

**ADA Update: Developments Affecting
Definition of "Disability"¹**

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¹ The following paper contains excerpts from **RESOLVING ADA WORKPLACE QUESTIONS: How Courts and Enforcement Agencies are Currently Dealing with Evolving Employment Issues** (Eighth Edition publication date: April 2000). Nothing in this paper is legal advice from Mr. Fram or NELI.

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"Disability" Issues

About This Paper

This paper presents a discussion of the questions concerning whether an individual has a disability under the ADA, and includes recent case citations on these issues. It does not, however, review the basic concepts concerning the definition of "disability." For a primer on the definition of disability, I suggest reading the EEOC's Technical Assistance Manual, Chapter 2.

Introduction and Background

One of the first questions that arises in connection with many ADA cases is whether the individual has a "disability." If the individual does not have a disability, s/he is generally not protected by the ADA. In fact, courts have disposed of a large number of ADA lawsuits by finding that the individual did not even have a disability.

Under the ADA, a disability is a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. 12102(2)(A). Of course, "disability" also includes having a "record of" such an impairment, or being "regarded as" having such an impairment. 42 U.S.C. 12102(2)(B),(C).

This definition raises a number of difficult issues, most of which have been -- and continue to be -- litigated. These issues include (among others) whether a "major life activity" is affected, whether medication is taken into account in determining if the impairment substantially limits a major life activity, whether an impairment is considered merely "short-term," when an individual is considered substantially limited in the major life activity of "working," and whether particular conditions like infertility, diabetes, and addiction to smoking are considered disabilities. These and other questions are examined below.

Whether Individual Has an *Impairment*

There has been little litigation on the issue of whether an individual has an impairment. This is probably because employers -- in most cases -- have not questioned the mere existence of an impairment. Nonetheless, it is very important to analyze whether an impairment exists.

The ADA regulations broadly define impairments to include a wide variety of disorders or conditions affecting any number of body systems, including the neurological or musculoskeletal systems, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic, lymphatic, or endocrine systems, or the skin. Impairments also include mental or psychological disorders, including mental retardation, organic brain syndrome, emotional or mental illness, and certain learning disorders. 29 C.F.R. § 1630.2 (h).

The EEOC has distinguished between conditions that are actually *impairments* and conditions that are not. For example, the EEOC has stated that physical characteristics (such as left-handedness), common personality traits (such as being irresponsible or showing poor judgment), cultural, environmental, or economic disadvantages, homosexuality, bisexuality, pregnancy, and normal deviations in height, weight or strength are not impairments. Appendix to 29 C.F.R. § 1630.2 (h). The EEOC and courts also have stated that traits like irritability and chronic lateness are not themselves impairments. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (3/25/97), at p. 4. See Duda v. Board of Education of Franklin Park Public School District No. 84, 133 F.3d 1054 (7th Cir. 1998)("mere temperament and irritability" are not covered under the ADA). Courts have stated that conditions like general grief or stress are not covered under the ADA. See Johnson v. Boardman Petroleum, Inc., 923 F. Supp. 1563 (S.D. Ga. 1996); Mundo v. Sanus Health Plan of Greater New York, 966 F. Supp. 171 (E.D.N.Y. 1997)(electronic publication only)("an inability to tolerate stressful situations is not an impairment" under the ADA; the ADA "was not intended to categorize people with common personality traits as disabled"); Dewitt v. Carsten, 941 F. Supp. 1232 (N.D. Ga. 1996), aff'd, 122 F.3d 1079 (11th Cir. 1997)(job-related stress, caused by an unpleasant boss or having unpleasant duties (working around prisoners) is not an ADA disability). Courts also have agreed with the EEOC that poor judgment is not an ADA impairment. See Greenberg v. New York State Department of Correctional Services, 919 F. Supp. 637 (E.D.N.Y. 1996)(employer's perception that corrections officer applicant lacked ability to make decisions concerning safety in emergency situations, perform well under stress, and identify potential disruptive situations was "tantamount" to finding that he had "poor judgment," which is a "personality character trait[]" not covered under the ADA). Similarly, in Watson v. City of Miami, 177 F.3d 932 (11th Cir. 1999), the court stated that regarding an individual as "paranoid, disgruntled, oppositional, difficult to interact with, unusual, suspicious, threatening, and distrustful" are behavioral characteristics, not mental impairments.

Importantly, the EEOC has continued to state that "characteristic predisposition to illness or disease" -- because of environmental, economic, or social conditions -- is not an impairment. EEOC Compliance Manual § 902.2(c)(2). It is critical to remember, however, that the EEOC has taken the position that discrimination because of *genetic* make-up *is* discrimination based on disability. For a discussion of this issue, see "Discrimination Based on Genetic Information as 'Regarded As' Case," below.

Of course, there are a number of other conditions that are expressly excluded from the ADA's protections -- *even if* they are substantially limiting impairments. These conditions include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, many gender identity disorders, other sexual behavioral disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal drug use. 42 U.S.C. 12211.

Another very important issue is whether the *voluntariness* of the condition is relevant when determining if the individual has an impairment. The EEOC has stated that it is irrelevant whether an individual developed the impairment through some "volitional act." EEOC Compliance Manual § 902.2(e) at p. 14. For example, it is irrelevant that someone got lung cancer because s/he smoked. Courts seem to agree with the EEOC's analysis in this regard. For example, in Cook v. Rhode Island Department of Mental Health, 10 F.3d 17 (1st Cir. 1993), the court stated that mutability of the plaintiff's "morbid obesity" was irrelevant to whether she had a disability.

Although, as mentioned above, there has not been much litigation on whether an impairment exists, there has been a great deal of litigation on whether the impairment substantially limits a major life activity. This issue is discussed below.

Whether a *Major Life Activity* is Even *Affected*

Courts have stated that, in bringing an ADA lawsuit, an individual must "articulate with precision" not only the alleged impairment, but also the major life activity affected by the impairment. See Poindexter v. Atchison, Topeka and Santa Fe Railway Co., 168 F.3d 1228 (10th Cir. 1999). See also Rebarchek v. Farmers Cooperative Elevator and Mercantile Association, 2000 U.S. App. LEXIS 277 (10th Cir. 2000)(unpublished)("to state a claim under the ADA, a plaintiff must articulate with precision the impairment alleged and the major life activity affected by that impairment").

Controversy About Which Life Activities are Considered *Major Life Activities*

There is a controversy over what are considered the "major life activities." In its regulations, the EEOC said that the major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). In the Appendix to its regulations, the EEOC *added* sitting, standing, lifting, and reaching. Appendix to 29 C.F.R. § 1630.2(i). In its Compliance Manual, the agency *added* mental/emotional processes such as thinking, concentrating, and interacting with others. EEOC Compliance Manual § 902.3(b) at p. 15. In a 1997 policy guidance,

the EEOC *added* "sleeping" as a major life activity. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (3/25/97), at p. 4. In an amicus curiae brief, the EEOC stated that the "ability to control basic bodily functions, specifically one's bowels" is a major life activity. EEOC's Amicus Curiae Brief in Pangalos v. Prudential Insurance Company of America, No. 96-2022 (Brief filed in Third Circuit, 2/13/97). In instructions to its investigators, the EEOC has stated that eating is also a major life activity. EEOC "Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified'" (July 1999) at p. 8.

A number of cases have revolved around whether particular activities -- including some activities on the EEOC's lists -- are major life activities. Although most courts have agreed with the activities listed by the EEOC, some have not. For example, in Pack v. Kmart Corp., 166 F.3d 1300 (10th Cir. 1999), the court held that although "sleeping" is a major life activity, "concentrating" is not. The court stated that concentrating is simply a "component" of other major life activities such as working, learning or speaking. In addition, at least one federal court has held, despite EEOC's lists, that "interacting with others" is not a major life activity. Soileau v. Guilford of Maine, 105 F.3d 12 (1st Cir. 1997)(although "ability to get along with others" is "a skill to be prized, it is different in kind from breathing or walking"; EEOC's manual is "hardly binding"). Similarly, another federal court has held that "caring for others" is not a major life activity. Krauel v. Iowa Methodist Medical Center, 95 F.3d 674 (8th Cir. 1996). One federal court has stated that "getting a sound night's sleep and report[ing] to work on time, clear-minded" is not a major life activity. Sarko v. Penn-Del Directory Co., 968 F. Supp. 1026 (E.D. Pa. 1997). On the other hand, in Workman v. Frito-Lay, Inc., 165 F.3d 460 (6th Cir. 1999), the court noted that a jury could conclude that controlling one's bowels is a major life activity. As a result, the employee's spastic colon, which occasionally manifested itself in constipation and diarrhea could be a disability. Similarly, in Ryan v. Grae & Rybicki, P.C., 135 F.3d 867 (2d Cir. 1998), the court assumed, without deciding, that controlling "elimination of waste" is a major life activity. In Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999), the court stated that eating is a major life activity. In McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999), the court held that sleeping and interacting with others (among other activities discussed below) are major life activities.

Some lawsuits have concerned whether other activities *not* on the EEOC's lists -- such as reproduction, running, throwing, eating, reading, climbing, and exercising -- are major life activities. For example, in Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998), the U.S. Supreme Court held that reproduction is a major life activity. The Court noted that an activity does not have to have a "public, economic, or daily dimension" to be a major life activity. The Court also stated that the "sexual dynamics surrounding" reproduction are "central to the life process itself." This suggests that the Supreme Court might consider sex itself to be a major life activity. In fact, in McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999), the court cited the Bragdon language and concluded that "engaging in sexual

relations" is a major life activity. The court noted that "[t]he number of people who engage in sexual relations is plainly larger than the number who choose to have children," and that "sexuality is important in how 'we define ourselves and how we are perceived by others' and is a fundamental part of how we bond in intimate relationships (citation omitted)."

In Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999), the Supreme Court noted, in passing, that running is a major life activity. Interestingly, as noted later in this paper, the Sutton Court questioned whether "working" is really a major life activity. In Hilburn v. Murata Electronics, 181 F.3d 1220 (11th Cir. 1999), the court assumed, for purposes of the case, that running is a major life activity. In Prince v. Claussen, 1999 U.S. App. LEXIS 5021 (10th Cir. 1999)(unpublished), the court stated that, in addition to the activities articulated by the EEOC, throwing and squatting are major life activities. In Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999), the court stated that shoveling, gardening, mowing a lawn, playing tennis, fishing, and hiking are not major life activities. The court also stated that although cardio-vascular problems are impairments, "having a fully functioning cardiovascular system" is not a major life activity. In Martinez v. City of Roy, 1998 U.S. App. LEXIS 5906 (10th Cir. 1998)(unpublished), the court stated that "recreational swimming" is not a major life activity under the ADA. Likewise, in Colwell v. Suffolk County Police Department, 158 F.3d 635 (2d Cir. 1998), the court stated that activities such as driving, working on cars, basic chores, shopping in a mall, skiing, golfing, yard work, painting, plastering, and shoveling snow are not major life activities. In Rogers v. International Marine Terminals, Inc., 87 F.3d 755 n.2 (5th Cir. 1996) and Robinson v. Global Marine Drilling Co., 101 F.3d 35 (5th Cir. 1996), cert. denied, 117 S. Ct. 1820 (1997), the courts stated that climbing is not a major life activity. In Wade v. General Motors Corp., 1998 U.S. App. LEXIS 22626 (6th Cir. 1998)(unpublished), the court held that "driving at night" was not a major life activity. Likewise, in Wyland v. Boddie-Noell Enterprises, Inc., 1998 U.S. App. LEXIS 29355 (4th Cir. 1998)(unpublished), the court stated that driving is not a major life activity. "Awareness" was not considered a major life activity in Deas v. River West, 152 F.3d 471 (5th Cir. 1998); therefore, an individual with epilepsy, whose seizures caused temporary loss of awareness, did not have a disability. In Reeves v. Johnson Controls World Services, Inc., 140 F.3d 144 (2d Cir. 1998), the court held that "everyday mobility" (defined by the plaintiff as 'taking vacations," performing "routine" tasks such as going to a shopping mall alone, taking modes of transportation which involve crossing bridges or tunnels, riding unaccompanied in trains, etc.) was not a major life activity.

Courts have addressed whether travelling itself is a major life activity. For example, in Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763 (E.D. Tex. 1996), the court stated that asymptomatic HIV is a per se disability because "[b]eyond the obvious impairment on the ability to procreate," an asymptomatic HIV-positive individual "cannot travel freely. Such an individual must be always mindful of exposure to bacterial infection and fungi or even places requiring vaccinations." Id. at n.37. Similarly, in Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997), the court suggested that traveling is a major life activity, noting the lower court's conclusion that the plaintiff had not shown that her ability to work, to care for herself, to

travel or engage in leisure activities, or to twist were substantially limited. On the other hand, in Schultz v. Spraylat Corp., 866 F. Supp. 1535 (C.D. Cal. 1994)(a California Fair Employment and Housing Act case), the court found that travelling by airplane was *not* a major life activity.

Whether Impairment Must Actually Affect Individual's Ability to Work in Order to be Covered Under ADA

Some management attorneys have argued that the impairment must actually affect the individual's ability to *work* in order to be covered under the ADA. The rationale for the argument is that if the impairment does not concern someone's ability to *work*, it is simply irrelevant to workplace issues. Most courts have *not* adopted this approach, instead analyzing whether *any* of the major life activities is affected. For example, in Berry v. City of Savannah, 1999 U.S. App. LEXIS 6278 (6th Cir. 1999)(unpublished), the court noted that an ADA plaintiff can demonstrate "disability" by showing a substantial limitation in any major life activity, not necessarily the major life activity of working. Likewise, in Janssen v. COBE Laboratories, Inc., 1999 U.S. App. LEXIS 30586 (10th Cir. 1999)(unpublished), the court addressed the argument that the plaintiff did not have a disability if she was not substantially limited in the major life activity of working. The court noted that, "[a]pplicable law, however, does not require that the disability affect a claimant's work, only that it affect a major life activity. In Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499 (7th Cir. 1998), the court noted that to make a threshold showing of disability, an individual does not necessarily have to "show a workplace-related limitation." Rather, "working" is just one of the possible major life activities that may be substantially limited.

Whether Impairment is Substantially Limiting

Meaning of "Substantially Limits"

According to the EEOC, an impairment "substantially limits" a major life activity if the person is either:

- ! [u]nable to perform a major life activity that the average person in the general population can perform; or
- ! [s]ignificantly restricted as to the condition, manner or duration under which s/he performs the activity as compared to the condition, manner, or duration under which the average person in the general population performs the activity.

29 C.F.R. § 1630.2(j)(1). See Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499 (7th Cir. 1998)(adopting EEOC's definition of "substantially limited"). For example, in Bowen v. Income Producing Management of Oklahoma, Inc., 2000 U.S. App. LEXIS 1212 (10th Cir. 2000), the plaintiff, who suffered a brain injury, claimed that he was substantially limited in learning in light of his memory loss, inability to concentrate and difficulty performing simple math. The court found that he was not "substantially limited" because he had "greater skills and abilities than the average person in general." In Vonderheide v. U.S. Post Office, 1998 U.S. App. LEXIS 16885 (6th Cir. 1998)(unpublished), the plaintiff was unable to work more than 40-hour workweeks because of his organic brain syndrome. The court compared this restriction to the average person's workweek, finding that the plaintiff was not substantially limited since "most people work 40 hours per week. If [the plaintiff] is disabled, then so, apparently, is the majority of the American workforce." Similarly, in Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3rd Cir. 1999), the court found that the employee's inability to stand and walk for more than 50 minutes per hour "is not significantly less than that of an average person."

The EEOC has stated that if someone is "extremely nauseous" or "constantly fatigued" while performing a major life activity, that person could be considered substantially limited compared to the average person. EEOC's Amicus Curiae Brief in Ellison v. Software Spectrum, Inc., No. 95-10704 (Brief in Support of Petition for Rehearing filed in Fifth Circuit, 6/28/96). In Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir. 1996), the court similarly suggested that if the plaintiff "suffers pain" (because of her bladder condition) while she works, she might be considered substantially limited in working. However, in Hill v. Baltimore City Department of Social Services, 1998 U.S. App. LEXIS 7772 (4th Cir. 1998)(unpublished), the court concluded that "severe chronic pain in the shoulder, upper and lower back, [and] sharp pains, and shooting in the arms and legs" would not rise to the level of a disability.

Of course, if the pain/nausea is not severe, it will generally not be a disability. According to the court in Gordon v. E.L. Hamm & Associates, Inc., 100 F.3d 907 (11th Cir. 1996), cert. denied, 118 S. Ct. 630 (1997), if an individual suffers only "mild nausea" while performing his/her major life activities, s/he would not be considered "substantially limited." In Lamb v. Bell County Coal Corp., 1999 U.S. App. LEXIS 22201 (6th Cir. 1999)(unpublished), the employee claimed that he was substantially limited in walking. However, the court found that since he experienced only "moderate discomfort" when he walked, he was not substantially limited. Likewise, in Benedict v. Eau Claire Public Schools, 1998 U.S. App. LEXIS 2138 (7th Cir. 1998)(unpublished), the court stated that "increased discomfort while performing a major life activity" simply does "not constitute a substantial limitation." Similarly, in Penny v. United Parcel Service, 128 F.2d 408 (6th Cir. 1997), the court noted that only "moderate difficulty or pain" experienced while walking would "not rise to the level of a disability." In Innes v. Mechatronics, Inc., 1997 U.S. App. LEXIS 18000 (9th Cir. 1997)(unpublished), the court held that where an employee's

side effects from cancer treatment only affected his ability to stay "awake and alert" while he worked, he did not have a disability.

The EEOC has stated that, in determining whether an individual is substantially limited in a "major life activity," a court must look at: (i) the *nature and severity* of the impairment; (ii) the *duration* or expected duration of the impairment; and (iii) the permanent or long-term *impact*, or the expected permanent or long-term impact resulting from the impairment. 29 C.F.R. § 1630.2(j)(2).

If an impairment *affects* -- but does not *substantially limit* -- a major life activity, a court is likely to dismiss the complaint. For example, in Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999), the court stated that although eating is a major life activity, simply having dietary restrictions (because of a heart condition) is not a substantial limitation in eating. In McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999), the court noted that "mere trouble getting along with co-workers" is not a substantial limitation in the major life activity of getting along with others. However, the employee may be substantially limited in that life activity where he claimed that he was "anxious all of the time," had a "fear reaction" causing him to stay away from crowds, shopping centers, disagreements with his wife, and social activities," and he was not involved in any groups, political or religious affiliations. Likewise, in Cain v. Airborne Express, 1999 U.S. App. LEXIS 22437 (6th Cir. 1999)(unpublished), the court noted that showing "substantial limitation" required the employee to allege more than that his walking "started getting real difficult." In Cody v. CIGNA Healthcare of St. Louis, 139 F.3d 595 (8th Cir. 1998), the court considered whether an employee with depression had an ADA-covered disability. The court held that she did not, noting that although "her depression caused difficulties in her life," such as anxiety in elevators and while driving, it was not a "substantial" limitation. Likewise, in Colwell v. Suffolk County Police Department, 158 F.3d 635 (2d Cir. 1998), the court stated that being unable to sit "too long," having "difficulty" sleeping, being unable to "get in and out of a patrol car 'excessively,'" or being unable to stand "for a long period of time" is not enough to show that a major life activity is substantially limited. In Pryor v. Trane Co., 138 F.3d 1024 (5th Cir. 1998), the court stated that simply being "below average" in lifting, pulling, and pushing was not a disability where the plaintiff's "activities of daily living are 100%." Likewise, in Christian v. St. Anthony Medical Center, Inc., 117 F.3d 1051 (7th Cir. 1997), cert. denied, 1998 U.S. LEXIS 1876 (1998), the court stated that the plaintiff's high cholesterol is not a disability because it does not substantially limit any major life activity. As noted above, in Penny v. United Parcel Service, 128 F.2d 408 (6th Cir. 1997), the court concluded that the plaintiff's walking limitation did not rise to the level of a disability because the plaintiff, who had a 14% "permanent, partial impairment" simply could not "walk briskly" and had "some trouble climbing stairs." Likewise, in Stone v. Entergy Services, Inc., 4 AD Cases 1112 (E.D. La. 1995), the court found that the plaintiff, who suffered residual effects of polio, was not substantially limited in walking because he *could* walk -- albeit slowly -- without assistance. In Kelly v. Drexel University, 94 F.3d 102 (3d Cir. 1996), the court also

held that the plaintiff was not substantially limited in walking just because he had "trouble climbing stairs, which requires him to move slowly and hold the handrail." Similarly, in Penchishen v. Stroh Brewery Co., 932 F. Supp. 671 (E.D. Pa. 1996), aff'd, 116 F.3d 469 (3d Cir.), cert. denied, 118 S. Ct. 178 (1997), the court stated that the plaintiff was not substantially limited in a major life activity simply because she walked and climbed stairs slowly because of a metal plate in her ankle. Likewise, as discussed below, if an impairment is only short-term, it is not generally considered substantially limiting.

Many courts have looked at the activities which a plaintiff was *able* to perform in determining that the individual was not substantially limited in a major life activity. For example, in Prince v. Claussen, 1999 U.S. App. LEXIS 5021 (10th Cir. 1999)(unpublished), the court stated that the plaintiff was not "substantially limited" in walking, standing, sitting, lifting, or stooping where he could walk, stand and sit for two hours without a break, lift eighty pounds from the floor, and stoop "on a frequent basis." Similarly, in Wild v. Minntech Corp., 1999 U.S. App. LEXIS 19292 (8th Cir. 1999)(unpublished), the court dismissed the plaintiff's "conclusory allegations" that his back pain substantially limited his ability to lift, sit, stand, sleep, walk and run. The court noted that the plaintiff's deposition testimony indicated "that he remains quite active despite his back injury: Wild continues to fell trees, move and stack logs, fish, travel, work in his yard, camp out in a tent, and work out at a health club." In Lamb v. Bell County Coal Corp., 1999 U.S. App. LEXIS 22201 (6th Cir. 1999)(unpublished), the court found that the plaintiff was not substantially limited in walking where, among other things, he admitted that he lived an active lifestyle, could hunt, fish, and play eighteen holes of golf "as best as anyone can play," march "double-time," and run a mile and a half in fifteen minutes. Likewise, in Penny v. United Parcel Service, discussed above, the court supported its conclusion that the plaintiff was not substantially limited in walking since he was able to perform a number of activities such as hunting rabbits, squirrels, pheasants and deer. In Jackson v. Analyst International Corporation, 1998 U.S. App. LEXIS 1348 (10th Cir. 1998)(unpublished), the court examined whether the plaintiff, who could not wear a tie or dress shirt because of a broken left clavicle, was substantially limited in any major life activity. The court specifically noted that man admitted that he was able to cook, shop, clean house, and play racquetball and golf. In Szalay v. Yellow Freight System, Inc., 1997 U.S. App. LEXIS 28884 (6th Cir. 1997)(unpublished), the court analyzed whether the plaintiff's knee impairment was a disability. In finding that the plaintiff was not substantially limited in a major life activity, the court noted a number of activities which the plaintiff *could* perform, such as yard work, recreational activities, and the ability to drive a car, truck and tractor trailer rig. Similarly, in Ventura v. City of Independence, 1997 U.S. App. LEXIS 4102 (6th Cir.)(unpublished), cert. denied, 1997 U.S. LEXIS 5377 (1997), the plaintiff claimed that he was substantially limited in breathing because of asthma. The court found that the individual was not substantially limited in breathing, in that he could play baseball and football, could play the saxophone, and could run, sing, and water ski.

Plaintiff's Burden to Present Evidence of Substantial Limitation

Courts will generally not *assume* that an impairment substantially limits a major life activity.² Rather, a number of courts have dismissed complaints because the plaintiff did not present evidence as to how his/her impairment substantially limited a major life activity. For example, in Pack v. Kmart Corp., 166 F.3d 1300 (10th Cir. 1999), the court held that the plaintiff did not show that her depression substantially limited the major life activity of sleeping since she did not present evidence comparing her sleeping habits to those of "the average person in the general population." Similarly, in Rebarchek v. Farmers Cooperative Elevator and Mercantile Association, 2000 U.S. App. LEXIS 277 (10th Cir. 2000)(unpublished), the employee claimed that his back impairment substantially limited his abilities to walk, sit, stand, lift, and work. According to the court, the evidence showed that the employee could not lift more than 40 pounds, had restrictions on bending, twisting, and climbing ladders, and could not sit, stand, or walk for more than two hours at a time. The Court of Appeals affirmed the lower court's determination that the plaintiff "presented no evidence showing that the restrictions on his lifting, walking, sitting, and standing abilities were significant when compared to the average person's abilities," and that the restrictions "were expected to be of significant duration."

In Long v. City of Leawood, 2000 U.S. App. LEXIS 273 (10th Cir. 2000)(unpublished), the court stated that the plaintiff's ten percent workers' compensation disability rating is only "relevant," but not "dispositive" evidence as to whether the plaintiff had a disability. Likewise, in Faulkner v. ATC Vancom of Nevada Limited Partnership, 1999 U.S. App. LEXIS 31855 (9th Cir. 1999)(unpublished), the court held that the plaintiff's forty percent disability rating from the Department of Veterans' Affairs "does not provide the court with any evidence as to the nature, permanence or severity of his condition." In Barzen v. Carlson Cos., 1999 U.S. App. LEXIS 3605 (8th Cir. 1999)(unpublished), the court refused to find that an employee had a disability, simply because she had a 10% permanent partial disability resulting from a head injury. Similarly, in Muller v. Costello, 187 F.3d 298 (2d Cir. 1999), the plaintiff presented evidence that when he was exposed to certain environmental stimulants, his lung function was decreased by 45%. Nonetheless, the court held that he did not present "enough evidence of off-the-job breathing problems to find a substantial limitation of that life activity."

In Finnicum v. Evant, Inc., 1999 U.S. App. LEXIS 9849 (6th Cir. 1999)(unpublished), the court found that the plaintiff did not show that her depression was a disability because she did not allege "any effects

² Even the EEOC has said that the plaintiff must demonstrate that the impairment substantially limits a major life activity. See 7/13/98 Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel to Senator John McCain (the individual claiming ADA protection "must also demonstrate . . . that these impairments substantially limit one or more major life activities").

she would experience if she stopped taking her medication.” Similarly, in Hilburn v. Murata Electronics, 181 F.3d 1220 (11th Cir. 1999), the court held that even if “running” is a major life activity, “diminished tolerance” is not enough to demonstrate substantial limitation. In Gibbs v. St. Anthony Hospital, 1997 U.S. App. LEXIS 2362 (10th Cir. 1997)(unpublished), the court found that a nurse with a neck injury did not have an ADA-disability because she did not present sufficient comparative evidence as to how her injury "substantially" limited the major life activity of lifting. Specifically, the court noted that the plaintiff "has pointed out no facts comparing her lifting restrictions to the capabilities of an average person in the general population;" the court refused to "'infer' that she has demonstrated a significant restriction on the major life activity of lifting" simply by presenting evidence of a 25-pound lifting restriction. Similarly, in Snow v. Ridgeview Medical Center, 128 F.3d 1201 (8th Cir. 1997), the court refused to assume that a “general lifting restriction imposed by a physician,” constituted a disability. The court noted that “[i]t is not enough that an impairment affect a major life activity; the plaintiff must proffer evidence from which a reasonable inference can be drawn that such activity is substantially or materially limited.” Likewise, in Williams v. Kerr-McGee, 1997 U.S. App. LEXIS 6366 (10th Cir. 1997)(unpublished), the court considered whether an individual with Lupus was covered under the ADA. The court found that the plaintiff had not presented evidence concerning the nature, severity, or expected duration of her impairment, how lupus affects the body, what stage of lupus she had, or how the symptoms affected her major life activities. In Aucutt v. Six Flags Over Mid-America, Inc., 869 F. Supp. 736, 744 (E.D. Mo. 1994), aff'd, 85 F.3d 1311 (8th Cir. 1996) , the court dismissed the complaint because the plaintiff had not produced evidence "that his alleged high blood pressure and unspecified angina and coronary-artery disease 'substantially limits' one or more of the ADA's recognized major life activities." In Robinson v. Global Marine Drilling Co., 101 F.3d 35 (5th Cir. 1996), cert. denied, 117 S. Ct. 1820 (1997), the court noted that although the plaintiff's lung capacity may have been "less than 50% of normal," that fact was simply "evidence of an impairment." The court stated that the plaintiff still needed to present evidence that a major life activity was *substantially* limited. Similarly, in Castle v. Bentsen, 867 F. Supp. 1 (D.D.C. 1994), aff'd, 78 F.3d 654 (D.C. Cir. 1996), the court said that demonstrating disability requires "more than a showing that the plaintiff has a blood condition which may cause" drowsiness; rather, the plaintiff must *present evidence* that the condition substantially limits a major life activity. Likewise, in Young v. St. Luke's Roosevelt Hospital Center, 5 AD Cases 685 (S.D.N.Y. 1996), the court threatened to dismiss the plaintiff's case unless she amended the complaint to provide specific information concerning how her respiratory impairment substantially limited her major life activities (e.g., the "nature and severity" of her bronchitis, how often she missed work and how debilitating the attacks were, the duration/expected duration of the bronchitis, the projected long-term impact). Other courts have reached the same conclusion, such as Oswalt v. Sara Lee Corp., 889 F. Supp. 253, 258 (N.D. Miss. 1995), aff'd, 74 F.3d 91 (5th Cir. 1996) and Deghand v. Wal-Mart Stores, 926 F. Supp. 1002 (D. Kan. 1996)(high blood pressure alone, without any evidence that it substantially affects one or more major life activities, is insufficient to bring an employee within the protection of the ADA); Taylor v.

Dover Elevator Systems, 917 F. Supp. 455 (N.D. Miss. 1996)(plaintiff "must carry his burden with more than mere allegations and conclusions" when he alleges that his medication for epilepsy substantially limits his major life activities); Kelly v. Drexel University, 94 F.3d 102 (3d Cir. 1996)("the burden rests with [the plaintiff] to show that his injury 'substantially limits' his ability to walk"); and White v. Residential Services Corp. of America, 1998 U.S. App. LEXIS 14996 (9th Cir. 1998)(unpublished)(work-related restrictions do not necessarily equate to a substantial limitation in working).

On the other hand, some courts and the EEOC have required less of plaintiffs. For example, in EEOC v. United Airlines, 1999 U.S. App. LEXIS 13347 (10th Cir. 1999)(unpublished), the plaintiff, a customer service representative, presented evidence that she had a 20-pound lifting restriction. The court noted that plaintiffs do not always need to present evidence comparing their abilities to the average person, as long as they have presented "sufficient evidence to allow a reasonable fact finder to conclude" they are substantially limited in a major life activity. The EEOC has specifically stated that although an individual must "present evidence outlining the extent of her impairment and the extent to which the impairment limited her in a major life activity," s/he does not need to present evidence comparing his/her limitations to the average person. Rather, members of a jury can rely on "their personal knowledge and experience" to determine how the plaintiff's limitations compare to the abilities of the average person. EEOC Amicus Curiae Brief in Pack v. Kmart Corp., No. 97-7120 (Brief filed in Tenth Circuit, 1/11/99) at p. 14.

Plaintiffs have attempted to establish that they have disabilities by simply presenting evidence that they were adjudged to be "disabled" in other forums, that they have "handicap" parking permits, or that they have been hospitalized for the conditions. Courts have generally found that this evidence, standing alone, is not sufficient to establish disability. Rather, courts require plaintiffs to present evidence as to how the impairment truly *limits* major life activities. For example, in Robinson v. Neodata Services, Inc., 94 F.3d 499 n.2 (8th Cir. 1996), the plaintiff argued that the Social Security Administration's determination that she was "disabled" was preclusive on whether she had a disability under the ADA. The court noted that, "[a]t best, the Social Security determination [was evidence for the trial court to consider in making its own independent determination." Similarly, in Weiler v. Household Finance Corp., 101 F.3d 519 (7th Cir. 1996), the court stated that "[b]ecause the ADA's determination of disability and a determination under the Social Security disability system diverge significantly in their respective legal standards and statutory intent, determinations made by the Social Security Administration concerning disability are not dispositive findings for [ADA] claims." As an interesting aside, at least one federal court has held that an individual's representation to a state agency that she did not have a disability did not *preclude* her from asserting that she had a disability under the ADA. Howard v. North Mississippi Medical Center, 939 F. Supp. 505 (N.D. Miss. 1996).

In Dumas v. Keebler Co., 5 AD Cases 69 (M.D. Ga. 1995), aff'd, 98 F.3d 1354 (11th Cir. 1996), the court stated that the mere fact that someone has a handicap parking permit is not enough to establish disability (for purposes of requiring the employer to provide reasonable accommodation). Similarly, in Burch v. Coca-Cola, 119 F.3d 305 (5th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998), the court stated that the ADA "requires an individualized inquiry beyond the mere existence of a hospital stay." Likewise, in Demming v. Housing Authority, 66 F.3d 950 (8th Cir. 1995), the court held that the fact that someone has been hospitalized is not enough to establish that s/he has a disability; in that case, the court concluded that the plaintiff, who had been hospitalized for thyroid cancer, did not have a disability because she failed to demonstrate that the condition substantially limited her major life activities. Even the EEOC has stated that "the mere fact that an individual may have required absolute bed rest or hospitalization" or even "the necessity of surgery" does not automatically mean the condition is a disability. EEOC Compliance Manual § 902.4(d) at p. 29.

Importantly, when the plaintiff *has* presented evidence that an impairment substantially limits a major life activity, an employer's summary judgment motion on the issue of "disability" will generally be denied. For example, in DiPuccio v. United Parcel Service, 890 F. Supp. 688 (N.D. Ohio 1995), the plaintiff (with a knee injury) presented affidavits from his orthopedic surgeon and rehabilitation consultant indicating that he had a substantially limiting impairment. As a result, the court denied the employer's motion for summary judgment despite the employer's evidence that: (1) the plaintiff returned to work without restrictions, and (2) the examining physician had opined that the plaintiff had "great knees."

Short-Term Conditions

Short-term conditions are generally *not* considered "substantially limiting." Therefore, these conditions are not normally covered under the ADA. Appendix to 29 C.F.R. § 1630.2(j). However, there is still an open question as to *when* a condition is considered short-term.

Generally, conditions lasting up to several months without residual effects have been considered short-term. For example, in Hilburn v. Murata Electronics, 181 F.3d 1220 (11th Cir. 1999), the court held that the employee's inability to work for 38 days was "an insufficient amount of time to support a claim that she was substantially limited in the major life activity of working." In Oblas v. American Home Assurance Co., 1999 U.S. App. LEXIS 23371 (2d Cir. 1999)(unpublished), the court held that the employee's depression was not a disability because it lasted only one month. In Sorensen v. University of Utah Hospital, 194 F.3d 1084 (10th Cir. 1999), the court held that the employee's Multiple Sclerosis was not a disability where it limited her life activities for less than two weeks since this was "of brief duration." Similarly, in McDonald v. Pennsylvania, 62 F.3d 92, 96 (3d Cir. 1995), the court held that

since the plaintiff was unable to work for less than two months, "her inability to work was not permanent, nor for such an extended time as to be of the type contemplated by" the ADA. In Halperin v. Abacus Technology Corp., 128 F.3d 191 (4th Cir. 1997), the court noted that a two-month absence from work would not be covered under the ADA. In Sanders v. Arneson Products, Inc., 91 F.3d 1351 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997), the court held that a psychological impairment that lasted for approximately three and one-half months was only "temporary" and "was not of sufficient duration to fall within the protections of the ADA as a disability." Likewise, in Heintzelman v. Runyon, 120 F.3d 143 (8th Cir. 1997), the court held that the employee's "inability to work while recovering from surgery is simply not evidence" of a substantial limitation in the life activity of working. See also Adams v. Citizens Advice Bureau, 187 F.3d 315 (2d Cir. 1999)(plaintiff's 3-1/2 month impairment was not covered under the ADA "because this court has found a temporary impairment of seven months, by itself, 'to short in duration'")(citation omitted); Huckans v. U.S. Postal Service, 1999 U.S. App. LEXIS 30755 (10th Cir. 1999)(unpublished)(condition lasting only three months would not be a disability).

On the other hand, the position of EEOC and other courts is that if an impairment lasts "at least several months," it is not short-term. See EEOC Compliance Manual § 902.4(d) at p. 30. In Aldrich v. The Boeing Company, 146 F.3d 1265 (10th Cir. 1998), the court stated that an impairment need not be permanent to be a disability. The court found that the plaintiff's flexor tenosynovitis could be a disability since its "anticipated duration was indefinite, unknowable, or was expected to be at least several months." Similarly, in Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996), the court cited the EEOC's guidance that a condition "expected to be at least several months" could constitute a disability. In EEOC v. Joslyn Manufacturing Co., 5 AD Cases 1220 (N.D. Ill. 1996), the court stated that since the plaintiff could not work for three and one-half months following his carpal tunnel surgeries, he might have a disability. The court also *suggested* that an inability to work for six weeks might be enough to qualify as a disability. Specifically, the court noted that "a record of two carpal tunnel surgeries strongly suggests a substantially limited ability to work for at least six weeks." Since the plaintiff had undergone such surgeries, "[a] rational trier of fact could therefore conclude that [the employer's] decision not to hire [the plaintiff] was based on a record of disability." Of course, courts have held that impairments lasting for periods such as a year or more are generally not considered short-term. For example, in Wood v. County of Alameda, 5 AD Cases 173, 181 (N.D. Cal. 1995), the plaintiff was "temporarily totally disabled" for over a year. The lower court found that a "mental impairment which renders an individual unable to work for a full year constitutes a disability under the ADA."

Although an individual may have to prove that the condition was more than short-term, s/he is generally not required to prove that it is "permanent." For example, in Patterson v. Downtown Medical Center, 866 F. Supp. 1379 (M.D. Fla. 1994), the court denied the employer's motion to dismiss, noting that the plaintiff "is not required to allege a permanent disability to establish a prima facie case" under the ADA.

Nonetheless, some courts have suggested that an impairment must be permanent. For example, in Burch v. Coca-Cola, 119 F.3d 305 (5th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998), the court stated that "[p]ermanency, not frequency, is the touchstone of a substantially limiting impairment." Similarly, in Pangalos v. Prudential Insurance Co. of America, 5 AD Cases 1825 (E.D. Pa. 1996), aff'd, 118 F.3d 1577 (3d Cir. 1997), the court stated that a "disability" requires "a condition which is permanent, or at least of indefinite prospective duration." In Rakestraw v. Carpenter Co., 898 F. Supp. 386 (N.D. Miss. 1995), the court held that the plaintiff's back injury was not a disability given its "non-permanent nature."

In addition, other conditions that do not themselves appear to be long-term may well be covered as disabilities. For example, impairments that are temporary (and in fact heal) may have permanent or residual long-term effects, such as effects on a person's ability to walk or think. These conditions may be ADA-covered disabilities. See EEOC Compliance Manual § 902.4(d) at p. 33. Similarly, episodic disorders that are substantially limiting when active -- such as bipolar disorder -- can be covered by the ADA. For example, in Taylor v. Phoenixville School District, 184 F.3d 296 (3d Cir. 1999), the court noted that episodic disorders can be substantially limiting. In this case, the plaintiff was treated 25 times during the year for her mental disability and she took daily medications. The court stated that even though "she may not have experienced problems every day . . . [c]hronic, episodic conditions can easily limit how well a person performs an activity as compared to the rest of the population: repeated flare-ups of poor health can have a cumulative weight that wears down a person's resolve and continually breaks apart longer-term projects." See EEOC Compliance Manual § 902.4(d) at p. 34; Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir. 1996)(plaintiff's bladder infections, "though intermittent and temporary, are a characteristic manifestation" of a physical impairment, and can be a disability if the infections are substantially limiting). On the other hand, if episodic disorders occur only rarely, they might not be disabilities. For example, in Ryan v. Grae & Rybicki, P.C., 135 F.3d 867 (2d Cir. 1998), the court determined that the employee's colitis, which caused an inability to control her bowels, was not covered because of the infrequency of her symptoms (i.e., symptoms occurred only during summer months and years could go by without symptoms).

Of course, many times, it is simply unclear how long an impairment will last. Importantly, according to the EEOC, if a condition is severe, and the duration is "indefinite and unknowable," it can qualify as a disability. See EEOC Compliance Manual § 902.4(d) at p. 30. For example, if an individual will recover "eventually" from a severe mobility limitation, s/he would likely have an ADA disability.

Whether Medication/Prosthetic Devices Should be Taken into Account When Analyzing Substantial Limitation

In analyzing whether an impairment substantially limits a major life activity, one very important issue is whether the mitigating effects of medication or prosthetic devices should be taken into account. The Supreme Court has held that if an individual takes measures "to correct for, or mitigate, a physical or mental impairment, the effects of those measures -- both positive and negative -- must be taken into account when judging whether that person is 'substantially limited' in a major life activity." Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999); Murphy v. United Parcel Service, 119 S.Ct. 2133 (1999). In Sutton, the Court noted that a "'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity."³ In Hill v. Kansas City Area Transportation Authority, 181 F.3d 891 (8th Cir. 1999), the court found that the employee's hypertension was not a disability because she controlled her condition with medications such that it did not substantially limit her major life activities. Likewise, in Spades v. City of Walnut Ridge, 186 F.3d 897 (8th Cir. 1999), the court held that the employee's depression was not a disability since he conceded that he functioned well with his medications. Similarly, in EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999), the court noted that it did "not doubt" that the plaintiff's condition, "if left untreated, would affect the full panorama of life activities, and indeed would likely result in an untimely death." Nonetheless, the court concluded that "the predicted effects of the impairment in its untreated state for the purposes of considering whether a major life activity has been affected by a physical or mental impairment has, however, been foreclosed" by the Supreme Court. In Muller v. Costello, 187 F.3d 298 (2d Cir. 1999), the court concluded that the plaintiff's asthma did not substantially limit his ability to breathe, after taking into account his inhalers and other medications. Similarly, in Ivy v. Jones, 192 F.3d 514 (5th Cir. 1999), the court held that whether the plaintiff's hearing impairment "substantially limited" her hearing should be determined as corrected by her hearing aids. The court noted that the

³ This decision reversed the vast majority of court decisions on this issue and rejected the positions of the EEOC and the Department of Justice, which stated that the effects of medication or prosthetic devices are irrelevant in determining whether someone's impairment substantially limits a major life activity. See, e.g., Arnold v. United Parcel Service, Inc., 135 F.3d 1089 (1st Cir. 1998)(diabetes); Taylor v. Phoenixville School District, 174 F.3d 142 (3rd Cir. 1999)(mental disability)(decision vacated); Washington v. HCA Health Services of Texas, 152 F.3d 464 (5th Cir. 1998)(adult still disease); Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998)(diabetes); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), cert. denied, 118 S. Ct. 693 (1998)(monocular vision); Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), cert. denied, 117 S. Ct. 1349 (1997); Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1996)(Graves disease).

plaintiff's hearing might not be substantially limited in light of the evidence showing that her hearing was "corrected to 92% with one hearing aid and 96% with two hearing aids."

In a document to its Field Offices issued after Sutton, the EEOC has specifically instructed investigators to analyze whether, despite the medication or prosthetic device, the particular individual is still substantially limited in a major life activity. For example, investigators are instructed to ask whether the mitigating measure controls the symptoms only some of the time, whether the mitigating measure is less effective under certain conditions (such as when the individual is under stress, when affected by certain weather or environmental conditions, when ill, when affected by monthly hormonal changes), and whether previous mitigating measures had become less effective over time. EEOC "Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified'" (July 1999) at pp. 4-6.

Medication as the Cause of the Substantial Limitation

An impairment may be substantially limiting *because of* the medication taken for the impairment. As noted above, in Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999), the court noted that the negative effects of mitigating measures must be taken into account in determining whether an individual is substantially limited in a major life activity. In EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999), the court noted that the plaintiff's "long hospital stay and his isolation from others," which were results of the plaintiff's cancer treatments, "may also be considered as the cause of such limitations" of his major life activities. Likewise, in Taylor v. Phoenixville School District, 184 F.3d 296 (3d Cir. 1999), the court noted a drug's "side effects can be important in evaluating whether someone is disabled." In this case, the court pointed out that the lithium taken by the plaintiff for her mental impairment may itself "cause a number of side effects," such as nausea and interference with her ability to think, concentrate, and remember. In McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999), the court noted that the employee may be substantially limited in sexual relations where he was impotent as a result of medications he took for his mental disorder.

Likewise, a prosthesis may be the cause of a substantial limitation. In Belk v. Southwestern Bell Telephone Co., 194 F.3d 946 (8th Cir. 1999), the court noted that, in addition to having a "pronounced limp" because of residual effects from polio, the plaintiff's "full range of motion in his leg is limited by the brace" he wore for his condition.

The EEOC has instructed its investigators to analyze whether an individual's mitigating measure causes limitations in a major life activity. For example, the EEOC has stated that certain medications may limit the ability to think, concentrate, or eat (because the medication may require a strict dietary regimen).

EEOC "Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified'" (July 1999) at pp. 6-8.

Interestingly, some courts might look at whether the treatment was truly required. In Hill v. Kansas City Area Transportation Authority, 181 F.3d 891 (8th Cir. 1999), the court dismissed the employee's allegations that her hypertension medication substantially limited her major life activities by causing drowsiness, noting that the employee presented no evidence that her "physical condition compelled her to take a combination of medications that persistently affected her ability . . . to stay awake on the job." Likewise, in Christian v. St. Anthony Medical Center, Inc., 117 F.3d 1051 (7th Cir. 1997), cert. denied, 1998 U.S. LEXIS 1876 (1998), the court noted that a required medical treatment can "count as a disability" if the treatment itself is disabling, even if the underlying condition was not disabling. The court pointed out, however, that the treatment must "be truly necessary, and not merely an attractive option."

Substantial Limitation in Order to Prevent Recurrence of Condition

Sometimes, a major life activity may be substantially limited in order to prevent recurrence of a condition, or to lessen the likelihood or severity of recurrence. According to the EEOC, this is particularly common in cases of severe back problems and most types of heart disease and cancer. The EEOC has stated that this would be considered a substantially limiting impairment and, therefore, would be covered under the ADA. See Compliance Manual § 902.4 at p. 34.

Whether "Mutability" of the Condition is Relevant

As discussed earlier, the EEOC takes the position that "voluntariness" or "mutability" is irrelevant to whether a condition is an impairment. The EEOC also has stated that mutability of the condition is irrelevant to whether an impairment is deemed to substantially limit a major life activity. See Compliance Manual § 902.5 at pp. 35-37. Under this approach, it is therefore irrelevant that the individual would not be substantially limited if s/he took medication, used a prosthesis, or got treatment.

The Supreme Court seems to agree with this approach. As noted above, in Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999), the Court held that an individual's condition, as it actually exists, should be analyzed, rather than looking at what the individual's condition "might," "could," or "would" be. In Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993), the court said that whether or not the plaintiff's "morbid obesity" was mutable (for example, if the plaintiff lost weight) was irrelevant. It should be noted that in Van Stan v. Fancy Colours & Company, 125 F.3d 563 (7th Cir. 1997), the court stated that an ADA

plaintiff "cannot recover . . . if through his own fault he fails to control an otherwise controllable illness." As a result, the court stated that the employer "could have offered proof that [the employee] failed to take ordinary measures such as taking the proper dosage to ensure his medication's effectiveness." However, it is doubtful that the Van Stan case is still good law in light of Sutton.

Whether Individual is Substantially Limited in Major Life Activity of Working

The major life activity of working is arguably the most difficult to analyze. In addition, the Supreme Court has explicitly questioned whether "working" is even a major life activity, noting "there may be some conceptual difficulty in defining 'major life activities' to include work." Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999). Specifically, the Sutton Court, quoting from the transcript of an oral argument in a lower court case, stated that "it seems 'to argue in a circle to say that if one is excluded, for instance, by reason of an impairment, from working with others . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.'" Nonetheless, most courts have held that working is a major life activity. In fact, in a post-Sutton case, one of the more conservative circuits emphatically declared that working is a major life activity. In EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999), the court stated that "the plain text of the ADA" indicates that working is a major life activity. The court further noted that:

[f]or many, working is necessary for self-sustenance or to support an entire family. The choice of an occupation often provides the opportunity for self-expression and for contribution to productive society. Importantly, most jobs involve some degree of social interaction, both with coworkers and with the public at large, providing opportunities for collegial collaboration and friendship. For those of us who are able to work and choose to work, our jobs are an important element of how we define ourselves and how we are perceived by others. The inability to access the many opportunities afforded by working constitutes exclusion from many of the significant experiences of life. Without doubt, then, working is a major life activity.

Similarly, in Davoll v. Webb, 1999 U.S. App. LEXIS 26827 (10th Cir. 1999), another post-Sutton case, the court stated that it "considers working to be a major life activity under the ADA." In Heyman v. Queens Village Committee for Mental Health, 198 F.3d 68 (2d Cir. 1999), the court considered working to be a major life activity. Likewise, in Duncan v. Washington Metropolitan Area Transit Authority, 2000 U.S. App. LEXIS 1020 (D.C. Cir. 2000), the court assumed that working is a major life activity under the ADA.

As discussed below, it has been extremely difficult for an individual to win an ADA suit when arguing that his/her impairment substantially limits the major life activity of working. Therefore, whether an individual

is substantially limited in working is generally analyzed only as a last resort. For example, in Pryor v. Trane Co., 138 F.3d 1024 (5th Cir. 1998), the court noted that "[i]f an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working."

In analyzing whether an individual is substantially limited in working, the Supreme Court decisions seem to indicate that there are two major questions: (1) Is the individual unable to perform a class or broad range of jobs because of the disability? and (2) Is the individual nonetheless *able* to perform many other jobs? These questions are addressed below.

Inability to Perform a Class of Jobs or Broad Range of Jobs

It is helpful to remember that an individual would not be substantially limited in working if s/he is only restricted from his/her particular job. Rather, the EEOC and courts examining the issue require that the individual must be excluded from a *class of jobs* or a *broad range of jobs*. 29 C.F.R. § 1630.2(j) and Appendix.

The EEOC has stated that relevant factors in determining whether a person is substantially limited in working include:

- ! the geographical area to which the individual has access;
- ! the job(s) from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing *similar skills and training*; and
- ! the job(s) from which the individual has been disqualified and the number and types of jobs not using similar skills and training.

29 C.F.R. § 1630.2(j), Appendix.

Plaintiff's Burden to Present Evidence of Class/Broad Range of Jobs

Courts have required that the plaintiff present this evidence as part of his/her prima facie case. For example, in Skorup v. Modern Door Corp., 153 F.3d 512 (7th Cir. 1998), the court considered whether an employee was substantially limited in working where she claimed that she could not perform jobs requiring repetitive stretching and pulling of the shoulder. The court concluded that the employee

provided "no evidence of the number of jobs from which she is precluded" because of her impairment. Instructively, the court stated that the employee "needed to identify what requirements posed by the class of assembly line jobs (or, alternatively, by a broad range of other jobs) were problematic in light of the limitations her fibromyalgia imposed on her." In Duncan v. Washington Metropolitan Area Transit Authority, 2000 U.S. App. LEXIS 1020 (D.C. Cir. 2000), the employee, who had a 20-pound lifting restriction, claimed he was substantially limited in working. In support of his claim, he presented evidence concerning his limited educational background and his prior employment in jobs requiring heavy lifting. However, the court found that he failed to present evidence as to the number and types of available jobs from which he was restricted because of his impairment. Likewise, in Duncan v. Washington Metropolitan Area Transit Authority, 2000 U.S. App. LEXIS 1020 (D.C. Cir. 2000), the court assumed that working is a major life activity under the ADA. Likewise, in Doren v. Battle Creek Health System, 187 F.3d 595 (6th Cir. 1999), the court determined that the pediatric nurse had not shown she was substantially limited in working, since she "failed to produce evidence regarding the number of pediatric nursing jobs from which she is excluded or the availability of pediatric nursing positions for which she is qualified." In Lewis v. Independent School District of Oklahoma County, 1999 U.S. App. LEXIS 32272 (10th Cir. 1999)(unpublished), the plaintiff presented evidence that he was "unable to work around vapors, chemicals, detergent and heat," but did not present evidence showing that "this limitation precluded him from performing "either a class of jobs or a broad range of jobs in various classes." Similarly, in Broussard v. University of California, 192 F.3d 1252 (9th Cir. 1999), the court considered whether an employee was substantially limited in working where she could not work with "transgenic mice" because of her carpal tunnel syndrome. The court concluded that the plaintiff did not present evidence showing what requirement of a class of jobs was problematic to her and that she therefore "faced 'significant restrictions' in her ability to meet the requirements of other jobs" (citation omitted). In Schneiker v. Fortis Insurance Co., 2000 U.S. App. LEXIS 90 (7th Cir. 2000), the plaintiff argued that she was substantially limited in working because her depression was triggered by stress. However, the court found that she "failed to produce any evidence that her inability to work in 'stressful situations' precludes her from a class of jobs or a wide range of jobs." The court noted that in order to "satisfy her burden of proof, mild as it may be, Ms. Schneiker needed to point to those job requirements that were problematic in light of her depression." Likewise, in Colwell v. Suffolk County Police Department, 158 F.3d 635 (2d Cir. 1998), the court stated that the plaintiffs did not provide enough evidence that they were substantially limited in working simply by presenting medical restrictions limiting them to day work, indoor work, and jobs without confrontation or stress. The court stated that the plaintiffs needed to present "specific evidence about 'the kinds of jobs'" from which they were actually disqualified. In Perkins v. St. Louis County Water Co., 160 F.3d 446 (8th Cir. 1998), the court held that the plaintiff's Meniere's disease, which caused him to miss only two and one-half weeks of work in three years, did not "substantially" limit the major life activity of working. The court noted that the plaintiff failed to present evidence that he could not perform his own job, much less a broad range of jobs. Similarly, in Milatz v.

Frito-Lay, Inc., 1997 U.S. App. LEXIS 599 (10th Cir. 1997)(unpublished), the court considered a plaintiff's claim that he was substantially limited in the major life activity of working. The court rejected the claim, noting that the plaintiff simply did not present any evidence concerning a class of jobs or a broad range of jobs. In Jackson v. Analyst International Corporation, 1998 U.S. App. LEXIS 1348 (10th Cir. 1998)(unpublished), the court considered whether a computer programmer, who could not wear a necktie or dress shirt because of a neck injury, was substantially limited in working. The court held that the plaintiff's evidence, showing that one-third of the computer programmer positions in Kansas City required a necktie, was insufficient. Specifically, the court stated that the plaintiff needed to present more evidence, such as whether "his access to jobs is limited to the Kansas City area," or "that he is unable to perform other jobs within or outside the class of computer programmer." Likewise, in Howard v. Navistar, 1997 U.S. App. LEXIS 2069 (7th Cir. 1997)(unpublished), the court ruled against the plaintiff, a factory worker, finding that his evidence (notes and letters from his doctor) "do not state that he cannot perform an entire class of jobs or a broad range of jobs in various classes." Rather, according to the court, the notes simply indicated that the plaintiff was subject to certain working restrictions. In Sherrod v. American Airlines, 132 F.3d 1112 (5th Cir. 1998), the plaintiff, a flight attendant, claimed that she was substantially limited in working because she could not perform any job requiring even medium lifting. The court rejected the claim, however, noting that the plaintiff did not "bolster her claims of disqualification from a broad range of jobs by presenting evidence of the number and types of jobs from which she is disqualified, or evidence that her training and skills limit her to jobs requiring heavy lifting." In Corrigan v. Perry, 1998 U.S. App. LEXIS 5859 (4th Cir. 1998)(unpublished), the court analyzed whether an employee was substantially limited in working when he could not lift more than 25 pounds, could not work above his head, and could not drive a forklift. The court decided against the employee, in part "because of [his] failure to present any evidence as to how his restrictions may have affected his eligibility for other jobs."

On the other hand, some courts have held plaintiffs to a lesser standard regarding the volume of evidence required -- up front -- as to "class" or "broad range" of jobs. For example, in Lucido v. Comprevue, Inc., 1999 U.S. App. LEXIS 34128 (9th Cir. 1999)(unpublished), the court noted that "the EEOC regulations do not require that plaintiffs who claim that they are disabled from working present demographic job data in order to survive summary judgment. In fact, the regulations say only that information on other available jobs in the relevant job market 'may' be considered along with the primary factors that govern disability, which concern the severity of the impairment in question." In Norsworthy v. The Kroger Company, 2000 U.S. App. LEXIS 497 (6th Cir. 2000)(unpublished), the court simply noted that since the injured employee was limited to four working hours per day, and could not lift, bend, or stoop, "she appears to be substantially limited in the major life activity of working." Similarly, in Best v. Shell Oil Company, 107 F.3d 544 (7th Cir. 1997), the court considered whether a truck driver with a knee injury was substantially limited in working. The court said that since the "record does not show, at

the present, how many truck driving jobs" the plaintiff could not perform, the employer's motion for summary judgment was denied. Interestingly, in Heyman v. Queens Village Committee for Mental Health, 198 F.3d 68 (2d Cir. 1999), the court seemed satisfied that the plaintiff may have been regarded as substantially limited in working simply because he presented evidence that the employer thought his lymphoma "significantly restricted [his] ability to perform his job."

What is a Class/Broad Range of Jobs?

Another question that arises in connection with the major life activity of working is what is a *class of jobs*, or a *broad range of jobs*. The EEOC has said that a *class of jobs* would include a category like "heavy labor jobs," "clerical" jobs, or "jobs requiring use of a computer." See EEOC Compliance Manual § 902.4 at pp. 24-26. The EEOC also has stated that "law enforcement or security positions" would be a class of jobs. EEOC's Amicus Curiae Brief in Deforrest v. Stanley Smith Security, Inc., Appellate Case No. A072441 (Brief filed in California Court of Appeal First Appellate District, 7/10/96) at 6. The Department of Justice has taken the position that "firefighting positions" are a class of jobs because this label includes emergency medical technicians and paramedics. DOJ's Amicus Curiae Brief in Bridges v. City of Bossier City, No. 95-30756 (Brief filed in Fifth Circuit, 12/14/95) at p. 15.

The EEOC has given some examples illustrating when it believes someone is limited in a *broad range of jobs*. These include:

- ! someone precluded (because of an allergy) from jobs in many of the high-rise office buildings in the individual's geographical area;
- ! someone precluded (because of a hearing impairment) from working in noisy jobs like carpentry, auto repair, heavy equipment operation, demolitions, or airport grounds work; and
- ! someone precluded (because of treatment for a disability) from working in "full-time" jobs.

See EEOC Compliance Manual § 902.4 at p. 25-27.

Litigated cases provide little guidance on this issue, most simply making conclusory findings on whether or not the individual was restricted in a class or broad range of jobs. For example, in Murphy v. United Parcel Service, 119 S.Ct. 2133 (1999), the court held that the plaintiff was not regarded as substantially limited in a class of jobs, even if he was perceived to be unable to perform a mechanic position requiring a commercial driver's license. Similarly, in Sutton v. United Air Lines, 119 S.Ct. 2139 (1999), the Court held that the plaintiffs were not regarded as substantially limited in working, where – at most – they were

regarded as unable to be "global airline pilots." In Muller v. Costello, 187 F.3d 298 (2d Cir. 1999), the court concluded that "correctional officer" in a particular geographic location was not a class or broad range of jobs. In Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770 (1997), the court stated that jobs "involving routine exposure to extreme trauma -- such as firefighter" are "merely a narrow range of jobs"; firefighters combined with emergency medical technicians/paramedics is *still* not a broad range because "'broad range' implies more than two job types". Likewise, in Shipley v. City of University City, 195 F.3d 1020 (8th Cir. 1999), the court considered whether an individual was substantially limited in working where he could not be a firefighter. The court stated that being a firefighter is not a class or broad range of jobs. In addition, the court noted that the plaintiff, despite his injury, "was able to perform a variety of jobs." Similarly, in Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996), the court noted that even if the City regarded the plaintiff as unable to be a firefighter, he is not "disabled" without evidence that the City "believed he was unable to perform other jobs." In Cantrell v. Nashville Electric Service, 1999 U.S. App. LEXIS 1207 (6th Cir. 1999)(unpublished), the court concluded that the employee's allergy to "Shell 4 Hydraulic Oil" did not substantially limit his ability to work because such oil was used in only a narrow range of jobs. In Young v. U.S. West Communications, Inc., 1998 U.S. App. LEXIS 31000 (10th Cir. 1998)(unpublished), the court held that the plaintiff's repetitive motion syndrome (RMS) did not substantially limit her in a class or broad range of jobs where she simply could not perform "a narrow range of jobs requiring extensive use of a keyboard." The court stated that the RMS did not necessarily limit "any number of other sedentary office jobs." In Lorubbio v. Ohio Department of Transportation, 1999 U.S. App. LEXIS 10916 (6th Cir. 1999)(unpublished), the court concluded that the plaintiff was not substantially limited in working just because she could not "work at a computer or ride in an automobile for extended periods." Similarly, in Hall v. Shelby County, 1997 U.S. App. LEXIS 21722 (6th Cir. 1997)(unpublished), the court found that the plaintiff's RMS did not substantially limit her in working where it only affected "her ability to make 'constant repetitive motions used for writing or being on a computer all day.'" According to the court, this was not a class or broad range of jobs. In Taylor v. Albertsons, Inc., 1996 U.S. App. LEXIS 390 (10th Cir. 1996)(unpublished), an employee had a 23% disability from repetitive arm movements, and could not perform her job as an order selector for a grocery store chain, which required manual labor and constant lifting. The court concluded that these restrictions did *not* mean that the plaintiff could not perform a class of jobs or broad range of jobs. Interestingly, the court did not find persuasive the plaintiff's evidence that her restrictions would keep her from working for the U.S. Postal Service, or from caring for her children.

On the other hand, in Depaoli v. Abbott Laboratories, 140 F.3d 668 (7th Cir. 1998), the court analyzed whether the employee's tendinitis, which precluded her from working in jobs involving repetitive hand motions, substantially limited a class or broad range of job. The court found that the restrictions precluded the employee from "a wide group of jobs in the Chicago area economy: virtually any assembly

line job that required repetitive movement. Similarly, in Wellington v. Lyon County School District, 187 F.3d 1150 (9th Cir. 1999), the court found that a maintenance man with carpal tunnel syndrome was substantially limited in working since he could not perform jobs in construction, maintenance, or plumbing. The court stated that given the plaintiff's limited education and skills, he was significantly restricted in working. In Snyder v. Fry's Food Stores of Arizona, Inc., 1999 U.S. App. LEXIS 29782 (9th Cir. 1999)(unpublished), the court also concluded that the plaintiff may have been substantially limited in working. The court noted that the plaintiff had only a high-school education, had always been a heavy laborer, and was now "severely restricted in his ability to perform repetitive activities and heavy lifting." The court noted that the plaintiff may be "significantly restricted from all heavy-labor jobs."

In Seaborn v. Florida, 143 F.3d 1405 (11th Cir. 1998), the court found that the plaintiff's pseudofolliculitis barbae, which causes skin lesions after shaving, did not substantially limit the major life activity of working. At least one court has held that sensitivity to secondhand smoke might qualify an individual as substantially limited in working. In Homeyer v. Stanley Tulchin Associates, Inc., 91 F.3d 959 (7th Cir. 1996), the court held that an individual with severe allergies triggered by environmental tobacco smoke might be substantially limited in working depending on the actual facts about the availability of alternative workplaces in the geographic area (for example, whether such places are sufficiently smoke-free, whether they are compatible with the plaintiff's "training, skills, or expectations").

Courts have also found that an individual's ability to work only 40-hour workweeks does not necessarily mean that the individual is substantially limited in working. For example, as noted earlier, in Vonderheide v. U.S. Post Office, 1998 U.S. App. LEXIS 16885 (6th Cir. 1998)(unpublished), the plaintiff was unable to work more than 40-hour workweeks because of his organic brain syndrome. The court found that the plaintiff was not substantially limited in working since "most people work 40 hours per week. If [the plaintiff] is disabled, then so, apparently, is the majority of the American workforce." See also Tardie v. Rehabilitation Hospital of Rhode Island, 168 F.3d 538 (1st Cir. 1999)(individual was not substantially limited in working simply because she could not work more than 40 hours per week); Berg v. Norand Corp., 169 F.3d 1140 (8th Cir. 1999)("being limited to a 40- to 50-hour work week" does not substantially limit the major life activity of working). On the other hand, in Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, rehearing denied, 1999 U.S. App. LEXIS 25675 (8th Cir. 1999), the court held that a plaintiff's limitation of 35-40 hours per week with no more than three consecutive work days could be a substantial limitation in working.

A large number of other cases have found that plaintiffs were *not* substantially limited in a class/broad range of jobs, such as Posey v. E.I. DuPont de Nemours and Co., 1999 U.S. App. LEXIS 4742 (4th Cir. 1999)(unpublished)(inability to perform shift work, or to stand/walk for extended periods of time (because of lupus) is not a substantial impairment in working); Deas v. River West, 152 F.3d 471 (5th

Cir. 1998)(being regarded as unable to work in a substance abuse clinic because of epilepsy was not a substantial limitation in working; rather such employment "required a certain level of vigilance that an individual suffering from seizures would be unable to provide"); Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499 (7th Cir. 1998)(psychotherapist with Attention Deficit Hyperactivity Disorder who could not quickly dictate notes for transcription did not show substantial limitation in working; court stated that this may have been special requirement of her employer and may not even be required by other employers of psychotherapists); Gutridge v. Clure, 153 F.3d 898 (8th Cir. 1998)(individual with carpal and cubital tunnel syndromes who could not be a Computerland service technician was not substantially limited in working; his particular job was different from other technician jobs because of Computerland's on-site repair business which required unassisted lifting); Talamanda v. Kentucky Fried Chicken, Inc., 140 F.3d 1090 (7th Cir. 1998)(inability to work at front counter of fast food restaurant -- because of missing teeth -- was not a class or broad range of jobs); Baulos v. Roadway Express, Inc., 139 F.3d 1147 (7th Cir. 1998)(inability to drive only "sleeper" trucks due to sleep disorder was not a disability); Witter v. Delta Air Lines, Inc., 138 F.3d 1366 (11th Cir. 1998)(inability to perform "piloting" jobs was "too narrow a range of jobs" to be a "class of jobs;" rather, a "class" would have to include piloting jobs, as well as non-piloting jobs involving similar training and skills); McIntosh v. Brookdale Hospital Medical Center, 1997 U.S. App. LEXIS 27162 (2d Cir. 1997)(unpublished)(even if employee's hypertension was "situationally induced" when she worked for the employer, that evidence showed "merely that [she] was somehow restricted from working at Brookdale Hospital, which alone is insufficient to establish a disability"); Woods v. Tyler Mountain Co., Inc., 1996 U.S. App. LEXIS 288 (8th Cir. 1996)(unpublished)(employee, whose broken arm resulted in permanent restrictions in lifting, reaching, and moving, was unable to perform his particular job as a general manager at the plant; court noted that he was not restricted in a class or broad range of jobs as evidenced by fact that he was employed as a manager for another manufacturer); MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437 (10th Cir. 1996)(plaintiff, because of his eye impairment, was unable to taxi aircraft; court held "taxiing aircraft" is not a class of jobs or a broad range of jobs); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995)(plaintiff, a welder, suffered an arm injury and could no longer climb; court concluded that the inability to climb restricted plaintiff only in the limited welding jobs that required substantial climbing); and Heilweil v. Mt. Sinai Hospital, 32 F. 3d 718 (2d Cir. 1994), cert. denied, 513 U.S. 1147 (1995) (where hospital worker's asthma was triggered only by one specific site -- the hospital blood bank where she worked -- she was not substantially limited in a class or broad range of jobs).

On the other hand, some courts have stated that certain job categories *are* a class or broad range of jobs. For example, in Shiplett v. Amtrak, 1999 U.S. App. LEXIS 14004 (6th Cir. 1999)(unpublished), the court stated that being unable to perform "safety-sensitive jobs" (because of the side effects of medication) would be substantially limited in a "broad range" of jobs. In Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1998), the court concluded that "supervisory" jobs would be a class of jobs. In

Cochrum v. Old Ben Coal Co., 102 F.3d 908 (7th Cir. 1996), the court considered whether a "roof bolter" with a shoulder injury was substantially limited in a class or broad range of jobs when he could not perform "overhead work, heavy lifting, or pulling and pushing out from his body." The court stated that this injury *could* pose a substantial limitation in working because it might apply to a broad range of jobs, including any position at the coal mine "or in related work such as construction." Likewise, in Gilday v. Mecosta County, 124 F.3d 760 (6th Cir.), amended, 7 AD Cases 1268 (6th Cir. 1997), the court noted that where the plaintiff's non-insulin dependent diabetes caused him to become "so irritable that he could not get along with co-workers and others," he was substantially limited in working. The court reasoned that "[t]he ability to get along with coworkers and customers is necessary for all but the most solitary of occupations."

Whether Inability to Work for One Supervisor is a Class/Broad Range of Jobs

Courts also have considered whether mental impairments triggered by personality conflicts with an employee's supervisor are disabilities. For example, as noted earlier, in Schneiker v. Fortis Insurance Co., 2000 U.S. App. LEXIS 90 (7th Cir. 2000), the plaintiff argued that she was substantially limited in working because her depression was triggered by stress. However, according to the court, the evidence showed only that the plaintiff could not work for her particular supervisor. Specifically, the court noted that the plaintiff's "reasonable accommodation" was that she be removed "from a supervisor whose supervisory techniques were the known cause of the stress she experienced." As a result, the court determined that the employee was not substantially limited in a class or broad range of jobs. Likewise, in Greer v. Emerson Electric Co., 185 F.3d 917 (8th Cir. 1999), the court stated that even if the employee's impairments made her unable to work with her particular supervisor, "this does not mean that Greer was substantially limited in the major life activity of working." In Weiler v. Household Finance Corp., 101 F.3d 519 (7th Cir. 1996), the plaintiff alleged that her depression and anxiety was triggered by stress caused by her supervisor. The court noted that "[t]he major life activity of working is not 'substantially limited' if a plaintiff merely cannot work under a certain supervisor because of anxiety and stress." Instructively, the lower court stated that "[t]he ADA does not protect people from the general stresses of the workplace. Everyone has encountered difficult situations in the working environment. Being unwilling or even unable to work with a particular individual simply is not the equivalent of being 'substantially limited' in . . . working." The lower court also stated that a "personality conflict" is not a disability. In Siemon v. AT&T, 113 F.3d 1175 (10th Cir. 1997), the court stated that the plaintiff's inability to work under a few supervisors was not a disability because it did "not prevent him from performing a class of jobs or a broad range of jobs;" rather, it only precluded him from working with a 150-employee group at one particular AT&T location. Likewise, in Gaul v. AT&T, Inc., 955 F. Supp. 346 (D.N.J. 1997), aff'd, 134 F.3d 576 (3d Cir. 1998), the court stated that when an employee "merely

needed to transfer away from [his supervisor] to accommodate" his depression and stress disorders, he is not covered under the ADA. Similarly, in Vega v. Adult Probation Dept. of Cook County, 1999 U.S. App. LEXIS 34579 (7th Cir. 1999)(unpublished), the employee claimed that his "situational anxiety secondary to job related stress" substantially limited his ability to work. The court, however, stated that situational anxiety "is by definition 'situational': it is linked to the particular tasks and supervisors encountered in a particular job. A condition that prevents a person from doing a single job (or just working with one supervisor) does not meet the regulation's definition of a disability."

Whether Inability to Work in a Particular Building is a Class/Broad Range of Jobs

The inability to work in one particular building is generally not considered a substantial limitation in working. In Mobley v. Board of Regents of University System of Georgia, 924 F. Supp. 1179 (S.D. Ga. 1996), the court considered the claim of an employee with asthma who stated that she was substantially limited in working because she could not work in a particular college building because of its poor air quality. The court, however, concluded that since the plaintiff was precluded from working only in the particular building, she was not prevented from "performing a broad class of jobs" or even "significantly impair[ed] in her ability to teach" at the college. The court further noted that far from being restricted in a class or broad range of jobs, the plaintiff "is not even restricted from performing a single, particular job: she is only restricted from working a single, particular job at a single, particular location." Similarly, in Gilbert v. Storage Technology Corp., 1996 U.S. App. LEXIS 26656 (10th Cir. 1996)(unpublished), the court noted that an employee, whose asthma was triggered by work at one particular facility, did not have an ADA-covered disability.

Whether, in Examining Substantial Limitation in Working, Court will Examine Jobs Individual Can Perform or Merely Those Jobs Individual Cannot Perform

The Supreme Court has indicated that, in determining whether someone is substantially limited in working, it will examine not only the jobs an individual cannot perform, but also the jobs an individual can still perform. The issue is extremely important because many people who cannot perform a class or a broad range of jobs *would* be able to perform many other jobs. Specifically, in Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999), the Court stated that "[i]f jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available," or "if a host of different types of jobs are available," then someone is not precluded from a class or broad range of jobs. In Sutton, the Court concluded that there were "a number of other positions utilizing petitioners' skills, such as regional pilot and pilot instructor," even if the plaintiffs were unable to be "global airline pilots" because of their vision impairments. Likewise, in

Murphy v. United Parcel Service, Inc., 119 S.Ct. 2133 (1999), the plaintiff, a mechanic, was fired because he did not satisfy Department of Transportation health standards for commercial drivers because of his high blood pressure. In holding that the plaintiff was not substantially limited in working, the Court noted that there were many other jobs the plaintiff could perform, including a number of mechanic jobs not requiring DOT certification. The court pointed out that the plaintiff in fact "secured another job as a mechanic shortly after leaving UPS."

The Sutton and Murphy cases clearly seem to reject the EEOC's position that one must simply look at whether the individual *cannot* perform a class of jobs or broad range of jobs. See EEOC Compliance Manual § 902.4 at p. 24; EEOC's Amicus Curiae Brief in McKay v. Toyota Motor Manufacturing USA, No. 95-5617 ((Brief filed in Sixth Circuit, 4/22/97) at p. 6 ("The inquiry into whether an ADA claimant is limited in working turns on the number or range of jobs from which she is disqualified, not the number or range of jobs she is still able to perform.")).⁴

The Sutton case appears to confirm the approach taken by some courts which have analyzed whether the individual *can* perform a number of jobs. For example, in Waincott v. Medusa, 1999 U.S. App. LEXIS 6273 (6th Cir. 1999)(unpublished), the court found that a quarry driver with a back impairment was not substantially limited in working just because he could not lift more than fifty pounds, drive on rough surfaces, or bend repetitively. The court noted that the employee "has engaged in a number of physical activities, including raising and harvesting tobacco, repairing various engines, and doing odd jobs." The court further stated that the plaintiff's claim that he was unable to perform 18,000 jobs was not a substantial limitation in working since over 90,000 jobs remained that the plaintiff could perform. In Lamb v. Bell County Coal Corp., 1999 U.S. App. LEXIS 22201 (6th Cir. 1999)(unpublished), the plaintiff claimed that he was substantially limited in working, since he could not perform "medium and heavy occupations" and "would be eliminated from employment in about 65 percent of the jobs that he could have done before sustaining his injury." However, the court noted that the plaintiff was still "capable of working at jobs that require moderate to low levels of physical activity," and that he "has had

⁴ A number of courts had followed EEOC's approach by analyzing whether the individual was *disqualified* from a class or broad range of jobs. For example, in Dalton v. Subaru-Isuzu, 141 F.3d 667 (7th Cir. 1998), the court looked at the percentage of jobs from which the plaintiffs were *restricted* in analyzing whether they were substantially limited in working. The court concluded that plaintiffs -- who were restricted from various percentages of jobs in their county (ranging from 35% to 89%) -- could be considered substantially limited in working. In Webb v. Garelick Manufacturing Co., 94 F.3d 484 (8th Cir. 1996), the court held that a court should analyze whether an individual could *not* perform a class of jobs, taking into account his "expertise, background, and job expectations." The court expressly rejected the approach of analyzing whether the individual *could* perform other jobs in the labor pool.

little trouble performing work that requires him physically to exert himself," such as landscaping work and work as a deputy sheriff. In Jowers v. GTE California Inc., 1999 U.S. App. LEXIS 31560 (9th Cir. 1999)(unpublished), the court held that the plaintiff was not substantially limited in working, noting that he "received at least ten other job offers to work as a mechanic," and he admitted that he could perform his job. As noted earlier, in Tardie v. Rehabilitation Hospital of Rhode Island, 168 F.3d 538 (1st Cir. 1999), the court held that the individual was not substantially limited in working simply because she could not work more than 40 hours per week. The court reached this conclusion after noting that "there are vast employment opportunities available which require only 40-hour work weeks." Also as noted above, in Shipley v. City of University City, 195 F.3d 1020 (8th Cir. 1999), the court considered whether an individual was substantially limited in working where he could not be a firefighter. In addition to noting that being a firefighter is not a class or broad range of jobs, the court stated that despite his injury, the plaintiff "was able to perform a variety of jobs." In Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997), the court determined that the employee was not substantially limited in working where "she was able to perform other jobs," she "had worked overtime preceding her discharge," and the employee had "testified that she believed she was capable of doing other jobs available to her at Marathon." In McKay v. Toyota Motor Manufacturing USA, 878 F. Supp. 1012, 1015 (E.D. Ky. 1995), aff'd, 110 F.3d 369 (6th Cir. 1997), a former automotive assembler argued that her carpal tunnel substantially limited her in a broad range of jobs because she could not perform many manual labor jobs. The lower court stated that the plaintiff was not substantially limited in working because "she is qualified for numerous positions not utilizing the skills she learned as an automobile assembler." Likewise, in Soileau v. Guilford of Maine, 5 AD Cases 1036 (D. Me.1996), aff'd, 105 F.3d 12 (1st Cir. 1997), the court noted that to be substantially limited in working, an individual must be precluded from working generally. To this end, the court stated that if the plaintiff "is in fact capable of performing other jobs, then he is not substantially limited in his ability to work and thus not disabled under the ADA." In Zirpel v. Toshiba America Information Systems, Inc., 111 F.3d 80 (8th Cir. 1997), the court noted that the plaintiff's panic disorder did not substantially limit her ability to work in light of the fact that she "has had three jobs since her discharge, and she currently holds a quality control position nearly identical to the one she held at Toshiba." See also Pritchard v. Southern Company Services, 92 F.3d 1130 (11th Cir. 1996), cert. denied, 117 S. Ct. 2453 (1997)(appeals court appeared to agree with district court's conclusion that plaintiff would not be substantially limited in working just because she could not work in the nuclear field, if she *could* work in a number of other jobs at the employer "and elsewhere"); Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), cert. denied, 1998 U.S. LEXIS 963 (1998)(to be covered as substantially limited in working, an individual must be "foreclose[d] generally [from] the type of employment involved"); Hileman v. City of Dallas, 115 F.3d 352 (5th Cir. 1997)("impairment must substantially limit employment in general" and it is the plaintiff's "burden to prove that there are no other satisfactory employment opportunities available to her that could accommodate her bowel movement schedule"); Van Sickle v. Automatic Data Processing, Inc., 1998 U.S. App. LEXIS 30104 (6th Cir.

1998)(unpublished)(employee with cosmetic disfigurement was not regarded as substantially limited in working because the employer did not regard him as "foreclosed generally [from] the type of employment involved").

In Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, rehearing denied, 1999 U.S. App. LEXIS 25675 (8th Cir. 1999), the court seemed to take an intermediate approach. The court stated that "[f]inding that an individual is substantially limited in his or her ability to work requires a showing that his or her overall employment opportunities are limited." In this case, the court found that the plaintiff may have shown this, given that she lived in a rural South Dakota town, she worked for Pizza Hut for almost 20 years, and her training and experience were in restaurant management. The plaintiff also presented evidence that "were 28,000 available jobs in South Dakota that fit her vocational profile, but that she is eligible for only about 1,300 of these jobs due to her functional limitations," a "91 percent reduction in employability, and a 95 percent reduction in labor market access based on actual positions available."

Some courts have held that if an individual continued to perform his/her job despite a medical condition, s/he will not be considered substantially limited in working. For example, in Long v. City of Leawood, 2000 U.S. App. LEXIS 273 (10th Cir. 2000)(unpublished), the court affirmed the lower court's determination that since the plaintiff "was able to perform his job as a maintenance worker (despite his restrictions), he was not substantially limited in "working." In Standard v. ABEL Services, Inc., 161 F.3d 1318 (11th Cir. 1998), the court noted that where the plaintiff admitted that he could fully perform his job, he could not argue that he was substantially limited in working. Similarly, in Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047 (5th Cir. 1998), the court analyzed whether the plaintiff's mental impairment substantially limited the major life activity of working, since it allegedly caused "crying when faced with stress, loss of temper, and an inability to deal with customer relation issues." The court found that the impairment did not substantially limit the employee, in light of the fact that his performance level was better than his peers.

Whether Particular Conditions are Disabilities

AIDS

Nearly all authority indicates that someone with HIV has a disability. For example, in Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998), the U.S. Supreme Court found that the plaintiff with asymptomatic HIV had a disability because she was substantially limited in the major life activity of

reproduction. Specifically, the court found that HIV substantially limits reproduction because of the risk of transmitting the disease to a sexual partner and the risk of infecting a child during gestation and childbirth. The EEOC has consistently taken the position that HIV infection (including asymptomatic HIV) is "inherently substantially limiting." Appendix to 29 C.F.R. § 1630.2(j); EEOC Compliance Manual § 902.4(c) at p. 21. Indeed, in passing the ADA, Congress stated that "a person infected with [HIV] is covered" under the ADA "because of a substantial limitation to procreation and intimate sexual relationships." S. Rep. No. 116, 101st Cong., 1st Sess. 22 (1989).

Some courts have suggested that other major life activities may be substantially limited by asymptomatic HIV. For example, in Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763 (E.D. Tex. 1996), the court stated that, "[w]ithout question, AIDS is a per se disability." It also stated its belief that asymptomatic HIV also is a per se disability; as noted earlier, it stated that, "[b]eyond the obvious impairment on the ability to procreate, even an asymptomatic HIV-positive individual cannot travel freely. Such an individual must be always mindful of exposure to bacterial infection and fungi or even places requiring vaccinations." Id. at n.37.

However, some courts have refused to hold that asymptomatic HIV is *always* a disability. In Ennis v. National Association of Business and Educ. Radio, 53 F.3d 55 (4th Cir. 1995), the employee claimed that she was discriminated against because she had an infant son with HIV (i.e., a "relationship discrimination" case). The court noted that an infant does not engage in reproduction/procreation; therefore, asymptomatic HIV does not substantially limit him in any major life activity.

Insulin-Dependent Diabetes

The EEOC, as well as a majority of courts, traditionally found that someone with insulin-dependent diabetes has a disability. See, e.g., Appendix to 29 C.F.R. § 1630.2(j)(EEOC stated that an insulin-dependent diabetic would be covered under the ADA because, without insulin, s/he "would lapse into a coma" and would be unable to perform major life activities); Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998)(analyzing plaintiff's condition "without regard . . . to the fact that he is apparently able to control the effects of the disease with insulin. That he is 'perfectly healthy' when he is taking insulin is utterly irrelevant to the assessment of disability for the purposes of the ADA"); Arnold v. United Parcel Service, Inc., 135 F.3d 1089 (1st Cir. 1998)(same).

However, these determinations were made before the Supreme Court's decision in Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999), which (as noted earlier) held that an individual's *medicated* condition should be analyzed to see if s/he is substantially limited in a major life activity. After Sutton,

courts need to analyze whether the individual is substantially limited in a major life activity after s/he takes the insulin. Some courts already had been using this analysis and had reached different results as to whether an individual's insulin-dependent diabetes was a disability. For example, as noted above, in Deckert v. City of Ulysses, 4 AD Cases 1569, 1573 (D. Kan. 1995), aff'd on other grounds, 1996 U.S. App. LEXIS 33969 (10th Cir. 1996)(unpublished), the court rejected the EEOC's instructions to examine the person without reference to medication. The court concluded that there was no evidence that the plaintiff's insulin-dependent diabetes impaired any major life activities, instead finding that the plaintiff was leading a "fit and active life." Similarly, in Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, sum. jud. granted in part, 851 F. Supp. 815 (N.D. Tex. 1994), the court refused to find that insulin-dependent diabetes is a per se disability. However, in this case, the court found the plaintiff to be substantially limited in the major life activities of *eating* and *sleeping*.

Nicotine Addiction

Clearly, not *all* smokers will be covered under the ADA. It seems clear, however, that a smoker could only be covered if s/he has an impairment, such as a nicotine addiction, and if the addiction substantially limits a major life activity.

There has not been a great deal of litigation concerning whether smokers are protected by the ADA. However, it is likely that the issue *will* come up in cases where an employer refuses to hire smokers, charges smokers more for health insurance, or enforces a "no-smoking" rule. In one Michigan case where the court looked to the ADA for guidance, the court concluded that the plaintiff's alleged "addiction to nicotine" was not a disability because it did not substantially limit any major life activity. Stevens v. Inland Waters, Inc., 220 Mich. App. 212 (Mich. App. 1996). Interestingly, the U.S. Supreme Court refused to hear a case involving smokers who were rejected from jobs because they had used tobacco within the last year. In that case, Kurtz v. North Miami, No. 95-545 (Fl. 1996), the state court said the rejections were lawful because they were based on evidence concerning worker productivity, absenteeism and public health objectives.

Obesity

The EEOC has said that weight within the normal range is not an impairment. Appendix to 29 C.F.R. § 1630.2(h). In addition, the EEOC has stated that "except in rare circumstances, obesity is not considered a disabling impairment." Appendix to 29 C.F.R. § 1630.2(j). Courts have agreed with this position. For example, in Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997), the court considered whether

police officers were covered under the ADA when they did not meet the state's weight limits or fitness standards. The court held that the officers did not have impairments, but rather had "certain physical characteristics -- either being marginally above a weight limit or marginally below a fitness standard -- which Ohio has deemed inconsistent with the job requirements of certain law enforcement positions." Similarly, in Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997), the court analyzed whether a firefighter, who was disciplined for exceeding fire department weight guidelines, was "regarded as" disabled. The court concluded that the employee had not alleged that the City regarded him as "suffering from a physiological weight-related disorder," but rather as "failing to meet a general weight standard." The court noted that a plaintiff "must allege that the employer believed, however erroneously, that the plaintiff suffered from an 'impairment' that, if it truly existed, would be covered" under the ADA. In Walton v. Mental Health Association of Southeastern Pennsylvania, 168 F.3d 661 (3rd Cir. 1999), the court likewise noted that for obesity to be covered under the "regarded as" category, the plaintiff must show that the employer perceived the obesity as substantially limiting a major life activity.

However, *severe or morbid obesity* -- defined as twice the normal body weight -- has been found to be a disability in certain instances. For example, in Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993), the plaintiff was 5'2" and weighed 320 pounds. The court said that "morbid obesity" is itself an impairment. Moreover, the court found that the employer regarded the plaintiff as having a disability because the employer believed the obesity "foreclosed a broad range of employment options in the health care industry, including positions such as community aide, nursing home aide, hospital aide, and home healthcare aide." Importantly, the court found that mutability of the condition is irrelevant to whether the individual has a disability.

Similarly, in EEOC v. Texas Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996), the court found that the employer regarded the plaintiff as disabled when it refused to hire her to be a bus driver because of her obesity. In that case, the employer relied on a doctor's conclusion that the plaintiff had limited mobility because of her weight and could not obtain DOT certification. The court criticized the doctor's cursory evaluation of the plaintiff, and noted that DOT certification does not provide blanket exclusions based on weight. The court specifically noted that the employer's "blind reliance on a very limited medical examination" by a health professional was "misplaced and cannot be used as a justification to circumvent the anti-discrimination mandate of the ADA." Id. at 889.

Drug Abuse

To be covered under the ADA, the individual must have been (or be "regarded as") a drug *addict*, not simply a casual drug user. This is because the individual must have an impairment, and drug *addiction* is

considered the substantially limiting impairment. See EEOC's Technical Assistance Manual § 8.5; Hartman v. City of Petaluma, 841 F. Supp. 946, 949 (N.D. Cal. 1994)(there must be "some indicia of dependence" to be considered substantially limiting). Therefore, even the EEOC has stated that if an individual has used drugs only casually, s/he is not protected under the ADA. Likewise, if the employer only regards the individual as a casual user -- not an addict -- the individual would not be protected under the "regarded as" section of the ADA. EEOC Compliance Manual § 902.6 at pp. 38-39.

The law specifically *excludes* individuals who currently use illegal drugs (when the employer's action is based on the drug use). 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3(a); See, e.g., Shafer v. Preston Memorial Hospital Corp., 107 F.3d 274 (4th Cir. 1997)(current illegal drug user is not covered). Therefore, an employee who illegally uses drugs, either because s/he is a casual user or because s/he is an addict, is not protected by the ADA if the employer acts on the basis of the illegal drug use. See H. Rep. 485, 101st Cong., 2d Sess., pt. 3, at 47 (1990).

Interestingly, one Court of Appeals has held that a recovering drug addict does not have a per se disability. In Zenor v. El Paso Healthcare System, Ltd., 176 F.3d 847 (5th Cir. 1999), the court held that, in order to have a protected "disability," a recovering drug addict must show that the condition "substantially limits, or is perceived by his employer as substantially limiting, his ability to perform a major life function."

Alcoholism

Courts have usually held that alcoholism is a covered disability. For example, in Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996), the court flatly stated (without discussion) that "[a]lcoholism is a covered disability." See also Adamczyk v. Baltimore County, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998)(unpublished)(alcoholism is covered under the Rehabilitation Act); Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir.), cert. denied, 118 S. Ct. 441 (1997)(where plaintiff could show she was regarded as being an alcoholic, she was "disabled within the meaning of the ADA"); Senate Sergeant-at-Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996)("it is well-established that alcoholism meets the definition of a disability"). Unlike a drug abuser who currently uses drugs, an alcoholic who currently uses alcohol is *not* automatically excluded. See Mararri v. WCI Steel, Inc., 130 F.3d 1180 (6th Cir. 1997) (the ADA "treats drug addiction and alcoholism differently").

This appears to be based on the ADA's legislative history in which Congress wrote that alcoholism is a protected disability. See H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 51 (1990) and H. Rep. No. 485, 2d Sess., pt. 3, at 28 (1990). Courts have generally held that although alcoholism is covered, an employer can enforce its workplace rules concerning alcohol use and influence. Therefore, most ADA claims involving alcoholics who were terminated for misconduct have failed.

Alcoholism claims also arise under the "regarded as" prong. For example, as noted above, in Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir.), cert. denied, 118 S. Ct. 441 (1997), the court found that the plaintiff might be covered because she was regarded as being an alcoholic. The court pointed to evidence that: (1) the employer offered the plaintiff "the choice between entering a chemical-abuse treatment program or being fired," and (2) the employer knew that the plaintiff "had missed a day of work as a result of her drinking." In Ackridge v. Department of Human Services, City of Philadelphia, 3 AD Cases 575, 576 (E.D. Pa. 1994), the plaintiff claimed that she was discriminated against because she was incorrectly regarded as an alcoholic and/or a substance abuser. The court noted that if the plaintiff was in fact regarded as a drug abuser (and if she was not using drugs), or if she was regarded as an alcoholic, she might have a valid ADA claim.

Some courts, however, have taken a different position concerning whether alcoholism is always a covered disability. In Burch v. Coca-Cola, 119 F.3d 305 (5th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998), the court held that alcoholism is not a per se disability. In that case, the court found that the plaintiff's alcoholism was not a covered disability because it did not substantially limit any of his major life activities. In Wallin v. Minnesota Department of Corrections, 153 F.3d 681 (8th Cir. 1998), the court also suggested that it would analyze alcoholism on a case-by-case basis. Specifically, the court noted that the plaintiff had not presented evidence "that his alcoholism impaired a major life activity." The court stated, however, that it did not need to decide this issue since the case was being dismissed for other reasons. Similarly, in Avery v. Omaha Public Power District, 1999 U.S. App. LEXIS 17699 (8th Cir. 1999)(unpublished), the court found that regarding an individual as having alcoholism does not necessarily mean that the individual is regarded as disabled. Rather, the individual must still show that the employer regarded the alcoholism as substantially limiting a major life activity.

Of course, an individual must do more than just *allege* alcoholism to succeed with an ADA claim. In Schneiker v. Fortis Insurance Co., 2000 U.S. App. LEXIS 90 (7th Cir. 2000), the plaintiff alleged that she had alcoholism; however, the court determined that she failed to produce any evidence that she actually suffered from alcoholism.

Infertility

In Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998), the U.S. Supreme Court held that reproduction is a major life activity. Therefore, infertility resulting from an impairment would likely be an ADA-covered disability. This issue generally comes up in ADA cases when an individual claims that the employer will not give a reasonable accommodation -- such as time off -- for fertility treatments, or if the employer's health insurance plan has limits on fertility treatments.

Pregnancy and Pregnancy-Related Impairments

The EEOC has specifically stated that "conditions, such as pregnancy, that are not the result of a physiological disorder" are "not impairments." 29 C.F.R. § 1630.2(i), app., EEOC Compliance Manual § 915.002 at 902-9. Accordingly, the EEOC would not consider a normal pregnancy to be a disability. The agency has noted that, "[a]lthough other statutes may use the term 'disability' when referring to pregnancy, pregnancy is not a 'disability' for purposes of the ADA." EEOC Compliance Manual § 915.002 at 902-9 n.10.

Nearly all courts that have considered the issue have concluded that pregnancy itself is not an impairment and, therefore, not a disability. For example, in Wenzlaff v. Nationsbank, 940 F. Supp. 889 (D. Md. 1996), the court stated that "[w]ith near unanimity, federal courts have held that pregnancy is not a 'disability' under the ADA." See also Johnson v. A.P. Products, Ltd., 934 F. Supp. 625 (S.D.N.Y. 1996)(neither plaintiff's "pregnancy nor its complications are a disability under the ADA"); Jessie v. Carter Health Care Center, Inc., 926 F. Supp. 613 (E.D. Ky. 1996)(since "[n]o unusual circumstances exist with respect to [plaintiff's] pregnancy," it is "not a 'physical impairment' under the ADA"); and Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465 (D. Kan. 1996)("pregnancy and related medical conditions do not, absent unusual circumstances, constitute a 'physical impairment' under the ADA. Accordingly, pregnancy and related medical conditions are not 'disabilities' as that term is defined by the ADA.").

However, at least one federal court has held that pregnancy itself "is a recognized disability under the Americans with Disabilities Act." Chapsky v. Baxter V. Mueller Div., 4 AD Cases 1047 (N.D. Ill. 1995). Noting that other courts have held "reproduction" to be a major life activity, the Chapsky court concluded that pregnancy must, therefore, be a disability. The Chapsky decision has been heavily criticized in later cases. See, e.g., Wenzlaff v. Nationsbank, *supra* ("Chapsky is "aberrant among the

body of case law"); Gudenkauf v. Stauffer Communications, *supra* (court "is not persuaded by Chapsky" which "neither cited nor discussed the EEOC's interpretative guidance").

Although pregnancy itself should not be considered a disability, if someone has an impairment -- such as hypertension -- *as a result of* a pregnancy, the EEOC would analyze whether that impairment rises to the level of a disability (*i.e.*, whether it substantially limits a major life activity). EEOC Compliance Manual § 915.002 at 902-9-10. Courts have agreed that complications and conditions resulting from pregnancy could be impairments. In Cerrato v. Durham, 941 F. Supp. 388 (S.D.N.Y. 1996), the court noted that the plaintiff's spotting, leaking, cramping, dizziness, and nausea might be considered impairments that substantially limit a major life activity. Similarly, in Patterson v. Xerox Corp., 901 F. Supp. 274 (N.D. Ill. 1995), the court stated that severe back pain resulting from pregnancy could be a substantially limiting impairment. Likewise, in Garrett v. Chicago School Reform Board of Trustees, 6 AD Cases 147 (N.D. Ill. 1996), an ADA Title III case, the court held that morning sickness associated with pregnancy could be a substantially limiting impairment.

Carpal Tunnel Syndrome

Carpal tunnel syndrome is treated the same as any other impairment. Again, the key question is whether the particular individual is substantially limited in a major life activity because of the carpal tunnel. Courts finding that the individual is substantially limited typically determine that the individual has a disability. For example, in Quint v. A.E. Staley Manufacturing Co., 172 F.3d 1 (1st Cir. 1999), the court held that the plaintiff's carpal tunnel could be a covered disability because she was unable to lift heavy objects and perform repetitive manual tasks. The court held that these restrictions could translate across a broad spectrum of physically demanding jobs. As noted above, in Miles v. General Services Administration, 5 AD Cases 351, 355 (E.D. Pa. 1995), the individual had carpal tunnel, as well as some other impairments. The court found that the plaintiff was substantially limited in his ability to perform manual tasks and to work, and was therefore covered under the law. *See also* EEOC v. Joslyn Manufacturing Co., 5 AD Cases 1220 (N.D. Ill. 1996)(plaintiff's carpal tunnel was a disability because employer regarded him as unable to perform a broad range of jobs involving "repetitive motions of bilateral hands"); Rosamond v. Pennaco Hosiery, Inc., 942 F. Supp. 279 (N.D. Miss. 1996)(under the ADA, "a person need not have a 'traditional' handicap; carpal tunnel can be a disability if it substantially limits any major life activity"); Feliberty v. Kemper Corp., 98 F.3d 274 (7th Cir. 1996)(employee with carpal tunnel had an ADA-covered disability).

On the other hand, some courts have found that the individual's carpal tunnel did not substantially limit any major life activities. For example, as noted above, in McKay v. Toyota Motor Manufacturing USA, 878 F. Supp. 1012, 1015 (E.D. Ky. 1995), aff'd, 110 F.3d 369 (6th Cir. 1997), the court rejected the plaintiff's arguments that her carpal tunnel substantially limited her in a class or broad range of jobs. In Shpargel v. Stage & Co., 914 F. Supp. 1468 (E.D. Mich. 1996), the court found that the plaintiff's carpal tunnel did not substantially limit his ability "to perform manual tasks or any other major life activity" since he could slice and chop foods, install locks, and manually repair items for his employer for eight hours each day.

Cancer

Many courts have held that individuals with cancer are covered under the ADA. This would be because the cancer currently substantially limits a major life activity, or because the individual has a record of such a limitation. However, this is not always the case. In Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996), the court found that a woman who was treated for breast cancer with daily radiation did not have a disability under the ADA. The court found that she was not limited in any major life activity because of the cancer; therefore, she was not protected. Similarly, in Innes v. Mechatronics, Inc., 1997 U.S. App. LEXIS 18000 (9th Cir. 1997)(unpublished), the court held that where, despite side effects from cancer treatment, an employee "was able to perform all of his job duties while undergoing treatment," he did not have a disability.

Monocular Vision

Courts have been inconsistent on whether an individual's monocular vision is a disability. For example, in Albertsons, Inc. v. Kirkingburg, 119 S.Ct. 2162 (1999), the Supreme Court stated that "people with monocular vision 'ordinarily' will meet the Act's definition of disability." However, the Court noted that in determining whether an individual's monocular vision is "substantially limiting," it will analyze the individual's ability *with* any behavioral modifications that the individual has undertaken to compensate for his impairment. In Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), cert. denied, 118 S. Ct. 693 (1998), the court found that a police officer had a disability because he was blind in one eye. Specifically, the court stated that the employee was substantially limited in seeing, since "[t]he manner in which Doane must sense depth and use peripheral vision is significantly different from the manner in which an average, binocular person performs the same visual activity." On the other hand, in Parker v. Geneva Enterprises, Inc., 1998 U.S. App. LEXIS 4980 (4th Cir. 1998)(unpublished), the court held that a used car salesman with one eye did not have an ADA-covered disability. Similarly, in Still v. Freeport-

McMoran, 120 F.3d 50 (5th Cir. 1997), the court held that a safety equipment clerk who was blind in one eye did not have a disability. The court noted that although his peripheral vision was limited, he could still perform "normal daily activities," such as driving cars and motorcycles, and shooting a gun.

Inability to Commute

Neither the EEOC nor courts have addressed whether "commuting" is a major life activity. The issue will be relevant in cases where an individual claims s/he has a disability because of an impairment that makes it difficult or impossible to commute. For example, if someone claims to have a type of claustrophobia which prevents him/her from riding in a vehicle, s/he would logically assert that s/he has a substantially limitation in the major life activity of "commuting." It is possible that since the EEOC has stated that activities like reaching and lifting are major life activities, it would find that commuting is a major life activity; therefore, it could find an impairment that restricts commuting to be a disability.

Inability to Lift

Whether someone who simply cannot lift because of an impairment has an ADA disability revolves around whether lifting is a major life activity. The EEOC and most courts have stated that lifting is a major life activity. Appendix to 29 C.F.R. § 1630.2(i). For example, in Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170 (10th Cir. 1996), the court specifically held "that lifting is a 'major life activity' and that an individual whose ability to lift is substantially impaired qualifies as a disabled person within the meaning of the ADA." In EEOC v. United Airlines, 1999 U.S. App. LEXIS 13347 (10th Cir. 1999)(unpublished), the plaintiff, a customer service representative, could not lift more than twenty pounds because of her back impairment. The court held that she could have a disability under the ADA. Likewise, in Martin v. Lockheed Martin Missiles and Space Co., 1999 U.S. App. LEXIS 15190 (9th Cir. 1999)(unpublished), the court concluded that an individual would be substantially limited in the major life activity of lifting because of a 10-pound lifting restriction. In Woods v. Tyler Mountain Co., Inc., 1996 U.S. App. LEXIS 288 (8th Cir. 1996)(unpublished), the court determined that the plaintiff did not have a disability because, among other things, his "major life activity of lifting has not been substantially impaired." Similarly, in Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996), the court noted that lifting is a major life activity. A number of other courts implicitly or explicitly reached this conclusion, such as Cook v. State of Rhode Island, 10 F.3d 17, 25 (1st Cir. 1993); Taylor v. U.S. Postal Service, 946 F.2d 1214, 1217-18 (6th Cir. 1991); and Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1100 (S.D. Ga. 1995). Of course, the courts look at whether the individual is significantly restricted in lifting compared to an average person in the general population. Haysman, 893 F. Supp. at 1100 (citing 29 C.F.R. § 1630.2(j)). However, there have been instances where some courts have implicitly determined that

lifting is not a major life activity. For example, in Mendoza v. Borden, Inc., 158 F.3d 1171 (11th Cir. 1998), the plaintiff had introduced evidence "showing that she had an impairment that prevented her from lifting objects over five to seven pounds." The court did not even analyze whether she was substantially limited in lifting, instead holding that she was not disabled since she was not substantially limited in the major life activity of working.

Other courts have explicitly or implicitly held that "heavy lifting" is not a major life activity. For example, in Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996), the court noted that the plaintiff's inability to perform the "discrete task" of "heavy lifting" does not render him substantially limited in a major life activity. In Sherrod v. American Airlines, 132 F.3d 1112 (5th Cir. 1998), the court held that the flight attendant's restriction to lifting 45 pounds occasionally and 20 pounds frequently showed "only that she is limited from heavy lifting, not the routine duties of daily living." In Huckans v. U.S. Postal Service, 1999 U.S. App. LEXIS 30755 (10th Cir. 1999)(unpublished), the court noted that a 35 pound lifting restriction "is not an impairment substantially limiting the major life activity of lifting." Likewise, in Gutridge v. Clure, 153 F.3d 898 (8th Cir. 1998), the court noted that a 45-pound lifting restriction is not a significant restriction in lifting. Similarly, in Thompson v. Holy Family Hospital, 121 F.3d 537 (9th Cir. 1997), the court noted that a nurse's 25-pound lifting restriction "does not amount to a substantial limitation on the ability to lift." In Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311 (8th Cir. 1996), the court held that the individual did not have a disability since the only medical limitation from his heart condition was a 25-pound lifting restriction. See also Williams v. Channel Master Satellite Systems, Inc., 101 F.3d 346 (4th Cir. 1996), cert. denied, 117 S. Ct. 1844 (1997)(holding, "as a matter of law, that a twenty-five pound lifting limitation -- particularly when compared to an average person's abilities -- does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity"); Halperin v. Abacus Technology Corp., 128 F.3d 191 (4th Cir. 1997)(employee's twenty pound lifting restriction did not substantially limit any major life activity). Therefore (as noted earlier), according to the court in Snow v. Ridgeview Medical Center, 128 F.3d 1201 (8th Cir. 1997), although lifting is a major life activity, a "general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA."

Restrictions in Breathing

The EEOC's regulations state that breathing is a major life activity. 29 C.F.R. § 1630.2(i). Therefore, according to the EEOC, someone substantially limited in breathing would have a covered disability. Although this has not been heavily litigated, courts seem to agree with the EEOC's position. For example, in Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998), the court stated that breathing is a major life activity. Therefore, an impairment causing a substantial limitation in breathing would be a

disability. Likewise, in Homeyer v. Stanley Tulchin Associates, Inc., 91 F.3d 959 (7th Cir. 1996), the court held that an individual with severe allergies triggered by environmental tobacco smoke may be covered under the ADA if she can demonstrate that she is substantially limited in breathing. As noted above, in Fehr v. McLean Packaging Corp., 860 F. Supp. 198 (E.D. Pa. 1994), the court held that the plaintiff would be covered under the ADA if the medication he took for depression substantially limited his ability to breathe in warm, enclosed places.

Of course, if the individual cannot show that his/her respiratory impairment substantially limits breathing (or some other major life activity), s/he would not have a disability. For example, in Ventura v. City of Independence, 1997 U.S. App. LEXIS 4102 (6th Cir.)(unpublished), cert. denied, 1997 U.S. LEXIS 5377 (1997), the plaintiff claimed, among other things, that his asthma limited his ability to breathe. The court found that the individual was not substantially limited in breathing, in that he could play baseball and football, could play the saxophone, and could run, sing, and water ski.

Multiple Chemical Sensitivity

Although Multiple Chemical Sensitivity (MCS) has been quite publicized, it has led to very few ADA cases. In fact, less than one-half of one percent of the charges filed with the EEOC have alleged that the individual had MCS. A plaintiff alleging MCS has the same burdens as plaintiffs alleging other conditions -- namely, that s/he has an impairment that substantially limits a major life activity. Of course, the MCS plaintiff may find it difficult in some cases to convince a court that s/he even has an *impairment*, given the current controversy about whether MCS is a "real" condition. The EEOC, in an informal guidance letter, has taken the position that MCS *is* an impairment, but "the critical issue" is whether, for the particular individual, it substantially limits a major life activity.⁵

In one MCS case, Patrick v. Southern Company Services, 910 F. Supp. 566 (N.D. Ala.), aff'd, 103 F.3d 149 (11th Cir. 1996), the court found that the plaintiff did not have an ADA disability because she failed to present sufficient evidence that her alleged MCS substantially limited her in the major life activity of working (that is, she did not show that she was excluded from a class of jobs or a broad range of jobs). On the other hand, in Whillock v. Delta Air Lines, 926 F. Supp. 1555 (N.D. Ga. 1995), aff'd, 86 F.3d 1171 (11th Cir. 1996), the court held that the plaintiff presented sufficient evidence that her multiple chemical sensitivity might be a disability because her exposure to certain chemicals "severely impairs her normal breathing."

⁵ 7/24/96 Informal Guidance letter from Claire Gonzales, Director of Communications and Legislative Affairs.

Special Considerations in "Record Of" Cases

"Record of" cases have traditionally been far less common than cases involving individuals who actually have substantially limiting impairments. "Record of" cases involve individuals who have a history of, or who have been either classified or misclassified as having a disability. However, the number of "record of" cases will likely increase in light of the Supreme Court cases holding that an individual's actual condition should be analyzed as controlled with mitigating measures. In fact, the EEOC has instructed its investigators that "[i]n all charges where a [charging party] indicates that s/he uses a mitigating measure, the Investigator should determine whether [s/he] has a record of a disability for the period before [s/he] began using the mitigating measure." EEOC "Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified'" (July 1999) at p. 10.

To be protected, the individual must have a record of an *impairment that substantially limited a major life activity*. In School Board of Nassau County v. Arline, 480 U.S. 273, 281 (1987), the Supreme Court found that the plaintiff's lengthy hospitalization for tuberculosis established a record of a substantially limiting impairment. In EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999), the court noted that the plaintiff may have had a record of a disability (even though his impairment did not currently substantially limit his major life activities) in light of the "pre-diagnosis effect on Boyle's vision due to cancer-related nerve palsy; a thirty-day hospitalization to complete his initial round of treatment, which prevented Boyle from caring for himself; and isolation from other persons due to Boyle's weakened immune system, which affected his ability to work."

On the other hand, in Gutridge v. Clure, 153 F.3d 898 (8th Cir. 1998), the court held that the mere fact that someone has been hospitalized does *not* necessarily mean that s/he has a record of a disability. Likewise, in Colwell v. Suffolk County Police Department, 158 F.3d 635 (2d Cir. 1998), the court stated that a plaintiff in a "record of" case must show more than mere hospitalization; rather, the individual must "show that the impairment for which he was hospitalized was imposing a substantial limitation of one or more of his major life activities." Similarly, in Prince v. Claussen, 1999 U.S. App. LEXIS 5021 (10th Cir. 1999)(unpublished), the court stated that the fact that the employee was hospitalized during surgeries does not establish a record of impairment. In Sorensen v. University of Utah Hospital, 194 F.3d 1084 (10th Cir. 1999), the court noted that in a "record of" case involving Multiple Sclerosis, the plaintiff must show that her MS "at some point substantially limited a major life activity." In this case, it limited her activities for less than two weeks, and therefore was not a disability because it was only of short duration. Along these lines, in Faulkner v. ATC Vancom of Nevada Limited Partnership, 1999 U.S. App. LEXIS 31855 (9th Cir. 1999)(unpublished), the plaintiff tried to establish a "record of" a disability by presenting evidence that he had a forty percent disability rating from the Department of Veterans' Affairs. The court

held, however, that this rating alone was insufficient because it did not provide evidence that the impairment had been substantially limiting under the ADA.

The EEOC has stated that if the individual has a record of a condition that was *not* an impairment (for example, being slightly overweight), or an impairment that was *not* substantially limiting (for example, a brief hospitalization), s/he is not covered under the "record of" prong. EEOC Compliance Manual § 902.7 at pp. 40-41. Courts appear to agree with this approach. For example, in Sherrod v. American Airlines, 132 F.3d 1112 (5th Cir. 1998), the court found that the plaintiff, a flight attendant, did not present sufficient evidence to support her claim that she had a "record of" a disability. The court noted that the plaintiff's evidence, showing that she had prior back surgery and disability leave, "tends to prove she has a record of impairment," but "fails to show that the impairment substantially limits a major life activity." Similarly, in Sweet v. Electronic Data Systems, Inc., 5 AD Cases 853, 858 (S.D.N.Y. 1996), the court noted that the plaintiff would not be covered under the "record of" prong where his vision impairment (a detached retina) had *never* been a substantially limiting impairment. Likewise, in Robinson v. Global Marine Drilling Co., 101 F.3d 35 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997), the court stated that the plaintiff was not covered under this prong because the "record" was not concerning an impairment that substantially limited a major life activity.

Special Considerations in "Regarded As" Cases

Categories of "Regarded As" Cases

Someone who is "regarded as" having a disability is, of course, covered under the ADA. This focuses on the employer's *perception* of the individual. There are several ways in which an employer may "regard" someone as having a disability:

- ! The individual might have an impairment that does not substantially limit a major life activity, but the employer treats him/her as having such an impairment. For example, an employee with controlled high blood pressure may be restricted by an employer from performing jobs involving strenuous activity.

- ! The individual has an impairment that substantially limits major life activities only because of the attitudes of others. For example, an individual might have a condition causing involuntary head jerks, leading an employer to refuse to hire him.

! The individual does not have an impairment, but is treated as having a substantially limiting impairment. For example, an employer might treat an individual as having AIDS even though he does not have AIDS.

29 C.F.R. § 1630.2(l), Appendix.

No "Regarded as" Discrimination Where Employer Encouraged Employee to Work

Courts have held that an employer could not have "regarded" the employee as substantially limited in a major life activity when the employer expressly encouraged the employee to engage in that activity. For example, in Tuten v. Clariant Corp., 1999 U.S. App. LEXIS 4135 (4th Cir. 1999)(unpublished), the court concluded that the employer did not view the employee as significantly restricted in his ability to perform a class or broad range of jobs because of his asthma. The court found that the employee was regarded as limited in "working as a chemical operator in Clariant's chemical production plant," but not from working at other jobs. Specifically, the court pointed out that the employer gave the employee work in an administration building and tried to find him a job that would not involve exposure to sulfur dioxide or other chemicals. Similarly, in McDowell v. Farmland Industries, Inc., 1999 U.S. App. LEXIS 9480 (10th Cir. 1999)(unpublished), the plaintiff claimed that he was regarded as substantially limited in working the class of "heavy labor" jobs; the court disagreed, noting that the employer "continued to employ him in the position of transfer pumper," a job that "required heavy lifting and other tasks requiring physical strength and flexibility." In Avery v. Omaha Public Power District, 1999 U.S. App. LEXIS 17699 (8th Cir. 1999)(unpublished), the court found that the employee was not "regarded as" limited in the class of "safety sensitive" positions in light of the employer's continuing to employ him in a position with "unescorted access to the nuclear facility." Likewise, in Wild v. Minntech Corp., 1999 U.S. App. LEXIS 19292 (8th Cir. 1999)(unpublished), the plaintiff claimed that his employer "regarded" him as substantially limited in working, by transferring him to a job that involved repetitive tasks (which further aggravated his back), attempting to remove his restrictions on work hours, and accusing him of fabricating his injury. The court found that these actions showed that the employer "believed that Wild did not have a disability, not that he had a disability." In Miller v. City of Springfield, 146 F.3d 612 (8th Cir. 1998), the court held that the City did not "regard" the plaintiff as substantially limited in working where it employed her as a police dispatcher, despite denying her a police officer position. Likewise, in Burgard v. Super Valu Holdings, Inc., 1997 U.S. App. LEXIS 12228 (10th Cir. 1997)(unpublished), the court found that the employer did not "regard" the plaintiff as substantially limited in working "especially since defendant offered plaintiff a nonunion warehouse job he was capable of performing." In Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), cert. denied, 1998 U.S. LEXIS 963 (1998), the court noted that the employer did not regard the plaintiff as substantially limited in working because, in

part, the supervisor "wanted [the employee] to come back to work." Similarly, in Thompson v. Holy Family Hospital, 121 F.3d 537 (9th Cir. 1997), the court noted that the employer did not regard a nurse as substantially limited in working where, among other things, it offered her another job at the hospital. In Gaul v. AT&T, Inc., 955 F. Supp. 346 (D.N.J. 1997), aff'd, 134 F.3d 576 (3d Cir. 1998), the court stated that the employer did not "regard" the plaintiff as substantially limited in working in light of the fact that it called him back from disability leave to work on a special project. Likewise, in Penchishen v. Stroh Brewery Co., 932 F. Supp. 671 (E.D. Pa. 1996), aff'd, 116 F.3d 469 (3d Cir.), cert. denied, 118 S. Ct. 178 (1997), the plaintiff claimed, among other things, that she was regarded as substantially limited in walking and working because she had a metal plate in her ankle. The court noted, however, that the employer "did not perceive Plaintiff as substantially limited in the activities of walking or working because it encouraged her to work in a position that required walking." See also Sherrod v. American Airlines, 132 F.3d 1112 (5th Cir. 1998)(American Airlines did not "regard" flight attendant as disabled where "[t]here is undisputed evidence which shows that American attempted to place [her] in other positions for which American did not deem her disqualified due to her back condition"); and Howard v. Navistar, 1997 U.S. App. LEXIS 2069 (7th Cir. 1997)(unpublished)(plaintiff was not "regarded as" disabled where employer allowed him to work and gave him the opportunity to make up lost overtime).

If the employee wants his/her original job and the employer instead offers less preferable jobs, the employer may be deemed to have regarded the employee as disabled. For example, in Gibson v. Wal-Mart Stores, Inc., 1999 U.S. App. LEXIS 15180 (6th Cir. 1999)(unpublished), a Loss Prevention Associate had a minor stroke, but presented a doctor's release to work without restrictions. His supervisor observed the employee sweating and breathing heavily in performing his duties, and was concerned about his health. He decided to involuntarily reassign the employee, and offered him other positions that required less strenuous physical work. The court concluded that, based on these facts, Wal-Mart may have regarded the employee as disabled. Similarly, in EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999), the court considered the company's argument that it did not regard the plaintiff -- its former President -- as having a disability because it offered him a job as Vice President of Sales. The court noted that "precedents do suggest that the employer's offer of another position in the same class of occupations may disprove an allegation of discrimination based on perception of disability." However, the court concluded that the situation is different when the company's offer was involuntary and involved a fifty-percent pay reduction. The court described the company's offer as "pretextual" and concluded that the company was trying to "hide behind a legal fig leaf."

Of course, employers must be careful not to violate state workers' compensation laws by coercing employees to return to work.

Employer's Knowledge of Impairment (or Alleged Impairment) as Key Piece of Evidence

The EEOC has written that an employer's "knowledge of an impairment (or alleged impairment)" is a critical piece of evidence in regarded as cases. EEOC ADA Case Study Training (1996), C.S.4 at p. 2. Therefore, it is very helpful to an employer's defense if it has no knowledge of an alleged impairment (e.g., it did not ask disability-related questions about the impairment at the post-offer stage). In Roberts v. Unidynamics Corp., 126 F.3d 1088 (8th Cir. 1997), the court held that there was not sufficient evidence that the company decision-makers had knowledge of rumors that the plaintiff had HIV or AIDS; therefore, the company did not regard the plaintiff as having a disability. Similarly, in Webb v. Mercy Hospital, 102 F.3d 958 (8th Cir. 1996), the court rejected the employee's "regarded as" claim because the employee "produced no evidence that her supervisors or the management at Mercy were aware" that she had a mental impairment diagnosis. The court stated that although the employer believed the plaintiff was difficult and insubordinate, "that does not establish that she was considered mentally impaired." Other cases have made this same point, such as Olson v. Dubuque Community School District, 137 F.3d 609 (8th Cir. 1998)(awareness of the individual's medical condition "is necessary . . . to have regarded her as disabled").

At the same time, according to federal courts, "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action." Kelly v. Drexel University, 94 F.3d 102 (3d Cir. 1996); Reeves v. Johnson Controls World Services, Inc., 140 F.3d 144 (2d Cir. 1998). Likewise, in Cody v. CIGNA Healthcare of St. Louis, 139 F.3d 595 (8th Cir. 1998), the court stated that "mere knowledge of behavior that could be associated with an impairment does not show" that the employer regarded the employee as disabled. Similarly, in Gorbitz v. Corvillia, Inc., 196 F.3d 879 (7th Cir. 1999), the plaintiff claimed that her employer's knowledge of her physical therapy appointments demonstrated that she was "regarded as" disabled. The court noted, however, that "[e]ven though she had numerous medical appointments, it does not necessarily follow" that she was regarded as disabled since "it is well known that medical appointments, in and of themselves, do not signal the existence of a disability; doctors frequently prescribe physical therapy for those without any substantial limitations in a major life activity that rise to the level of a disability."

Where, however, a plaintiff can show that an employer *did* know about his/her impairments, it will be more difficult for the employer to have the case dismissed on summary judgment. For example, in Olson v. General Electric Astrospace, 101 F.3d 947 (3rd Cir. 1996), the court noted that the employer "was aware of Olson's hospitalizations and illnesses," referred (in performance evaluations) to the fact that Olson had missed work because of illness, and had spent a "significant amount of time" talking to Olson about his health problems and illness-related absences. In light of this evidence, the court denied part of

the employer's summary judgment motion, concluding that the employer *may* have regarded the plaintiff as disabled.

Lack of knowledge of disability can be a successful defense in a wide variety of ADA cases. For example, in Wilking v. County of Ramsey, 153 F.3d 869 (8th Cir. 1998), the court stated that knowledge of an individual's disability can be "an essential element of an ADA employment discrimination claim." Importantly, the court held that the employer could use lack of knowledge as a defense even though it learned of the individual's medical condition before her actual discharge (but after the poor job performance, which was the reason for the discharge). In Van Stan v. Fancy Colours & Company, 125 F.3d 563 (7th Cir. 1997), the court stated that where the decisionmaker did not know about the employee's disorder, a reasonable jury could conclude that the employer did not violate the ADA. In Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499 (7th Cir. 1998), the court noted that "a 'record of impairment' claim . . . requires proof that the employer was aware of the record in question." Similarly, in Kolivas v. Credit Agricole, 1997 U.S. App. LEXIS 27163 (2d Cir. 1997)(unpublished), the court found that where the employer did not know about the employee's depression prior to the termination decision, there was no disability discrimination. This was so even though the employer may have learned about the depression prior to informing the employee about that decision. See also Bola v. City of Cleveland, 1999 U.S. App. LEXIS 4906 (6th Cir. 1999)(unpublished)(where the plaintiff refused to submit to a medical or psychological examination (arguing that he did not have a disability), he could not establish a prima facie case of disability discrimination); Potts v. National Healthcare, L.P., 5 AD Cases 1110 (M.D. Tenn. 1996)("relationship discrimination" case in which court stated that "[a]t the most basic level, it is intuitively clear when viewing the ADA's language in a straightforward manner than an employer cannot fire an employee 'because of' a disability unless it knows of the disability").

Whether Individual Must be Regarded as Having an Impairment That Truly Would be Substantially Limiting

One very important issue in "regarded as" cases is whether the employer must regard the individual as having something that truly would be a substantially limiting impairment. [Note: Remember, in "record of" cases, the individual *had* to have a record of something that was a substantially limiting impairment.] The EEOC's position seems to be that it does *not matter* whether the condition *really* would be a substantially limiting impairment. For example, the EEOC has stated that if an employer thinks that someone whose blood pressure is within the "normal" range poses a safety risk, the employer still may be regarding the individual as disabled. EEOC Compliance Manual § 902.8(e) at pp. 49-50.

On the other hand, courts have suggested that the impairment must be something that -- if true -- really *would* substantially limit the individual in a major life activity. In Sutton v. Lader, 185 F.3d 1203 (11th Cir. 1999), the court noted that "[a]n employee who is perceived by his employer as having only a temporary incapacity to perform the essential functions of his job is not perceived as 'disabled' as defined by the Act." The court noted that the individual must be perceived as having a long-term restriction. In Burch v. Coca-Cola, 119 F.3d 305 (5th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998), the court held that regarding the employee as having alcoholism was not covered under the ADA, unless the employer truly regarded the individual as having an impairment that would substantially limit a major life activity. The court stated that although the company may have been concerned about the employee's "inappropriate" behavior, short temper, and off-duty conduct, the employee "offered no evidence that demonstrates Coca-Cola regarded his alcoholism as substantially limiting his ability to work or his other major life activities. Similarly, in Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997), the court analyzed whether a firefighter, disciplined for exceeding fire department weight guidelines, was "regarded as" disabled. The court found that the employee had not alleged that the City regarded him as "suffering from a physiological weight-related disorder," but rather as "failing to meet a general weight standard." The court noted that a plaintiff "must allege that the employer believed, however erroneously, that the plaintiff suffered from an 'impairment' that, if it truly existed, would be covered" under the ADA. Likewise, in Richards v. City of Topeka, 173 F.3d 1247 (10th Cir. 1999), the court found that an employee could not establish disability discrimination merely by showing that the employer regarded her pregnancy as being an impairment, since normal pregnancy is not covered by the ADA.

Whether Individual *Must Be* Regarded as Having an Impairment That Substantially Limits "Working"

There is no logical rationale for distinguishing the major life activities that are covered under the "regarded as" prong from the major life activities covered under the other sections of the ADA. However, at least one court has said that an individual is only covered under the "regarded as" prong if s/he is regarded as substantially limited in working. In Taylor v. Dover Elevator Systems, 917 F. Supp. 455 (N.D. Miss. 1996), the court stated that "[f]or purposes of the ADA, 'regarded as' simply means that the employer regards the employee as having a substantial limitation on his ability to work in general."

Whether Individual *Is* "Regarded As" Substantially Limited in Working

Most "regarded as" cases involve the major life activity of working. To be covered in this respect, an individual will have to show that the employer perceived him/her as having an impairment that precluded or substantially restricted work in a class of jobs or broad range of jobs (as opposed to a particular job

or narrow range of jobs). Importantly, as noted earlier, the Supreme Court will also likely analyze these claims to determine whether -- despite the alleged perception -- the individual could still perform a number of other jobs. See Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999); Murphy v. United Parcel Service, 119 S.Ct. 2133 (1999).

The EEOC has stated that in examining these cases, it will look at the *criterion that the employer has used to disqualify the individual*, and then determine *whether the criterion* applies to one particular job, or to a class/broad range of jobs. EEOC Compliance Manual § 902.8(f) at p. 51. See also EEOC's Amicus Curiae Brief in Graham v. Connie's Inc., (Brief filed with Ninth Circuit, 7/15/98) at 30 (an employer's regarding an individual "as unfit for the particular job at issue . . . does not support a 'regarded as' claim").

In a nationwide training conducted throughout 1996, EEOC headquarters instructed EEOC investigators concerning how to analyze cases involving allegations that an individual was regarded as substantially limited in working. The EEOC stated that qualification criteria include standards such as:

- ! certain levels of hearing or vision;
- ! ability to lift certain amount of weight;
- ! working at certain heights;
- ! working with certain tools, equipment or substances; or
- ! ability to work under particularly stressful conditions.

EEOC ADA Case Study Training (1996), C.S.4 at p. 4. The EEOC also stated that standards or criteria do "not necessarily refer to a formal requirement that might be listed in a job announcement or job description." Rather, it refers to the employer's reason for believing that the individual could not perform the job. Importantly, the EEOC stated that an employer can be liable under the "regarded as" section of the ADA only if it "believes that the impairment disqualifies or restricts [the individual] from meeting a qualification standard or criterion." Id. at p. 5. Therefore, if the employer believes that the individual cannot meet the standards or criteria for reasons unrelated to an impairment, the individual should not be able to prove that s/he is regarded as substantially limited in working.

Other "regarded as" cases have focused on what the employer actually thought the individual was unable to do because of the employer's perception of the person's condition. For example, as noted above, in Tuten v. Clariant Corp., 1999 U.S. App. LEXIS 4135 (4th Cir. 1999)(unpublished), the court concluded that the employer did not view the employee as significantly restricted in his ability to perform a class or broad range of jobs because of his asthma. Rather, the court noted, the employer believed that the employee's condition "precluded him from working as a chemical operator in Clariant's chemical

production plant but did not prevent him from working at other jobs." The court pointed out that the evidence showed that the employer gave the employee work in an administration building and tried to find him a job that would not involve exposure to sulfur dioxide or other chemicals. On the other hand, in Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1998), the court determined that the employer believed the employee could not handle the stress or hours of a supervisory position. Therefore, the court concluded that Wal-Mart regarded the employee as unable "to perform a class of supervisory jobs." In Eyster v. City of Los Angeles, 1997 U.S. App. LEXIS 33805 (9th Cir. 1997)(unpublished), the court analyzed whether the plaintiff's back injury, as perceived by the employer, would limit the plaintiff's ability to find work across a spectrum of jobs, or instead, whether the supervisory position with the employer presented unique physical demands. In Stevens v. City of Vallejo, 1998 U.S. App. LEXIS 29567 (9th Cir. 1998)(unpublished), the court concluded that the City did not regard the plaintiff as substantially limited in working because of his color vision deficiency; rather, it regarded him as unable to perform the particular job of a police officer. In Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993), the court found that the employer regarded the plaintiff as substantially limited in working because the employer believed the obesity "foreclosed a broad range of employment options in the health care industry, including positions such as community aide, nursing home aide, hospital aide, and home healthcare aide."

Discrimination Based on Genetic Information as "Regarded As" Case

The EEOC has stated that when an employer subjects someone to discrimination based on genetic information relating to illness, disease, or other disorders, the employer is "regarding" the individual as having a disability. See EEOC Compliance Manual § 902.8 at p. 45. For example, if an employer refuses to hire someone because her genetic profile indicates that she has an increased susceptibility to colon cancer, the employer is "regarding" her as having a disability. To date, there has been very little litigation concerning discrimination because of genetic profile; however, as genetic testing becomes more widespread, this area may be the source of substantial litigation.

Discrimination Based on Past Workers' Compensation Claims as "Regarded As" Case

One interesting question is whether an individual could make a "regarded as" claim by showing that the employer did not hire him/her because of past workers' compensation claims. In Kresge v. Circuitek, 958 F. Supp. 223 (E.D. Pa. 1997), the court suggested that an individual might be able to make such a claim by demonstrating that "he was not hired because of his past workers' compensation claims" and by

presenting evidence of the employer's "comments suggesting that hiring plaintiff would negatively affect defendant's insurance."

Whether Employer Has "Regarded" Individual as Disabled Because Employer Has Made Job Modifications for Employee's Medical Condition

The mere fact that an employer has made some changes to a job to help an individual with a medical condition *should not* generally result in a determination that the employer has "regarded" the individual as disabled or that the employee has a "record of" a disability. In Mobley v. Board of Regents of University System of Georgia, 924 F. Supp. 1179 (S.D. Ga. 1996), the court considered the claim of an employee with asthma that she was regarded as disabled because the employer "made efforts to accommodate" her requests for an environment with better air quality. Among other things, the employer moved her office to another building and commissioned an air quality study. The court rejected the plaintiff's arguments, noting that they would "discourage[] employers from taking preliminary or temporary steps to keep their employees happy for fear that showing concern for an employee's alleged medical problems could draw them into court facing an ADA "regarded as" claim. *Id.* at 956. Similarly, in Johnson v. Boardman Petroleum, Inc., 923 F. Supp. 1563 (S.D. Ga. 1996), the court considered an employee's claim that the employer "regarded" her as disabled by suggesting that she seek professional help for her grief and offering time off for treatment, and by requiring a doctor's release to return to work. The court stated that these employer actions were "a humanitarian gesture" which should not be punished. The court noted that "[t]his suit flies in the face of the policy concerns underlying the ADA because it encourages employers to dehumanize their relationships with their employees for fear that showing concern for and recognizing their employees' emotional problems would land them in court facing a discrimination claim based upon a perceived mental disability." The court also stated that the employer's alleged statement that the employee was "not mentally or physically able to handle" her job was not sufficient evidence to show that the employer regarded her as having a mental disability. *Id.* at 987. Likewise, in Colwell v. Suffolk County Police Department, 158 F.3d 635 (2d Cir. 1998), the employee, a police officer, attempted to rely on the employer's "open-ended light duty" to show that he had a "record of" a disability. However, the court stated:

An employer that accedes to minor and potentially debatable accommodations (a sensible way to avoid litigation, liability, and confrontation), does not thereby stipulate to the employee's record of a chronic and endless disability. Otherwise, costless accommodations to physical complaints - here, the plaintiff's fellow officers, not the county, paid the price in terms of reduced flexibility in assignments -- would entail large future costs, would discourage the employment of persons with minor limitations, and would promote litigation without assisting persons entitled to protection of the ADA.

See also Faulkner v. ATC Vancom of Nevada Limited Partnership, 1999 U.S. App. LEXIS 31855 (9th Cir. 1999)(unpublished)(granting employee with knee complaints an exemption from driving certain types of vehicles did not "regard" him as being disabled).

On the other hand, in Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), cert. denied, 117 S. Ct. 1349 (1997), the court denied the employer's summary judgment motion on whether the employee was "regarded as" disabled. The court noted that a trier of fact *could* determine that the plaintiff was regarded as disabled because the employer: (1) asked the employee whether he was having any "problems;" (2) encouraged him to seek counseling through the employer's employee assistance program; and (3) received doctors' reports diagnosing the employee's depression, anxiety, and stress.

A related issue is whether referring an individual to an employee assistance program is evidence that the employer regarded the individual as having a disability. In Burch v. Coca-Cola, 119 F.3d 305 (5th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998), the court stated that such a referral for an employee with alcohol-related misconduct shows that the company is assisting "employees who may be experiencing problems with alcohol" so that they will continue to work. Therefore, it is not "regarding" the individual as unable to work. Along these lines, the EEOC has informally written that an employer has not "automatically regarded" an employee as having a disability simply by referring him/her to an employee assistance program.⁶ The EEOC has noted that the employer may have regarded someone as disabled in making such a referral by making "broad statements about the individual's significant problems in major life activities like learning, thinking, or pursuing a whole line of work. An EAP referral, made routinely and with a focus on unacceptable workplace conduct, would not in itself entail such exposure." See also Walton v. City of Manassas, 1998 U.S. App. LEXIS 19169 (4th Cir. 1998)(unpublished)(requiring an employee to attend EAP "as a condition of keeping his employment" is "not itself a violation of the ADA").

Whether Employer Has "Regarded" Individual as Disabled Because Employer Asked for a Medical Evaluation

An individual might claim that the employer "regarded" him/her as disabled because the employer asked for a medical examination. Courts of Appeals to address the issue seem to be holding that a simple request for a medical evaluation is not equivalent to regarding the individual as having a disability. In Cody v. CIGNA Healthcare of St. Louis, 139 F.3d 595 (8th Cir. 1998), the court stated that employers

⁶ 2/12/98 Informal Guidance Letter from Ellen J. Vargyas, Legal Counsel.

"need to be able to use reasonable means to ascertain the cause of troubling behavior" in the workplace "without exposing themselves to ADA claims." Similarly, in West v. Central Valley Regional Center, Inc., 1999 U.S. App. LEXIS 11067 (9th Cir. 1999)(unpublished), the court stated that the employer's suggestion that the employee get medically evaluated to determine whether she could perform a restructured position does not "regard" the individual as having a disability. In Sullivan v. River Valley School District, 197 F.3d 804 (6th Cir. 1999), the employer asked one of its teachers to undergo a medical examination after exhibiting unusual behavior, including disruptive outbursts at meetings. The court disagreed with the plaintiff's argument that this medical referral regarded him as disabled, noting that "an employer needs to be able to determine the cause of an employee's aberrant behavior."

Whether Employer Has "Regarded" Individual as Disabled By Offering Medical Leave

An individual might claim that the employer "regarded" him/her as disabled because the employer offered medical leave to the employee. In Cody v. CIGNA Healthcare of St. Louis, 139 F.3d 595 (8th Cir. 1998), the court held that offering such leave was not enough to support such a conclusion.