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ARGUING FOR MORE PRINCIPLED DECISION MAKING IN DECIDING WHETHER AN INDIVIDUAL IS SUBSTANTIALLY LIMITED IN THE MAJOR LIFE ACTIVITY OF WORKING UNDER THE ADA

Reed L. Russell

In 1990, Congress passed and President Bush signed the Americans with Disabilities Act (ADA or Act). The Act generally extends to the private sector the scope of protection for disabled persons originally provided to federally funded programs or activities by the Rehabilitation Act of 1973. The stated purpose of the ADA is nothing less than to eliminate discrimination against disabled individuals. More specifically, Congress wanted to increase the employment opportunities for persons with disabilities and, as a consequence, remove from the welfare system disabled persons who were willing and able to work. To achieve this

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4. See 42 U.S.C. § 12101(a)(8)-(9); S. REP. No. 101-116, at 9 (citing the Lou Harris Poll which found that while a majority of disabled persons are out of the labor force and on government or other financial assistance, they possess a desire to be self-sufficient); Arlene Mayerson, The Americans with Disabilities Act—An Historic Overview, 7 LAB. L. 1, 8 (1991) (arguing that the ADA represents a shift in perspective from one in which society saw a disabled person as someone requiring care and protection to a vision of the disabled as “active, contributing members” who need civil rights protections to ensure full societal participation); see also Tracy L. Hart, Legislative Note, The Americans with Disabilities Act Title I: Equal Employment Rights for Disabled Americans, 18 U. DAYTON L. REV. 921, 921 (1993) (arguing that the ADA was passed to reduce the waste of federal assistance on disabled persons who are willing and able to work); cf. Jacobus tenBroek & Floyd W. Matson, The Disabled and the Law of Welfare, 54 CAL. L. REV. 809, 810 (1966) (arguing that the medieval and early modern view of the disabled as “‘legitimate’ beggars” has carried over to modern society, manifested in the perspective that the disabled are “unemployable[.]”). Hart also argues that workplace accommodations that facilitate the productivity of disabled individuals are significantly less expensive than workers’ compensation, thus providing additional savings. See Hart, supra, at 921-22.
purpose, the Act broadly defines the term disability to include not only those currently disabled, but also those with a record of disability and those who are regarded as disabled by their employers.\(^5\)

The Act contains a definition of disability similar to that in the Rehabilitation Act.\(^6\) Regulations promulgated by the Department of Health, Education, and Welfare (now the Department of Health and Human Services) define a “handicapped person” as “any person who has a physical or mental impairment that substantially limits one or more major life activities, “a record of [such impairment],” or “is regarded as having [such impairment].”’ Congress intended that the analysis used to implement the “individual with handicaps” portion of the Rehabilitation

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5. See 42 U.S.C. § 12102(2)(A)-(C). The “record of” disability provision covers those individuals who no longer suffer from an impairment, but who previously were substantially limited in a major life activity or were misclassified as such. See 29 C.F.R. § 1630.2(k) (1997). The basis for inclusion of the “record of” provision was to eliminate discrimination against those who were previously disabled and continue to suffer the “stigma” of that injury or illness. AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS & EMPLOYER OBLIGATIONS § 3.03, at 3-81 to 3-82 (Jonathan R. Mook ed., 1997) [hereinafter EMPLOYEE RIGHTS] (quoting Allen v. Heckler, 780 F.2d 64, 66 (D.C. Cir. 1985)).

The “regarded as” provision means that if the individual’s employer or another entity perceives or treats him as if he is disabled, then he can claim coverage under the Act, as long as the perception substantially limits a major life activity. See 29 C.F.R. § 1630.2(l) (1997). This provision is aimed, not at actual or recorded impairments, but at employers’ perceptions of disability that produce discrimination in the workplace. See EMPLOYEE RIGHTS, supra, § 3.04[1], at 3-82.5 to 3-82.6; see also School Bd. of Nassau County v. Arline, 480 U.S. 273, 282 n.9 (1987) (noting examples of cases where the “regarded as” provision was needed). In one case, a child with cerebral palsy was excluded from class because he “produced a nauseating effect on his classmates.”’ Id. In an employment-related case, trustees denied an arthritic woman a position at a college because they did not want “normal students [to] see her.”’ Id.

6. See H.R. REP. NO. 101-485, pt. 2, at 50 (1990) (same), reprinted in 1990 U.S.C.A.A.N. 303, 332; id. pt. 3, at 27, (same), reprinted in 1990 U.S.C.A.A.N. 445, 449; S. REP. No. 101-116, at 21 (stating that Congress intended the definition of “disability” was to be comparable to that of “handicapped individuals” contained in the regulations implementing the Rehabilitation Act). The Rehabilitation Act of 1973 targeted “federal contractors, . . . recipients of federal grants, and . . . participants in federal programs.”’ 1 HENRY H. PERRITT, JR., AMERICANS WITH DISABILITIES ACT HANDBOOK § 8.1, at 328 (3d ed. 1997). The Rehabilitation Act expanded previous legislative aid packages designed to assist handicapped individuals, but it did not reach the private sector. See id. § 8.5, at 336-38. The ADA includes a provision requiring it to construe standards at least as strictly as the Rehabilitation Act. See id. § 8.2, at 329. Indeed, the ADA also includes a provision requiring coordination between enforcement agencies to ensure consistency in applying the two laws. See id. at 329-30.

Act be applied to the definition of disability in the ADA.\textsuperscript{8} Like the Department of Health, Education, and Welfare, in considering the language of the ADA, Congress stated its intention to limit coverage to exclude trivial injuries or non-impairing characteristics.\textsuperscript{9} To prevent an overly broad interpretation, the Act limits coverage to those injuries or illnesses that substantially impair an individual in a major life activity.\textsuperscript{10} Congress intended the term "major life activity" to include such tasks as walking, breathing, lifting, seeing, taking care of oneself, learning, and working.\textsuperscript{11}

The Equal Employment Opportunity Commission (EEOC), in implementing the ADA's provisions, adopted definitions for "physical impairment" and "major life activities" virtually verbatim from the regulations implementing the Rehabilitation Act.\textsuperscript{12} The term "substantially limits," however, was not defined by the Rehabilitation Act regulations.\textsuperscript{13}

\textsuperscript{8} See S. REP. NO. 101-116, at 21; Nondiscrimination on the Basis of Handicap, 42 Fed. Reg. at 22,685-86 (analyzing the definition of handicapped persons). The Department of Health, Education, and Welfare defined "handicapped individuals" covered by the Rehabilitation Act to include those with physical or mental impairments that substantially limited at least one major life activity. See id. at 22,685. It included having a "record of" and being "regarded as having" a substantial impairment of a major life activity within the covered conditions. Id. at 22,686.

The Agency refused to develop an exhaustive list of maladies that qualified as physical or mental impairments because it believed a sufficiently comprehensive one was impossible. See id. at 22,685. The rule did eliminate as handicaps, standing alone, "environmental, cultural, and economic disadvantage[s]," as well as "prison records, age, or homosexuality." Id. at 22,686.

\textsuperscript{9} See S. REP. NO. 101-116, at 22 (stating that physical characteristics such as eye or hair color would not constitute a disability); id. at 23 (stating that injuries such as infected fingers would not be considered disabilities).

\textsuperscript{10} See 42 U.S.C. § 12102(2)(A); see also EMPLOYEE RIGHTS, supra note 5, §§ 3.02-.07 (discussing terms); 1 PERRITT, supra note 6, §§ 3.1-.3 (discussing statutory definitions).


\textsuperscript{12} Compare 29 C.F.R. § 1630.2(b)(1) (defining physical impairments under the ADA as "physiological disorder[s]," "cosmetic disfigurement[s]," or "anatomical loss[es]"), and id. § 1630.2(i) (defining major life activities under the ADA to include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"); with 45 C.F.R. § 84.3(j)(2)(i) (1996) (defining physical impairments under the Rehabilitation Act as "physiological disorder[s]," "cosmetic disfigurement[s]," or "anatomical loss[es]"); and id. § 84.3(j)(2)(ii) (defining major life activities under the Rehabilitation Act to include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

\textsuperscript{13} See 29 C.F.R. § 1630.2(j); Nondiscrimination on the Basis of Handicap, 42 Fed. Reg. at 22,685 (stating the Department of Health, Education, and Welfare's position that the definition for "substantially limits" was not achievable at that time).
Therefore, the EEOC devised its own definition for purposes of the ADA. The EEOC's definition of "substantially limits" uses a factor analysis which takes into consideration the severity, duration, and long-term impact of the injury or illness.\[14\] In accordance with the statute, courts apply these considerations to find a disability when the injury or illness impairs activities such as walking, breathing, taking care of oneself, or seeing.\[15\] The activity of working is considered only when a complainant cannot prove that he is substantially impaired in any other major life activity.\[16\] The EEOC, in delineating an additional step for evaluating the major life activity of working, recognized a conceptual difference between limitations on one's ability to work and one's ability to perform other major life activities; namely, that a "working" impairment does not obtain coverage because of the medically diagnosed injury or illness, but rather it is a product of societal barriers to the individual's ability to obtain employment.\[17\]

\[14\] See 29 C.F.R. § 1630.2(j)(2)(i)-(iii). The factors to be considered in determining whether an impairment substantially limits a major life activity are, "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Id.

\[15\] See 29 C.F.R. app. § 1630.2(i); see also Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995) (listing the factors recommended by the EEOC, then applying them to Dutcher's claim of an impairment of "a major life activity other than working"); Nedder v. Rivier College, 908 F. Supp. 66, 75-77 (D.N.H. 1995) (citing EEOC factors to be applied in determining a substantial limitation and applying them to Nedder's claim that she was substantially limited in the major life activity of walking).

In a recent case, the court cited only to the basic definition of a substantial limitation of a major life activity, but in fact considered the individual's condition in light of the suggested factors. See Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 758-59 (5th Cir. 1996) (analyzing the ability to perform major functions and the characterization of Rogers's disability by his own occupational therapist as a mere 13% permanent, partial disability, as factors in denying coverage).

\[16\] See 29 C.F.R. app. § 1630.2(j). The court need not consider the impact of a disability on an individual's ability to work if the individual can show that he is substantially impaired in any other major life activity because his ability to work would be affected, a fortiore, by his inability to, for example, see or hear. See id. In Dutcher, the court expressed its willingness to consider the factors that the EEOC suggested courts apply to claims of impairments of working, but refused to perform such an analysis because Dutcher did not present any evidence. 53 F.3d at 727 n.13; see also Vaughan v. Harvard Indus., Inc., 926 F. Supp. 1340, 1346-47 (W.D. Tenn. 1996) (reasoning that for a plaintiff to establish a disability under the major life activity of working, he must present evidence of his training, his geographic area of access, or a list of jobs requiring similar training); EMPLOYEE RIGHTS, supra note 5, § 3.02(5), at 3-57, 3-63 to 3-65 (asserting that claimants seeking to prove a substantial limitation on the major life activity of working must bring forth evidence to establish the claim).

\[17\] See tenBroek & Matson, supra note 4, at 814 (arguing that many handicaps are not the result of the physical impairment, as much as they are the result of societal obsta-
If an individual claims he is disabled in the major life activity of working, the EEOC suggests that, in addition to the analysis for other major life activities, the courts employ three factors derived from case law under the Rehabilitation Act: (1) how many jobs and of what type is the person disqualified from because of his claimed disability; (2) to what reasonable employment market does the person have access; and (3) based on the person’s education and training, what reasonable expectations of employment does the individual have. These factors are used because the individuals who claim to be disabled under the “working” prong cannot show substantial impairment in regard to any other activity. Although the EEOC attempts to define specifically the term “substantial impairment of a major life activity,” courts have reached divergent conclusions when applying the definition as it relates to working.


19. See 29 C.F.R. app. § 1630.2(j) (stating that there is no need to consider the major life activity of working if the individual is substantially impaired in any other major life activity such as seeing); infra notes 139-40 and accompanying text (discussing rationale for separating “working” from other major life activities).

20. See Bridges v. City of Bossier, 92 F.3d 329, 334 (5th Cir. 1996) (holding that since a hemophiliac firefighter was barred only from those jobs in which he was placed at a significant risk of injury, he was not covered under the ADA because the class of jobs was too narrow), cert. denied, 117 S. Ct. 770 (1997). But see Frix v. Florida Tile Indus., Inc., 970 F. Supp. 1027, 1034 (N.D. Ga. 1997) (holding that plaintiff’s 25-pound lifting restriction barred him from the class of jobs of “heavy labor” and, thus, constituted a substantial impairment of his major life activity of working); Huber v. Howard County, 849 F. Supp. 407, 412 (D. Md. 1994) (holding that a firefighter’s inability to advance in that profession, based on a physical impairment, qualified him as disabled), aff’d, 56 F.3d 61 (4th Cir. 1995).

In an article analyzing E.E. Black, Professor Haines argued that a qualitative analysis of the definition of disability, using individualized factors, would greatly complicate interpretation of the Rehabilitation Act by allowing the definition of the term to be, at least potentially, completely open-ended. See Andrew W. Haines, E.E. Black, Ltd. v. Marshall: A Penetrating Interpretation of “Handicapped Individual” for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes, 16 LOY. L.A. L. REV. 527, 545 (1983). Professor Haines believed this complication was necessary to honor the spirit of the Rehabilitation Act and that the alternative, a purely quantitative analysis, would allow first time discriminators to receive an “anomalous gift.” Id. at 546-47. A “gift” would result because a purely quantitative analysis would likely never find a one-time case of discrimination to “substantially limit” employment. Id. at 547.

Alternatively, one author suggested that there would be little confusion in application of the definitions under the ADA because of a substantial body of case law interpreting the
At least one court has defined the term broadly, but, arguably, more closely to the intent expressed by the EEOC in its regulations. The majority trend, however, is to define the term strictly, thus excluding most claims. One commentator has called for radical changes to the regulations. Because the Supreme Court has yet to address affirmatively same definitions under the Rehabilitation Act. See Hart, supra note 4, at 945 (arguing that the Rehabilitation Act cases had already clarified the "vague" terms in the definitions, such as "disability").

21. See, e.g., Fria, 970 F. Supp. at 1034 (holding that, as suggested in the EEOC's Interpretive Guidance example of heavy labor jobs as a class of jobs from which disqualifications based on a statutory impairment should create coverage, exclusion from a class of heavy labor jobs is a substantial limitation).

22. See 29 C.F.R. app. § 1630.2(j) (1997) (providing an example of an individual with a back problem that limits his ability to lift as being barred from a class of jobs and, subsequently, meeting the definition of substantial impairment). The EEOC evinces its intent to provide broad coverage by its refusal to limit the list of major life activities, leaving open the possibility that any daily functioning activity potentially could be deemed major. See id. Also, by not allowing the consideration of mitigating measures, such as maintenance medicine, the EEOC potentially broadened coverage. See id. The EEOC could draw support from the statute's stated intent to provide broad coverage. See 42 U.S.C. § 12101(b)(1) (1994) (stating that the purpose of the ADA is to "provide a clear and comprehensive national mandate [to] eliminate[ ] disabilities discrimination"); cf. Wendy Wilkinson, Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act, 38 S. TEX. L. REV. 907, 934 (1997) (arguing that many courts do not give adequate deference to the EEOC regulations when interpreting the ADA and, consequently, reach results in contradiction of the administrative intent). In support of Wilkinson's point, consider that the EEOC Interpretive Guidance says that HIV is an inherently substantially limiting physical impairment. See 29 C.F.R. app. § 1630.2(j). If the courts give the weight to the interpretation Wilkinson suggests, HIV should be considered a per se disability. See Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994) (holding HIV to be a per se disability). But see Runnebaum v. Nationsbank of Md., 95 F.3d 1285, 1289-90 (4th Cir. 1996) (rejecting per se disability status for asymptomatic HIV, and instead holding that the determination must be made on a case-by-case basis).

23. See Bridges, 92 F.3d at 334 (holding that firefighters and Emergency Medical Technician backup firefighters only encompass a "narrow range of jobs," thus, being unable to work as a firefighter does not substantially limit a person's ability to work); Joyce v. Suffolk County, 911 F. Supp. 92, 95 (E.D.N.Y. 1996) (holding that an inability to perform police work is not a substantial limitation on the ability to work); Williams v. City of Charlotte, 899 F. Supp. 1484, 1488 (W.D.N.C. 1995) (holding that an inability to work the night shift is not a substantial limitation, even though it excluded the plaintiff from approximately one-half of the jobs in her field); Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328, 1343 (S.D. Tex. 1987) (holding that an inability to work as a telephone pole climber is not a substantial limitation), aff'd, 863 F.2d 881 (5th Cir. 1988); see also Wilkinson, supra note 22, at 908 (arguing that many cases are dismissed on motions for summary judgment because of the judiciary's view that only traditional, severe disabilities should be covered).

24. See generally R. Bales, Once Is Enough: Evaluating When a Person Is Substantially Limited in Her Ability to Work, 11 HOFSTRA LAB. L.J. 203 (1993). Bales argues that the EEOC test for substantial impairment puts too great an onus on workers to prove discrimination and does not give equal treatment to unskilled workers or those in densely populated areas. See id. at 234-41. Bales suggests that the test should be similar to the one
tively the issue of which interpretation is correct, the definition remains unclear. 25

This Comment explores the definitions of a disability under the ADA, examines court construction of those definitions, and offers a solution for reaching more principled decisions. In particular, this Comment focuses on the definition of a substantial limitation on the major life activity of working. Part I of this Comment reviews the statutory definitions of a disability and discusses the seminal case and its progeny under the Rehabilitation Act. Part I then discusses how the EEOC has defined the term “disability” under the ADA. Next, it provides some examples of the ways differing courts have construed those definitions. In Part II, this Comment analyzes the courts’ majority approach in light of congressional intent. It criticizes the majority for failing to provide principled decisions upon which meaningful precedent can be built. It also criticizes the minority for applying the EEOC guidance mechanically and for failing to read that guidance in context. Finally, this Comment offers a modest proposal to reach more principled solutions, while maintaining fidelity to congressional intent, by suggesting that the courts engage in a thorough factual analysis using the factors the EEOC has provided in its regulations for determining when an impairment substantially limits the major life activity of working.

I. DEFINING THE DEFINITIONS

A. The First Attempts at Defining Substantially Limits as It Relates to Working

It is evident when reading the legislative history of the ADA, together with the implementing regulations of the Rehabilitation Act, that Congress intended the Rehabilitation Act case law to serve as interpretive material for the EEOC in promulgating regulations under the ADA, 26

used for Title VII claims, that is the burden shifts to the employer to prove it had legitimate reasons for the rejection or dismissal once the protected characteristic is shown to have been a consideration for adverse action. See id. at 245-46.

25. The Supreme Court may provide some guidance when it decides Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1996), cert. granted in part by 118 S. Ct. 554 (1997), concerning whether asymptomatic HIV is a covered disability and whether reproduction is a major life activity.

and for courts interpreting those regulations. In developing its regulations to define disability under the ADA, the EEOC stated its reliance on case law under the Rehabilitation Act as a source of interpretation for the ADA. The EEOC's decision to rely on Rehabilitation Act cases for interpretive guidance can be explained partially by reference to Congress's apparent intent to rely on those cases. Even if the EEOC had wanted to rely on the Rehabilitation Act's language for interpretive guidance, it would have been unable to do so for terms such as "substantially limits" because such terms were not defined by either the Rehabilitation Act or its implementing regulations.

The Department of Health, Education, and Welfare's decision not to define the term "substantially limits," when it developed regulations for the Rehabilitation Act, exemplifies the challenge in developing meaningful definitions. By its failure, however, the agency left the task to the courts. Although the EEOC, when it implemented the ADA regulations, developed definitions through an extended rulemaking, it admitted that many terms would continue to be defined necessarily on a case-by-case basis.

27. See Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 725 n.4, 726 (5th Cir. 1995) (noting that the definitions of "disability" and "major life activities" in EEOC regulations are significantly similar to those in the Rehabilitation Act); EEOC v. Exxon Corp., 967 F. Supp. 208, 212 (N.D. Tex. 1997) (stating that Congress intended "the two acts' judicial and agency standards [to] be harmonized"); Jackson v. Boise Cascade Corp., 941 F. Supp. 1122, 1126 n.2 (S.D. Ala. 1996) (noting that Rehabilitation Act cases are "authoritative" precedent for ADA cases); Rakestraw v. Carpenter Co., 898 F. Supp. 386, 389 n.1 (N.D. Miss. 1995) (noting that Congress intended Rehabilitation Act case law to provide guidance for courts in resolving ADA cases).

28. See 29 C.F.R. app. § 1630.2(g) (stating that Congress intended that Rehabilitation Act case law be applied to ADA definitions).


30. See Nondiscrimination on the Basis of Handicap, 42 Fed. Reg. at 22,685 (declining to define the term "substantial limit").


32. See id.
1. E.E. Black, Ltd. v. Marshall

Because the Department of Health, Education, and Welfare refused to define the term "substantially limits," courts were faced with trying to develop a standard that allowed for broad coverage under the Rehabilitation Act without lowering the threshold to a point at which eligibility would be automatic. In the seminal Rehabilitation Act case, E.E. Black, Ltd. v. Marshall, the United States District Court for Hawaii recognized this difficulty, especially the inherent danger of creating a rigid definition which was either too broad or narrow, and subsequently responded by developing a factorial analysis that would allow for significant flexibility in each case. In E.E. Black, George Crosby, an apprentice carpenter, had worked for several years accumulating approximately 3600 hours of the 8000-hour requirement for becoming a journeyman carpenter; however, he had injured his back twice during that time. When the local union sent Crosby to work for E.E. Black, Ltd., he was denied work because the company doctor identified him as a high-risk candidate for injury. Although a second doctor cleared him for work on the condition that Crosby maintain good muscle tone of his back and abdomen, Crosby had significant difficulty obtaining employment because of the original report.

Crosby filed a complaint with the Hawaii Department of Labor, claiming that he had been rejected from employment on the basis of his

35. See id. at 1100-02; see also Bales, supra note 24, at 225-31 (analyzing how E.E. Black and its progeny defined substantial limitations on the major life activity of working); Haines, supra note 20, at 531 (lauding the analysis in E.E. Black as "a significant effort to advance our thinking" on the concept of a "handicapped individual").
36. E.E. Black, 497 F. Supp. at 1091. On the first occasion, Crosby injured his back carrying a load of lumber. See id. In the second instance, he "felt a little discomfort" when moving a concrete form, and was subsequently x-rayed, revealing a congenital back anomaly. Id.
37. See id. The company required pre-employment physicals and the doctor examining Crosby determined that he was a "poor risk for heavy labor." Id. Another doctor, however, disagreed that Crosby's back condition would prevent him from performing the tasks required of a carpenter's apprentice. See id. at 1091-92.
38. See id. Crosby's claim would come under the "regarded as" prong of the definition for disability under either the Rehabilitation Act or the ADA because the adverse treatment by the potential employers resulted from the perception of his injury as substantially limiting (i.e., that his back was prone to reinjury on the job), rather than its actual limitation. See 42 U.S.C. § 12102(2)(C) (1994); supra note 5 (discussing the Act's coverage of individuals who are "regarded as" disabled); see also 1 PERRITT, supra note 6, § 3.5, at 48-53 (discussing case law interpreting the "regarded as" prong); Bales, supra note 24, at 221-25 (discussing the definition of "regarded as" and its application by the courts).
congenital back abnormality. The Administrative Law Judge (ALJ) rejected Crosby's claim, reasoning that the perceived impairment did not create a substantial limitation on his major life activity of working. The ALJ argued that Congress had not intended to reach persons with less than "the most disabling" impairments, and that the requirement for coverage should be a bar to general employment. The Assistant Secretary of Labor overruled the ALJ's interpretation as too limiting and instead adopted the view that the coverage extended to anyone having an impairment that created a bar to the "employment of one's choice . . . [that one] is currently capable of performing." Neither the ALJ's nor the Assistant Secretary's view prevailed in the district court.

The district court rejected the ALJ's reasoning as contravening the purposes of the Rehabilitation Act by restricting access to protection more stringently than Congress had intended. The court also reasoned that the Assistant Secretary's reading was too broad and undermined congressional intent by making the term "substantially limits" mere surplusage.

40. See id. at 1093. The ALJ agreed that Crosby had an impairment, but did not consider it one that substantially limited his ability to work. See id.
41. Id. at 1093-94. The ALJ found that a bar to heavy labor jobs only disqualifed Crosby from a very few jobs when that category was viewed as part of the entire labor force. See id. at 1094. The ALJ further determined that only those disabilities that prevented individuals from engaging in the full spectrum of available employment could be considered substantially limiting. See id.
42. Id. The ALJ and Assistant Secretary agreed on a definition of "impairment," which was not defined in the statute or regulations. See id. They defined impairment as "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical . . . activity." Id. Nonetheless, the Assistant Secretary rejected the contention that coverage could be obtained only upon a showing of disqualification from many or most jobs. See id. Instead, he adopted a much more expansive view of the definition of a substantial limitation on the ability to work, that is, disqualification from the current job in which one chooses, and is currently able, to work. See id.
43. See id. at 1099 (holding that the Assistant Secretary's view was overbroad, but the ALJ's view "undercut[] the purpose[]" of the Act). The district court did say that the Assistant Secretary's reasoning comported more closely with the Rehabilitation Act's purposes than the ALJ's reasoning. See id. at 1101. The court observed that the ALJ's interpretation of "substantially limits," that results in a bar from almost all employment available regardless of type, was too narrow in light of the congressional intent that the Act have a broad scope and that coverage be determined case-by-case. See id. at 1102.
44. See id. at 1099.
45. See id. The court reasoned that the Assistant Secretary's interpretation of "substantially limits"—that an individual disqualified from the job of his choice would be eligible for coverage—would allow an individual to claim protection based on rejection from one particular job, even though that individual had been offered identical jobs in locations, or under conditions, that did not pose any difficulty based on the impairment. See id. For
The district court determined that disability claims must be decided on a case-by-case basis, using several objective factors to determine whether an individual is substantially impaired in a major life activity.\textsuperscript{46} The first factor is the number of positions and types of employment unavailable to the individual due to the alleged condition.\textsuperscript{47} To make an effective comparison, it is necessary to assume all employers would utilize the same or similar hiring criteria.\textsuperscript{48} The second factor is the number of employers with similar requirements that exist in the geographical area.\textsuperscript{49} This criterion prevents coverage for applicants who are turned away from a job because that particular plant or office has a characteristic that aggravates the impairment, but is not shared by similar employers, thus still allowing the applicant to work at a different, but similar, location.\textsuperscript{50} It also prevents the rejecting employer, who is the only one of its type in a reasonably accessible geographic area, from claiming that other jobs exist when in fact access to them is prohibitive due to distance.\textsuperscript{51} Third, the district court considered the geographical area to which the applicant has reasonable access to avoid a comparison of employers in a city to which the individual could not reasonably travel.\textsuperscript{52} Finally, the court considered the individual's own "expectations and training."\textsuperscript{53}

\textsuperscript{46} See E.E. Black, 497 F. Supp. at 1100.
\textsuperscript{47} See id.
\textsuperscript{48} See id. This exercise prevents an employer with some peculiar or aberrational criterion from claiming that the adversely affected individual can find employment elsewhere, since the qualifications required here are so specialized. See id.
\textsuperscript{49} See id. at 1101. It is important to note that "similar" applies not only to the working conditions, but also may include salary and benefits considerations. See id. at 1101 n.13.
\textsuperscript{50} See id. at 1101. The court noted that an inability to work at one plant containing a substance to which the applicant is allergic would not be a substantial impairment to work where the employer had offered the applicant a job at other plants that did not contain the offending substance. See id. at 1099. This argument is similar to the one in \textit{Forrisi v. Bowen}, where the court held that the employee's inability to work at one particular plant, when positions were available at other plants that did not aggravate his condition, did not satisfy the definition of substantial impairment. See 794 F.2d 931, 935 (4th Cir. 1986).
\textsuperscript{51} See E.E. Black, 497 F. Supp. at 1101.
\textsuperscript{52} See id.
\textsuperscript{53} Id. The court argued that this point is especially important if the claims are to be evaluated on a case-by-case basis, and also to honor Congress's intent that the Act have
These objective factors became the test for evaluating the term "substantially limits" in the context of working. The court's definition was significant because it created a framework for future analysis by other courts considering the issue, which the Department of Health, Education, and Welfare had declined to provide in its original rules implementing the Rehabilitation Act. Other courts, at least purportedly, followed the analysis in E.E. Black in considering Rehabilitation Act claims. Although the EEOC did not formally adopt the test from E.E. Black, it developed a similar factor analysis for evaluating claims of substantial impairment of working under the ADA.

broad coverage. See id. at 1101-02. If the claims are not evaluated on a case-by-case basis, very narrow readings, like that provided by the ALJ, would be easily defensible. Cf. id. at 1100 (holding that claimants should qualify for coverage only if they were limited from "employability generally"). If one does not consider the expectations and training of the individual, then, presumably, that individual would have to take any job available, regardless of remuneration, as long as the job could be performed notwithstanding the individual's impairment. See id. at 1099. The court used an example of a chemist who, after being rejected from a chemistry job because of his impairment, would not be "heartened" if he could still obtain employment as a streetcar conductor. See id..

54. See Haines, supra note 20, at 562. Haines argues that the court's formula does a good job in protecting individuals against "single-instance" or "first-time" discrimination because it focuses on the qualitative factors affecting the employee and does not use a strict quantitative analysis to determine the threshold of coverage. See id. He argues, however, that the court did not adequately quell the fear of a "totally open-ended definition," that is, one that seemingly has no boundaries. See id. Indeed, Professor Haines pointed out that the court recognized the deficiency by emphasizing the case-by-case approach required by Congress, thus allowing the court to use a potentially over-broad interpretation because its determination only applied to the particular case at hand. See id. But see Bales, supra note 24, at 235-36 (criticizing the EEOC for not adopting, as a separate factor for consideration, the individual's "'training, knowledge, skills, and abilities'" which was critical to the outcome of E.E. Black).

55. See Nondiscrimination on the Basis of Handicap, 42 Fed. Reg. at 22,685 (stating HEW's belief that a definition of "substantially limits" was impossible at that time).


57. 29 C.F.R. § 1630.2(j)(3)(ii) reads in relevant part
(A) The geographical area to which the individual has reasonable access;
(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the indi-
The court in *E.E. Black* interpreted the Rehabilitation Act’s definition broadly, potentially bringing a much larger class of individuals under the Act’s protection than the ALJ believed that Congress intended. On the other hand, the court recognized the inherent risk in such a broad reading, namely that undeserving individuals might qualify for coverage. It warned of the danger of an individual who claimed discrimination after being rejected from one job receiving protection under the Rehabilitation Act.

2. *Jasany v. United States Postal Service*

Federal courts heeded *E.E. Black*’s warning against finding undeserving individuals qualified for coverage under the Rehabilitation Act, particularly focusing on the number of jobs from which an individual was disqualified, and dismissing claims where they did not see a substantial barrier to the individual’s employment. In *Jasany v. United States Postal Service*, the Sixth Circuit held that the plaintiff’s inability to carry out the duties of only one job within the workplace was not a substantial limitation on his ability to work. Thomas Jasany was hired by the Post Office to work as an operator of a mail-sorting machine. He suffered from strabismus (crossed eyes) and experienced difficulty operating the machine, but had no other complications when performing other duties. The Post Office terminated him after he repeatedly refused to operate the mail-sorting machine because the union contract did not entitle him to transfer to another position based on his condition. The Sixth Circuit individual is also disqualified because of the impairment (broad range of jobs in various classes).


58. See *E.E. Black*, 497 F. Supp. at 1099; *supra* notes 44-46 and accompanying text (discussing the rejection of the ALJ’s and Assistant Secretary’s reasoning).

59. See *E.E. Black*, 497 F. Supp. at 1099. The court believed that the Assistant Secretary’s interpretation was overbroad and, if adopted, would contravene congressional intent by making the term “substantial” unnecessary. See id.

60. See id. The court used the example of an acrophobic who was offered ten positions with one company and received protection under the Act based on his impairment from working after he was disqualified from one position due to its location on the 37th floor. See id.

61. See generally *Forrisi*, 794 F.2d at 931; *Jasany*, 755 F.2d at 1244.

62. 755 F.2d 1244 (6th Cir. 1985).

63. See id. at 1250.

64. See id. at 1247.

65. See id. Jasany was able to perform such tasks as manual distribution of mail. See id.

66. See id. The American Postal Worker’s Union filed a grievance against the Postal Service, claiming that the union contract provisions entitled Jasany to reassignment within the Postal Service. See id. The arbitrator found no right to reassignment existed. See id.
reversed the district court's finding that Jasany was handicapped under the Rehabilitation Act.\textsuperscript{67}

Indeed, the \textit{Jasany} court suggested that, when read with the requirement that an individual otherwise be qualified,\textsuperscript{68} the definition of "substantially limits" as it relates to working also would exclude from the Act's coverage those individuals who were barred from only a "narrow range of jobs."\textsuperscript{69} In \textit{Jasany}, the court noted that the legislative history of the Rehabilitation Act did not explain the point at which an individual

The fact that Jasany lost the arbitration of his grievance did not preclude his Rehabilitation Act claim. \textit{See id.} at 1247-48. In \textit{Alexander v. Gardner-Denver Co.}, the Supreme Court held that arbitration of a contractual right arising out of a collective bargaining agreement does not preclude the complaining individual from bringing a separate action in court based on an "independent statutory right." \textit{415 U.S. 36, 49-50 (1974).} In \textit{Gardner-Denver}, the employee was allowed to pursue a Title VII racial discrimination claim after losing a grievance arbitration. \textit{See id.} The Court reasoned that, by bringing the Title VII action, the employee was not seeking judicial review of his arbitration proceeding, but rather asserting a "statutory right independent of the arbitration process." \textit{Id.} at 54.

If, however, the \textit{Jasany} plaintiff's collective bargaining agreement had stated that the arbitrator could resolve not only contract but statutory complaints as well, the claim may have been precluded on that ground. \textit{See generally} \textit{Gilmer v. Interstate/Johnson Lane Corp.}, \textit{500 U.S. 20, 23 (1991)} (holding that a securities analyst's claim of wrongful discharge was precluded by a New York Stock Exchange requirement that all applicants wishing to be registered agree to arbitrate all employment disputes). For further discussion of how \textit{Gilmer} may be a precursor for a major shift of employment disputes out of the hands of the judiciary and into private arbitration, see generally Robert A. Gorman, \textit{The Gilmer Decision and the Private Arbitration of Public-Law Disputes}, 1995 \textit{U. ILL. L. REV.} 635.

\textit{67.} \textit{See Jasany, 755 F.2d at 1250.} The district court regarded the plaintiff's inability to work on the specified machine, caused by his physical impairment of strabismus (crossed-eyes), as a substantial limit on his major life activity of working. \textit{See id.} at 1248. The court of appeals agreed that Jasany suffered from a physical impairment as defined in the statute. \textit{See id.} The court found, however, that his impairment only limited his ability to operate one machine; he was only unable to do one particular job. \textit{See id.} at 1250. The court reasoned that this single limitation, along with Jasany's ability to perform other functions within the Post Office, disqualified him from coverage. \textit{See id.}

\textit{68.} \textit{See 42 U.S.C. § 12111(8) (1994)} (defining the term qualified individual with a disability). This Comment does not address the "otherwise qualified" definition. Briefly, an individual is otherwise qualified if he is able to satisfy the employer's program requirements, despite his handicap. \textit{See Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).} In \textit{Davis}, the Court held that a hearing-impaired nursing student was not "otherwise qualified" because her inability to hear prevented her from safely interacting with patients without close and constant supervision. \textit{See id.} at 409-10. The Court further reasoned that it doubted any level of accommodation would suffice to allow Davis to complete all of the nursing-program requirements. \textit{See id.} at 409.

\textit{69.} \textit{Jasany, 755 F.2d at 1249 n.3.} The court concluded that a narrow range of jobs does not equate to the major life activity of working or, if it does, the inability to perform this narrow range of jobs is not a substantial limitation. \textit{See id.; see also} Amalia Magdalena Villalba, \textit{Comment, Defining "Disability" Under the Americans With Disabilities Act, 22 U. BALTIMORE L. REV. 357, 363-64 (1993) (citing Jasany v. United States Postal Service as one of the leading cases interpreting the definition of "substantially limits").}
could claim a "substantial limitation" on his major life activity of working caused by lost job opportunities.70 Further, the regulations implementing the Rehabilitation Act did not define the term "substantially limits," claiming it was impossible, and leaving that challenge to the courts.71 Considering the facts surrounding Thomas Jasany's situation, the Sixth Circuit reasoned that the plaintiff was limited from only one job and, hence, could not be substantially limited in working.72

3. Forrisi v. Bowen

Trying to define the boundaries of coverage, the Fourth Circuit placed significant weight on the term "substantial" by concluding that although Congress may have intended broad coverage, it did not intend coverage to extend beyond the boundaries of the class of individuals who, as a result of their impairment, faced significant challenges to securing and maintaining employment.73 In Forrisi v. Bowen,74 the Fourth Circuit Court of Appeals reemphasized the significance of the term "substantially limits," making a statement similar to the E.E. Black court's argument against surplusage.75 The Fourth Circuit said that the inclusion of the "substantially limits" language indicated Congress's intent that only "significant" impairments receive protection under the Rehabilitation Act.76 Like the court in Jasany, the court in Forrisi observed that Congress intended the statute to protect a relatively narrow class of individuals who were "truly handicapped" and whose characteristics were not "widely shared."77

70. Jasany, 755 F.2d at 1248 & n.2. The court referred instead to the E.E. Black court's analysis, which reasoned that a court should consider only situations where the individual was barred from "obtain[ing] satisfactory employment." Id. at 1248 (citing E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1099-1100 (D. Haw. 1980)). The E.E. Black court refused to consider situations where the individual could not perform a particular job. See E.E. Black, 497 F. Supp. at 1099-1100.
72. See Jasany, 755 F.2d at 1250.
73. See Forrisi v. Bowen, 794 F.2d 931, 933-34 (4th Cir. 1986).
74. 794 F.2d 931 (4th Cir. 1986).
75. See id. at 933-34.
76. Id.
77. Id. at 934 (citing Jasany v. United States Postal Serv., 755 F.2d 1244, 1249 (6th Cir. 1985)). This interpretation finds support in the Department of Health, Education, and Welfare's final rule defining "handicapped individuals." See Nondiscrimination on the Basis of Handicap, 42 Fed. Reg. at 22,686 (declining to limit the definition to those persons with "traditional" handicaps but stating HEW's intention to commit its resources to combating discrimination "against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act".)
B. Defining Impairment

In defining the term disability, the ADA uses the term "impairment" of a physical or mental function.78 According to the EEOC, an impairment may exist notwithstanding the fact that the individual functions normally with the help of medicine or prosthetic devices.79 The term does not include conditions that, although potentially impairing in some way, are characteristics of environment, physiology, culture, or economic background, because these are not considered per se physical or mental impairments.80 Examples given by the EEOC in its Interpretive Guidance following the regulations include such characteristics as hair color,78

78. See 42 U.S.C. § 12102(2) (1994). This Comment focuses on physical, not mental, impairment cases. The impairment concept under the ADA is the same as under the Rehabilitation Act. See Bales, supra note 24, at 217-21 (discussing the concept of impairment).

79. See 29 C.F.R. app. § 1630.2(h) (1997) (giving the example that an epileptic is still considered disabled, even though his condition is controlled by medication); see also Gilday v. Mecosta County, 124 F.3d 760, 765 (6th Cir. 1997) (holding that the EEOC's determination, that mitigating factors should not be taken into account when determining the existence of a disability, is consistent with both the text and legislative history of the ADA); Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997) (quoting with approval, EEOC guidelines that prohibit consideration of mitigating measures in the determination of whether an individual is disabled), cert. denied, 118 S. Ct. 693 (1998); Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996) (same); Canon v. Clark, 883 F. Supp. 718, 721 (S.D. Fla. 1995) (holding that an insulin-dependent diabetic alleged a colorable ADA claim by stating that she would lapse into a coma without her medication). But see Runnebaum v. Nationsbank of Md., 123 F.3d 156, 169 (4th Cir. 1997) (holding asymptomatic HIV not to be a per se impairment, and, a fortiori, not a per se disability because it did not physically prevent the individual from performing any major life function); Deckert v. City of Ulysses, No. 93-1295-PFK, 1995 WL 580074, at *6 (D. Kan. Sept. 6, 1995) (holding insulin-dependent diabetic not to be disabled because no major life activity was substantially impaired), affd, 105 F.3d 669 (10th Cir. 1996); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (questioning the EEOC requirement that courts not consider mitigating factors in determining disability). The Coghlan court reasoned that someone with controlled diabetes is not limited in performing major life activities and is, therefore, not within the statutory definition of "disability." See id. The general thrust of cases like Coghlan seems to be that if someone has an impairment that is controlled with only a maintenance dosage drug or something as common as eyeglasses, then that individual is not substantially limited in the activity which the disease or condition otherwise inhibits. See Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) (reasoning that if an individual can control his diabetes with insulin or his near-sightedness with glasses, he cannot be substantially limited in a major life activity); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 881 (D. Kan. 1996) (same) (quoting Schluter, 928 F. Supp at 1445).

height or weight, pregnancy, poor judgment, poverty, lack of education, or even advanced age. Coverage, however, will not be restricted if the party with one of these characteristics also has an actual physical or mental impairment.

Not all courts have adhered strictly to these limitations when faced with the many challenges to the Act's boundaries. In one case, a woman claimed she was disabled due to her morbid obesity. The dis-

81. See 29 C.F.R. app. § 1630.2(h). The EEOC does make the distinction that characteristics such as advanced age, although not impairments on their own, may bring with them conditions such as osteoporosis or arthritis that would be considered impairments. See id.

82. See id. Further, impairments that are the result of conditions, such as osteoporosis caused by aging, or even certain pregnancy-related illnesses, may be covered. See id.; see also Pritchard v. MacNeal Hosp., 960 F. Supp. 1321, 1328 (N.D. Ill. 1997) (holding that osteoporosis, or osteoarthritis, is a permanent physical impairment); Erickson v. Board of Governors, 911 F. Supp. 316, 323 (N.D. Ill. 1995) (holding infertility to be an impairment because it impaired the major life activity of reproduction); Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 242 n.1 (E.D. La. 1995) (citing EEOC Interpretive Guidance that osteoporosis may be covered), aff'd, 79 F.3d 1143 (5th Cir. 1996); Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1404-05 (N.D. Ill. 1994) (holding esophageal reflux, which prevented plaintiff from becoming pregnant naturally, to be a statutory impairment). For discussion of the infertility issue, see Sandra M. Tomkowicz, The Disabling Effects of Infertility: Fertile Grounds for Accommodating Infertile Couples Under the Americans With Disabilities Act, 46 Syracuse L. Rev. 1051, 1091-92 (1996) (concluding that both partners of an infertile couple should be considered disabled because they are both substantially limited in their ability to bear children); Kristina M. Hall, Note, Pacourek v. Inland Steel Company: Enforcing Equal Protection Rights by Designating Infertility as a Disability Under the Americans With Disabilities Act, 11 BYU J. Pub. L. 287, 300 (1997) (concluding that infertility is a "reproductive impairment" and should be treated similarly to other impairments).

83. See Christian v. St. Anthony Med. Ctr., Inc., 117 F.3d 1051, 1051-52 (7th Cir. 1997) (stating, in dicta, that hypercholesterolemia—high cholesterol—may be covered by the Act because treatment of the condition is disabling); Cerrato v. Durham, 941 F. Supp. 388, 393 (S.D.N.Y. 1996) (holding that pregnancy-related conditions, such as dizziness, cramping, spotting, leaking, and nausea, if sufficiently severe, may qualify as disabilities under the Act).

At least one commentator believes genetic impairments, including those which have yet to manifest any symptoms, should be covered. See Jon D. Bible, When Employers Look for Things Other than Drugs: The Legality of AIDS, Genetic, Intelligence, and Honesty Testing in the Workplace, 41 Lab. L.J. 195, 206 (1990) (arguing that a genetic test showing an impairment, e.g., the sickle cell anemia trait, would qualify that individual as disabled). See generally Brian R. Gin, Genetic Discrimination: Huntington's Disease and the Americans With Disabilities Act, 97 Colum. L. Rev. 1406 (1997) (arguing that latent Huntington's disease should be covered under the ADA). For a practical discussion on avoiding "pitfalls" in testing employees, see Jonathan R. Mook, Personality Testing in Today's Workplace: Avoiding the Legal Pitfalls, 22 Employee Rel. L.J. 65, 75-80 (1996) (discussing prohibitions and allowances for employee medical exams under the ADA). 84. See Nedder v. Rivier College, 908 F. Supp. 66, 73 (D.N.H. 1995) (claiming morbid obesity substantially limited her ability to ambulate). See generally William C. Taussig, Note, Weighing in Against Obesity Discrimination: Cook v. Rhode Island, Department of
The district court denied her claim, not on the grounds that she had no impairment, but because her impairment did not substantially limit a major life activity. The court acknowledged some apparent flexibility in the regulation’s definition of impairment if the condition was sufficiently severe, but nonetheless, it held that an impairment must exist. For example, in another case where the court denied a claim, the individual exceeded weight restrictions for a flight attendant position because he was an avid body builder. The district court held that he did not have an impairment at all, because his condition was not the result of some physical deficiency, but rather the result of extensive physical training.

In another case, the plaintiff was denied protection under the ADA for an alleged disability based on pregnancy and related medical conditions, such as ovarian cysts, because the court concluded that the conditions were not impairments under the ADA. The court found that pregnancy

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Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans With Disabilities Act, 35 B.C. L. REV. 927 (1994) (arguing that the Cook holding should be extended beyond morbid obesity to include general obesity as an impairment); Steven M. Ziolkowski, Case Comment, The Status of Weight-Based Employment Discrimination Under the Americans With Disabilities Act After Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals, 74 B.U. L. REV. 667 (1994) (arguing for inclusion of obesity in the list of ADA and Rehabilitation Act impairments).

85. See Nedder, 908 F. Supp. at 74-77. The court “assume[d] arguendo” that Nedder had a statutory “impairment.” Id. at 74. It analyzed testimony relating to her condition, considered the EEOC regulations and relevant case law, but concluded that Nedder’s impairment did not rise to the level of a substantial limitation. See id. at 77. The court reasoned that neither the inability to walk briskly, nor obesity, standing alone, constituted a disability. See id. at 75-76. The court relied in particular on a case involving an individual suffering from post-polio-related impairments affecting his ability to walk. See id. at 76. In that case, the court found that the plaintiff had difficulty climbing stairs and experienced limited body motion, yet the court held that he was not substantially limited in a major life activity. See id. (quoting Stone v. Entergy Servs., Inc., Civ. A. No. 94-2669, 1995 WL 368473, at *3-4 (E.D. La. June 20, 1995); see also Smaw v. Virginia Dep’t of State Police, 862 F. Supp. 1469, 1475 (E.D. Va. 1994) (holding that a state trooper, who claimed that she was terminated because of her obesity, did not have a physical impairment because she presented no evidence that the condition impaired any major life activity); infra notes 102-10 and accompanying text (defining major life activity).

86. See Nedder, 908 F. Supp. at 74-75.

87. See Tudyman v. United Airlines, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (holding that disqualification from a flight attendant’s job due to the candidate’s overweight condition, resulting from his body-building activities, did not constitute a limit on a major life activity because it only barred him from one job). The court also reasoned that the claimant’s condition was not the result of a physiological disorder, and, therefore, could not qualify as a statutory impairment. See id.

88. See id.

was not, standing alone, a statutory impairment because, as suggested by the EEOC regulations, it was not a physiological disorder. The court then quoted the regulation excluding temporary conditions, and concluded, although not elaborating on its reasoning, that ovarian cysts and, more broadly, all pregnancy-related conditions, were of insufficient duration to qualify as impairments under the ADA. The court explained that these complications were related to the temporary, non-statutorily impairing condition of pregnancy.

The EEOC, perhaps anticipating difficult and unique cases, developed broad categories into which impairments may fall: "physiological disorder[s], or condition[s], cosmetic disfigurement[s], or anatomical loss[es] affecting [a] body system[]." The EEOC adopted the position of the Department of Health, Education, and Welfare under the Rehabilitation Act, refusing to make an exhaustive list of specific diseases and disorders because of the impossibility of compiling a comprehensive list. In the legislative history of the ADA, however, Congress focused its attention on individuals who suffered from severe physical limitations caused by the loss of a major body function or limb, or even as a result of a serious illness such as cancer or AIDS. Thus, although the EEOC created

pregnancy discrimination is already covered by the Pregnancy Discrimination Act and Title VII. See id. But see Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10(b) (1997) (stating that, under the ADA, disabilities caused by pregnancy or other related medical conditions would be treated the same as those caused by other medical conditions); Kindlesparker v. Metropolitan Life Ins. Co., 9 A.D.D. 881, 882 (N.D. Ill. 1995) (holding that the ADA does not "countenance[] discharge because a woman must seek medical attention related to pregnancy"). The Kindlesparker court's statement implies that it believed that termination of a woman for being pregnant invoked the same concerns that the ADA was intended to combat. See id.

90. See Tsateranos, 893 F. Supp. at 119 (quoting the non-impairment exclusion of the EEOC regulations).

91. See id.

92. See id. (quoting the EEOC's Interpretive Guidance, 29 C.F.R. § 1630.2(h)).


95. See S. REP. NO. 101-116, at 4 (1989). Witnesses testifying before the committee were a cancer survivor, a blind attorney, a quadriplegic, the Vice President of the National Coalition for Cancer Survivorship, and a representative of the National Organizations Responding to AIDS. See id. The representation at the hearings, as well as legislative history from the Rehabilitation Act, buttresses the argument that the severely handicapped were the focus of the ADA. See Nondiscrimination on the Basis of Handicap, 42 Fed. Reg. at 22,686 (stating that persons with severe handicaps were the focus of the Rehabilitation Act of 1973).

The goal was not to lower the threshold for coverage to include a broader base of people, but rather to extend the protections afforded under the Rehabilitation Act to disabled persons in the private sector. See Bales, supra note 24, at 210 (arguing that a "major shortcoming" of the Rehabilitation Act was its "limited scope" that did not include private
broad categories into which physical infirmities might properly be classified as impairments, it seems evident from Congress's focus that the intention was to limit what would qualify. Underlying Congress's intent was the unstated purpose of preventing individuals who were disqualified from a job because of a physical deficiency, such as an overweight condition, from claiming that they were impaired within the meaning of the ADA.96

Indeed, in Jasany, the Fourth Circuit criticized the E.E. Black court for not making the critical distinction between an actual impairment and merely a limiting physical trait.97 The Jasany court said that if a court did not focus on whether the individual had an actual impairment, especially in cases where job qualifications did not include special physical skills, the burden would shift to the employer.98 The employer would thus be forced to prove that the individual was not qualified for the job for which the employer had rejected him. The employer would have to meet such

96. See supra note 9 (citing legislative history that addressed the scope of what Congress considered an impairment).

97. See Jasany v. United States Postal Serv., 755 F.2d 1244, 1249 & n.5 (6th Cir. 1985). The court reasoned that characteristics, such as height or strength, that render an individual incapable of performing a particular job, are not covered because they fail to qualify as impairments, instead of, as the E.E. Black court said, because the individual would not be otherwise qualified to perform the job in spite of his impairment. See id. at 1249. The ALJ in E.E. Black drew the analogy of an individual bringing a successful discrimination claim because he was not hired as a running back by the Dallas Cowboys football team, an illustration intended to show the potentially absurd results of interpreting the standard for a substantial limitation on the ability to work as the loss of a particular job as opposed to a bar from general employability. See E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1099-1100 (D. Haw. 1980). The district court rejected that analogy as inapposite because he was not hired as a running back by the Dallas Cowboys since he would not be capable of performing it notwithstanding any physical impairment and, thus, was not otherwise qualified. See id. at 1100. The court in Jasany would have said that the individual was not handicapped because he lacked a physical impairment as defined by the regulations. See Jasany, 755 F.2d at 1249.

98. See Jasany, 755 F.2d at 1249-50 & n.5.
a burden before the individual would need to prove that he was disabled under the statute, and that he was qualified apart from his handicap.99

More recently, the Fourth Circuit has further narrowed its definition of impairment by reasoning that if an individual is diagnosed with a disease such as HIV, and there is no negative physical impact on him, he may not even be impaired within the meaning of the statute.100 The court seems to have reasoned that although such a diagnosis may force an individual to make certain difficult choices based on his risk of aggravating the condition, it does not physically constrain him from performing any activity.101

99. See id. The burden shifting standard for disability discrimination cases is different from the one for Title VII cases because disabled individuals are usually rejected overtly on the basis of their disabilities, whereas those discriminated against on the basis of race, sex, or national origin are usually presented with an alternative reason for their termination or rejection. See Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385-87 (10th Cir. 1981) (holding that a modification of the traditional McDonnell Douglas test for discrimination was needed for handicap cases).

The McDonnell Douglas Corp. v. Green case established the elements required to prove a prima facie case of Title VII racial discrimination. See 411 U.S. 792, 802 (1973). The plaintiff must establish:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications .... The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

Id. (emphasis added).

In disability discrimination cases, the express reason stated for termination or disqualification is often the disability at issue. See Pushkin, 658 F.2d at 1385-86. Therefore, as Pushkin suggests, a disabled person should be required to prove that he is disabled, and otherwise qualified. See id. at 1387. The burden should then shift to the employer to state a legitimate business reason for disqualifying the employee. See id. If proved, the employee could rebut the employer's decision by proving that the rejection was unjustified because it was based on "misconceptions or unfounded factual conclusions." Id.

100. See Runnebaum v. Nationsbank of Md., 123 F.3d 156, 172 (4th Cir. 1997). The court reasoned that HIV-status alone is not a per se impairment because it does not physically inhibit either procreation or intimate relations. See id.

101. See id. The court conceded that the disease has caused many infected individuals to refrain from procreation or intimate sexual relations, but that "reaction to the knowledge of [their] infection" was not the same as physically being unable to participate in the activity. Id. The court contrasted the "reaction" with the predicament of a paraplegic who lacks the physical ability to walk. See id. The court considered the fundamental difference between the paraplegic and the asymptomatic HIV sufferer to be the physical barrier that paralysis places between a paraplegic's desire, versus his ability, to walk. See id. In the case of an asymptomatic HIV individual, no physically impassable barrier exists. See id. Rather, the reaction to the disease (for example, the fear of infecting others), not the disease standing alone, operates as the impairment. See id.
C. Defining Major Life Activity

To further limit the scope of coverage of the ADA, Congress also circumscribed the definition of disability to include only those impairments that restrict a major life activity. The EEOC defined the phrase "major life activity" in a way that distinguishes trivial impairments from those that prevent truly disabled persons from performing essential functions without significant difficulty. The EEOC categorized such activities as walking, seeing, learning, taking care of oneself, performing manual tasks, breathing, and working as major life activities. It explicitly stated, however, that this list was not exhaustive and other activities such as lifting and standing also may be included. Although seemingly self-explanatory, this open-ended definition has produced diametrically opposed court decisions for some conditions. For example, the issue of

104. See 29 C.F.R. app. § 1630.2(i).
105. See id.
106. See id. (defining major life activities as "those basic activities that the average person ... can perform with little or no difficulty").

One commentator argues for the elimination of "working" as a major life activity. See Locke, supra note 95, at 135-38. Locke suggests that inconsistent results occur when disability is measured through the spectrum of its "occupational impact" because of the individual, and thus wide-ranging, nature of each inquiry. See id. at 136. He also argues that courts are reluctant to find individuals disabled in their ability to work because work encompasses so many different activities. See id. at 138. A finding of disability would virtually ensure proof of the prima facie case every time, as no work activity would be left unaf-
infertility has been held to be an impairment of the major life activity of reproduction by one court,\textsuperscript{108} but not by another. The latter court reasoned that reproduction/pregnancy was merely a personal lifestyle choice.\textsuperscript{109} Also, one court held asymptomatic HIV to be a per se impairment, while another did not, because the latter court found that it did not physically prevent the individual from performing any major life activity.\textsuperscript{110}

\textbf{D. Defining Substantially Limits}

Notwithstanding the difficulties produced by the terms "impairment" and "major life activity," the term "substantially limits" serves to decide most disability cases at the summary judgment stage.\textsuperscript{111} The EEOC de-

\textsuperscript{108} See Pacourek, 858 F. Supp. at 1404. The district court reasoned that since the EEOC listed the reproductive system in its regulations as a body system vulnerable to a physiological disorder, then logic dictated the conclusion that reproduction is a major life activity. \textit{See id.} The court cited a Seventh Circuit case which held that the Rehabilitation Act covers reproductive systems and, therefore, reproductive activity. \textit{See id.} (citing McWright v. Alexander, 982 F.2d 222, 226-27 (7th Cir. 1992)). Since the ADA was based on the same definitional structure, the interpretations should be substantially similar. \textit{See id.} at 1405.

\textsuperscript{109} See Zatarain, 881 F. Supp. at 243. The district court argued that the major life activity affected must be "separate and distinct" from the impairment that limits it. \textit{Id.} Otherwise, the court argued, the plaintiff could "bootstrap" a major life activity onto the impairment by making the circular argument that, since her ability to reproduce is substantially limited, it is a substantial limitation of her major life activity of reproduction. \textit{Id.} The court also argued that the generally infrequent and, impliedly, discretionary nature of pregnancy should not be included in the list of such daily and mandatory life activities as walking and seeing. \textit{See id.}

\textsuperscript{110} \textit{Compare} Abbott v. Bragdon, 107 F.3d 934, 938-40 (1st Cir. 1997) (holding HIV-positive status, "simpliciter," to be an impairment, and because there existed a concomitant substantial limitation on the major life activity of reproduction, the plaintiff's condition satisfied the definition of disability), \textit{with} Runnebaum v. Nationsbank of Md., 123 F.3d 156, 172 (4th Cir. 1997) (reasoning that HIV-positive status alone is not a per se impairment because it does not \textit{physically} inhibit either procreation or intimate relations).

\textsuperscript{111} See Robinson v. Neodata Serv., 94 F.3d 499, 501-02 (8th Cir. 1996) (holding employee with restricted arm movement was not substantially limited in a major life activity); Kelly v. Drexel Univ., 94 F.3d 102, 108 (3d Cir. 1996) (holding that a limp, caused by hip surgery, is not a substantial limitation of the major life activity of walking); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 (5th Cir. 1995) (holding that an inability to perform one aspect of a job is not a substantial limitation on a major life activity); Vaughan v. Har-
fined "substantially limits" as either preventing an individual from participating in a major life activity,\textsuperscript{112} or significantly restricting his ability to perform one or more major life activities compared with the abilities of an average person.\textsuperscript{113} To guide the EEOC, Congress gave an example of a person who can walk ten miles but experiences pain in the eleventh mile, and concluded he would not be substantially limited because the average person would not be able to walk such a distance without also experiencing pain.\textsuperscript{114} Other examples that help to clarify the term "average" exist in the appendix to the regulations.\textsuperscript{115} For instance, a person with extraordinary abilities who, after suffering an impairment, can perform only at the level of an average person, does not qualify as substantially limited in that major life activity.\textsuperscript{116} The EEOC pointed out that the focus should not be on the impairment, but rather on the effect that impairment has on the individual's ability to perform essential functions.\textsuperscript{117}
Reinforcing Congress’s intention that the Act should apply only to those with serious illnesses or injuries, the EEOC explained that “temporary, non-chronic impairments of short duration” are not likely to be covered.\(^{118}\)

Like the court in *E.E. Black*, the EEOC concluded that whether an impairment is substantially limiting should be determined on a case-by-case basis, using a set of three factors to guide the analysis.\(^{119}\) The first factor is the “nature and severity of the impairment.”\(^{120}\) Based on the
legislative history and the explanations in the regulations, this factor appears to eliminate coverage for trivial injuries that Congress did not intend to protect. Courts have been relatively strict, but not uniform, in their application of this factor. Some courts have rejected claims that involve actual impairments after finding that the impairments are not severe enough to be considered substantial limitations of major life activities; these impairments do not cause individuals more difficulty in performing specific tasks than average people.

The EEOC's second factor is the "duration or expected duration of the impairment." Temporary injuries, such as broken bones, absent some long term complications, will likely be considered of insufficient duration to qualify as substantial limitations on major life activities. Courts evaluating this factor have set a high standard for showing the requisite impairment, holding such impairments as back injuries, that limit the ability to lift and bend, and joint injuries that restrict the ability to walk and climb, not to be substantially limiting enough to qualify for coverage under the Act.

term impact of the impairment); see also EMPLOYEE RIGHTS, supra note 5, § 3.02(3)(b), at 3-31 (arguing that determination of substantial limitation cannot be made in the abstract).


123. See S. REP. NO. 101-116, at 23 (stating that the Act was not intended to protect "minor, trivial impairments").

124. See Robinson v. Neodata Serv., Inc., 94 F.3d 499, 501-02 (8th Cir. 1996) (determining that an employee's six percent impairment in the use of her upper arm was too minor to constitute a disability under the ADA); Kelly v. Drexel Univ., 94 F.3d 102, 108 (3d Cir. 1996) (holding that no substantial limit on walking existed where employee's hip injury did not require him to use prosthetic devices, notwithstanding the fact that he had a permanent limp and significant pain when he walked). But see Gilday v. Mecosta County, 124 F.3d 760, 765 (6th Cir. 1997) (recognizing untreated diabetes, which prevented an employee from getting along with others at work, as a substantial limitation on his ability to work).

125. See Kelly, 94 F.3d at 106-07 (discussing the EEOC Compliance Manual guidance, and noting that moderate difficulties in walking should not be considered substantial impairments); Nedder v. Rivier College, 944 F. Supp. 111, 117 (D.N.H. 1996) (holding the plaintiff's obesity, which prevented her from walking as swiftly as the average person, and required significant physical exertion to walk at all, was not substantially limiting); Graver v. National Eng'g Co., No. 94 C 1228, 1995 WL 443944, at *11 (N.D. Ill. July 25, 1995) (holding that, although plaintiff walked with a noticeable limp, he was not substantially limited in his ability to walk).

126. 29 C.F.R. § 1630.2(j)(2)(ii).

127. See id. app. § 1630.2(j) (noting that "a broken leg that takes eight weeks to heal is an impairment of fairly brief duration").

128. See Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996) (holding correctable ankle difficulties were not a substantial impairment, even
The final factor is the "permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."\textsuperscript{129} This impact factor allows individuals who suffer impairments, which are not in themselves substantially limiting due to the impairments' lack of severity or duration, to obtain protection based on manifested difficulties from the primary injury or illness that are sufficiently restricting to qualify the individual for coverage.\textsuperscript{130} The impact itself also must be sufficiently severe and of permanent or long-term duration before an individual may obtain coverage.\textsuperscript{131} Furthermore, the impact must be a manifestation of an actual impairment.\textsuperscript{132} For example, a broken leg which heals properly would probably have little, if any, long term impact.\textsuperscript{133} If, however, the leg heals improperly and creates a permanent limp, the individual may qualify for coverage.\textsuperscript{134}

\textsuperscript{129} 29 C.F.R. § 1630.2(j)(2)(iii).
\textsuperscript{130} See id. app. § 1630.2(j) (explaining that an improperly healed broken leg or a cognitive disability resulting from a serious accident would be considered the impact necessary for coverage); Bolton v. Scrivner, Inc., 36 F.3d 939, 944 n.3 (10th Cir. 1994) (noting that evidence of plaintiff's ability to return to work without limitations, seven to nine months following injury, undermined his ADA claim because the impact was neither "long term" nor severe); see also Richard H. Nakamura, Jr., \textit{Pride and Prejudice in the Workplace: Can the ADA Split the Difference Without Splitting Hairs?}, 43 \textit{FED. LAW.} 22, 25 (1996) (explaining that an individual must be disabled enough to obtain coverage and suggesting the analysis used in Bolton as the model for a court analyzing this factor) (citing Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994)).
\textsuperscript{131} See Rogers, 87 F.3d at 759 (noting therapist's statement that Rogers's impairment would not restrict him in any of his pre-surgery activities in finding no substantial impairment).
\textsuperscript{132} See 29 C.F.R. app. § 1630.2(j) ("[T]he restriction on the performance of the major life activity must be the result of a condition that is an impairment.").
\textsuperscript{133} See id.; see also Rogers, 87 F.3d at 759 (holding that a surgically correctable, temporary ankle injury was not a substantial impairment to the appellant's ability to walk).
\textsuperscript{134} See 29 C.F.R. app. § 1630.2(j). But see Rogers, 87 F.3d at 759 (reasoning that since employee could still perform most duties, he was not substantially limited); Blanton v. Winston Printing Co., 868 F. Supp. 804, 807 (M.D.N.C. 1994) (holding plaintiff's post-injury condition to be "nearly as good as" pre-injury, and, therefore, not substantially limiting).

The injury standing on its own may be of too short a duration to be deemed substantial; however, the employer's attitude toward the employee's ability may create eligibility. See Spath v. Berry Plastics Corp., 900 F. Supp. 893, 903 & n.9 (N.D. Ohio 1995) (holding that a broken ankle was a disability because that employer regarded the employee as having a substantial limitation on her ability to walk).
Thus, even if a person is substantially limited in a major life activity such as walking or learning, unless that limitation is the result of an "impairment," the individual is not protected. Also, to meet the requirement of a substantial limitation on a major life activity, the court must determine that the impairment is severe enough and is of sufficient duration with a corresponding impact before it will find a disability. The EEOC draws an analytical distinction for the substantial impairment in the major life activity of working in that it is only evaluated once an individual fails to prove his impairment substantially limits any other major life activity.

135. See 29 C.F.R. § 1630.2(i).
136. See id. app. § 1630.2(j) (explaining that if someone cannot read because of a cultural factor, which is not an impairment, then he is not covered, but he would be covered if the inability to read was caused by dyslexia).
137. See id. § 1630.2(j)(2)(i). Neither the regulations nor the Interpretive Guidance establish a benchmark of severity, but rather suggest all factors be evaluated on a case-by-case basis. See id. app. § 1630.2(j). Although the EEOC generally declined to set static bases for qualification, a quasi-common law threshold appears to be developing for weight-lifting restrictions. See Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996) (finding a 25-pound lifting restriction not sufficiently limiting to obtain coverage under the ADA), cert denied, 117 S. Ct. 1844 (1997); Aucutt v. Six Flags over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (holding 25-pound lifting restriction not to be a disability); Ray v. Glidden Co., 85 F.3d 227, 229 (5th Cir. 1996) (holding inability to continuously lift 44- to 56-pound containers throughout the workday not to constitute a severe impairment when compared to the average person in the general populace). But see Frix v. Florida Tile Indus., Inc., 970 F. Supp. 1027, 1034 (N.D. Ga. 1997) (holding that a 25-pound lifting restriction is a disability under the ADA).
138. See 29 C.F.R. § 1630.2(j)(2)(ii), (iii). These factors must be evaluated on a case-by-case basis. See id. app. § 1630.2(j); supra notes 126-34 and accompanying text (discussing duration and impact of impairment).
139. See 29 C.F.R. app. § 1630.2(j); see also Bonnie P. Tucker, The Americans With Disabilities Act Interpreting the Title I Regulations: The Hard Cases, 2 CORNELL J. L. & PUB. POL'Y 1, 3 (1992) (hypothesizing that an individual suffering from mild seizures would have to prove a substantial limitation on his ability to work because none of "his other everyday activities would be similarly affected). The EEOC treats work separately because it is not a basic life-functioning task, but rather a combination of those tasks at a higher level of performance, such as repetitive tasks like typing. See Locke, supra note 95, at 115 & n.44. The working activity potentially brings under the Act's coverage many impairments that are not severe enough to hinder a basic major life activity, but do have a severe impact on daily functions. See id.; James M. Zappa, Note, The Americans With Disabilities Act of 1990: Improving Judicial Determinations of Whether an Individual Is "Substantially Limited," 75 MINN. L. REV. 1303, 1334 (1991) (pointing out that the major life activity of work encompasses multiple tasks and activities that must be performed even if that individual is not working). Zappa argues that courts should consider the limitation on an individual's ability to work in general, such as the ability to perform those activities generally involved in work. See id. If a court finds an individual impaired in his ability to engage in activities associated with working in general, Zappa argues, it should determine that disability coverage exists. See id. at 1335.
E. Defining the Major Life Activity of Working

1. EEOC Factors

The EEOC says that the activity of working should be considered only if an individual cannot demonstrate substantial limitation in another major life activity, because if an individual is substantially limited in a major life activity, such as walking or seeing, then a fortiori he is also substantially limited in his ability to work. The EEOC states that an individual is substantially limited in the major life activity of working when he is barred from "either a class of jobs or a broad range of jobs in various classes" in comparison with an average person of "comparable training, skills and abilities." The regulation specifically excludes the "inability to perform a single, particular job" from the definition. As
with other major life activities, the EEOC again suggests a case-by-case analysis; it provides three factors, in addition to those discussed above, which a court "may" use in making its determination. These factors are similar to the ones used by the district court in *E.E. Black*.

The first factor is "[t]he geographical area to which the individual has reasonable access." The EEOC does not give any examples of this factor, but its reference to *E.E. Black* and its earlier statement that it would look to Rehabilitation Act cases allows the inference that the example given in *E.E. Black* is apposite.

The second factor addresses the term "class of jobs." Specifically, the EEOC says that the court may consider not only the particular job from which the individual is barred as a result of his impairment, but also other jobs within a reasonably accessible distance that utilize similar manual, vocational, or professional skills, and from which the individual also is barred as a result of his impairment. The Interpretive Guidance provides an example of an individual with a back injury who could not perform heavy lifting, and, as such, would be barred from the class of jobs that requires heavy lifting. If the individual is barred from a class

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143. See 29 C.F.R. app. § 1630.2(j)(3)(ii). When referring to the factors for determining whether other major life activities are substantially limited, the EEOC uses the term "should," not "may," suggesting a stronger intent to influence the court's analysis. See id. § 1630.2(j)(2), (j)(3)(ii).

144. See *E.E. Black*, 497 F. Supp. at 1100-01; supra notes 34-60 and accompanying text (discussing the decision in *E.E. Black* and the factors delineated by the court for determining coverage under the Rehabilitation Act).

145. See 29 C.F.R. § 1630.2(j)(3)(i).

146. See id. app. § 1630.2(j).

147. See id. app. § 1630.2(g).

148. See *E.E. Black*, 497 F. Supp. at 1101 ("It is irrelevant that a similar job could be obtained in Kansas City if the applicant lives in San Diego.").

149. See 29 C.F.R. § 1630.2(j)(3)(i) (defining substantially limits in the context of working as the "ability to perform . . . a class of jobs").

150. See id. § 1630.2(j)(3)(ii)(B).

151. See id. app. § 1630.2(j). It is important to note that the Interpretive Guidance represents the EEOC's "interpretation of the issues discussed" in the appendix to the regulations. See 56 Fed. Reg. 35,726, 35,726 (1991) (presenting an overview of the regulations). The EEOC's guidance is "not controlling upon the courts by reason of their authority." General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). The Appendix, however, "[does] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Id.

152. See 29 C.F.R. app. § 1630.2(j). If the individual could not perform heavy labor jobs, he would not be required to show that he was barred from all other vocations before
of jobs, the EEOC will consider the individual disabled, even if he could perform jobs in a different class, such as in the class of semi-skilled jobs.

The third factor addresses the term "broad range of jobs." The analysis is the same as the analysis for a class of jobs, except that it focuses on those jobs which do not involve similar manual, vocational, or professional skills, but from which the individual also is barred as a result of his impairment. The EEOC gives the example of an individual who is allergic to some substance only found in high-rise office buildings that makes his breathing extremely difficult. In this case, he would be unable, without extreme difficulty, to work in high-rise office buildings and, thus, would be substantially limited in his ability to perform a broad range of jobs—those in high-rise office buildings. Therefore, he would be considered disabled under the ADA.
2. The Majority Interpretation of the Definitions

Many courts analyzing ADA claims have read the Act narrowly and have dismissed these claims on the bases that the plaintiff was not "disabled" as that term is defined in the statute. Some courts, however, have reached divergent results based on a broader reading of the statute. The Eighth Circuit, representing the prevailing view, strictly interpreted the Act when it denied a claim in Aucutt v. Six Flags Over Mid-America, Inc. The plaintiff was a security guard at an amusement park. One of the requirements was to complete a streams course. Aucutt suffered from angina, high blood pressure, and coronary heart disease. After a short stay in the hospital, his physician put him on a twenty-five pound lifting restriction. He could not complete the streams course without suffering extreme pain. Aucutt was fired during a reduction in force, and subsequently sued based on a claim that he had been discriminated against because of, among other things, his disability.

In holding that Aucutt was not disabled under the ADA, the court relied on the terms provided by the EEOC when defining "major life activity of working" and "class of jobs or a broad range of jobs in various

\[158. \text{See Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (holding that a 25-pound lifting restriction did not substantially impair an individual's ability to work), Ellison v. Software Spectrum, Inc., 85 F.3d 187, 190-91 (5th Cir. 1996) (holding that plaintiff's breast cancer, though causing nausea and fatigue, and affecting her job, was not serious enough to trigger coverage of the Act).} \]

\[159. \text{See Frix v. Florida Tile Indus., Inc., 970 F. Supp. 1027, 1034 (N.D. Ga. 1997) (holding plaintiff's lifting restriction prevented him from performing heavy labor jobs, thus barring him from a class of jobs and qualifying his condition as disabling in that it substantially limited his major life activity of working); Keller v. Western-Southern Life Ins. Co., 881 F. Supp. 1559, 1563 (M.D. Fla. 1995) (holding that heart disease qualifies as a disability under the ADA).} \]

\[160. \text{85 F.3d 1311, 1314 (8th Cir. 1996).} \]

\[161. \text{See id.} \]

\[162. \text{See id. The streams course was a required obstacle course for all security employees. See id.} \]

\[163. \text{See id. Aucutt spent time in the hospital and was treated for high blood pressure after becoming ill at work. See id.} \]

\[164. \text{See id. He stayed in the hospital only a few days, but was not released to return to work for three weeks. See id.} \]

\[165. \text{See id. Six Flags was aware of Aucutt's pain, and had previously denied him use of a vehicle for patrolling on hot days. See id.} \]

\[166. \text{See id. Two other security officers were terminated during the restructuring. See id. Six Flags cited Aucutt's abuse of park patrons as the reason for selecting him to be terminated; he made some patrons do push-ups, and, without authorization, searched vehicles for alcohol. See id.} \]

\[167. \text{Id. at 1319. The court reasoned that Aucutt's failure to produce evidence of how} \]
classes.” In a statement that sounded very similar to the ALJ’s reasoning in *E.E. Black*, however, the court observed that Aucutt’s condition did not “limit[] his overall employment opportunities.”

The Fifth Circuit in *Bridges v. City of Bossier* took a similarly broad view of the employment opportunities that must be barred before an individual qualifies for coverage. The plaintiff in *Bridges* was rejected for a position as a firefighter because he suffered from a mild form of hemophilia. Bridges claimed that the City rejected him because it believed him to be a high risk, which placed him within the “regarded as” prong of disability coverage under the ADA. The district court found, and the Fifth Circuit affirmed, that his disqualification from positions requiring “routine exposure to extreme trauma” did not substantially limit his heart condition restricted his ability to obtain employment sufficed to dismiss his motion in opposition to summary judgment. See id. The court discounted both Aucutt’s pain in completing the streams course and his 25-pound lifting restriction as insignificant limitations on his ability to work. See id.

168. 29 C.F.R. § 1630.2(j)(3)(i); see also supra notes 149-57 and accompanying text (describing “class” and “broad range” concepts). In *Aucutt*, the court did not attempt any significant definition of these terms, but merely stated them as criteria and concluded that the plaintiff failed to satisfy either one. 85 F.3d at 1319. The court did cite to *Bolton v. Scrivner, Inc.*, but only for the proposition that the plaintiff in that case also failed to produce evidence of his inability to “perform either a class of jobs or a broad range of jobs in various classes.” See id. (citing Bolton v. Scrivner, Inc., 36 F.3d 939, 942-44 (10th Cir. 1994)).

169. See *E.E. Black v. Marshall*, 497 F. Supp. 1088, 1100 (D. Haw. 1980) (“[T]hey are not [disabled] within the meaning of the statutory definition because their respective impairments are not likely to affect their employability generally, measured against the full spectrum of possible employments.”) (second emphasis added)).

170. *Aucutt*, 85 F.3d at 1319. The court did not discuss its reasons for concluding that his heart condition and lifting restriction were “hardly” substantial limitations. Id. Instead, it cited *Bolton v. Scrivner* which held that the loss of a particular job did not create a substantial limitation on the ability to work as it represented neither a “class” nor a “broad range” of occupations. Id. (citing Bolton, 36 F.3d at 943).


172. Id. at 331. The court held that jobs which require “routine exposure to extreme trauma” encompass a “narrow range” and, therefore, do not qualify for coverage. See id. at 334. The City considered Bridges a high risk of harm to himself, as well as other firefighters. See id. at 331.

173. See id. Bridges claimed that he was generally unimpeded by his hemophilia, evidenced by his participation in high school sports, his occupation as an Emergency Medical Technician, and his service in the Louisiana National Guard. See id. He further claimed that the City, in making its decision not to hire him, failed to determine his risk of injury based on an “individualized assessment,” but instead relied on “myths, fears, and stereotypes.” Id. On the other hand, the City claimed that, although it rejected him based on his impairment, he did not qualify as disabled “as that term [was] defined under the ADA.” Id.
ability to work. The court reasoned that the category from which Bridges was disqualified represented only a "narrow range of jobs," and, therefore, could not qualify him for coverage under the ADA.

3. The Minority Interpretation of the Definitions

In rather stark contrast to the Eighth Circuit's interpretation of disability in Aucutt, as well as a majority of other circuits that have considered the question, the United States District Court for the Northern District of Georgia in Frix v. Florida Tile Industries, Inc. held that a lifting restriction was a disability under the ADA. Robert Frix worked as a storeroom coordinator in the maintenance department of a tile pro-

174. Id. The district court reasoned that Bridges was excluded only from jobs which required "routine exposure to extreme trauma," and that this category constituted a "narrow range of jobs." Id. The court of appeals affirmed this logic, based in large part on a Tenth Circuit decision, Welsh v. City of Tulsa, in which the court held the occupation of firefighter did not establish a class of jobs for Rehabilitation Act purposes. See id. at 335-36 (citing Welsh v. City of Tulsa, 977 F.2d 1415, 1416-20 (10th Cir. 1992)).

175. Bridges, 92 F.3d at 334. The court cited with approval the conclusion drawn by the Second Circuit that disqualification from the job of police officer represented only a narrow range of jobs; the rejection from a firefighter's job, even if it included backup firefighter jobs, was essentially the same case. See id. (citing Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989)). The court rejected arguments by Bridges and amicus curiae that disqualification from one's chosen field created a substantial limit on the ability to work. See id. It instead cited a Tenth Circuit case that held a firefighter's job did not constitute a "class of jobs." Id. at 335 (citing Welsh v. City of Tulsa, 977 F.2d 1415, 1416-20 (10th Cir. 1992)). The court also rejected the contention that firefighters and backup firefighters constituted a "broad range of jobs in various classes." Id. at 334 (citing the EEOC regulations for the proposition that a "broad range" implied more than two job types).

In another Fifth Circuit case, the court rejected an individual's claim of disability, holding that her impairment only prevented her from performing a particular job, and not a "class" or "broad range" of jobs. See Dutcher v. Ingalls Shipbuilding, Inc., 53 F.3d 723, 727 (5th Cir. 1995). In Dutcher, the plaintiff suffered a gun-related injury that limited her ability to climb and perform the welding work needed by her employer. Id. at 724-25. Her employer, following a reduction in force, refused to reinstate her into a non-climbing job that she previously held. See id. at 725. She claimed discrimination under the ADA based on this refusal. See id.

The Fifth Circuit analyzed her claim first as a substantial limit on a major life activity, then as a substantial limit on the major life activity of work. See id. at 726-27. Finding that she could perform all essential daily functions such as grocery shopping, driving, personal hygiene, etc., it held that she was not disabled in any major life activity other than working. See id. at 726. In rejecting her disability claim under the working activity, the court reasoned that her inability to climb was only one aspect of a job and did not prevent her from welding in general. See id. at 727. Therefore, she was barred from no more than a "narrow range of jobs," and could not qualify for coverage under the Act. See id. (quoting Jasany v. United States Postal Serv., 775 F.2d 1244, 1249 n.3 (6th Cir. 1985)).


177. See id. at 1034.
His job involved heavy lifting on a regular basis, and he sustained an injury to his back which ultimately resulted in a lifting restriction of twenty-five pounds. He claimed he was fired because his injury prevented him from doing heavy lifting.

Although the court ultimately found for the defendant, Florida Tile Industries, it found first that Frix was disabled under the ADA. The court cited the EEOC regulations regarding substantial limitation as its model for assessing Frix's claim of disability. The court flatly rejected the interpretation of many courts that a lifting restriction was not substantially limiting because it only barred an individual from a "narrow range of jobs." Instead, the court took literally the example provided in the Interpretive Guidance accompanying the EEOC regulations defining disability. The court held that since Frix's condition prevented

178. See id. at 1030. Frix was responsible for issuing, receiving, and storing machine parts inventory, and was therefore required to pry open crates with crow-bars and lift motors weighing between 25 and 150 pounds. See id.

179. See id. at 1030-31. Frix initially suffered a herniated disc and was placed on a temporary 20-pound lifting restriction. See id. at 1030. He later had surgery and, although it was deemed successful, was placed under a permanent 25-pound lifting restriction. See id. at 1031.

180. See id. at 1029, 1033. When Frix could no longer work in the storeroom, his employer placed him in a desk job preparing computer reports. See id. at 1032. Florida Tile eventually laid him off because the reports it needed required a higher level of sophistication, and Frix refused additional training. See id.

181. See id. at 1038. Although Frix was disabled, he rebuffed his employer's attempts to reasonably accommodate him by refusing computer training; instead he demanded that the employer discharge another employee so that he could continue working in a lower-skill level position. See id. The court found that this demand was unreasonable under the Act. See id.

182. See id. at 1034.

183. See id. at 1033; supra notes 111-39 and accompanying text (describing EEOC regulations relating to substantial limitations).

184. See Frix, 970 F. Supp. at 1033-34; see also Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996) (holding that a 25-pound lifting restriction was not a substantial limitation on a major life activity, "particularly when compared to an average person's abilities"); cert. denied, 117 S. Ct. 1844 (1997); Aucut v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (holding 25-pound lifting restriction not to be a substantial limitation on a major life activity); Ray v. Glidden Co., 85 F.3d 227, 229 (5th Cir. 1996) (holding a lifting restriction that prevented repetitious lifting of containers was not a substantial limitation on a major life activity); Wooten v. Farmland Foods, 58 F.3d 382, 384, 386 (8th Cir. 1995) (holding that a light-duty restriction and 20-pound lifting restriction did not substantially limit the major life activity of working).

185. See Frix, 970 F. Supp. at 1034; 29 C.F.R. app. § 1630.2(j) (1997); see also supra notes 140-42 and accompanying text (discussing the EEOC example of what constitutes disability).
him from performing heavy labor jobs, which the EEOC guidelines described as a "class of jobs," Frix satisfied that part of the definition. 186

The Eleventh Circuit also has taken a different approach to the definition of disability from the narrow view enunciated by the Bridges court. 187 In Fitzpatrick v. City of Atlanta, 188 the court found a firefighter’s position would probably represent a class of jobs, as opposed to a narrow range of jobs, and thus meet the requirement for coverage under the Act. 189 A group of firefighters that suffered from a skin condition which prevented them from shaving regularly, and thus, violating the City’s “no-beard rule,” claimed they were discriminated against under the Rehabilitation Act. 190 The district court rejected their claim on the ground that they were not disabled within the meaning of the Rehabilitation Act, and that, assuming they were, there was no reasonable accommodation the City could provide for their condition. 191 The Eleventh Circuit agreed that the City could not reasonably accommodate the condition because of legitimate safety and technology limitations in the use of the respirators. 192 It disagreed, however, with the district court’s reasoning that the firefighters were not handicapped individuals. 193 The court cited the definitions

186. See Frix, 970 F. Supp. at 1034. The court buttressed its reasoning by pointing out that Frix would be unable to lift objects at other employers’ facilities and thus was not merely barred from a particular job at a particular location. See id. Further, the court reasoned, Frix’s injury was permanent, a critical component in satisfying the disability definition. See id.; see also 29 C.F.R. § 1630.2(j)(2)(ii) (stating that a factor to be considered in determining disability includes “[t]he duration or expected duration of the impairment”).

187. See Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1126 (11th Cir. 1993) (reasoning, in dicta, that disqualification from a firefighter’s job would qualify the claimants as “handicapped individual[s]”).

188. 2 F.3d 1112 (11th Cir. 1993).

189. Id. at 1126 (stating that “it appears probable. . . that the district court erred insofar as it indicated that the firefighters do not qualify as ‘handicapped individuals’”).

190. See id. at 1114. The firefighters were removed from duty because the City determined that they could not maintain even a shadow beard and safely wear the respirators required to be worn during a fire. See id.

191. See id. at 1126-27. The district court based its decision to grant summary judgment on two grounds. See id. at 1126. First, it doubted that the skin condition was an actual physical impairment or, if so, that it prevented the firefighters from complying with the no-beard rule by prohibiting shaving, and thus was not a substantial limitation on their ability to work as firefighters. See id. Second, the court found that the firefighters could not show a reasonably accommodating method by which they could safely perform their duties, because if they could not comply with the no-beard rule, they could not wear the protective masks required for entry into smoke-filled structures. See id.

192. See id. at 1126-27.

193. See id. at 1126. The Eleventh Circuit held that the district court erred by concluding the firefighters were not handicapped, but that the ultimate holding to grant summary judgment was correct because the inability to shave, caused by the skin condition, was a substantial limitation on their major life activity of working as firefighters, but no
Substantially Limited Under the ADA

for physical impairment and major life activities and found that the skin disorder qualified as a physiological disorder. Because it prevented the claimants from engaging in the occupation of firefighter, the condition substantially limited their ability to work. Implicit in the court's conclusion is a rejection of the reasoning later adopted by the Bridges court, that the inability to work in the occupation "of one's choice" does not disqualify an individual from a "class of jobs."

Although the Aucutt and Bridges view is more prevalent, the Frix and Fitzpatrick decisions emphasize that there still is a divergence of philosophy as to when an individual is substantially limited in his ability to work. The next part of this Comment points out the strengths and weaknesses of the two approaches, as well as offers a potential solution.

II. TOWARD MORE PRINCIPLED DECISIONMAKING WHILE HONORING CONGRESSIONAL INTENT

A. The Majority Approach Lacks a Solid Analytical Foundation

Courts, such as the Eighth Circuit in Aucutt v. Six Flags Over Mid-America, Inc. and the Fifth Circuit in Bridges v. City of Bossier, reasonable accommodation existed at that time. See id.

194. See id. at 1125-26.
195. See id. (citing U.S. Department of Health and Human Services regulations, 45 C.F.R. § 84.3(j)(2)(ii) (1996)).
196. See Bridges v City of Bossier, 92 F.3d 329, 334-35 (5th Cir. 1996) (considering and rejecting the argument that disqualification from one's "chosen field" is disqualification from a "class of jobs"), cert denied, 117 S. Ct. 770 (1997).
197. See Frix v. Florida Tile Indus., Inc., 970 F.Supp. 1027, 1033 (N.D. Ga. 1997) (conceding that a "growing body of case law" interprets a lifting restriction as only precluding employment in a "narrow range of jobs," and citing cases in support); Locke, supra note 95, at 121-22 (arguing that there is a growing trend to reject claims of substantial limitations on the major life activity of work); Wilkinson, supra note 22, at 916-31 (arguing that courts use judicial estoppel to dismiss most claims of a substantial limitation on the ability to work).
198. See supra notes 176-96 and accompanying text (discussing the Frix and Fitzpatrick interpretations of the definition of substantial limitation of working). Compare Bridges, 92 F.3d at 335-36 (holding an inability to perform firefighting jobs bars only a narrow range of jobs, and thus does not qualify as a disability), and Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (holding that a bar from becoming a police officer, due to a perceived impairment, only represented a bar from a narrow range of jobs), with Fitzpatrick, 2 F.3d at 1126 (arguing, in dicta, that the inability to be a firefighter because of a skin condition was a substantial limitation on the ability to work), and E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1101-02 (D. Haw. 1980) (stating that foreclosure from an entire field—carpentry—would qualify as a substantial limitation on the major life activity of work).
199. 85 F.3d 1311 (8th Cir. 1996); see also supra notes 160-70 and accompanying text (discussing Aucutt).
200. 92 F.3d 329, 333 (5th Cir. 1996) (holding a hemophiliac's disqualification from
jected claims of disability because they found plaintiffs were not substantially limited in their major life activities of working.\textsuperscript{201} The courts' conclusions seem to comport with congressional and EEOC intent.\textsuperscript{202} In both situations, however, a different court evaluating a similar, if not identical, set of facts reached the opposite conclusion, that a lifting restriction did substantially impair a major life activity\textsuperscript{203} and that a firefighter's job could represent a class of jobs.\textsuperscript{204} This divergence of opinion is a bane to employers attempting to comply with the provisions of the Act because they cannot adjust their policies to comport with the Act and its regulations when there are two, diametrically opposed, interpretations of what the Act and the regulations require.\textsuperscript{205}

In cases like Aucutt and Dutcher v. Ingalls Shipbuilding,\textsuperscript{206} the courts point to the plaintiff's failure to produce evidence of a substantial limitation as one of the reasons for dismissing the complaint at the summary judgment stage.\textsuperscript{207} Indeed, it is well settled that the plaintiff in an ADA case bears a heavier burden of proving coverage under the Act than plaintiffs in Title VII cases.\textsuperscript{208} Since ADA claims are to be decided on a
Substantially Limited Under the ADA

209 however, the courts' dismissal of cases based on a lack of evidence prevents a probing empirical analysis of the factors suggested by the EEOC. Therefore, decisions rest on the district court judge's own subjective determination of what represents a class or broad range of jobs.210 This vacuum leaves future courts and employers without a principled basis for making their decisions.211

(citing Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385-87 (10th Cir. 1981), for the proposition that plaintiffs must prove that they are handicapped and that the handicap was the sole reason for their rejection, as opposed to race- or sex-discrimination complainants who need not prove that they are a member of the protected class). It was Congress's intention that courts construing the ADA look to Rehabilitation Act cases for guidance on the definition of disability. See Venclauskas v. Department of Pub. Safety, 921 F. Supp. 78, 81 n.1 (D. Conn. 1995) (noting that the ADA and Rehabilitation Act definitions of "individual with a disability" and "individual with a handicap" are "virtually identical"); Smaw v. Department of State Police, 862 F. Supp. 1469, 1474 (E.D. Va. 1994) (explaining that the ADA was designed to be interpreted like the Rehabilitation Act). It logically follows that if courts construing the ADA are looking to the Rehabilitation Act for guidance on interpretation, then they will also use the burden-shifting standard applied by Rehabilitation Act courts. See Locke, supra note 95, at 114-16 (criticizing the burden-shifting standard of the ADA that requires a plaintiff to prove first that he is within the protected class, and then prove that he was discriminated against on the basis of the disability).

209. See 29 C.F.R. app. § 1630.2(j) (1997) (stating that the determination of substantial limitation should be made on a case-by-case basis); Byrne v. Board of Educ., 979 F.2d 560, 564 (7th Cir. 1992) (implying that courts must determine on an individual basis whether an impairment is substantial); Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986) (stating that the question of who is handicapped is best made by a case-by-case determination); Nedder v. Rivier College, 908 F. Supp. 66, 74 (D.N.H. 1995) (explaining that a disability claim must be determined on a case-by-case basis).

210. See supra notes 160-75 and accompanying text (discussing court decisions regarding classes and ranges of jobs in Aucutt and Bridges).

211. See Ryan, supra note 205, at 14 (arguing courts have inconsistently interpreted both the Rehabilitation Act and the Fair Housing Act). For arguments stating that courts are not only inconsistent, but are misinterpreting the Act altogether, see Locke, supra note 95, at 109 (arguing courts' interpretations are inconsistent with purpose of the statute); Wilkinson, supra note 22, at 908 (asserting that the judiciary does not understand the statute, regulations, or disabilities in general). Wilkinson argues that the judiciary often uses the doctrine of judicial estoppel to dismiss claims when the plaintiff establishes that he is unable to work because of a disability by holding that he is estopped from claiming that he is otherwise qualified in spite of that disability. See id. at 915 & n.29. She points out that this doctrine is typically asserted where an individual is already receiving some type of disability payment, either through Social Security, ERISA, or Workers' Compensation. See id. at 916 & n.30. But Wilkinson's point includes its own rebuttal; if the party is able to receive disability benefits to compensate him because he cannot work, how can he reasonably be expected to perform the essential functions of the job? Furthermore, the statutory benefits he does receive are in place to provide him substitutionary income; thus, he would not be one of the individuals for whom the ADA was intended because he would not be outside of the economic mainstream of society. See 42 U.S.C. § 12101(a)(8)-(9) (1994) (stating that one of the purposes of the Act is to provide "economic self-sufficiency" for the disabled). For those who would argue that Social Security Disability, ERISA, and Workers' Compensation benefits are inadequate, the response has to be that their claims of dissatisfaction should be directed to those statutes and not the ADA.
Some of the difficulty for courts may be found in the terms class or broad range of jobs. These terms are not self-defining, but courts still must use them to evaluate the veracity of a claim of substantial impairment as it relates to working. Even the EEOC Compliance Manual, in an attempt at a clearer definition, merely announced another non-self-defining term, "narrow range of jobs." Because of this failure to define the terms clearly, judges have rendered their decisions based on their own personal values or their perception of society's values.

The EEOC does provide examples in its Interpretive Guidance to the regulations implementing the ADA, but strict use of those examples would violate the EEOC's own admonition that each court base its determination on the severity of the impairment's effect on the individual, rather than on the name or diagnosis of the impairment itself. For example, in the case of asymptomatic HIV, the EEOC says that this diagnosis creates a per se impairment, but it may not actually impair any activity of the individual until the disease begins to manifest symptoms.

213. See id. (defining the term "substantially limits" as it relates to working to mean the inability to perform, compared to the average person with similar training, skills, and abilities, either a class of jobs or broad range of jobs). This definition, by its silence, leaves the question of defining a "class" to the court. See Locke, supra note 95, at 118 (arguing that the EEOC's confusing definitions have forced courts to define the terms).
214. EEOC COMPLIANCE MANUAL § 902.8(f) (stating that the ability to work is not substantially impaired by an individual's preclusion from a "narrow range of jobs").
215. See RICHARD V. BURKHAUSER & ROBERT H. HAVEMAN, DISABILITY AND WORK: THE ECONOMICS OF AMERICAN POLICY 7-8 (1982) (arguing that the definition of handicap is a social judgment); tenBroek & Matson, supra note 4, at 814 (arguing that the "cultural definition" of disability imposes more significant incapacities on the disabled than their physical impairments). Society imposes, beyond the actual physical impairment, "aversive responses, and outright prejudices" not unlike the adverse attitudes it often takes toward "underprivileged ethnic and religious minority groups." Id. at 814; see also Wilkinson, supra note 22, at 908-10 (criticizing the judiciary for not understanding the implications of most disabilities and thus, only extending coverage to traditional disabilities, namely "the ones with obvious, severe manifestations").
216. See 29 C.F.R. pt. 1630 app. (1997); supra notes 151-57 and accompanying text (discussing EEOC examples of impairments that would qualify for coverage as substantial limitations on the major life activity of working because the impairment excluded the individual from either a class or broad range of jobs in various classes).
217. See 29 C.F.R. app. § 1630.2(j) (explaining that a determination "is not necessarily based on the name or diagnosis of the impairment . . . but . . . the effect . . . on the life of the individual").
218. See id. (declaring HIV status to be an impairment and inherently substantially limiting).
219. See supra note 100 (discussing Runnebaum v. Nationsbank of Maryland and the court's reasoning that HIV status was not a disability because there was no physical impairment).
Substantially Limited Under the ADA

Stating that the EEOC's explanations are unclear as to what constitutes a substantial limitation of working, one court looked primarily to prior case law for guidance. This solution, however, merely builds precedent on conclusion, because those earlier courts also made value judgments based on non-self-defining terms like "narrow range of jobs" and "class of jobs." Particularly in the case of a lifting restriction, the courts' refusal to find a substantial impairment, due to their belief that the limitation forecloses only a narrow range of jobs, appears to contradict EEOC guidance directly, because the Interpretive Guidance itself explains that an individual with a lifting restriction would be barred from a class of jobs. This clear contradiction increases these decisions' vulnerability to rejection by other courts on that basis.

220. See Bridges v. City of Bossier, 92 F.3d 329, 335 n.10 (5th Cir. 1996) ("The appendix to the regulations is unclear on this point."); cert. denied, 117 S. Ct. 770 (1997).

221. See id. at 334-35 (analyzing the holdings of other circuits for guidance on what qualifies as a substantial impairment in the major life activity of working); see also Welsh v. City of Tulsa, 977 F.2d 1415, 1416-20 (10th Cir. 1992) (holding that inability to perform a fireman's job does not represent a substantial impairment); Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (holding that exclusion from a police officer's job did not create a substantial impairment because it affects only a "narrow range of jobs"). But see Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1126 (11th Cir. 1993) (stating, in dicta, that the job of "firefighter" did represent a class of jobs caused by a substantial impairment); Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1986) (arguing, in dicta, that an employee's foreclosure from his chosen occupational field of utility repairman would represent a substantial impairment).

222. See Locke, supra note 95, at 118 (criticizing EEOC regulations as more confusing than clarifying); see also Bales, supra note 24, at 237-38 (arguing that EEOC regulations leave crucial questions of interpretation unanswered). Bales contends that the EEOC failed to prevent employers from relying on "aberrational but discriminatory job [requirements]" as a defense to claims of a substantial limitation of the major life activity of working. Bales, supra note 24, at 237. This failure occurred because the regulations do not suggest that courts presume the exclusionary criteria to exist at all area employers using similar skills. See id. at 237-38. If courts do not presume this exclusion, Bales argues, employers can say that the individual is only disqualified from one particular job because of its unique characteristics, and not from either a class or broad range of jobs. See id. at 237.

223. See 29 C.F.R. app. § 1630.2(j) (explaining that a back condition which bars an individual from the class of heavy labor jobs would be a substantial impairment of the major life activity of working).

224. See Frix v. Florida Tile Indus., Inc., 970 F. Supp. 1027, 1033-34 (N.D. Ga. 1997) (contradicting reasoning by courts that held lifting restrictions were not substantial limitations on a major life activity).
B. The Minority Approach Ignores the Case-by-Case Analysis Requirement

The court in *Frix* chose to follow EEOC guidance rather than the trend in the courts. Nonetheless, the *Frix* decision presents its own analytical problems. That court's strict reliance on the example given in the EEOC Interpretive Guidance represents a failure to analyze the impact of the impairment on a particular plaintiff's ability to continue working as compared to the average person with similar training, skills, and abilities. Further, in light of the number of circuits contradicting the EEOC guidance, it appears unlikely that courts will follow the reasoning in *Frix*. Although the trend is to reject lifting restriction disability claims, and employers may rely on that trend for some guidance,
they are still left with the conundrum that those opinions could change based on a shift in societal values whereby courts, more particularly district court judges, do consider a lifting restriction to represent disqualification from a class or broad range of jobs.229

III. COURTS SHOULD ATTEMPT TO USE THE EEOC FACTORS WHEN MAKING ELIGIBILITY DETERMINATIONS, THEREBY ADDING LEGITIMACY TO THEIR DECISIONS

Although the EEOC regulations do not define the terms “class of jobs,” “broad range of jobs,” or “narrow range of jobs,” they do provide factors which a court “may” use in making a determination.230 Use of these factors requires a thorough evaluation of the accessible geographic area,231 the job the individual lost as well as jobs that use similar training, knowledge, skills, or abilities from which the individual’s impairment excludes him,232 and jobs that do not use similar training, knowledge, skills, or abilities from which the individual’s impairment excludes him.233 A decision based on a full exploration of these factors in each individual case would represent a value judgment, rooted in an empirical analysis based on relevant factors that truly affect the individual’s ability to obtain satisfactory employment,234 not a personal, and oftentimes uninformed, judgment subject to changes in societal philosophy.235

1319 (8th Cir. 1996) (concluding that Aucutt’s 25-pound lifting restriction was insufficient to show that his heart condition impaired his “overall employment opportunities”).

229. See THE LEGAL RIGHTS OF HANDICAPPED PERSONS 10-11 (Robert L. Burgdorf, Jr. ed., 1980) (arguing that the label of handicap is based on “perceptions of an individual’s role in society”); Robert L. Burgdorf, Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 HARV. C.R.-C.L. L. REV. 413, 426-27 (1991) (citing the shift in societal perceptions toward the disabled “from charity to civil rights” as the impetus for much of the disability discrimination statute movement); Wilkinson, supra note 22, at 915 (discussing the shift in societal perception in the 1960’s of the disabled from needing protection and care to needing civil rights).


231. See id. § 1630.2(j)(3)(ii)(A); supra notes 145-48 and accompanying text (discussing the reasonable access factor).

232. See 29 C.F.R. § 1630.2(j)(3)(ii)(B); supra notes 149-52 and accompanying text (discussing the similar jobs factor).

233. See 29 C.F.R. § 1630.2(j)(3)(ii)(C); supra notes 152-57 and accompanying text (discussing the dissimilar jobs factor).

234. See Engh, supra note 80, at 163 (arguing that the E.E. Black factor analysis offered the “most useful standard” for determining the existence of a disability); see also Haines, supra note 20, at 531 (praising E.E. Black as an excellent method for evaluating a claim of disability).

235. See supra notes 212-15 and accompanying text (discussing EEOC regulations’ lack of clarity and judges’ use of personal value judgments to determine disability).
Perhaps the only change to these factors should be to the sole focus on an individual’s exclusion from jobs because of the impairment. Rather than determining what jobs an individual cannot do because of an impairment, the decision should be based on what an individual can do in light of his reasonable employment prospects. The purpose of the statute is to bring disabled individuals into the economic mainstream, not to provide them with rights greater than those of the average person.

This change would not result in the absurd consequences that the district court in *E.E. Black* cautioned against when it rejected the ALI’s reasoning. The court would still consider the individual’s knowledge, training, skills, and abilities in the decision-making process. These factors would restrain a court from determining that an individual’s ability to perform any job in the geographically accessible area, or, more broadly, in the entire marketplace, would preclude a finding of a substantial limitation of his ability to work. The court would be forced to consider the individual’s investment in professional or vocational training as suggested in *E.E. Black*. Thus, an unskilled worker with few specific

236. See supra notes 140-57 (discussing the EEOC’s factors for analyzing a claim of substantial impairment of one’s ability to work).

237. See 29 C.F.R. § 1630.2(j)(3)(ii)(B)-(C) (defining factors to consider when evaluating a claim of a substantial limitation on the major life activity of work).

238. See, e.g., *McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 373 (6th Cir. 1997). The *McKay* court held, based primarily on the plaintiff’s status as a college student, who was near completion of her teaching certificate, that her inability to perform repetitive-motion factory work, caused by carpal tunnel syndrome, was not a substantial limit on her ability to work. See *id.* The court reasoned that, because of her education, she was not barred from a class of jobs or “broad range of jobs in various classes.” See *id.*

239. See 42 U.S.C. § 12101(8) (1994) (stating that the “proper goals” of the legislation should be, inter alia, to provide equal opportunity and economic self-sufficiency).

240. See *id.* § 12101(9) (finding the need for “opportunity to compete on an equal basis”). Indeed, the argument may be made that only a general foreclosure from employment, in vocations somewhat related to the individual’s current occupation, would hinder an employee enough, in comparison to the average person with similar skills, training, and education, to meet the requirement of a substantial limitation. See *Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) (holding that a substantial limitation on working means “to foreclose generally the type of employment involved”); *Mustafa v. Clark County Sch. Dist.*, 876 F. Supp. 1177, 1180 (D. Nev. 1995) (holding that although impairment may prevent an individual from teaching, it does not bar employment in general). The ADA is not meant to change the standards applied to claims under the Rehabilitation Act cases. See *Smaw v. Department of State Police*, 862 F. Supp. 1469, 1474 (E.D. Va. 1994) (stating that “[t]he ADA does not create a new avenue for claims”).


242. See 29 C.F.R. § 1630.2(j)(3)(ii)(B)-(C) (identifying factors a court “may” consider when determining if an individual is “substantially limited” in his ability to work).

243. See *E.E. Black*, 497 F. Supp. at 1101 (arguing that the individual’s “own job ex-
vocational objectives would likely be limited only by his ability to receive comparable remuneration, benefits, and working conditions. On the other hand, an individual who had invested many years developing a craft or profession would potentially have more specific expectations.

At this point, an example of this methodology will prove illuminating. Assume an individual is terminated from a position as warehouse foreman following a back injury that restricts the amount of weight he can lift to twenty-five pounds. Assume further that this individual lives in a relatively small city, but one that is not overly remote. Finally, assume that this individual has a high school education and some experience with maintaining records at work as well as some rudimentary computer experience.

In considering this individual's claim, one can determine first that the reasonably accessible geographic area is not a major barrier to employment because the impaired individual is not in a remote site. The important consideration then would be what jobs he could perform, despite the fact that he could no longer lift more than twenty-five pounds. The job he lost was not a profession or a vocation that required a license or other type of certification. Thus, except for a personal preference on his part

244. See Vaughan v. Harvard Indus., Inc., 926 F. Supp. 1340, 1347 (W.D. Tenn. 1996) (pointing to the plaintiff's continued employment in numerous manual labor jobs as evidence that he was not substantially limited in his ability to work simply because he could not perform heavy manual labor); O'Dell v. Altec Indus., Inc., No. 94-6180-CV-SJ-6, 1995 WL 611341, at *4 (W.D. Mo. Oct. 16, 1995) (holding that because the plaintiff worked as a truck driver, machine operator, and a machinist following his disqualification, he could not show an inability to perform either a "class of jobs or . . . a broad range of jobs in various classes"); Czopek v. General Elec. Co., No. 93 C 7664, 1995 WL 374036, at *2 (N.D. Ill. June 21, 1995) (holding the plaintiff's continued performance of other manual labor jobs precluded him from showing he was disqualified from a "broad range of manual tasks"). But see Bales, supra note 24, at 236-37 (arguing that unskilled workers are ill-served by this interpretation because, before obtaining coverage, they must show a greater number of jobs are unavailable to them than to a highly-skilled worker for highly-skilled workers will be employed in smaller, but not necessarily narrow, classes of jobs); Haines, supra note 20, at 546 (noting that even those without "special training" can suffer a "qualitative employment loss" if they are disqualified from their desired occupation).

245. See E.E. Black, 497 F. Supp. at 1102 (reasoning that since the position of journeyman required so many hours of training (8000) and the plaintiff had completed such a substantial portion (3600), it was not unreasonable to consider his preclusion from the profession of his choice to be a substantial limit on his ability to work); see also Bales, supra note 24, at 236-37; Haines, supra note 20, at 544; Mayerson, supra note 142, at 509 (arguing that the ADA does not require employees to prove they would be rejected in more than one employment setting); supra note 53 (suggesting that a chemist should not be satisfied with substitute employment as a streetcar conductor).

246. The example is hypothetical, but the facts are based loosely on those from Frix v. Florida Tile Industries, Inc., 970 F. Supp. 1027, 1030-33 (N.D. Ga. 1997).
to remain in his old job, the individual’s realistic employment expec-
tations would be relatively limited. Indeed, viewed through this Com-
ment’s framework, the class or broad range of jobs in various classes for
which the individual still is qualified include any jobs that do not require
him to lift more than twenty-five pounds, and offer him similar wages
and working conditions. Considering his predicament in this framework,
a court could reasonably conclude that this individual did not face any
more significant hurdles to securing employment than an average person
and was, therefore, not substantially limited in the major life activity of
working.

Contrast that individual’s situation with that of Mr. Crosby in E.E.
Black. Mr. Crosby lived on Oahu, Hawaii and, more importantly, had
invested approximately 3600 hours of apprentice training in an attempt
to become a journeyman carpenter. While Mr. Crosby’s reasonable
geographic access might be of some significance, the crucial considera-
tion would be his education, training, and experience. Mr. Crosby had
both a high school and college education, and a court might consider
that he was able, theoretically, to perform most jobs for which college
was a critical requirement. That finding, however, would have to be bal-
anced against Mr. Crosby’s significant investment in becoming a jour-
neyman carpenter. Mr. Crosby had a reasonable expectation in con-
tinuing to work as a carpenter, and requiring him to find unrelated
employment would, in effect, forfeit his investment. Therefore, he had a
much more viable claim to a substantial limitation on his ability to work
because he had more specific employment expectations, and, in part, be-
cause he produced evidence that supported his claim of substantial limi-
tation.

Requiring additional evidence to prove a substantial limitation of the
major life activity of working creates a higher threshold of proof for the
plaintiff because he must produce enough economic evidence to show
that he meets the specific ADA standards. Failure to do so would
probably result in the court’s ruling against the plaintiff due to a lack of
evidence and for failure of proof. At least one commentator probably

248. See id. at 1091.
249. See id.
250. See id.
251. See id. at 1102.
252. See Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 n.13 (5th Cir. 1995). The
court seemed willing to consider the additional factors provided by the EEOC for evalua-
tion of “working” claims, but ultimately declined to do so based on the plaintiff’s failure to
produce evidence regarding those factors. See id.
Substantially Limited Under the ADA

would disagree with this requirement because he believes that it places an additional burden on a plaintiff seeking to bring a claim in an already too onerous process.\textsuperscript{253} That criticism, however, ignores the structure of the EEOC regulations, which permit consideration of the major life activity of working only after an individual has failed to prove that he is substantially impaired in any other major life activity.\textsuperscript{254} The major life activity of working will apply only to those impairments which are too marginal to receive coverage as a substantial limitation of one of the other major life activities.\textsuperscript{255} The list of major life activities is extensive,\textsuperscript{256} but not exhaustive.\textsuperscript{257} Thus, it is reasonable to require a higher threshold of proof before allowing a plaintiff to go forward with a claim of being substantially limited in working, thereby allowing only those truly deserving of ADA coverage to come under the statutory umbrella.\textsuperscript{258}

\begin{itemize}
\item \textsuperscript{253} See Bales, supra note 24, at 239-40 (arguing that a requirement that the plaintiff present demographic evidence and occupational information is an onerous requirement for establishing membership in the protected class).
\item \textsuperscript{254} See 29 C.F.R. § 1630.2(i), (j)(3) (1997) (considering the major life activity of working separately from other major life activities); id. app. § 1630.2(j) (explaining that only if an individual cannot show a substantial impairment of any other major life activity will he be required to show a substantial limitation of his ability to work in order to obtain coverage).
\item \textsuperscript{255} See id. app. § 1630.2(j) (stating that only when an individual can show no substantial limitation of another major life activity should “working” be considered); \textit{EMPLOYEE RIGHTS}, supra note 5, § 3.02(5), at 3-57 (stating that the major life activity of working will not be considered in “serious mobility impairment” cases, but that the analysis will only focus on the individual’s employability); Locke, supra note 95, at 115 (stating that only impairments which do not substantially limit “basic life task[s]” are considered under the working category).
\item \textsuperscript{257} See 29 C.F.R. app. § 1630.2(j).
\item \textsuperscript{258} See Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) (arguing that the Rehabilitation Act should protect only “truly disabled, but genuinely capable, individuals”). The Fourth Circuit recognized that congressional intent was to limit coverage to those whose disabilities were relatively severe when compared with the general population. \textit{See id. (“It would debase this high purpose if the statutory protections . . . could be claimed by [an individual] whose disability was minor and whose relative severity of impairment was widely shared.”); see also} S. REP. NO. 93-318, at 18 (1973) (stating the need to ensure the Rehabilitation Act reached those most in need of its services—(the severely handicapped); Nondiscrimination on the Basis of Handicap, 42 Fed. Reg. at 22,686 (stating that “persons with the severe handicaps . . . were the focus of concern in the Rehabilitation Act of 1973”); D. Todd Arney, Note, \textit{Survey of the Americans With Disabilities Act, Title I: With the Final Regulations In, Are the Criticisms Out?}, 31 WASHBURN L.J. 522, 526 (1992) (arguing that the EEOC regulations extended coverage beyond congressional intent).
IV. CONCLUSION

The substantial impairment of the major life activity of working is not defined adequately in the regulations implementing the Americans with Disabilities Act of 1990. Courts considering these cases generally have been hesitant to find a disability. They have defined "working" broadly, rejecting most claims as not foreclosing an individual from a class of jobs or broad range of jobs, but concluding that the individual is barred only from a narrow range of jobs. The courts have relied heavily on plaintiffs' failure to produce evidence adequately supporting their claims, and have simply concluded in the absence of facts that the impairments did not qualify for statutory coverage. This broad-brush approach, although representing a majority view, does not rest upon principled, empirical analysis, but rather on the personal value judgments of a majority of district court judges. Accordingly, employers continue to find themselves without a reliable method by which to assess their conduct and to ensure compliance with the statutory requirements. The EEOC has set forth factors in its Interpretive Guidance that would allow a court to use empirical analysis and reach principled decisions. Requiring plaintiffs to produce the evidence needed to evaluate those factors is consistent with congressional intent. Although use of these factors may not resolve close cases easily, it will provide a more reasoned foundation on which courts faced with ADA claims in the future may base their decisions.