

ONCE IS ENOUGH: EVALUATING WHEN A PERSON IS SUBSTANTIALLY LIMITED IN HER ABILITY TO WORK

*R. Bales**

TABLE OF CONTENTS

INTRODUCTION	205
I. ORIGIN AND OVERVIEW OF THE ADA	209
A. The Rehabilitation Act	209
B. The Status of Disabled Americans	210
C. The Response of the Americans with Disabilities Act	211
1. Who is protected	212
2. Scope of coverage	213
3. The employer's duty of reasonable accommodation	213
II. THE CONCEPT OF "IMPAIRMENT"	217
III. THE "REGARDED AS" TEST	221
A. The Act and the Regulations	221
B. One Exclusion Is Not Enough	223
IV. THE "SUBSTANTIALLY LIMITED" TEST AS IT PERTAINS TO WORK	225
A. The Judicial Approach to the Rehabilitation Act	225
1. <i>E. E. Black</i> and the "substantially limits" test	225
2. The injection of the "substantially limits" test into the "regarded as" prong of the definition of "disability"	231
B. The EEOC Approach to the ADA	234
C. Flaws in the Rehabilitation Act and EEOC Approaches	235
1. The EEOC Regulations inadequately account for the employee's training and expectations	235

* B.A., Trinity University; J.D., Cornell Law School; Associate of the Houston law firm of Baker & Botts, L.L.P.

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2. The Rehabilitation Act cases' emphasis on the employee's training and expectations restricts the protection afforded to nonskilled employees	236
3. The EEOC Regulations fail to specify whether courts should assume that all other similarly-situated employers will apply the same exclusionary criteria	237
4. Both approaches reward employers for saying one thing and doing another	239
5. Both approaches impose an unreasonable burden on plaintiffs	239
6. Both approaches reward the first-in-time discriminator	240
7. Both approaches reward big-city discriminators while punishing small-town discriminators	241
8. Both approaches ignore the fact that the loss of one job can constitute a substantial limitation on an individual's ability to work	241
D. The ADA and Congressional Intent	242
V. ALTERNATIVE APPROACHES	245
A. The "Once Is Enough" Standard	245
B. The Burden-Shifting Standard	245
CONCLUSION	246

INTRODUCTION

Congress in 1990 promulgated the Americans with Disabilities Act¹ (hereinafter "ADA" or "Act") to rectify the inferior status of disabled Americans.² One of the initial hurdles to such legislation was defining whom the Act would cover. The text of the Act states that a person is within the protected class of disabled persons if that person (A) has a physical or mental impairment that substantially limits one or more major life activities; (B) has a record of such an impairment; or (C) is regarded as having such an impairment.³

A person claiming to be actually disabled (i.e., who claims to qualify under the first prong of the definition) must prove that she (1) has a physical or mental impairment (2) that substantially limits (3) one or more major life activities.⁴ Each of these limitations may be defined either broadly or narrowly; the definition of each limitation has a significant influence on whom the Act protects.

The Equal Employment Opportunity Commission Regulations to the ADA (hereinafter "EEOC Regulations" or "Regulations") define major life activities as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁵ Often, an impairment will limit many such activities. Deafness, for example, in addition to limiting a person's ability to hear, also makes it difficult to learn to speak, and may make it difficult to find employment. Many impairments, however, only limit the major life activity of working. A mild case of epilepsy, causing infrequent and mild seizures, might not affect a person's nonworking life at all, but will make it very difficult to find employment.⁶ The

1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (Supp. III 1992)).

2. 42 U.S.C. § 12101(a)(6) (Supp. III 1992).

3. 42 U.S.C. § 12102(2) (Supp. III 1992).

4. *Id.*

5. 29 C.F.R. § 1630.2(i) (1992).

6. People with any history of epilepsy are ineligible to drive trucks in interstate commerce. 49 C.F.R. § 391.41(b)(8) (1992). Epileptics are ineligible for "hazardous" jobs in the federal civil service unless they have been seizure-free without medication for two years. OFFICE OF PERSONNEL MANAGEMENT, HANDBOOK OF SELECTIVE PLACEMENT OF PERSONS WITH PHYSICAL AND MENTAL HANDICAPS IN FEDERAL CIVIL SERVICE EMPLOYMENT, OPM Doc. 125-11-3, 63 (1981). Similarly, the military will not consider applications from epileptics until they have been seizure-free without medication for five years. EPILEPSY FOUNDATION OF AMERICA, LEGAL RIGHTS OF PERSONS WITH EPILEPSY 7 (1985). Many states refuse to issue a driver's license to epileptics who have not been seizure-free for a specified amount of time.

Regulations explicitly state that a person who only is limited in the major life activity of working is protected by the Act.⁷ This article examines what it means to be substantially limited in the major life activity of working.

Not all characteristics which affect one's ability to work are protected by the ADA. Human beings differ from one another in many ways, not all of which are thought of as disabilities. I, for example, am a dark-haired, brown-eyed, right-handed male with broad shoulders, small feet, and a passion for hockey, Pushkin, and Nanci Griffith. If an employer rejects my employment application because of any of these characteristics, I might be displeased, but I will not consider myself discriminated against on the basis of disability.

These characteristics are likewise unprotected by the ADA. The text of the ADA limits in two ways the class of persons who can claim protection because a condition limits their major life activity of working: they must have (1) a substantially limiting (2) physical or mental impairment.⁸ The Act does not define either of these limitations; interpretation was left to the EEOC and to the courts.

EEOC Regulations define "impairment" to include physiological disorders, cosmetic disfigurement, anatomical loss, and mental or psychological disorders.⁹ Mere physical characteristics such as eye color or left-handedness are not covered; nor are environmental, cultural, or economic disadvantages such as poverty or lack of education.¹⁰ This definition thus imposes an effective limitation on the scope of the Act, and prevents mere "difference" from being protected as "disability."

EEOC Regulations also qualify what it means to be "substantially limited" in the major life activity of working. A person's inability to perform a particular job, the Regulations state, does not substantially limit that person's ability to work.¹¹ Instead, a person must be unable to perform either a class of jobs or a broad range of jobs in order to

Id. The inability to drive to work further limits epileptics' employment opportunities. COMMISSION FOR THE CONTROL OF EPILEPSY AND ITS CONSEQUENCES, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, 1 PLAN FOR NATIONWIDE ACTION ON EPILEPSY 85 (1977). As a result of these exclusionary policies, the unemployment rate among fully employable epileptics is more than twice the national average. *Id.*

7. 29 C.F.R. app. § 1630.2(j) (1992).

8. See *supra* note 3 and accompanying text.

9. 29 C.F.R. § 1630.2(h)(1)-(2) (1992).

10. 29 C.F.R. app. § 1630.2(h) (1992).

11. 29 C.F.R. § 1630.2(j)(3)(i) (1992).

be "substantially limited" in the major life activity of working.¹²

This definition of "substantially limited" is consistent (or at least, is not blatantly inconsistent) with the text and purpose of the Act insofar as it pertains to persons who are discriminated against because (A) they are in fact disabled (i.e., persons who have a physical or mental impairment that substantially limits one or more life activities).¹³ Recall, however, that the Act also protects (B) persons with a record of such an impairment, and (C) persons who are regarded as having such an impairment.¹⁴ The word "such" in the latter two phrases indicates that the "substantially limited" and "major life activity" qualifications that apply to part (A) of the definition also apply to parts (B) and (C). Thus, a person who claims protection under part (C) must show that she is regarded as having an impairment that substantially limits a major life activity.

By applying the EEOC gloss to the statutory requirements, a person who claims that she is regarded as disabled for the major life activity of working must prove that she is regarded as having an impairment that renders her unable to perform either a class of jobs or a broad range of jobs.¹⁵ Merely showing that one employer regards her as unemployable is not enough. Take, for example, the case of a telephone company employee who is fired from his job installing telephones because his asthma and medically-induced heat sensitivity make it impossible for him to accept temporary transfers to extremely hot parts of the country.¹⁶ In order to make the threshold showing that he is regarded as a disabled individual, he must show that his employer regards him as unable to perform a wide range of jobs.¹⁷ It is not enough that his employer regards him as unable to perform the job for which he was hired.

This interpretation of the "regarded as" test runs directly contrary to congressional intent, which was to protect individuals such as this telephone installer.¹⁸ The House Judiciary Report, for example, states that a person will be covered under the "regarded as" test "whether

12. *Id.*

13. 29 C.F.R. § 1630.2(g)(1) (1992).

14. 42 U.S.C. §12102(2) (Supp. III 1992).

15. 29 C.F.R. §1630.2(g)(3) (1992).

16. *See Miller v. AT & T Network Sys.*, 722 F. Supp. 633 (D. Or. 1989), *aff'd and opinion adopted*, 915 F.2d 1404 (9th Cir. 1990) (discussed in greater detail *infra* Part IV-A-2) (construing an Oregon statute identical, in relevant part, to the ADA).

17. *Id.* at 639.

18. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 30 (1990).

or not the employer's perception is shared by others in the field."¹⁹ The EEOC interpretation also defies both logic and the plain text of the Act: How can one say that this telephone installer's medical condition did not substantially limit his major life activity of working? It did, after all, cause him to be fired.

This article argues that the EEOC definition of "substantially limits" is too narrow and excludes a large class of persons Congress intended to protect. The purpose of the narrow EEOC definition — to keep "difference" from being protected as "disabled" — is adequately met by the EEOC definition of impairment. A person should be recognized as substantially limited in the major life activity of working if that person is excluded from even one job because she has — or is regarded as having — an impairment. I call this standard the "once is enough" test.

Part I of this article provides a brief overview of the ADA and its legislative precursor, the Rehabilitation Act of 1973²⁰ ("Rehabilitation Act"). Part II examines the concept of "impairment" in the context of both the EEOC Regulations to the ADA and the case history of the Rehabilitation Act. It concludes that although "impairment" is and should be interpreted broadly, it still adequately distinguishes between "difference" and "disability." Part III discusses the "regarded as" prong of the test, covering both Congressional intent and EEOC treatment. Part IV examines the "substantial limitation" qualification as it relates to the major life activity of working. It first describes the Rehabilitation Act and the EEOC approaches — both of which explicitly reject the "once is enough" test. It next lists and describes the eight shortcomings of these approaches. The final section of Part IV describes how these two approaches run afoul of the Congressional intent behind the ADA.

Part V of this article proposes two new standards for evaluating when a person is substantially limited in the major life activity of working. The preferred approach is the "once is enough" test, which recognizes that a person's employment opportunities are substantially limited when she is excluded from even one job because she is — or is regarded as — disabled. An alternative approach shifts to employ-

19. *Id.* at 30.

20. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2, 87 Stat. 355, 357, reprinted in 1973 U.S.C.A.N. 409, 410 (codified as amended at 29 U.S.C. §701-794 (1988)). The Rehabilitation Act originally protected "handicapped" individuals; the 1992 Amendments to the Rehabilitation Act changed the terminology to "disabled" individuals. This was not intended as a change in substance.

ers the burden of proving the existence of alternative employment opportunities. While this latter approach does not solve the problems inherent in the EEOC and Rehabilitation Act approaches, it does decrease their significance by limiting the situations in which employers are allowed to avail themselves of the "other jobs are available" defense.

I. ORIGIN AND OVERVIEW OF THE ADA

A. The Rehabilitation Act

Prior to the passage of the ADA, the Rehabilitation Act was the primary source of federal protection for disabled persons. The Rehabilitation Act originally was enacted to provide vocational rehabilitation for disabled persons;²¹ Section 504 was intended to prevent discrimination against disabled individuals by affording them equal opportunities in federally funded programs.²² Originally an "inconspicuous part" of the Rehabilitation Act,²³ Section 504 only became significant several years after its enactment when the Department of Health, Education, and Welfare ("HEW") empowered the Office of Civil Rights to draft implementing regulations for the Rehabilitation Act.²⁴

A Section 504 plaintiff establishes a prima facie case of employment discrimination by showing that she was (1) an individual with a disability within the meaning of the Rehabilitation Act; (2) qualified for the job but for her disability; (3) denied a job, promotion, or raise for which she applied; and (4) excluded solely because of her disability.²⁵ Once the plaintiff has established a prima facie case, the burden shifts to the employer to show either that the plaintiff was not otherwise qualified,²⁶ or that any possible accommodation would

21. See 119 CONG. REC. 24,571 (1973).

22. S. REP. NO. 1297, 93d Cong., 2d Sess. 38 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6388.

23. RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 1 (1984), cited in Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 116 n.25 (1990).

24. Brandfield, *supra* note 23, at 116. The regulations were not implemented until 1978. SCOTCH, *supra* note 23, at 80.

25. See Arneson v. Heckler, 879 F.2d 393, 396 (8th Cir. 1989); Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1148 (3d Cir. 1988); Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985); Prewitt v. United States Postal Serv., 662 F.2d 292, 309-10 (5th Cir. 1981).

26. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (holding that

cause the employer undue hardship.²⁷ Finally, the plaintiff has the opportunity to rebut the employer's contention of undue hardship by showing that the proposed accommodation is indeed reasonable.²⁸

A major shortcoming of the Rehabilitation Act is its limited scope.²⁹ Section 501 requires affirmative action in federal employment, Section 504 prohibits discrimination in federally funded programs,³⁰ and Section 503 requires affirmative action programs by federal contractors receiving more than \$10,000.³¹ This narrow coverage precludes the effectiveness of the Rehabilitation Act in combating general societal discrimination against disabled persons.³²

B. The Status of Disabled Americans³³

By almost any definition, Americans with disabilities are uniquely underprivileged and disadvantaged. They are much poorer, much less educated, and have less of a social life, fewer amenities, and a lower level of self-satisfaction than other Americans.³⁴

Congressional findings in the ADA indicate recognition that discrimination against individuals with disabilities persists and is pervasive throughout all facets of life.³⁵ This discrimination includes outright intentional exclusion; the discriminatory effects of barriers in architecture, transportation, and communication; overprotective rules and policies; failure to make modifications to existing facilities and practices; exclusionary qualifications standards and criteria; segregation; and relegation to lesser services, programs, activities, benefits,

an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap).

27. *Arneson v. Heckler*, 879 F.2d at 397-98.

28. *See id.*; *see also* *Prewitt v. United States Postal Serv.*, 662 F.2d at 310.

29. For a broad treatment of the limitations of the Rehabilitation Act, *see* NATIONAL COUNCIL ON THE HANDICAPPED, *TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES — WITH LEGISLATIVE RECOMMENDATIONS A-6 to A-14* (1986) [hereinafter *TOWARD INDEPENDENCE*].

30. 29 U.S.C. §§ 791-794 (1990).

31. 29 U.S.C. § 703 (Supp. 1993).

32. *See infra* Part I-B.

33. *See generally* 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, 415-26 (1991); UNITED STATES COMM'N ON CIVIL RIGHTS, *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES* 17-45 (1983) [hereinafter *ACCOMMODATING THE SPECTRUM*].

34. SENATE SUBCOMMITTEE ON THE HANDICAPPED, S. HRG. 166, pt. 2, at 9 (1987) (statement of Humphrey Taylor).

35. 42 U.S.C. § 12101(a)(2)-(3) (Supp. III 1992).

and jobs.³⁶

The status of disabled Americans in employment is documented by a 1986 nationwide Harris poll.³⁷ Two-thirds of working age people with disabilities are unemployed, a rate which exceeds all other demographic groups under age sixty-five.³⁸ This extraordinary unemployment rate is not a result of the disabled individual's unwillingness to work,³⁹ poor performance,⁴⁰ expensive insurance premiums,⁴¹ or the cost of accommodation,⁴² but instead is due predominantly to employment discrimination.⁴³

C. The Response of the Americans with Disabilities Act

To rectify the inferior status of disabled Americans,⁴⁴ Congress in 1990 promulgated the Americans with Disabilities Act. One of the initial hurdles to such legislation was defining who the Act would cover.

36. 42 U.S.C. § 12101(a)(5) (Supp. III 1992).

37. LOUIS HARRIS & ASSOCS., *THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM* (1986), cited in Burgdorf, *supra* note 33, at 415-16, 420-22.

38. *Id.*

39. "Two-thirds of those not working want to work." *Id.* at 421.

40. Individuals with disabilities tend to maintain above average work attendance and productivity. *Id.* at 420, 421 n.41.

41. *Id.* at 421.

42. According to a 1982 study measuring the cost of accommodating employees under the Rehabilitation Act, 51% of accommodations can be provided without cost to the employer, 30% of the accommodations which impose costs can be provided for less than \$500, and only 8% of accommodations cost over \$2000. Berkeley Planning Associates, *A Study of Accommodations Provided to Handicapped Employees by Federal Contractors, Volume I: Study Findings 28-31* (1982), cited in GAO, *PERSONS WITH DISABILITIES: REPORTS ON COSTS OF ACCOMMODATIONS*, GAO Briefing Report GAO/H.R. Doc. No. 44 BR, 101st Cong. 19-20 (1990).

43. See Burgdorf, *supra* note 33, at 421 n.37, citing, *inter alia*, a report by the President's Committee on Employment with Disabilities finding that 45 different studies conclude that the discriminatory attitudes of employers are the predominant reason why people with disabilities do not have jobs. Burgdorf also discusses a Harris survey reporting that three-fourths of business managers admit that people with disabilities often encounter job discrimination from employers, and the conclusion of Frank Bowe that employer attitudes toward workers with disabilities are "less favorable than those . . . toward elderly individuals, minority group members, ex-convicts, and student radicals." See LOUIS HARRIS & ASSOCS., *THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS* 12 (1987); FRANK BOWE, *HANDICAPPING AMERICA: BARRIERS TO DISABLED PEOPLE* (1978); William G. Johnson, *The Rehabilitation Act and Discrimination Against Handicapped Workers: Does the Cure Fit the Disease?*, in *DISABILITY AND THE LABOR MARKET* 242, 245 (Monroe Berkowitz & M. Anne Hill eds., 1986).

44. 42 U.S.C. § 12101(a)(6) (Supp. III 1992).

1. Who is protected

The term "disability" means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.⁴⁵

The first prong of the ADA's tripartite definition of disability includes physiological disorders, cosmetic disfigurement, and mental or psychological disorders,⁴⁶ and, "is to be determined without regard to mitigating measures such as medicines or assistive or prosthetic devices."⁴⁷ Mere physical characteristics such as eye color, left-handedness, or height or weight within "normal" range are not covered; nor are environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record.⁴⁸ Major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.⁴⁹ The "impairment" requirement is discussed in more detail in Part II of this article; the "substantial limitation" requirement, insofar as it pertains to the major life activity of working, is discussed in Part IV.

The purpose of the second prong of the definition — having a record of such an impairment — is to ensure that people are not discriminated against because of a history of disability.⁵⁰ For example, former cancer patients may not be discriminated against on the basis of their prior medical history.⁵¹ This provision also protects persons who have been misclassified as disabled, for example, as having a learning disability.⁵²

The purpose of the third prong of the definition — regarded as

45. 42 U.S.C. § 12102(2) (Supp. III 1992).

46. 29 C.F.R. § 1630.2(h)(1)-(2) (1992); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 51 (1990).

47. 29 C.F.R. app. § 1630.2(h) (1992); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 51-52 (1990).

48. 29 C.F.R. app. § 1630.2(h) (1992).

49. 29 C.F.R. § 1630.2(i) (1992).

50. 29 C.F.R. app. § 1630.2(k) (1992).

51. *Id.*

52. *Id.*

substantially limited in a major life activity — is to protect an individual discriminated against due to the “myths, fears, and stereotypes” associated with disabilities.⁵³ The Regulations adopt the finding of the Supreme Court in the Section 504 case of *School Board of Nassau County v. Arline*,⁵⁴ in which the Court stated that “society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”⁵⁵ The “regarded as” prong of the test is discussed in more detail in Part III of this article.

2. Scope of coverage

The broad coverage of the ADA far surpasses the limited scope of the Rehabilitation Act. When fully implemented, the anti-discrimination provisions of the ADA will extend to employment,⁵⁶ public services,⁵⁷ public transportation,⁵⁸ public accommodations and commercial facilities,⁵⁹ and telecommunication.⁶⁰ The purpose of the employment provisions of the ADA, Title I, is to rectify the inferior status of disabled Americans and to provide to them a “meaningful equal employment opportunity”;⁶¹ i.e., an opportunity to attain the same level of performance as is available to nondisabled people.⁶²

3. The employer’s duty of reasonable accommodation

Title I of the ADA defines discrimination as “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”⁶³ The EEOC Regulations to the ADA delineate three categories of reasonable accommodation.⁶⁴ First, an employer must modify or adjust the job

53. 29 C.F.R. app. § 1630.2(i) (1992).

54. 480 U.S. 273 (1987) (holding that a schoolteacher with tuberculosis is a “handicapped person” within the meaning of the Rehabilitation Act).

55. *Id.* at 284.

56. 42 U.S.C. §§ 12111-12117 (Supp. III 1992).

57. 42 U.S.C. §§ 12131-12134 (Supp. III 1992).

58. 42 U.S.C. §§ 12141-12165 (Supp. III 1992).

59. 42 U.S.C. §§ 12181-12189 (Supp. III 1992).

60. 47 U.S.C. § 225(c) (Supp. III 1991).

61. H.R. REP. NO. 485, pt. 2, at 66.

62. *Id.*

63. 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1992).

64. “Reasonable accommodation” has become a term of art in the context of Title VII religious discrimination. In *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), the Supreme Court interpreted the undue hardship limitation of EEOC regulations as not requiring employers to “reasonably accommodate” workers’ religious beliefs if doing so would impose

application process to allow an otherwise qualified disabled applicant to be considered for the position.⁶⁵ Second, the employer must modify or adjust the work environment, or the manner in which the job is customarily performed, to enable a qualified individual with a disability to perform the essential functions of that position.⁶⁶ Third, the employer must make modifications or adjustments to enable disabled employees to enjoy equal benefits and privileges of employment as are enjoyed by nondisabled employees.⁶⁷

The ADA provides four exceptions to an employer's duty to provide reasonable accommodation to applicants or employees. First, an employer need not accommodate a disabled applicant or employee who is unqualified for the job.⁶⁸ EEOC Regulations define a qualified individual as one who "satisfies the requisite skill, experience, education and other job-related requirements of the employment posi-

more than a *de minimis* cost. The report of the House Commission on Education and Labor expressly rejected the application of this *de minimis* approach to reasonable accommodation under the ADA:

The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, 432 U.S. 63 (1977) [sic] are not applicable to this legislation Under the ADA, reasonable accommodations must be provided unless they rise to the level of "requiring significant difficulty or expense" on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in *Hardison*.

H.R. REP. NO. 485, pt. 2, at 68.

65. *Id.* at 64.

66. The ADA imposes on employers the duty to modify both the work environment and the job itself. Examples of altering the environment include making the workplace, break rooms, restrooms, training rooms, and employer-provided transportation accessible to disabled employees and applicants. Employers are not required to provide "personal use" items. Thus, while employers must provide telephone headsets, magnifiers, readers, and interpreters, they need not provide hearing aids, eyeglasses, or guide dogs. See 29 C.F.R. app. § 1630.2(o) (1992); H.R. REP. NO. 485, pt. 2, at 64.

Examples of altering the job itself include altering when or how the function is performed, reallocating marginal job functions, and reassigning the disabled employee to another position. Employers are not required to reallocate essential job functions, and the reassignment option is strictly limited to avoid segregation or discrimination. See 29 C.F.R. app. § 1630.2(o) (1992); H.R. REP. NO. 485, pt. 2, at 64.

The ADA does not require the employer to provide reasonable accommodation to an employee or applicant if the only way to do so entails curing the disability. Thus, employers are not required to provide rehabilitation for alcoholism or drug addiction; nor are they required to pay for an eye operation. See 135 CONG. REC. S10753-4, S10776-7 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin). They might, however, be required to give unpaid leave for the individual to attend rehabilitation, particularly in the context of alcohol and drug addiction. See cases cited *infra* note 110.

67. 29 C.F.R. § 1630.2(o)(1)(i)-(iii) (1992).

68. The general rule against discrimination states that "No covered entity shall discriminate against a *qualified individual* with a disability" 42 U.S.C. § 12112 (a) (Supp. III 1992) (emphasis added).

tion such individual holds or desires"⁶⁹ If a law firm requires all incoming lawyers to have graduated from an accredited law school and to have passed the bar examination, the firm need not accommodate a disabled individual who has not met these selection criteria; such an individual is not otherwise qualified for the position.⁷⁰

Second, an employer is not required by the ADA to accommodate an applicant or employee unless that accommodation will enable the applicant or employee to perform the essential functions of the position.⁷¹ Application of this "essential functions" requirement indicates two competing congressional concerns: Congress did not want to force employers to hire employees who could not perform the job,⁷² but simultaneously wished to avoid giving employers the opportunity to define the job so rigidly so as unnecessarily to exclude⁷³ disabled applicants merely because of their inability to perform purely peripheral tasks.⁷⁴ Congress compromised by stating that courts must con-

69. 29 C.F.R. § 1630.2(m) (1992).

70. H.R. REP. NO. 485, pt. 2, at 65; 29 C.F.R. app. § 1630.2(m) (1992).

71. The Act defines a "qualified individual with a disability" (i.e., one covered by Title I of the Act) as "an individual with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position . . ." 42 U.S.C. § 12111(8) (Supp. III 1992) (emphasis added); *see also* 29 C.F.R. § 1630.2(o)(1)(ii) (1992) (Reasonable accommodation includes "modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the *essential functions* of the position." [emphasis added]). For application of the "essential functions" requirement under Section 504 of the Rehabilitation Act, *see* School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987).

72. *See* H.R. REP. NO. 485, pt. 2, at 55-56.

73. For example, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), an employer imposed a requirement that all applicants pass a written test. The employer, which before the passage of Title VII had refused to promote African-Americans beyond the lowest department, imposed the written test requirement immediately after Title VII went into effect, and did not require white incumbents to pass the test. Although the Court held that the test violated Title VII because of its disparate impact on African-Americans, the facts recited above strongly indicate that the employer introduced the test specifically to exclude African-Americans. By this analysis, disparate treatment would have been a more appropriate standard for evaluating the employer's actions. Similarly, employers may attempt to circumvent the ADA by imposing highly detailed, overly-restrictive job descriptions, which may have the same effect (disparate impact) as overt discrimination.

74. *See* H.R. REP. NO. 485, pt. 2, at 71.

The distinction between "primary duties" and "peripheral duties" has been much-litigated in the context of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1982 & Supp. V 1987). Section 7 of the FLSA requires employers to pay overtime to an employee who works more than forty hours per week. Section 13(a)(1) exempts from the maximum hour provision "bona fide executive, administrative, or professional" positions. Each of the three exceptions requires ascertaining what constitutes the employee's "primary duty." *See* Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) (defining an employee's "primary

sider the employer's definition of essential job functions, but that this consideration is neither conclusive nor presumptive.⁷⁵

Third, an employer need not reasonably accommodate an applicant or employee if doing so would "pose a direct threat to the health or safety of other individuals in the workplace."⁷⁶ The EEOC Regulations place a heavy burden on an employer who uses safety concerns to justify a discharge or a refusal to hire.⁷⁷ An employer may not rely on remote or speculative evidence, subjective perceptions, irrational fears, patronizing attitudes, or stereotypes.⁷⁸ The employer must analyze the risks⁷⁹ on a case-by-case basis; statistical probability is

duty" as the work performed by the employee that is of "principal value" to the employer, regardless of whether that work encompasses more than 50% of the employee's work-time).

It remains to be seen whether the FLSA distinction between primary and peripheral duties will be applied to the essential functions exception. The EEOC has issued a non-exclusive, non-conclusive list of factors for determining whether a particular function is essential. According to the EEOC, a court must consider (i) the employer's judgment as to which functions are essential; (ii) written job descriptions prepared before advertising or interviewing applicants for the job; (iii) the amount of time spent on the job performing the function; (iv) the consequences of not requiring the incumbent to perform the function; (v) the terms of a collective bargaining agreement; (vi) the work experience of past incumbents in the job; and/or (vii) the current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3)(i)-(vii) (1992).

75. See H.R. REP. NO. 485, pt. 3, at 33; Jeffrey O. Cooper, Note, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1442-43 (1991).

76. 42 U.S.C. § 12113(b) (Supp. III 1992). The statutory language seems to preclude a paternalistic employer from refusing to hire an applicant with a disability for what the employer perceives to be the applicant's own good. See 42 U.S.C. § 12101(a)(5) (Supp. III 1992) (citing "overprotective rules and policies" as an obstacle to be overcome); Cooper, *supra* note 75 at 1448 n.146; Bonnie P. Tucker, *The Americans with Disabilities Act Interpreting the Title I Regulations: The Hard Cases*, 2 CORNELL J.L. & PUB. POL. 1, 8-12 (1992).

The EEOC Regulations, on the other hand, would allow an employer to reject such an applicant:

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm.

29 C.F.R. app. § 1630.2(r) (1992).

77. See *infra* notes 98-101 and accompanying text.

78. See 29 C.F.R. app. § 1630.2(r) (1992).

79. The regulations list four factors which the employer must consider:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

Id.

irrelevant.⁸⁰ The employer must also consider whether a reasonable accommodation would reduce the risk to a reasonable level.⁸¹

Fourth, the ADA imposes no duty to accommodate where the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the [employer's] business."⁸² "Undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, disruptive, or that would fundamentally alter the nature or operation of the business.⁸³

The ADA retains many of the same limitations as the Rehabilitation Act concerning what it means to be "disabled." One of these limitations is that in order for a person to qualify for protection under the law, the person must demonstrate that she has an "impairment." This prerequisite is discussed in Part II of this article.

II. THE CONCEPT OF "IMPAIRMENT"

In order to meet the ADA definition of "disability," a person must demonstrate that she has a physical or mental *impairment* that substantially limits one or more major life activities.⁸⁴ The Rehabilitation Act regulations define "physical impairment" to mean a "physiological disorder or condition, cosmetic disfigurement, or anatomical loss" affecting any of a list of body systems;⁸⁵ and define "mental impairment" as "any mental or psychological disorder," listing several examples.⁸⁶ The original ADA bill incorporated these definitions verbatim into the proposed statutory language,⁸⁷ but Congress eventually deleted them in the interest of brevity.⁸⁸ The ADA Committee reports, however, retained the language as the Committees' understanding of the meaning of the terms "physical or mental impairment."⁸⁹

The EEOC Regulations also adopt this same language.⁹⁰ The Regulations state:

80. *Id.*

81. See 42 U.S.C. § 12113(a) (Supp. III 1992); H.R. REP. NO. 485, pt. 2, at 76; Cooper, *supra* note 75, at 1448.

82. 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1992).

83. 29 C.F.R. app. § 1630.2(p) (1992).

84. 42 U.S.C. § 12102(2)(A) (Supp. III 1991).

85. 45 C.F.R. § 84.3(j)(2)(i)(A) (1992).

86. 45 C.F.R. § 84.3(j)(2)(i)(B) (1992).

87. S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. S5110 (daily ed. Apr. 28, 1988).

88. Burgdorf, *supra* note 33, at 446.

89. S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989).

90. See 29 C.F.R. app. § 1630.2(h) (1992).

(h) *Physical or mental impairment means:*

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁹¹

The appendix to the EEOC Regulations explains that "the existence of an impairment is to be determined without regard to mitigating factors such as medicines, or assistive or prosthetic devices."⁹² For example, an individual with epilepsy is considered impaired even if her symptoms are completely controlled by medicine.⁹³ Similarly, an individual with a hearing loss is considered impaired even if the loss is correctable by a hearing aid.⁹⁴

As a general matter, "impairment" should be defined broadly.⁹⁵ The ADA Committee Reports, borrowing from the Rehabilitation Act Regulations,⁹⁶ provide a non-exhaustive list of conditions intended to be included within the definition of "impairment."⁹⁷ These conditions include orthopedic,⁹⁸ visual,⁹⁹ speech,¹⁰⁰ and hearing impair-

91. 29 C.F.R. § 1630.2 (1992).

92. 29 C.F.R. app. § 1630.2(h) (1992).

93. *Id.*

94. *Id.* However, the EEOC Regulations indicate that minor vision problems which may be corrected with glasses would not necessarily "substantially limit" a person's ability to work. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. 29 C.F.R. app. § 1630.2(j) (1992).

95. See, e.g., *Salt Lake City Corp. v. Confer*, 674 P.2d 632 (Utah 1983) (defining "impairment" as "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity."); see also *E. E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1093 (D. Haw. 1980) (same); cf. *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991) (holding that neither PKD nor end-stage renal condition "rise[s] to the level of a 'physical impairment' within the meaning of the Act.>").

96. 42 Fed. Reg. 22685-94 (May 4, 1977).

97. S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989); H.R. REP. NO. 485, pt. 2, at 51; H.R. REP. NO. 485, pt. 3, at 28.

98. See *Sisson v. Helms*, 751 F.2d 991, 994 (9th Cir. 1985), *cert. denied*, 474 U.S. 841 (1985) (ankylosing spondylitis); *Guinn v. Bolger*, 598 F. Supp. 196, 198 (D.D.C. 1984), *judgment vacated by stipulation* (1985) (permanent osteoarthritis of the knee joints).

99. See *Norcross v. Sneed*, 755 F.2d 113, 114 (8th Cir. 1985) (legal blindness); *Holly v.*

ments;¹⁰¹ cerebral palsy;¹⁰² epilepsy;¹⁰³ muscular dystrophy; multiple sclerosis;¹⁰⁴ cancer;¹⁰⁵ heart disease;¹⁰⁶ diabetes;¹⁰⁷ mental retardation;¹⁰⁸ emotional illness;¹⁰⁹ drug addiction;¹¹⁰ alcoholism;¹¹¹

City of Naperville, 603 F. Supp. 220, 223 (N.D. Ill. 1985) (blindness in one eye); *but see* Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993) (stating that a person is not disabled if his vision can be corrected to 20/200).

100. *Cf.* Reeder v. Frank, 813 F. Supp. 773, (D. Utah 1992), *aff'd*, 986 F.2d 1428 (10th Cir. 1993).

101. *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979). The Davis decision is predicated on the assumption that the plaintiff in that case, who had a major hearing deficiency, was in fact disabled. The Court, however, held that she was not entitled to accommodation because the accommodations she proposed would have compromised the "essential nature" of the nursing program she sought to enter. *Id.* at 414.

102. Fitzgerald v. Green Area Educ. Agency, 589 F. Supp. 1130, 1135-36 (S.D. Iowa 1984).

103. Estate of Reynolds v. Dole, 57 Fair Empl. Prac. Cas. (BNA) 1848 (N.D. Cal. 1990), *aff'd*, 985 F.2d 470 (9th Cir. 1993); Fitzgerald v. Green Area Educ. Agency, 589 F. Supp. 1130, 1135-36 (S.D. Iowa 1984) (concluding that nocturnal epilepsy constitutes a handicap as defined in the Rehabilitation Act of 1973).

104. *See* Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1382 (10th Cir. 1981).

105. *See* Katradis v. Dav-El of Washington, DC, 846 F.2d 1482, 1484 (D.C. Cir. 1988).

106. *See* Bento v. I.T.O. Corp. of R.I., 599 F. Supp. 731, 741 (D.R.I. 1984); Treadwell v. Alexander, 707 F.2d 473, 474 (11th Cir. 1983).

107. Wood v. Omaha Sch. Dist., 985 F.2d 437, 438 n.3 (8th Cir. 1993).

108. Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295, 1323 (E.D. Pa. 1978), *aff'd in part and rev'd in part on other grounds*, 451 U.S. 1 (1981); *See also* Kent v. Derwinski, 790 F. Supp. 1032, 1039 (E.D. Wash. 1991); Ciocco v. City of Philadelphia, No. CIV.A.89-4097, 1990 WL 166389, at *5 (E.D. Pa. Oct. 24, 1990).

109. *See* Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985) (holding that it was unduly burdensome to require defendant to reassign employee with manic depressive syndrome in a foreign country); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983) (concluding that nervous condition combined with heart disease constitutes a handicap under the Rehabilitation Act of 1973).

110. Nisperos v. Buck, 720 F. Supp. 1424, 1427 (N.D. Cal. 1989); Burka v. New York City Transit Auth., 680 F. Supp. 590, 600 (S.D.N.Y. 1988); Wallace v. Veterans Admin., 683 F. Supp. 758, 761 (D. Kan. 1988).

111. Traynor v. Turnage, 485 U.S. 535, 555 (1988) (Blackmun, J., concurring in part and dissenting in part) ("It is beyond dispute that petitioners, as alcoholics, were handicapped individuals covered by the Act."); Teahan v. Metro-North Commuter R.R., 951 F.2d 511, 517 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 54 (1992); Fuller v. Frank, 916 F.2d 558, 561 (9th Cir. 1990); Crewe v. United States Office of Personnel Management, 834 F.2d 140, 141-42 (8th Cir. 1987); Whitlock v. Donovan, 598 F. Supp. 126, 129 (D.D.C. 1984), *aff'd* 790 F.2d 964 (D.C. Cir. 1986); Wendy K. Voss, Note, *Employing the Alcoholic Under the Americans With Disabilities Act of 1990*, 33 WM. & MARY L. REV. 895, 911-14 (1992). Voss notes that a "tension exists between the stated requirements for disabled status, which demand case-by-case analysis, and the nearly per se definition of alcoholism as a handicap the federal government and courts [have] adopted under the Rehabilitation Act." Voss argues that courts should adopt the case-by-case approach when interpreting the ADA, because a per se approach "begs the question of whether an alcoholic claimant must prove that he is regarded by *this* employer as 'having such an impairment,' or whether society's generalized prejudice

and infection with the Human Immunodeficiency Virus.¹¹² In addition, courts construing the Rehabilitation Act have found such diverse conditions as the following to constitute impairments: chronic tuberculosis,¹¹³ dyslexia,¹¹⁴ and hypersensitivity to tobacco smoke.¹¹⁵

Although broad, "impairment" is not all-inclusive. The Appendix to the EEOC Regulations make clear that mere physical characteristics such as eye color, left-handedness,¹¹⁶ or height or weight within "normal" range are not covered;¹¹⁷ nor are environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record.¹¹⁸ Other conditions or characteristics that are not included within the definition of impairment include:¹¹⁹ characteristic predisposition to illness or disease, pregnancy, poor judgment or a quick temper when not a symptom of a mental or psychological disorder,¹²⁰ transitory ailments,¹²¹ and advanced age.¹²² In addition, Congress specifically excluded the following conditions from the definition of disability:

- (a) homosexuality or bisexuality;
- (b) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders;
- (c) compulsive gambling, kleptomania, or pyromania; or

is sufficient to allow him to qualify for preferred status under the Act." *Id.* at 912.

112. See Justice Department Memorandum on Application of Rehabilitation Act's Section 504 to HIV-infected Persons (September 27, 1988); OFCCP Federal Contract Compliance Manual Appendix 6D subd. 4; see also *Chalk v. United States Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988).

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

114. *Wynne v. Tufts Univ. Sch. of Medicine*, 932 F.2d 19 (1st Cir. 1991); *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984).

115. *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982).

116. See *Torres v. Bolger*, 781 F.2d 1134 (5th Cir. 1986).

117. *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985); but see *Cook v. State*, No. 93-1093, 1993 WL 470697 (1st Cir. Nov. 22, 1993) (holding that morbid obesity is a disability).

118. 29 C.F.R. app. § 1630.2(h) (1992).

119. *Id.*

120. *Daley v. Koch*, 892 F.2d 212, 214-15 (2d Cir. 1989).

121. *Stevens v. Stubbs*, 576 F. Supp. 1409 (N.D. Ga. 1983).

122. Although medical conditions associated with the aging process, such as hearing loss, osteoporosis, and arthritis, would constitute impairments. 29 C.F.R. app. § 1630.2(h) (1992).

- (d) psychoactive substance use disorders resulting from current use of illegal drugs.¹²³

These substantial limitations on the otherwise-broad definition of "impairment" impose an effective limitation on the scope of the Act, and prevent mere "difference" from being protected as "disabled." This is consistent with the Congressional purpose of limiting the protection of the Act to those who truly require such protection.¹²⁴ An employer's attitudes and actions, however, can transform even a seemingly insignificant health condition into a meaningful employment barrier within the spirit of the term "impairment."¹²⁵ The next section of this article examines how the ADA accounts for employer attitudes.

III. THE "REGARDED AS" TEST

A. The Act and the Regulations

Conditions that do not inherently interfere with major life activities may become substantially limiting as a result of other people's reactions to the conditions.¹²⁶ For this reason, Congress added the "regarded as" prong to the definition of disability;¹²⁷ this allows persons who are regarded as disabled — but who are not in fact disabled — to avail themselves of the protection afforded by the ADA.¹²⁸ The EEOC Regulations provide that "regarded as" means:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such a limitation;

123. 42 U.S.C. § 12211 (Supp. III 1992).

124. See *infra* Part IV-D.

125. 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, 542 (1983).

126. TOWARD INDEPENDENCE, *supra* note 29, at A-24; School Bd. of Nassau County v. Arline, 480 U.S. 273, 283-84 (1987).

127. 42 U.S.C. § 12102(2)(C) (Supp. III 1992).

128. See 29 C.F.R. pt. 1630.2 (1992). The most obvious example is persons with severe facial disfigurements.

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.¹²⁹

An individual satisfies the first part of this definition if she has an impairment that is not substantially limiting but for the attitude of an employer.¹³⁰ For example, suppose an individual has controlled high blood pressure that is not substantially limiting — i.e., that does not significantly interfere with any of her normal life activities. If an employer reassigns or refuses to hire this individual because of unsubstantiated fears that the individual will suffer a heart attack, the employer regards the individual as disabled.¹³¹

The second part of the “regarded as” definition is satisfied if an individual has an impairment that is not substantially limiting but for the attitude of third parties.¹³² For example, suppose an individual has a prominent facial scar or disfigurement. If an employer discriminates against this individual because of the negative reactions of customers, the employer regards the individual as disabled.¹³³

An individual satisfies the third part of the “regarded as” definition if the employer “erroneously believes the individual has a substantially limiting impairment that the individual actually does not have.”¹³⁴ Suppose, for example, that an employer hears a rumor that one of his employees is infected with HIV, and discharges the employee on this basis. Even if the rumor is totally unfounded and the individual has no impairment, the individual is protected by the ADA because the employer regards the individual as disabled.¹³⁵ Similarly, if an employer regards a burn victim or an obese employee as disfigured, and consequently acts to minimize the employee’s contact with customers or clients, the employee should be considered “regarded as”

129. 29 C.F.R. § 1630.2(l) (1992).

130. 29 C.F.R. app. § 1630.2(l) (1992).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

disabled and entitled to protection under the Act.

Congress made it quite clear that it intended the "regarded as" test to be construed as extremely broad.¹³⁶ The House Judiciary Report, for example, notes that:

a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under [the "regarded as"] test, *whether or not the employer's perception is shared by others in the field* and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.¹³⁷

The same report also states:

In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test¹³⁸

Similar language is used in the EEOC Regulations.¹³⁹

B. One Exclusion Is Not Enough

Courts construing the "regarded as" test of the Rehabilitation Act have almost universally concluded that an employer does not necessarily regard an employee as disabled simply by finding the employee incapable of performing a single job or a narrow range of jobs.¹⁴⁰

136. H.R. REP. NO. 485, pt. 3, at 30 (1990).

137. *Id.* (emphasis added); *see also* E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Haw. 1980) ("It is of little solace to a person denied employment to know that the employer's view of his or her condition is erroneous.").

138. H.R. REP. NO. 485, pt. 3, at 30-31.

139. 29 C.F.R. app. § 1630.2(l) (1992).

140. *See, e.g.*, Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993); Sanford v. Stern, 980 F.2d 731 (6th Cir. 1992) (text of decision reproduced in Westlaw); Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989); Forrasi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986); Cook v. Rhode Island Dep't of Mental Health, 783 F. Supp. 1569, 1574 (D.R.I. 1992); Goerlich v. Davis, No. 91 C 1743, 1991 WL 195772 (N.D. Ill. Sept. 25, 1991); Scharff v. Frank, 791 F. Supp. 182, 187 (S.D. Ohio 1991); Taylor v. United States Postal Serv., 771 F. Supp. 882, 889 (S.D. Ohio 1990), *rev'd*, 946 F.2d 1214 (6th Cir. 1991); Miller v. AT & T Network Sys., 722 F. Supp. 633 (D. Or. 1989), *aff'd and opinion adopted*, 915 F.2d 1404 (9th Cir. 1990); Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328, 1343 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988); Tudyman v. United Airlines, 608 F. Supp. 739 (D.C. Cal. 1984); *see also* Anna Phipps Engh, Note, *The Rehabilitation Act of*

For example, in *Reeder v. Frank*,¹⁴¹ an employee (Reeder) with a speech impediment applied for a promotion which would have involved a "fairly heavy use of the telephone."¹⁴² Reeder's application was rejected.¹⁴³ Reeder alleged in his pleadings that he was told by his supervisor that he was not given the job because of his speech impediment; the supervisor acknowledged that the impediment was "a minor factor" in his decision not to award Reeder the promotion.¹⁴⁴ The court, on a motion for summary judgment, ruled first that Reeder's speech impediment was not a "substantial impairment" because, despite the impediment, Reeder was still able to communicate "intelligibly."¹⁴⁵ The court next considered whether the supervisor had regarded Reeder as having an impairment. The court found the supervisor had not. Citing *Forrisi v. Bowen*¹⁴⁶ for the proposition that "an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job,"¹⁴⁷ the court stated, "Reeder was denied the [promotion] in part because it required heavy use of the telephone. However, this does not demonstrate that the Postal Service regarded Reeder as having a handicap."¹⁴⁸

1973: *Focusing the Definition of a Handicapped Individual*, 30 WM. & MARY L. REV. 149, 169-72 (1988); cf. *Taylor v. United States Postal Serv.*, 946 F.2d 1214, 1218 (6th Cir. 1991) (acknowledging that "a per se rule that permitted every unsuccessful applicant who was rejected" due to a real or perceived impairment "would stand the act on its head," but rejecting a per se rule that would "never permit[] an unsuccessful job applicant to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so-called job requirement due to a physical impairment").

141. 813 F. Supp. 773 (D. Utah 1992), *aff'd*, 986 F.2d 1428 (10th Cir. 1993). The affirmance of the Tenth Circuit is listed in the Federal Reporters in a table. The circuit court's short opinion, however, is reproduced in Westlaw. Regarding Reeder's Rehabilitation Act claims, the court stated simply:

As to Reeder's § 501 claim, we affirm for substantially the reasons given by the district court the conclusion that Reeder did not qualify as a handicapped person under the Act Because Reeder's § 504 claim also requires an initial determination that the individual is handicapped, we dismiss as moot Reeder's request to reconsider our decision in *Johnson v. United States Postal Service*

986 F.2d 1428 (text available in Westlaw).

142. *Reeder*, 813 F. Supp. at 782.

143. *Id.*

144. *Id.*

145. *Id.* at 781.

146. 794 F.2d 931 (4th Cir. 1986).

147. *Reeder*, 813 F. Supp. at 782.

148. *Reeder*, 813 F. Supp. at 782. The court continued:

The telecommunications detail was merely one employment position. The Postal Service's refusal to grant Reeder this detail does not suggest that he would be precluded, generally, from the type of employment in which he is currently en-

These two sentences are utterly incomprehensible. If Reeder's supervisor denied him the promotion *because* of his disability, how can it be that the supervisor did not regard Reeder as disabled? The courts' unconvincing answer to this question is the subject of Part IV of this article.

IV. THE "SUBSTANTIALLY LIMITED" TEST AS IT PERTAINS TO WORK

A. The Judicial Approach to the Rehabilitation Act

1. *E. E. Black* and the "substantially limits" test

The Rehabilitation Act definition of "handicapped" is identical to the ADA definition of "disability": both impose a three-part test, the first prong of which requires a plaintiff to prove that she has an impairment which substantially limits one or more major life activities.¹⁴⁹ The seminal Rehabilitation Act case interpreting the "substantially limits" test is *E. E. Black, Ltd. v. Marshall*.¹⁵⁰

George Crosby, the plaintiff in *E. E. Black*, was an aspiring carpenter, who entered an apprenticeship program which required 8000 hours of work in the field.¹⁵¹ After he had accumulated approximately 3600 hours, Crosby applied for employment as a carpenter's apprentice with *E. E. Black, Ltd.*, a general construction contractor.¹⁵² Black required all applicants to take a pre-employment physical examination.¹⁵³ When Crosby was examined, doctors discovered a congenital back anomaly, on which basis Black denied Crosby's employment application.¹⁵⁴ Crosby filed a complaint against Black under Section 503 of the Rehabilitation Act, arguing that Black had discriminated against him on the basis of handicap.¹⁵⁵ Crosby testified that because

gaged, or for which he has received his training. The record clearly demonstrates that, during the course of Reeder's employment with the Postal Service, he has advanced from a craft employee, level 3, to management, level 14. Therefore, the Court concludes that Reeder's allegations and the evidence he has produced do not demonstrate the Postal Service regards Reeder as handicapped.

Id.

149. 29 U.S.C. § 706(8)(a) (1988); 42 U.S.C. § 12102(2) (Supp. III 1992).

150. 497 F. Supp. 1088 (D. Haw. 1980).

151. *Id.* at 1091.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 1092. Black failed to raise the issue of whether § 503 grants individuals a private right of action. Subsequent cases have held that it does not. *See, e.g., Hodges v.*

of Black's refusal to employ him he had great difficulty obtaining employment as a carpenter's apprentice, and had been unable to get the apprenticeship hours needed to become a fully qualified carpenter.¹⁵⁶ The Office of Federal Contract Compliance Programs ("OFCCP") of the Department of Labor investigated and issued an administrative complaint.¹⁵⁷

A hearing was then held before an Administrative Law Judge, who found that Black had regarded Crosby as having an impairment, and that this had caused Crosby to have difficulty obtaining employment.¹⁵⁸ However, the Judge held that in order for Crosby to prove that his impairment was "substantially limiting," he had to prove that the impairment "impeded activities relevant to many or most jobs."¹⁵⁹ Because Crosby had only shown that his impairment limited his ability to be a carpenter's apprentice, the Judge ruled that Crosby was not a handicapped individual and thus was not protected by the Rehabilitation Act.¹⁶⁰

Crosby appealed to the Assistant Secretary of Labor.¹⁶¹ Although the Assistant Secretary agreed with the Administrative Law Judge's findings of fact,¹⁶² the Assistant Secretary interpreted the "substantially limiting" requirement much more broadly.¹⁶³ He found that coverage under the Rehabilitation Act did not require a showing that the impairment impeded activities relevant to many or most jobs, but rather that protection "under the Act is extended to every individual with an impairment which is a current bar to employment which the individual is currently capable of performing It is sufficient that the impairment is a current bar to the employment of one's choice"¹⁶⁴ I call the Assistant Secretary's test the "once is enough" approach, because exclusion from even one job is deemed sufficient to constitute a substantial limitation to employment.

The district court rejected both the Administrative Law Judge's

Atchison, Topeka & Santa Fe Ry., 728 F.2d 414, 416 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984); Simon v. St. Louis County, 656 F.2d 316, 319 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1085 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

156. *E. E. Black*, 497 F. Supp. at 1091.

157. *Id.* at 1093.

158. *Id.*

159. *Id.* at 1099.

160. *Id.* at 1093.

161. *Id.* at 1094.

162. *Id.*

163. *Id.*

164. *Id.*

and the Assistant Secretary's definitions of the "substantially limiting" requirement.¹⁶⁵ Regarding the Judge's assertion that a plaintiff must show that the impairment impeded "many or most jobs," the court held that this definition "drastically reduces the coverage of the Act, and undercuts the purposes for which the Act was intended."¹⁶⁶ The court noted:

A person . . . who has obtained a graduate degree in chemistry, and is then turned down for a chemist's job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger. A person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities.¹⁶⁷

However, the district court also rejected the interpretation of the Assistant Secretary, who had argued that an impairment is substantially limiting if it impedes the employment of one's choice.¹⁶⁸ This, the court held, contravened the statutory language of the Rehabilitation Act: If Congress had intended this interpretation, it would not have required an "impairment that substantially limits one or more life activities," but would have used the terms "any handicap to employment" or "in any way limits one or more of such person's major life activities."¹⁶⁹ Congress did not intend, the court concluded, to protect individuals whose impairments had impeded them merely from acquiring the job of their choice.¹⁷⁰ Instead of relying on the bright-line tests of either the Administrative Law Judge or the Assistant Secretary, the district court ruled that decisions about whether an impairment is substantially limiting in the major life activity of work should be made on a case-by-case basis.¹⁷¹ The court gave three fac-

165. *Id.* at 1099.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*; see also *Reeder v. Frank*, 813 F. Supp. 773, *aff'd*, 986 F.2d 1428 (10th Cir. 1993); *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986); *Tudyman v. United Airlines*, 608 F. Supp. 739, 745 (D. Cal. 1984); *Salt Lake City Corp. v. Confer*, 674 P.2d 632, 636 (Utah 1983).

170. *E. E. Black*, 497 F. Supp. at 1099. For a list of other Rehabilitation Act cases with the same holding, see *infra* note 190.

171. *E. E. Black*, 497 F. Supp. at 1100; see also *Byrne v. Board of Educ.*, 979 F.2d 560, 565 (7th Cir. 1992); *Taylor v. United States Postal Serv.*, 946 F.2d 1214, 1217 (6th Cir. 1991); *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); *Scharff v. Frank*, 791 F. Supp. 182, 187 (S.D. Ohio 1991).

tors which it deemed appropriate for consideration.¹⁷² First, decisionmakers should consider the number and types of jobs from which the impaired individual is disqualified.¹⁷³ In making this determination, "it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process."¹⁷⁴ The purpose of this qualification is to prevent employers from imposing an aberrational but discriminatory job qualification, and then arguing that because the qualification is unique, it is not a substantial handicap to employment, and that for this reason the applicant is not protected as disabled.¹⁷⁵

Second, decisionmakers should consider the geographical area to which the impaired individual has reasonable access.¹⁷⁶ An applicant should not be forced to move across the country to obtain a substantially equivalent job.

Third, decisionmakers should consider the applicant individually, taking into account the applicant's job expectations and training.¹⁷⁷ Crosby, for example, had already worked 3600 hours toward the 8000 hour requirement of becoming a master carpenter.¹⁷⁸ If Crosby had been denied the opportunity to finish his apprenticeship, he would have lost a substantial amount of human capital investment.

After applying the foregoing factors to the facts of Crosby's case, the district court concluded that Crosby's impairment "constituted . . . a substantial handicap to employment,"¹⁷⁹ and denied Black's motion for summary judgment.¹⁸⁰ Other courts, construing similar Rehabilitation Act cases, have rejected the "once is enough" approach in favor of the multi-factored *E. E. Black* approach.¹⁸¹ Courts have done so for two reasons. First, they argue that the substantial limitation requirement must be interpreted broadly to restrict the definition of

172. *Id.* For other cases applying this three-part test, see *Byrne v. Board of Educ.*, 979 F.2d 560, 565 (7th Cir. 1992); *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1249 (6th Cir. 1985); *James v. Runyon*, No. CIV.A.92-2262, 1992 WL 382311, at *4 (E.D. Pa. Dec. 9, 1992); *Scharff v. Frank*, 791 F. Supp. 182, 187 (S.D. Ohio 1991); *Coley v. Secretary of the Army*, 689 F. Supp. 519 (D. Md. 1987); *Carty v. Carlin*, 623 F. Supp. 1181, 1185 (D. Md. 1985).

173. *E. E. Black*, 497 F. Supp. at 1100.

174. *Id.*

175. *Id.*

176. *Id.* at 1101.

177. *Id.*

178. *Id.* at 1091.

179. *Id.* at 1102.

180. *Id.* at 1104.

181. See *supra* text accompanying note 164; see also cases cited *supra* note 172.

"disability" so that only persons with "major" disabilities will be protected. For example, in *Salt Lake City Corp. v. Confer*,¹⁸² the court stated:

Most or all persons have some physical or mental deviations from a norm or from personal or employer aspirations. Considerations of height, weight, sensory abilities, speech, pulse rate, blood pressure, and a whole variety of measures of mental ability are only a few characteristics whose variations can be deemed "impairments"¹⁸³

The Fourth Circuit in *Forrisi v. Bowen*¹⁸⁴ likewise stated:

The statutory language, requiring a *substantial* limitation of a *major* life activity, emphasizes that the impairment must be a significant one The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protection available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.¹⁸⁵

The *Forrisi* court's analysis contains its own two-part refutation. First, the court acknowledges the congressional intent to prohibit discrimination "because of stereotypes about the insurmountability of" handicaps. This intent is frustrated, however, when employers are given, as in *Forrisi*, carte blanche to discriminate simply because the employee can obtain another job with another employer.¹⁸⁶ Second, the *Forrisi* court recognizes that "the very concept of an impairment

182. 674 P.2d 632 (Utah 1983) (interpreting a Utah statute the language of which was, in relevant part, identical to that of the Rehabilitation Act).

183. *Id.* at 636; *see also* Reeder v. Frank, 813 F. Supp. 773 (D. Utah 1992), *aff'd*, 986 F.2d 1428 (10th Cir. 1993) (quoting *Salt Lake City Corp. v. Confer*, 674 P.2d 632 (Utah 1983)).

184. 794 F.2d 931 (4th Cir. 1986).

185. *Id.* at 933-34 (emphasis supplied); *see also* Maulding v. Sullivan, 961 F.2d 694, 698 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993) (holding that a plaintiff who had shown that her impairment prevented her from doing lab work, but which did not prevent her from performing many of her other job duties, failed to prove that her impairment substantially limited her employment as a whole).

186. *See infra* Part IV-D (discussing the congressional intent behind the ADA).

implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment."¹⁸⁷ The statutory and judicial definitions of "impairment" adequately limit the class of persons protected by the Act.¹⁸⁸ It was therefore not necessary for the *Forrisi* court to interpret the "substantial limitation" requirement to accomplish this same purpose.

The second ground upon which courts have justified adopting the multi-factored *E. E. Black* approach instead of the "once is enough" approach is that the former approach is dictated by the statutory language of the Rehabilitation Act.¹⁸⁹ According to this reasoning, a narrow interpretation of the "substantially limits" requirement would render the phrase mere surplusage. If Congress had intended that an impairment be considered substantially limiting merely because it impedes the employment of one's choice, Congress would not have required an "impairment that substantially limits one or more life activities." Instead, Congress would have stopped with the word "impairment."¹⁹⁰

This is nonsense. The "substantially limits" phrase can easily be interpreted in a meaningful way that still permits courts to find that the loss of a single job by an individual "substantially limits" that

187. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986).

188. *See supra* Part II.

189. *E. E. Black*, 497 F.Supp. at 1090.

190. *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986); *Reeder v. Frank*, 813 F. Supp. 773, (D. Utah 1992), *aff'd*, 986 F.2d 1428 (10th Cir. 1993); *Tudyman v. United Airlines*, 608 F. Supp. 739, 745 (D.C. Cal. 1984); *E. E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980); *Salt Lake City Corp. v. Confer*, 674 P.2d 632, 636 (Utah 1983); *see also* Haines, *supra* note 125, at 545:

[If] one also adopts a qualitative analysis, the statutory definition becomes greatly complicated, as does the identification task of employers; for, in effect, the qualitative interpretation connotes an expansion of the statutory definition to encompass every rejection by every statutorily covered employer because the decision based on the health condition amounts to a "substantial limitation." In essence, this qualitative analysis appears to "trivialize" the phrase "substantially limits" to the point that the latter seems boundless and hence rather nonsensical.

Id. (citation omitted). Nonetheless, Haines concludes:

Notwithstanding the above fear and projected difficulty with the qualitative analysis, social realities compel use of a qualitative analysis in interpreting the phrase "substantially limits." Situations arise where the loss of even a single job by an individual based on an "impairment" surely comes within the meaning of "substantially limits," owing to the privation coming within the spirit of the term "handicap."

Id. at 545-46.

individual in the major life activity of working. The phrase could, for example, be used to distinguish between “major” terms and conditions of employment — those which affect pay, advancement, and job satisfaction — from “minor” terms and conditions of employment — which do not. Suppose, for example, that an employer accommodates a disabled individual by reassigning her to a different (but equal in terms of pay, advancement, job satisfaction, et cetera) position.¹⁹¹ The employee, however, is dissatisfied with the reassignment, and demands her original job back with substantial alternative accommodations. A court might use the “substantially limits” clause to hold that although the job reassignment “affects” the employee, it does not “substantially limit” her in the life activity of working.

Suppose, alternatively, that an employer reallocates the job duties of a secretarial pool to accommodate a deaf secretary who cannot use an audial telephone. The employer relieves the deaf secretary of her telephone duties, and in place assigns her a proportionally equal share of extra typing work. The deaf secretary, unhappy with this arrangement, demands that the employer equip her with a TDD, allow her to retain the telephone duties that other secretaries have, and stop giving her the extra typing work. Again, a court might hold that although the employer’s proposed accommodation “affects” the deaf employee, it does not “substantially limit” her ability to work. It is thus clear that the “substantially limits” phrase can be meaningfully interpreted in a way that permits courts to find that a person’s employment opportunities are “substantially limited” when she is excluded from even one job because she is — or is regarded as — disabled.

2. The injection of the “substantially limits” test into the “regarded as” prong of the definition of “disability”

The discussion in *E. E. Black* was primarily directed at whether the plaintiff was *actually* handicapped — i.e., whether he met the first prong of the Rehabilitation Act’s definition of disability. Both *E. E. Black*¹⁹² and subsequent Rehabilitation Act cases,¹⁹³ however, have

191. For a comprehensive discussion of job reassignment, see R. Bales, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J. L. & PUB. POL. 161 (1992).

192. 497 F. Supp. at 1100.

193. See, e.g., *Mowat v. Transportation Unlimited, Inc.*, 984 F.2d 230, (8th Cir. 1992); *Byrne v. Board of Educ.*, 979 F.2d 560, 566-67 (7th Cir. 1992); *Reeder v. Frank*, 813 F. Supp. 773 (D. Utah 1992), *aff’d*, 986 F.2d 1428 (10th Cir. 1993); *Torres v. Bolger*, 610 F.

also applied this case-by-case, multi-factored approach to cases in which the plaintiff claims she is *regarded as* disabled. In these cases, courts import the "substantial limitation" requirement of the first prong of the definition of disability into the third prong of the definition. For example, in *Miller v. AT & T Network Systems*,¹⁹⁴ a telephone company employee was fired from his job installing telephones because his asthma and medically-induced heat sensitivity made it impossible for him to accept temporary transfers to extremely hot parts of the country.¹⁹⁵ The plaintiff sued, arguing first that he was a disabled person under the statute; and second that even if he was not in fact disabled, his employer regarded him as disabled.¹⁹⁶ Citing *E. E. Black*, the *Miller* court held that the plaintiff was not disabled because "[a]n impairment which only interferes with an individual's ability to do one particular job with one particular employer, but which does not significantly decrease the individual's ability to obtain satisfactory employment otherwise, is not 'substantially' limiting within the meaning of the statute."¹⁹⁷ Concerning the plaintiff's claim that he was "regarded as" disabled, the court held that the same analysis precluded a finding that the employee was regarded as disabled:

An employer does not necessarily regard an employee as handicapped simply by finding that the employee is incapable of satisfying the singular demands of a particular job. The statutory reference to a "substantial" limitation indicates instead that an employer regards an employee as handicapped in his ability to work by finding the employee's impairment to foreclose generally the type of employment involved.¹⁹⁸

In other words, the employee must prove that if the employer's *erroneous* perception of the employee's condition had been accurate, that condition would have foreclosed the employee's employment opportunities generally. It is not enough, according to the courts, for an employee to prove that the employer's erroneous perception of the employee's condition caused the employer to deny the employee a specific job.

Supp. 593, 597 (N.D. Tex. 1985), *aff'd on other grounds*, 781 F.2d 1134 (5th Cir. 1986).

194. 722 F. Supp. 633 (D. Or. 1989), *aff'd and opinion adopted*, 915 F.2d 1404 (9th Cir. 1990) (construing an Oregon statute as identical, in relevant part, to the Rehabilitation Act).

195. *Id.* at 637-38.

196. *Id.* at 639-40.

197. *Id.* at 639.

198. *Id.* at 640 (citing *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986)).

This interpretation has placed an onerous burden for employees to carry; such burden is illustrated by the fact that very few employees have managed to get past summary judgment on the issue. In *Scharff v. Frank*,¹⁹⁹ the plaintiff alleged that the United States Post Office denied her employment application for a letter carrier position because the Post Office regarded her as handicapped due to her history of musculoskeletal injuries.²⁰⁰ The Post Office admitted it regarded the plaintiff as impaired, but contended that her impairment only limited her ability to perform the specific job of letter carrier.²⁰¹ The court implied that if the Post Office had regarded her as unable to perform only a single job, the plaintiff would be unprotected by the Act.²⁰² The court noted, however, that the plaintiff had presented evidence that if she did in fact have the physical impairment the Post Office had regarded her as having, she would be unable to perform approximately half the unskilled jobs in the local economy.²⁰³ Based on this evidence, the court denied the Post Office's motion for summary judgment.²⁰⁴

The outcome of *Scharff* is unusual — nearly every other case in which the plaintiff has argued that an employer's erroneous perception of impairment substantially limited the plaintiff's ability to work has been decided in the employer's favor.²⁰⁵ The injection of this interpretation of the "substantially limited" test into the "regarded as" prong of the definition of disability has thus further diminished the protection afforded by the Rehabilitation Act.

199. 791 F. Supp. 182 (S.D. Ohio 1991).

200. *Id.* at 183-84.

201. *Id.* at 185.

202. *Id.* at 187.

203. *Id.* at 186-87.

204. *Id.* at 187.

205. See, e.g., *Mowat v. Transportation Unlimited, Inc.*, 984 F.2d 230 (8th Cir. 1992) (plaintiff alleged that his employer regarded his shoulder injury, which rendered the plaintiff unable to lift objects above shoulder-height as disabling; court granted employer's motion for summary judgment); *Byrne v. Board of Educ.*, 979 F.2d 560 (7th Cir. 1992) (plaintiff alleged that her employer regarded her allergy to fungus as disabling; court entered judgment for employer on jury verdict); *Reeder v. Frank*, 813 F. Supp. 773, (D. Utah 1992), *aff'd*, 986 F.2d 1428 (10th Cir. 1993) (plaintiff alleged that his employer regarded his speech impediment as disabling; court granted employer's motion for summary judgment); *Torres v. Bolger*, 610 F. Supp. 593 (N.D. Tex. 1985), *aff'd on other grounds*, 781 F.2d 1134 (5th Cir. 1986) (plaintiff alleged that his employer regarded his left-handedness as disabling; court granted judgment for employer after bench trial); but see *Cook v. State*, No. 93-1093, 1993 WL 470697, at *5 (1st Cir. Nov. 22, 1993) (affirming judgment for plaintiff who proved that her employer erroneously believed that her morbid obesity "foreclosed a broad range of employment options in the health care industry").

B. The EEOC Approach to the ADA

Like *E. E. Black*, the EEOC Regulations to the ADA adopt a case-by-case,²⁰⁶ multi-factored approach to deciding whether a person is substantially limited in the major life activity of working. The regulations explicitly reject the "once is enough" approach, and instead assert that the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."²⁰⁷ The EEOC gives three factors which courts are to consider.²⁰⁸

First, courts should consider "[t]he geographical area to which the individual has reasonable access."²⁰⁹ Although this factor is not discussed in the regulations in any more detail, it presumably reflects the *E. E. Black* court's judgment that an applicant should not be expected to move across the country to obtain a substantially equivalent job.²¹⁰

Second, courts should consider "[t]he 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)"²¹¹

The regulations cite as an example an individual who has a back condition preventing him from performing any heavy labor.²¹² He is substantially limited in the activity of working because his back condition eliminates his ability to perform a class of jobs (heavy labor).²¹³ This would be the case even if he were able to perform jobs in another class (e.g., semi-skilled jobs).²¹⁴

Third, the EEOC Regulations state that courts should consider

[t]he 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 geograph-

206. 29 C.F.R. app. § 1630.2(j) (1992).

207. 29 C.F.R. § 1630.2(j)(3)(i) (1992).

208. 29 C.F.R. § 1630.2(j)(3)(ii) (1992).

209. 29 C.F.R. § 1630.2(j)(3)(ii)(A) (1992).

210. *E. E. Black*, 497 F. Supp. at 1101.

211. 29 C.F.R. § 1630.2(j)(3)(ii)(B) (1992).

212. 29 C.F.R. app. § 1630.2(j) (1992).

213. *Id.*

214. *Id.*

ical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).²¹⁵

The regulations cite as an example an individual who is allergic to a substance found in most high-rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult.²¹⁶ The allergy substantially limits this individual's ability to perform a broad range of jobs in various classes that are conducted in high-rise office buildings, and hence the individual is substantially limited in her ability to work.²¹⁷

C. Flaws in the Rehabilitation Act and EEOC Approaches

As discussed *supra* in Parts IV-B and IV-C, both the judicial approach to the Rehabilitation Act and the EEOC approach to the ADA use a case-by-case, multi-factored approach to determine whether a person is substantially limited in the major life activity of working.²¹⁸ Because each approach adopts a somewhat different set of factors to be considered, criticism of one approach is not necessarily applicable to the other. On the other hand, the two approaches are sufficiently similar to justify discussing their many shortcomings together.

1. The EEOC Regulations inadequately account for the employee's training and expectations

Conspicuously understated in the EEOC Regulations' list of factors to be considered is the *E. E. Black* court's third factor: the individual plaintiff's training and job expectations.²¹⁹ This factor was critical to the outcome of *E. E. Black*.²²⁰ There, Crosby (the plaintiff) had already worked 3600 hours toward the 8000-hour requirement of becoming a master carpenter.²²¹ A judicial pronouncement that Crosby is not "substantially limited" in his employment opportunities because he is fully capable of becoming an electrician or a plumber would ignore Crosby's training and expectations.

The EEOC's second factor (the class of jobs from which the

215. 29 C.F.R. § 1630.2(j)(3)(ii)(C) (1992).

216. 29 C.F.R. app. § 1630.2(j) (1992).

217. *Id.*

218. *Id.*

219. *E. E. Black*, 497 F. Supp. at 1101.

220. *Id.* at 1101-02.

221. *Id.* at 1091.

plaintiff is excluded) is supposed to take into account "training, knowledge, skills, and abilities."²²² The example which the regulations provide to illustrate this factor (an individual with a back condition that precludes *any* heavy labor), however, emphasizes the regulations' apparent requirement that the plaintiff be excluded from a broad class of jobs.²²³ If Crosby's training and experience had been in constructing doors, and his disability precluded only doormaking, but not carpentry in general, it is unclear whether the EEOC regulations would permit the conclusion that Crosby was "substantially limited" in his ability to work. A better approach would be to remove entirely the focus on whether other jobs are available; a person in Crosby's situation should be protected whether his disability precludes him from the broad occupation of carpentry or the narrow specialty of door construction.

2. The Rehabilitation Act cases' emphasis on the employee's training and expectations restricts the protection afforded to nonskilled employees

Even if the EEOC Regulations are interpreted to account fully for employees' training and job expectations, this increased protection for experienced and well-trained employees is likely to come at the expense of those less experienced and less well-trained.²²⁴ This is so because both the Rehabilitation Act approach and the EEOC approach require the plaintiff to show that there are no (or very few) jobs available which mirror her experience and qualifications.²²⁵ A specialized employee is likely to have little difficulty making such a

222. 29 C.F.R. § 1630.2(j)(3)(ii)(B) (1992).

223. 29 C.F.R. app. § 1630.2(j) (1992).

224. See, e.g., *Taylor v. United States Postal Serv.*, 771 F. Supp. 882, 888 (S.D. Ohio 1990), *rev'd*, 946 F.2d 1214 (6th Cir. 1991) (concluding that the plaintiff's "lack of specialized training leaves him without the argument that his physical impairment prevents him from performing a job for which he [was] uniquely qualified"); see also *Haines*, *supra* note 125, at 546 (noting that "even an applicant who does not possess special training can experience [a] qualitative employment loss.").

225. 29 C.F.R. app. § 1630.2(j) (1992); but see *Cook v. State*, No. 93-1093, 1993 WL 470697 (1st Cir. Nov. 22, 1993):

an applicant need not subject herself to a lengthy series of rejections at the hands of an insensitive employer to establish that the employer views her limitations as substantial. If the rationale proffered by an employer in the context of a single refusal to hire adequately evinces that the employer treats a particular condition as a disqualifier for a wide range of employment opportunities, proof of a far-flung pattern of rejections may not be necessary.

Id. at *6.

showing. There are, for example, a limited number of job openings in Corpus Christi, Texas for doctors specializing in winter sports-related injuries. There are likely to be plenty of openings, however, for burger-flippers and dock workers.

ADA protection should be available to all employees — skilled and unskilled alike. The only way to protect the training and expectations of skilled employees while simultaneously protecting unskilled employees is to remove the requirement that plaintiffs prove that there are no other jobs available. The “once is enough” approach accomplishes this.

3. The EEOC Regulations fail to specify whether courts should assume that all other similarly-situated employers will apply the same exclusionary criteria

The first prong of the *E. E. Black* test, and the second and third prongs of the EEOC test, is to determine the number and types of jobs from which the impaired individual is disqualified.²²⁶ In making this determination, the *E. E. Black* court stated that “. . . it must be assumed that all employers offering the same or similar jobs would use the same requirement or screening process.”²²⁷ The purpose of this qualification, the court explained, is to prevent employers from imposing an aberrational but discriminatory job qualification, and then arguing that because the qualification is unique, it is not a substantial handicap to employment, and therefore the applicant is not protected as disabled.²²⁸

The EEOC’s initial proposed regulations stated that, when determining whether an individual is regarded as substantially limited in the life activity of working, “it should be assumed that all similar employers would apply the same exclusionary standard that the employer charged with discrimination has used.”²²⁹ This language was, however, deleted from the final regulations.²³⁰ It thus appears that the Regulations protect employers who impose aberrational job qualifications that discriminate on the basis of real or perceived impairments.

The injustice of this approach is well-illustrated by the Tenth

226. *E. E. Black*, 497 F. Supp. at 1100; 29 C.F.R. § 1630.2(j)(3)(ii)(B) and (C) (1992).

227. *E. E. Black*, 497 F. Supp. at 1100.

228. *Id.*

229. Equal Employment Opportunity for Individuals with Disabilities; Notice of Proposed Rulemaking, 56 Fed. Reg. 8578 (1991).

230. See 56 Fed. Reg. 35,728 (1991); see also Tucker, *supra* note 76, at 4-5 (1992).

Circuit case of *Welsh v. City of Tulsa*.²³¹ Welsh wanted to be a firefighter. He successfully completed all the job requirements, including a specialized college degree.²³² Nonetheless, his application was denied because he had decreased sensation in the ring and little fingers of his right hand.²³³ A statewide regulation stated that candidates for the fire department should be rejected for "disturbances of sensation . . . which are of such a nature or degree as to preclude the satisfactory performance of fire duties."²³⁴ The employer's physician, believing Welsh's impairment would pose a safety risk to Welsh if an ember dropped into his glove, recommended the denial of Welsh's employment application, and the employer rejected Welsh.²³⁵ Following his rejection, Welsh obtained the opinions of two other physicians that the impairment would not interfere with his employment as a firefighter: a glove with a high-closed gauntlet, fire resistant glove liner, and fire resistant tape would eliminate any possibility of hot embers entering the glove and working their way down into the area of decreased sensitivity.²³⁶ The employer conceded that its physician had erroneously applied the state criteria to Welsh, but nonetheless maintained that Welsh had not been the victim of discrimination on the basis of disability.²³⁷

On a motion for summary judgment, both the district court and the Tenth Circuit agreed. Because Welsh's impairment had only caused him to be rejected for a single job, the courts held that Welsh was not "substantially limited" in his ability to work.²³⁸ Further, the Tenth Circuit held that since the employer's physician had misapplied a state hiring criterion, Welsh could not assume that other fire departments would also misapply the hiring criterion so as to disqualify him.²³⁹ Thus, despite the employer's admission that it had rejected Welsh because it had erroneously regarded Welsh as impaired, the court held that Welsh could not prove that the employer had regarded

231. 977 F.2d 1415 (10th Cir. 1992).

232. *Id.* at 1416. Welsh's B.A. was in safety.

233. *Id.*

234. *Id.* (citing Okla. Firefighters Pension & Retirement Sys. Rule 2-2.13.2(c)).

235. *Id.* This behavior, excluding an employee or applicant for that employee or applicant's "own good," is precisely the type of paternalistic behavior that Congress intended to proscribe when it limited the employer's "safety defense" to situations in which reasonable accommodation would pose a direct threat to the safety of "other individuals" in the workplace. *See supra* note 76.

236. *Welsh*, 977 F.2d at 1416.

237. *Id.*

238. *Id.* at 1417-19.

239. *Id.* at 1419.

him as substantially limited in the ability to work.²⁴⁰ The effect of *Welsh* is thus to nullify entirely the "regarded as" prong of the anti-discrimination statute.

4. Both approaches reward employers for saying one thing and doing another

The *Welsh* case also illustrates another shortcoming of the Rehabilitation Act and EEOC approaches: they encourage employers to say one thing and to do another. *Welsh's* employer *treated* him as if his "impairment" "substantially limited" his employability, but simultaneously argued that the "impairment" *did not* "substantially limit" his employability.²⁴¹ Conversely, the employee is put in a catch-22 situation. First, she must prove that she either had, or was regarded as having, an impairment that made it extremely difficult to find meaningful employment opportunities.²⁴² If she succeeds at this, she must turn around and prove that the impairment (or perceived impairment) does not actually limit her ability to do the job for which she is applying.²⁴³ By dispensing with the requirement that a plaintiff prove the unavailability of other employment opportunities, the "once is enough" standard eliminates this problem.

5. Both approaches impose an unreasonable burden on plaintiffs

Both the Rehabilitation Act cases²⁴⁴ and the EEOC Regulations²⁴⁵ require the person claiming discrimination to shoulder the burden of establishing (presumably by expert testimony) that there are no (or very few) jobs available which mirror her experience and qualifications. Although the interpretive guidelines to the EEOC Regu-

240. *Id.*

241. Haines, *supra* note 125, at 548 (discussing *E. E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980)); Burgdorf, *supra* note 33, at 448.

242. Burgdorf, *supra* note 33, at 448.

243. *Id.*

244. *See, e.g., Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992) (granting employer's motion for summary judgment because plaintiff had failed to prove that his impairment precluded him from obtaining other jobs); *Miller v. AT & T Network Sys.*, 722 F. Supp. 633 (D. Or. 1989), *aff'd and opinion adopted*, 915 F.2d 1404 (9th Cir. 1990) (same); *James v. Runyon*, No. CIV.A.92-2262, 1992 WL 382311, at *4 (E.D. Pa. Dec. 9, 1992) (requiring the plaintiff to show each of the three *E. E. Black* factors as part of her *prima facie* case).

245. The EEOC's declaration that "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working," 29 C.F.R. § 1630.2(j)(3)(i) (1992), forces the plaintiff to prove otherwise. *See* Burgdorf, *supra* note 33, at 449 n.186.

lations state that an "onerous evidentiary showing" is not required,²⁴⁶ the plaintiff nonetheless must present "evidence of general employment demographics and/or of recognized occupational classifications that indicate the appropriate number of jobs" from which the plaintiff is excluded.²⁴⁷ This hardly sounds non-onerous; Rehabilitation Act cases indicate that courts will likely hold plaintiffs to high standards.²⁴⁸

As Bonnie Tucker notes, this burden is purely a creation of the EEOC; it is not supported in either the ADA or its legislative history.²⁴⁹ Enforcement of the ADA would be better served if the existence or nonexistence of alternative jobs was declared to be moot — the plaintiff's *prima facie* evidence of adverse employment action being dispositive. Alternatively, the burden should be shifted to the employer to prove that numerous other employment opportunities exist. This makes far more sense than requiring the plaintiff to prove a negative. It is also much fairer: the employer's burden would only arise after the plaintiff has made a *prima facie* showing of an adverse employment action due to a real or perceived impairment.

6. Both approaches reward the first-in-time discriminator

The focus of both the Rehabilitation Act cases and the EEOC Regulations on the existence or nonexistence of alternative jobs creates another bizarre anomaly — the first employer to discriminate against an individual will likely go unpunished, while subsequent discriminators are likely to be sanctioned. Andrew Haines explains:

If the analyzer rejects the qualitative analysis in certain "first-time rejection" fact situations — the facts of *E. E. Black, Ltd.*, for example — the statute would create an "anomalous gift" for the employer: one free act of handicap discrimination that the statute does not treat as a cognizable act, even though the employer's behavior plainly falls within the spirit of the statute. The net effect is obvious: the first employer can unfairly treat the applicant based on the latter's health condition without fear of statutory retribution, while the statute penalizes each successive employer who mistreats this applicant owing to the fact that these subsequent acts come within

246. 29 C.F.R. app. § 1630.2(j) (1992).

247. *Id.*

248. *See supra* note 244.

249. Tucker, *supra* note 76, at 4 n.11.

the *quantitative* interpretation of “substantially limits.”²⁵⁰

One cannot imagine that Congress intended this outcome. A “once is enough” approach — by making irrelevant the existence or nonexistence of alternative jobs — would eliminate this anomaly.

7. Both approaches reward big-city discriminators
while punishing small-town discriminators

The focus of both approaches on the existence or nonexistence of alternative jobs also means that enforcement of the ADA will depend on whether the plaintiff lives in a small town or a big city. Bonnie Tucker explains:

If he lives in a major city, for example, he may not be covered by Title I [of the ADA], because there are a variety of other jobs [available]. If, however, he lives in a small town, he may be covered by the ADA because of the smaller number of other jobs available in that area. Under the Title I regulations, where two people have identical physical characteristics but live in different locations, one may be held “disabled” and thus covered under the ADA, and the other may not. Aside from leading to incongruous results, this provision allows employers in metropolitan areas to engage in conduct that may be held discriminatory when engaged in by employers in less populated areas.²⁵¹

Again, Congress could not possibly have intended this. A “once is enough” standard — by ignoring the existence or nonexistence of other jobs — would eliminate this bizarre result.

8. Both approaches ignore the fact that the loss of one
job can constitute a substantial limitation
on an individual’s ability to work

The *E. E. Black* court stated that “men of common intelligence would not be shocked to find out that a person is substantially impaired in finding employment if he is disqualified from pursuing the profession of his choice.”²⁵² Similarly, it should come as no surprise that a person is substantially impaired in finding employment if she is rejected for even one job. The Rehabilitation Act cases and EEOC Regulations to the contrary defy both logic and the plain text of the

250. Haines, *supra* note 125, at 547.

251. Tucker, *supra* note 76, at 6.

252. *E. E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1102 (D. Haw. 1980).

ADA. Take, for example, the case of the telephone installer discussed in the introduction to this article, who was fired from his job installing telephones because his asthma and medically-induced heat sensitivity made it impossible for him to accept temporary transfers to extremely hot parts of the country.²⁵³ He lost his job, and with it his seniority and other benefits of long-term employment. Consider also the case of the plaintiff in *Reeder*,²⁵⁴ who's application for a promotion was denied because he had a minor speech impediment. Consider, too, Mr. Crosby in *E. E. Black*.²⁵⁵ If the court had upheld the employer's refusal to hire, Crosby would have "lost" the 3600 hours he had invested toward becoming a master carpenter. Similarly, consider the would-be firefighter in *Welsh*,²⁵⁶ who's lifelong dream of becoming a firefighter in his home town was shattered when the town, on the basis of an erroneous determination of disability, refused to hire him. These cases provide vivid illustrations of why the loss of even a single job can constitute a substantial limitation on an individual's ability to work. A person should be recognized as substantially limited in the major life activity of working if that person is excluded from even one job because she is — or is regarded as — disabled.

This article argues that the EEOC definition of "substantially limits" is too narrow and excludes a large class of persons Congress intended to protect. Congress' intent in passing the ADA is discussed in the next section of this article.

D. The ADA and Congressional Intent

Congress enacted the ADA to protect disabled Americans.²⁵⁷ Congress deliberately defined "disability" broadly,²⁵⁸ but simultaneously realized that the scope of the definition must be narrowed to exclude mere difference.²⁵⁹ Otherwise, everyone who deviated from

253. See *Miller v. AT & T Network Sys.*, 722 F. Supp. 633 (D. Or. 1989), *aff'd and opinion adopted*, 915 F.2d 1404 (9th Cir. 1990) (construing an Oregon statute which is identical, in relevant part, to the ADA).

254. *Reeder v. Frank*, 813 F. Supp. 773 (D. Utah 1992), *aff'd*, 986 F.2d 1428 (10th Cir.), *cert. denied*, 114 S. Ct. 61 (1993) (discussed *supra* Part III-B).

255. 497 F. Supp. 1088 (discussed *supra* Part IV-A-1).

256. *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992) (discussed *supra* Part IV-C-3).

257. 42 U.S.C. § 12101(b) (Supp. III 1992).

258. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 51-54 (1990).

259. *Id.* at 51-52.

the norm in any way (such as hair color, intelligence, personality, bruised knee) would have a cause of action, and the statute would be unworkable. For this reason, Congress limited the scope of persons to be protected under the Act in two ways. First, as discussed in Part II, Congress imposed an impairment requirement.²⁶⁰ Although "impairment," like "disability," is defined broadly, it nonetheless excludes mere physical characteristics and environmental, cultural, and economic disadvantages.²⁶¹

Not all impairments are disabling. Congress thus imposed a second limitation on the scope of persons to be protected by the ADA: in order to meet the definition of "disability," an impairment must result in a "substantial limitation of one or more major life activities."²⁶² Congress inserted the "major life activity" requirement to underscore its intent to limit protection of the ADA to persons who have, or who are regarded as having, major impediments.²⁶³ The House Report of the Committee on Education and Labor, for example, states:

A person with a minor, trivial impairment, such as an infected finger, is not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.²⁶⁴

Importantly, the requirement that a plaintiff demonstrate an actual, major impairment is limited to the first prong of Congress' tripartite definition of disability. A plaintiff meets the second prong of the definition if she can show that she was misclassified as having a disability, even if she does not in fact have the disability.²⁶⁵ Likewise, and as discussed in Part III of this article, a plaintiff meets the third prong of the definition if she can show that her employer regards her as disabled, regardless of whether she actually is disabled or whether other employers would consider her disabled.²⁶⁶ Legislative history further demonstrates that Congress intended the "regarded

260. *Id.* at 51.

261. *Id.* at 51-52.

262. H.R. REP. NO. 485, pt. 2, at 52.

263. H.R. REP. NO. 485, pt. 2, at 52; Burgdorf, *supra* note 33, at 447.

264. H.R. REP. NO. 485, pt. 2, at 52; *see also* S. REP. NO. 116, 101st Cong., 1st Sess. 23 (1990).

265. H.R. REP. NO. 485, pt. 2, at 53.

266. H.R. REP. NO. 485, pt. 3, at 30.

as" prong to be construed extremely broadly.²⁶⁷ The House Judiciary Report, for example, states that a person will be covered under the "regarded as" test "whether or not the employer's perception was shared by others in the field."²⁶⁸

A plaintiff, then, who proves that her employer fired her because she has an infected finger is entitled to the Act's protection. As Congress made clear, this is true regardless of whether other employers consider her disabled, and regardless of whether her minor impairment forecloses other job opportunities.²⁶⁹ To paraphrase Professor Bonnie Tucker: the employer has either misclassified the employee as having a disability, or regards the employee as having a disability although she is not, in fact, disabled.²⁷⁰ In the former case, the plaintiff meets the second prong of the ADA definition of disability; in the latter, the third. Either way, she is protected, and her employer's discrimination proscribed. A person's employment opportunities should thus be recognized as "substantially limited" when that person is excluded from even one job because she is — or is regarded as — disabled.²⁷¹

267. *Id.* at 30-31 ("This list of frequent workplace concerns is not completely exhaustive").

268. *Id.* at 30.

269. *Id.*

270. Tucker, *supra* note 76, at 4-5.

271. See Haines, *supra* note 125, at 547 (arguing that "the integrity of the statutory definition of "handicapped individual" requires the adoption of this qualitative [and not merely a quantitative] interpretation of the phrase "substantially limits"); Burgdorf, *supra* note 33, at 449 ("The ADA should ameliorate such problems with the concept of "major life activities" because of evidence that Congress intended that the denial of opportunities to an individual because of a physical or mental impairment shall in itself qualify as a substantial limitation on a major life activity."). Burgdorf argues that the ADA "represents a Congressional rejection of court decisions [such as *E. E. Black*] that hold that exclusion from a particular job was not sufficient to establish a substantial limitation on the major life activity of working." *Id.* at 449 n.186. Burgdorf thus criticizes the EEOC approach, stating that:

Where a worker has been discharged from or refused employment expressly because of a physical or mental impairment, it is inequitable to require that person to shoulder the burden of establishing (presumably by expert testimony) that he or she would be unable to perform other jobs. A fairer approach would accept showing that an employer has based a negative employment decision upon an individual's physical or mental impairment as establishing a *prima facie* case that the individual has been "regarded as having" a disability, and would estop an employer who has taken a disability-based job action from contesting the substantiality of the underlying actual or perceived impairment.

Id.

V. ALTERNATIVE APPROACHES

A. The "Once Is Enough" Standard

The EEOC requirement that a plaintiff prove she is disqualified from a broad range of jobs should be jettisoned in favor of the "once is enough" approach. Ideally, the burdens should be allocated as follows:

1. The plaintiff has the *prima facie* burden to show that the employer took adverse employment action against the plaintiff because of the plaintiff's actual or perceived impairment.
2. The burden of proof shifts to the employer to prove one of the statutorily-created affirmative defenses (e.g. direct threat to health or safety, or undue hardship).

This "once is enough" approach would eliminate all the shortcomings, discussed in Part III-C, inherent within the Rehabilitation Act and the EEOC approaches. It would protect employees who have been discriminated against even once on the basis of disability. Finally, it would further, rather than frustrate, the congressional purpose of protecting employees who are regarded as disabled. It would not, contrary to the assertions of several courts, render the "substantially limited" phrase meaningless.²⁷²

B. The Burden-Shifting Standard

An alternative approach is as follows:

1. The plaintiff has the *prima facie* burden to show that the employer took adverse employment action against the plaintiff because of the plaintiff's actual or perceived impairment.
2. The burden of proof shifts to the employer to prove either:
 - a. one of the statutorily-created affirmative defenses; or
 - b. that
 1. within the geographical area to which the plaintiff has

272. See *supra* Part IV-A-1.

reasonable access, . . .

2. the same or substantially similar job with the same or substantially similar terms and conditions of employment is available from at least five other employers . . .

3. who do not apply the same exclusionary criteria as does the employer-defendant.

This approach would first require the plaintiff to make the "once is enough" showing. After this, the burden would shift to the employer to prove that numerous other employment opportunities exist. This is much fairer, because the employer's burden would only arise after the plaintiff has made a *prima facie* showing of an adverse employment action due to a real or perceived impairment.

This burden-shifting approach would significantly ease the plaintiff's now onerous burden of proving that no jobs exist for which she is qualified. It would not, however, eliminate entirely the limitations of the current approach discussed in Part III-C. Nonetheless, to the extent that it reduces employers' abilities to use the existence of other jobs to defeat plaintiffs' claims of discrimination, this approach reduces the incidence of these limitations. It also preserves — albeit in a limited way — the current meaning of the "substantially limited" phrase.

CONCLUSION

Nothing could be plainer than the fact that a person who is denied a job or who is fired because of a real or perceived disability has been "substantially limited" in employment. The EEOC Regulations to the ADA, however, require such a person to prove that her disability disqualifies her from all or nearly all the jobs in her geographical area for which she is qualified. This approach defies logic, congressional intent, and the plain meaning of the Americans with Disabilities Act. Courts should jettison the EEOC Regulations in favor of a "once is enough" approach, which recognizes that a person's employment opportunities are "substantially limited" when she is excluded from even one job because she is — or is regarded as — disabled. At a minimum, courts should apply a burden-shifting approach, which shifts to employers the burden of proving the existence of alternative employment opportunities.