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Can't We All Just Get Along?: The Treatment of "Interacting with Others" as a Major Life Activity in the Americans with Disabilities Act

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I. INTRODUCTION

The Americans with Disabilities Act (ADA) was passed in 1990 with the stated goal of providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[1] Congress determined that, at the time of the passage of the Act, approximately forty-three million Americans had mental or physical disabilities.[2] By enacting the ADA, Congress meant to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[3] Now, fourteen years after the ADA's enactment, the success of these goals is in doubt. A 1998 survey of cases brought under Title I of the ADA[4] indicated that employers prevail in approximately 92 percent of the final case decisions.[5] The survey also indicated that employers prevail in 86 percent of the administrative complaints resolved by the Equal Opportunity Employment Commission.[6] One explanation for these pro-defendant results may be that courts encounter an abundance of meritless claims, and thus these results are justified. On the other hand, it could be that courts and jurors harbor stereotypes about disabled plaintiffs that influence their decisions.[7] An alternative possibility is that the ADA sets forth an analytical framework that makes it very difficult for plaintiffs with certain disabilities to prevail. Thus, many plaintiffs with meritorious claims may lose their ADA cases not because of incorrect stereotypes by judges and jurors, but rather, because of the language of the ADA itself.

The ADA differs from Title VII of the Civil Rights Act and other antidiscrimination laws in that Congress defined what it means

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1. Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (2000).

2. § 12101(a)(1).

3. § 12101(b)(2).

4. Title I of the ADA covers discrimination in employment. BUREAU OF NAT'L AFFAIRS, THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT AND COMPLIANCE 63-69 (1990). Title II prohibits discrimination in all programs, activities and services of state and local governments. *Id.* at 69-70. Title III prohibits discrimination by privately run places of public accommodation and by public transportation run by private entities. *Id.* at 70-74. Title IV covers telecommunications. *Id.* at 74-75. Title V contains several miscellaneous provisions. *Id.* at 75-76..

5. ABA Commission, *Study Finds that Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 403 (1998) (defining "final case decisions" as "cases that have gone through the appeals process or have not been overturned on appeal as of March 31, 1998"). Althougb there is no comparable information on the percentage of cases won by employers since mid-1998, there is nothing to suggest that these numbers have changed significantly.

6. *Id.*

7. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 272-73 (2000).

to be disabled, and the plaintiff has the burden of proving that she fits within this definition to be covered by the Act.[8] To be considered disabled, an individual must have "a physical or mental impairment" which "substantially limits one or more of the major life activities."[9] Alternatively, an individual will be covered if she has "a record of such an impairment" or is "regarded as having such an impairment."[10] Even if an individual can establish that she is disabled, the Act only prohibits discrimination against individuals who are otherwise qualified for the job.[11] An individual is otherwise qualified only if she can perform the "essential functions" of the job "with or without reasonable accommodation."[12] Finally, the Act requires employers to provide reasonable accommodation to facilitate job performance by a disabled individual but only if the reasonable accommodation can be made without "undue hardship" on the employer.[13]

For many ADA plaintiffs, this framework makes it very difficult to establish a successful discrimination claim based on an alleged disability. The ADA's requirement that the individual be substantially limited in some major life activity is particularly troublesome to plaintiffs who claim that they are discriminated against because of a mental disability.[14] Courts generally agree that activities such as walking, lifting, and performing manual tasks are major life activities, but these are the sorts of activities that are affected mainly by physical disabilities.[15] On the other hand, courts have been reluctant to regard as major those activities that are affected by mental disabilities.[16] Evidence of this reluctance is the current circuit court split over whether the ability to interact with other people constitutes a major life activity.[17] Since many mentally

8. *Compare* 42 U.S.C. § 12112(a) (2000), *with* 42 U.S.C. § 2000e-2 (2000). For example, Title VII of the Civil Rights Act makes it unlawful to discriminate against "any individual . . . because of such individual's race, color, religion, sex, or national origin." § 2000e-2. Thus any person is qualified to bring a claim under the act and the only question is whether that person was discriminated against because of prohibited factors. On the other the hand, the ADA only protects those plaintiffs that are disabled, regarded as disabled, or have a record of being disabled as that term is defined by the Act. § 12102(2). Thus, there is a threshold burden of proof for an ADA plaintiff that does not exist for a plaintiff under other discrimination laws.

9. § 12102(2)(A).

10. § 12102(2)(A)-(B).

11. § 12112(a).

12. § 12111(8).

13. § 12112(b)(5)(A).

14. SUSAN STEFAN, HOLLOW PROMISES 75 (2002).

15. *Id.*

16. *Id.*

17. The First Circuit has held that the ability to get along with others is not a major life activity. Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997). The Ninth Circuit has

disabled plaintiffs are not limited in their ability to walk, breathe, or perform other physical activities, they must show that some other activity is substantially limited. The activity that many mentally disabled plaintiffs point to is the ability to interact with others. Social interaction is often the function most inhibited by mental disability.[18] Therefore, it is critical for these plaintiffs that the circuit split is resolved in favor of recognizing the ability to interact with others as a major life activity.

Even if courts recognize the ability to get along with others as a major life activity under the ADA, plaintiffs who rely on this activity will still face a formidable obstacle to coverage because of the analytical framework of the Act. In addition to proving a substantial limitation in a major life activity, the plaintiff must show that she is otherwise qualified for the job.[19] The key inquiry in this determination is whether the individual can perform the essential elements of the job, with or without reasonable accommodation.[20] Thus, when an employee claims that her ability to interact with others is substantially limited, an employer can defend against the discrimination suit by asserting that interacting with others is an essential element of the job and that the employee is therefore inherently unqualified. This is likely to be a successful defense in many cases since the ADA defers to the employer's judgment as to what functions are essential.[21] Indeed, the ability to get along with others does seem to be an essential element of many jobs in today's workplace. As a result, the proof that the employee uses to establish substantial limitation of a major life activity will be used by the employer to show that the employee is not otherwise qualified for the job. It is likely that, under this analytical framework, many mentally disabled plaintiffs will not be covered by the ADA. This Note suggests that such a result is inconsistent with the Congressional intent in enacting the ADA.

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held that the ability to get along with others is a major life activity. McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999). The Second, Fourth, Seventh, Eighth, and Tenth Circuits have noted the issue but have not made a determination either way. Cameron v. Cmty. Aid for Retarded Children. Inc., 335 F.3d 60, 63-64 (2d Cir. 2003); Davis v. Univ. of N.C., 263 F.3d 95, 101 n.4 (4th Cir. 2001); Emerson v. N. States Power Co., 256 F.3d 506, 511 (7th Cir. 2001); Steele v. Thiokol Corp., 241 F.3d 1248, 1254-55 (10th Cir. 2001); Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999).

18. Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1143.

19. 42 U.S.C. §§ 12102(2),12112(a) (2000).

20. § 12111(8).

21. *See id.*

Part II provides a historical overview of the concept of disability and outlines the analytical framework of the ADA. Part III discusses the ADA's framework in the context of mental disabilities, focusing on the circuit split over the issue of whether the ability to get along with others is a major life activity. This Note demonstrates that, regardless of a resolution of the circuit split in the employee's favor, the analytical framework of the ADA makes it very difficult for plaintiffs claiming substantial limitation in the ability to get along with others to prevail in these cases. Part IV argues that this result is incompatible with the Congressional intent in enacting the ADA and examines possible solutions that would give deserving mentally disabled plaintiffs a greater chance for success in ADA cases.

II. THE ADA: ORIGIN, PURPOSE, AND FUNCTION

A. The Evolving Definition of "Disability"

The concept of disability has changed dramatically over time.[22] In colonial America, disability correlated with dependency.[23] Disabled persons were perceived as being unable to care for themselves and useless to society.[24] Since they were unable to function in society, the disabled were either hidden away and cared for by family members or sent to hospitals and asylums to be separated from the rest of society.[25] This view of disability has been characterized as the "exclusionary model."[26] One important effect of equating disability with inability to care for oneself was that many individuals with serious physical or mental impairments were not considered disabled if they could care for themselves notwithstanding those impairments.[27] Thus, in the employment context, disability was a very limited, all-or-nothing concept which was equated with total inability to function in the workplace.

In the early part of the twentieth century, advancements in medical knowledge brought about a new concept of disability.[28] This

22. *See generally* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2001) (tracing how the concept and interpretation of "disability" has changed since the ADA's creation).

23. *Id.* at 94-95.

24. *Id.*

25. *Id.*

26. *Id.* at 96.

27. *Id.* at 95.

28. *Id.* at 95-96.

new "medical model" or "rehabilitation model" rejected the old view that disabled individuals should be excluded from society.[29] Rather, the goal was to rehabilitate them and reintegrate them into mainstream society.[30] Still, this new model focused on changing the disabled person and did not contemplate changing aspects of mainstream society to allow disabled persons to function.[31] Also, the older exclusionary model continued to apply to people with incurable disabilities who could not be reintegrated into society.[32] Thus, under the rehabilitation model, the disabled were separated into two classes: those who could be rehabilitated and those who could not.[33] The focus, however, remained on figuring out what was wrong with the disabled person and making her "normal."[34] Although the rehabilitation model was an improvement over the exclusionary model, the 1960's civil rights movement, which sought equal treatment for all individuals, brought about the most important challenges to the prevailing theories about individuals with disabilities.[35] This movement rejected the notion that disabled persons could not function in society and began shifting the focus away from rehabilitation and toward changing the stereotypes and fears that made it difficult for disabled individuals to function in society.[36] In response to the civil rights movement, the government began to address discrimination against the disabled. The Rehabilitation Act of 1973[37] was the precursor to the ADA. Its purpose was "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society," and "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities."[38] A 1974 amendment to the Rehabilitation Act provided the definition of disability that was ultimately incorporated into the ADA.[39]

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29. *Id.* at 96-97 (citing GARY ALBRECHT, THE DISABILITY BUSINESS: REHABILITATION IN AMERICA 96 (1992)).

30. *Id.* at 96.

31. *Id.*

32. *Id.*

33. *See id.* at 96-97.

34. *Id.*

35. *See id.* at 97.

36. *Id.* at 98-100.

37. 29 U.S.C. §§ 701-797 (2000). The Rehabilitation Act of 1973 was limited in its application as it applied only to the federal government (§ 501), federal government contractors (§ 503), and entities that received federal financial assistance (§ 504).

38. § 701(b)(1)-(2).

39. § 705(9)(B).

The ADA exemplified society's changing attitude toward disabled individuals. It rejected both the exclusionary and the rehabilitation models of the past and adopted an approach that sought equal treatment for disabled individuals.[40] When President Bush signed the ADA, he stated that, "[w]ith today's signing of the landmark Americans with Disabilities Act, every man, woman and child with a disability can now pass through once-closed doors, into a bright new era of equality, independence and freedom."[41] The language of the Act evidenced a new view of what it meant to be disabled:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.42

Perhaps because of the long and varied history of the meaning of disability, Congress elected to define the term in the ADA.[43] This is in contrast to other antidiscrimination legislation such as Title VII, which does not define terms like race, sex, or national origin.[44] One explanation may be that determining whether a person is disabled is more difficult than determining a person's race, sex, or national origin.[45] Including a definition of disability also suggests that not all people with perceived disabilities are meant to be protected by the Act. Rather, only those with disabilities severe enough to fit within the statutory definition deserve protection.

Another option for Congress would have been to use a more "comprehensive model" to protect all persons with limiting physical or mental conditions from discrimination, regardless of the severity.[46] The original version of the ADA, introduced in 1988 by the National Council on the Handicapped, proposed prohibiting discrimination

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40. Hensel, *supra* note 18, at 1145-46.

41. *President Signs Disabilities Act, 2,000 Cheer Long-Awaited Independence*, L.A. DAILY NEWS, July 27, 1990, at N1.

42. 42 U.S.C. § 12101(a)(7) (2000) (emphasis added).

43. *See* § 12102(2).

44. *See* 42 U.S.C. § 2000e.

45. Of course, determining a person's race, sex, or national origin is not necessarily obvious either. For example, the issues of mixed ancestry and transsexuals can make these determinations more difficult. However, determining whether someone is disabled has proven to be a more ambiguous and difficult problem than determining these other characteristics.

46. *See* Mark Rothstein et al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 251-52 (2002).

based on any handicap.[47] This would have greatly expanded the potential scope of the Act by setting a lower threshold for employees to receive protection as compared to the existing definition in the Rehabilitation Act.[48] Some commentators believe that the broader comprehensive language was not used because of fear in the business community and the Reagan Administration that broader coverage would be too burdensome on employers.[49] However, one drafter of the ADA contends that the decision to define disability rather than using the comprehensive language was *not* "a considered, deliberate decision to narrow the class of covered individuals" but, rather, a "legal judgment that the existing definition would cover most people with impairments along the spectrum of physical and mental impairments, and the political judgment that using any other definition would unnecessarily slow down passage of the bill."[50] Regardless of the motivation for including the existing definition of disability in the ADA, the effect has been to provide a substantial hurdle for many plaintiffs seeking coverage under the Act.

B. Analytical Framework of the ADA

Title I of the ADA states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual."[51] The first step in any ADA case is for the court to determine whether the plaintiff is disabled.[52] The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities."[53] Alternatively, an individual will be considered disabled if she has a "record of such an impairment" or is "regarded as having such an impairment."[54] So, the threshold question is whether an individual has a mental or physical impairment, a record of such impairment, or is regarded as having such impairment. If the answer to any of these questions is yes, then the court must determine whether the impairment substantially limits a major life activity. If the answer to

47. *See* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 432-33 (1991).

48. 29 U.S.C §§ 701-797 (2000).

49. Rothstein et al., *supra* note 46, at 250-51.

50. Feldblum, *supra* note 22, at 129.

51. 42 U.S.C. § 12112(a) (2000).

52. *See* Bragdon v. Abbott, 524 U.S. 624, 630 (1998).

53. § 12102(2)(a).

54. § 12102(2)(b)-(c).

this question is also yes, then the individual is deemed disabled for purposes of the ADA.

Since Congress did not define many of the key terms in the ADA, the Equal Employment Opportunity Commission (EEOC)[55] has provided guidance through both formal regulations[56] and informal guidelines.[57] The formal regulations (regulations), which have been officially promulgated by the EEOC, are entitled to great deference[58] while the informal guidelines (guidelines or guidance) represent unofficial statements that are not binding on courts.[59]

1. Proving Impairment

Neither the ADA nor the EEOC provides a comprehensive list of all the diseases or conditions that may qualify as physical or mental impairments. Thus, in the years since the ADA was passed, courts have established which physical or mental conditions constitute impairments.[60] In doing so, courts rely upon the guidelines first set forth by the Department of Health, Education, and Welfare that interpret the Rehabilitation Act of 1973[61] and were adopted by the EEOC as regulations applicable to the ADA.[62] Physical or mental impairment is defined as: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, (including speech organs), cardiovascular,

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55. Congress established the Equal Employment Opportunity Commission in the Civil Rights Act of 1964. 42 U.S.C. § 2000e-4 (2000). The EEOC has administrative enforcement responsibilities, which requires an individual complaining of discrimination to timely file a complaint with the EEOC before any judicial proceeding may commence. § 2000e-5(e)(1), (f)(1). The ADA grants the EEOC the same administrative enforcement responsibilities to the EEOC in the context of disability discrimination claims. § 12117. The ADA also gives the EEOC the power to issue regulations to carry out the mandate of ADA. § 12116. These regulations are found at 29 C.F.R. pt. 1630 (2003).

56. *See* 29 C.F.R pt. 1630.

57. *See, e.g.* Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app.; EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL (2002) [hereinafter EEOC COMPLIANCE MANUAL].

58. *See, e.g.*, Francis v. City of Meriden, 129 F.3d 281, 283 n.1 (2d Cir. 1997) (noting that courts tend to accord "great deference" to the EEOC's regulations interpreting tbe ADA).

59. *See, e.g.*, Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 n.2 (1st Cir. 1997) (noting that informal guidelines such as the EEOC's Interpretive Guidelines and the Compliance Manual, althougb often cited by courts, are not entitled to as much deference as the formal regulations and are certainly not considered binding).

60. For a substantial, but not comprehensive, list of cases wbere the court has addressed different impairments, see GARY S. MARX, 1 DISABILITY LAW COMPLIANCE MANUALapp. 1A (2002).

61. 45 C.F.R. § 84.3(j)(2)(i)(A)-(B) (2003).

62. 29 C.F.R. § 1630.2(h)(1)-(2) (2003).

reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[63]

The term "impairment" has been broadly construed by courts, making it relatively easy for plaintiffs to establish the existence of impairment.[64] At trial, most defendants do not even contest the plaintiff's claim of impairment.[65]

2. Defining "Major Life Activity"

If the court determines that a particular condition constitutes impairment, it must then determine whether the impairment substantially limits one or more major life activities.[66] It is only when this second question is answered affirmatively that a particular impairment will rise to the level of a disability under the ADA.[67] The ADA does not define "major life activity." Since Congress did not define what constitutes a major life activity, the EEOC has attempted to guide courts in determining which life activities are major for purposes of the ADA. The EEOC regulations define major life activity by providing an exemplary list, including caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and working.[68] With the exception of "learning" and the ambiguous "working," this list tends to focus on people with physical disabilities.[69] The EEOC's Compliance Manual expands this list to include "mental and emotional processes such as thinking, concentrating, and interacting with others."[70] The Compliance

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63. *Id.*

64. Curtis Edmonds, *Snakes and Ladders: Expanding the Definition of "Major Life Activity" in the Americans with Disabilities Act*, 33 TEX. TECH L. REV. 321, 323 (2002).

65. *Id.* (citing Lisa Eichorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1475 (1999)).

66. *See* Bragdon v. Abbott, 524 U.S. 624, 637 (1998).

67. *Id.*

68. 29 C.F.R. § 1630.2(i) (2003).

69. Edmonds, *supra* note 64, at 325-26. Of course, some mentally impaired individuals are limited in their ability to perform some of these listed activities. However, a large class of mentally impaired individuals (e.g. those suffering from bipolar disorder or depression) are not so limited in these activities that they will be successful bringing an ADA claim on this basis. As discussed below, individuals suffering from the psychiatric disabilities are mostly limited in social-type activities.

70. EEOC COMPLIANCE MANUAL, *supra* note 57, § 902.3(b). Although the Compliance Manual is given some deference by courts, it is not given as much deference as the actual EEOC regulations. *See, e.g.*, Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 n.2 (1st Cir. 1997). Thus,

Manual states that these lists do not provide "an exhaustive list of all major life activities."[71] Instead, the lists represent the types of activities that are major life activities.[72]

Despite this guidance from the EEOC,[73] courts have the ultimate task of determining which life activities should be considered "major" for purposes of the ADA.[74] In the leading Supreme Court case, *Bragdon v. Abbott,* the plaintiff, who was infected with HIV, claimed that reproduction was a major life activity. [75] Although Abbott was infected, she did not manifest serious symptoms when she went to the defendant's office for a dental examination.[76] Abbott disclosed that she had HIV, and the dentist informed her that he would not fill cavities of HIV patients in his office.[77] He offered to fill the cavity at a hospital, but Abbott would have been required to pay for the use of the hospital's facilities.[78] She declined and filed suit against the dentist for discrimination in violation of the ADA.[79]

To be protected by the ADA, Abbott had to establish that HIV was an impairment and that it substantially limited her in some major life activity.[80] The Court easily concluded that HIV was an impairment.[81] The Court also found that reproduction is a major life activity, reasoning that "'[t]he plain meaning of the word 'major' denotes comparative importance' and 'suggests that the touchstone for determining an activity's inclusion under the statutory rubric is its significance.'"[82] Although *Bragdon* decisively included reproduction as

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the fact the Compliance Manual lists "interacting with others" as a major life activity is not dispositive as to whether courts will hold that it is.

71. EEOC COMPLIANCE MANUAL, *supra* note 57, § 902.3(b).

72. *Id.* "Specific activities that are similar to the listed activities in terms of their impact on an individual's functioning, as compared to the average person, also may be major life activities." *Id.*

73. Formal regulations are entitled to great deference while informal guidelines are non-binding on courts. *See supra* notes 55-59 and accompanying text.

74. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999) (noting that "[n]o agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA. . . . Most notably, no agency has been delegated authority to interpret the term 'disability' [which includes determining what constitutes a major life activity].").

75. Bragdon v. Abbott, 524 U.S. 624, 631, 637-38 (1998).

76. *Id.* at 628.

77. *Id.* at 629.

78. *Id.*

79. *Id.*

80. *Id.* at 631.

81. *Id.* at 632-37 (reproduction was the major life activity that was at issue on appeal so the court did not consider whether there might be other major life activities which were substantially limited by the Abbott's HIV).

82. *Id.* at 638 (citing Abbott v. Bragdon, 107 F.3d 934, 939-40 (1st Cir. 1997)).

a major life activity, the decision does little to clarify the standard that lower courts should apply to other activities.[83]

In *Toyota Motor Manufacturing v. Williams*, the Supreme Court attempted to clarify the standard by adding that to qualify as disabled, a person must be substantially limited in an activity that is "central to daily life."[84] Like the guidance provided by the Court in *Bragdon*, this language in *Toyota* fails to set forth a clear standard for the lower courts to apply in determining whether a particular activity is major for the purposes of the ADA. Determining whether an activity is "significant" or "central to daily life" has produced varied results in different lower courts.[85]

3. Defining "Substantially Limits"

Once a plaintiff successfully establishes impairment of a major life activity, she must prove that the impairment amounts to a substantial limitation of that activity.[86] While the ADA does not define substantial limitation, the EEOC has provided guidance in this area. The regulations state that substantially limited means "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity" in comparison to the average person.[87] The EEOC guidelines further outline three factors that a court should consider in determining whether a person's impairment substantially limits a major life activity: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or expected impact, of the impairment.[88]

As with many terms and concepts in the ADA, courts have struggled to apply the phrase "substantially limits." The Supreme Court provided some insight in *Toyota*, where the issue was whether an employee was substantially limited in her ability to perform manual tasks.[89] The Court held that "'substantially' in the phrase

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83. Edmonds, *supra* note 64, at 339 (arguing that the Supreme Court's statement in *Bragdon* is "at best, unhelpful. Describing a major life activity as a 'significant' life activity does little more than replace one synonym for another. If 'significance' is the 'touchstone' for determining a major life activity, it is a badly chipped touchstone, revealing little truth.").

84. Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

85. *See infra* Part III.A (discussing the circuit split over whether interacting with others is a major life activity).

86. *See* Bragdon v. Abbott, 524 U.S. 624, 639 (1998).

87. 29 C.F.R § 1630.2(j)(1)(ii) (2003).

88. 29 C.F.R. pt. 1630 app. § 1630.2(j).

89. Toyota, 534 U.S. at 192.

'substantially limits' suggests 'considerable' or 'to a large degree.'"[90] The Court added that "[t]he word 'substantial' . . . clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities."[91] Additionally, a plaintiff must provide "evidence that the extent of the limitation [caused by the impairment] in terms of *their own experience* . . . is substantial."[92] Thus, courts have held that the existence of a disability is to be determined on an individual basis in which a plaintiff must prove that the effect of the impairment was personally, substantially limiting.[93]

Some commentators suggest that the way courts have applied the "substantially limits" requirement contradicts Congressional intent by unduly restricting the class of plaintiffs who can establish a disability under the ADA. One drafter of the ADA suggests that the Senate Report to the ADA indicates that Congress meant to preclude only "minor, trivial impairments" or "physical limitations that are not different from those of the average person."[94] The Senate Report used the example of "a simple infected finger" to illustrate the kind of minor impairments that are not substantially limiting.[95] This drafter contends that the decision to include the "substantially limits" language in the definition of disability was "not a considered, deliberate decision to narrow the class of covered individuals."[96] However, legislative history does not indicate whether Congress intended to adopt a narrow scope of coverage nor does it explain why Congress adopted the substantial limitation language.[97] Thus, courts must define the substantial limitation language, which has resulted in

90. *Id.* at 196-97.

91. *Id.* at 197; *see also* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999) (holding that a "mere difference" does not amount to a "significant restric[tion]" and therefore does not satisfy the EEOC's interpretation of "substantially limits").

92. Toyota, 534 U.S. at 198 (quoting *Albertson's, Inc.*, 527 U.S. at 567) (emphasis added).

93. *Id.* "[R]ecently, the courts have tended to hold that the plaintiff is required to introduce evidence actually comparing his or her limitations to that of the 'average person' as opposed to relying on the fact finders' general knowledge." DISABILITY LAW COMPLIANCE MANUAL § 1:2 (2002). For exemplary cases, see, for example, Maynard v. Pneumatic Products. Corp., 233 F.3d 1344 (11th Cir. 2000); Gonzales v. National Board of Medical Examiners, 225 F.3d 620 (6th Cir. 2000); Moore v. J.B. Hunt Transportation, Inc., 221 F.3d 944 (7th Cir. 2000); Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 32 (1st Cir. 2000). However, comparator evidence may not be necessary in every case, as at least one court has held, "[c]omparator evidence may already be established where, for example, caselaw, the regulations, or the EEOC's interpretive guidance makes clear that plaintiff's condition substantially limits a major life activity as compared to the average person in the general population." *Maynard*, 233 F.3d at 1350.

94. Feldblum, *supra* note 22, at 129.

95. S. REP. NO. 101-116, at 22 (1988).

96. Feldblum, *supra* note 22, at 129.

97. Rothstein et al., *supra* note 46, at 249.

severe restrictions on the class of plaintiffs who may bring suit under the ADA.

Another unresolved issue is whether mitigating measures should be considered in determining whether an individual is substantially limited in a major life activity. In *Sutton v. United Air Lines, Inc.*, the Supreme Court held that mitigating measures should be considered.[98] In *Sutton*, the plaintiffs were twin sisters with impaired vision who applied for employment as commercial airline pilots, but because they did not meet vision requirements, were denied employment.[99] The sisters filed an ADA discrimination suit.[100] To meet the definition of disability, they asserted that they were substantially limited in the major life activity of seeing.[101] The Court held that the sisters were not substantially limited by their impaired vision because they used corrective measures, which gave them 20/20 vision.[102] In doing so, the Court rejected the EEOC's suggestion that "the determination of whether an individual is substantially limited in a major life activity must be made . . . without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[103] The Court concluded that impairments should be evaluated in their mitigated state for three reasons. First, the phrase "substantially limits" is written in the present indicative, which requires that the "person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[104] Second, the definition of disability requires an evaluation "with respect to an individual."[105] If a plaintiff uses mitigating measures, then an individualized inquiry requires the court to consider such measures rather than speculating about the degree of impairment absent such measures.[106] Finally, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities," and the Court concluded that, if Congress intended for courts to evaluate plaintiffs in their unmitigated state, this number would be much higher.[107]

Justice Stevens' dissent in *Sutton* points out that the Senate Report, the House of Representatives' Committee Reports, and each of

98. Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999).
99. *Id.* at 475-76.
100. *Id.* at 476.
101. *See id.*
102. *Id.* at 481-83.
103. *Id.* at 482-84 (citing 29 C.F.R pt. 1630 app. § 1630.2(j)).
104. *Id.* at 482-83.
105. *Id.* at 483 (citing 42 U.S.C. § 12102(2)).
106. *Id.*
107. *Id.* at 484 (citing 42 U.S.C. § 12101(a)(1)).

the three Executive agencies charged with implementing the Act all indicate that the determination of whether an individual is substantially limited should be made without regard to mitigating measures.[108] Commentators argue that the Court's decision that mitigating measures should be considered in determining whether an individual is disabled will insulate employers from discrimination liability where impaired individuals control their conditions with medication and other measures.[109] The troubling effect created by *Sutton* is that a plaintiff who attempts to limit the impact of her impairment through mitigating measures will not be considered disabled under the Act and will not be protected from discriminatory action by an employer.

Not surprisingly, many plaintiffs asserting mental disability bring their claims under the ADA's regarded as disabled test, rather than claiming actual disability.[110] The EEOC regulations provide three ways that an individual may be regarded as being disabled:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
> (3) Has none of the impairments defined [in this section] but is treated by a covered entity as having a substantially limiting impairment.[111]

Bringing a claim under the theory that a plaintiff is regarded as disabled rather than actually being disabled makes sense given that the discrimination faced by many of these plaintiffs is based on misconceptions and ungrounded fears many people have about mental disability.[112] In other words, these plaintiffs are not actually disabled for purposes of the ADA, but, nevertheless, they face workplace

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108. *Id.* at 499-502 (Stevens, J., dissenting) (citing S. REP. NO. 101-116, at 23 (1989); H.R. REP. NO. 101-485, pt. III, at 28 (1990); H.R. REP. NO. 101-485, pt. II, at 52 (1990); 29 C.F.R pt. 1630 app. § 1630.2(j) (1998)).

109. *See, e.g.*, STEFAN, *supra* note 14, at 36-37 ("The court's conclusion that disabilities must be considered in their mitigated state is devastating to the millions of Americans who control their conditions of bipolar disorder or depression with medication but are nevertheless afraid that if their employers discovered this fact they would face discrimination in the workplace. The U.S. Supreme Court's decisions effectively insulate such discrimination entirely.").

110. Stefan, *supra* note 7, at 276; *see* 42 U.S.C. §12102(2)(C).

111. 29 C.F.R. § 1630.2(l) (2003).

112. 42 U.S.C. § 12101(a)(7); *see also* School Bd. v. Arline, 480 U.S. 273, 284 (1987) ("By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."); 29 C.F.R. pt. 1630 app. §1630.2(l) (2003) (explaining that the purpose of the "regarded as" prong is to cover individuals "rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities").

discrimination due to some employers' stereotypes about mental disabilities. Although bringing a claim under the regarded as disabled test seems like a promising solution for mentally impaired plaintiffs, courts have narrowly construed this language as requiring evidence that the plaintiff was regarded as being substantially limited in a major life activity.[113] This interpretation effectively insulates "discrimination by employers who were simply hostile or uncomfortable with mental illness, as long as they believed the plaintiff was not limited in one or more major life activities."[114] Ultimately, mentally disabled plaintiffs cannot escape the substantial limitation of a major life activity test even when claiming that an employer regarded them as disabled. Further, it may be just as difficult for a plaintiff to establish that her employer *regarded* her as substantially limited in a major life activity as it is to establish that she actually *is* substantially limited in a major life activity.

Commentators have observed that requiring substantial limitation of a major life activity, at least as the courts have applied the requirement, undermines the intent and effect of disability law.[115] The argument is that people with disabilities are not necessarily discriminated against because of any real or perceived limitations in their ability to perform major life activities.[116] Rather, they are discriminated against because others are afraid, ashamed, or hostile toward them.[117] This is especially true for people with mental disabilities, because the "depth of discomfort caused by the revelation that an individual has a mental illness is not associated with the perception that the individual is substantially limited in major life activities."[118] The inquiry of how well the individual can perform major life activities is often irrelevant to the discriminatory treatment they receive from others.[119] In other words, the discrimination they

113. *See, e.g.*, *Sutton*, 527 U.S. at 489 ("[I]t is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.").

114. Stefan, *supra* note 7, at 276.

115. *See, e.g.*, Lisa Eichorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1428 (1999) (arguing that defining disabilities in terms of limitations of major life activities is not only "vague" but "also runs counter to the notions of the disability rights movement and fails to capture the overall intent of the drafters"); Stefan, *supra* note 7, at 274 ("[R]equiring a person to show that he or she is substantially limited in a major life activity misses the point of discrimination against people on the basis of psychiatric disability.").

116. STEFAN, *supra* note 14, at 73.

117. *Id.*

118. *Id.*

119. *Id.*

face is not rooted in the perception that they are substantially limited in a major life activity. Therefore, requiring them to prove that they are substantially limited is not appropriate.

4. Proving "Qualified Individual" Status

To be protected by the ADA, a person must not only be disabled but must also be "qualified."[120] A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[121] Making this determination requires (1) identifying the essential functions of the job and (2) determining whether the person with the disability can perform these functions, with or without reasonable accommodations. Once again, requiring a plaintiff to show that she is otherwise qualified for a job, combined with judicial interpretation of the substantial limitation language, creates a barrier to recovery because an employee's evidence of her disability can be used by an employer to show that she is not otherwise qualified for the job.

The ADA mandates that consideration should be given to the employer's judgment as to what functions of a job are essential.[122] The ADA also states that, "if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[123] The EEOC regulations define essential functions as the "fundamental job duties of the employment position" which "[do] not include the marginal functions of the position."[124] The regulations provide examples of evidence that should be given considerable weight in determining whether a particular function is essential.[125]

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120. 42 U.S.C. § 12112(a) (2000).

121. § 12111(8).

122. *Id.*

123. *Id.*

124. 29 C.F.R. § 1630.2(n)(1) (2003).

125. 29 C.F.R. § 1630.2(n)(3). The regulation specifically includes the following types of evidence:

> "(i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs."

Id.

Courts determine the essential functions of a job on a case-by-case basis.[126] The employer has the burden of proving which functions are essential.[127] However, this burden is minor considering that courts generally defer to the employer in making this determination.[128] Once the essential functions of a job have been determined, the court must decide whether the disabled person can perform those functions. The court makes this determination in light of any reasonable accommodations that could be provided to the employee. The ADA places an affirmative duty on employers to provide reasonable accommodations unless the employer can show that doing so would place an undue hardship on the employer.[129] The ADA defines a reasonable accommodation as a modification or adjustment to job requirements, the work environment, or facilities that would enable a qualified individual with a disability to enjoy an equal employment opportunity.[130]

Requiring employers to make reasonable accommodations for disabled employees distinguishes the ADA from other employment antidiscrimination laws, which place no affirmative duties on employers beyond treating employees equally.[131] In the ADA context, this affirmative duty is necessary because of the unique nature of disability discrimination. Often, a disabled person is discriminated against because some unnecessary barrier in the workplace keeps her from being able to perform the essential functions of her job.[132] If an employee could perform the essential functions of the job but for these unnecessary barriers, the ADA requires the employer to make reasonable accommodations.[133]

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126. *See, e.g.*, Conneen v. MBNA Am. Bank, N.A., 334 F.3d 318, 326 (3d Cir. 2003) (citing Interpretative Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, app. § 1630.2(n)) (2003).

127. *See, e.g.*, Hamlin v. Charter Township, 165 F.3d 426, 429-30 (6th Cir. 1999); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1184 (6th Cir. 1996).

128. *See* 42 U.S.C. § 12111(8) (2000).

129. § 12112(b)(5)(A).

130. § 12111(9). The statute states that a reasonable accommodation may include:

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

Id.

131. *See, e.g.*, Civil Rights Act, Title VII, 42 U.S.C. § 2000e-2 (2000).

132. *See* Leslie Goddard, *Searching for Balance in the ADA: Recent Developments in the Legal and Practical Issues of Reasonable Accommodation*, 35 IDAHO L. REV. 227, 228 (1999).

133. *Id.* at 230.

Recognizing the burden of reasonable accommodations, the ADA does not require accommodation if it would cause undue hardship on the employer.[134] Undue hardship is "an action requiring significant difficulty or expense, when considered in light of the factors set forth."[135] Factors that may be considered in determining undue hardship include the nature and cost of the accommodation, the financial resources of the entity or facility, and the effect of the accommodation on the operation of the facility.[136]

III. APPLYING THE ADA FRAMEWORK TO MENTALLY DISABLED EMPLOYEES WHO CLAIM SUBSTANTIAL LIMITATION IN THEIR ABILITY TO INTERACT WITH OTHERS.

A. Circuit Split: Is the Ability to Interact with Others a "Major Life Activity" under the ADA?

The regulations implementing Title I of the ADA define the term mental disability to include "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[137] For the most part, courts have recognized diagnoses of most well-known mental illness such as schizophrenia, depression, and bipolar disorder as impairments.[138] In fact with regards to most common mental illnesses, defendants do not contest that they constitute impairments under the ADA.[139] However, for the purposes of the ADA, just because a condition is acknowledged as an impairment does not mean that it will be considered a disability. To constitute a disability, the impairment must substantially limit one or more major life activities.[140] It is meeting this requirement that presents the first barrier to recovery for alleged discrimination for those with mental disabilities under the ADA. Unlike most physical impairments, mental impairments may not readily appear to limit major life activities. For example, a paraplegic can identify walking as a life activity that is substantially limited by her impairment, and since

134. § 12112(b)(5)(A).
135. § 12111(10)(A).
136. § 12111(10)(B)
137. 29 C.F.R. § 1630.2(h) (2003).
138. STEFAN, *supra* note 14, at 47 (citing to exemplary cases).
139. *Id.*
140. § 12102(2).

walking is clearly accepted by courts as a major life activity, she passes the threshold test. Likewise, a blind or deaf individual has no trouble identifying seeing or hearing as the major life activity that each of these impairments affects. On the other hand, an individual with bipolar disorder has the more formidable task of proving how her impairment limits a major life activity. While more debilitating mental impairments, such as mental retardation, affect some of the widely accepted major life activities, other mental impairments such as schizophrenia, depression, or bipolar disorder primarily affect an individual's ability to interact with others.[141] Consequently, interacting with others may be the only major life activity for which some plaintiffs can establish sufficient proof to meet the substantial limitation requirement. So, a court's acceptance of the ability to interact with others as a major life activity will be dispositive in many ADA cases involving individuals with mental disabilities.

Circuits are currently split on whether the ability to get along with others should be considered a major life activity for purposes of the ADA. The First Circuit was the first to squarely address the issue in *Soileau v. Guilford of Maine, Inc.*[142] In that case, the plaintiff, Soileau, had worked for his employer for thirteen years when he was placed under a new supervisor.[143] The new supervisor was not satisfied with Soileau's job performance and, after several warnings and discussions, issued a final warning and a two-day suspension.[144] This situation caused great stress for Soileau, who sought treatment from a psychologist whom he had seen four years earlier during a depressive episode.[145] Upon returning to work, Soileau informed his supervisor of his condition and told him that he was having trouble interacting with other people, particularly with regard to his responsibility of facilitating meetings.[146] The supervisor temporarily relieved Soileau of his normal responsibilities and limited him to clerical work.[147] Soileau's psychologist then wrote a letter to the supervisor asking that Soileau's duties be "restricted so as to avoid responsibilities which require significant interaction with other employees" and advising that Soileau "not be ridiculed, provoked, or

141. For a discussion of how mental impairments such as bipolar disorder and depression affect individuals and their ability to interact with others, see Douglas A. Blair, *Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection Under Title I of the Americans with Disabilities Act*, 29 SETON HALL L. REV. 1347 (1999).

142. 105 F.3d 12 (1st Cir. 1997).

143. *Id.* at 13.

144. *Id.* at 13-14.

145. *Id.* at 14.

146. *Id.*

147. *Id.*

startled by or in front of supervisors or other employees."[148] The supervisor informed Soileau that he felt these accommodations had already been met.[149] The following day, Soileau was terminated because he had failed to correct the problems that led to his suspension.[150]

Soileau sued his employer under the ADA, claiming that he had a mental impairment which substantially limited him in the major life activity of interacting with others.[151] The court easily concluded that Soileau suffered from a mental impairment but determined that he was not disabled within the meaning of the ADA because he did not establish a substantial limitation in a major life activity.[152] The court held that the ability to interact with others should not be recognized as a major life activity, calling it a "skill to be prized" but "different in kind from breathing or walking," two examples of major life activities used in the regulations.[153] The court felt that the "ability to get along with others" is "remarkably elastic, perhaps so much so as to make it unworkable as a definition."[154] The court further noted that even if it did recognize ability to interact with others as a major life activity, Soileau's offer of proof would not establish a substantial limitation in this activity.[155] Working against Soileau's claim was the court's finding that his alleged disability "came and went and was triggered by vicissitudes of life which are normally stressful for ordinary people—losing a girlfriend or being criticized by a supervisor."[156] In other words, even if the ability to get along with others was considered a major life activity, Soileau would not be covered because he was no different than the average person who experiences stress and anxiety in work and everyday life.

Other courts have followed the First Circuit in expressing doubt as to whether the ability to interact with others is a major life activity under the ADA.[157] For example in *Amir v. St. Louis*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 13, 15.

152. *Id.* at 15.

153. *Id.* Although "interacting with others" is listed as a major life activity in the EEOC Compliance Manual, it is not listed in the EEOC's regulations. The court in *Solieau* noted that while the court had "found reference to the EEOC Compliance Manual to be helpful on occasion, the manual is hardly binding." *Id.* at 15 n.2 (citation omitted).

154. *Id.* at 15.

155. *Id.*

156. *Id.*

157. *See, e.g.*, Davis v. Univ. of N.C., 263 F.3d 95, 101 (4th Cir. 2001); Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999).

University, the Eighth Circuit stated that it is "questionable whether [the ability to interact with others] constitutes a major life activity."[158] In *Davis v. University of North Carolina*, the Fourth Circuit expressed "some doubt" about the plaintiff's claim that the ability to interact with others is a major life activity.[159] The Second, Seventh, and Tenth Circuits have noted the question, but have not expressed an inclination either way.[160] Thus, a number of courts either do not allow ADA plaintiffs to rely on the ability to interact with others as the major life activity in which they are substantially limited or have not decided the issue.

In contrast, the Ninth Circuit, in *McAlindin v. County of San Diego*, held that the ability to get along with others is a major life activity.[161] In that case, the plaintiff, McAlindin, suffered from anxiety and panic disorders.[162] After receiving a promotion at work, McAlindin requested and was granted leave due to "work stress" associated with the duties of his new job.[163] He returned to work, but two years later he again took leave for his "stress-related disability."[164] During his extended leave, McAlindin requested that his employer transfer him to another job, asserting the ADA's requirement of reasonable accommodations.[165] The employer refused, viewing the request as an attempt to gain preferential treatment.[166] Upon returning to work after his second leave, McAlindin subsequently sued his employer for discrimination in violation of the ADA.[167]

McAlindin claimed and the court agreed that the ability to interact with others is a major life activity.[168] The court reasoned that "[b]ecause interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity.'"[169] The court directly disputed the First Circuit's contention that the ability to interact with others was too vague a

158. *Amir*, 184 F.3d at 1027.

159. *Davis*, 263 F.3d at 101 n.4.

160. Cameron v. Cmty. Aid for Retarded Children, Inc., 335 F.3d 60, 63-64 (2d Cir. 2003); Emerson v. N. States Power Co., 256 F.3d 506, 511 (7th Cir. 2001); Steele v. Thiokol Corp., 241 F.3d 1248, 1254-55 (10th Cir. 2001).

161. 192 F.3d 1226, 1233 (9th Cir. 1999).

162. *Id.* at 1230.

163. *Id.* at 1231.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* 1231-32.

168. *Id.* at 1233-34.

169. *Id.* at 1234.

concept to be a major life activity.[170] According to the Ninth Circuit, vagueness is not the statutory test for determining whether an activity is a "major life activity."[171] Furthermore, the court reasoned the ability to interact with others is no more vague than the ability to care for oneself, which has been widely recognized as a major life activity.[172] This concept is workable because courts can differentiate between situations where a person is merely "cantankerous" and situations where the inability to interact with others rises to the level of substantial limitation.[173] The court will thus rely on the substantial limitation requirement to prevent plaintiffs with only minor limitations from being considered disabled under the Act.

Since many plaintiffs suffering from mental impairments are substantially limited mostly with regard to social interaction, the ability to interact with others may be the only major life activity that they can identify for purposes of establishing disability under the ADA.[174] Thus, the resolution of the circuit split will determine whether these plaintiffs can be considered disabled under the Act.[175] The Supreme Court's guidance in *Bragdon* and *Toyota* seems to support a resolution in favor of recognizing the ability to interact with others as a major life activity.[176] In *Bragdon*, the Court noted that the "touchstone for determining an activity's inclusion . . . is its significance."[177] In *Toyota*, the Court stated that, for an activity to be major, it must be "of central importance to daily life."[178] Interacting with others certainly fits both definitions. Since we live in a world where everyone is "connected," it would be rare to find an individual who is not required to interact with others, to some degree, in order to work or perform routine everyday tasks.[179] For most people, interacting with others is as significant and central to daily life as judicially recognized major life activities, such as walking and seeing. If and when the Supreme Court squarely addresses this issue, it will

170. *Id.* at 1234-35.

171. *Id.*

172. *Id.* at 1235.

173. *Id.*

174. *See generally* Hensel, *supra* note 18, at 140-43.

175. Commentators have made strong arguments that the ability to interact with others should be considered a major life activity for the purposes of the Act. *See, e.g.*, Edmonds, *supra* note 64; Hensel, *supra* note 18.

176. Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184, 197 (2002); Bragdon v. Abbott, 524 U.S. 624, 638 (1998).

177. *Bragdon*, 524 U.S. at 638.

178. *Toyota*, 534 U.S. at 197.

179. Hensel, *supra* note 18, at 1190.

most likely hold that the ability to interact with others is a major life activity for purposes of the ADA.

B. Can an Employee Be "Substantially Limited in the Ability to Interact with Others" and also "Otherwise Qualified for the Job"?

The analytical framework of the ADA often works to prevent protection of mentally disabled plaintiffs. First, plaintiffs must identify a major life activity that is affected by their impairment,[180] and for impairments such as depression and bipolar disorder, the only impairment they may be able to identify is the ability to interact with others.[181] Second, assuming that the circuit split is resolved in favor of recognizing this as a major life activity, proving a substantial limitation requires an almost complete inability to interact with others.[182] Third, even if plaintiffs meet this burden, an employer may assert that the ability to interact with others is an essential function of the job.[183] Therefore, evidence showing that employees are substantially limited in this function may also prove that they are not qualified for the position. Finally, because plaintiffs must establish an almost complete inability to interact with others to be considered disabled, there is likely no reasonable accommodation that would make such a person qualified. The effect is to largely preclude many mentally disabled employees from receiving protection under the ADA.

1. Proving "Substantial Limitation in the Ability to Interact with Others"

The EEOC Compliance Manual specifically recognizes interacting with others as a major life activity.[184] However, the EEOC noted that an individual is not substantially limited in her ability to interact with others "just because [she] is irritable or has some trouble

180. 42 U.S.C. § 12102(2) (2000).

181. *See* Blair, *supra* note 141.

182. *See. e.g.*, Heisler v. Metro. Council, No. CIV.00-2749 RHK/JMM, 2001 WL 1690052, at *7-8 (D. Minn. Dec. 14, 2001), *aff'd in part, rev'd on other grounds*, 339 F.3d 622 (8th Cir. 2003); Steele v. Thiokol Corp., 241 F.3d 1248, 1250, 1255-56 (10th Cir. 2001); Doyal v. Okla. Heart, Inc., 213 F.3d 492 (10th Cir. 2000); Comber v. Prologue, Inc., No. CIV.JFM-99-2637, 2000 WL 1481300, at *3, 5-6 (D. Md. Sept. 28, 2000).

183. *See, e.g.*, Gilday v. Mecosta County, 124 F.3d 760, 765 (6th Cir. 1997); Misek-Falkoff v. Int'l Bus. Machs. Co., 854 F. Supp. 215, 227 (S.D.N.Y. 1994).

184. EEOC COMPLIANCE MANUAL, *supra* note 57, § 902.3(b); *see supra* Part II.B (discussing that the EEOC Compliance Manual is informal guidance, which is not entitled to as much deference by the courts).

getting along with a supervisor or coworker."[185] The EEOC further explains that an individual would be considered substantially limited if "her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary."[186] Moreover, "[t]hese limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability."[187]

Absent a statutory definition, courts have set the standard for substantial limitation in the ability to interact with others in a way that makes it difficult for plaintiffs to survive summary judgment.[188] In some courts, in order to survive summary judgment, a plaintiff must demonstrate "potentially life-long impairments that are virtually incapacitating, coupled with extensive individualized medical evidence."[189] Although the Supreme Court, in *Bragdon*, noted that the Act does not require "utter inabilities" in performing major life activities, some lower courts approach this level of proof in the context of interaction with others.[190] The First Circuit, in *Soileau*, held that interacting with others is not a major life activity but stated that, even if it were, the plaintiff would not be substantially limited.[191] The court reasoned that, although he had trouble handling conflicts at work and could not tolerate crowded places, the plaintiff was not substantially different from a normal person in stressful situations.[192] The court also focused on the plaintiff's ability to perform many daily activities that required interaction with other people, like grocery shopping and visiting pubs.[193]

In finding no substantial limitation, some courts focus on plaintiffs' ability to get along with other people at least some of the time.[194] In *Steele v. Thiokol Corp.*, the plaintiff, who was diagnosed

185. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES 22 (1997) [herinafter EEOC ENFORCEMENT GUIDANCE], http://www.eeoc.gov/policy/docs/psych.html.

186. *Id.*

187. *Id.*

188. Hensel, *supra* note 18, at 1178.

189. *Id.*

190. *See, e.g.*, Heisler v. Metro. Council, No. CIV.00-2749 RHK/JMM, 2001 WL 1690052, at *7-8 (D. Minn. Dec. 14, 2001), *aff'd in part, rev'd on other grounds*, 339 F.3d 622 (8th Cir. 2003); Steele v. Thiokol Corp., 241 F.3d 1248, 1250 (10th Cir. 2001); Doyal v. Okla. Heart, Inc., 213 F.3d 492, 498-99 (10th Cir. 2000); Comber v. Prologue, Inc., No. CIV.JFM-99-2637, 2000 WL 1481300, at *3, 5-6 (D. Md. Sept 28, 2000).

191. Soileau v. Guilford of Me., Inc.,105 F.3d 12, 15 (1st Cir. 1997).

192. *Id.* at 15-16.

193. *Id.* at 16.

194. Hensel, *supra* note 18.

with depression and obsessive compulsive disorder, complained that he had difficulty getting along with his coworkers.[195] He was often involved in confrontations with his coworkers and supervisor, which led to disciplinary action against him.[196] His trouble interacting with people at work led to a nervous breakdown and a three-and-one-half week leave of absence.[197] Although the court did not decide whether the ability to interact with others is a major life activity, it determined that, even if it were, the plaintiff would not survive summary judgment because he was not substantially limited in this activity.[198] The court reasoned that the plaintiff did not meet the burden of establishing a substantial limitation because he did not show that he had "trouble getting along with people in general" but, rather, only seemed to have problems with his coworkers.[199]

In *Heisler v. Metropolitan Council*, the plaintiff, who had suffered from a major depressive disorder for twenty years, testified that her impairment caused her to go through periods when she could not speak to anyone due to her feelings of sadness and isolation.[200] The court found that she failed to prove substantial limitation because she was not wholly unable to interact with others.[201] Rather, she alleged only that her depression made social interaction difficult.[202] Essentially the *Heisler* court equated substantial limitation with total inability to interact with others.[203] Other courts have determined that evidence of "a single positive relationship is sufficient" to conclude that a plaintiff is not substantially limited in the ability to interact with others.[204]

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195. *Steele*, 241 F.3d at 1250.

196. *Id.* at 1250-52.

197. *Id.* at 1252.

198. *Id.* at 1255.

199. *Id.*

200. Heisler v. Metro. Council, No. CIV.00-2749 RHK/JMM, 2001 WL 1690052, at *8 (D. Minn. Dec. 14, 2001), *aff'd in part, rev'd on other gounrds*, 339 F.3d 622 (8th Cir. 2003).

201. *Id.*

202. *Id.*

203. *Id.*

204. Hensel, *supra* note 18, at 1185; *see* Doyal v. Okla. Heart, Inc., 213 F.3d 492, 499 (10th Cir. 2000) (finding that the plaintiff was not substantially limited because one supervisor testified that the plaintiff interacted normally with him); Comber v. Prologue, Inc., No. CIV.JFM-99-2637, 2000 WL 1481300, at *6 (D. Md. Sept. 28, 2000) (finding that plaintiff was not substantially limited in her ability to interact with others because one co-worker testified that she had a "good working relationship" with the plaintiff and found working with her "very pleasurable").

2. Proving "Otherwise Qualified for the Job"

The requirement that plaintiffs prove almost complete inability to interact with others in order to establish a substantial limitation makes it difficult to then convince the court that they are otherwise qualified for the job. Since the ADA only prohibits discrimination against *qualified* individuals with disabilities, an employer would only need to show that (1) interacting with others is an essential element of the job and (2) with or without reasonable accommodation, the employee cannot perform this essential element.[205] Given that the ADA states that "consideration shall be given to the employer's judgment as to what functions of a job are essential," it is not surprising that courts generally agree with employers that interacting with others is an essential element of most jobs.[206] For example, in *Gilday v. Mecosta County*, the Sixth Circuit held that "[t]he ability to get along with customers is necessary for all but the most solitary of occupations."[207] Further, proving that a plaintiff cannot perform the essential job function of interacting with others is relatively simple given that the plaintiff has already had to demonstrate a substantial limitation in this very function. Proving that a plaintiff is not otherwise qualified is made even easier in jurisdictions that require almost complete inability to interact with others.[208]

The requirement of reasonable accommodation generally does not help mentally impaired plaintiffs who assert substantial limitation in the ability to interact with others to prove that they are qualified. Recall that the ADA defines "qualified individual with a disability" as "an individual with a disability who, *with or without reasonable accommodation*, can perform the essential functions of the employment position."[209] Theoretically, a plaintiff could argue that, although she is substantially limited in her ability to interact with others, which is an essential function of the job, she can perform this function with reasonable accommodation. However, because many courts require almost complete inability to interact with others to establish a substantial limitation, it is hard to imagine a reasonable accommodation that would make such a person sufficiently able to

205. 42 U.S.C. §§ 12111(8), 12112(a) (2000).

206. § 12111(8).

207. Gilday v. Mecosta County, 124 F.3d 760, 765 (6th Cir. 1997); *see also* Misek-Falkoff v. Int'l Bus. Machs. Corp., 854 F. Supp. 215, 227 (S.D.N.Y. 1994) ("It is certainly a 'job-related requirement' that an employee, handicapped or not, be able to get along with co-workers and supervisors.").

208. *See supra* Part III.B.1.

209. 42 U.S.C. § 12111(8) (emphasis added).

interact with others to be considered otherwise qualified for the job. Limiting the individual's interaction with coworkers and supervisors is likely impractical or even impossible given the modern work environment where communication and job-interrelatedness are common. Beyond allowing the person to work from home or in isolation, there does not seem to be any reasonable accommodation. Although it is possible that there are some jobs that could be done from home or without any interaction with others, it is likely that for the majority of jobs this would not be an option. Therefore, the reasonable accommodation avenue seems a dead end for the majority of mentally disabled plaintiffs claiming substantial limitation in their ability to interact with others.

Consequently, even among courts that accept the ability to interact with others as a major life activity, the proof required to establish a substantial limitation is so exacting that employees may effectively provide employers with the proof needed to establish that the employee is not otherwise qualified for the job. Employers will claim that the ability to interact with others is an essential element of the job which the employee, by proving substantial limitation, has shown that she cannot perform. Where an employee cannot perform an essential element of a job given reasonable accommodations, she is not otherwise qualified and the ADA will provide no protection from discrimination.[210]

IV. TWO PROPOSED SOLUTIONS: (1) APPLYING THE "CORRECT" SUBSTANTIAL LIMITATION STANDARD OR (2) BRINGING A REGARDED AS DISABLED CLAIM

While the judiciary's strict interpretation of substantial limitation in the ability to interact with others helps eliminate frivolous claims by individuals who should not be afforded the protections of disability law, it may go too far in preventing some deserving mentally impaired plaintiffs from recovering. Two possible solutions would give deserving plaintiffs a chance for coverage under the ADA while still protecting employers' interest in ensuring that frivolous claims are defeated. Both solutions are consistent with the statutory language of the ADA and, therefore, could be included in the EEOC regulations and applied by courts without legislative action. First, courts should adopt a more sensible standard for the substantial limitation test, whereby a plaintiff would not have to show almost complete inability to interact with others. Second, plaintiffs should

210. *See* §§ 12111(8), 12112(a).

bring suit under the regarded as disabled standard rather than the actually disabled standard. Although the plaintiff must still show that her employer regarded her as disabled in a major life activity, she would not have to show actual, substantial limitation, which often leads to the conclusion that she is not otherwise qualified for the job.

Both proposed solutions operate under the assumption that courts will accept interaction with others as a major life activity. Should the Supreme Court decide to resolve the split among the circuit courts, it should recognize that interacting with others is as significant and central to daily life as other widely accepted major activities.[211]

A. Regulatory Action to Redefine the Substantial Limitation Requirement

First, courts should adopt a more sensible standard for the substantial limitation test. Instead of requiring almost complete inability to interact with others, courts should follow the Supreme Court's interpretation in *Bragdon* that "[t]he Act addresses substantial limitations on major life activities, not utter inabilities."[212] With regard to claims based on limitations in the ability to interact with others, the lower courts have required more of plaintiffs.[213] Courts should recognize that an individual who is substantially limited in her ability to interact with others may still be qualified to perform a job that requires interaction given reasonable accommodation.[214] Adhering to the concept of substantial limitation set forth by Supreme Court would allow the ADA to adequately protect deserving plaintiffs. Unfortunately the Court's language in *Bragdon* seems to have been too vague to prevent lower courts from continuing to set a standard for showing substantial limitation in the ability to interact with others that is too high. It is apparent that the

211. *See supra* Part III.A.

212. Bragdon v. Abbott, 524 U.S. 624, 641 (1998).

213. *See supra* Part III.B.1. This may be a result of the doubt lower courts have expressed as to whether interaction with others should be considered a major life activity in the first place. *See, e.g.* Davis v. Univ. of N.C., 263 F.3d 95, 101 (4th Cir. 2001); Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999).

214. If the court requires almost complete inability to interact with others, then there would be no accommodation, other than working from home or in isolation, that would work. *See supra* Part III.B.2. However, if the courts adopted a more reasonable standard of what it means to be substantially limited, then there may be some other accommodations that would enable the individual to perform essential job functions even though she has some difficulty interacting with others.

lower courts need more detailed guidance as to what substantially limits means.

One commentator suggests that the Ninth Circuit set the appropriate standard in *McAlindin* when it held that individuals who demonstrate severe problems interacting with others on a regular basis, such as "consistently high levels of hostility, social withdrawal or failure to communicate when necessary" would meet the substantial limitation requirement.[215] While this standard appears to strike a better balance than courts that require almost complete inability to interact with others, its language, like the *Bragdon* language, may also be too vague, thus allowing lower courts to continue setting too high a burden for the substantial limitation requirement. Just as the lower courts seem close to requiring the "utter inabilities" which the Supreme Court rejected, the *McAlindin* standard seems subject to the same treatment by the lower courts. Essentially, these judicial determinations are too vague to effectuate a clear and uniform standard.

The most appropriate course of action would be for the EEOC to promulgate regulations that would provide a more comprehensive statement of what a plaintiff must show to establish a substantial limitation in her ability to interact with others. The EEOC has provided some suggestions for courts in its Enforcement Guidance and its Compliance Manual. However, these suggestions do not bind courts.[216] Since courts afford greater deference to administrative regulations, which are promulgated according to the agency's formal rule-making procedures, than to informal administrative guidance,[217] the EEOC should formalize its informal guidance. Currently, EEOC regulations do not address the issue of whether interaction with others is a major life activity. The EEOC does recognize interaction with others as a major life activity in its Compliance Manual,[218] and it should do so in the regulations as well. This would perhaps solve the split in the circuits over this threshold issue since the courts would be more likely to defer to the EEOC. Then, the EEOC should promulgate regulations setting forth an appropriate standard for showing substantial limitation in the ability to interact with others. This

215. Hensel, *supra* note 18, at 1194 (citing McAlindin v. County of San Diego, 192 F.3d 1226, 1235) (9th Cir. 1999); *see also* EEOC ENFORCEMENT GUIDANCE, *supra* note 185, at 22.

216. *See, e.g.*, Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 n.2 (1st Cir. 1997); *see also supra* Part II.B.

217. *See* Christensen v. Harris County, 529 U.S. 576, 587-88 (2000); *see also Soileau*, 105 F.3d at 15 n.2; *supra* Part II.B.

218. EEOC COMPLIANCE MANUAL, *supra* note 57, § 902.3(b).

would require courts, giving the appropriate deference to the regulations, to apply a fairer and uniform standard.

In defining substantial limitation in the ability to interact with others, the proposed EEOC regulations should take their start from the 1997 Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, which states that:

> Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a substantial limitation in interacting with others. An individual would be substantially limited, however, if his/her relations with others were characterized on a regular basis by severe problems. . . . These limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.[219]

This language, combined with the examples given in the Enforcement Guidance,[220] help to define the meaning of substantial limitation in the context of interacting with others. This language is only a start. In promulgating formal regulations to address interaction with others cases, the EEOC should consider its own interpretations, found in the Enforcement Guidance and in the Compliance Manual, as well judicial precedent. The new regulations should consider all of the possible sources and fashion a comprehensive statement of what it means to be substantially limited in the ability to interact with others. Through notice and comment rulemaking, the EEOC can reconcile the divergent approaches taken by courts and more fairly address the concerns of employees and employers. Ultimately, the EEOC must set forth a standard that rejects "virtual incapacity" and that more appropriately balances the interests of employers and deserving plaintiffs.

B. Bringing More Claims under the "Regarded as Disabled" Standard

Another solution that would allow more deserving mentally impaired plaintiffs to bring successful claims for discrimination would be for these plaintiffs to avoid claiming that they are actually disabled, and, instead, claim that they are regarded as disabled by their employers.[221] The ADA allowance of this type of claim is crucial for plaintiffs who are not substantially limited in any major life activity yet face discrimination based on an employer's misperception of them.[222] Many times, employees with mental disabilities do not need tangible accommodations. Rather, they simply seek to stop the

219. EEOC ENFORCEMENT GUIDANCE, *supra* note 185, at 22.

220. *Id.*

221. *See* 42 U.S.C. § 12102(2) (2000).

222. *See* STEFAN, *supra* note 14, at 93.

perception that they are incapable of performing the essential functions of a job.[223] Thus, it may be more appropriate and more effective for these plaintiffs to bring a cause of action under the ADA's "regarded as" standard rather than attempt to prove actual disability.

Although the regarded as disabled standard recognizes that some discrimination is grounded in an employer's perception of mental disability, bringing a successful claim under this standard remains difficult. The EEOC and courts have interpreted "regarded as disabled" as requiring a plaintiff to show that her employer regarded her as substantially limited in some major life activity.[224] It may be just as difficult to prove that an employer thought that an employee was substantially limited in a major life activity as it is to prove that the employee was actually and substantially limited in a major life activity.[225]

Despite this difficulty, plaintiffs may still ultimately have more success claiming that they are regarded as disabled rather than actually disabled because the regarded as claim avoids the problem of having to show substantial limitation in the ability to interact with others while at the same time proving qualification for the job. Under a claim of actual disability, the employer can show that the plaintiff is not otherwise qualified for the job by using the plaintiff's proof of substantial limitation in the ability to interact with others.[226] However, under a "regarded as disabled" claim, the plaintiff is not required to put on proof of inability to interact with others; she must show only that the employer perceived her as unable to interact with others.[227] Thus, the proof that the plaintiff puts forward will not undermine the requirement that she be otherwise qualified.

Even plaintiffs whose mental disabilities actually do affect their ability to interact with others should consider bringing their claims under the regarded as disabled standard. Although ideally these plaintiffs would rather employers and courts recognize that they can be both substantially limited in their ability to interact with others *and* qualified for the job given reasonable accommodations, as a practical matter, it is difficult to win this argument given the current judicial application of the ADA framework. As long as courts continue

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223. *Id.*

224. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999) ("[I]t is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.").

225. *See supra* Part II.B.3.

226. *See supra* Part III.B.

227. *See* 42 U.S.C. § 12102(2) (2000).

to require a showing of virtual incapacity to interact with others to establish a substantial limitation, plaintiffs will have difficulty bringing a claim under the actual disability standard. Ultimately, courts should move away from this virtual incapacity requirement toward a more balanced standard for showing substantial limitation. For now, many plaintiffs can increase the likelihood of a successful claim by arguing not that they are disabled yet qualified, but rather that they are regarded as disabled by their employers. Under both proposals, the plaintiff must not only show that she fits within a protected class of the ADA but must also show that she was actually discriminated against by her employer because of an actual or perceived disability.[228] Thus, lowering the threshold for establishing a disability would not excessively increase employer liability.[229] Lowering the threshold will, however, allow more plaintiffs to survive summary judgment and put on their case of discrimination.

V. CONCLUSION

Current judicial application of the ADA to mentally disabled employees who have difficulty interacting with others makes it nearly impossible for some deserving plaintiffs to survive summary judgment. The first obstacle these plaintiffs face is convincing the court that interacting with others is a major life activity for the purposes of the ADA.[230] The circuits are currently split on this issue.[231] If and when the Supreme Court decides the question, it should determine that interacting with other is indeed a major life activity. The Court's language in *Bragdon*, that the test for whether something is a major life activity is its "significance,"[232] and *Toyota*, that the determination is whether it is of "central importance to daily life,"[233] supports the conclusion that interacting with others should be included. Even if courts recognize this major life activity, plaintiffs face a second obstacle. In proving that they are disabled due to a substantial limitation in their ability to interact with others, these plaintiffs necessarily present themselves as being unqualified for most jobs. This obstacle exists because some courts seem to require a "virtual incapacity" to interact with others in order to be considered

228. *See* § 12112(a).

229. *See, e.g.*, Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997).

230. *See supra* Part III.A.

231. *Id.*

232. Bragdon v. Abbott, 524 U.S. 624, 638 (1998).

233. Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

substantially limited.[234] If plaintiffs satisfy this burden, employers can then argue that the ability to interact with others is an essential function of the job that the plaintiff desires and that since the plaintiff is so limited in this function, she is inherently not qualified for the position.

To overcome the second obstacle, courts should relax the substantial limitation standard in a way that is more consistent with Congressional intent and Supreme Court precedent. The EEOC should promulgate formal regulations that set an appropriate standard for showing a substantial limitation in the ability to interact with others. The EEOC has already provided guidance in this regard,[235] but a regulation that requires judicial deference is needed. Adjusting the substantial limitation standard will allow more plaintiffs to satisfy the threshold requirement of showing disability. Lowering the burden of proof for plaintiffs will not excessively extend employer liability because the ADA still requires that the plaintiff actually prove that the employer discriminated on the basis of a disability or perceived disability.[236]

Alternatively, some plaintiffs should consider utilizing the regarded as standard of the ADA rather than trying to establish actual disability. This approach is especially appropriate in the context of mental disability where discrimination is often rooted in misperceptions about workplace capabilities.[237] Since a plaintiff must show that the employer merely regarded her as substantially limited in her ability to interact with others, rather than proving actual substantial limitation, the plaintiff avoids the problem of unintentionally proving that she is not qualified for the job.[238] For this reason, even if a plaintiff is actually limited in her ability to interact with others, she should consider bringing a claim under the regarded as disabled standard. Although she would like the court to recognize that she can be both substantially limited in her ability to

234. *See supra* Part III.B.1.

235. *See, e.g.*, *supra* text accompanying note 217.

236. 42 U.S.C. § 12112(a) (2000).

237. *See* STEFAN, *supra* note 14, at 93.

238. § 12102(2); *see supra* Part IV.B.

interact with others and also qualified for the job, until the court changes its substantial limitation standard, a claim brought under the regarded as disabled standard is more likely to succeed.

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