware of the ADA's teeth, cases in which an employer has been so careless as to allow "smoking gun" evidence of its discriminatory animus to fall into the hands of an employee are increasingly rare.[340]

2. *Disparate Impact*

Title I disparate impact occurs when "uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative

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336. Armbruster v. Unisys Corp., 32 F.3d 768, 778 (3d Cir. 1994) (emphasis omitted).

337. Price Waterhouse v. Hopkins, 490 U.S. at 244-45. The employer's burden of proving that it would have made the same decision even in the absence of discrimination is governed by the preponderance of the evidence standard. *Id.* at 253.

338. Direct evidence or "mixed motive" sex discrimination cases were judicially created when the Supreme Court found that discrimination "because of such individual's . . . sex" did not mean "solely because of," but included "decisions based on a mixture of legitimate and illegitimate considerations." Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 399 n.9 (N.D. Iowa 1995) (quoting 42 U.S.C. § 20003-2(a)(1), (2) (1994); Price Waterhouse v. Hopkins, 490 U.S. at 240-41). Congress later replaced the "same decision showing" defense of *Price Waterhouse* with a rule that such a showing would only affect the remedies available to the employee, rather than absolve the employer of all liability with § 107 of the Civil Rights Act of 1991. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). This amendment has been carried over to the ADA via case law. Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300, 1301 (8th Cir. 1995). Thus, once a plaintiff meets her *Price Waterhouse* burden of showing that her disability was a motivating factor in the employer's decision, she is entitled to relief. *Id.* But if the employer successfully mounts an affirmative defense by establishing that it would have made the same decision even if it had not taken disability into account, the plaintiff's remedies are limited to attorney's fees, costs, declaratory, and injunctive relief. *Id.* When an employer succeeds with a "same decision showing," the employee is not entitled to reinstatement, back pay, or compensatory damages. *Id.* at 1301-03.

339. *See* Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346 (4th Cir. 1996) (per curiam), *cert. denied*, 520 U.S. 1240 (1997).

340. "There is no restriction on the *type* of evidence a plaintiff may produce to demonstrate [a direct evidence, or *Price Waterhouse* case]." Stacks v. Southwestern Bell Yellow Pages, Inc., 996 F.2d at 201 n.1 (Title VII case). Direct evidence can mean direct as well as circumstantial evidence. *Id.* Direct evidence "means only that the plaintiff must present evidence showing a specific link between discriminatory animus and the challenged decision." *Id.*

impact on a class of individuals with disabilities."[341] In a disparate impact case, the burden of proof analysis is altered somewhat because there is no required showing of a discriminatory motive. The focus shifts away from the defendant's intent to the effects of a particular practice on the plaintiff. Often, a plaintiff will rely on statistical evidence to support a disparate impact case.[342] In keeping with the congruence of the ADA and Title VII, the *Prewitt v. United States Postal Service*[343] analysis would likely apply.[344]

Prewitt was brought under the Rehabilitation Act, when an applicant for a clerk/carrier position with the United States Postal Service was rejected when he failed to meet the physical standards for the position which included the ability to lift heavy weights, carry moderate weights, and reach above shoulder level.[345] Because the plaintiff George Prewitt had limited motion in his left shoulder, he was rejected as medically unsuitable for the job.[346] Although the employment policy was facially neutral, the court questioned its discriminatory impact on individuals with disabilities.[347] Applying the Supreme Court case of *Griggs v. Duke Power Co.*,[348] the *Prewitt* court articulated the elements of a plaintiff's prima facie disparate impact case: "that the challenged standard disparately disadvantages the protected group of which he is a member, and that is he qualified for the position under all but the challenged criteria."[349] The employer will then

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341. 29 C.F.R. pt. 1630, app., at 365 (1998); *see also* 42 U.S.C. § 12112(b)(3) (defining discrimination as the act of utilizing criteria or standards which have the effect of discriminating on the basis of disability).

342. Royal v. Missouri Highway & Transp. Comm'n, 655 F.2d 159, 162 (8th Cir. 1981); Rice v. City of St. Louis, 607 F.2d 791, 795 (8th Cir. 1979). For a discussion of the use of statistics in disparate impact cases, see *Palmer v. Schultz*. Palmer v. Schultz, 815 F.2d 84, 90-101 (D.C. Cir. 1987), *cited in* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 861 (D. Minn. 1993), *aff'd in part, vacated in part*, 130 F.3d 1287 (8th Cir. 1997).

343. Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981).

344. Richey, *supra* note 31, at 6-64; *see also* Prewitt v. United States Postal Serv., 662 F.2d at 305 n.19 ("[T]he Title VII disparate impact decisions are relevant in the determination of disparate impact handicap discrimination."). In *Stillwell v. Kansas City, Missouri Board of Police Commissioners*, a Title II case, a disparate impact-type analysis was applied without the court identifying it as such. Stillwell v. Kansas City, Mo. Bd. of Police Comm'rs, 872 F. Supp. 682, 686-88 (W.D. Mo. 1995). The court found that an eligibility criterion which automatically screens out all police officer applicants who are missing a hand could not be justified for safety reasons. *Id.* at 687-88.

345. Prewitt v. United States Postal Serv., 662 F.2d at 298. The duties of the position included "stooping, bending, squatting, lifting up to seventy pounds, standing for long periods, stretching arms in all directions, reaching above and below the shoulder, and some twisting of the back." *Id.*

346. *Id.* at 299.

347. *Id.* at 306.

348. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

349. Prewitt v. United States Postal Serv., 662 F.2d at 306.

have the opportunity to defend by establishing that the criteria are a business necessity.[350] Thus, in *Prewitt*, the employer would have the opportunity to show that the physical requirements of the mail carrier position were related to the job.[351]

C. *"Public Entity Discrimination"*

Title II concerns disability discrimination by the government and public access by individuals with disabilities to public entities.[352] Public entities include state and local governments and their agencies and instrumentalities including prisons, universities, and boards of bar examiners.[353] Title II prohibits the exclusion of any qualified individual with a disability from participating in the activities of a public entity because of the individual's disability, and also generally prohibits discrimination on the basis of disability.[354] Unlike the multifarious examples of what constitutes discrimination as articulated in Titles I and III, Title II offers a single, broad prohibition which outlaws both exclusion and discrimination, but without enumerating examples of what constitutes discrimination: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[355] Congress decided to set forth only a general definition of discrimination rather than list all the sorts of actions encompassed

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350. *Id.* The court noted one minor difference in the application of the *Griggs'* principles to a disability discrimination case: "[w]hen assessing the disparate impact of a facially-neutral criterion, courts must be careful not to group all handicapped persons into one class, or even into broad subclasses." *Id.* at 307. The reasoning for this distinction is illustrated by "'the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person.'" *Id.* (quoting Amy Jo Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DEPAUL L. REV. 953, 972 (1978)).

351. *See* Prewitt v. United States Postal Serv., 662 F.2d at 307.

352. *See* 42 U.S.C. § 12131(1) (1994).

353. *See id.* § 12131(1)(A)-(B); Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1954 (1998) (holding that state prisons are public entities); Coleman v. Zatechka, 824 F. Supp. 1360, 1367-68 (D. Neb. 1993) (holding that the University of Nebraska is a public entity); *In re* Rubenstein, 637 A.2d 1131, 1136 (Del. 1994) (holding that a board of bar examiners is a public entity); *see also Judge Lets Suit over Adoption Proceed Under Disabilities Act*, OMAHA WORLD-HERALD, Apr. 27, 1997, at 4B (describing Senior District Judge Urbom's decision to allow Jay Brummett to continue his lawsuit under the ADA against the State Department of Social Services for attempting to prevent his and his late wife's adoption of a child after the agency learned that the wife had AIDS). Public entities, however, do not include the federal government. County of St. Louis v. Thomas, 967 F. Supp. 370, 376 (D. Minn. 1997). Suits against federal entities must be pursued under the Rehabilitation Act, as explained *supra* notes 41-47 and accompanying text.

354. 42 U.S.C. § 12132.

355. *Id.*

by the term.[356] Although the statute does require that actionable discrimination be "by reason of" disability, defining Title II discrimination has largely been left to the courts and the regulations.[357]

As under Title I, a plaintiff must first demonstrate that he has a disability.[358] Next, the plaintiff must establish that he is "qualified," but under Title II the meaning of "qualified" is dissimilar to the Title I definition. "Qualified" under Title II means the following:

> [A]n 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.[359]

The Title II definition of "qualified" received some discussion in *Pottgen v. Missouri State High School Activities Ass'n*.[360] Edward Pottgen was an active high school athlete who had to repeat two grades in elementary school because of learning disabilities.[361] Having played interscholastic baseball all through high school, he hoped to play baseball in his senior year as well, but because he had repeated two grades, his nineteenth birthday fell before July 1st of his senior year and he was thus rendered ineligible by the Missouri State High School

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356. H.R. REP. NO. 101-485, pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367.

357. *See, e.g.*, Dominguez v. City of Council Bluffs, 974 F. Supp. 732, 736 (S.D. Iowa 1997) (holding that Title II discrimination includes employment discrimination); Lewis v. Truitt, 960 F. Supp. 175, 178-79 (S.D. Ind. 1997) (holding that genuine issues of fact remain whether an arrestee was arrested because of his disability when officers should have known he was deaf, refused to communicate with him in writing, and arrested him because of his failure to respond to their questions); 28 C.F.R. § 35.130 (1998) (expounding a detailed multi-part definition of Title II discrimination). Congress specifically delegated authority to the Department of Justice to promulgate implementing regulations. 42 U.S.C. § 12134(a). The regulations state that discrimination by public entities includes affording qualified individuals with disabilities unequal opportunities to participate in or benefit from services offered to others, 28 C.F.R. § 35.130(b)(1)(ii), providing different services to individuals with disabilities, *id.* § 35.130(b)(1)(iv), failing to make reasonable modifications in policies, practices, and procedures when such modifications are necessary to avoid discriminating on the basis of disability, *id.* § 35.130(b)(7), or failing to administer programs in the most integrated setting appropriate for individuals with disabilities. *Id.* § 35.130(b)(8)(d).

358. *See supra* notes 123-232 and accompanying text for the ADA's definition of a disability.

359. 42 U.S.C. § 12131(2).

360. Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 930-31 (8th Cir. 1994), *appeal after remand*, 103 F.3d 720 (8th Cir. 1997).

361. *Id.* at 927.

Activities Association by-laws.[362] Although he petitioned for a hardship exception to the age limit, "Pottgen struck out" and brought suit under the ADA.[363]

Edward Pottgen struck out before the court of appeals as well. Because all parties stipulated that Pottgen had a disability because learning disabilities are listed disabilities under the ADA,[364] the court continued with an analysis of whether Pottgen was qualified. The analysis first necessitates an identification of the program's "essential eligibility requirements" which the individual must satisfy in order to meet the definition of qualified.[365] Without supporting its reasoning, the majority concluded that the age limit was an essential eligibility requirement because it was "necessary for the provision of the . . . activity being offered."[366] Because Pottgen was too old to meet this essential requirement as a result of his learning disabilities, he was not "qualified" to play baseball, and relief was denied.[367]

Assuming that an individual with a disability can satisfy the court that she is qualified to participate in the program or activity by meeting its essential eligibility requirements, the plaintiff can then sue the public entity for being segregated, excluded, or otherwise denied the full and equal enjoyment of the "services, programs, or activities of a public entity."[368] Having established that she is disabled, qualified in the Title II sense of the word, and that she was

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362. *Id.* at 928.

363. *Id.* Pottgen also alleged a violation of the Rehabilitation Act. *Id.*

364. *Id.* at 929 n.2.

365. *Id.* at 930 (citing 42 U.S.C. § 12131(2) (1994)). Compare the "essential functions" of a job element from Title I which is discussed *supra* notes 241-49 and accompanying text.

366. *Id.* at 931 & n.6 (quoting 28 C.F.R. § 35.130(b)(8) (1994)); *see also* Jacobsen v. Tillmann, 17 F. Supp. 2d 1018, 1025 (D. Minn. 1998) (finding that the PPST test is an essential eligibility requirement of teacher licensure).

367. Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d at 931. The court concluded that the district court had erred in granting Pottgen a preliminary injunction prohibiting application of the age limit against him. *Id.* The majority rejected the proposal of an individualized inquiry into the necessity of the age limit as applied to Pottgen. *Id.* at 930. Chief Judge Richard Arnold dissented. *Id.* at 931 (Arnold, C.J., dissenting). Judge Arnold believed that the age requirement was not "essential," because it could be waived as against Pottgen without fundamentally altering the nature of the high school baseball program since Pottgen was not noticeably larger or competitively superior to his classmates. *Id.* at 932 (citing 28 C.F.R. § 24.130(b)(7) (1994)). Because the age limit could be modified "without doing violence to its essential purposes," the dissent found it was not "essential." *Id.* at 932-33. Furthermore, modification of the rule would be a reasonable modification with which Pottgen could satisfy the definition of "qualified." *Id.* at 932.

368. 42 U.S.C. § 12132 (1994); *see* Aswegan v. Bruhl, 113 F.3d 109, 110 (8th Cir.) (concluding that a prisoner's contention that a lack of cable television reception in his cell violated the ADA failed because cable television "is not a public service, program, or activity within the contemplation of the ADA"), *cert. denied*, 118 S. Ct. 383 (1997).

denied the services or benefits of a public entity, the plaintiff's remaining burden is to show that she was denied equal enjoyment of the services of the public entity on the basis of her disability.[369] The plaintiff's prima facie case does not necessarily include a showing of discriminatory intent.

Lawsuits brought against schools under Title II must contend with the Eighth Circuit's pronouncement that in the context of education, defendants are shielded from ADA liability in the absence of "either bad faith or gross misjudgment."[370] This judicially-imposed liability buffer, although it is firmly ensconced in the case law, lacks any statutory basis and goes against the grain of the ADA.[371] The effect of the bad faith/gross misjudgment threshold is to deny students with disabilities relief under the ADA unless their schools have acted egregiously. Of course, the degree of fault on the part of a disabled student's

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369. 42 U.S.C. § 12182(a). The Eighth Circuit frames a Title II prima facie case as a plaintiff's demonstration that:

> (1) he is a qualified individual with a disability; (2) he was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the entity; and (3) that such exclusion, denial of benefits, or other discrimination, was by reason of his disability.

Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998) (citations omitted). In *Layton*, two disabled veterans had been denied access to a county courthouse because of accessibility impediments. *Id.* at 471. For other successful Title II cases, see *Gorman v. Bartch*, 152 F.3d 907, 915-16 (8th Cir. 1998) (finding that the ADA covers allegations that an arrestee with paraplegia was not properly transported in a police van); *McGarry v. Director, Department of Revenue*, 7 F. Supp. 2d 1022, 1029 (W.D. Mo. 1998) (holding a state's two dollar charge for removable handicapped windshield parking placards violates the ADA); *Heather K. v. City of Mallard*, 946 F. Supp. 1373, 1387 (N.D. Iowa 1996) (holding that city's open burning regulations may violate ADA if ordinance has discriminatory effect on the ability of individuals suffering from respiratory conditions to take advantage of city services). In the spring of 1999, a jury awarded the plaintiff $2.2 million in the *Gorman* case. Mark Morris, *KC Police Ordered to Pay $2.2 Million in Damages*, KANSAS CITY STAR, Apr. 9, 1999, at B1, *available in* 1999 WL 2410232.

370. Thompson v. Board of the Special Sch. Dist. No. 1, 144 F.3d 574, 580 (8th Cir. 1998); Hoekstra v. Independent Sch. Dist., No. 283, 103 F.3d 624, 625 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1852 (1997), *applying* Monahan v. Nebraska, 687 F.2d 1164, 1171 (8th Cir. 1982) (Rehabilitation Act case). In *Hoekstra*, a school had delayed in providing a disabled student an elevator key while it established criteria for safe operation of the lift. Hoekstra v. Independent Sch. Dist., No. 283, 103 F.3d at 626. In *Thompson*, the plaintiff claimed that a school had misdiagnosed her son with emotional behavioral disturbance and failed to modify its discipline policies to accommodate the boy's disability. Thompson v. Board of the Special Sch. Dist. No. 1, 144 F.3d at 578, 580. In both cases the plaintiffs' claims failed for want of showing bad faith or gross misjudgment.

371. The *Monahan* court's rationale for the "bad faith or gross misjudgment" requirement was to "harmonize" the Education for All Handicapped Children Act of 1975 and section 504 of the Rehabilitation Act. Hoekstra v. Independent Sch. Dist., No. 283, 103 F.3d at 627 (citing Monahan v. Nebraska, 687 F.2d at 1171). The *Hoekstra* court felt that the same reasoning was appropriate to apply to the ADA. *Id.*

school makes little difference to the student who has been denied the equality of access and opportunity which the statute guarantees and which is enjoyed by his non-disabled classmates. Nonetheless, a showing of extreme fault is required.

That successfully bringing Title II suits against schools has proved a daunting task is illustrated by two cases in which schools have refused to administer a prescribed dosage of Ritalin to pupils with attention deficit disorder, *DeBord v. Board of Education*[372] and *Davis v. Francis Howell School District*.[373] Schools often adopt a policy that school nurses are not to administer prescription dosages in excess of limits defined in the Physician's Desk Reference.[374] Parents who meet with refusal to administer a prescribed dosage to their children, even when the school is presented with documentation, medical literature, a letter from a doctor, and an offer to sign a waiver of liability, have sought the remedies of the ADA.[375]

Such claims are not cognizable under an intentional discrimination theory in the absence of direct evidence or factual inferences showing a discriminatory animus.[376] In most cases, of course, the schools lack any discriminatory ill will towards the children, but by their inflexible policies adversely affect the ability of students with disabilities to work, play, and learn alongside their non-disabled peers. Such policies interfere with students receiving the remedial medication which would allow them to function relatively free of the distractions brought on by their attention deficit disorder, and pose an inconvenience to the students' parents as well. When a school refuses to administer the prescribed dosage of

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372. DeBord v. Board of Educ., 126 F.3d 1102 (8th Cir. 1997).

373. Davis v. Francis Howell Sch. Dist., 104 F.3d 204 (1997) [hereinafter Davis I], *appeal after remand*, 138 F.3d 754 (8th Cir. 1998) [hereinafter Davis II]. See Katie M. Burroughs, *Learning Disabled Student Athletes: A Sporting Chance Under the ADA?*, 14 J. CONTEMP. HEALTH L. & POL'Y 57 (1997) for more on cases of this sort.

Attention deficit hyperactivity disorder (ADHD) is characterized by hyperactivity, inattention, and impulsivity. Russell A. Barkley, *Attention-Deficit Hyperactivity Disorder*, SCI. AM., Sept. 1998, at 66, 68. Ritalin has the effect of regulating impulsive behaviors by inhibiting the brain's dopamine transporter. *Id.* at 70. Ritalin and similar compounds has been found to improve the behavior of 70% to 90% of children with ADHD over the age of five. *Id.* Children who take regular prescribed doses of Ritalin are less impulsive and "better able to hold important information in mind, to be more productive academically, and have more internalized speech and better self-control." *Id.*

374. *See* DeBord v. Board of Educ., 126 F.3d at 1104; Davis I, 104 F.3d at 205.

375. DeBord v. Board of Educ., 126 F.3d at 1104. In *Davis I*, the school nurse asked the child's mother to obtain a second doctor's opinion regarding the Ritalin dosage. Davis I, 104 F.3d at 205. Even after she did so, the nurse refused to administer the medication. *Id.*

376. See *supra* notes 288-340 and accompanying text for the elements of an "intentional discrimination" or "disparate treatment" theory. The court of appeals quickly disposed of the Davis's claim that their son, Shane, was intentionally denied benefits of the school because of disability. Davis II, 138 F.3d at 756.

Ritalin to the student, the students' parents are put to the inconvenience of taking time off work to visit the school every day and administer the medication—much to the students' embarrassment, no doubt—themselves.[377] Otherwise the student goes without the appropriate medical assistance altogether. A discriminatory impact theory would, therefore, be apropos.[378] Alternatively, plaintiffs might rely on an "accommodation discrimination" theory since the students are being denied simple treatment which is by any definition a reasonable accommodation or modification.[379] Because Title II provides only a generalized statement that discrimination by public entities is prohibited, the statutory mosaic lacks any explicit definition of discrimination as the failure to accommodate. However, plaintiffs might turn to the implementing regulations which impose an affirmative duty on public entities to make reasonable policy modifications when necessary to avoid discrimination on the basis of disability.[380] Without fail, however, the Eighth Circuit has denied them relief.

First, the Eighth Circuit has held that the Department of Justice regulations which require public entities to "'make reasonable modifications in policies . . . when the modifications are necessary to avoid discrimination on the basis of disability'" required a plaintiff to show that a school's refusal to modify its policy was *because* of the student's disability.[381] Presumably, the plaintiffs could meet this burden by showing that the school's policy had either a discriminatory pur-

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377. *See* Davis I, 104 F.3d at 205. "The district told Shane's parents they could designate someone to come onto school grounds to administer his medication, and Mrs. Davis changed her work schedule and child care arrangements in order to give Shane his school time dose." *Id.*

378. See *supra* notes 341-51 and accompanying text for discussion of "discriminatory impact" theory. In *DeBord* the court stated that "[d]isparate treatment is not the only way to prove unlawful discrimination," but that the plaintiffs had not tried to show that the school policy had a discriminatory effect, thus leaving open an invitation for future plaintiffs to proceed on a discriminatory impact theory. DeBord v. Board of Educ., 126 F.3d at 1105-06; *see* Heather K. v. City of Mallard, 946 F. Supp. 1373, 1387 (N.D. Iowa 1996) (holding that city could be liable under Title II of the ADA for its open burning regulation because of the regulation's discriminatory effect on individuals with disabilities).

379. *See* 42 U.S.C. §§ 12112(b)(5)(A), 12182(b)(2)(A)(ii) (1994). Plaintiffs could argue that Title I and Title II accommodation discrimination is logically subsumed within the use of the term "discrimination" in Title III.

380. 28 C.F.R. § 35.130(b)(7) (1998). The regulation reads: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.*

381. DeBord v. Board of Educ., 126 F.3d at 1105 (quoting 28 C.F.R. § 35.130(b)(7) (1996)).

pose or a discriminatory effect with regard to disabilities.[382] *DeBord* drew upon tortured reasoning to find that the school's policy did not have the effect of discriminating against the more severely disabled children who require higher doses of medication. The reason for a student's higher dosage of Ritalin, the court deduced, is related to an individual's metabolism rather than the severity of the disorder.[383] According to the court's logic, because the reason a student requires a higher-than-normal dosage is related to metabolism rather than severity of disability, a school policy which fails to accommodate students requiring higher dosages discriminates on the basis of metabolism rather than disability.[384] Thus, the court concluded, since the plaintiff in *DeBord* could not satisfactorily demonstrate the school's conduct to be sufficiently related to attention deficit disorder, the policy could not be said to discriminate against students with more severe forms of that disorder.[385] Because the school's inflexible policy did not disadvantage students with attention deficit disorder because of their disorder, a

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382. *Id.* at 1106. The court hinted that public entities might not be required to make reasonable modifications in policies which have the effect of discriminating on the basis of disability when the policy at issue is facially neutral towards disabilities. *See id.* at 1105 (describing the policy as one containing "an objective standard limiting administration of prescription medication"). The court also found it relative that there was "no evidence that the school district had disabilities in mind when formulating or implementing its policy." *Id.*

383. *Id.*; *see also* Davis II, 138 F.3d 754, 756 (8th Cir. 1998) (stating that showing that the school's action was taken because of the student's disability is a required element of the plaintiff's case); Davis I, 104 F.3d 204, 206 (8th Cir. 1997) (finding plaintiffs unlikely to succeed when they had "not produced evidence that the district refused to administer [the student's] medication on the basis of his disability rather than on the basis of its policy and its concerns about liability and students' health").

384. The court conspicuously avoided examining the disparate effect that the school's policy had on the severity of the student's symptoms. Without question, when a student requiring higher Ritalin dosages was denied medication altogether because of the policy, the symptoms of attention deficit disorder would be aggravated. Thus, it would seem that regardless of the reason for higher dosages—whether linked to metabolism or disability—the effect of the policy was to make some students' disabilities even more disabling. Somewhat gracelessly, the court sidestepped this fact by bifurcating disability and metabolism. *See* DeBord v. Board of Educ., 126 F.3d at 1105.

385. *Id.* at 1105-06. Judge Bright questioned this logic in *Davis II.* Davis II, 138 F.3d at 757 (Bright, J., concurring). Judge Bright wrote:

> While the medical cause/effect relationship may be unknown, nevertheless to treat [the student's] disability the doctor prescribes a high dosage. That treatment is for his disability. Thus, it seems to me that if the school administers adequate medication for one child's disability and inadequate medication for another child's similar disability, the school policy discriminates.

Id. at 758.

reasonable modification of that policy was not required under terms of the Department of Justice regulation.[386]

Second, the Eighth Circuit left conspicuously unanswered the exact requirements that Title II imposes on public entities with regard to reasonable modifications/accommodations. In both decisions, the court did not resolve whether a public entity is required to provide reasonable modifications absent a separate showing of discrimination on the basis of disability.[387] In *Davis*, the court rephrased the question as whether a failure to make reasonable modifications is by itself discriminatory, but nonetheless left the question unanswered.[388] The court found it unnecessary to rule on the issue because in both cases it found the proposed modification—administering prescriptions above certain dosages—to be unreasonable.[389] In neither case was the finding of unreasonableness buttressed by any specific supported facts or analysis.[390] It would seem from these cases that the Eighth Circuit would find even the slightest administrative inconvenience unreasonable.[391]

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386. While it is true that other courts have denied plaintiffs relief absent a showing of a "link" between the plaintiff's disability and the denial of public services, the showing ought not to be so stringent as to displace plaintiffs such as those in *Davis* and *DeBord*. *See* Rasmus v. Arizona, 939 F. Supp. 709, 718 (D. Ariz. 1996) (denying relief to a student with attention deficit disorder who was excluded from a classroom for ten minutes for misbehavior absent any showing that he was treated differently from non-disabled pupils because of his disability).

387. Davis II, 138 F.3d at 757; DeBord v. Board of Educ., 126 F.3d at 1106. The *DeBord* court also left unresolved whether a Title III public accommodation discrimination theory would apply in a Title II case. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994); DeBord v. Board of Educ., 126 F.3d at 1106.

388. Davis II, 138 F.3d at 757. The court noted a split in authority on the issue. *Id.* (citing Weinreich v. Los Angeles County Metro. Transp. Auth., 114 F.3d 976, 979 (9th Cir.) (holding that reasonable modifications are only required when an individual is denied meaningful access or benefit on the basis of his disability), *cert. denied*, 118 S. Ct. 423 (1997); McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 460 (6th Cir. 1997) (en banc) (holding that plaintiff's burden is satisfied by showing that a public entity could have reasonably accommodated an individual's disability but refused)).

389. *See* Davis II, 138 F.3d at 757 (holding that a waiver of the policy for certain children would be unduly expensive and administratively burdensome); DeBord v. Board of Educ., 126 F.3d at 1106 (holding that "adjudication of waiver requests would impose an undue administrative burden on the school district").

390. *Cf.* Trovato v. City of Manchester, 992 F. Supp. 493, 498 (D.N.H. 1997) (holding that a city's granting zoning variance to build paved parking space to be not an unreasonable accommodation when city failed to show a financial or administrative burden).

391. A showing of unreasonableness ought only to be satisfied when it is affirmatively demonstrated that the proposed modification would actually impose significant inconvenience, burdens, or interference with the delivery of services. *See, e.g.*, Maczaczyj v. New York, 956 F. Supp. 403, 409 (W.D.N.Y. 1997) (finding a student's request to attend a residency program by telephone to be unreasonable when it was shown that allowing one student to participate by telephone would significantly interfere with the student's educational objectives of intensive

The law of Title II will receive some clarification when the Supreme Court decides *L.C. v. Olmstead*,[392] a case arising out of Georgia in the Eleventh Circuit.[393] *Olmstead* was brought against the state of Georgia by "L.C.," a twenty-seven-year-old woman diagnosed with mental retardation and schizophrenia, and "E.W.," a forty-three-year-old woman with mental retardation and other mental disorders.[394] The plaintiffs challenged their confinement at a state mental institution under Title II of the ADA, claiming that because their confinement was, in professional psychiatric judgment, no longer required, the ADA required their release into community-based residential programs.[395] The defendant agreed that both plaintiffs were qualified individuals with disabilities who had been denied the benefits of a public entity's services, but disputed whether the discrimination was "by reason of" their disability.[396]

The district court rejected the defendant's argument that the plaintiffs, L.C. and E.W., had been denied community-based placements because of inadequate funding rather than discrimination on the basis of disability: "[U]nnecessary institutional segregation of the disabled constitutes discrimination per se, which cannot be justified by a lack of funding."[397] The court of appeals affirmed, holding that a public entity acting without malevolence, but out of mere indifference to the unique needs of disabled individuals, "is exactly the kind of conduct that the ADA was designed to prevent."[398] The Supreme

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academic interaction and development of critical thinking and communication skills, as well as interfere with the educational experience of fellow students).

392. L.C. by Zimring v. Olmstead, 138 F.3d 893 (11th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3386, 67 U.S.L.W. 3392 (Dec. 14, 1998) (No. 98-536), *order amended by* 67 U.S.L.W. 3408 (Dec. 17, 1998) [hereinafter Olmstead II].

393. L.C. by Zimring v. Olmstead, No. 1:95-CV-1210-MHS, 1997 WL 148674 (N.D. Ga. Mar. 26, 1997) [hereinafter Olmstead I].

394. Olmstead I, 1997 WL 148674, at *1.

395. *Id.*

396. *Id.* at *3 (citing 42 U.S.C. § 12132; Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, 846 F. Supp. 986, 990 (S.D. Fla. 1994)).

397. *Id.* "The fact that it may be more convenient, either administratively or fiscally, to provide services in a segregated manner does not justify defendants' failure to comply with the ADA." *Id.* at *4. The court relied on two Title II regulations which defined discrimination as the failure to administer programs in an integrated setting and the failure to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on basis of disability." *Id.* at *3 (quoting 28 C.F.R. § 35.130(d), (b)(7) (1998)).

398. Olmstead II, 138 F.3d 893, 901 (11th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3386, 67 U.S.L.W. 3392 (Dec. 14, 1998) (No. 98-536), *and order amended by* 67 U.S.L.W. 3408 (Dec. 17, 1998). In essence, the Eleventh Circuit incorporated the Title I and III duties to provide reasonable accommodations into Title II. *See Case Law Developments: Rights in Facilities*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 312 (1998) (although incorrectly identifying the Eighth Circuit as the deciding court, the analysis of *Olmstead II*, decided by the Eleventh Circuit, is properly discussed). In its decision, the court of appeals relied only on 28 C.F.R. § 35.130(d)

Court granted certiorari in December 1998.[399] One issue that the Supreme Court can be expected to resolve is whether, as the court of appeals reasoned, the statutory requirement that plaintiffs prove discrimination "by reason of" disability is satisfied when confinement or other adverse treatment is "attributable to" the plaintiff's disability.[400] Resolution of this question in favor of plaintiffs could portend a reassessment of Eighth Circuit cases such as *DeBord* and *Davis*. A decision in favor of the state of Georgia, on the other hand, could significantly weaken the ADA's requirements of integration of individuals with disabilities.

D. *"Public Accommodation Discrimination"*

The sweep of Title III has an arguably even broader reach than Title I because it applies to nearly all private entities and organizations.[401] "Public accommodation discrimination," or discrimination as it is defined in Title III, however, is far less commonly litigated than discrimination in the employment context.[402] Therefore, only a brief sketch of the Title's provisions will be presented here. The primary difference between Titles I and III is that in Title III, the employer-employee relationship is absent and is replaced by that of con-

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which prohibits the unnecessary segregation of individuals with disabilities. Olmstead II, 138 F.3d at 897. The court remanded for further findings related to the government's defense that the relief sought would fundamentally alter the nature of the program. *Id.* at 904-05; 28 C.F.R. § 35.130(b)(7) (1998).

399. Olmstead II, 138 F.3d at 904-05. Governors in 21 states including two from the Eighth Circuit—South Dakota and Nebraska—have joined an amicus brief prepared by the attorney general of Florida in arguing that the ADA does not require community placement when appropriate care can be provided in an institutionalized setting. *Disability Rights Group Says Governors Declare War on Disabled People*, U.S. NEWSWIRE, Dec. 18, 1998, *available in* 1998 WL 24335922.

400. *See* Olmstead II, 138 F.3d at 896. The Supreme Court will answer the question: "Whether the public-services portion of the ADA compels the State to provide treatment and habilitation for mentally disabled persons in a community placement, when appropriate treatment and habilitation can also be provided to them in a State mental institution." *Civil Rights: ADA Violation Based on Failure to Provide Integrated Services—Certiorari Amended*, WESTLAW BULL., Dec. 21, 1998. The court of appeals has concluded that Georgia's failure to provide the most integrated services appropriate discriminated against persons with disabilities "by reason of such disability." Olmstead II, 138 F.3d at 899.

401. Paul V. Sullivan, Note, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117, 1128-29 (1995). The regulations call the coverage of Title III "quite extensive." 28 C.F.R. pt. 36, app. B, at 591.

402. *See generally* Robert L. Burgdorf, Jr., *"Equal Members of the Community": The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 551 (1994) (discussing the history of the public accomodations provisions of the ADA); Michael N. Petkovich, *Consumer Rights Under the Americans with Disabilities Act*, 4 LOY. CONSUMER L. REP. 44 (1992) (discussing Titles II and III of the ADA in relation to consumer issues); Sullivan, *supra* note 401, at 1125-42.

sumer and service provider. Title III applies to private entities which operate places open to the public—"public accommodations"—such as private schools or retail stores.[403]

Public accommodations are prohibited from discriminating against individuals with disabilities.[404] In some cases, public accommodations may be required to renovate so that the facilities are physically accessible to individuals with disabilities.[405] An entity may even be required to make readily achievable modifications to its policies or facilities.[406] "Readily achievable" means those modifications which can be "easily . . . carried out without much difficulty or expense."[407] Although the requirements of Title III are quite elaborate, the overall goal is requiring places of public accommodation to provide equal access to individuals with disabilities.

In *Roberts v. Kindercare Learning Centers, Inc.*,[408] the plaintiff's burden was successfully met when a day care center refused to enroll a disabled child without the child being accompanied at all times by a personal care attendant.[409] The child tended to commit self-injurious acts and suffered from seizures and attention-deficit hyperactivity disorder.[410] The day care center agreed to enroll the child only if he was accompanied by a full-time personal care attendant as required by the boy's individual education plan.[411] The court implicitly found that the day care center's refusal denied the child equal enjoyment of the services of a public accommodation.[412] The plaintiff in *Roberts* ultimately lost, however, when the court accepted the defendant's argument that providing one-on-one care would result in an "undue burden" on the day care center.[413]

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403. 42 U.S.C. § 12182(a) (1994). Public accommodations are private entities whose operations affect commerce including gymnasiums, libraries, and barber shops. *Id.* § 12181(7).

404. *Id.* § 12182(a).

405. *Id.* §§ 12182-12183.

406. *See id.* § 12182(b)(2)(A)(ii) (defining discrimination as including "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, . . . to individuals with disabilities").

407. *Id.* § 12181(9). The statutory definition also includes several factors to consider in determining whether a modification is readily achievable. *Id.*

408. Roberts v. Kindercare Learning Ctrs., Inc., 86 F.3d 844 (8th Cir. 1996).

409. *Id.* at 845-46.

410. *Id.* at 845.

411. *Id.* at 846. "The Center agreed to enroll [the child] on the condition that he only attend the Center when he was accompanied by a PCA [personal care attendant]; the Center would not provide an employee to give one-on-one care for [the child] when a PCA was unavailable." *Id.*

412. *Id.*

413. *Id.* (citing 42 U.S.C. § 12182(b)(2)(iii) (1994)). The ADA squarely places the burden of demonstrating an undue burden on the defendant. 42 U.S.C. § 12182(b)(2)(A)(iii). The defendant can also defend that an accommodation or auxiliary aids or services would "fundamentally alter" the nature of the program. *Id.*

The general prohibitions of Title III restrict public accommodations from discriminating against individuals with disabilities in three ways: (1) by not providing goods or services; (2) by providing unequal goods or services; or (3) by providing, without justification, separate goods or services.[414] Entities can also run afoul of Title III by failing to actively take steps to ensure individuals with disabilities are not excluded from the full enjoyment of goods and services.[415] The attentive reader will observe the similarities to Title I: a bipolar definition of discrimination is in place. Entities are prohibited from discriminating against individuals with disabilities, and at the same time are required to provide reasonable assistance to individuals with disabilities in accessing the entity's facilities.[416] Operators may incur Title III liability simply by making generalized assessments about what individuals with disabilities can and cannot do instead of assessing a disabled person's individual capacities.[417] Title III, like Title I, imposes an affirmative duty to consider each individual's limitations and provide individualized assistance and accommodation in order to provide full and equal access to individuals with disabilities. It is anticipated that the future will see more and more cases from the Eighth Circuit which confront and grapple with this duty.

V. CONCLUSION

The ADA is a comprehensive and broadly phrased remedial statute and its effect will continue to be felt on American life and culture. The numerous provisions within the ADA offer multitudinous theories on which the aggrieved potential plaintiff may base a cause of action. As a tool in the fight against discrimination against individuals with disabilities, the ADA's potential has only

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414. 42 U.S.C. § 12182(b)(1)(A)(i)-(iii).

415. *Id.* § 12182(b)(2)(ii)-(iv). *See, e.g.*, Bragdon v. Abbott, 118 S. Ct. 2196, 2201 (1998) (dealing with a dentist's refusal to treat an individual with disabilities in his office); Pona v. Cecil Whittaker's, Inc., 155 F.3d 1034, 1036 (8th Cir. 1998) (dealing with a pizzeria's refusal to serve an individual with a service dog). The regulations state:

> Full and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others to the extent possible with such accommodations as may be required by the Act and these regulations. It does not mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability. For example, an exercise class cannot exclude a person who uses a wheelchair because he or she cannot do all of the exercises and derive the same result from the class as persons without a disability.

28 C.F.R. pt. 36, app. B, at 591 (1998).

416. *Compare* 42 U.S.C. § 12182 (prohibiting discrimination in public accomodations), *with id.* § 12112 (prohibiting discrimination in employment).

417. Sullivan, *supra* note 401, at 1134.

begun to be explored. In the years to come, one can expect to see brisk and dynamic extensions and developments as the courts in the Eighth Circuit wrestle with Supreme Court pronouncements and new arguments advanced by creative and enterprising attorneys. The apotheosis of the ADA is opportunity for people with disabilities. It is incumbent upon plaintiffs' attorneys to advance their clients' interests while at the same time advancing the courts' interpretations of the ADA in order to fulfill the broad and expansive aims of Congress. Individuals with disabilities and their advocates will find an ally in the ADA in their battle against discrimination, their ambitions of integration, their goals of equal access, and their dreams of equal opportunities. Through dedication and tenacity, these aims can be achieved.