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Defining “Disability” in a Civil Rights Context: The Courts’ Focus on
Extent of Limitations as Opposed to Fair Treatment and Equal
Opportunity

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INTRODUCTION

In 1990, when it enacted the Americans with Disabilities Act (ADA), Congress adopted a definition of the term “disability” that had been used under Title V of the Rehabilitation Act since the 1970s. The definition included individuals with a physical or mental impairment that substantially limits at least one major life activity, individuals with a history of such an impairment, and people who are regarded by others or perceived as having such an impairment. In the legislative history of the ADA, Congress indicated its intention that this definition protect people with epilepsy, diabetes, mental health conditions, amputees, and others who are able to mitigate the effects of their impairments but nonetheless encounter discrimination in the workplace and other settings because of fears, myths and stereotypes of individual employers and other covered entities.

In the years since the ADA’s enactment, the federal courts have chipped away at the law’s protected class by adopting overly narrow rules for the analysis of who meets the statutory definition of “disability.” As a result of a string of Supreme Court decisions and hundreds of cases in the lower federal courts, it has become very difficult for individuals with certain health conditions to establish that they have a disability for purposes of the ADA. People with epilepsy, diabetes, psychiatric diagnoses, and other conditions that are well controlled with medications or other disease management strategies are routinely dismissed as outside the protection of the statute. Win or lose, many employment discrimination victims are now subjected to irrelevant questions about their personal lives and private health information that have nothing to do with the merits of their discrimination case. As a result of the narrowing of the definition of disability, millions of Americans who continue to experience disability discrimination are barred from challenging these abuses in the courts.

When a plaintiff with epilepsy attempts to challenge his or her job termination under the ADA, the most likely scenario is that the person will be found not impaired enough to satisfy the new “disability” standard established by the courts. The practical impact of this result is that, regardless of the merits of the individual’s discriminatory treatment claim, this plaintiff never gets to prove the case in a court of law. In those rare instances where the plaintiff can produce adequate evidence to establish the existence of a disability for purposes of the ADA, the

employer will use often use this same evidence of impaired functioning to support its claim that the plaintiff is not qualified for the position in question. This Catch-22 was not intended by Congress and has had the perverse effect that individuals with disabilities who are clearly capable of working have become unable to rely on the ADA for protection against disability discrimination.

In light of the unwillingness of the U.S. Supreme Court and the lower federal courts to interpret the ADA's definition of disability in an inclusive manner, consistent with the intent of the law's drafters in Congress, it is time to rewrite the ADA's definition of disability and restore civil rights protections to the millions of Americans who experience disability-based discrimination. Disability civil rights protections should be placed on equal footing with the protections afforded other protected classes under Title VII of the Civil Rights Act. Title VII does not require claimants to make cumbersome evidentiary showings to establish that they fall within a protected class. Similarly, an ADA plaintiff should be able to focus on his or her qualifications for a particular position and not be required to emphasize the irrelevant details about his impairment in order to state a claim.

Section (I) of this paper provides an overview of the origins of the statutory language found in the ADA definition of disability. Section (II) considers the dramatically narrowed scope of the ADA's coverage resulting from a series of hostile federal court decisions. These rulings have construed the ADA's definition of disability to exclude individuals with a vast array of significant physical and mental conditions from any protections under the ADA. This outcome is devastating, unjust, untenable, and contrary to the original intent of the sponsors of the ADA. Section (III) looks to the experiences of several states that have adopted independent and broader definitions of "disability" for the purposes of antidiscrimination statutes. Similarly, Section (IV) examines the models and definitions of "disability" used beyond the borders of the United States, by other countries and by the World Health Organization. Section (V) outlines a broader approach to the statutory framework.

I. Origins of the ADA Definition of Disability

The definition of “disability” in the ADA is based on the definition of “handicapped individual” contained in the Rehabilitation Act of 1973, as amended in 1974. The effort to enact the Rehabilitation Act began in 1972, when a group in Congress sought to beef up what had been called the Vocational Rehabilitation Act by crafting a broader bill.¹ If enacted, the bill would significantly expand federal efforts to improve the lives of people with disabilities by moving from the traditional vocational rehabilitation model to a more global approach. As President Nixon articulated it in 1973, the year he finally signed a compromise version of the bill after two vetoes, “the final goal of all rehabilitation services was to improve in every possible respect the lives as well as livelihood of individuals served.”² Title V of the 1973 Act established affirmative action obligations for federal agencies and federal contractors in the hiring of disabled workers, created a federal agency charged with ensuring compliance with the access requirements of the Architectural Barriers Act of 1968, and extended civil rights protections to disabled employees or customers of entities that receive federal support.

This final important element was codified in Section 504 of the bill, stating: “No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” Rather than prohibiting discrimination “on the basis of” handicap, Section 504 applied only to “otherwise qualified handicapped individuals” who had encountered discrimination “solely by reason of” their “handicap” or disability. This distinction was important, because in order to satisfy Section 504, a person with a disability would need to establish his or her status as a “handicapped individual” before challenging an allegedly discriminatory act such as a refusal to hire. In contrast, under Title VII, a woman or man seeking to challenge a hiring decision as gender discrimination is assumed to be a member of the protected class and is able to focus on the evidence related to the alleged discrimination.

The 1973 Act used a vocational rehabilitation model, defining a handicapped individual as a person who “has a physical or mental disability which for such individual constitutes or results in

a substantial handicap to employment [and] can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . .”³ In 1974, Congress amended the definition for the purposes of the nondiscrimination provisions, defining handicapped individual as a “person who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.”⁴ Under the first prong, an individual was considered “handicapped” if he had a physical or mental impairment that substantially limited one or more major life activities. The second prong extended protection to people with a history of such an impairment, and the third prong provided coverage for individuals who were regarded by others as having such an impairment. The intention behind adopting the now-familiar three-pronged definition was to broaden the scope of coverage to further the civil rights purposes of the nondiscrimination mandate.⁵

The Rehabilitation Act of 1973 was not the first effort to enact a federal law prohibiting disability discrimination. In 1972, Senator Hubert H. Humphrey Jr. (D-MN) proposed to amend the Civil Rights Act of 1964 to insert the word “handicap” among the list of protected classes in Title VII of that law.⁶ Title VII already outlawed discrimination “on the basis of” characteristics like race, color, national origin, gender and religion. Aware of the discrimination that artificially limited Americans with disabilities in part because of his personal experience of his granddaughter with Down syndrome being refused admission by a public school, Senator Humphrey attempted unsuccessfully in 1972 to extend civil rights protections to Americans with disabilities by adding one word in key places in the Civil Rights Act of 1964.

In 1978, after a long battle on the part of disability advocates around the country to get regulations released interpreting Section 504, the Department of Health, Education and Welfare finally promulgated the regulatory standards that would further define the nature of federally prohibited disability discrimination under Section 504.⁷ These regulations included the three-pronged definition of a “handicapped individual,” and defined “physical or mental impairment” to include numerous medical conditions which may be controlled or mitigated through treatment, including emotional or psychological disorders.⁸ Further, the commentary to the regulations provides a non-exclusive list of additional examples, including hearing impairments, epilepsy,

multiple sclerosis, cancer, heart disease, diabetes, drug addiction, and alcoholism.⁹ The commentary notes that federal disability nondiscrimination law should not be limited to “traditional disabilities,” nor to “severe disabilities.”¹⁰

In late 1986, the National Council on the Handicapped (now known as the National Council on Disability) began work on the first draft of what would become the ADA. This body, which was created in the 1978 reauthorization of the Rehabilitation Act and had become an independent federal agency in that law’s 1984 reauthorization, is charged with advising the President and the Congress on public policy issues affecting people with disabilities. NCD was made up of 15 members, all appointed by President Reagan and confirmed by the Senate. Under the leadership of NCD chairperson Sandra Swift Parrino and vice chairperson Justin Dart, Jr., NCD issued a 1986 report called *Toward Independence*, which called on Congress to “enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap.”¹¹ NCD went on to recommend that:

[The proposed law] should straightforwardly prohibit ‘discrimination on the basis of handicap,’ without establishing any eligibility classification for the coverage of the statute. Discrimination on the basis of handicap should be broadly construed to apply the requirements of the statute to all situations in which a person is subjected to unfair or unnecessary exclusion or disadvantage because of some mental or physical impairment, perceived impairment, or history of impairment.¹²

NCD’s approach constituted a clear endorsement of Hubert Humphrey’s original approach to federal disability non-discrimination, and an unambiguous rejection of the approach adopted in Section 504 of the Rehabilitation Act and the regulations interpreting that definition. NCD asserted that the 504 approach was problematic because it forced people to identify as a person with a disability according to a medical model that emphasized the nature and scope of their “impairments” and “limitations.”¹³ NCD noted at the time that the 504 approach did not provide comprehensive protection and allowed individuals to fall through the cracks.¹⁴ It also noted the

problem with evidence of the nature and scope of an individual's impairment being used against that individual when his or her qualifications for a particular position are assessed.¹⁵

In 1988, NCD issued a follow-up report called *On the Threshold of Independence*, which included as an appendix a draft version of the Americans with Disabilities Act. The draft bill was based on the approach outlined in the recommendations in *Toward Independence*, augmented by the comments and advice received from disability advocates and Congressional leaders in the intervening 18 months. The draft bill included a definition of "on the basis of handicap" and a definition of "physical or mental impairment," as follows:

(1) ON THE BASIS OF HANDICAP. - The term "on the basis of handicap" means because of a physical or mental impairment, perceived impairment, or record of impairment.

(2) PHYSICAL OR MENTAL IMPAIRMENT. - The term "physical or mental impairment" means-

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems:

(i) the neurological system;

(ii) the musculoskeletal system;

(iii) the special sense organs, and respiratory organs, including speech organs;

(iv) the cardiovascular system;

(v) the reproductive system;

(vi) the digestive and genitourinary systems;

(vii) the hemic and lymphatic systems;

(viii) the skin; and

(ix) the endocrine system; or

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

(3) PERCEIVED IMPAIRMENT. - The term “perceived impairment” means not having a physical or mental impairment as defined in paragraph (2), but being regarded as having or treated as having a physical or mental impairment.

(4) RECORD OF IMPAIRMENT. - The term “record of impairment” means having a history of, or having been misclassified as having, a mental or physical impairment.¹⁶

Importantly, this 1988 draft remained true to NCD’s 1986 admonition that the ADA not establish an onerous eligibility classification for coverage under the statute, and did not incorporate the 504 approach of requiring that the impairments “substantially limit one or more major life activities.”

NCD’s influence was tangible in the first version of the ADA, introduced in April of 1988 by Senators Lowell Weicker (R-CT) and Tom Harkin (D-IA) and Representative Tony Coelho (D-CA).¹⁷ In the Americans with Disabilities Act of 1988, as the bill was called, the 504 definitional approach was discarded in favor of the broader language developed by NCD in consultation with disability advocates around the country. When Senator Weicker lost to Joseph Lieberman in his Senate election in November of 1988, Senator Harkin became the chief sponsor of the ADA in the Senate. Concerned that the 1988 version of the bill was too extreme to be enacted and signed by President Bush, Senator Harkin set about rewriting the bill into a version that was more likely to pass.¹⁸ The definition in Senator Harkin’s new version of the ADA, introduced in 1989, simply repeated the language that had been used under Section 504. This language, which remained in the bill that passed in 1990, defined “disability,” with respect to an individual, as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.¹⁹

Although some in the disability advocacy community protested what they viewed as a weakening of the 1988 legislation with regard to the definition of disability,²⁰ the community came to rally behind the new bill as their best hope for a law that could actually garner bipartisan support in Congress and the endorsement of the Bush Administration. Also, in light of the case law interpreting the 504 language, few would have expected the narrowing interpretations of the 1990s.

II. The Unexpected Definition of Disability Crisis

In 1989, the sponsors of the Americans with Disabilities Act chose to mirror the definition of disability found in the Rehabilitation Act of 1973, as amended. This decision was pragmatic: a statute that reiterates existing standards is far more likely to succeed politically. Equally important, the judicial interpretations of the definition in the Rehabilitation Act in the 1980s had been broad and inclusive, consistent with the remedial purposes of the legislation. At the time of the ADA hearings, existing Rehabilitation Act case law extended civil rights protections to numerous groups of persons with disabilities which were either wholly or partially mitigated through treatment and other measures. For example, insulin-controlled diabetes was held to be covered under Section 504 prior to the passage of the ADA.²¹ Similarly, epilepsy and seizure disorders were repeatedly deemed disabilities.²² Courts also recognized that diseases such as HIV, even in their “asymptomatic” phases, may be disabilities.²³ The pre-ADA courts also held that Section 504 protects recovered alcoholics and drug users.²⁴

Additionally, the “regarded as” prong of the Rehabilitation Act had been broadly interpreted by the United States Supreme Court to protect persons who were limited and discriminated against because of the “prejudice, stereotype, or unfounded fear” of others. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987). “By includ[ing] not only those who are actually physically impaired, but also those who are regarded as impaired . . . Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical

limitations that flow from actual impairment.” *Id.* at 284. Further, according to *Arline*, “a broad definition, one not limited to so-called traditional handicaps, is inherent in the statutory definition.” *Id.* at 280 n.5.²⁵ The lower courts employed similarly broad interpretations.²⁶ By incorporating into the ADA virtually the same definition of disability contained in Section 504, Congress intended to adopt and ratify that case law. *Bragdon*, 118 S. Ct. at 2208 (Congress is presumed to know the state of the law when it passes legislation, and its use of terms which have been previously construed indicates an intent to ratify such interpretations).²⁷

From the relatively rosy vantage point of 1989, it would have been difficult to predict the onslaught of miserly decisions that have greeted the ADA’s definition of disability. Beginning in the mid-1990s, numerous federal courts applying an overly restrictive reading of the federal definition have dismissed claims brought by persons facing egregious discrimination on the basis of significant mental and physical conditions. Indeed, a widely circulated study conducted by the American Bar Association and published in 1998 found that, among ADA employment cases filed since 1992, employers won 92 percent of the time, often due to the restrictive application of the federal definition. 22 *Mental and Physical Disability L. Rep.* 403, 404 (May-June 1998).²⁸

The culmination of this devastating trend was “the *Sutton* trilogy,” three Supreme Court cases decided in the Summer of 1999. In *Sutton v. United Airlines*, the Supreme Court ruled that individuals with successfully treated medical conditions – persons who are currently functioning well due to mitigating measures such as medications or prosthetic devices – are not protected as “persons with disabilities” under the ADA. Boldly narrowing the protected class in a manner opposed by the federal agencies Congress entrusted to enforce the statute, this ruling erased protections for millions of persons with stabilized diabetes, seizure disorders, heart disease, and psychiatric conditions.

The *Sutton* Court also narrowly construed the “regarded as” prong to virtually eliminate most “failure-to-hire” claims. Accepting the “class of jobs” rule contained in the EEOC’s regulations, the Court concluded that two applicants rejected on the basis of their vision impairment were not regarded as substantially limited in working, as there was no perception regarding a broad class of jobs. The Court’s narrow construction was bluntly articulated: “An employer runs afoul of the

ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment – such as one’s height, build, or singing voice – are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.” 527 U.S. at 490-91.

The latest Supreme Court ruling, the unanimous *Toyota v. Williams*, took the already battered statutory language and added still additional barriers to coverage. Under *Williams*, the phrase “substantially limited” is restricted further to “prevented or severely restricted.” Additionally, the major life activity of “performing manual tasks” was limited to manual tasks that are “central to most people’s daily lives.” Further, contrary to the usual rule of statutory construction in the context of civil rights legislation, the Court announced that the definitional phrase “substantially limited in a major life activity” must be “interpreted strictly to create a demanding standard for qualifying as disabled.” 534 U.S. 184, 197-98 (2002).

In the hundreds of federal cases ruling that ADA plaintiffs are not disabled, certain patterns emerge. In “actual” or prong one disability cases, hostile court rulings frequently turn on whether the individual is “substantially limited.” Many opinions hold that while the plaintiff has certain documented limitations as a result of a mental or physical impairment, these limitations are not great enough to constitute *substantial* limitations. Persons with mental disabilities have been particularly hard hit by the federal judiciary’s miserly reading of the definition of disability.²⁹ However, persons with significant physical disabilities have also been excluded.³⁰ To reach this conclusion, courts often note how capable the particular individual is in various activities – an analysis from the vocational rehabilitation model of disability – and/or how incompetent the average person in society is by comparison.³¹ In many cases, the plaintiff deemed non-disabled required only the most modest steps from their employer in order to retain their employment – a minor alteration or simply garden-variety equal treatment.

In cases relying upon the “regarded as” or third prong – the provision intended by Congress to ensure the broadest possible standard to combat myths and stereotypes – plaintiffs face an even

more onerous challenge: not only must they demonstrate the illusive “substantial limitation,” but they must situate this construct in the theoretical mind of the employer.³² The “class of jobs” regulation adopted by the EEOC and embraced by virtually every circuit makes this difficult task virtually impossible. In failure-to-hire cases, in which rejected applicants claim that they were unfairly excluded by medical screening despite their actual ability to perform the job, employers routinely convince courts that they only “regarded” the applicant as unable to perform a single job.

A few ADA plaintiffs have faltered on the requirement of a mental or physical “impairment,” including cases in which the worker is discriminated against on the basis of obesity or size.³³ Additional obstacles are associated with the term “major life activity,” particularly when the activity limited is working or performing manual tasks.³⁴ Under existing case law, persons with orthopedic impairments are highly likely to be excluded from protection because they cannot show a “substantial limitation” in a broad enough range of jobs or manual tasks.³⁵ These individuals have often acquired their repetitive stress injuries or back injuries on the job while performing services for the summary judgment-winning defendant. However, with the ADA judicially recast as a statute protecting only individuals with the most severe impairments, most workers facing discrimination can no longer obtain a federal remedy.

III. Disability Definitions Used in State Civil Rights Laws

As the U.S. Supreme Court noted in *Garrett*, “by the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that ‘this is probably one of the few times where the States are so far out in front of the Federal Government, it’s not funny.’ Hearing on Discrimination Against Cancer Victims and the Handicapped before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 100th Cong., 1st Sess., 5 (1987).” *Bd. of Trustees v. Garrett*, 531 U.S. 356, 368 n.5 (2001).

At that time in the late 1980s, state disability laws presented a diverse set of definitions for the terms “handicap” and “disability.” Some state statutes contained no definitions. Throughout the

early 1990s, however, many of these statutes were amended to more closely reflect the federal ADA, which was then regarded as the “state of the art” in disability discrimination. For example, in 1974 California enacted a prohibition against discrimination on the basis of “physical handicap,” and adopted a broad definition of “physical handicap” that did not include the requirement of a limitation in a major life activity: “‘Physical handicap’ includes impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services.” This definition – which included no requirement of a “substantial limitation of a major life activity” – was interpreted to bar discrimination against a broad range of physical impairments.³⁶ In 1992, however, California amended its law in response to the enactment of the federal ADA, and changed its definition of physical handicap to more closely parallel the ADA definition by requiring a “limitation” (but not a “*substantial* limitation”) of a major life activity.

Similarly, at the time the ADA was being considered, the state of Michigan’s disability discrimination law defined “handicap” broadly as: “a determinable physical or mental characteristic of an individual or a history of the characteristic which may result from disease, injury, congenital condition of birth, or functional disorder which characteristic . . . is unrelated to the individual’s ability to perform the duties of a particular job . . .” Mich. Code L. § 37.1103(b)(i) (1989); *see also Sanchez v. Kostas LaGoudakis* (Sanchez I), 440 Mich. 496, 486 N.W.2d 657 (1992) (reviewing and applying 1989 definition to find that person perceived to have HIV/AIDS could pursue her claim). In 1990, however, the Michigan statute was amended to require that the characteristic “substantially limit[] 1 or more of the major life activities of that individual.” *Sanchez I*, 440 Mich. at 501 n.12. Michigan’s Supreme Court has construed the 1990 version of its statute narrowly, and consistent with *Sutton*, to exclude a plaintiff’s claims of “regarded as” disability discrimination on the basis of her multiple sclerosis. *Michalski v. Bar-Levav*, 463 Mich. 723, 625 N.W.2d 754 (2001) (noting that prior version “contained no requirement that the determinable physical or mental characteristic substantially limit a major life activity,” and concluding that the lower court’s reliance on *Sanchez I* was thus “misplaced”).

During the same era, the District of Columbia anti-discrimination statute defined handicap as “a bodily or mental disablement which may be the result of injury, illness or congenital condition

and for which reasonable accommodation can be made.” D.C. Code § 1-2512(a)(1)(1987). In 1994, this provision was repealed, and replaced with the federal disability definition. *See Strass v. Kaiser Foundation Health Plan*, 744 A.2d 1000 (D.C. App. 2000) (tracking history of definition, and describing amended statute as “more restrictive”).

Today, the vast majority of the states – approximately 43 – have adopted anti-discrimination laws that track the ADA definition of disability virtually verbatim.³⁷ Several states have taken their own paths, however. California and Rhode Island have recently amended their disability discrimination statutes to explicitly reject federal case law narrowing the scope of the protected class. Further, Connecticut, New Jersey, New York, and Washington state never amended their statutes to reflect the ADA, and thus have never required a “limitation” or “substantial limitation” of a “major life activity” to demonstrate disability. Finally, the state Supreme Courts of Massachusetts and West Virginia have recently rejected United States Supreme Court case law. These States provide important examples for consideration as we seek to redefine “disability” for purposes of the federal ADA.

1. California.

California’s employment discrimination statute has never precisely mirrored the federal ADA’s definition of disability. In response to the increasingly narrow federal case law on definition, disability rights litigators pointed out the differences between the federal and state laws – that the state law is broader because it does *not* require a substantial limitation of a major life activity. These distinctions engendered significant legal debate.³⁸ In 2000, in response to this legal debate, as well as the worsening state of federal disability discrimination law, the California State Legislature again amended its statute to make perfectly clear that an independent and broader definition of disability applies under state law, enacting the following definitions of mental and physical disability:

“Mental disability” includes . . . Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. . . . Having a record or history of a mental or psychological disorder or condition . . . which is known

to the employer . . . Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult. Being regarded or treated . . . as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability . . . Cal. Gov't Code § 12926(i).

“Physical disability” includes . . . Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that . . . [A]ffects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine [and] Limits a major life activity. . . . Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment . . . which is known to the employer . . . Being regarded or treated . . . as having, or having had, any physical condition that makes achievement of a major life activity difficult. Being regarded or treated . . . as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability . . . Cal. Gov't Code § 12926(k).

Notably, the revised provisions do not require an “impairment” or “disorder”; rather, a mental or physiological “condition” is sufficient.

Additionally, with the 1999 *Sutton* trilogy freshly decided – a dramatic demonstration of the often surprising results of statutory interpretation – the Legislature set forth explicit instructions on how these definitions were to be construed. These rules respond to a number of problems associated with the federal definition as interpreted, including the obstacles to claims brought under the “actual” disability prong created by the “mitigating measures” rule and an extreme interpretation of the word “substantially,” as well as the barriers to failure-to-hire and other discrimination cases brought under the “regarded as” prong of disability caused by the “class of jobs” analysis. Thus, the Legislature stated:

“Limits” shall be determined without regard to mitigating measures such as medications,

assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. Cal. Gov't Code §§ 12926(i)(1)(A), (k)(1)(B)(i). Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Cal. Gov't Code § 12926.1.³⁹

Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. Cal. Gov't Code § 12926.1.

The Legislature has determined that the definitions of “physical disability” and “mental disability” under the law of this state require a “limitation” upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a “substantial limitation.” This distinction is intended to result in broader coverage under the law of this state than under that federal act. Cal. Gov't Code § 12926.1. A mental or psychological disorder or condition, or a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss, limits a major life activity if it makes the achievement of the major life activity difficult. Cal. Gov't Code § 12926(i)(1)(B), (k)(1)(B)(ii).

Under the law of this state, “working” is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments. Cal. Gov't Code § 12926.1.

Additionally, although the 2000 provisions were added prior to the Supreme Court's opinion in *Williams*, the amendments include an explicit rejection of the strict construction advised by that opinion, and instead require broad interpretations of the terms “disability” and “major life activities”:

The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical

disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling. Cal. Gov't Code § 12926.1. "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working. Cal. Gov't Code § 12926(i)(1)(C), (k)(1)(B)(iii).

The new provisions are plainly designed to shift the focus of trial courts away from coverage and toward the merits of particular cases.⁴⁰

2. Connecticut.

Connecticut's state law has long defined "physically disabled" as referring to "any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device." Conn. Gen. Stat. § 461-51(15). Thus, while requiring an "impairment," the state law has never required a "limitation" or "substantial limitation" of a major life activity. Until recently, the state law did not include a prohibition on discrimination on the basis of mental disability. In 2001, the state Legislature added this protection, and defined "mental disability" broadly – albeit medically – as follows:

"Mental disability" refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders."

2001 Conn. Public Act No. 28 (amending § 46a-51).

3. New Jersey.

Unlike many states, New Jersey never amended its disability discrimination statute to conform to the ADA definition of disability. The New Jersey Legislature first amended its civil rights statute

to bar discrimination on the basis of “physical handicap” in 1972. In 1978, the state expanded its protections to persons with “non-physical handicaps.” See *Viscik v. Fowler Equipment Co.*, 173 N.J. 1 (2002) (reviewing history of statute). The original definition remains virtually unchanged to the present day, and states:

“Handicapped” means suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Handicapped shall also mean suffering from AIDS or HIV infection.

N.J. Stat. § 10:5-5 (q). Thus, New Jersey’s statute has never required a “limitation” or “substantial limitation” in a major life activity.

In 1982, the New Jersey Supreme Court endorsed a broad construction of this statute, ruling that the definition is not limited to “severe” disabilities:

We reject such an interpretation of the New Jersey statute. We need not limit this remedial legislation to the halt, the maimed or the blind. The law prohibits unlawful discrimination against those suffering from physical disability. As remedial legislation, the Law Against Discrimination should be construed “with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.”

Andersen v. Exxon Co., 89 N.J. 483, 495, 446 A.2d 486 (1982). This year, the New Jersey Supreme Court reiterated *Andersen*’s central holding, stating:

The term ‘handicapped’ in LAD [Law Against Discrimination] is not restricted to ‘severe’ or ‘immutable’ disabilities and has been interpreted as significantly broader than the analogous provision of the Americans with Disabilities Act.

Viscik, 173 N.J. at 16 (citing *Failla v. City of Passaic*, 146 F.3d 149, 154 (3d Cir. 1998)).⁴¹ Indeed, the statute has been interpreted to cover a broad range of medical conditions.⁴² However, medical evidence – including an “accepted” medical diagnosis – is required.⁴³

4. New York.

New York’s anti-discrimination statute defines the term “disability” as follows: “(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment . . .” NY CLS Exec § 292 (21).⁴⁴ Thus, while requiring an “impairment,” New York has never required a “limitation” or “substantial limitation” of a major life activity. In *State Div. of Human Rights v. Xerox*, 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985), the New York Court of Appeals upheld the trial court’s finding that obesity was a handicap within that state’s anti-discrimination statute. The highest court rejected the employer’s contention that the law covered only “immutable disabilities,” and found that “the statute protects all persons with disabilities and not just those with hopeless conditions.” *Id.* The court also found that the complainant’s obesity was a “medical condition” that was “clinically diagnosed” in accordance with the statutory definition. *Id.*; see also *McEniry v. Landi*, 84 N.Y.2d 554, 644 N.E.2d (1994) (alcoholism is covered disability). Again, as with the New Jersey statute, medical evidence and a medical diagnosis is required.⁴⁵

5. Washington.

Washington State’s Law Against Discrimination, Rev. Code Wash. § 49.60.180, prohibits discrimination on the basis of a “sensory, mental, or physical disability,” but provides no

definition for this phrase. However, the state's Human Rights Commission issued regulations providing the following guidance:

“The presence of a sensory, mental, or physical disability” includes, but is not limited to, circumstances where a sensory, mental, or physical condition: (a) Is medically cognizable or diagnosable; (b) Exists as a record or history; (c) Is perceived to exist whether or not it exists in fact.

A condition is a “sensory, mental, or physical disability” if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question, or was denied equal pay for equal work, or was discriminated against in other terms and conditions of employment, or was denied equal treatment in other areas covered by the statutes. In other words, for enforcement purposes a person will be considered to be disabled by a sensory, mental, or physical condition if he or she is discriminated against because of the condition and the condition is abnormal.

Wash. Admin. Code § 162-22-020(2); *see also Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 641 & n.3, 9 P.3d 787 (2000) (“the Americans with Disability Act of 1990’s (ADA) definition of ‘disability’ is narrower” than state definition) (plaintiff with lumbar strain and broken foot restricting her to light duty was “disabled” under state law). Thus, echoing the social model of disability, Washington’s regulation finds “disability” where discrimination occurs on the basis of some abnormal physical or mental condition.

6. Massachusetts and West Virginia.

Embracing virtually every argument advanced by disability rights advocates before the United States Supreme Court in *Sutton*, the Massachusetts Supreme Judicial Court ruled that “mitigating measures” should not be considered in determining whether an individual has a “handicap” under Massachusetts antidiscrimination law. *Dahill v. Police Dep’t of Boston*, 434 Mass. 233, 748 N.E.2d 956 (2001). According to the *Dahill* court, the public policy underlying the antidiscrimination statute supported its interpretation that mitigating measures should be excluded. By contrast, embracing the *Sutton* standard would “exclude[] from the statute’s

protection numerous persons who may mitigate serious physical or mental impairments to some degree, but who may nevertheless need reasonable accommodations to fulfill the essential functions of a job.” *Id.* at 240 & n.10 (noting need of employees with controlled diabetes, epilepsy, or heart disease to take occasional time off for doctor’s appointments, to take medication, or to receive testing or therapy).

The West Virginia Supreme Court rejected another bulwark of the federal disability definition jurisprudence – the principle that a person excluded from employment on the basis of a physical or mental impairment cannot proceed on a “regarded as” theory if he cannot show a perceived limitation in a broad class of jobs, but can “only” show that the employer regarded him as limited in one job.⁴⁶

IV. INTERNATIONAL APPROACHES TO DISABILITY CIVIL RIGHTS LAWS

Just as state law approaches to disability civil rights laws vary, international approaches are even more diverse. Some countries emphasize inclusiveness and comprehensiveness, while others rely heavily on strict medical assessments. Many countries define disability discrimination in terms of the social model, emphasizing the intersection between the individual and the environment, where discrimination derives from the existence of barriers to full participation. Other countries focus on the medical model, assessing the extent of functional limitations experienced by the individual, with little consideration of how those limitations interact with the individual’s environment. In the first model, the evidence that is most relevant would measure how a person’s environment has artificially limited that person’s opportunities to participate fully. In the second model, the person alleging discrimination typically must begin with medical evidence of the existence of an impairment and documentation of how that impairment affects functioning.

1. Zimbabwe.

One of the most intriguing international disability civil rights laws was enacted by Zimbabwe in 1992. Zimbabwe’s Disabled Persons Act defines a disabled person as “a person with a physical, mental or sensory disability ... which gives rise to physical, cultural or social barriers inhibiting

him from participating at an equal level with other members of society.”⁴⁷ This definition is somewhat circular, as it uses the term “disability” in the context of a definition of a “disabled” person. However, read in context, the term “disability” in the Zimbabwe law could be replaced with the word “impairment.” The law does not emphasize the extent of a person’s impairment, but instead looks at how that impairment “gives rise to” or results in “barriers” that inhibit “equal” participation as compared with society at large.

2. Venezuela.

Similarly, Venezuela uses a social model approach in its 1994 Law of Integration of Persons with Disabilities. The Venezuela law, translated from the Spanish, defines persons with disabilities as “those whose opportunities for social integration are diminished due to a physical, sensory or intellectual impediment, of differing levels or degrees, that limit his or her ability to carry out any activity.”⁴⁸ Like the Zimbabwe law, the Venezuela law focuses on how opportunities for social integration are limited by the person’s disability, rather than emphasizing the need to show a particular level of functional impairment for purposes of qualifying for protection under the statute.

3. Hungary.

In 1998, Hungary passed its “Equalization Opportunity Law,” which represents a bit of a hybrid approach, hinting at a social model but incorporating strong medical restrictions on who is protected. Section 4 of that law defines a “person living with disability” as “anyone who is to a significant extent or entirely not in possession of sensory – particularly sight, hearing – locomotor or intellectual functions, or who is substantially restricted in communication and is thereby placed at a permanent disadvantage regarding active participation in the life of society.”⁴⁹ Although the law references a “disadvantage” with regard to participating “active[ly]” in “society,” the only people who get to make such a showing are people with “traditional” disabilities – those who are “significant[ly]” or “substantially” restricted in sensory, mobility, cognitive, or communicative functioning.

4. World Health Organization Approach.

The World Health Organization published an International Classification of Impairments, Disabilities and Handicaps (ICIDH) in 1980. This document has had a tangible impact on disability non-discrimination laws in many countries. The ICIDH provides a conceptual framework for disability with three parts: First, an “impairment” is “any loss or abnormality of psychological, physiological or anatomical structure or function.” Second, a “disability” is “any restriction or lack (resulting from an impairment) of an ability to perform an activity in the manner or within the range considered normal for a human being.” Finally, “handicap” is defined as “a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the fulfillment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual.” In this approach, the concept of “impairment” relies upon a medical model analysis (the WHO provides a list of health conditions in its International Classification of Diseases (ICD-10)), “disability” requires a functional analysis, and the concept of “handicap” incorporates a social model of disability.

In 2001, the World Health Organization published a new version of the ICIDH. The document, referred to as the ICIDH-2, is officially titled the “International Classification of Functioning and Disability,” or ICF.⁵⁰ Under this new system, which is intended for use in a wide variety of contexts, including rehabilitation, education, statistics, and policy, the three concepts of impairment, disability and handicap have been replaced by two concepts – (1) “body functions and structures” (replacing “impairment”); and (2) “activities and participation” (replacing “handicap”) – which are thought to extend the prior categories to permit the description of positive as well as negative experiences. The prior concept of “disability,” or “functional” abilities or inabilities, is now conceived of as an umbrella concept applicable to either the body perspective, or to the individual and society perspective. The new system explicitly contemplates an assessment of “environmental factors,” including the physical environment, the social environment and the impact of attitudes, and of “personal factors,” which correspond to the personality and characteristic attributes of an individual.⁵¹

Although the ICIDH-2 is too complicated and nuanced to be used in an American law prohibiting disability discrimination – the document has 39 chapters, and in English spans 299 pages – it does reflect evolving global views on the nature of disability and the complex interaction between a person, his or her body, and his or her environment that can result in a classification of “disability.” Although many countries still use disability definitions that are deeply rooted in the medical model and emphasize the extent of impaired functioning, there is a growing world consciousness that functional limitations are frequently the result of inaccessible environments and lack of access to assistive technology and other long-term services and supports, rather than attributable to medical diagnosis and disease pathology.

V. REVISTING THE ADA

In light of the case law interpreting the definition of “disability” under the ADA, now is the time to re-consider the statutory framework for alleging disability discrimination, to propose alternatives, and to spur discussion on these matters.⁵² The existing models of disability definitions and legislation provide a starting point for outlining legislative options.

It is recognized that many employers have argued successfully to elected officials and courts that disability discrimination laws should only protect people with significant impairments that are uncorrected or uncorrectable. However, it is worth noting that the broad approach adopted by a number of states has not led to an avalanche of frivolous claims or onerous hardships for employers in those states. Although the current legal trend is to create boundaries around who can and cannot use a disability non-discrimination law, it is difficult to understand why prohibition of discrimination on the basis of disability should operate differently from prohibition of discrimination on the basis of race, national origin, gender or religion. In all of these cases, Title VII provides federal civil rights protections regardless of the specifics of one’s particular profile. Title VII protects a white Catholic male from discrimination, as it does an African-American Baptist female. Yet, under the ADA as it currently stands, in order to come under the law’s protections, a person must establish that he or she is far enough outside the range of “normal” to deserve civil rights protections. This is bad policy. If disability is a normal or

natural part of the human experience then why not extend the protections of the ADA more broadly?

A non-discrimination law is not a retirement program or a special license plate program. Whereas there are good reasons to carefully circumscribe who gets to retire because of their disability and who gets to use specially designated parking because of their mobility impairment, there is not a good reason to exclude people from the protections of the ADA. Fair treatment and barrier removal are good things that don't need to be doled out to the "truly needy." When we remove barriers to full participation in the name of disabled people, everyone benefits. An enlightened implementation of the ADA will enable victims of discrimination to focus on how they were treated, not how worthy they are of having civil rights protections.

A model to consider in re-drafting the ADA's definition of disability is also found across our borders in the disability discrimination statutes adopted by many countries since 1990. Many of these statutes define the problem as the discrimination that occurs when an impairment interacts with society's barriers; the severity of the impairment is not emphasized. Indeed, one could argue that disability discrimination *never* happens "because of" a person's health condition or impairment, but instead is always a result of a barrier present in that person's environment. When an employer refuses to hire a qualified person because of his diagnosis of bipolar disorder, for example, the discrimination did not happen "because of" his mood disorder, but instead it happened because of the attitudinal barrier that the person making the hiring decision possessed and acted upon. Similarly, when a person in a wheelchair can't get up a flight of stairs into a restaurant, or a deaf person can't follow a video at a reception, these things do not happen because a person uses a wheelchair or is deaf. Instead, the exclusion occurs because the restaurant lacks accessibility or because the video is not captioned. In other words, a barrier in the person's environment typically plays a causal role in producing disability discrimination.

CONCLUSION

Given the aggressive narrowing by the federal courts of the protected class, rethinking the definition of disability is critical to advancing equality and fair treatment, in our schools,

workplaces, government offices, and places of public accommodation. But this effort is only one of many key components of the disability rights agenda. With staggeringly low employment rates among people with disabilities, America must redouble its efforts to advance the needs and interests of the entire community, from those with non-traditional disabilities, to those with the most severe disabilities, and everyone in between. Of particular note are efforts to advance the integration and employment of persons with significant disabilities, including Social Security reform, vocational rehabilitation reform, Medicaid and Medicare reform, private insurance reform, supported employment, wage supports, and investments in accessible, affordable housing and transportation. Any effort to re-fashion the ADA to broadly protect all Americans from disability discrimination, in the tradition of the Civil Rights Act of 1964, must occur as part of a much larger agenda that will help to make real the ADA's promise of full participation and integration. An effective federal nondiscrimination mandate can provide a floor, or solid foundation, of fairness. Such a floor by itself, however, is not nearly enough for people with disabilities when so many need education, transportation, housing, assistive technology, job training, health care, personal assistance, and other long-term community supports. By addressing serious problems in how the law has developed defining the protected class, a solid foundation on which we can build inclusive policies will be restored.

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¹ National Council on Disability, *Equality of Opportunity: The Making of the Americans with Disabilities Act* (1997) at 12-13 (available at www.ncd.gov).

² *Id.* at 13, n. 13.

³ See Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 360 (1973).

⁴ See Pub. L. No. 93-516, 88 Stat. 1617, 1619 (1974).

⁵ See S. REP. NO. 93-1297, at 38 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389; H. REP. NO. 101-485, pt. 2, at 52-53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 334-335.

⁶ *Equality of Opportunity* at 12.

⁷ For a description of the process leading to the regulations, see *Equality of Opportunity* at 16-21.

⁸ 45 C.F.R. § 84.3(j)(2)(i).

⁹ 42 Fed. Reg. 22685 (1977), reprinted in 45 C.F.R. Pt. 84, App. A, p. 334 (1998).

¹⁰ *Id.* at 352.

¹¹ National Council on the Handicapped, *Toward Independence* (1986) at 18 (available at www.ncd.gov).

¹² *Id.* at 19.

¹³ Jonathan M. Young, “‘Same Struggle, Different Difference’: The Americans with Disabilities Act and the Disability Rights Movement, 1964-1990” (Ph.D. diss., University of North Carolina at Chapel Hill, 2002), p. 191.

¹⁴ *Id.* at 191.

¹⁵ *Id.* at 192.

¹⁶ National Council on the Handicapped, *On the Threshold of Independence* (1988), Appendix (available at www.ncd.gov).

¹⁷ *See Equality of Opportunity* at 63-67.

¹⁸ *Id.* at 95-99.

¹⁹ *Id.* at 100.

²⁰ *Id.* at 103.

²¹ *Bentivegna v. United States Dep’t of Labor*, 694 F.2d 619, 621 (9th Cir. 1982); *Davis v. Meese*, 692 F. Supp. 505, 513, 517 (E.D. Pa. 1988), *aff’d*, 865 F.2d 592 (3d Cir. 1989) (table) (“Some insulin-dependent diabetics never experience a severe hypoglycemic occurrence, and are able to control their blood sugar levels at nearly normal levels throughout their working careers. . . . [A]n insulin dependent diabetic is clearly a ‘handicapped person.’”).

²² *Reynolds v. Brock*, 815 F.2d 571, 573-74 (9th Cir. 1987) (plaintiff with infrequent seizures could be disabled because persons with epilepsy face policies restricting their employment opportunities); *Mantolite v. Bolger*, 767 F.2d 1416, 1420, 1424 (9th Cir. 1985) (person with condition under “complete control” was disabled and potentially entitled to accommodation); *Akers v. Bolton*, 531 F. Supp. 300, 315 (D. Kan. 1981) (Section 504 “doubtless encompasses the class of epileptic school children”); *Drennon v. Philadelphia General Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977) (“That persons with epilepsy are considered handicapped is too self-evident to be contested.”).

²³ *Doe v. Garrett*, 903 F.2d 1455, 1457, 1459 (11th Cir. 1990) *cert. denied*, 484 U.S. 849 (1987) (“[I]t is well established that infection with AIDS constitutes a handicap.”); *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524, 1527-28, 1536 (M.D. Fla. 1987); *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 383 (C.D. Cal. 1987); *see also Robertson v. Granite City Com. Unit School Dist.* 9, 684 F.Supp. 1002, 1007 (S.D. Ill. 1988).

²⁴ *See, e.g., Tinch v. Walters*, 765 F.2d 599, 603 (6th Cir. 1985); *Sullivan v. City of Pittsburgh, Pa.*, 811 F.2d 171, 182 (3d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987); *Wallace v. Veterans Administration*, 683 F.Supp. 758, 761 (D. Kan. 1988); *Anderson v. University of Wisconsin*, 665 F.Supp. 1372, 1391 (W.D. Wis. 1987), *aff’d*, 841 F.2d 737, 740 (7th Cir. 1988); *Traynor v. Walters*, 606 F.Supp. 391, 399-400 (S.D.N.Y. 1985) (alcoholic who had been sober 10 years was “handicapped individual”); *Davis v. Bucher*, 451 F.Supp. 791, 796 (E.D. Pa. 1978); *Burka v. New York City Transit Authority*, 680 F.Supp. 590, 600 (S.D.N.Y. 1988). Indeed, the issue was considered so well settled that this Court simply assumed that recovered alcoholics are disabled in *Traynor v. Turnage*. 485 U.S. 535, 548-49 (1988).

²⁵ See also *Doe v. New York University*, 666 F.2d 761, 775 (2d Cir. 1981) (“definition is not to be construed in a niggardly fashion”); *Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991) (“The Act and the regulations promulgated under it are to be interpreted broadly.”).

²⁶ See, e.g., *Thornhill v. Marsh*, 866 F.2d 1182 (9th Cir. 1989) (applicant denied job due to abnormal back X-ray could pursue claim – “Thornhill’s ‘handicap’ . . . is the congenital deformity of his spine which the Corps perceived as imposing a disqualifying limitation on his ability to lift weight.”); *Reynolds v. Brock*, 815 F.2d 571, 573-74 (9th Cir. 1987) (plaintiff with infrequent seizures was disabled due to policies restricting the opportunities of people with epilepsy); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1102-1103 (D. Haw. 1980) (job applicant rejected due to back X-ray showing congenital back anomaly believed by employer to signify increased risk of future injury was regarded as handicapped); *Doe v. Centinela Hosp.*, 1988 U.S. Dist. LEXIS 8401 (C.D. Cal. 1988) (asymptomatic HIV-positive person excluded on that basis from a residential drug rehabilitation program was regarded as handicapped as a matter of law); see also *Taylor v. U.S.P.S.*, 946 F.2d 1214, 1215, 1218 (6th Cir. 1991) (applicant who was medically disqualified because back and knee problems purportedly placed him at risk for future injury was regarded as handicapped as a matter of law); *Harris v. Thigpen*, 941 F.2d 1495, 1523-24 (11th Cir. 1991) (HIV-positive prisoners were “regarded as” handicapped regardless of their actual condition where prison excluded them from programs); *United States v. Southern Management Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) (recovered drug addicts excluded from an apartment complex were “handicapped” because they were denied “benefits integral to a person’s ability to function generally in society” on the basis of their status as recovered addicts) (“In *Arline*, the Supreme Court rejected the argument that only an impairment that results in diminished physical or mental capabilities could be considered a handicap under § 504 of the Rehabilitation Act. The Court reasoned that the negative reactions of others to the impairment could limit a person’s ability to work regardless of the absence of an actual limitation on that person’s mental or physical capabilities.”).

²⁷ Congress expressly endorsed the reasoning of *Arline* in all three major committee reports. H.R. Rep. No. 485(II), 101st Cong., 2d Sess. (1990) at 53; H.R. Rep. No. 485(III), 101st Cong., 2d Sess. (1990) at 30; S. Rep. No. 116, 101st Cong., 1st Sess. (1989) at 23. “A person who is . . . discriminated against [] because of a covered entity’s negative attitude toward that person’s impairment is treated as having a disability.” H.R. Rep. No. 485(II) at 53; S. Rep. No. 116 at 24. Accordingly, the committee reports explained, an individual rejected from a particular job because an X-ray indicates abnormalities is “regarded as” disabled even if the person has no outward symptoms. H.R. Rep. No. 485 (III) at 31; S. Rep. No. 116 at 24.

²⁸ See also Bonnie Poitras Tucker, *The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 Alabama Law Rev. 321 (Fall 2000); Chai Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkeley J. Employ. & Lab. Law 91 (2000); Colker, R., *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L.Rev. 99 (1999); Robert L. Burgdorf Jr., “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 Vill. L. Rev. 409 (1997).

²⁹ See, e.g., *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083 (8th Cir. 2000) (railroad manager with major depression and anxiety not substantially limited); *Schneiker v. Fortis Insurance Company*, 2000 U.S. App. LEXIS 90 (7th Cir. 2000) (benefits analyst with depression and

alcoholism requiring hospitalizations, medication, outpatient care, and AA meetings not substantially limited); *Spades v. City of Walnut Ridge*, 186 F.3d 897 (8th Cir. 1999) (police officer with depression who attempted suicide not substantially limited); *Scherer v. G.E. Capital Corp.*, 59 F. Supp. 2d 1132 (D. Kan. 1999) (fraud investigator with bipolar disorder and obsessive compulsive disorder not disabled).

³⁰ See, e.g., *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001) (machine operator with epilepsy causing seizures, bedwetting on one occasion, bruises, and periods of “zoning out” was not substantially limited); *Bowen v. Income Producing Mgmt. of Okla.*, 202 F.3d 1282 (10th Cir. 2000) (fast food manager who as a result of brain surgery suffered short-term memory loss, inability to concentrate, and difficulty doing simple math not substantially limited); *Sorensen v. University of Utah*, 194 F. 3d 1084 (10th Cir. 1999) (nurse with MS, forcibly reassigned immediately after five-day hospitalization, not disabled); *Weber v. IDEX Corp.*, 186 F.3d 907 (8th Cir. 1999) (sales manager with heart disease, heart attack, hypertension, and multiple hospitalizations not disabled); *Lorubbio v. Ohio Dep’t of Trans.*, 181 F.3d 102 (6th Cir. 1999) (transportation worker with spinal injury not substantially limited); *Ivy v. Jones*, 192 F.3d 514 (5th Cir. 1999) (hearing impaired clerical worker using hearing aids not substantially limited); *Tone v. U.S.P.S.*, 68 F. Supp. 2d 147 (N.D. N.Y. 1999) (tractor trailer operator who lost left eye to cancer not disabled).

³¹ This flawed analysis is the source of the ADA’s “Catch-22” between “disabled” and “qualified.” In *Olson v. General Electric Astrospace*, No. 95-5480, 9 N.D.L.R. ¶ 86 (3rd Cir. 1996), the Third Circuit concluded that a senior technical staffer with depression requiring a four-month hospital stay was not “disabled” because he was highly qualified: “[T]he evidence that was apparently offered to demonstrate [plaintiff’s] fitness as an employee ironically establishes that he was not substantially limited in a major life activity. Therefore he can not establish that he is disabled, or that he has a history of being disabled.” Similarly, in *Sarko v. Penn-Del Directory Co.*, 968 F. Supp. 1026 (E.D. Pa. 1997), the district court rejected the idea that a top performing sales representative with depression and anxiety could have a disability, stating, “Plaintiff admits that she was able to work long hours and perform quite successfully as a salesperson while at Penn-Del.” *Id.*; see also *Hatfield v. Quantum Chemical Corp.*, 920 F. Supp. 108 (S.D. Tex. 1996) (process technician returning from leave with diagnosis of recurrent major depression and post-traumatic stress disorder not disabled: “It is logically inconsistent for Hatfield to say he is so impaired that he cannot care for himself, while at the same time saying that he can go to work and perform his job.”).

³² See, e.g., *Williams v. Osram-Sylvania, Inc.*, 175 F.3d 193 (1st Cir. 1999) (employer did not regard injured worker as disabled even if its decision was based on stereotypes: “A negative employment action taken by an employer, even if myth-driven, does not establish liability under the ADA unless the employer regards the employee as substantially limited.”).

³³ See, e.g., *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (stating that weight is generally not an impairment); *Coleman v. Georgia Power Co.*, 81 F. Supp. 2d 1365, 1370 (N.D. Ga. 2000) (finding plaintiff’s “morbid obesity” was not a physical impairment); see also Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 Calif. L. Rev. 57, 84 (2002). Other cases have also found no impairment when psychological screening tests found plaintiffs unfit for jobs in law enforcement. See, e.g., *Santiago v. City of Vineland*, 107 F. Supp. 2d 512, (D. N.J. 2000) (finding no impairment when the plaintiff’s “personality traits and emotional health” were at issue); *Daley v. Koch*, 892 F. 2d 212, 215 (2d Cir. 1989)

(same with regard to “poor judgment, irresponsible behavior and poor impulse control”); *Greenberg v. New York State*, 919 F. Supp. 637, 643 (E.D.N.Y. 1996) (stating that the psychological report did not demonstrate an impairment).

³⁴ See, e.g., *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (finding that interacting with others was not a major life activity); *Mahon v. Crowell*, 295 F.3d 585, 590, 591-92 (6th Cir. 2002) (stating that working was “problematic” as a major life activity).

³⁵ See, e.g., *Toyota v. Williams*, 534 U.S. 184, 198 (2002) (holding that to be “substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”); *Wooten v. Farmland Foods*, 58 F.3d 382, 385-86 (8th Cir. 1995) (finding plaintiff with carpal tunnel syndrome and a lifting restriction was not regarded as substantially limited in the major life activity of working); *Pollard v. High’s of Balt., Inc.*, 281 F.3d 462, 471 (4th Cir. 2002) (finding that an employee with a back injury was not substantially limited in working when she immediately obtained a new job); *Mahon v. Crowell*, 295 F.3d 585, 590, 591-92 (6th Cir. 2002) (holding that an employee with a back injury was not substantially limited in working when he suffered a 47% loss of access to the job market).

³⁶ See, e.g., *American National Insurance v. FEHC*, 32 Cal.3d 603, 186 Cal.Rptr. 345 (1982) (high blood pressure thought to pose increased risk of future disability covered); *Johnson v. Civil Service Commission*, 153 Cal.App.3d 585 (1984) (spinal anomaly protected by state law); *Sanders v. City and County of San Francisco*, 6 Cal.App.4th 626 (1992) (chemical dependency covered); *County of Fresno v. FEHC*, 226 Cal.App.3d 1541 (1991) (workers with respiratory disorders causing hypersensitivity to tobacco smoke were “physically handicapped” under the FEHA); *Raytheon v. FEHC*, 212 Cal.App.3d 1242 (1989) (person with AIDS is physically handicapped); *Sterling Transit Company v. Fair Employment Practice Commission*, 121 Cal.App.3d 791 (1981) (lower back congenital problem of scoliosis was protected); see also *State Personnel Bd. v. Fair Employ. & Hous. Comm.*, 39 Cal.3d 422 (1985) (three traffic officer cadets permitted to pursue claims challenging disqualification from employment pursuant to “medical standards” on basis of colorblindness, osteoarthritis, and prior intestinal bypass surgery); *McPhail v. Court of Appeals*, 39 Cal.3d 454 (1985) (rejected applicant permitted to pursue claim challenging disqualification from California Highway Patrol based on anomaly found on back X-ray).

³⁷ Code of Ala. 24-8-3(6); Ak. Stat. § 18.80.300(12) (also includes “condition that may require prosthesis, special equipment for mobility, or service animal”); Ariz. Rev. Stat. 41-1461(4); Ark. Code Ann. 16-123-102(3) (first prong only); Colo. Rev. Stat. § 24-34-301(2.5); 19 Del. Code § 722(4) (“substantial limitation” must be related to employability); D.C. Code § 2-1401.02(5a); Fla. Stat. 760.22(7)(a) (no definition in employment provisions, definition found in housing provisions, also includes “developmental disability”); Ga. Code Ann. § 34-6A-2(3) (“substantial limitation” must be related to employability, no regarded as prong); Haw. Rev. Stat. § 489-2; Idaho Code § 67-5902(15) (disability must be clinically “demonstrable,” “substantial limitation” is “to person,” rather than of a major life activity); Burns Ind. Code Ann. § 22-9-5-6(1); Iowa Code § 216.2(5) (“substantial disability”), Iowa Admin. Code rs. 161--8.26(1)-(3) (“substantial disability” defined using ADA definition); Kan. Stat. Ann. § 44-1002(j); Ky. Rev. Stat. § 12.450(1); La. Rev. Stat. § 23:322(3); 5 Me. Rev. Stat. § 4553(7) (includes “substantial disability” as determined by physician, psychiatrist, or psychologist), Code of Me. Rules § 94-348-003.01(C) (following ADA definition); Md. Ann. Code Art. 49B, § 15(g) (“any physical

disability” and “any mental impairment or deficiency”), Code of Md. Reg. (COMAR) § 14.03.02.03 (following ADA definition, and condition must be “demonstrable by medically accepted clinical or laboratory diagnostic techniques”); Mass. Ann. Laws Ch. 151B, 1(17); Mich. C. L. S. § 37.1103(d) (instead of impairment, definition requires “determinable physical or mental characteristic” that substantially limits); Minn. Stat. § 256.481; Code of Miss. Rules 46-000-001 (State Personnel Board Policy and Procedures Manual), § 7.30 (Equal Employment Opportunity) (public employment only); Mo. Rev. Stat. § 213.010(4); Mont. Code Ann. § 49-2-101(19); Rev. Stat. Neb. Ann. § 48-1102(9); Nev. Rev. Stat. Ann. § 613.310(1); N.H. Rev. Stat. Ann. § 354-A:2(IV); N.M. Stat. Ann. § 28-1-2(M); N.C. Gen. Stat. § 168A-3(7a); N.D. Cent. Code § 14-02.4-02(4); Ohio Rev. Code Ann. § 4112.01(13); 25 Okla. Stat. § 1451(6); Or. Rev. Stat. § 174.107(1); 43 Penn. Stat. 954 (p. 1); S.C. Code Ann. § 1-13-30(N); S.D. Cod. Laws § 20-13-1(4); Tenn. Code Ann. § 4-21-102(9); Tex. Lab. Code § 21.002(6); Utah Code Ann. § 34A-5-102(5) (“disability as defined and covered by the Americans with Disabilities Act”); Vt. Stat. Ann. § 495d(5) (“substantial limitation” must be related to employability); Va. Code Ann. § 51.5-3 (no regarded as prong); W. Va. Code § 5-11-3(m); Wyo. Stat. § 27-9-105 (no definition), Rules of Practice and Procedure Before the Wyoming Fair Employment Commission Concerning Handicap Discrimination Complaints Filed Pursuant to the Fair Employment Practices Act of 1965 as Amended, Ch. X, § 3 (adopting federal definition); *see also* Wis. Stat. § 111.32 (for employment discrimination law, disability is mental or physical impairment “which makes achievement unusually difficult or limits the capacity,” or record or perception), Wis. Stat. § 106.50(g) (for housing discrimination law, federal law definition); *cf.* 75 Ill. L.C.S. 5/1-103 (no requirement of substantial limitation), *but see* 56 Ill. Admin. Code § 2500.20(b) (definition excludes “conditions which are transitory and insubstantial,” and “conditions which are not significantly debilitating or disfiguring”).

³⁸ *Colmenares v. Braemar Country Club*, 2001 Cal. LEXIS 5483; 111 Cal. Rptr. 2d 336 (Cal. Supreme Aug. 22, 2001); *Swenson v. County of Los Angeles*, 75 Cal. App. 4th 889 (1999), *rev. dismissed*, 2001 Cal. LEXIS 428 (Jan. 24, 2001) (broader definition of “mental disability” under FEHA is consistent with legislative intent to provide broader protection than ADA); *Pensinger v. Bowsmith*, 60 Cal. App. 4th 709, 721-22 (1998) (“there is no basis for us to impose a requirement that a mental disability limit a major life activity, when the Legislature saw fit not to do so. Undoubtedly, the Legislature was aware of the definitions of mental and physical disability included in the ADA because it referred to it repeatedly in enacting the amendment to the FEHA. . . . Undoubtedly, the Legislature also knew how to amend the FEHA to include a requirement that a mental disability effect must limit a major life activity, if it wished that result.”); *Jenson v. Wells Fargo Bank*, 85 Cal. App. 4th 245, 257 (2000) (“the plain meaning of the language used in the FEHA’s definition of mental disability . . . require[s] us to follow the Legislature’s language and give a broader meaning to mental disability”); *Muller v. Automobile Club of So. California*, 61 Cal. App. 4th 431, 71 Cal. Rptr. 2d 573 (1998) (stating that “the Legislature . . . intended, in accordance with the ADA, to uniformly define ‘mental disability’ as a mental impairment that substantially limits a major life activity) *Colmenares v. Braemar Country Club, Inc.*, 89 Cal. App. 4th 778 (2001); *Wittkopf v. County of Los Angeles*, 90 Cal. App. 4th 1205 (2001).

³⁹ Also in 2000, the Rhode Island legislature amended the definition of disability to exclude consideration of mitigating measures: “Disability” means any physical or mental impairment

which substantially limits one or more major life activities, has a record of an impairment, or is regarded as having an impairment . . . ; provided, however, that whether a person has a disability shall be determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications, or auxiliary aids.” P.L. 2000, ch. 499, § 2; P.L. 2000, ch. 507, § 2 (amending R.I. Gen. Laws § 42-87-1).

⁴⁰ San Francisco, California’s ordinance prohibiting weight and height discrimination provides another example of a law which attempts to focus on the merits of a particular discrimination claim rather than establishing “disability.” *See generally* City and County of San Francisco Human Rights Commission, *Compliance Guidelines to Prohibit Weight and Height Discrimination*, July 26, 2001, available at

http://www.sfgov.org/sfhumanrights/guidelines_final.htm.

⁴¹ To meet the physical standard, the plaintiff must show “that he or she is (1) suffering from physical disability, infirmity, malformation or disfigurement (2) which is caused by bodily injury, birth defect or illness including epilepsy.” *Viscik*, 173 N.J. at 16. To meet the non-physical standard, the plaintiff must show that he or she is (1) suffering from any mental, psychological, physiological or neurological condition that either (a) prevents the normal exercise of any bodily or mental functions or (b) is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. *Id.* (citing *Clowes v. Terminex Int’l, Inc.*, 109 N.J. 575 (1988)).

⁴² *Andersen v. Exxon Co.*, 89 N.J. at 494-95 (spinal and lumbar disc ailments covered); *Viscik*, 173 N.J. at 17 (woman with morbid obesity has physical handicap); *Harris v. Middlesex County College*, 2002 N.J. Super. LEXIS 339 (2002) (“We agree that a mastectomy qualifies as an “amputation,” but the LAD’s protections are broader and may include a person with breast cancer even if she is treated with the less radical alternatives available to breast cancer patients. . . . The fact that she suffered no recurrence and that she had minimal limitations on her physical capabilities does not disqualify her from protection under the LAD.”); *Tynan v. Viscinage 13 of the Superior Court*, 798 A.2d 648, 2002 N.J. Super. LEXIS 258 (2002) (post-traumatic stress disorder, depression, and anxiety panic attacks are psychological disorders that qualify as handicaps under the LAD); *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501, 519, 777 A.2d 365 (App. Div. 2001), *certif. denied*, 170 N.J. 211 (2001) (gender dysphoria qualifies as a “handicap”); *Blume v. Denville Township Board Of Education*, 334 N.J. Super. 13, 756 A.2d 1019 (2000) (plaintiff “handicapped” as the result of the two mastectomies which she underwent as treatment for cancer); *Gimello v. Agency Rent-A-Car-Systems, Inc.*, 250 N.J. Super. 338, 362 (App. Div. 1991) (obese plaintiff satisfied definition); *Rogers v. Campbell Foundry Co.*, 185 N.J. Super. 109, 447 A.2d 589 (App.Div.), *certif. Denied*, 91 N.J. 529, 453 A.2d 852 (1982) (rejected applicant with nondisabling hilar shadow covered); *Panettieri v. C.V. Hill Refrigeration*, 159 N.J. Super. 472, 388 A.2d 630 (App.Div.1978) (heart attack).

⁴³ *See, e.g., Clowes v. Terminex Intern, Inc.*, 109 N.J. 575, 538 A.2d 794 (1988) (plaintiff failed to present adequate medical proof of alcoholism: “Conspicuously absent from the record is any testimony from a treating or examining physician that Clowes had been diagnosed as an alcoholic. . . . Clowes’s admission that he was an alcoholic, along with his testimony regarding his drinking habits, is insufficient to prove that he suffered from this disease.”); *Enrique*, 342 N.J. Super. at 522 (plaintiff protected if she can demonstrate she was diagnosed with gender dysphoria using accepted techniques); *Heitzman v. Monmouth County*, 321 N.J. Super. 133, 728

A.2d 297 (1999) (“Plaintiff failed to present any medical evidence that hypersensitivity to second-hand smoke is a recognized medical condition or that he suffers from such a condition.”).

⁴⁴ New York City’s antidiscrimination ordinance – Article 15 of the Human Rights Law – includes a similar definition of disability: “The term ‘disability’ means (a) a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment, or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.” Art. 15, § 292(21).

⁴⁵ A recent decision by the highest court ruled that experienced flight attendants excluded from employment pursuant to Delta’s weight requirements could not bring claims under a perceived disability theory because they did not have (and, presumably, were not perceived to have) a medical impairment. *Delta Air Lines v. New York State Div. of Human Rights*, 91 N.Y.2d 65, 689 N.E.2d 898 (1997) (“Appellants failed to establish that they are medically impaired members of a protected class defined under the New York Human Rights Law. Nothing in the record supports the proposition that appellants suffer from a legally defined or cognizable “medical impairment” which restricts their “normal bodily function. . . . Appellants did not proffer evidence or make a record establishing that they are medically incapable of meeting Delta’s weight requirements due to some cognizable medical condition.”). The Court in *Delta* did not specifically discuss the standards for a “perceived” disability.

⁴⁶ *Stone v. St. Joseph’s Hospital of Parkersburg*, 208 W.Va. 91, 538 S.E.2d 389 (2000). As that court noted, “[t]he ‘exclusion-from-only-one-job’ rationale . . . has been relied upon in some federal cases to deny threshold protected status as a matter of law to a range of persons with fairly substantial impairments.” *Id.* at 103, & n.18 (citing examples collected by Robert L. Burgdorf, Jr. in 42 Vill.L.Rev. 409 (1997), *supra* note 28). In rejecting this line of federal case law, the court noted that the West Virginia Human Rights Act “represents an independent approach to the law of disability discrimination that is not mechanically tied to federal disability discrimination jurisprudence.” *Id.* at 106. “[I]t should be remembered that if a person is prohibited from establishing threshold “protected status” as a person with a disability within the meaning of the law, an employer may inflict any sort of (otherwise legal) discriminatory conduct or acts on the person – no matter how unfair, arbitrary, stereotyped, bigoted, or unrelated to business necessity that those acts or conditions may be – and the person will have no standing to complain of or remedy the discrimination. And it should also be remembered that establishing the “protected person” status . . . in no way guarantees that a claim of disability discrimination will succeed. All other elements of a claim . . . must be shown before a person is entitled to any relief.” *Id.* at 104.

⁴⁷ Disabled Persons Act of 1992, Zimbabwe, available at www.dredf.org/symposium/lawindex/html.

⁴⁸ *Ley para la integracion de las personas incapacidadas* (Aug. 15, 1993), Venezuela, available in an English translation at www.dredf.org/symposium/lawindex.html.

⁴⁹ Equalization Opportunity Law (Act No. XXVI of 1998) Hungary, available in an English translation at www.dredf.org/symposium/html.

⁵⁰ See *ICIDH-2: International Classification of Functioning and Disability*, available at www.deakin.edu.au/tedca/ncet/information/resources/ididh.html.

⁵¹ *Id.*

⁵² Indeed, a serious discussion about what definitional provisions should be employed to further disability civil rights has not taken place within the disability community since the late 1980s.