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## Mending a Monumental Mountain: Resolving Two Critical Circuit Splits Under the Americans with Disabilities Act for the Sake of Logic, Unity, and the Mentally Disabled

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## Mending a Monumental Mountain: Resolving Two Critical Circuit Splits Under the Americans with Disabilities Act for the Sake of Logic, Unity, and the Mentally Disabled

### I. INTRODUCTION

Welcome to Mount ADA. Now please picture yourself in a group of fifty hikers on this large and diverse mountain.<sup>1</sup> You have a guide that is responsible for leading you and your colleagues along the tricky trails and over the rocky terrain. A number of hikers in your group—ten to be exact<sup>2</sup>—need special assistance in order to successfully navigate the mountain, and the guide has provided them with the necessary accommodations. As you make your way along the mountain's paths, you encounter some difficulties. You feel weighed down by unhappy thoughts, and, as a result, your relationship with your guide deteriorates. In fact, your melancholic mood makes it difficult to communicate and work with most of the people in the group. The guide considers you to be substantially limited in your ability to interact with others and questions your capability to continue the hike. You, however, feel confident in your abilities to perform the necessary tasks involved with the hike—provided that the guide relieves you of duties that require significant interaction with the other hikers. What should be done? Must the guide provide the accommodations necessary for you to remain with the group? Can she send you packing?<sup>3</sup>

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1. This thinly veiled parable illustrates some of the major issues and challenges in the employment arena under the Americans with Disabilities Act.

2. This number is representative of the datum from the United States Census Bureau, which states that about one in five U.S. residents suffer from at least one disability. U.S. CENSUS BUREAU, FACTS FOR FEATURES (2003), <http://www.census.gov/Press-Release/www/2003/cb03ff-10.html>. Additionally, only about thirty percent of individuals suffering from a major disability are currently working. U.S. DEP'T OF LABOR, FREQUENTLY ASKED QUESTIONS (FAQS): PEOPLE WITH DISABILITIES, <http://www.dol.gov/dolfaq/go-dol-faq.asp?faqid=66&faqsub=Statistics&factop=People+with+Disabilities&topicid>.

3. Before answering such questions, it is important for one to consider not only the point of view of the mentally impaired hiker, but also that of the guide and other hikers on the mountain. John Erskine wrote, "[T]he body travels more easily than the mind, and until we have limbered up our imagination we continue to think as though we had stayed home. We

In the context of the workplace environment, the answers to these and other questions are to be found by looking to the Americans with Disabilities Act (ADA) of 1990.<sup>4</sup> Congress enacted the ADA in an attempt to provide comprehensive protection against discrimination for individuals with real or perceived disabilities. Title I of the ADA states that employers are prohibited from discriminating against qualified individuals with disabilities in all facets of employment.<sup>5</sup> In addition to the requirement of equal treatment, the ADA requires employers “to make ‘reasonable accommodations’ or adjustments in the workplace not offered to applicants or employees without disabilities, which permit the person with a disability to perform the essential functions of his or her job.”<sup>6</sup> Thus, an employer that is subject to the requirements of the ADA is prohibited from discriminating against qualified individuals with disabilities and is required to provide reasonable accommodations that do not amount to an undue hardship.<sup>7</sup>

The courts’ application of Title I of the ADA has, at times, been considerably inconsistent.<sup>8</sup> One significant fissure in the ADA mountain involves the question of whether an individual’s ability to interact with others is a major life activity under the ADA.<sup>9</sup> This is an important issue because unless an individual is substantially limited in a major life activity (i.e., seeing, hearing, or walking), that individual does not qualify as disabled under the ADA, and an employer has no

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have not really budged a step until we take up residence in someone else’s point of view.” JOHN ERSKINE, *THE COMPLETE LIFE* 192 (1943).

4. 42 U.S.C. §§ 12101–12213 (2000).

5. *See id.* § 12112(a).

6. Leslie Goddard, *Searching for Balance in the ADA: Recent Developments in the Legal and Practical Issues of Reasonable Accommodation*, 35 IDAHO L. REV. 227, 230 (1999); *see also* 42 U.S.C. § 12111.

7. Undue hardship is defined as “an action requiring significant difficulty or expense, when considered in light of . . . the nature and cost of the accommodation[,] . . . the overall financial resources of the facility or facilities involved[,] . . . the overall financial resources of the covered entity[, and] . . . the type of operation or operations of the covered entity.” 42 U.S.C. § 12111.

8. Some even view the current ADA employment landscape as warranting action by the mountain’s creator—Congress. In 2004 the National Council on Disability (NCD) published a report entitled *Righting the ADA*, in which the NCD analyzed “problematic rulings” involving the ADA and offered suggestions for legislative action that would “restore the ADA to its original intent.” THE NATIONAL COUNCIL ON DISABILITY, *RIGHTING THE ADA* 1 (2004), available at [http://www.ncd.gov/newsroom/publications/2004/righting\\_ada.htm](http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm).

9. “Interacting with others” refers precisely to one’s ability to communicate and interact with others.

responsibility to accommodate that individual.<sup>10</sup> Although most circuits have not directly addressed this issue, the First Circuit and the Ninth Circuit have come to different conclusions, creating the “interacting with others divide.”<sup>11</sup> In August 2005, the Eleventh Circuit expanded another critical divide when it rejected the precedent of four sister circuits and joined the First, Third, and Tenth Circuits in holding that the ADA requires employers to reasonably accommodate those employees they perceive as disabled.<sup>12</sup> The Eleventh Circuit’s decision deepened what one might call the “accommodation divide.” This split in authority is significant because a mentally impaired individual will often base his discrimination claim on the fact that the employer perceived him as disabled, and if a court does not recognize a duty to accommodate such an individual, that person has no recourse under the ADA.

These two splits in authority impact a significant number of discrimination claims and have created considerable confusion in the employment arena.<sup>13</sup> The Supreme Court should quickly act to resolve these disputes and should do so by looking to the plain language of the ADA, congressional intent, Supreme Court precedent, and explicit guidance from the Equal Employment Opportunity Commission (“EEOC”). If and when the Court engages in this analysis, the Court should hold that interacting with others is a major life activity and that employers are responsible to accommodate those individuals they perceive as disabled. Such holdings represent the most logical interpretation of the ADA and will create a desirable unity among the lower courts. Perhaps most

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10. See 42 U.S.C. § 12102(2); see also *Bragdon v. Abbott*, 524 U.S. 624 (1998).

11. See *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (holding that the ability to interact with others is a “skill to be prized” but should not be recognized as a “major life activity” for purposes of the ADA). *But see* *McAlindin v. County of San Diego*, 192 F.3d 1226, 1230, 1234 (9th Cir. 1999) (recognizing the ability to get along with others as a “major life activity” under the ADA). Further, both the Eighth and Fourth Circuits have expressed doubt as to whether the ability to interact with others is a major life activity. See *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir. 1999); *Davis v. Univ. of N.C.*, 263 F.3d 95, 101 n.4 (4th Cir. 2001).

12. See *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005). See *infra* Parts III and IV for a discussion of this circuit split.

13. “Recent EEOC data show more discrimination cases involve mental impairments (more than 20 percent) than any other disabilities category . . . .” Lyda Phillips, *Employment Discrimination—Disability: Accommodating the Problem Employee: No Easy Answers, Experts and Courts Agree*, 73 U.S. L. WK. 2275 (2004).

important, such a course of action is critical for the liberation and protection of many individuals suffering from mental illness.

The “interacting with others” and “accommodation” divides impact individuals suffering from mental impairments<sup>14</sup> more than any other segment of the disabled community. This is due to the following: an individual must have a disability to be protected under the ADA, and whether an individual has a disability hinges on whether that person is substantially limited in a major life activity. Unlike their physically disabled counterparts who have disabilities that involve limitations in major life activities such as seeing, hearing, speaking, or walking, individuals with mental impairments are often left to argue that their limitation lies with their inability to interact with others. Therefore, unless a court recognizes interacting with others as a major life activity, many mentally impaired individuals will not be “disabled” as defined by the ADA and will remain unprotected under the Act. Courts that refuse to recognize interacting with others as a major life activity unjustly discriminate against the mentally impaired. This occurs simply because their impairment is lesser known and their limitations are less apparent. Even if a court recognizes interacting with others as a major life activity, many mentally impaired individuals will still fall outside the protections of the ADA because such employees are forced to allege discrimination based on a “perceived disability”; and, as mentioned above, about half of the circuits do not require employers to reasonably accommodate individuals “perceived” as disabled. Consequently, a mentally impaired individual that qualifies as “disabled” due to the fact that he is perceived as substantially limited in his ability to interact with others is still denied the right to a reasonable accommodation that would allow this individual to secure a job or continue to work.

Part II of this Comment provides some background on the framework of the Americans with Disabilities Act, focusing on those sections of the Act pertinent to this Comment. Part III analyzes the circuit splits: first, it looks at the leading case on each side of the “interacting with others divide”; and second, it looks at some of the major cases representing the “accommodation divide.” This

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14. Mental impairments include anxiety disorder, depression, bipolar disorder, and schizophrenia. Of the discrimination claims that involve mental impairments, anxiety disorder is the most common, followed by depression. *Id.*

discussion illustrates both the importance of a unified rule and provides the necessary background to understanding the impact of these issues on persons suffering from mental impairments. Part IV argues that the Supreme Court should resolve the circuit splits by recognizing the interaction with others as a major life activity and recognizing an employer's duty to reasonably accommodate individuals with perceived disabilities. Such holdings are entirely consistent with the text and purpose of the ADA and, as Part IV illustrates, are critical to the protection of persons suffering from mental impairments. However, even if the Court resolves the splits as suggested, Part IV shows that the realities of the present work environment are such that many mentally disabled individuals will not be protected under the current rubric of the ADA. Nevertheless, there appear to be additional things that can be done to help bring Congress's goal of a discrimination-free work environment closer to a reality. Part V offers a brief conclusion.

## II. THE AMERICANS WITH DISABILITIES ACT

Congress passed the Americans with Disabilities Act after finding that some forty-three million Americans had one or more physical or mental disabilities<sup>15</sup> and that discrimination against individuals with disabilities continued in areas such as employment, public accommodations, education, housing, transportation, communication, health services, and recreation.<sup>16</sup> In an attempt to cure this "serious and pervasive social problem,"<sup>17</sup> Congress enacted this legislation to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and to "provide clear strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."<sup>18</sup> Although the ADA was the first piece of legislation to provide comprehensive protection for the disabled,<sup>19</sup> it

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15. See 42 U.S.C. § 12101(a)(1) (2000). Congress's inclusion of this figure has recently come under fire by the disabled community due to the Supreme Court's usage of the figure to justify its conclusion that Congress desired a narrow interpretation of "disability." See *Disability Agency Urges Congress To 'Right' ADA Through Legislation*, 73 U.S. L. WK. 2326 (2004).

16. 42 U.S.C. § 12101(a)(3).

17. *Id.* § 12101(a)(2).

18. *Id.* § 12101(b)(1)-(2).

19. Goddard, *supra* note 6, at 228.

was not the first significant disability legislation. The Rehabilitation Act of 1973 prohibited federally funded programs or activities from discriminating against the disabled.<sup>20</sup> The Rehabilitation Act had a noteworthy impact on the ADA<sup>21</sup>—indeed the ADA incorporated some of the Rehabilitation Act’s primary definitions nearly word-for-word.<sup>22</sup> This is significant because the Supreme Court interpreted many of the provisions of the Rehabilitation Act that were eventually incorporated into the ADA.

Title I of the ADA covers employment discrimination.<sup>23</sup> It “applies to all private employers who have employed fifteen or more employees for a minimum of twenty calendar weeks within the current or preceding calendar year.”<sup>24</sup> Title I applies to state and local governments, employment agencies, and labor unions.<sup>25</sup> Most courts recognize that an individual makes out a prima facie discrimination case under Title I by showing four things: (1) the individual’s employer is subject to the ADA; (2) the individual suffers from a disability within the meaning of the ADA; (3) the individual could perform the essential function of the job with or without reasonable accommodation; and (4) the individual suffered adverse employment action because of the disability.<sup>26</sup> These steps may appear on their face to be clear, but the interpretations of the ADA have been far from lucid. To better understand the issues underlying the two circuit splits and their impact on the mentally disabled, the following Sections examine some of the ADA’s key terminology and definitions.

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20. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).

21. For more on the Rehabilitation Act and its influence on the ADA, see Timothy J. McFarlin, *If They Ask for a Stool . . . Recognizing Reasonable Accommodation for Employees “Regarded as” Disabled*, 49 ST. LOUIS U. L.J. 927 (2005).

22. Most notably—at least for purposes of this Comment—is the ADA’s near word-for-word adoption of the Rehabilitation Act’s definition of “handicapped individual,” which as amended read: “[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” 42 U.S.C. § 12102(2); *see also* Rehabilitation Act, 87 Stat. at 361.

23. Because this Comment deals exclusively with employment discrimination, it is only necessary to discuss Title I of the ADA—the sole Title covering employment issues.

24. Nancy L. Abell et al., *The Americans with Disabilities Act: Rights, Responsibilities, and Recent Results*, A.L.I.-A.B.A., Sept. 19, 2000, at 249; *see also* 42 U.S.C. § 12111(5)(a) (2000).

25. 42 U.S.C. § 12111.

26. *See, e.g.*, *Brunko v. Mercy Hosp.*, 260 F.3d 939 (8th Cir. 2003).

*A. “Disability” Under the ADA*

Congress defined “disability” in the ADA as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.”<sup>27</sup> Thus, an individual qualifies as disabled under the ADA in any one of three ways: (1) having a physical or mental impairment that substantially limits one or more major life activities;<sup>28</sup> (2) having a record of a physical or mental impairment that substantially limits one or more major life activities;<sup>29</sup> or (3) being regarded as having a physical or mental impairment that substantially limits one or more major life activities.<sup>30</sup> An individual is disabled for purposes of the ADA if that individual falls under any one of the three definitions.<sup>31</sup> Embedded within these definitions are numerous terms of art—“physical or mental impairment,” “substantially limits,” and “major life activities.” The outcome of many cases hinges on the court’s interpretation of these terms, and the following discussion contains a brief analysis of these terms. Because the circuit splits are primarily dealing with individuals asserting discrimination based on perceived disabilities, a deeper analysis of the third disability definition—“regarded as” disabled—will follow the analysis of the key terms.

*1. Physical or mental impairment*

At the heart of the disability definitions lies the phrase “physical and mental impairment.”<sup>32</sup> The EEOC defines physical impairment as “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the

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27. 42 U.S.C. § 12102(2).

28. Courts describe this as the “actual disability” definition. *See, e.g.*, *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 762–66 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1725 (2005).

29. Courts refer to this as the “disability of record” definition.

30. Courts deem this the “regarded as disabled” definition. *See, e.g.*, *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1225 (11th Cir. 2005).

31. *See, e.g., id.* Due to the complexity involved in answering the question of whether an individual is protected under the ADA and because the focus of this Comment involves questions regarding reasonable accommodation and undue hardship, a thorough analysis of this topic is not feasible. For a more detailed analysis of whether an individual is protected under the ADA, see *Abell*, *supra* note 24.

32. 42 U.S.C. § 12102(2).

following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.”<sup>33</sup> Mental impairment is defined as “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”<sup>34</sup> Courts have construed the disability definition to protect individuals with a wide range of disabilities spanning from heart conditions, high blood pressure, AIDS, epilepsy, and diabetes, to hearing, speech and mobility impairment, and back problems.<sup>35</sup> Individuals with temporary, short-term injuries or illnesses are not covered.<sup>36</sup> Also, “impairments” excluded from coverage include recreational drug use, homosexuality and bisexuality, compulsive gambling, kleptomania, transsexualism, pedophilia, exhibitionism, and voyeurism.<sup>37</sup> In 1997 the EEOC issued guidelines designed to facilitate the full enforcement of the ADA with respect to individuals alleging employment discrimination based on psychiatric disability.<sup>38</sup> This EEOC report shows how the issue of psychiatric disabilities in the workplace has been, and continues to be, a complicated issue that affects a significant number of people. Proving that an individual is physically or mentally impaired is alone insufficient for that person to be protected under the Act. One must also show that the impairment substantially limits one or more major life activities.

## 2. *Major life activities*

Before an impairment can rise to the level of a disability, a court must determine that the impairment substantially limits one or more major life activities.<sup>39</sup> The ADA does not provide a definition of what

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33. 29 C.F.R. § 1630.2(h)(1) (2004).

34. *Id.* § 1630.2(h)(2).

35. Abell, *supra* note 24, at 252.

36. *Id.*

37. 42 U.S.C. § 12211. These “impairments” are obviously not considered as such for large segments of society, as evidenced by their exclusion from the statute.

38. 3 EQUAL EMPLOYMENT OPPORTUNITY COMM’N, GUIDE TO EMPLOYMENT LAW AND REGULATIONS § 73:6 (1997) [hereinafter GUIDE TO EMPLOYMENT LAW]. In addition to its purpose of facilitating full enforcement, the EEOC published the guidelines to “respond to questions and concerns expressed by individuals with psychiatric disabilities regarding the ADA; and answer questions posed by employers about how principles of the ADA analysis apply in the context of psychiatric disabilities.” *Id.*

39. 42 U.S.C. § 12102(2); *see* Bragdon v. Abbott, 524 U.S. 624 (1998).

constitutes a major life activity. Consequently, courts have had the final say on which life activities are “major” under the ADA. The EEOC has provided guidance and regulations in an attempt to direct courts in this area of law.<sup>40</sup> EEOC regulations initially provided the following nonexhaustive list of major life activities: caring for oneself, performing manual tasks, seeing, hearing, speaking, walking, breathing, learning, and working.<sup>41</sup> In 1997 the EEOC published an enforcement guidance that added thinking, concentrating, and interacting with others to the nonexhaustive list of major life activities.<sup>42</sup> Although courts disagree as to the level of recognition that is to be given to these latter activities, they have also expanded the list to include the activities of reproduction, sleeping, and sexual relations.<sup>43</sup> The Supreme Court provided a little insight into its reasoning concerning what activities might qualify as “major” for purposes of the ADA in *Bragdon v. Abbott*. The Court noted that “the touchstone for determining an activity’s inclusion under the statutory rubric [of the ADA] is its significance.”<sup>44</sup> In the 2002 case *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court found that a major life activity must be “central to daily life.”<sup>45</sup> Similar to *Abbott*, “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.”<sup>46</sup>

### 3. Substantially limits

The last hurdle in the process of proving disability is a finding that the impairment “substantially limits” a major life activity.<sup>47</sup> In determining whether an impairment substantially limits a major life activity, courts look at the nature and severity of the impairment and

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40. “The formal regulations (regulations), which have been officially promulgated by the EEOC, are entitled to great deference while the informal guidelines (guidelines or guidance) represent unofficial statements that are not binding on courts.” Mark DeLoach, *Can’t We All Just Get Along?: The Treatment of “Interacting with Others” as a Major Life Activity in the Americans with Disabilities Act*, 57 VAND. L. REV. 1313, 1321 (2004).

41. 29 C.F.R. § 1630.2(h)(2)(i) (2004).

42. GUIDE TO EMPLOYMENT LAW, *supra* note 38, § 73:6(3).

43. *See Abbott*, 524 U.S. at 624 (recognizing reproduction as a major life activity).

44. *Id.* at 638.

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

46. DeLoach, *supra* note 40, at 1324.

47. *See* GUIDE TO EMPLOYMENT LAW, *supra* note 38, § 73:6.

the duration or expected duration of the impairment.<sup>48</sup> Courts have also evaluated the permanent or long term impact of the impairment. “The determination that a particular individual has a substantially limiting impairment should be based on information about how the impairment affects that individual and not on generalizations about the condition.”<sup>49</sup> In the 1999 case *Sutton v. United Air Lines, Inc.*, the Supreme Court held that courts must consider mitigating factors when deciding if the impairment is a substantial limitation.<sup>50</sup> Therefore, post-*Sutton* plaintiffs who mitigate their impairments may find themselves unshielded from discriminatory actions because they will not be considered “disabled” under the ADA. The *Sutton* decision “raised the bar for claims under all three [parts of] the disability definition”<sup>51</sup> and has far-reaching effects on medicated persons suffering from psychiatric impairments.

#### 4. *Perceived disabilities*

When an employer perceives an employee as disabled, as having a physical or mental impairment that substantially limits one or more major life activities, that employee is “regarded as disabled.” Employees can fall under the “regarded as disabled” disability definition in three circumstances:

[The individual] (1) [h]as 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) [h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or

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48. *Id.*

49. *Id.*

50. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475, 481–83 (1999) (holding that plaintiffs were not substantially limited by their poor eyesight because corrective measures gave them twenty-twenty vision).

51. Michael D. Reisman, Note, *Traveling “to the Farthest Reaches of the ADA,” or Taking Aim at Employment Discrimination on the Basis of Perceived Disability?*, 26 CARDOZO L. REV. 2121, 2135 (2005).

(3) [h]as none of the impairments defined in [this regulation] but is treated by a covered entity as having a substantially limiting impairment.<sup>52</sup>

This language shows that the “regarded as” definition of disability focuses on the “perceptions about the individual, not the individual’s actual condition.”<sup>53</sup> By focusing on the perception of others, the third prong recognizes “that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”<sup>54</sup> This definition functions to punish employers that take discriminatory action against the disabled, or those they perceive as disabled, and also strikes at the discriminatory attitudes that thwart an individual’s ability to work.<sup>55</sup> “These three categories should be seen as a guide to recognizing that employer misperceptions can result in discrimination in a variety of circumstances, and courts have used them to this end.”<sup>56</sup>

#### *B. Qualified Individual and Reasonable Accommodation*

In addition to having a recognized disability under the ADA, an individual who seeks protection under the Act must be qualified for the job at issue.<sup>57</sup> A “qualified individual”<sup>58</sup> under the ADA is a person with a disability who can perform the essential function of the employment position that such person occupies, or desires to occupy, with or without reasonable accommodation.<sup>59</sup> If such a person cannot perform the essential functions of the position at

52. 29 C.F.R. § 1630.2(l) (2004).

53. Reisman, *supra* note 51, at 2127–28 (“[C]laims ‘regarded as disabled in the major life activity of working’ should be the primary, if not exclusive, basis for membership in the ADA’s protected class for individuals with less visible impairments.”).

54. School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987). Congress pointed to the *Arline* decision as explaining the proper purpose of the “regarded as” prong and “adopted the Supreme Court’s analysis of the ‘regarded as’ definition (under the Rehab Act) in introducing the ADA.” McFarlin, *supra* note 21, at 942; *see also* H.R. REP. NO. 101-485 (III), at 453 (1990).

55. McFarlin, *supra* note 21, at 943.

56. *Id.* at 940.

57. 42 U.S.C. §§ 12111–12117 (2000).

58. For a comprehensive discussion of the question of who is a “qualified individual” for purposes of Title I of the ADA, see William H. Danne, Annotation, *Who Is “Qualified Individual” Under Americans with Disabilities Act Provisions Defining, and Extending Protection Against Employment Discrimination to Qualified Individual with Disability*, 146 A.L.R. FED. 1 (1998).

59. 42 U.S.C. § 12111.

issue, the employer need not hire or retain that person.<sup>60</sup> The EEOC, through a promulgated regulation, defines a qualified individual with a disability as “an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.”<sup>61</sup> Embedded in this definition is a two-step analysis that courts have consistently followed to determine whether individuals are qualified under the ADA.<sup>62</sup>

Consistent with the approach embodied in an [EEOC] regulation (29 C.F.R. §1630.29(m)), the courts have engaged in a fundamental 2-step analysis in resolving whether one is a qualified individual with a disability under ADA Title I, the first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, and the like, and the second step is to determine whether the individual can perform the essential functions of the position, with or without reasonable accommodation.<sup>63</sup>

A court makes the determination of an employee’s “qualified” status under the ADA at the time of the adverse employment action.<sup>64</sup> The EEOC defines essential functions as “the fundamental job duties of the employment position the individual with a disability holds or

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60. *Id.* § 12112.

61. 29 C.F.R. § 1630.2 (2004).

62. *See, e.g.*, Hammel v. Eau Galle Cheese Factory, 407 F.3d 852 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 746 (2005) (recognizing that courts employ a two-part inquiry when determining whether a person is a qualified individual under the ADA, looking first to whether the employee satisfied the employer’s legitimate selection criteria for the position, and then looking to whether the employee was capable, with or without accommodation, of performing the job’s essential functions); Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2003) (noting that an employee establishes the “qualified individual” element by satisfying the requisite job-related requirements of the position and performing the essential functions of the position, with or without reasonable accommodation); Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29 (1st Cir. 2000) (noting that the examination of an employee’s “qualified” status involves asking whether the employee could perform the essential functions of the job, and if not, whether any reasonable accommodation by the employer would enable him to perform those functions).

63. Danne, *supra* note 58, § 2(a).

64. *Id.* § 5(a) (citing Morton v. GTE North Inc., 922 F. Supp. 1169 (N.D. Tex. 1996)).

desires.”<sup>65</sup> The ADA requires that courts consider the employer’s judgment as to what functions of a job are essential.<sup>66</sup> The qualified individual analysis is especially pertinent for people with mental disabilities because interacting with others is often an essential function of the job. The question then becomes whether there is an accommodation that would enable a mentally impaired person to be able to interact with others.

Employers under the ADA have an affirmative duty to reasonably accommodate “otherwise qualified individual[s]” so that these individuals can perform the essential functions of their employment positions.<sup>67</sup> The ADA defines reasonable accommodation by providing possible examples:

(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.<sup>68</sup>

The EEOC has stressed that employers should initiate an informal and interactive process with the disabled individual to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”<sup>69</sup> However, the ADA does not require employers to accommodate such individuals if such accommodation would result in an undue hardship. The ADA defines an undue hardship as “an action requiring significant difficulty or expense, when considered in light of . . . the nature and cost of the accommodation . . . the overall financial resources of the facility or facilities involved . . . the overall financial resources of the covered entity . . . [and] the type of operation or operations of the covered entity.”<sup>70</sup>

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65. 29 C.F.R. § 1630.2(n).

66. 42 U.S.C. § 12111(8) (2000).

67. *Id.* § 12112(b)(5)(A).

68. *Id.* § 12111(9).

69. 29 C.F.R. § 1630.2(o)(3).

70. 42 U.S.C. § 12111(10)(A)–(B).

*C. The EEOC*

To fully analyze the circuit splits, and to really engage in any serious employment law discussion, it is necessary to briefly discuss the Equal Employment Opportunity Commission (EEOC) and some of its actions pertaining to the mentally impaired. Congress has given the EEOC the primary responsibility of enforcing the employment-related portions of the ADA.<sup>71</sup> In 1997 the EEOC published enforcement guidelines designed to “facilitate the full enforcement of the ADA with respect to individuals alleging employment discrimination based on psychiatric disability.”<sup>72</sup> Among the notable elements of this guidance were the EEOC’s additions to the list of major life activities. In addition to the list of enumerated activities in the ADA, the EEOC added the life activities of “learning, thinking, concentrating, [and] interacting with others.”<sup>73</sup> The EEOC qualified this latter activity in a footnote where it stated that “[i]nteracting with others, as a major life activity, is not substantially limited just because an individual is irritable or has some trouble getting along with a supervisor or coworker.”<sup>74</sup> Despite this limiting language, the EEOC suggests an expansion from the traditional scope of major life activities.

Due to the structure of the ADA disability definition, many people that might be considered disabled in a colloquial sense would not qualify as disabled under the ADA. Clearly, individuals suffering from a mental impairment face challenges and discrimination equal to that which their physically impaired brothers and sisters face. However, unless courts recognize “interacting with others” as a major life activity, the mentally impaired may face the discrimination without the protection of the ADA.

## III. EXPLORING THE DIVIDES

This Part describes the current state of the law as affected by the circuit splits; namely, the split in authority involving some courts’ recognition of interacting with others as a major life activity and the courts’ recognition of an employer’s duty to reasonably

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71. Other Federal agencies, such as the Department of Labor’s Office of Federal Contract Compliance Programs, also have responsibilities under those segments of the law.

72. GUIDE TO EMPLOYMENT LAW, *supra* note 38, § 73:6.

73. *Id.*

74. *Id.* § 73:6 n.15.

accommodate those perceived as disabled. To best explain this division, the following Sections look at the leading cases on each side of the “interacting with others” and “accommodation” divides. This discussion illustrates the importance of a unified rule and provides the background necessary to understand the impact of these issues on persons suffering from mental impairments.

*A. The Interacting with Others Divide*

The First Circuit and the Ninth Circuit have both directly addressed the question of whether one’s interaction with others is a major life activity for purposes of the ADA. Their conflicting holdings have created the interacting-with-others divide—a divide that left unattended will certainly grow deeper. This Section analyzes these two leading cases to sharpen the focus of this debate and to set the stage for a discussion of whose interpretation is correct.<sup>75</sup> The First Circuit, in *Soileau v. Guilford of Maine, Inc.*, did not recognize the ability to interact with others as a major life activity.<sup>76</sup> In contrast, the Ninth Circuit, in *McAlindin v. County of San Diego*, held that interacting with others is a major life activity for purposes of the ADA.<sup>77</sup>

*I. Soileau v. Guilford of Maine, Inc.*

In January 1997, the First Circuit heard *Soileau v. Guilford of Maine, Inc.* and refused to recognize the “ability to get along with others” as a major life activity.<sup>78</sup> The court found the concept to be unworkable as a definition and different in kind to the more generally recognized major life activities of walking and breathing.<sup>79</sup>

Randall Soileau began working for Guilford in 1979.<sup>80</sup> In 1992 Soileau started working for Earnest, a new supervisor, but the ensuing relationship between Soileau and Earnest deteriorated.<sup>81</sup> A dispute subsequently arose between Earnest and Soileau when

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75. See discussion *infra* Part IV (including an analysis of “who got it right”).

76. 105 F.3d 12 (1st Cir. 1997).

77. 192 F.3d 1226 (9th Cir. 1999).

78. *Soileau*, 105 F.3d at 12. This case was decided prior to the release of the 1997 EEOC enforcement guidance referenced *infra* Part II.C.

79. *Id.*

80. *Id.* at 13.

81. *Id.*

Soileau refused to train a coworker as directed by Earnest.<sup>82</sup> The next day Earnest issued Soileau a “Final Written Warning/Suspension” that “listed four performance deficiencies, ordered a two day suspension, and required Soileau to evaluate his own performance and come back with an improvement plan.”<sup>83</sup> Stressed by the final warning, Soileau told Earnest of his previous suicidal state and that he was afraid he might once again be falling ill. This was the first time Earnest had heard of Soileau’s condition.<sup>84</sup> Soileau went to see a psychologist a week later.<sup>85</sup> The doctor diagnosed Soileau as suffering from a bout of depression. Soileau told Earnest that he was having a difficult time interacting with other people and Earnest agreed that Soileau would be temporarily relieved from certain duties that aggravated his illness.<sup>86</sup>

On April 12, the doctor provided Guilford with a letter that requested Soileau’s duties to be “restricted so as to avoid responsibilities which require[d] significant interaction with other employees.”<sup>87</sup> On April 21, Earnest and Soileau met to discuss Soileau’s employment situation. Earnest indicated that he believed the new accommodations satisfied the doctor’s recommendations.<sup>88</sup> However, because Soileau had failed to provide Earnest with an improvement plan as requested in the warning, Earnest fired Soileau a day later. Earnest informed Soileau that he had been fired as a result of his lack of improvement in the four problem areas and because he failed to submit an improvement plan.<sup>89</sup>

Soileau filed an ADA discrimination claim in federal court against Guilford arguing that he was significantly limited in the major life activity of interacting with others.<sup>90</sup> The district court granted summary judgment for Guilford and held, among other things, that Soileau’s dysthemia did not substantially impair a major life activity. Reviewing the case de novo, the First Circuit found that Soileau had a mental impairment but refused to recognize the inability to work

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82. *Id.*

83. *Id.* at 14.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

with others as impairing a major life activity.<sup>91</sup> Therefore, Soileau was not “disabled” under the ADA because he failed to show that his impairment substantially limited a major life activity.

The court noted that the “concept of ‘ability to get along with others’ is remarkably elastic, perhaps so much so as to make it unworkable as a definition.”<sup>92</sup> Moreover, even if courts recognized the ability to interact with others as a major life activity, Soileau was not sufficiently limited because the two documented bouts of depression occurred at times when most people would feel stress—following a break-up with a girlfriend and criticism from a supervisor.<sup>93</sup> The court described the ability to get along with others as a “skill to be prized . . . [but] different in kind from breathing or walking.”<sup>94</sup> However, “a more narrowly defined concept going to essential attributes of human communication could, in a particular setting, be understood to be a major life activity.” Nevertheless, the court saw no need to address this question in its opinion<sup>95</sup> and felt uncomfortable imposing duties on employers for an “amorphous” concept.<sup>96</sup>

Two years after the *Soileau* decision, the Ninth Circuit addressed the question of whether interacting with others is major life activity under the ADA, and it came to a different conclusion than the First Circuit.

## 2. *McAlindin v. County of San Diego*

In 1999 the Ninth Circuit decided *McAlindin v. County of San Diego* and held that interacting with others is a major life activity because it is a significant activity that the average person can perform with little or no difficulty.<sup>97</sup>

Richard McAlindin worked for the County of San Diego’s Housing and Community Development Department for more than

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91. *Id.*

92. *Id.*

93. *Id.* The court found that “Soileau’s alleged inability to interact with others 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.” *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234–35 (9th Cir. 1999).

ten years.<sup>98</sup> McAlindin suffered from and received treatment for anxiety disorders, panic disorders, and somatoform disorders.<sup>99</sup> In early 1989, McAlindin was promoted and took on various stressful duties.<sup>100</sup> During a meeting with his supervisor, McAlindin allegedly became agitated and shouted in an accusatory manner. He was granted leave due to “work stress” and, as a result, obtained workers compensation.<sup>101</sup> In May 1992, McAlindin again took leave for stress-related disability, during which time “he repeatedly requested through his attorney a transfer to a different job as a ‘reasonable accommodation’ required by the ADA.”<sup>102</sup> The County agreed to place his name on the transfer list but would not make special efforts to guarantee a transfer.<sup>103</sup>

At the request of the County, McAlindin visited another doctor in the summer of 1993 who also diagnosed him with anxiety and panic disorders but felt that he could return to his job in three to six weeks with proper treatment.<sup>104</sup> When McAlindin returned to work, he felt that his supervisors treated him drastically worse. A supervisor gave McAlindin a written warning for sleeping at work despite his explanation that his prescribed medications made him drowsy.<sup>105</sup> Additionally, McAlindin complained about “not receiving adequate training to help him adapt to the changing technologies in the department.”<sup>106</sup> Though he retained his position, McAlindin filed an ADA discrimination claim against the County and his supervisors, and the district court granted summary judgment in favor of the County.<sup>107</sup> Although the district court found that McAlindin had a mental impairment, it concluded that he was not substantially limited in any major life activity.<sup>108</sup> The Ninth Circuit reversed.<sup>109</sup>

Although McAlindin had not specifically alleged disability based on his limited ability to interact with others, the Ninth Circuit found

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98. *Id.* at 1231.

99. *Id.* at 1230.

100. *Id.* at 1231.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1233.

109. *Id.* at 1240.

enough evidence to support such a conclusion and further held that interacting with others is a major life activity under the ADA.<sup>110</sup> As support for its holding, the court pointed to Supreme Court and other circuit precedent as well as to the 1997 EEOC Enforcement Guidance concerning psychiatric disabilities.<sup>111</sup> The Ninth Circuit noted that in *Bragdon v. Abbott* the Supreme Court found that the term “major life activity” was very broad and denoted “comparative importance,” suggesting that “the touchstone for determining an activity’s inclusion under the [ADA] rubric is its significance.”<sup>112</sup> The court also noted that the Tenth Circuit supported a broad definition of “major life activity” in its decision *Pack v. Kmart, Inc.*,<sup>113</sup> where it held that “a major life activity also must be ‘a basic activity that the average person in the general population can perform with little or no difficulty.’”<sup>114</sup>

The Ninth Circuit found “interacting with others” to fit comfortably within the Act’s broad definition of major life activity. It viewed interacting with others as “an essential, regular function, like walking and breathing.”<sup>115</sup> The court dismissed the First Circuit’s concern that the “ability to get along with others” was too vague by noting that the ADA text contained nothing about vagueness as a test for determining “major life activities.”<sup>116</sup> Moreover, the court believed interacting with others to be no vaguer than “caring for oneself.”<sup>117</sup> The Ninth Circuit did stipulate, however, that “a plaintiff must show that his ‘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.’”<sup>118</sup>

Before analyzing which of these two cases was decided correctly, an exploration of the accommodation divide is in order.

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110. *Id.* at 1233–35.

111. *Id.* at 1233.

112. *Id.* (citing *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998)).

113. *Pack v. Kmart, Inc.*, 166 F.3d 1300 (10th Cir. 1999).

114. *McAlindin*, 192 F.3d at 1233 (quoting *Pack*, 166 F.3d at 1305).

115. *Id.* at 1234.

116. *Id.*

117. *Id.* at 1235 (noting that the Fifth Circuit had defined caring for oneself as including “everything from driving and grooming to feeding oneself and cleaning one’s home”).

118. *Id.*

*B. The Accommodation Divide*

Most circuit courts have directly addressed the question of whether an employer is required to reasonably accommodate those individuals perceived as disabled. Currently, there is a four-four split—the Fifth, Sixth, Eighth, and Ninth Circuits hold that an employee perceived as disabled is *not* entitled to reasonable accommodation,<sup>119</sup> and the First, Third, Tenth, and Eleventh Circuits hold that such individuals *are* entitled to reasonable accommodation.<sup>120</sup> The following cases illustrate the arguments for both sides of the debate.

*I. Kaplan v. City of North Las Vegas*

First, consider an illustrative case in which the Ninth Circuit held that perceived disability does not amount to protection under the ADA in the form of reasonable accommodations. In *Kaplan*, a peace officer brought suit under the ADA alleging discrimination by the city when it fired him because of a perceived disability.<sup>121</sup> Although the peace officer successfully proved that he was regarded as disabled for purposes of the ADA, the court concluded that he was not entitled to a reasonable accommodation for his perceived disability because of the pervasive and troubling results associated with accommodating individuals with perceived disabilities.<sup>122</sup>

In 1989 the City of North Las Vegas hired Frederick Kaplan as a peace officer.<sup>123</sup> In 1995 Kaplan injured his right wrist and thumb during a defensive tactics training exercise.<sup>124</sup> During rehabilitation, Kaplan complained of pain in his right hand when holding objects.<sup>125</sup>

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119. See *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 2003); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916–18 (8th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998).

120. See *Kelly v. Metallics W., Inc.*, 410 F.3d 670 (10th Cir. 2005); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1236–39 (11th Cir. 2005); *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 772–76 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1725 (2005); *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996) (assuming, but not expressly holding, that employers are required to reasonably accommodate employees regarded as disabled).

121. 323 F.3d at 1227.

122. *Id.* at 1232–33.

123. *Id.* at 1227.

124. *Id.* at 1228.

125. *Id.*

Despite numerous therapy sessions, Kaplan continued to experience significant pain. Dr. Mark Reed concluded that Kaplan had rheumatoid arthritis and recommended “a full duty work release, with his employer to evaluate his ability to handle a gun.”<sup>126</sup> Shortly thereafter, Kaplan met with Dr. Timothy Deneau who determined that Kaplan’s rheumatoid arthritis condition was permanent.<sup>127</sup> Dr. Deneau informed the office that Kaplan could not perform the essential function of his job as a peace officer.<sup>128</sup> Although Kaplan requested an opportunity to qualify at the gun range—a necessary activity to remain on the job—the deputy chief denied his request.<sup>129</sup> Kaplan was terminated later that day.<sup>130</sup>

Less than a week after his termination, and on his own initiative, Kaplan qualified on the gun range but did not request reinstatement.<sup>131</sup> Kaplan later testified that it was not until years later that he recovered the ability to perform the actions that would constitute his former essential job functions.<sup>132</sup> Two years later, “an independent physician retained by the City determined that Kaplan never suffered from rheumatoid arthritis.”<sup>133</sup> Kaplan filed a complaint in federal court.<sup>134</sup>

On appeal, the Ninth Circuit had to resolve two issues to determine whether Kaplan was a “qualified individual” under the ADA: “(1) whether Kaplan was able to perform the essential function of the peace officer position at the time of his termination without an accommodation, and (2) whether Kaplan was entitled to reasonable accommodation to help him perform the essential job functions of a peace officer.”<sup>135</sup> The court quickly concluded that at the time of his termination Kaplan could not perform the essential job function of a peace officer without accommodation.<sup>136</sup> Because Kaplan was asserting a perceived disability claim, the court concluded

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126. *Id.*

127. *Id.* at 1228–29.

128. *Id.* at 1228.

129. *Id.* at 1229.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1230; *see supra* Part II.B.

136. *Kaplan*, 323 F.3d at 1230–31.

that he was not entitled to reasonable accommodation under the ADA.<sup>137</sup>

Although the *Kaplan* court looked first to the plain language of the statute, it was not convinced that a clear answer to the accommodation question was available. Notably, the court said that the absence of a stated distinction between the three alternative parts of the “disability” definition was “not tantamount to an explicit instruction by Congress that ‘regarded as’ individuals are entitled to reasonable accommodation[.]”<sup>138</sup> Also, the court argued that a “formalistic reading of the ADA”<sup>139</sup> would lead to bizarre results.<sup>140</sup> The court looked beyond the plain language of the statute, noting that if it “were to conclude that ‘regarded as’ plaintiffs are entitled to reasonable accommodation, impaired employees would be better off under the statute if their employers treated them as disabled even if they were not.”<sup>141</sup> The court viewed this as a “perverse and troubling result”<sup>142</sup> and stated that

[w]ere we to entitle “regarded as” employees to reasonable accommodation, it would do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage the employers to see their employees’ talents clearly; instead, it would improvidently provide those employees a windfall if they perpetuated their employers’ misperception of a disability.<sup>143</sup>

Although most circuits recognize the fact that some strange results will occur when accommodating individuals with perceived disabilities, some circuits are not overly concerned. These unconcerned circuits rely on a strict interpretation of the ADA to hold that an employer is responsible to accommodate those perceived as disabled.

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137. *Id.* at 1231.

138. *Id.* at 1232.

139. *Id.* While some call it formalistic, others call it accurate.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* (citing *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3d Cir. 1999)).

## 2. D'Angelo v. ConAgra Foods, Inc.

Next, consider a case in which the Eleventh Circuit held that perceived disabilities do amount to protection under the ADA in the form of reasonable accommodations. In *D'Angelo v. ConAgra Foods, Inc.*, the Eleventh Circuit held that employers are required “to provide reasonable accommodations for individuals they regard as disabled”<sup>144</sup> because the ADA requires employers to accommodate the disabled and the ADA disability definition makes no distinction between one who is actually disabled and one perceived as disabled.

Cris D'Angelo was diagnosed with vertigo in September 1998.<sup>145</sup> A doctor prescribed some antivertigo medication, but D'Angelo started feeling better and did not fill the prescription.<sup>146</sup> A month after the diagnosis, D'Angelo began working for ConAgra. Over the next few years, she worked in several divisions doing various types of jobs.<sup>147</sup> D'Angelo became sick only when she performed tasks that forced her to continuously stare at a conveyer belt.<sup>148</sup> In September 2001, a supervisor assigned D'Angelo to monitor the “box-former belt,” which required her to make sure that the boxes on the belt were properly formed.<sup>149</sup> This work resulted in the resurfacing of her vertigo condition, and she informed her line leader that the work was making her sick and dizzy.<sup>150</sup> The supervisor asked for “documentation” of D'Angelo's vertigo condition.<sup>151</sup> D'Angelo provided the plant manager with a letter from her doctor stating that she should avoid situations where she has to look at moving belts.<sup>152</sup>

The plant manager met with Singleton's Vice President of Human Resources and determined that there were no available positions where D'Angelo could avoid working around and viewing moving equipment.<sup>153</sup> D'Angelo was terminated the next day.<sup>154</sup>

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144. *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1222 (11th Cir. 2005).

145. *Id.*

146. *Id.* at 1223.

147. *Id.* at 1222.

148. *Id.* at 1223. Although her first position required her to work on a conveyer belt, D'Angelo's subsequent positions rarely involved work with conveyer belts. *Id.* at 1222.

149. *Id.* at 1223.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 1224.

After failing to receive a response from a filed union grievance, D'Angelo filed suit against ConAgra, alleging disability-based discrimination due to the employer's failure to reasonably accommodate her.<sup>155</sup> She claimed protection under the ADA because she was both disabled and because her employer regarded her as disabled. A federal district court in Florida granted summary judgment for ConAgra after finding that D'Angelo was not actually disabled because her "vertigo condition did not significantly limit her in the major life activity of working."<sup>156</sup> The district court also denied her "regarded as" claim.

The appellate court found that D'Angelo's vertigo condition did not significantly limit her in the major life activity of work and affirmed the district court's grant of summary judgment against D'Angelo on her "actual impairment" claim.<sup>157</sup> In analyzing D'Angelo's "perceived disability" claim, the court first examined whether D'Angelo was a "qualified individual."<sup>158</sup> This analysis focused on whether working on a conveyer belt is an essential function of the position of product transporter.<sup>159</sup> The court reversed the district court's grant of summary judgment on this claim because there was a genuine issue of material fact as to whether working on the conveyer belt was an essential function of the job.<sup>160</sup>

In denying D'Angelo's perceived disability claim, the district court based its holding on the decisions of the Fifth, Sixth, Eighth, and Ninth Circuits, which held that plaintiffs claiming they were regarded as disabled were not entitled to a reasonable accommodation under the ADA.<sup>161</sup> Therefore, D'Angelo's inability to perform her job as a transporter without an exemption from working on the spreader and box-former belts denied her a valid claim under the ADA.<sup>162</sup> The Eleventh Circuit rejected the four sister circuits and followed the Third Circuit in holding that individuals perceived as disabled are entitled to reasonable accommodations.<sup>163</sup>

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155. *Id.*

156. *Id.*

157. *Id.* at 1227.

158. *Id.* at 1229.

159. *See id.* at 1230–34.

160. *Id.* at 1234.

161. *Id.* at 1234–35.

162. *Id.* at 1234.

163. *Id.* at 1235.

In coming to this conclusion, the Eleventh Circuit engaged in an appropriate analysis of statutory interpretation, beginning with—and ultimately relying on—an examination of the plain language of the ADA.<sup>164</sup>

After quoting selected sections of the ADA, the Eleventh Circuit logically concluded that the “ADA bars discrimination ‘against an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position.’”<sup>165</sup> The court then looked to the statute’s definition of “disability,” paying special attention to the word “or” that separated the three “kinds” of disabilities: “A ‘disability,’ in turn, is defined by the statute as either ‘a physical or mental impairment that substantially limits one or more of the major life activities of such individual,’ or ‘a record of such an impairment,’ or ‘being regarded as having such an impairment.’”<sup>166</sup> The court reasoned that when one inserts this definition into the statute’s prohibition, the bar on discrimination clearly applies equally to all statutorily defined disabilities. The court stated that “[t]he text of this statute simply offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not.”<sup>167</sup> The court viewed the Supreme Court’s decision in *School Board of Nassau County v. Arline*<sup>168</sup> as support for its interpretation of the statute.<sup>169</sup>

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164. *Id.* at 1225–29, 1239.

165. *Id.* at 1235.

166. *Id.* (emphasis added) (quoting 42 U.S.C. § 12102(2)(A)–(C) (2000)).

167. *Id.* at 1236.

168. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

169. *See D’Angelo*, 422 F.3d at 1236. In *Arline*, a Florida schoolteacher afflicted with tuberculosis claimed that her employer violated the 1973 Rehabilitation Act when she was fired because her employer regarded her as handicapped. *Id.* 1236 (citing *Arline*, 480 U.S. at 273–74). As part of its analysis, the Supreme Court interpreted the 1973 Rehabilitation Act’s definition of “handicapped individual.” *Id.* Part of this definition, then codified at 29 U.S.C. § 706(7)(B)(1970), read that “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment” qualifies as a handicapped individual. *D’Angelo*, 422 F.3d at 1236. Based on this definition, the Supreme Court concluded that the schoolteacher was a handicapped individual within the “regarded as” definition. *Id.* Recognizing that employers have an affirmative obligation to make a reasonable accommodation for handicapped employees, the Court remanded the case to the district court to determine if the school board could have reasonably accommodated the teacher. *Id.* The Supreme Court provided valuable insights into the “regarded as” definition when it stated that

The *D'Angelo* court further cited to the ADA's legislative history that "expressly states that '[t]he ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship on the operation of the business.'"<sup>170</sup> Therefore, based on the plain language of the statute and the insights provided by the *Arline* court, the Eleventh Circuit concluded that the ADA requires employers to provide reasonable accommodations for employees they regard as disabled.<sup>171</sup>

Just two months before the Eleventh Circuit handed down the *D'Angelo* decision, the Tenth Circuit decided *Kelly v. Metallica West, Inc.* and came to the same conclusion that the ADA's reasonable accommodation requirement applies to individuals regarded as disabled.<sup>172</sup>

### 3. *Kelly v. Metallica West, Inc.*

In April 1996, Beverly Kelly began working for Metallica West as a receptionist.<sup>173</sup> Kelly was hospitalized in May 2000 due to a blood clot in her lung.<sup>174</sup> She returned home on supplemental oxygen, and her physician cleared her to return to work about a week later.<sup>175</sup> Kelly attempted to work without oxygen but "felt short of breath, light-headed, and [she] had a headache."<sup>176</sup> She returned to her doctor and received a note stating that she needed to use oxygen to

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[b]y 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. . . . The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief.

*Id.* at 1236-37.

170. *Id.* at 1237 (citing S. REP. NO. 101-116, at 2 (1989)).

171. *Id.* at 1240.

172. See *Kelly v. Metallica W., Inc.*, 410 F.3d 670 (10th Cir. 2005).

173. *Id.* at 671.

174. *Id.* at 672.

175. *Id.*

176. *Id.*

work.<sup>177</sup> Kelly told Michael Mola, Chairman of the Board of Metallics West, that she needed to use oxygen in order to return to work.<sup>178</sup> According to Kelly, Mola told her, “No, there will be no oxygen on the premises.”<sup>179</sup> Upon filing for short term disability benefits, Kelly received them from June 2 to June 19, 2000.<sup>180</sup> Her doctor allowed her to return to work without oxygen, but shortly after returning to work, she began to suffer from headaches and lightheadedness.<sup>181</sup> After finding that her oxygen levels were low, the doctor provided her a release, clearing her to return to work with oxygen.<sup>182</sup>

Kelly contacted Mola on June 27 and told him that her doctor would only allow her to return to work if she used supplemental oxygen.<sup>183</sup> Once again, Mola refused Kelly’s request to use oxygen and stated “that he did not want the responsibility because she might ‘fall over dead.’”<sup>184</sup> Later that day, Mola wrote a letter to Kelly that she construed as terminating her employment.<sup>185</sup> Kelly did not return to work but instead brought discrimination and retaliation claims

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177. *Id.* The note simply read: “Patient needs to use O<sub>2</sub> at work.” *Id.*

178. *Id.* Kelly had also testified that she provided the doctor’s note to somebody at Metallics West, but she could not remember exactly to whom she had given the note. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* Kelly did not provide this release to Metallics West until her attorney contacted them one month later. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 673. The letter stated:

Relative to our conversation of this morning concerning your absen[ce]. It appears that your health situation the past few months has not improved. You have lost considerable time and your words to me this morning is [sic] that you and your doctor have not found the answer and you would either report to work with an oxygen bottle or lose more time. Either condition does not make for a stable employee. Based on this information, management in a meeting this morning, voted to hire a new replacement for your job. This job of order entry is so critical that we cannot do without a full time person. You will need to contact Ann or Shawn to arrange your Cobra Insurance payments. Bev, you have been an exceptional employee these past years and your professionalism and genial manner endeared you to all of us. You are a very special person. If and when your health improves we will try to work with your doctors and you for a safe return to us. As I indicated we’d try to find another job within our organization that fits your talent and drive. We are all praying for your swift and complete recovery.

*Id.*

under the ADA against *Metallics West*.<sup>186</sup> The trial court denied *Metallics West*'s motion for summary judgment and allowed the discrimination claim to proceed on the theory that Kelly's employer had regarded her as disabled and had fired her because of this perceived disability.<sup>187</sup> *Metallics West* moved for a judgment as a matter of law<sup>188</sup> on the theory that an employee merely regarded as disabled by her employer is not entitled to reasonable accommodation under the ADA.<sup>189</sup> The trial court denied the motion.<sup>190</sup>

After acknowledging the circuit split on the issue, the Tenth Circuit followed the reasoning of the First and Third Circuits and held that an employer must reasonably accommodate employees perceived or regarded as disabled.<sup>191</sup> Much like the *D'Angelo* court, the *Kelly* court noted that "the plain language of the ADA's interlocking statutory definitions includes within the rubric of a 'qualified individual with a disability' protected by the ADA individuals (1) regarded as disabled but (2) who, with reasonable accommodation, can perform the essential functions of the position that they hold."<sup>192</sup> The court looked to the plain language of the statute, noting that Congress "makes no distinction between employees who are actually disabled and those who are merely regarded as disabled."<sup>193</sup>

This circuit split, just like the split involving the "interacting with others" question, does not happen by accident. There are strong arguments on each side of the splits, and thousands of educated eyes have looked at these issues. Therefore, in the search for logic, unity, and the liberation of the mentally disabled, each side must be thoroughly analyzed.

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186. *Id.*

187. *Id.*

188. This was done pursuant to Section 50(a) of the Federal Rules of Civil Procedure.

189. *Kelly*, 410 F.3d at 673.

190. *Id.*

191. *Id.* at 675–76.

192. *Id.* at 675.

193. *Id.* at 676. ("Can it be inherently 'unreasonable' to accommodate an employee who is only regarded as disabled? Congress does not appear to have thought so . . ."); *see also* 42 U.S.C. § 12111(9) (2000).

## IV. WHO GOT IT RIGHT AND WHERE DO WE GO FROM HERE?

This Part analyzes the two circuit splits and argues that the Supreme Court should resolve the splits by recognizing that interaction with others is a major life activity and by recognizing an employer's duty to reasonably accommodate individuals with perceived disabilities. This Part then illustrates the importance of such holdings for individuals suffering from mental impairments that are making perceived disability claims. However, even if the Court resolves the splits as suggested, this Part shows that the realities of the present work environment are such that many mentally disabled individuals will not be protected under the current rubric of the ADA. Nevertheless, there are in fact additional ways to make Congress's goal of a discrimination-free work environment closer to a reality.

*A. The "Interacting with Others" Divide*

Although many courts have hesitated to recognize "interacting with others" as a major life activity under the ADA,<sup>194</sup> the Ninth Circuit came to the correct conclusion when it held that "interacting with others" is a major life activity under the ADA. Supreme Court precedent, the EEOC guidelines, and the overarching goals of the ADA all suggest such a conclusion. Therefore, the Supreme Court should also recognize "interacting with others" as a major life activity.

Supreme Court precedent provides powerful suggestions as to how a court should view "interaction with others" under the ADA. In *Bragdon v. Abbott*, the Court found that the term "major life activity" was very broad and denoted "comparative importance," suggesting that "the touchstone for determining an activity's inclusion under the [ADA] rubric is its significance."<sup>195</sup> More recently in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court noted that to be "major," an activity must be "of central importance to daily life."<sup>196</sup> One would be hard pressed to argue that "interaction with others" is not of central importance to daily life. In

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194. 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).

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

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

fact, when compared to the major life activities most commonly associated with the physically disabled—seeing, hearing, walking, breathing—one’s weakened ability to interact with others carries a comparable importance and results in a similar frustration. As much as an unimpaired individual would shrink from going through a week with limited ability to walk, see, or hear, such an individual would similarly shrink from the idea of experiencing a week with limited ability to interact with others, especially given today’s world of personal communication and interconnectedness.

In addition to this Supreme Court language, the EEOC, through its Enforcement Guidance issued in 1997, added “interacting with others” to its nonexhaustive list of major life activities that fall under the ADA.<sup>197</sup> This addition was clearly influenced by Congress’s goal to “combat . . . employment discrimination as well as the myths, fears, and stereotypes upon which it is based.”<sup>198</sup> Congress has given the EEOC the primary responsibility of enforcing the employment-related portions of the ADA.<sup>199</sup> The EEOC devotes countless hours to analyzing and preparing guidance on how to implement and interpret the ADA. Although the 1997 Enforcement Guidance was not a regulation and, therefore, is not afforded great deference, the guidance should not be taken lightly. One’s ability to interact with others is a significant activity, and one’s limitation in this activity should not be minimized.

Interacting with others is a significant activity that is of central importance to the daily lives of most Americans. While the concept may be vague, the Ninth Circuit rightly recognized that “interacting with others” is no more vague than the “ability to care for oneself.”<sup>200</sup> Furthermore, the text of the ADA contains nothing

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197. GUIDE TO EMPLOYMENT LAW, *supra* note 38, § 73:6. The EEOC could increase the likelihood that the Supreme Court would recognize interacting with others as a major life activity by formalizing this guidance through formal rule-making procedures. As a general rule, courts afford a promulgated regulation greater deference than an enforcement guidance. *See* Smith v. City of Jackson, 125 S. Ct. 1536, 1558 (2005) (“Under Chevron, we will defer to a reasonable agency interpretation of ambiguous statutory language provided that the interpretation has the requisite ‘force of law.’” (citing Christensen v. Harris County, 529 U.S. 576, 587 (2000))).

198. GUIDE TO EMPLOYMENT LAW, *supra* note 38, § 73:6.

199. Other Federal agencies, such as the Department of Labor’s Office of Federal Contract Compliance Programs, also have responsibilities under those segments of the law.

200. *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999).

about vagueness as a test for determining major life activities.<sup>201</sup> Interacting with others necessarily and naturally fits as a major life activity.

The inclusion of “interacting with others” as a major life activity clearly creates a few challenges in its application. As one author noted, “it is hard[] to imagine how someone could succeed in today’s global, high-performance, team-oriented workplace if he were substantially limited in his ability to . . . interact with other people.”<sup>202</sup> Moreover, in this classification more than any other, there is the problem of distinguishing between disabilities and inabilities. “There are, truth be told, people in the workplace who are irritable, quick tempered, cantankerous or prone to poor judgment. The ADA does not, however, protect people with obnoxious personality traits but only those who (in the case of mental impairments) have a mental or psychological disorder.”<sup>203</sup>

The Supreme Court should recognize “interacting with others” as a major life activity. Not only does precedent so dictate, but the liberation of many mentally impaired individuals depends on it. Lydia Phillips elaborated upon this and wrote, “In 2003, the World Health Organization estimated that mental health problems in the United States account for 35 percent to 45 percent of absenteesim, an average of six work loss days per 100 workers, and an estimated 59 percent of the economic costs arising from injury and illness-related loss of productivity.”<sup>204</sup> Based on these statistics, resolving the split might do more than rightfully protecting the mentally impaired; it may be a financially sound course of action.

### *B. The Accommodation Divide*

The Eleventh, Tenth, Third, and First Circuits were correct in holding that employers have an obligation under the ADA to reasonably accommodate individuals they perceive as disabled. First and foremost, the plain language of the ADA requiring reasonable accommodation makes no distinction between employees that are actually disabled and those merely regarded as disabled. The

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201. *Id.*

202. Michael Starr & Megumi Sakae, *Mental Disabilities*, NAT’L L.J., Nov. 22, 2004, at 12.

203. *Id.*

204. Phillips, *supra* note 13.

Supreme Court has explained that a court's first step in interpreting a statute is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."<sup>205</sup> The *D'Angelo* court correctly took a careful look at the text, noting that "the ADA bars discrimination 'against an individual with a disability who, with or without reasonable accommodation, can perform the essential function of the employment position.'"<sup>206</sup> The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."<sup>207</sup> As has been discussed, an individual is "disabled" for purposes of the ADA if that individual meets any one of the disability definition's three prongs.<sup>208</sup> The *D'Angelo* court then properly inserted the definition into the statute's prohibition. Only then does it become clear that the ADA bars discrimination "against an individual *regarded as having such an impairment* who, with or without reasonable accommodation, can perform the essential functions of the employment position."<sup>209</sup> As the Eleventh, Tenth, and Third Circuits noted, "the text of this statute simply offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not."<sup>210</sup>

The recognition of an employer's obligation to accommodate individuals perceived as disabled is not only a logical reading of the ADA, it is also entirely consistent with the overarching purpose of the Act. Congress enacted the ADA in an attempt to provide comprehensive protection against discrimination for individuals with real or perceived disabilities. The "ADA is concerned with safeguarding the employee's livelihood from adverse action taken on the basis of 'stereotypic assumptions not truly indicative of the individual ability' of the employee."<sup>211</sup> Moreover, the trend is moving towards circuits recognizing this obligation to

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205. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

206. *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005).

207. 42 U.S.C. § 12102(2) (2000).

208. *See supra* Part II.A.

209. *D'Angelo*, 422 F.3d at 1235.

210. *Id.* at 1236.

211. *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 676 (10th Cir. 2005) (citing 42 U.S.C. § 12101(a)(7)).

accommodate, as is evidenced by the 2005 decisions in the Tenth and Eleventh Circuit Courts.

The *Kaplan* court also looked first to the plain language, but it concluded that the absence of a stated distinction between the three alternative prongs of the “disability” definition was “not tantamount to an explicit instruction by Congress that ‘regarded as’ individuals are entitled to reasonable accommodations.”<sup>212</sup> This argument rings hollow for many reasons. The *Kaplan* court conceded that the ADA’s definition of “qualified individual with a disability,” on its face, does not differentiate between the three alternative prongs of the disability definition.<sup>213</sup> Even if it is not an “explicit” instruction by Congress, a court would need some justification to depart from what clearly is the natural application of the disability definition to the statute’s prohibition.

The Ninth Circuit believes it is justified by the “bizarre results” that will allegedly result from a “formalistic” reading of the statute.<sup>214</sup> The Ninth Circuit stated that under such a formalistic reading, “impaired employees would be better off under the statute if their employers treated them as disabled even if they were not. This would be a perverse and troubling result under a statute aimed at decreasing ‘stereotypic assumptions not truly indicative of the individual ability of [people with disabilities].’”<sup>215</sup> Moreover, the court noted that

were [it] to entitle “regarded as” employees to reasonable accommodation, it would do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage the employers to see their employees’ talents clearly; instead, it would improvidently provide those employees a windfall if they perpetuated their employers’ misperception of a disability.<sup>216</sup>

Looking past the language of the statute should not be necessary in the first place, and even if bizarre results were likely, it is not the court’s prerogative to fix a law that might be poorly written. However, even if one were to engage in such an analysis, the Ninth

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212. *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003).

213. *Id.*

214. *Id.*

215. *Id.* (quoting 42 U.S.C. § 12101(a)(7) (2000)).

216. *Id.*

Circuit's arguments are unpersuasive. In response to the *Kaplan* court's concern of "bizarre results," the Tenth Circuit responded,

[I]t is in the nature of *any* "regarded as disabled" claim that an employee who seeks protections not accorded to one who is impaired but not regarded as disabled does so because of the additional component—"regarded as" disabled. This rationale provides no basis for denying validity to a reasonable accommodation claim.<sup>217</sup>

The Tenth Circuit also pointed out the flaws in the argument that accommodation of perceived disabilities would "do nothing to encourage . . . employees to educate employers of their capabilities" or to "encourage the employers to see their employees' talents clearly."<sup>218</sup> The *Kelly* court noted,

[T]he real danger is not that an employee will fail to educate an employer concerning her abilities, but that "[t]he employee whose limitations are perceived accurately gets to work, while [the employee regarded as disabled] is sent home unpaid." That is to say, an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions. In this sense, the ADA encourages employers to become more enlightened about their employees' capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.<sup>219</sup>

The approach and arguments of the Tenth, Eleventh, and Third Circuits are better aligned to both traditional canons of statutory construction as well as the intent of Congress in the ADA. Moreover, this approach includes the mentally impaired with their physically impaired brothers under the protection of the ADA. As an EEOC official observed, "We don't think twice anymore about curb cuts for wheelchairs and Braille on ATMs. But I'm not so sure we've crossed the frontier on psychiatric disabilities. There's still so much stigma related to the disease."<sup>220</sup> It is time to cross that frontier, and

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217. *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 676 (10th Cir. 2005).

218. *Id.*

219. *Id.* (quoting *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751 (3d Cir. 2004)).

220. Phillips, *supra* note 13, at 2275 (quoting Sharon Rennert).

the Supreme Court can build the bridge by recognizing “interacting with others” as a major life activity and by recognizing an employer’s responsibility to accommodate individuals perceived as disabled.

*C. The Splits’ Impact on the Mentally Impaired*

The circuit split on whether “interacting with others” is a major life activity under the ADA is a major obstacle to many mentally impaired plaintiffs alleging employment discrimination. In addition to proving a mental impairment, a plaintiff is not deemed disabled for purposes of the ADA unless a court finds that the impairment substantially limits at least one major life activity.<sup>221</sup> Unfortunately, most of the major life activities that courts historically have recognized have been directed towards individuals with physical disabilities. Therefore, persons suffering from common mental impairments like depression, bipolar disorder, and schizophrenia are not usually able to argue a substantial limitation in the major life activities of walking, seeing, hearing, or breathing. Although clearly impaired, the only major life activity in which such individuals may claim a limitation is the ability to interact with others. It is hard to imagine that Congress did not have such individuals in mind when it passed the ADA in 1990. Thus, it is critical to quickly resolve this divide, because for individuals suffering from mental impairments, such as depression or bipolar disorder, their only avenue for relief may depend on a court’s recognition that “interacting with others” constitutes a major life activity.<sup>222</sup>

While the Supreme Court’s recognition of “interacting with others” as a major life activity appears to be in line with precedent and statutory intent, such a finding by the Court would not, by itself, guarantee that mentally impaired individuals will receive adequate protection under the ADA. As was briefly discussed in Part I, a mentally impaired plaintiff must often face the apparent necessity of alleging discrimination based on perceived disabilities. This hurdle exists because a mentally impaired person pursuing an “actual

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221. See *Bragdon v. Abbott*, 524 U.S. 624, 630–31(1998).

222. In addition to having (or being regarded as having) a physical or mental impairment, a person is not “disabled” for purposes of the ADA unless that impairment substantially limits one or more major life activities. See 42 U.S.C. § 12102(2)(a) (2000). Moreover, unlike the individual confined to a wheelchair who can clearly show she is substantially limited with regards to walking, an individual suffering from a mental impairment may not appear to be limited in a major life activity.

disability” claim must show that she was substantially limited in her ability to interact with others.<sup>223</sup> This poses problems for such plaintiffs because “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.”<sup>224</sup> Many courts require plaintiffs to show an almost total inability to interact with others in order to prove themselves substantially limited in that area.<sup>225</sup> In fact, “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.”<sup>226</sup> Thus, by proving the substantial limitation, a plaintiff may provide the employer with the necessary ammunition to destroy the impaired plaintiff’s case. If they have not done so already, employers will forcefully maintain that the ability to interact with others is an essential element to most employees’ positions—the very positions that the employees, through their proof of substantial limitation, have revealed that they cannot adequately perform.

Some argue that courts should relax the substantial limitation standard so that plaintiffs would not have to show an almost absolute inability to interact with others.<sup>227</sup> Although such a course of action would undoubtedly help the plight of mentally impaired plaintiffs, by itself it would be insufficient. Such a relaxed standard would still require plaintiffs to put forth considerable evidence showing a substantial limitation in their ability to interact with others. Employers would undoubtedly continue to use this evidence—

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223. See GUIDE TO EMPLOYMENT LAW, *supra* note 38, § 73:6.

224. DeLoach, *supra* note 40, at 1337.

225. See *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 16 (1st Cir. 1997) (noting that even if the court were to recognize interacting with others as a major life activity, Soileau’s ability to perform daily chores, visit pubs, and shop at the grocery store showed that his impairment did not substantially limit his ability to interact with others); *cf. Bragdon*, 524 U.S. 624, 641 (1998) (“[The ADA] addresses substantial limitations on major life activities, not utter inabilities.”).

226. DeLoach, *supra* note 40, at 1340.

227. See *id.* at 1341–43; see also Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1143 (suggesting that “consistently high levels of hostility, social withdrawal, or failure to communicate when necessary” would set the appropriate standard for a substantial limitation requirement (quoting *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999))).

though not as damning to plaintiffs as the current standard—as proof that the plaintiff could not perform the essential functions of the job and, therefore, does not meet the standard of an “otherwise qualified” individual. Even the adoption of the Ninth Circuit’s language in *McAlindin*<sup>228</sup> would require plaintiffs to provide an enormous amount of ultimately self-destructive evidence. However, this is not to say that a relaxed limitation standard would only serve as a paper tiger. A more lenient standard could significantly help persons with mental impairments that choose to assert “perceived disability” claims as opposed to “actual disability” claims.

Under a “perceived disability” claim, an individual must only show that the employer *perceived* the employee as being substantially limited in a major life activity—that is, one’s ability to interact with others.<sup>229</sup> Since “perceived disability” claims still require a plaintiff to show that the employer regarded him as *substantially limited* in a major life activity,<sup>230</sup> a relaxed substantial limitation standard would appropriately aid deserving plaintiffs while limiting the damaging evidence the current standard makes available to the employer. Thus, “perceived disability” claims would avoid the problem of requiring plaintiffs to submit evidence that undercuts their own claims. However, even this framework does not provide the mentally impaired with all the necessary protection against discrimination. Unless courts recognize a responsibility to reasonably accommodate individuals regarded as disabled, a legion of capable individuals with disabilities will still be without recourse.<sup>231</sup>

#### *D. Where Do We Go from Here?*

Given the current landscape of the ADA mountain, with its various cracks and crevices in critical places, one might ask, “Where do we go from here?” As was noted above, some advocate legislative action that would “restore the ADA to its original intent.”<sup>232</sup> One course of action that can and should be taken is for the Supreme

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228. See *McAlindin*, 192 F.3d at 1235 (setting the standard for a substantial limitation as “consistently high levels of hostility, social withdrawal or failure to communicate when necessary”).

229. *Id.*

230. See, e.g., *id.*

231. See *supra* Part III.

232. THE NATIONAL COUNCIL ON DISABILITY, RIGHTING THE ADA I (2004), available at [http://www.ncd.gov/newsroom/publications/2004/righting\\_ada.htm](http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm).

Court to mend the circuit splits. Perhaps embedded in the question of “Where do we go?” is part of the answer: we must go, we must move, we must take action. Dr. Judith A. Cook noted, “The lack of employment among consumers of mental health services reflects a tremendous loss of productivity and potential for these individuals personally and for our society economically.”<sup>233</sup> Individuals suffering from some sort of mental impairment are growing in number. It is clear that the ADA mountain demands the utmost care and attention, because like it or not, this mountain casts a wide and encompassing shadow.<sup>234</sup> The Supreme Court should mend the two circuit splits by recognizing “interacting with others” as a major life activity and by recognizing an employer’s duty to reasonably accommodate employees perceived as disabled. Such a resolution of these splits is entirely consistent with the plain language of the statute and with Congress’s intent in passing this essential legislation.

Although a proper resolution of the circuit splits is critical to the protection and liberation of mentally disabled individuals, such a resolution will still leave many such individuals unprotected under the ADA.<sup>235</sup> One might then ask, “What more can be done?”<sup>236</sup> There are many organizations dedicated to making the goals of the ADA a reality, and many have attempted to answer this question. The Office of Employment Policy in the Department of Labor has “the ultimate goal of increasing the number of people with disabilities who work, either as employees or entrepreneurs” and provides education, policy analysis, technical assistance, and a variety of programs and initiatives to reach this goal.<sup>237</sup> The government

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233. Judith A. Cook, *Employment: A Workable Option Despite Mental Illness*, 10 SAMHSA NEWS 1, 1 (2002).

234. There are roughly fifty million Americans with disabilities. One current writer wisely noted, “Disability is a natural part of human lives. Sooner or later, it will touch most of us.” Mary Johnson, *A Long Way To Go: Judges and Others Still Don’t Grasp that the 15-Year-Old Americans with Disabilities Act Is About Rights, Not Benefits*, PHILA. INQUIRER, July 25, 2005, at A11.

235. This is due to the fact that there are simply some jobs that absolutely require interacting with others, and there are some disabilities that cannot be reasonably accommodated.

236. Many employers might argue nothing more should be done. If an individual is incapable of performing the essential functions of a job, with or without accommodation, that person may just not be able to make it on the Mountain. This is harsh, but arguably the reality of today’s work environment.

237. See U.S. Department of Labor, Office of Disability Employment Policy, Frequently Asked Questions, <http://www.dol.gov/odep/faqs/main.htm> (last visited Mar. 1, 2006).

currently provides tax incentives for certain employers that accommodate employees with disabilities.<sup>238</sup> The Substance Abuse and Mental Health Services Administration's Center for Mental Health Services commenced a study seeking to answer the question "What do people with psychiatric disabilities need so that they can successfully obtain and retain employment?"<sup>239</sup> The Job Accommodation Network has created an online resource that provides suggested accommodations for all types of disabilities.<sup>240</sup> These are but a few of the organizations that are working to eliminate discrimination against individuals with disabilities. Perhaps all that is clear is that there is not one answer to the question "What more can be done?"

#### V. CONCLUSION

The Americans with Disabilities Act is designed to eliminate discrimination against individuals with disabilities.<sup>241</sup> This landmark legislation prohibits employers from discriminating against qualified individuals with disabilities and requires employers to provide such individuals with reasonable accommodations. Since the enactment of the ADA, this monumental mountain has become riddled with cracks and questions. One major split involves whether interacting with others is a major life activity under the ADA. Another considerable crack concerns the issue of whether employers have an obligation to accommodate employees perceived as disabled. The mentally impaired are significantly affected by these two circuit splits. First, many mentally impaired individuals can only satisfy the ADA "disability" definition by showing that they are substantially limited in their ability to interact with others.<sup>242</sup> Thus, if a court does not

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238. *See, e.g.*, Disabled Access Credit, I.R.C. § 44 (2005) (stating tax credit is available for small businesses that make their businesses accessible to persons with disabilities).

239. The Employment Intervention Demonstration Program (unpublished study) (on file with the author).

240. *See* Job Accommodation Network, <http://www.jan.wvu.edu> (last visited Mar. 1, 2006).

241. 42 U.S.C. § 12101 (2000). "[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." *Id.* § 12101(a)(8). A primary purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* § 12101(b)(1).

242. As discussed above, the majority of major life activities recognized by courts involve physical disabilities.

recognize “interacting with others” as a major life activity, a mentally impaired individual—one that would be viewed as having a disability under most colloquial definitions—would not be disabled as defined by the ADA and is therefore unprotected under the Act. Even if a court recognizes “interacting with others” as a major life activity, a mentally disabled individual asserting a “regarded as disabled” claim will still lack necessary protection if the court does not recognize an employer’s responsibility to accommodate individuals perceived as disabled. Consequently, a mentally impaired individual that qualifies as “disabled” because he is perceived as substantially limited in his ability to interact with others is still denied the right to a reasonable accommodation that would allow him to secure a job or continue to work. Fortunately for the mentally impaired facing these obstacles, the plain language of the ADA, congressional intent, Supreme Court precedent, and explicit EEOC guidance all suggest that such individuals are protected under the Act.

The Supreme Court should resolve the circuit splits by recognizing “interacting with others” as a major life activity and by recognizing an employer’s duty to reasonably accommodate individuals with perceived disabilities. Such holdings represent the most logical interpretation of the ADA and will create a desirable unity among the lower courts. Perhaps most important, such a course of action is critical for the liberation and protection of many individuals suffering from mental illness. However, what is also clear is that any hope of realizing a land free of discrimination against individuals with disabilities will require the creative and collaborative problem solving of employees, employers, organizations, agencies, governments, and every concerned American. It is argued that “no matter how much legislation is passed, attitude changes cannot be mandated. This change must come from within.”<sup>243</sup> This may be true, but one should not undervalue the law’s influence on societal attitudes. The ADA is a monumental mountain worth celebrating, and where necessary, mending.

*Matthew M. Cannon*

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243. Francine Bell, Editorial, *ADA Brings Quasimodo Out of the Bell Tower*, CHI. SUN TIMES, July 2, 2005, at A17.