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Volume 31  
Number 3 *Symposium on Mental Disability Law*

Article 13

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4-1-1998

### You'd Have to be Crazy to Work Here: Worker Stress, the Abusive Workplace, and Title I of the ADA

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#### Recommended Citation

Susan Stefan, *You'd Have to be Crazy to Work Here: Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 Loy. L.A. L. Rev. 795 (1998).

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# **“YOU’D HAVE TO BE CRAZY TO WORK HERE”: WORKER STRESS, THE ABUSIVE WORKPLACE, AND TITLE I OF THE ADA**

*Susan Stefan\**

[Senator] Helms: Does an employer’s own moral standards enable him to make a judgment about any or all of the employees identified in our previous question?

[Senator] Harkin: Are you talking about transvestites?

Mr. Helms: Pardon?

Mr. Harkin: Are you talking about transvestites?

Mr. Helms: Right, or kleptomaniacs or manic depressives. You said they are covered and that schizophrenics are covered as well.<sup>1</sup>

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1. 135 CONG. REC. S10,765 (1989). The Congressional floor debate on the Americans with Disabilities Act was marked by conspicuous, even fulsome, articulations of concern for disabled individuals. *See id.* at S10,711 (referring to an “elderly grandmother with arthritis, but determined to fend for herself and live her retirement years in dignity,” the “proud American veteran, who risked life but lost limb,” the “young boy, born with Downs syndrome, but thanks to loving parents and enlightened school officials, will graduate from high school”) (statement of Senator Harkin); *see also id.* at S10,716 (“My heart is with the community of persons with disabilities.”) (statement of Senator Hatch). The only groups singled out for public opprobrium were people with psychiatric disabilities, people with substance abuse problems, and people who were HIV-positive or had AIDS. *See id.* at S10,751 (“I have hired a lot of people in my business career. What happens if somebody comes and has some mental infirmity?”) (statement of Senator Boschwitz); *see also id.* at S10,753 (“[T]he ideals of our country certainly call upon the Senate to do whatever it can to be helpful to people in wheelchairs or who have some kind of a physical disability . . . . What concerns me is the thought that this disability [definition] might include some things which by any ordinary definition we would not expect to be included . . . . Mental disorders, such as alcohol withdrawal, . . . hallucinosis [sic], . . . disillusional disorder [sic].”) (statement of Senator Armstrong); H.R. REP. NO. 101-

## I. INTRODUCTION

Despite widespread fear about extending the Americans with Disabilities Act (ADA)<sup>2</sup> to protect people diagnosed with psychiatric disabilities, most employment discrimination lawsuits brought by people with psychiatric disabilities do not involve the kind of bizarre behavior associated with stereotypes of mental illness. Nor are these lawsuits instituted by people of marginal qualifications seeking to retain employment by claiming discrimination.

Rather, in the vast majority of employment discrimination cases involving people with actual or perceived psychiatric disabilities, the employees tended to be highly qualified. Most worked a considerable length of time, and their performances were "rated highly"<sup>3</sup> or "consistently rated as an above average to outstanding worker."<sup>4</sup> Some employees were "very successful[,] . . . being named the company's all-time profit producer,"<sup>5</sup> "honored as Employee of the Month,"<sup>6</sup> or considered "exceptional"<sup>7</sup> and "fully successful."<sup>8</sup> In other cases, the employee "won numerous awards for his work,"<sup>9</sup> "performance evaluations were consistently good,"<sup>10</sup> or, at the least, the employee "received a 'meets standards' review on . . . evaluations."<sup>11</sup>

Many employees filing suit had significant academic or professional expertise.<sup>12</sup> Some were promoted at a rapid pace, which occa-

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485, pt. 4, at 81 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 564 ("Under the ADA, would an employer be able to take prudent, prophylactic steps to control an employee whose psychological profile suggests that he wants to murder his fellow workers?") (dissenting views on the Americans with Disabilities Act). In addition, various Representatives and Senators strove diligently to ensure that the ADA could not be used to protect homosexuals. *See* H.R. REP. NO. 101-485, pt. 4, at 82, *reprinted in* 1990 U.S.C.C.A.N. at 565 ("In particular, we believe that the ADA is a homosexual rights bill in disguise.") (dissenting views on the Americans with Disabilities Act).

2. 42 U.S.C. §§ 12101-12213 (1994).

3. *Simpkins v. Specialty Envelope, Inc.*, 94 F.3d 645 (table), No. 95-3370, 1996 WL 452858, at \*1 (6th Cir. Aug. 9, 1996).

4. *DiGloria v. American Tel. & Tel. Co.*, No. 92-1179-CIV-ORL-19, 1993 WL 735034, at \*1 (M.D. Fla. Nov. 30, 1993).

5. *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 364 (9th Cir. 1996).

6. *Mundo v. Sanus Health Plan*, 966 F. Supp. 171, 171 (E.D.N.Y. 1997).

7. *EEOC v. Amego, Inc.*, 110 F.3d 135, 138 (1st Cir. 1997).

8. *Gonzagowski v. Widnall*, 115 F.3d 744, 746 (10th Cir. 1997).

9. *McCrary v. Kraft Food Ingredients*, 98 F.3d 1342 (table), No. 94-6505, 1996 WL 571146, at \*1 (6th Cir. Oct. 3, 1996).

10. *Hogarth v. Thornburgh*, 833 F. Supp. 1077, 1080 (S.D.N.Y. 1993).

11. *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1012 (7th Cir. 1997).

12. *See, e.g., Misk-Falkoff v. International Bus. Mach. Corp.*, 854 F. Supp.

sionally precipitated the problem reflected in the litigation.<sup>13</sup> Other times problems arose due to a change in employment<sup>14</sup> or a promotion to a supervisory position.<sup>15</sup> Most often, however, an excellent employee began to experience problems after the arrival of a new supervisor.<sup>16</sup>

A review of hundreds of discrimination cases involving psychiatric disabilities<sup>17</sup> revealed employees whose claims typically fell into one of four categories:

1. Employees who had worked satisfactorily for an extended period of time until the appointment of a new supervisor and whose claims clearly arose from escalating interpersonal difficulties with their supervisors.<sup>18</sup>

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215, 218 (S.D.N.Y. 1994) ("former college professor holding a Ph.D. degree with a background in computers and linguistics . . . who is now an attorney"); *see also* *Fitzgerald v. Alleghany Corp.*, 904 F. Supp. 223, 225 (S.D.N.Y. 1995) (senior vice president); *Remine v. Deckers*, 871 F. Supp. 1538, 1539 (D. Conn. 1995) (director of the Connecticut Cancer Institute and vice-chairman of the Department of Surgery); *Robertson v. Neuromedical Ctr.*, 983 F. Supp. 669 (M.D. La. 1997) (former neurologist).

13. *See, e.g., Mundo*, 966 F. Supp. at 171-72; *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 937 (N.D. Ga. 1995); *Wood v. County of Alameda*, No. C 94 1557 TEH, 1995 WL 705139, at \*1 (N.D. Cal. Nov. 17, 1995) (plaintiff had always received "satisfactory or better" evaluations until she was promoted to supervising clerk).

14. *See, e.g., Anderson v. General Motors Corp.*, 991 F.2d 794 (table), No. 92-2185, 1993 WL 94309, at \*1 (6th Cir. Mar. 30, 1993).

15. *See, e.g., Wisniewski v. Ameritech*, No. 95 C 2340, 1996 WL 501737, at \*1 (N.D. Ill. Sept. 3, 1996).

16. *See, e.g., Simpkins*, 1996 WL 452858, at \*1; *DiGloria*, 1993 WL 735034, at \*1.

17. The review involved looking at all cases charging employment discrimination on the basis of psychiatric disability, including cases brought under the ADA, section 504 of the Rehabilitation Act of 1974, and a variety of state anti-discrimination laws. The search included cases that were published in any form, including the various disability law reporters—Americans with Disabilities Cases, Americans with Disabilities Decisions, the National Disability Law Reporter, the Mental Health Law Reporter, and the Mental and Physical Disability Law Reporter—as well as Westlaw and LEXIS, from July 26, 1992, when Title I of ADA became effective, until December 1, 1997.

18. *See, e.g., Siemon v. American Tel. & Tel. Corp.*, 117 F.3d 1173, 1174 (10th Cir. 1997); *Gonzagowski*, 115 F.3d at 746; *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 522 (7th Cir. 1996); *Crawford v. Runyon*, 37 F.3d 1338, 1339 (8th Cir. 1994); *Johnson v. Merrell Dow Pharm., Inc.*, 965 F.2d 31, 32 (5th Cir. 1992); *Barton v. Tampa Elec. Co.*, No. 95-1986-CIV-T-17E, 1997 WL 128158, at \*1 (M.D. Fla. Mar. 11, 1997); *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37, 43 (D. Me. 1996), *aff'd*, 105 F.3d 12 (1st Cir. 1997); *Hatfield v. Quantum Chem. Corp.*, 920 F. Supp. 108, 109 (S.D. Tex. 1996); *Boldini v. Postmaster Gen.*, 928 F. Supp. 125, 128 (D.N.H. 1995); *Voytek v. University of Cal.*, No. C-92-3465 EFL, 1994 WL 478805, at \*1 (N.D. Cal. Aug. 25, 1994); *DiGloria*, 1993 WL 735034, at \*1; *Mancini v. General Elec. Co.*, 820 F. Supp. 141, 143 (D. Vt. 1993). In other cases,

2. Employees whose psychiatric disabilities arose from other work environment issues, including women who were sexually harassed;<sup>19</sup> individuals subjected to hostile work environments as a result of disability,<sup>20</sup> gender,<sup>21</sup> race,<sup>22</sup> or sexual preference;<sup>23</sup> whistleblowers;<sup>24</sup> and people whose disabilities were related to other claims of employer abuse or unfair treatment.<sup>25</sup>

3. Employees whose disabilities were related to increasing

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the employee had been working for several years before problems arose with a new supervisor. See *Pavone v. Brown*, No. 95 C 3620, 1997 WL 441312, at \*1 (N.D. Ill. July 29, 1997); *McIntyre v. Kroger Co.*, 863 F. Supp. 355, 356, 359 n.12 (N.D. Tex. 1994); *Kent v. Derwinski*, 790 F. Supp. 1032, 1035-37 (E.D. Wash. 1991).

19. See, e.g., *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 568 (D.R.I. 1996).

20. This includes both physical and mental disabilities. It is not unusual for a psychiatric disability claim to arise out of a claim of harassment for physical disability. See *Williams v. Kerr-McGee Corp.*, 110 F.3d 74 (table), No. 96-6090, 1997 WL 158176, at \*1 (10th Cir. Apr. 1, 1997) (psychiatric problems related to exacerbation of lupus by job stress); *Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 744-45 (1st Cir. 1995) (plaintiff with cataracts and glaucoma harassed by co-workers); *Bryant v. Better Bus. Bureau*, 923 F. Supp. 720, 727 (D. Md. 1996) (deaf woman harassed based on disability and sex). Sometimes the harassment claim related to the psychiatric disability itself. See *McClain v. Southwest Steel Co.*, 940 F. Supp. 295, 300 (N.D. Okla. 1996); *Henry v. Guest Servs., Inc.*, 902 F. Supp. 245, 251-52 (D.D.C. 1995) (plaintiff harassed about his depression), *aff'd mem.*, 98 F.3d 646 (D.C. Cir. 1996); *Howard v. Navistar Int'l Trans. Corp.*, 904 F. Supp. 922, 932 (E.D. Wis. 1995) (plaintiff whose supervisor called him a "wussy"), *aff'd mem.*, 107 F.3d 13 (7th Cir. 1997); *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1098 (S.D. Ga. 1995) (supervisor told plaintiff he thought plaintiff was "a 'joke'"). Plaintiffs whose psychiatric disability stem from harassment about a physical disability are more successful in their cases than plaintiffs who claim to be harassed due to their psychiatric disability. Compare *Rivera-Flores*, 64 F.3d at 749, with *Henry*, 902 F. Supp. at 251-52.

21. See, e.g., *Hunt-Golliday*, 104 F.3d at 1008; *Webb v. Baxter Healthcare Corp.*, 57 F.3d 1067 (table), No. 94-1784, 1995 WL 352485, at \*5 & n.6 (4th Cir. June 13, 1995) (ADA claim dismissed because "whatever emotional problems [plaintiff] had were the result, rather than the cause, of her hostile work environment").

22. See, e.g., *Barefield v. Chevron U.S.A., Inc.*, No. C86-2427 TEH, 1997 WL 9888, at \*1 (N.D. Cal. Jan. 2, 1997) (noting that emotional distress stemmed from hostile work environment based on race).

23. Usually the harassment is based on co-workers' or supervisors' assumptions about sexual preference. See *Ralph v. Lucent Techs., Inc.*, No. 97-1963, 1998 WL 29837, at \*2 (1st Cir. Feb. 2, 1998); *Kaufman v. Checkers Drive-In Restaurants, Inc.*, 122 F.3d 892, 893 (11th Cir. 1997); *Hatfield*, 920 F. Supp. at 109.

24. See, e.g., *Wagner v. Texas A&M Univ.*, 939 F. Supp. 1297 (S.D. Tex. 1996) (involving retaliation in violation of the Texas Whistleblower Act).

25. See, e.g., *Collins v. Blue Cross Blue Shield*, 103 F.3d 35, 36 (6th Cir. 1996) (involving work-related stress); *Simpkins*, 1996 WL 452858, at \*1, 8; *Mundo*, 966 F. Supp. at 171; *Mears v. Gulfstream Aerospace Corp.*, 905 F. Supp. 1075, 1077 (S.D. Ga. 1995), *aff'd mem.*, 87 F.3d 1331 (11th Cir. 1996); *Anderson*, 1993 WL 94309, at \*1.

stress, increased hours on the job, or the demands of new positions or new responsibilities.<sup>26</sup> These people often requested, and were denied, accommodations considered reasonable by the Equal Employment Opportunity Commission (EEOC),<sup>27</sup> including modified work schedules involving limited overtime, no night shifts, transfers, or leaves of absence.<sup>28</sup>

4. Employees disciplined for misconduct, usually sexual harassment, who claimed that their behavior resulted from a mental disability or that being disciplined showed that their employer perceived them as being mentally disabled.<sup>29</sup>

These cases undermine a number of public and media assumptions about employees with psychiatric disabilities and the ADA. First, although there has been widespread focus on employees in the fourth category as the primary beneficiaries of the ADA, case law re-

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26. See, e.g., *Beck v. University of Wisc. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996); *Morton v. GTE N. Inc.*, 922 F. Supp. 1169, 1173 (N.D. Tex. 1996) (employee began employment with defendant in 1969 and became depressed due to increased job stress in 1985), *aff'd mem.*, 114 F.3d 1182 (5th Cir.), *cert. denied*, 118 S. Ct. 205 (1997); *Wisniewski*, 1996 WL 501737, at \*1 (involving employee promoted to supervisor).

27. See 29 C.F.R. § 1630.2(o) (1997).

28. See, e.g., *Scott v. American Airlines, Inc.*, No. 3:95-CV-1393-R, 1997 WL 278129 (N.D. Tex. May 15, 1997); *Simmerman v. Hardee's Food Sys., Inc.*, No. CIV. A. 94-6906, 1996 WL 131948 (E.D. Pa. Mar. 22, 1996), *aff'd mem.*, 118 F.3d 1578 (3d Cir. 1997). The plaintiff in *Simmerman* requested an accommodation that his work hours be limited to 40 per week and he not be required to work night shifts. See *id.* at \*1. However, the court found that working more than 50 hours a week and working both shifts was an "essential element" of managing the fast food restaurant. See *id.* at \*5.

29. See, e.g., *Graehling v. Village of Lombard, Ill.*, 58 F.3d 295, 298 (7th Cir. 1995) (employee alleged he was coerced into resigning because, in part, of bipolar depression and post-traumatic stress syndrome); *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437, 1441-42 (D. Kan. 1996) (employee was fired after he stalked, harassed, and assaulted co-worker); *Bunevith v. CVS/Pharmacy*, 925 F. Supp. 89, 94 (D. Mass. 1996) (plaintiff fired for violating sexual harassment policies); *Biddle v. Rubin*, No. 95 C 1505, 1996 WL 14001, at \*11 (N.D. Ill. Jan. 9, 1996) (employee charged with sexual harassment who claimed employer regarded him as psychiatrically disabled because he was called delusional); *Miles v. General Serv. Admin.*, No. CIV. A. 94-1945, 1995 WL 766013, at \*1 (E.D. Pa. Dec. 27, 1995) (employee with carpal tunnel syndrome, diabetes, and depression fired for sexual harassment, intoxication at work, insubordination, and repeated absences); *Mustafa v. Clark County Sch. Dist.*, 876 F. Supp. 1177, 1179 (D. Nev. 1995) (teacher accused of sexual misconduct); *Gordon v. Runyon*, No. CIV.A. 93-0037, 1994 WL 139411, at \*1 (E.D. Pa. Apr. 21, 1994) (employee discharged for assaulting a nurse, possessing a mace and a stun gun, and disruptive behavior); *Klein v. Boeing Co.*, 847 F. Supp. 838, 843 (W.D. Wash. 1994) (employee discharged because of sex crime conviction and not because of disability).

veals that employees in the first and second categories predominate.

Second, although the ADA is seen as a vehicle to open the workplace to people with pre-existing disabilities, in the vast majority of cases the disability appeared to be triggered or greatly exacerbated by aspects of the workplace environment that could have easily been remedied, but were not. The majority of cases suggest that society is losing valuable, skilled, and dedicated employees because employers are unwilling to accommodate psychiatric disabilities and courts have failed to enforce employers' obligation to do so. The employees who litigate these ADA cases could and did work for many years. Instead of an accommodation, many of them now receive disability benefits at enormous social and economic cost.

Third, only a few cases reflect employee behavior corresponding to social stereotypes of mental illness.<sup>30</sup> Likewise, few ADA cases reveal employers who exhibited stereotypical discriminatory attitudes towards individuals with psychiatric disabilities, such as assuming that such individuals would be violent or dangerous or simply refusing to hire them because of their psychiatric diagnoses.<sup>31</sup> Many of the cases, however, do reveal abusive or stressful work environments with very long hours and bullying supervisors. Employers' attitudes toward the impact of these conditions on employees with psychiatric disabilities mirrors past attitudes toward the employment of women and minorities: as long as such employees fit into the workplace culture and do not demand that it change, they will be accepted.

The employers in these cases are generally unwilling to grant employees with psychiatric disabilities the kinds of workplace accommodations that would enable them to continue to work. This is particularly striking because the requested accommodations are

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30. See, e.g., *Carrozza v. Howard County, Md.*, 45 F.3d 425 (table), No. 94-1593, 1995 WL 8033, at \*1 (4th Cir. Jan. 10, 1995) (employee emptied trash bag on table during meeting); *Solomon v. New York City Bd. of Educ.*, No. CV-95-1878, 1996 WL 118541, at \*1 (E.D.N.Y. Mar. 6, 1996) (plaintiff claiming medical conspiracies against her); *Lassiter v. Reno*, 885 F. Supp. 869, 871 (E.D. Va. 1995) (plaintiff with delusional paranoid personality who believed elderly neighbor was conspiring to burglarize his home), *aff'd mem.*, 86 F.3d 1151 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 766 (1997); *Hogarth*, 833 F. Supp. at 1080 (FBI clerk handed out blank doctor's notes which he signed in the name of non-existent doctor).

31. But see *McCrory*, 1996 WL 571146, at \*6 (noting that supervisor stated he "was 'uncomfortable' with plaintiff talking to customers while plaintiff was on [antidepressant] medication"); *Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442, 444 (E.D. La. 1994) ("Based on his 'general life experiences,' [plaintiff's supervisor] believed that [plaintiff's] condition [of acute anxiety and depression] made him potentially violent and hostile in the workplace.").

common personnel practices routinely adopted in other circumstances. For example, employers refuse to transfer employees under the supervision of particular supervisors although the practice is well-established in sexual harassment cases; in several cases, such transfers were accomplished when the supervisor, rather than the employee, requested it.<sup>32</sup> Moreover, some employers refuse to permit employees to work "normal" work weeks,<sup>33</sup> even though part-time work, especially for new mothers, is becoming commonplace.

While management consultants increasingly counsel employers to treat workers with respect, few ADA cases involve employers who were willing to admonish abusive supervisors or insist on a workplace environment of civility. Employers' unwillingness to accommodate psychiatrically disabled employees is not a question of economics; many employers are far more willing to pay employees psychiatric disability benefits than to transfer them to a new supervisor. Some employers, for example, have fought disability discrimination cases by arguing that the employee is not disabled and then urging, encouraging, or forcing the employee to retire on disability benefits.<sup>34</sup>

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32. See *Misek-Falkoff*, 854 F. Supp. at 219.

33. Most requests for lower hours made by employees in ADA cases involve requests to work 40, 50, and 60 hour work weeks instead of what they have been working. See, e.g., *Williams*, 1997 WL 158176, at \*2 (plaintiff's doctor recommended plaintiff "limit work days to ten hours including travel"); *Brown v. Northern Trust Bank*, No. 95 C 7559, 1997 WL 543098, at \*1-2 (N.D. Ill. Sept. 2, 1997) (plaintiff requested overtime hours reduced and that she be allowed to work "normal hours"); *Kolpas v. G.D. Searle & Co.*, 959 F. Supp. 525, 527-28 (N.D. Ill. 1997) (request that working time be reduced from 60 to 70 hours per week to 40 hours per week); Amy Stevens, *Boss's Brain Teaser: Accommodating Depressed Worker*, WALL ST. J., Sept. 11, 1995, at B1 (reporting the case of *Putnam v. Pacific Gas & Electric*, No. C-9403558-WHO (N.D. Cal. 1995) in which an attorney with depression was awarded \$300,000 under state anti-discrimination statute after being denied accommodation of one-half-day off every time he worked more than 45 hours in two consecutive weeks); *Long Hours Necessary in Many Jobs—But is it an Essential Function?*, DISABILITY COMPLIANCE BULL. 3 (Mar. 14, 1996). Several newspapers reported the case of Santo Alba, a foreman at Raytheon who was working 70-80 hours a week when his supervisor told him his workload would increase again. That afternoon, Alba apparently stuck his head into a giant circular saw used to cut sheet metal and was decapitated. The family filed a complaint with the Massachusetts Commission Against Discrimination, claiming that the company knew Alba was diagnosed with manic-depression and did nothing to lower his hours. See Audrey Choi, *Family of Suicide Victim Claims Raytheon Drove Him to Death*, WALL ST. J., Nov. 3, 1995, at B14.

34. See, e.g., *Cadelli v. Fort Smith Sch. Dist.*, 23 F.3d 1295, 1297 (8th Cir. 1994) (noting that the principal told a teacher that his course load could not be reduced without unduly disrupting the school, but suggested at the same time that the teacher take sick leave for the rest of the year); *Misek-Falkoff*, 854 F.



Employers' unwillingness to accommodate psychiatrically disabled employees is also not the result of willful or malingering employees with diagnoses suggesting only mild impairments such as adjustment disorders; most employees who file suit are in fact diagnosed with one of the so-called "serious mental illnesses" such as depression, bipolar disorder, or schizophrenia and its milder variants.<sup>35</sup> Rather, employers are simply unwilling to transfer supervisors or employees as an accommodation for psychiatric disability.

Thus, the vast majority of ADA psychiatric disability claims encompass more than employees exhibiting bizarre behavior or employers indulging in gross stereotypes. Rather, ADA cases involving psychiatric disabilities raise issues at the heart of the employment relationship: the scope of permissible behavior of supervisors toward employees; the extent to which tolerance of stress is an "essential function"<sup>36</sup> of either a given job or employment in general; and the extent to which a worker is expected to tolerate insensitivity or abuse by supervisors or co-workers. ADA psychiatric disability claims focus increasingly on the balance between what employees must endure in a "normal" work environment—or risk being held unqualified for employment—and what employers must change about work environments—or risk being held not to have reasonably accommodated an employee with a psychiatric disability.

Plaintiffs with psychiatric disabilities almost always lose ADA discrimination cases, despite EEOC regulations and guidance requiring employers to adjust supervisory methods, or permit employees to work fewer hours, or work different shifts if feasible.<sup>37</sup> This is because courts reflexively assume that conditions which preclude peo-

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Supp. at 221 (involving plaintiff placed on mandatory disability retirement).

35. See, e.g., *Blankenship v. Martin Marietta Energy Sys., Inc.*, 83 F.3d 153, 154-55 (6th Cir. 1996) (schizophreniform disorder); *Tyler v. Runyon*, 70 F.3d 458, 460 (7th Cir. 1995) (paranoid schizophrenia); *Breiland v. Advance Circuits, Inc.*, 976 F. Supp. 858, 859-62 (D. Minn. 1997) (major depression, schizoid personality disorder, and severe psychological stress); *Kemer v. Johnson*, 900 F. Supp. 677, 679 & n.1 (S.D.N.Y. 1995) (depressive neurosis and schizotypal personality disorder), *aff'd mem.*, 101 F.3d 683 (2nd Cir.), *cert. denied*, 117 S. Ct. 441 (1996); *Partridge v. Runyon*, 899 F. Supp. 291, 292 (N.D. Tex. 1995) (schizophrenia).

36. Under the ADA, a plaintiff must be a "qualified individual with a disability." 42 U.S.C. § 12112(a). A qualified individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8).

37. See Equal Employment Opportunity Commission, *Americans with Disabilities Act and Psychiatric Disabilities*, in 2A AMERICANS WITH DISABILITIES PRACTICE AND COMPLIANCE MANUAL 101-02 (Supp. 1998) (EEOC Enforcement Guidance) [hereinafter PRACTICE AND COMPLIANCE MANUAL].

ple with psychiatric disabilities from being successful are necessary elements of the workplace. While courts understand that accessible workplaces may require teletypewriters or ramps, and that neither sexual harassment nor race discrimination is an employer prerogative, stress, punishing hours, overwork, unpleasant personality conflicts, and even worker abuse are much more commonly seen as simply intrinsic features of the workplace.<sup>38</sup> As Regina Austin notes:

It is generally assumed that employers and employees alike agree that some amount of such abuse is a perfectly natural, necessary, and defensible prerogative of superior rank . . . . Workers for their part are expected to respond to psychologically painful supervision with passivity, not insubordination and resistance. They must and do develop stamina and resilience.<sup>39</sup>

But what about the worker who is exceptionally qualified to perform a given job, but who is *not* gifted with the "stamina and resilience" to cope with stress or abuse in the workplace? Numerous cases brought by employees with psychiatric disabilities raise issues such as being screamed at, assaulted, or treated unfairly by supervisors,<sup>40</sup> or continual mocking or mistreatment by co-workers.<sup>41</sup> In

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38. See Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 1 (1988).

39. *Id.* at 1-2.

40. See *Ralph v. Lucent Technologies, Inc.*, No. 97-1963, 1998 WL 29837, at \*1 (1st Cir. Feb. 2, 1998); *Pavone v. Brown*, No. 95 C 3620, 1997 WL 441312, at \*2 (N.D. Ill. July 29, 1997); *Barton*, 1997 WL 128158, at \*1 ("[p]laintiff [who] allege[d] that she was not permitted to ask more than two (2) questions during training sessions, not allowed to use the restroom when needed, not allowed to take breaks so that she could take her medication, and constantly called into her supervisor's office and criticized"); *Dewitt v. Carsten*, 941 F. Supp. 1232, 1234 (N.D. Ga. 1996) (supervisor "scolded and yelled at plaintiff"), *aff'd mem.*, 122 F.3d 1079 (11th Cir. 1997); *Kotlowski v. Eastman Kodak Co.*, 922 F. Supp. 790, 800 (W.D.N.Y. 1996); *DiGloria*, 1993 WL 735034, at \*1 (plaintiff alleged that supervisor "repeatedly harassed her and on occasion verbally assaulted her in an aggressive and confrontational manner"); *Kent v. Derwinski*, 790 F. Supp. 1032, 1037 (E.D. Wash. 1991) (mentally disabled worker's supervisor would "lecture Ms. Kent for up to two hours on getting along with co-workers . . . ordering Ms. Kent to stand against the wall and not work, grabbing Ms. Kent's arm in the restroom and ordering her to keep silent about the conditions in the laundry, and criticizing Ms. Kent for her behavior, which was due to her handicap").

41. See *Ralph*, 1998 WL 29837, at \*2 (making the plaintiff the butt of sexually derisive jokes); *McClain*, 940 F. Supp. at 300 ("Co-workers allegedly referred to Mr. McClain as 'crazy' and/or as 'a lunatic' and talked about people on Prozac or going to the mental health facility in Vinita, Oklahoma. Plaintiff further alleges that his supervisor . . . was 'hateful' and asked him 'what the f\*\*\*'s wrong with you.'"); *Muller v. Automobile Club*, 897 F. Supp. 1289, 1291 (S.D. Cal. 1995).

some cases, the complaints involve working conditions which most people, including the judges deciding the cases, would acknowledge as unfair,<sup>42</sup> a violation of standards of behavior in the workplace,<sup>43</sup> or even intolerable.<sup>44</sup> In other cases, work stress arises not from interpersonal conflicts but from an employee working fifty to seventy hour weeks,<sup>45</sup> double shifts, or night shifts.<sup>46</sup>

Courts cite three principal justifications for ruling against plaintiffs in these cases, corresponding to the elements of a *prima facie* case under the ADA. First, courts often conclude that a plaintiff is not disabled because his or her claimed disability results from stress, abuse, or difficulties with a supervisor. Even if the plaintiff is hospitalized—and despite EEOC enforcement guidance that interacting with others is a major life activity<sup>47</sup>—most courts hold as a matter of law that conditions arising from an interpersonal conflict at work or

(after plaintiff's life was threatened repeatedly by customer, co-workers asked her if she was wearing her "target," permitted the customer on company property, and told plaintiff they had informed customer where she lived and what kind of car she drove); *Kent*, 790 F. Supp. at 1036 (co-workers called plaintiff "brain-dead" and "droolie"); *see also Howard*, 904 F. Supp. at 932 (characterizing co-worker harassment); *Henry*, 902 F. Supp. at 252 (plaintiff subjected to jokes about his depression, including the placement of a cartoon in his mailbox); *Haysman*, 893 F. Supp. at 1098 (discussing friction that developed as a result of disability).

42. *See Simpkins*, 1996 WL 452858, at \*8.

43. *See Webb v. Baxter Healthcare Corp.*, 57 F.3d 1067 (table), No. 94-1784, 1995 WL 352485, at \*5 (4th Cir. June 13, 1995).

44. *See Sedor v. Frank*, 42 F.3d 741, 743 (2nd Cir. 1994) (stating that "insensitivity on the part of fellow employees 'barely reached tolerable maturity levels for junior high students'" (citation omitted); *Pavone*, 1997 WL 441312, at \*8; *Hatfield*, 920 F. Supp. at 109; *Kent*, 790 F. Supp. at 1040-41.

45. *See Williams*, 1997 WL 158176, at \*1 (involving doctor who recommended that employee limit her work days to 10 hours); *Kolpas v. Searle*, 959 F. Supp. 525, 527 (N.D. Ill. 1997) (requiring employee to work at least 60 to 70 hour weeks); *Simmerman*, 1996 WL 131948, at \*1 (depressed employee not qualified to perform the essential functions of managing a fast food restaurant because he could only work the day shift and not more than 40 hours per week); *Mazzarella v. United Parcel Serv.*, 849 F. Supp. 89, 91-92 (D. Mass 1994) (noting that plaintiff, by his own choice, worked six or seven days a week, eight hours a day, but testified "that such a schedule was probably not good for his 'balance'").

46. *Webb v. Mercy Hosp.*, 102 F.3d 958, 959 (8th Cir. 1996) (nurse unable to work night shift). Because of the effects of some psychotropic medications, some workers who take these drugs find it extremely difficult to work night shifts or begin work early in the morning. *See PRACTICE AND COMPLIANCE MANUAL*, *supra* note 37, at 101.

47. *See PRACTICE AND COMPLIANCE MANUAL*, *supra* note 37, at 91. However, the EEOC notes that an individual "is not substantially limited just because [he or she] is irritable or has some trouble getting along with a supervisor or co-worker." *Id.* at 91 n.15.

job-related stress cannot be considered a disability for the purposes of the ADA.<sup>48</sup>

Second, courts conclude that the ability to withstand stressful work conditions or the ability to get along with others is so essential to the job that the plaintiff cannot be considered a qualified individual with a disability.<sup>49</sup> Courts make abstract judgments that job stress and getting along with others are simply inherent to employment without examining each situation in the individualized terms required by the ADA. Courts, therefore, do not determine the source of the stress or interpersonal difficulties or whether, in the plaintiff's situation, that particular stressor is indeed essential to the plaintiff's actual job.<sup>50</sup>

Third, courts either refuse to consider or simply deny plaintiffs' proffered reasonable accommodations.<sup>51</sup> Although the ADA requires courts to consider whether reasonable accommodations could render an employee qualified,<sup>52</sup> courts deem accommodations such as transfer or reduction in hours to be unreasonable in psychiatric disability cases even though they are routinely granted in other disability cases. No court, however, has required an employer to show that abusive or stressful practices are so necessary to the job that eliminating them would "fundamentally alter" the actual job being done.

This Article is divided into four parts. Parts II and III track the elements of an ADA claim, arguing that judicial assumptions about the nature of psychiatric disabilities and essential employment functions have resulted in the near-total failure of the ADA to protect individuals with psychiatric disabilities from employment discrimination. Part IV proposes a solution to this problem focusing on the ADA's prohibition of practices that have a disparate impact on people with disabilities.

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48. See *infra* notes 95-124 and accompanying text. The only judge who appears to have a different understanding is Judge Richard Posner. See *infra* text accompanying notes 122-24.

49. See *infra* notes 124-42 and accompanying text.

50. See *infra* notes 143-85 and accompanying text.

51. See *Ralph*, 1998 WL 29837, at \*6-7; *Lewis*, 908 F. Supp. at 946 (finding that "[p]laintiff's requested accommodation of a transfer [was] unreasonable as a matter of law"); *Mazzarella*, 849 F. Supp. at 95; *Mancini*, 820 F. Supp. at 148 (D. Vt. 1993) (involving invalid request for transfer).

52. See 42 U.S.C. § 12111(8).

## II. DEFINING DISABILITY AND THE EXCLUSION OF WORKERS WITH PSYCHIATRIC DISABILITIES FROM THE PROTECTION OF THE ADA

In order to establish a claim under Title I of the ADA, a plaintiff must show that he or she is disabled, qualified for the job, and discriminated against on the basis of a disability.<sup>53</sup> The ADA defines disability as: "[1] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; [2] a record of such an impairment; or [3] being regarded as having such an impairment."<sup>54</sup>

The first and most common rationale used by courts in dismissing employment discrimination claims brought by employees claiming to have a psychiatric disability is that the employee is in fact not disabled under the ADA. The reason advanced by courts for this conclusion is not based on the absence of serious manifestations of disability, as many plaintiffs are hospitalized, on medication, and under the care of one or more doctors and specialists. Rather, courts conclude as a matter of law that disabilities that plaintiffs allege are caused by workplace abuse, interpersonal conflicts, and job stress simply are not disabilities for purposes of the ADA.

### A. Workplace Abuse and Interpersonal Conflicts on the Job

Almost all law review articles written about abuse in the workplace focus specifically on abuse related to race or gender.<sup>55</sup> Vast compendia are written about labor law that do not contain a single word about abuse in the workplace. At the same time, case law and the popular press, books, and oral histories by and about workers<sup>56</sup>

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53. See *id.* § 12112.

54. *Id.* § 12102(2).

55. Regina Austin provides one notable exception. See Austin, *supra* note 38, at 1-5. A few authors responded to her suggestion that the tort of intentional infliction of emotional distress be expanded to render employers more frequently liable for abuse in the workplace. See David P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 390-91 (1994). Other authors have written on workplace harassment based on a person's disability—rather than day-to-day abuse directed at all employees. See, e.g., Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475 (1994).

56. See, e.g., Rosalyn Baxandall & Linda Gordon, *AMERICA'S WORKING WOMEN: A DOCUMENTARY HISTORY 1600 TO THE PRESENT* (1995); Joe R. Feagin & Melvin P. Sikes, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1994).

are filled with stories indicating both the extent to which workplace abuse is common and the toll it takes on workers. For example, every year the organization "9 to 5" sponsors a "worst boss" contest<sup>57</sup> which receives thousands of entries, including:

[a] manufacturing company [that] demand[ed] mandatory overtime, making some employees work 16 hours a day, seven days a week, then force[d] all employees to take their two-week vacations at the end of May, when most kids [were] still in school. The plant [was not] air-conditioned, but workers [were] forbidden to drink water unless on an authorized break.<sup>58</sup>

Other entries included a boss whose response to an employee's request for bereavement leave following a miscarriage late in her pregnancy was to demand the baby's death certificate,<sup>59</sup> and an employee who "raced home [from work] to her hysterical children and found the baby sitter dead on the sofa" and was then ordered back to work by her employer, who said "she was of more use to him than to the nanny."<sup>60</sup>

These stories are extreme but not necessarily aberrant. Social science researchers confirm that workplace abuse is common. Researchers underscore that, despite losing a great deal of productivity, the American workplace is permeated with "an organizational perversity where abusers are often protected and the victims punished."<sup>61</sup> In a television show about mothers on welfare going back to work, one repentant woman explained why she had lost two jobs since returning to work and would now be able to retain the third because of the lessons she had learned:

I guess I've been out of the work field too long to realize that if the boss screams at you for no reason or if he says something that's his way, whether you're right or wrong, it doesn't matter; it's the boss, and that's what I consider the business politics that I've learned on the past two jobs, so

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57. See Tamara Jones, *A Real Piece of Work: 'Worst Boss' Contest Lets Employees Vent*, WASH. POST, Oct. 16, 1997, at B1.

58. See *id.*

59. See *id.*

60. *Id.* The story also detailed a boss who "[i]n addition to routinely screaming insults and throwing trays of hot food at the employee . . . forced her to clean the floors with a toothbrush and crawl through a Dumpster to find a burned biscuit when she was seven months pregnant." *Id.*

61. *Id.* (quoting Dr. Harvey Hornstein of Columbia University, who studied more than a thousand workers over eight years).

I'm ready for my third and my last.<sup>62</sup>

An article in *The Indiana Lawyer* noted casually: "Leadership styles vary greatly, of course. We've all had bosses who were screamers . . . ."<sup>63</sup> One article in the wake of the controversy surrounding basketball player Latrell Sprewell's attack on his coach<sup>64</sup> observed:

One of the dirty little secrets of the American workplace—and a mostly overlooked wrinkle in the firing of basketball player Latrell Sprewell—is the so-called "screamer," a boss who feels at liberty to berate and belittle his employees even if he feels constrained by law or political correctness from making sexual advances or using racial epithets.<sup>65</sup>

The cases brought by plaintiffs with psychiatric disabilities under the ADA mirror these observations. Courts' generalizations that the ability to cope with virtually any level of stress is essential to maintaining employment in this country often insulate levels of abuse or extreme working conditions unnecessary to any job's function. The stories told by plaintiffs range from physical assault by supervisors<sup>66</sup> and limitations on use of the restroom<sup>67</sup> to repeated harassment and criticism.<sup>68</sup>

*Kotlowski v. Eastman Kodak Co.*<sup>69</sup> is a fairly representative case in its seamless intertwining of gender and disability issues. Kotlowski's supervisor "berated her for her professional shortcomings and told her she had fallen through the cracks. [He] hovered around her cubicle, making her feel very nervous and pressured. He would sometimes tell her that stress was good for her."<sup>70</sup> When Kotlowski attempted to approach him with medical concerns, "he told [her] that

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62. *The News Hour with Jim Lehrer* (PBS television broadcast, Oct. 10, 1997) (comments of Renee Lawrence).

63. George A. Buskirk, Jr., *Leadership in a Legal Organization*, INDIANA LAW., Nov. 12, 1997, at 17.

64. See Jonathan Kirsch, *The Screamer and His Fire Within*, L.A. TIMES, Dec. 14, 1997, at M5.

65. *Id.*

66. See *Hatfield v. Quantum Chemical Corp.*, 920 F. Supp. 108, 109 (S.D. Tex. 1996).

67. See *Barton v. Tampa Elec. Co.*, No. 95-1986-CIV-T-17E, 1997 WL 128158, at \*1 (M.D. Fla. Mar. 11, 1997).

68. See *DiGloria v. American Tel. & Tel. Co.*, No. 92-1179-CIV-ORL-19, 1993 WL 735034 (M.D. Fla. Nov. 30, 1993).

69. 922 F. Supp. 790 (W.D.N.Y. 1996).

70. *Id.* at 800 (citations omitted).

she was a hypochondriac.”<sup>71</sup> He also “repeatedly commented that the length of [her] skirts was too short, that she should dress more conservatively, and that people would perceive her in a negative way.”<sup>72</sup>

Other psychiatric disability cases arise out of workplace harassment over perceived homosexuality. One of the more extreme examples of these cases—which may now be prosecuted as sex discrimination cases<sup>73</sup>—is *Hatfield v. Quantum Chemicals*.<sup>74</sup> Hatfield’s supervisor harassed him continually. In particular, the plaintiff alleged that his supervisor

would sometimes summon [him] by calling him “pussy.” In the spring of 1992, Hatfield had injured his back on the job. When he approached the supervisor about getting time off to see a chiropractor, the supervisor responded by telling Hatfield to get underneath his desk and perform oral sex on him. The supervisor then laughed and walked off. In May of 1992, Hatfield was standing by a water fountain when the supervisor grabbed the back of his head and pulled it toward the supervisor’s groin and asked if he was ready to perform oral sex on him.<sup>75</sup>

These kinds of stories are also found in ADA claims brought by people with physical disabilities,<sup>76</sup> whose co-workers often taunt them by calling them mentally disabled.<sup>77</sup> In *Rivera v. Domino’s Pizza, Inc.*,<sup>78</sup> Rivera’s co-workers and supervisors mocked his speech defect and cleft palate and lip by calling him “a numskull” and “retarded,” and they told Domino’s customers that he had been hired from a local facility for mentally handicapped people and that “the reason Rivera was ‘so fucked up’ was that he was a ‘failed abortion.’”<sup>79</sup>

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71. *Id.*

72. *Id.*

73. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998).

74. 920 F. Supp. 108 (S.D. Tex. 1996).

75. *Id.* at 109.

76. The difference is that plaintiffs with physical disabilities—even physical disabilities about which some are skeptical—often win their challenges of workplace abuse. See, e.g., *Goodman v. Boeing Co.*, 899 P.2d 1265, 1267 (Wash. 1995) (involving plaintiff with carpal tunnel syndrome who won \$1.1 million).

77. *Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 744 (1st Cir. 1995) (co-workers and supervisors called woman with cataracts and glaucoma “‘little blind lady,’ ‘mentally retarded,’ ‘mutant,’ cross-eyed, and physically repulsive[,] and hid or defaced her paperwork”); *Williams v. Kerr-McGee Corp.*, 110 F.3d 74 (table), No. 96-6090, 1997 WL 158176 (10th Cir. Apr. 1, 1997) (plaintiff’s psychiatric problems related to exacerbation of lupus by job stress).

78. No. CIV. A. 95-1378, 1996 WL 53802 (E.D. Pa. Feb. 9, 1996).

79. *Id.* at \*1 (citations omitted).



The cases often concern supervisors who curse, yell, or scream at their employees.<sup>80</sup> Neither the employer nor the courts, however, consider the screaming supervisor the problem in these situations.<sup>81</sup> As one author recently wrote:

some bosses feel empowered to treat their subordinates with a degree of coarseness, contempt and cruelty that would be unthinkable in any other social setting. I observed that screamers are often coddled and even encouraged within the corporate culture if they are successful at making money for the company . . . . Screamers are still tolerated in workplaces where sexual advances and racial epithets are now forbidden.<sup>82</sup>

The reactions of psychiatrically vulnerable employees to this kind of treatment tend to vary.<sup>83</sup> Some get angry and are fired for being "insubordinate"<sup>84</sup> and some break down and leave and are fired for leaving work without notifying their immediate supervisors.<sup>85</sup> Neither response is acceptable to the employer or the courts. As outlined in the next two sections, courts either find that these plaintiffs cannot be disabled as a matter of law or that their anger or breakdowns render them unqualified for employment. Courts reject outright any suggestion that the employer might have an obligation to either create a more respectful environment or, at least, transfer the employee.

In fact, one of the concerns raised by defendants and their amici

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80. See, e.g., *Curry v. Empire Berol*, 134 F.3d 370 (table), No. 97-5012, 1998 WL 13407, at \*1 (6th Cir. Jan. 7, 1998) (supervisor cursed at employee); *Dewitt v. Carsten*, 941 F. Supp. 1232, 1234 (N.D. Ga. 1996) (supervisor "scolded and yelled at plaintiff"), *aff'd mem.*, 122 F.3d 1079 (11th Cir. 1997).

81. See *Curry*, 1998 WL 13407 at \*4 (holding plaintiff failed to state a claim); *Dewitt*, 941 F. Supp. at 1241 (granting defendant's motion for partial summary judgment).

82. Kirsch, *supra* note 64, at M5.

83. Unfortunately for those who might have hoped that the advent of women in positions of authority might make for a kinder, gentler workplace, I have not been able to detect any gender-specific pattern of allegations of abuse or harassment at work. That is, although a substantial number of the cases are brought by women or minorities, both men and women are portrayed as abusive supervisors by employees of both genders. The stories seem to have far more to do with workplace cultures of hierarchy and authority than gender.

84. See, e.g., *Mancini v. General Elec. Co.*, 820 F. Supp. 141, 143 (D. Vt. 1993) (involving plaintiff who frequently had heated arguments with his supervisor, including one incident where he "lost his temper with his supervisor and directed abusive language at him").

85. See, e.g., *Simpkins v. Specialty Envelope, Inc.*, 94 F.3d 645 (table), No. 95-3370, 1996 WL 452858, at \*1-2 (6th Cir. Aug. 9, 1996).

and addressed by the Supreme Court in *Oncale v. Sundowner Off-shore Services, Inc.*<sup>86</sup> was the specter that the decision would create “a general civility code for the American workplace.”<sup>87</sup> The Court was reassuring that this “risk” could be met by “careful attention to the requirements of the statute.”<sup>88</sup> The Court emphasized that “verbal or physical harassment” is not prohibited by Title VII and that it had “never held that workplace harassment, even harassment between men and women, is automatically discrimination.”<sup>89</sup> Although concern about vague prohibitions of undefined behavior in the workplace is understandable, the vehemence with which the Court rejected a “code of civility” in the workplace and underscored the immunity of generalized workplace harassment from gender discrimination law only confirms that legal protection—if any—for emotionally fragile workers today must come from the ADA, or it will not be there at all.

*B. The Relationship Between Abuse, Interpersonal Conflicts, and the Definition of Disability*

One of the fundamental canons of psychiatry and the medical profession is that high levels of stress can cause, trigger, or exacerbate both physical illness and psychiatric disabilities.<sup>90</sup> These disabilities and illnesses, however, can diminish or even vanish if the stress is reduced.

Because courts, consciously or unconsciously, associate disability with the model of blindness, deafness, and severe mobility impairment, they construct disability as permanent, unchanging, and located totally within the individual. Although some courts have been able to understand that physical disability can manifest itself episodically<sup>91</sup>

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86. 118 S. Ct. 998 (1998) (holding that Title VII covers same-sex harassment).

87. *Id.* at 1002.

88. *Id.*

89. *Id.*

90. See LINAS A. BIELIAUSKAS, STRESS AND ITS RELATIONSHIP TO HEALTH AND ILLNESS 22-23, 63, 81-87 (1982); Muhammad Jamal, *Relationship of Job Stress and Type-A Behavior to Employees' Job Satisfaction, Organizational Commitment, Psychosomatic Health Problems, and Turnover Motivation*, 43 HUM. REL. 727, 735 (1990); see also *Simpson v. Chater*, 908 F. Supp. 817, 822 (D. Or. 1995) (noting that plaintiff's treating physician confirmed that “stress of working would exacerbate the progression of [plaintiff's multiple sclerosis]”).

91. See *Vande Zande v. State Dept. of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) (“[A]n intermittent impairment that is a characteristic manifestation of an admitted disability is, we believe, a part of the underlying disability, and hence a condition that the employer must reasonably accommodate. *Often the disabling*

or as a result of a physical environment<sup>92</sup> or physical demands,<sup>93</sup> courts do not have the same understanding of psychiatric disabilities, which also manifest themselves episodically,<sup>94</sup> and often as a result of environmental or psychological demands. Above all, courts cannot conceptualize disability as interactional or arising in an interpersonal context. Therefore, they cannot recognize many psychiatric disability claims, sometimes declaring that psychiatric disability of certain origins—primarily psychiatric disability which the plaintiff traces to difficulties and conflicts with co-workers or supervisors—cannot exist as a matter of law.<sup>95</sup>

In *Weiler v. Household Finance Corp.*,<sup>96</sup> the plaintiff asked to be transferred after her supervisor, who had decided to conduct her annual employment review in the cafeteria, “got loud, sarcastic and abusive. He discussed her physical and mental disabilities in a loud voice and was critical of the various therapies she was undergoing. On numerous occasions during the evaluation, [he] allegedly lunged forward in his chair and put his face close to plaintiff’s and got louder.”<sup>97</sup> This was apparently the culmination of a long campaign of

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*aspect of a disability is, precisely, an intermittent manifestation of the disability rather than the underlying impairment.”*) (emphasis added).

92. See *Fehr v. McLean Packaging Corp.*, 860 F. Supp. 198, 200 (E.D. Pa. 1994).

93. See *Valle v. City of Chicago*, 982 F. Supp. 560, 565 (N.D. Ill. 1997) (finding that police officer candidate with rhabdomyolysis—a physical disability which manifests itself under heavy physical exertion—stated a claim under the ADA when denied requested accommodation of relaxed running requirement in police training program).

94. See PRACTICE AND COMPLIANCE MANUAL, *supra* note 37, at 93 (“Chronic episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms.”).

95. See *Siemon v. American Tel. & Tel. Corp.*, 117 F.3d 1173, 1176 (10th Cir. 1997) (stating that a “mental impairment merely prevent[ing] a plaintiff] from working under a few supervisors within the organizational structure of one major corporation . . . is far too narrow to constitute a ‘class of jobs’” under the ADA’s interpretive guidelines); *Weiler v. Household Fin. Corp.*, No. 93 C 6454, 1995 WL 452977, at \*5 (N.D. Ill. July 27, 1995) (holding that conflict with employer not recognized as a disability under the ADA), *aff’d*, 101 F.3d 519 (7th Cir. 1996); *Dewitt v. Carsten*, 941 F. Supp. 1232, 1236 (finding that job related stress does not qualify as a disability under the ADA); *Hatfield v. Quantum Chem. Corp.*, 920 F. Supp. 108, 110 (S.D. Tex. 1996) (holding that disability due to friction with supervisor does not qualify as a disability under the ADA); *Adams v. Alderson*, 723 F. Supp. 1531, 1531 (D.D.C. 1989) (finding that employee’s reaction to supervisor was “transitory phenomenon” because it would disappear if supervisor was removed).

96. No. 93 C 6454, 1994 WL 262175 (N.D. Ill. June 10, 1994).

97. *Id.* at \*1.

abuse by the plaintiff's supervisor.<sup>98</sup> In a later decision granting the defendant's motion for summary judgment, the court noted:

The ADA does not protect people from the general stresses of the workplace. Everyone has encountered difficult situations in the working environment. Being unwilling or even unable to work with a particular individual simply is not the equivalent of being "substantially limited" in the life activity of working . . . . The evidence shows that the plaintiff had a personality conflict with [her supervisor], albeit one which caused her to suffer anxiety and depression to an apparently significant degree. *A disability is part of someone and goes with her to her next job. A personality conflict, on the other hand, is specific to an individual, in this case, [plaintiff's supervisor].*<sup>99</sup>

The court in *Weiler*, like other courts in these cases, supported its decision by micro-analyzing Weiler's situation as a personality conflict with her supervisor,<sup>100</sup> which by definition was so individualized that Weiler could not meet the EEOC regulatory requirement that her disability disqualify her from more than a single job.<sup>101</sup> The court did not frame her disability as an unusual fragility or vulnerability to interpersonal conflict or public humiliation<sup>102</sup> which she *would* carry with her to her next job and which, in fact, is replicated in many other psychiatric disability cases.<sup>103</sup>

It is important to underscore that psychiatric disabilities are the only disabilities where courts look to etiology rather than to manifestations of the disability itself to determine whether the plaintiff is a member of the protected class. Weiler was placed on disability leave

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98. *Id.* at \*1-2.

99. *Weiler*, 1995 WL 452977, at \*5 (emphasis added).

100. *See id.* at \*4-5.

101. *See* 29 C.F.R. § 1630.2(j)(3)(i) (1997). This section provides that with respect to the major life activity of working:

[t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

*Id.*

102. *See Weiler*, 1995 WL 452977, at \*5.

103. *See Mears v. Gulfstream Aerospace Corp.*, 905 F. Supp. 1075, 1077 (S.D. Ga. 1995) (noting that precipitating event of breakdown was being escorted through the office by two security guards for drug test after she had dropped files while suffering from a migraine), *aff'd mem.*, 87 F.3d 1331 (11th Cir. 1996).

and diagnosed with depression and anxiety after the incident with her supervisor.<sup>104</sup> The court acknowledged that she suffered "anxiety and depression to an apparently significant degree."<sup>105</sup> But it does not matter if plaintiffs are institutionalized<sup>106</sup> or medicated with powerful psychotropic drugs;<sup>107</sup> courts are unmoved even if all testifying experts and physicians agree on their diagnosis. If the disability arises from interpersonal difficulties, it is not a disability under the ADA as a matter of law. Plaintiffs who claim that their psychiatric disability is related to a conflict with their supervisors simply do not win ADA cases.<sup>108</sup>

Meanwhile, physical disabilities that manifest themselves in interpersonal difficulties are protected, as are psychiatric disabilities that arise from various other sources. For instance, in *Gilday v. Me-costa County*,<sup>109</sup> the court held that a plaintiff who was fired because he was rude and could not get along with co-workers and customers stated a cause of action under the ADA because he was a diabetic.<sup>110</sup> The plaintiff had put forth sufficient evidence to overcome summary judgment by alleging that fluctuating blood sugar levels impaired his ability to work amiably with co-workers and patients.<sup>111</sup> The court also noted that Gilday became "frustrated and irritable" when his blood sugar deviated from normal levels<sup>112</sup> and that "[s]tress [could] also apparently cause his blood sugar to fluctuate wildly,"<sup>113</sup> and therefore remanded so the district court could consider whether transfer to a less stressful and chaotic position would be a reasonable accommodation.<sup>114</sup>

Likewise, the very few psychiatric disability cases that survive motions to dismiss or for summary judgment are cases in which the disability either clearly does not arise from the work environment at

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104. See *Weiler*, 1995 WL 452977, at \*1.

105. *Id.* at \*5.

106. See *Miller v. National Casualty Co.*, 61 F.3d 627, 629 (8th Cir. 1995) (involving employer held not to have been informed of plaintiff's disability despite call from plaintiff's sister saying that she "was mentally falling apart and the family was trying to get her into the hospital"); *Simpkins*, 1996 WL 452858, at \*2; *Adams*, 723 F. Supp. at 1531 n.1.

107. See *Simpkins*, 1996 WL 452858, at \*2.

108. See, e.g., *id.*; *Mundo v. Sanus Health Plan*, 966 F. Supp. 171, 173 (E.D.N.Y. 1997); *Mears*, 905 F. Supp. at 1075.

109. 124 F.3d 760 (6th Cir. 1997).

110. See *id.* at 765.

111. See *id.*

112. *Id.* at 761.

113. *Id.*

114. See *id.* at 766.

all or arises from some physical and non-personal aspect of the employment. For example, courts have far less difficulty accepting psychiatric disabilities such as claustrophobia,<sup>115</sup> agoraphobia,<sup>116</sup> anxiety disorder related to commuting,<sup>117</sup> stress related to working with nuclear energy,<sup>118</sup> and, occasionally, claims related to the side effects of medication taken for mental disorders.<sup>119</sup>

The rejection of psychiatric disability is thus not so much a repudiation of the theory that disabilities can be triggered by environment or context as a visceral rejection of the specific contention that disabilities can be triggered by dealing with other people. The court in *Weiler* makes clear its belief that Weiler, who worked for Household Finance without difficulty for seven years, is simply "unwilling" to work with her supervisor.<sup>120</sup> While Gilday is excused from responsibility for monitoring his blood sugar level, Weiler is ousted from the legal system for failing to control her reaction to her supervisor, a man who conducted her performance evaluation in the cafeteria and

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115. See, e.g., *Neveau v. Boise Cascade Corp.*, 902 F. Supp. 207 (D. Or. 1995) (denying summary judgment because genuine issue existed whether claustrophobia caused by having to enter small enclosed "slusher" substantially limited plaintiff's ability to perform her job).

116. See, e.g., *Przybylak v. New York State Thruway Auth.*, No. 95-CV-0707E(F), 1997 WL 662346 (W.D.N.Y. Oct. 16, 1997) (denying summary judgment because genuine issue remained whether accommodation was reasonable); *Ofat v. Ohio Civil Rights Comm'n*, No. 94-J-31, 1995 WL 310051 (Ohio Ct. App. May 17, 1995) (affirming lower court's judgment against state for discrimination against employee with panic disorder).

117. See, e.g., *Poindexter v. Atchison, Topeka & Santa Fe Ry. Co.*, 975 F. Supp. 1387 (D. Kan. 1997) (stating that summary judgment was improper because genuine issue existed whether plaintiff's anxiety disorder qualified as a disability).

118. See, e.g., *Pritchard v. Southern Co. Servs.*, 102 F.3d 1118 (11th Cir. 1996) (reversing summary judgment against plaintiff on ADA and Rehabilitation Act claims).

119. Compare *Overton v. Reilly*, 977 F.2d 1190, 1195 (7th Cir. 1992) (finding that summary judgment was precluded by genuine issue of whether plaintiff qualified for protection under the Rehabilitation Act due to depression medication which caused sleepiness at work), and *Fehr v. McLean Packaging Co.*, 860 F. Supp. 198, 200 (E.D. Pa. 1994) (denying summary judgment because genuine issue remained whether shortness of breath caused by medication qualified as a disability under the ADA), with *Gordon v. E.L. Hamm & Assocs.*, 100 F.3d 907, 912 (11th Cir. 1996) (granting summary judgment for employer because plaintiff failed to show that side effects resulting from chemotherapy treatments substantially limited his ability to work).

120. See *Weiler*, 1995 WL 452977, at \*4 ("[I]t is clear that the plaintiff could work either in another position for this employer or for another employer—she simply could not (or would not) work under [her current supervisor].").

lunged and yelled at her.<sup>121</sup> If Weiler's supervisor had sexually harassed her, the question would not be whether she could control her reactions, but why the supervisor was not controlling his actions. Her reaction to being yelled and lunged at is, however, her problem.

Of all judges to consider these ADA cases, only Judge Richard Posner has been willing to entertain the notion that disabilities may arise from interpersonal difficulties on the job. In *Palmer v. Circuit Court of Cook County*<sup>122</sup> Judge Posner begins by summarizing the holding below, a typical district court decision finding that the plaintiff was not disabled because the disability she claimed arose from interpersonal conflicts at work:

The district judge determined, as a matter of law, that Palmer's depression and paranoia were not disabling because she testified in her deposition that she had never had any problems at work before Clara Johnson became her supervisor. This meant, the judge thought, that Palmer had merely had "a personality conflict with her supervisor, Clara Johnson, and her co-worker, Nicki Lazzaro—although one which caused her to suffer anxiety and depression to an apparently significant degree."<sup>123</sup>

Judge Posner at first appeared to support this conclusion:

The judge was certainly correct that a personality conflict with a supervisor or coworker does not establish a disability within the meaning of disability law . . . even if it produces anxiety and depression, as such conflicts often do. Such a conflict is not disabling; at most it requires the worker to get a new job.<sup>124</sup>

But then, in seeming contradiction to the previous two sentences, Judge Posner stated what no other judge to date has understood:

But if a personality conflict triggers a serious mental illness

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121. See *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 522 (7th Cir. 1996).

122. 117 F.3d 351, 352 (7th Cir. 1997).

123. *Id.* 352. Although the description that the personality conflict was "one which caused her to suffer anxiety and depression to an apparently significant degree" is identical to the phrase used in *Weiler*, the cases were decided by different judges. *Id.*; *Weiler*, 1995 WL 452977, at \*5. The *Weiler* decision predated—and obviously influenced—the judge in *Palmer*.

124. *Palmer*, 117 F.3d at 352 (citation omitted). The ease with which this circuit court judge with lifetime tenure assumes that a clerical-level black woman who has schizophrenia and major depression in Cook County can simply "go out and get a new job" speaks volumes about the different worlds in which he and the plaintiff live their lives.

that is in turn disabling, the fact that the trigger was not itself a disabling illness is no defense. Schizophrenia and other psychoses are frequently triggered by minor accidents or other sources of normal stress . . . . Our only point is to distinguish between the nondisabling trigger of a disabling mental illness and the mental illness itself. On the record compiled in the district court, it is not possible to negate the inference that Palmer has in fact a disabling mental illness.<sup>125</sup>

While people can differ over whether workplace abuse, especially at the levels seen in many of these cases, constitutes a source of "normal stress"—with the accompanying assumption that normal stress conditions are acceptable—Judge Posner's fundamental proposition that a disability should not be disqualified merely because of its source in interpersonal conflict is sound. Rather, the key in psychiatric disability cases—as in all other disability cases—is to look at the manifestations of disability rather than the etiology of disability.

### C. *The Relationship Between Stress and the Definition of Disability*

A number of ADA claims filed by employees with psychiatric disabilities relate to their difficulty in tolerating stress. Plaintiffs who allege that their psychiatric disabilities arise from stress, like plaintiffs whose claims arise from interpersonal difficulties, are regarded by courts as not being disabled as a matter of law.<sup>126</sup> In one case, a plaintiff raised both job stress and interpersonal difficulties associated with her supervisor, a sheriff.<sup>127</sup> The court held that she could not be disabled as a matter of law:

Indeed, the causal relationship between the job and her claimed "disability" distinguishes plaintiff's stress from other conditions that clearly constitute disabilities under the ADA. After all, a visually impaired person will be visually

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125. *Id.* It is, of course, not only schizophrenia which can be triggered in this way, but major depression, anxiety disorders, and bipolar disorder as well. See BIELIAUSKAS, *supra* note 90, at 87; PETER C. WHYBROW, A MOOD APART 172-73, 182 (1997). However, the conditions Judge Posner described were only the ones principally at issue in *Palmer*.

126. See, e.g., *Mundo v. Sanus Health Plan*, 966 F. Supp. 171, 173 (E.D.N.Y. 1997) ("[A]n inability to tolerate stressful situations is not an impairment for purposes of the ADA."); *Dewitt v. Carsten*, 941 F. Supp. 1232, 1236 (N.D. Ga. 1996) (stating that stress triggered by only one job does not constitute a disability under the ADA), *aff'd mem.*, 122 F.3d 1079 (11th Cir. 1997).

127. See *Dewitt*, 941 F. Supp. at 1234.



impaired no matter what job he holds; a quadriplegic will be unable to walk whether or not he is employed. Plaintiff's "disability," however, was triggered only when, out of the universe of hundreds of jobs, she held a very specific job in the jail that required a lot of interaction with inmates and with the Sheriff. According to plaintiff, this disability would not be triggered if plaintiff had a job that required less interaction with these individuals.<sup>128</sup>

Perhaps this plaintiff should not have won. Her inability to interact with prisoners in jail may have rendered her unable to perform an essential function of the job, and perhaps she could not be reasonably accommodated.<sup>129</sup> But the court found that she had not and could not demonstrate that she was disabled precisely because she alleged that her disability was triggered by interpersonal interactions and because she referred to it as extreme stress and anxiety.<sup>130</sup>

The very essence of most psychiatric disabilities, however, is that they can be triggered or exacerbated by environmental stimuli, principally stress and stressful interactions with others.<sup>131</sup> In this respect, they are similar to many physical disabilities.<sup>132</sup>

The very fact that psychiatric difficulties manifest themselves in certain contexts and relationships but not in others might be interpreted as making them easier to accommodate. Instead, courts interpret this dichotomy to mean that psychiatric disabilities do not exist at all, at least for the purposes of Title I of the ADA. For example, in *Adams v. Alderson*,<sup>133</sup> the court noted that "Adams' present psychiatrist . . . describes his condition as a 'maladaptive reaction to a psychosocial stressor,' viz., the antagonizing supervisor, which is, however, a transitory phenomenon that can be expected to disappear

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128. *Id.* at 1237 (footnote omitted).

129. The plaintiff had asked for a transfer to a position at the courthouse, which apparently required less interaction with prisoners and the sheriff. *See id.* at 1234-35. *But see* *Sharp v. Abate*, 887 F. Supp. 695, 699 (S.D.N.Y. 1995) (finding that summary judgment was precluded because dealing with inmates may not be an essential function of a corrections officer in New York).

130. *See Dewitt*, 941 F. Supp. at 1234.

131. *See* WHYBROW, *supra* note 124, at 169-95.

132. *See* Dwight Evans et al., *Severe Life Stress as a Predictor of Early Disease Progression in HIV Infection*, 154 AM. J. PSYCHIATRY 630 (May 1997) (finding that for every single severe stressor per six-month study interval, the risk of early disease progression doubled while, for subjects in the study for at least two years, higher severe life stress increased the odds of developing HIV disease progression nearly four-fold).

133. 723 F. Supp. 1531 (D.D.C. 1989) (involving Rehabilitation Act).

when the 'psychosocial stressor' is removed."<sup>134</sup> This observation appears to indicate that Adams was capable of meeting the essential functions of the job with a transfer to a different supervisor. The next step would then have been to inquire whether such a transfer was a reasonable accommodation under the circumstances. The court, however, used the psychiatrist's testimony to find that Adams was not disabled at all: "[The condition] is, therefore, hardly an 'impairment' which 'substantially limits one or more . . . major life activities.'"<sup>135</sup>

Most courts faced with claims of psychiatric disability resulting from stress simply hold as a matter of law that stress is not a disability under the ADA.<sup>136</sup> As with disabilities arising from interpersonal conflicts with supervisors and workplace abuse, this conclusion misses the point. The question is not whether stress is a disability but whether the stress causes or is a symptom of a disability covered under the ADA.<sup>137</sup>

As in the case of interpersonal difficulties, courts have no problem understanding that job stress may cause physical disability.<sup>138</sup> But in a psychiatric disability case involving considerably greater manifestations of disability than reflected in the physical disability cases,<sup>139</sup> the court found that the plaintiff did not meet the definition of dis-

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134. *Id.* at 1531.

135. *Id.* (quoting 29 U.S.C. § 706(8)(B)) (defining 'disability' for the purposes of the Rehabilitation Act).

136. *See, e.g., Mundo*, 966 F. Supp. 171; *Dewitt*, 941 F. Supp. 1232.

137. The Equal Employment Opportunity Commission, for example, has written that "'stress' . . . may or may not be considered [an] impairment[], depending on whether . . . [it] result[s] from a documented physiological or mental disorder." EEOC, TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, § 2.1(a)(i), at II-3 (1992). At least one court has followed this interpretation. *See Paleologos v. Rehab Consultants, Inc.*, No.Civ.1:96-CV-2193-JEC, 1998 WL 21667, at \*2-3 (N.D. Ga. Jan. 16, 1998).

138. *See Patterson v. City of Seattle*, 97 F.3d 1460 (table), No. 95-35487, 1996 WL 528267, at \*1-2 (9th Cir. Sept. 17, 1996) (indicating that job-related stress which exacerbated plaintiff's Crohn Disease might require reasonable accommodation but finding that requested accommodation not necessary for plaintiff to perform essential functions of job); *Gonsalves v. J.F. Fredericks Tool Co.*, 964 F. Supp. 616, 621 (D. Conn. 1997) (acknowledging that hypertension and diabetes exacerbated by unreasonable work expectations may qualify as a disability under the ADA).

139. *Margeson v. Springfield Terminal Ry. Co.*, No. CIV.A. 91-11475-Z, 1993 WL 343676, at \*5 (D. Mass. Aug. 24, 1993) (stating that stress condition resulted in ongoing treatment, numerous trips to the emergency room, canceled family vacations, and absence from work).

ability.<sup>140</sup>

Interestingly, although the definition of disability for purposes of receiving disability benefits is considerably more stringent than the definition of disability for purposes of the ADA<sup>141</sup>—and requires an inability to work in almost any job—many plaintiffs who lose psychiatric disability claims on the grounds that they are not disabled nevertheless receive disability benefits for the very disability at issue in the discrimination case.<sup>142</sup> Not only do employers not fight the disability benefits claim as vigorously as the ADA claim, they often encourage and facilitate the disability benefits claim or even make it mandatory.<sup>143</sup>

### III. PSYCHIATRIC DISABILITY AND THE REQUIREMENT THAT EMPLOYEES BE "QUALIFIED INDIVIDUALS"

In addition to requiring that plaintiffs demonstrate that they are disabled in order to receive the protection of the ADA, courts require plaintiffs to establish that they are "qualified individual[s] with a disability."<sup>144</sup> To be a qualified individual, the plaintiff must be a person who can, "with or without reasonable accommodation, . . . perform the essential functions of the employment position."<sup>145</sup>

#### A. Interpersonal Conflicts and Being a "Qualified Individual"

Occasionally, a court will concede that the plaintiff is disabled and will examine the plaintiff's interpersonal difficulties in the context of being otherwise qualified for the job.<sup>146</sup>

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140. *See id.*

141. To qualify for ADA protection, an employee "must show that she is a 'qualified individual with a disability' who can perform the essential functions of her position despite her disability, or, can perform the essential functions of her job with a reasonable accommodation." *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 944 (N.D. Ga. 1995). On the other hand, to qualify to receive disability benefits, an employee must "be totally disabled to perform any job." *Id.* at 945.

142. *See, e.g., Hatfield v. Quantum Chem. Corp.*, 920 F. Supp. 108, 111 (S.D. Tex. 1996); *Lewis*, 908 F. Supp. at 945.

143. *See, e.g., Misk-Falkoff v. International Bus. Mach. Corp.*, 854 F. Supp. 215, 220 (S.D.N.Y. 1994), *aff'd mem.*, 60 F.3d 811 (2d Cir. 1995).

144. 42 U.S.C. § 12112(a) (1994).

145. *Id.* § 12111(8).

146. These concessions are usually made in the face of either defendant stipulations to the plaintiff's disability or overwhelming evidence of multiple hospitalizations and long histories of treatment. *See, e.g., McCrory v. Kraft Food Ingredients*, 98 F.3d 1342 (table), No. 94-6505, 1996 WL 571146 (6th Cir. Oct. 3, 1996); *Misk-Falkoff*, 854 F. Supp. at 218-19; *Boldini v. Postmaster Gen.*, 928 F. Supp. 125 (D.N.H. 1995); *Lewis*, 908 F. Supp. at 944.

In determining whether a plaintiff is otherwise qualified for a job, courts undertake the very opposite mode of analysis to the one employed in deciding whether a plaintiff has a disability. When courts consider whether a plaintiff is disabled, they conduct minute micro-analyses, examining the plaintiff's situation with great specificity. This typically leads to the determination that the inability to get along with one specific supervisor cannot constitute a disability because it leaves the plaintiff presumptively capable of performing every other job in which he or she does not report to the particular objectionable supervisor.<sup>147</sup>

When courts decide whether a plaintiff is "otherwise qualified," however, the inquiry is raised to a grand level of abstraction, with courts finding that "[i]t is certainly 'a job-related requirement' that an employee, handicapped or not, be able to get along with co-workers and supervisors."<sup>148</sup> When deciding whether the plaintiff is disabled, courts assume that the plaintiff can get along with anyone but the supervisor in question.<sup>149</sup> When deciding whether the plaintiff is a "qualified individual with a disability," the plaintiff's inability to get along with one or a few people is generalized into an inability to get along with anyone, thus rendering him or her unqualified for this or any other job.<sup>150</sup>

Ironically, when courts analyze whether a plaintiff is disabled, the ability to get along with others is dismissed as not constituting a major life activity.<sup>151</sup> But when the question is whether a plaintiff is otherwise qualified to work, the ability to get along with others is deemed an essential function of the job.<sup>152</sup> Because social interactions are uniquely relevant in cases of psychiatric disability, this disparity sweeps only people with psychiatric disabilities into its net.

Indeed, courts have enumerated a growing list of social skills as

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147. See *Weiler v. Household Fin. Corp.*, No. 93 C 6454, 1995 WL 452977, at \*4 (N.D. Ill. July 27, 1995).

148. *Misek-Falkoff*, 854 F. Supp. at 227.

149. See, e.g., *Hatfield v. Quantum Chem. Corp.*, 920 F. Supp. 108, 110 (S.D. Tex. 1996).

150. See, e.g., *Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 442 (6th Cir. 1991); *Misek-Falkoff*, 854 F. Supp. at 227; *Schmidt v. Bell*, No. CIV. A. 82-1758, 1983 WL 631, at \*14 (E.D. Pa. Sept. 9, 1983).

151. See, e.g., *Guilford of Maine, Inc. v. Soileau*, 105 F.3d 12, 14-15 (1st Cir. 1997). This is true despite the fact that the EEOC has made it clear that interacting with others is, in fact, a major life activity. See PRACTICE AND COMPLIANCE MANUAL, *supra* note 37, at 91.

152. See, e.g., *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 675 (1st Cir. 1995).

"essential" to employment.<sup>153</sup> Such skills include the ability to get along with supervisors and co-workers;<sup>154</sup> to accept and follow instructions;<sup>155</sup> to refrain from contentious arguments and insubordinate conduct with supervisors, co-employees, or customers;<sup>156</sup> to not cause or contribute to undue interruptions and hostility in the workplace;<sup>157</sup> and even to serve as a role model for other staff.<sup>158</sup> One court concluded that "plaintiff's behavior violated essential functions of her working environment" because she "conducted herself and her job as though she knew more about the particular business affairs than did her supervisors."<sup>159</sup>

In few of these cases do courts actually look at the specific functions of the particular job. For example, the ability to "refrain from contentious arguments and insubordinate conduct with supervisors, co-employees or customers" was regarded as an essential function of the job of a mail carrier who delivered mail by herself in a rural area.<sup>160</sup>

In cases involving interpersonal difficulties, courts have deemed getting along with bosses or co-workers an essential function of the job *and* the responsibility of the disabled employee.<sup>161</sup> Cultivation of interpersonal relationships is rarely conceptualized as a shared re-

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153. The district court judge in *Palmer v. Circuit Court* is one of the few exceptions. In *dicta*, he noted that "[t]he non-essential functions of plaintiff's job included working with Clara Johnson and Nicki Lazzaro." *Palmer v. Circuit Court*, 905 F. Supp. 499, 509 (N.D. Ill. 1995), *aff'd*, 117 F.3d 351 (7th Cir. 1997).

154. See *Pesterfield*, 941 F.2d at 442; *Misek-Falkoff*, 854 F. Supp. at 227.

155. See *Boldini*, 928 F. Supp. at 131.

156. See *id.* (finding that plaintiff failed to follow procedures and failed to accept authority).

157. See *Misek-Falkoff*, 854 F. Supp. at 227. Under some circumstances this could be seen as excluding union organizers from the realm of qualified employees.

158. See *EEOC v. Amego, Inc.*, 110 F.3d 135, 138 (1st Cir. 1997) ("The essential functions of that position included: supervising the day-to-day implementation of individual clinical, educational, and vocational programs and data collection for all programs; serving as a role model for staff in all areas of client programming, client services, and professional practice . . ."). The court concluded plaintiff did not meet her burden of showing she was able to meet the essential function of overseeing and administering medication. See *id.* at 144.

159. *Boldini*, 928 F. Supp. at 131. In this case, at the time of the events referred to by the court, Boldini had worked at the post office for almost eight years, and her supervisor had been appointed in the previous year. See *id.* at 128.

160. See *id.* at 131. Although there were allegations that she engaged in contentious arguments with customers and co-workers, these allegations arose for the first time seven years after she began working, immediately upon the appointment of a new supervisor. See *id.* at 128.

161. See *id.* at 131; *Misek-Falkoff*, 854 F. Supp. at 227.

sponsibility.<sup>162</sup> Unfortunately, employers are not held to the slightest burden of training employees or supervisors on working with people with psychiatric disabilities.<sup>163</sup> Like many analogous physical accommodations for people with disabilities,<sup>164</sup> such training would probably benefit non-disabled employees as well.

Moreover, many courts do not appear to take very seriously plaintiffs' contentions that their difficulties in interpersonal relations stemmed from the actions of co-employees or supervisors. In one troubling case a court declared that whether the plaintiff was correct when she stated she had not started the difficulties was irrelevant. The court noted that "where there are external indications of serious difficulties in the interaction between an employee and other employees and staff of the employer, as is the case here, the reality of perceptions of the supervisors, *regardless of the correctness of those perceptions*, presents a problem for the employer."<sup>165</sup>

The court is correct that supervisors' perceptions may present a problem for the employer, but the employer's problem may be one with the supervisors rather than with the plaintiff. If the supervisors' perceptions were that cancer was contagious or that AIDS could be contracted from doorknobs, it is unlikely that a court would believe that the reality of the supervisors' perceptions, regardless of their correctness, was what counted in terminating an employee with cancer or AIDS.

In *School Board of Nassau County v. Arline*,<sup>166</sup> the Supreme Court emphasized that disabilities could be constructed as much by the attitudes, interactions with, and reactions of others as by any inherent physical or mental limitations presented by the impairments themselves.<sup>167</sup> In interpreting the predecessor statute to the ADA,<sup>168</sup>

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162. See *Wernick v. Federal Reserve Bank*, 91 F.3d 379, 384 (2d Cir. 1996) ("one of the essential functions of [her] job was to work under her assigned supervisor") (emphasis added).

163. Although a number of employers have undertaken such efforts voluntarily, the EEOC has reserved judgment on whether such training could be required as a reasonable accommodation for an individual with a disability. See OFFICE OF TECHNOLOGY ASSESSMENT, UNITED STATES CONGRESS, *PSYCHIATRIC DISABILITIES, EMPLOYMENT, AND THE AMERICANS WITH DISABILITIES ACT* 80 n.7 (1994).

164. For example, curb cuts and ramps benefit people on bicycles, people with strollers, people on skates, as well as people with mobility or visual impairments.

165. *Misek-Falkoff*, 854 F. Supp. at 228 (emphasis added).

166. 480 U.S. 273 (1987).

167. See *id.* at 282-83 ("That history [of § 504] demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual . . . . Such an impairment might not diminish a person's

the Court disagreed with the assumption of the *Weiler* court that "a disability is part of someone that goes with her to her next job."<sup>169</sup> Rather, the Court reasoned that disability can be created by one's environment.<sup>170</sup> In fact, Congress made clear in a variety of ways, including the legislative history, comments from the floor of both the House and Senate, and through reprinting of testimony at hearings, that social and physical barriers constituted disability as much or more than the individual's impairment.<sup>171</sup>

### *B. Stress and Being a "Qualified Individual"*

In cases involving the determination of whether an employee who has difficulty withstanding stress is a qualified individual, courts also employ reasoning that contradicts their assumptions when making decisions about whether people who have difficulty dealing with stress are disabled.

Courts conclude in one of two ways that people whose alleged psychiatric disabilities were caused by stress are not disabled under the ADA. Either the court assumes that the stress was associated with the specific job and that the plaintiff could do any job except the one at issue,<sup>172</sup> or the court concludes that stress itself simply does not qualify as a disability.<sup>173</sup> In deciding whether a plaintiff who suffers from stress in the workplace is qualified for employment, courts

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physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.")

168. See Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 793-94 (1994). Congress intended interpretation of the Rehabilitation Act to conform to interpretation of the ADA, and referred specifically and approvingly to the Supreme Court's interpretation of the definition of disability in *Arline* at several points in the legislative history of the ADA. See S. REP. NO. 101-116, at 23-24, 27 (1989); H.R. REP. NO. 101-485, pt. 2, at 53 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 335; H.R. REP. NO. 101-485, pt. 3, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 453.

169. *Weiler*, 1995 WL 452977, at \*5.

170. See *Arline*, 480 U.S. at 283 n.10 ("[T]he effects of one's impairment on others is as relevant to a determination of whether one is handicapped as is the physical effect of one's handicap on oneself.")

171. See H.R. REP. NO. 101-485, pt. 2, at 35, reprinted in 1990 U.S.C.C.A.N. at 317 (quoting Senator Weicker's testimony that "[p]eople with disabilities have been saying for years that their major obstacles are not inherent in their disabilities, but arise from barriers that have been imposed externally and unnecessarily"); 135 CONG. REC. 10,711 (1989) ("But ask any person with a disability: Most often it is not his or her own disability that is limiting; it is the obstacles placed in the way by an independent society.") (statement of Senator Harkin).

172. See, e.g., *Dewitt v. Carsten*, 941 F. Supp. 1232, 1235-36 (N.D. Ga. 1996).

173. See, e.g., *id.*

simply rely on the generalization that all employees must be able to endure stress in general; otherwise, they are not qualified for employment.<sup>174</sup> This contradicts Congress's instructions on interpreting the ADA on a case-by-case basis.<sup>175</sup>

Distinctions regarding the source of stress in the workplace are vital to understanding the requirements of Title I in the context of individuals with psychiatric disabilities. Stress in the workplace is caused by a variety of factors. The only court to parse the causes of stress noted:

Sometimes . . . the job is inherently stressful. (Dealing with inmates would be a good candidate for an inherently stressful job). Sometimes, the job is stressful because one's boss is unpleasant or demanding or yells at his employees or because the employee just does not hit it off with her boss or co-workers. Other times, the employee simply may be ill-suited in temperament or skill for the job and this poor fit will necessarily create stress as the employee endeavors to perform a job whose demands are simply too much for her.<sup>176</sup>

These different sources of stress have markedly different meanings under the ADA, and may lead to markedly different outcomes.

#### 1. "The job is inherently stressful"

The ADA requires that a plaintiff be able to perform the essential functions of the job with or without reasonable accommodation.<sup>177</sup> If the stress causing or exacerbating an employee's psychiatric disability is fundamentally intertwined with the essential functions of the job, and cannot be reasonably accommodated, an employer cannot be required to alter the essential functions of the job.<sup>178</sup>

Some courts have characterized either a particular job or all employment as "inherently stressful."<sup>179</sup> However, the interaction of

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174. See, e.g., *id.* at 1237.

175. See, e.g., *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir. 1995) (construing 42 U.S.C. § 12102(2)).

176. *Dewitt*, 941 F. Supp. at 1235.

177. See 42 U.S.C. § 12112(b)(5).

178. See, e.g., *Boldini v. Postmaster Gen.*, 928 F. Supp. 125, 131 (D.N.H. 1995). The employer may have to transfer the employee to an available, open position. See 29 C.F.R. § 1630.2(o)(2)(ii) (1997).

179. *Schmidt v. Bell*, No. CIV. A. 82-1758, 1983 WL 631, at \*14 (E.D. Pa. Sept. 9, 1983) (holding that position of student loan collector was inherently stressful under the Rehabilitation Act).



psychiatric disability and stress is far more complicated and contextual than courts have considered. For example, as one woman with a psychiatric diagnosis wrote:

For a decade, I functioned in the high-stress world of urban policing. Fortunately, when I got really down, there were an abundance of mental health professionals to whom I could turn for discussion and medication. Unfortunately, aberrant behavior is not easily detected among urban police professionals. Because of their independence in a patrol car and little or no supervision while on duty, they have a cult-like environment that almost encourages and rewards aggression and other violent attitudes toward street criminals.

For this reason, my dark, irascible nature could sneak up on me and envelop me before anyone around me might notice. At one point I developed a reputation on the street of being the "lady cop who wouldn't take no lip off nobody." I actually considered it a compliment at the time.<sup>180</sup>

This woman functioned well in the stressful life of a police officer on the street but poorly in a job that was apparently less stressful. The second job required her to be "cooped up in a little room with a bunch of chattering women. [She] thought [she] would strangle more than one of them."<sup>181</sup> In another case, "an individual who was expert in cold stress and survival found crossing the polar ice cap considerably less demanding than giving an important lecture at the Edinburgh Medical School."<sup>182</sup>

Case studies show there is no single set of circumstances that employees with psychiatric disabilities identify as stressful. For example, although case law suggests that, for many people, working at home is considered less stressful,<sup>183</sup> in a study of workers with psychiatric disabilities, one woman stated she didn't like to work at home because "[she] can go days without saying a word to anybody and that tends to make things more stressful."<sup>184</sup> One person interviewed

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180. Tammy D. Clevenger, *Where Do I Fit In?*, 48 PSYCH. SERVS. 1007, 1007 (Aug. 1997).

181. *Id.*

182. WHYBROW, *supra* note 124, at 170.

183. See, e.g., *Paleologos v. Rehab Consultants, Inc.*, No. Civ.1:96-CV-2193-JEC, 1998 WL 21667, at \*6 (N.D. Ga. Jan. 16, 1998); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 128 (D. Conn. 1997).

184. LAURA MANCUSO, CALIFORNIA DEPT. OF MENTAL HEALTH, CASE STUDIES ON REASONABLE ACCOMMODATIONS FOR WORKERS WITH PSYCHIATRIC DISABILITIES 35 (1993).

for the study recalled a period in which he and his colleagues worked eighty hours each week. This employee stated: "It was constant intense hours, not just being there for 80 hours . . . . And I didn't get any more symptomatic because I was purposeful, and I was getting somewhere, had a sense of accomplishment. I got much more symptomatic when I had a lot of time on my hands . . . ." <sup>185</sup>

Thus, whether a job is inherently stressful requires a far more individualized determination than courts have previously conducted. Similarly, the relationship between stress and psychiatric disability is more complex. But simply trying to parse out whether the stress complained of is inherent to the essential functions of the job would be a useful first step for most courts.

2. "The job is stressful because the boss is unpleasant or demanding or yells at the employees"

It is hard to imagine that it is essential to the functions of *any* job for a boss to yell at his or her employees or to behave in the wide variety of abusive ways chronicled in these cases. It is equally difficult to imagine an employer resorting to the defense that eliminating abusive behavior would be too expensive or constitute a fundamental alteration in the nature of the job.

3. "The job is stressful because the employee just does not hit it off with his or her boss or co-workers"

Stress caused by failing to "hit it off" with one's boss or co-workers covers a multitude of situations, some of which, such as workplace harassment or hostile environment, are covered by the ADA. <sup>186</sup>

In fact, stress caused by failing to "hit it off" with one's boss or co-workers may be the result of any number of factors. An examination of cases brought under the ADA suggests that race and gender discrimination may constitute a considerable cause of the stress gen-

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185. *Id.*

186. Every court that has decided the issue has held that the ADA covers hostile environment claims. *See, e.g.,* *Rio v. Runyon*, 972 F. Supp. 1446, 1459 (S.D. Fla. 1997); *Rodriguez v. Loctite Puerto Rico, Inc.*, 967 F. Supp. 653, 663-64 (D.P.R. 1997); *McClain v. Southwest Steel Co.*, 940 F. Supp. 295, 301-02 (N.D. Okla. 1996); *Henry v. Guest Servs., Inc.*, 902 F. Supp. 245, 250 (D.D.C. 1995), *aff'd mem.*, 98 F.3d 646 (D.C. Cir. 1996); *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1106-07 (S.D. Ga. 1995). However, the Fifth Circuit has explicitly stated that the question remains open. *See McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1998).

erated in a situation where the employee doesn't hit it off with the boss or co-workers. It is no coincidence that employees raise a substantial number of psychiatric disability claims under the ADA or the Rehabilitation Act of 1973<sup>187</sup> in conjunction with claims of gender discrimination,<sup>188</sup> sexual harassment,<sup>189</sup> race discrimination,<sup>190</sup> or racially hostile work environments.<sup>191</sup>

A number of ADA claims, both psychiatric and physical, involve the interaction between race or gender discrimination and disability. Race or gender discrimination is alleged to cause or aggravate physical<sup>192</sup> or psychiatric<sup>193</sup> problems.

The interaction of race and gender discrimination, abusive work environments, and severe emotional debilitation has been evident in case law and research literature for more than twenty-five years.<sup>194</sup> Before the ADA, many claims of race and sex discrimination included descriptions of psychiatric disability suffered by the plaintiff.<sup>195</sup> Such claims, especially those related to a hostile environment, also included allegations that the employer's actions caused the employee "severe and substantial emotional distress."<sup>196</sup> Despite evidence of

187. 29 U.S.C. §§ 701-797 (1994).

188. See *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1006 (7th Cir. 1997); *Hazeldine v. Beverage Media, Ltd.*, 954 F. Supp. 697, 698-99 (S.D.N.Y. 1997); *Kotlowski v. Eastman Kodak Co.*, 922 F. Supp. 790, 794-95 (W.D.N.Y. 1996); *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 936 (N.D. Ga. 1995).

189. See *Kaufman v. Checkers Drive-In Restaurants, Inc.*, 122 F.3d 892, 893 (11th Cir. 1997); *Hunt-Golliday*, 104 F.3d at 1006; *Bryant v. Better Bus. Bureau*, 923 F. Supp. 720, 727 (D. Md. 1996).

190. See *Hunt-Golliday*, 104 F.3d at 1006; *Guice-Mills v. Derwinski*, 967 F.2d 794, 796 (2d Cir. 1992); *Brown v. Northern Trust Bank*, No. 95 C 7559, 1997 WL 543098, at \*7 (N.D. Ill. Sept. 2, 1997).

191. See *Palmer v. Circuit Court*, 117 F.3d 351, 351-52 (7th Cir. 1997); *Contreras v. Suncast Corp.*, No. 96 C 3439, 1997 WL 598120, at \*1-2 (N.D. Ill. Sept. 19, 1997); *Prince v. Suffolk County Dept. of Health Servs.*, Nos. 89 Civ. 7243 (LAP), 89 Civ. 8085 (LAP), 1996 WL 393528, at \*1-3 (S.D.N.Y. July 12, 1996); *Rivera v. Domino's Pizza, Inc.*, No. CIV. A. 95-1378, 1996 WL 53802, at \*1-2 (E.D. Pa. Feb. 9, 1996).

192. *Williams v. Dairy Fresh Ice Cream Inc.*, No. CIV. A. 2:95-1041-RV, 1997 WL 834163, at \*1 (S.D. Ala. Oct. 10, 1997) (involving aggravation of plaintiff's epilepsy due to poor treatment by supervisor, including the use of racial epithets).

193. *Webb v. Baxter Healthcare Corp.*, 57 F.3d 1067 (table), No. 94-1784, 1995 WL 352485, at \*5 (4th Cir. June 13, 1995).

194. See, e.g., *Austin*, *supra* note 38, at 1-5, 8-17, 51-55; Ezra H. Griffith & Elvin J. Griffith, *Racism, Psychological Injury, and Compensatory Damages*, 37 HOSP. & COMMUNITY PSYCHIATRY 71, 71 (Jan. 1986).

195. See *Bundy v. Jackson*, 641 F.2d 934, 944-46 (D.C. Cir. 1981); *Xieng v. Peoples Nat'l Bank*, 821 P.2d 520, 523 (Wash. Ct. App. 1991).

196. *Green v. American Broad. Co.*, 647 F. Supp. 1359, 1361 (D.D.C. 1986).

the interaction between race and gender discrimination claims and claims of severe emotional distress in the workplace, the courts have not generally appreciated the intersection of these claims.

In fact, if employees sue for disability discrimination in addition to race, gender, or age discrimination, the court may accuse the plaintiff's attorney of adopting a "kitchen sink" approach to the litigation.<sup>197</sup> Thus, each claim is delegitimized simply because of the presence of others. More often, courts consider the claims in a conceptual vacuum, separating various kinds of discrimination and ignoring the interrelationship among them.

The relationship between discrimination on the basis of psychiatric disability and race or gender discrimination may be concurrent. Studies for over twenty years have confirmed "significant correlations between negative attitudes toward different racial groups and the mentally ill."<sup>198</sup> Recent studies conclude:

the social and demographic characteristics which place some people at severe disadvantage in the labor market [e.g., age, race, and gender] operate even more strongly among those with mental conditions, suggesting that the presence of a mental condition makes a bad employment situation much worse than would be indicated by either the mental condition or the social or demographic characteristics alone.<sup>199</sup>

Case law suggests that members of racial minority groups who have disabilities work in environments where they must contend with hostility towards both their racial status and their disability.<sup>200</sup>

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197. See *Hunt-Golliday*, 104 F.3d at 1006 ("In this lawsuit, [plaintiff] tossed everything in the kitchen, including the sink, at her former employer . . .").

198. Clifford R. Schneider & Wayne Anderson, *Attitudes Toward the Stigmatized: Some Insights from Recent Research*, REHABILITATION COUNSELING BULL., June 1980, at 299, 301 (citing Robert Harth, *Attitudes Towards Minority Groups as a Construct in Assessing Attitudes Towards the Mentally Retarded*, 6 EDUC. & TRAINING OF THE MENTALLY RETARDED 142 (1971); Charles L. Mulford, *Ethnocentrism and Attitudes Toward the Mentally Ill*, 9 SOC. Q. 107 (1968)).

199. Edward H. Yelin & Miriam G. Cisternas, *Employment Patterns Among People With and Without Mental Conditions*, in MENTAL DISORDER, WORK DISABILITY AND THE LAW 25, 27 (Richard J. Bonnie & John Monahan eds., 1997).

200. See *Rivera*, 1996 WL 53802, at \*5. In *Rivera*, co-workers of a Puerto Rican plaintiff with a speech impediment called him, among other things, "retarded," "hired from . . . a facility for mentally handicapped people," "Mexican tamale," "a dumb Puerto Rican," "a dumb Mexican," "shit for brains," and said Puerto Ricans were not worth a damn. *Id.* at \*1. When the plaintiff complained to the regional manager he was told "[t]hat's the way they joke around" and that he "should not take it so seriously." *Id.* at \*2; see also *Rivera*

Other cases suggest a cause and effect situation. In these situations, race discrimination or gender harassment may lead to massive stress for the employee who, in turn, will seek professional assistance and receive a diagnosis arguably requiring an accommodation.<sup>201</sup>

For example, in one case, an African-American research analyst for Suffolk County alleged that when he tried to use his research regarding the statistically significant number of low-birth-weight babies born to African-American women in Suffolk County as the basis for his Ph.D. thesis, he was transferred and demoted because his supervisor was concerned that these facts would become public.<sup>202</sup> His complaint alleged that this demotion caused his psychological disability which in turn resulted in his discriminatory termination.<sup>203</sup> Ultimately, he applied for and received disability benefits.<sup>204</sup> The defendant argued that it terminated the plaintiff because he could not do his job and that his receipt of disability benefits estopped him from arguing that he was a "qualified individual."<sup>205</sup> The court rejected this argument, finding that the plaintiff alleged that "'the transfer and the surrounding facts of the transfer' and 'the intense level of harassment' by [the defendant] caused his mental disability."<sup>206</sup> The court continued: "[Defendant], therefore, may not profit from its wrongdoing by relying on the very disability which its discriminatory conduct created (assuming [plaintiff's] allegations are true) to terminate

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v. Heyman, 982 F. Supp. 932, 933-34 (S.D.N.Y. 1997) (HIV-positive employee who complained of racial and religious slurs in addition to harassment based on his disability); *Chua v. St. Paul Fed. Bank for Savs.*, No. 95 C 2463, 1996 WL 34458, at \*4 (N.D. Ill. Jan. 26, 1996) (Asian-American was subjected to racially derogatory names, and was imitated and mocked because of a limp).

201. See *Webb*, 1995 WL 352485, at \*5; *Prince*, 1996 WL 393528, at \*2-3, 5 (involving race discrimination by employer that led to mental disability); see also BEYOND BEDLAM 167 (Jeanine Grobe ed., 1995) ("Despite the popular belief that 'madness' is biological in origin, the survivors in this section [of the book] have a different story. From our experiences, 'madness' has to do with homelessness, poverty, sexism, racism, ableism, mentalism, ageism, homophobia, ethnocentrism, and child abuse, to name a few."). In one case, the employer's response to an employee's complaint of harassment based on gender and national origin was to write a memorandum to the company's human resources department stating that she was paranoid and to require her to undergo counseling as a condition of her job. See *Kohn*, 1998 WL 67540, at \*1.

202. See *Prince*, 1996 WL 393528, at \*2. Ironically, far more people are privy to this research—at least as allegations—because of this litigation than would have been the case if Mr. Prince had simply been permitted to write his Ph.D. thesis.

203. See *id.* at \*2-3.

204. See *id.* at \*5.

205. See *id.*

206. *Id.* at \*5 n.8.

[plaintiff's] employment."<sup>207</sup>

This court did what courts rarely do. It understood the interrelationship of the race and disability discrimination charges. In cases involving work environments where hostility is expressed based on both race and disability, however, courts rarely aggregate both forms of harassment in considering the hostile environment claims.<sup>208</sup> In fact, contrary to the language of the ADA and its regulations, a few courts have even held that people with disabilities caused by workplace harassment and sex discrimination are somehow not covered by the ADA.<sup>209</sup> More often, courts simply disjoin race or sex discrimination and disability discrimination claims, treating each in an immaculate evidentiary vacuum.<sup>210</sup>

To be fair, the law is structured to make it very difficult for courts to avoid this response.<sup>211</sup> Section 504 of the Rehabilitation Act, which limits recovery for discrimination to situations where the worker's handicap is the "sole" reason for discrimination, provides the classic example.<sup>212</sup> Thus, as Congress noted when it eliminated this requirement from the ADA,<sup>213</sup> an individual discriminated against on the grounds of both race and disability could not recover under the law prohibiting disability discrimination until the early 1990s.<sup>214</sup>

However, other structures are still in place which present more conceptually challenging obstacles. For example, the interrelationship between disability discrimination law and employee disability benefits law has presented difficulties in a number of cases.

If an employer, by racist acts or gender discrimination, causes an employee's psychiatric disability, many courts are still struggling with whether the case should be framed as a civil rights case or a medical

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207. *Id.*

208. *See Rivera*, 1996 WL 53802, at \*4 n.3.

209. *See Williams*, 1997 WL 834163, at \*1 (holding that employee's claim that employer's racial discrimination and harassment aggravated his epilepsy did not state a claim under the ADA); *see also Krocka v. Bransfield*, 969 F. Supp. 1073, 1083 (N.D. Ill. 1997) (denying employee's summary judgment motion on grounds that he was not disabled under the ADA); *Mears v. Gulfstream Aerospace Corp.*, 905 F. Supp. 1075, 1082 (S.D. Ga. 1995) ("[I]f Gulfstream's conduct did cause Plaintiff's disability, her remedy is under Georgia's worker compensation laws, not the ADA."), *aff'd mem.*, 87 F.3d 1331 (11th Cir. 1996).

210. *See Leisen v. City of Shelbyville*, 968 F. Supp. 409 (S.D. Ind. 1997).

211. *See id.* at 417-22.

212. *See* 29 U.S.C. § 794 (1994).

213. *See* S. REP. NO. 101-116, at 44-45 (1989).

214. *See id.*

problem appropriately dealt with under the rubric of worker's compensation or disability benefits.<sup>215</sup>

The difficulty of formulating an appropriate approach is caused in part by conceptual distinctions between race and gender discrimination on the one hand and disability discrimination on the other. Disability has only recently evolved from a totally medical concept to one with political, social, and civil rights ramifications.<sup>216</sup> Thus, disability discrimination law coexists with disability benefits law, ranging from worker's compensation to the Employment Retirement Income Security Act (ERISA),<sup>217</sup> which may help shape outcomes in ADA cases, even when not explicitly addressed.<sup>218</sup>

For example, the maintenance of abusive and stressful workplaces and the consequent exclusion of more psychiatrically fragile workers has arguably been facilitated by the existence of disability benefits. Granting disability benefits to workers who are particularly vulnerable to workplace abuse reinforces the notion that the problem lies with the worker and not the working environment. Thus, the existence of these disability benefit programs provides a way for employers and society to continue to characterize the abusive workplace as "normal" and its casualties as "abnormal" in a way that has not been possible with sexual harassment, sex discrimination, and hostile racial environments.

The Ninth Circuit's predicament in *Nichols v. Frank*<sup>219</sup> vividly reflects the dilemmas created by this approach. Nichols, a deaf-mute,<sup>220</sup> was forced by her supervisor—the only supervisor who knew

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215. See *Mears*, 905 F. Supp. at 1082; *Webb*, 1995 WL 352485, at \*6 n.6. This issue is similar to the tort/civil rights/worker's compensation trilemma raised by sexual harassment suits. See, e.g., Jean C. Love, *Actions for Non-Physical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CAL. L. REV. 857 (1985). However, it is more difficult in the context of disability discrimination because, unlike gender, disability was historically a medical concept.

216. See Matthew B. Schiff & David L. Miller, *The Americans with Disabilities Act: A New Challenge for Employers*, 27 TORT & INS. L.J. 44, 44-48 (1991).

217. 29 U.S.C. §§ 1001-1461 (1994).

218. See Ilana De Bare, *Making Accommodations: Employers Dealing with Mental Illness in Wake of Federal Disability Law*, S.F. Chron., Sept. 8, 1997, at B1, B1 (quoting one attorney as saying "[w]e've got to integrate as many as five different laws—the ADA, workers' comp, long-term disability leave, voluntary paid leave policies, and the Family and Medical Leave Act").

219. 42 F.3d 503 (9th Cir. 1994).

220. See *id.* at 506. The intersection of disability and sexual harassment and abuse is one which has escaped attention although it is clear that disabled women disproportionately suffer sexual assault, abuse and harassment. See Judith I. Av-

sign language—to perform sexual acts.<sup>221</sup> The forced sexual acts and her fear of communicating with anyone at work about them resulted in Nichols experiencing severe emotional distress.<sup>222</sup> The emotional distress and her aversion to sex because of the harassment caused her marriage to deteriorate.<sup>223</sup> Her supervisor forced her to perform oral sex before he would give her a two week leave of absence when her husband began divorce proceedings.<sup>224</sup> Nichols was subsequently diagnosed with post-traumatic stress disorder for which she received disability benefits under the Federal Employees' Compensation Act (FECA),<sup>225</sup> the federal equivalent of worker's compensation.<sup>226</sup> When she sued her employer for sex discrimination and won, the employer appealed on the grounds that her disability benefits were the exclusive remedy under FECA for her workplace injuries.<sup>227</sup>

The Ninth Circuit rejected this argument with rather strained legal reasoning, finding that Nichols's post-traumatic stress disorder was distinguishable from the impact of sex discrimination.<sup>228</sup> The court found that the former was "a disease proximately caused by her employment," but underscored that the latter was not.<sup>229</sup> The court pointed out that it would be inequitable to restrict Nichols to her disability benefits—which were seventy-five percent of her pay—while awarding a claimant under identical circumstances who did not suffer from PTSD full back pay.<sup>230</sup> This is certainly true, but still results in the court explicitly constructing the plaintiff's extreme distress at being forced to have sex into a "disease" which was somehow separable from the injury of sex discrimination. The problem in *Nichols* is that her experience as she lived it could not be parsed into separate categories: being deaf-mute was integral to her sexual harassment; her emotional anguish at being forced to have sex was intensified by the fact that the only person she could communicate with at work was the supervisor who was forcing her to have sex.

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ner, *Sexual Harassment: Building a Consensus for Change*, 3 KAN. J.L. & PUB. POL'Y 57, 64-65 (1994).

221. See *Nichols*, 42 F.3d at 506.

222. See *id.*

223. See *id.*

224. See *id.*

225. 5 U.S.C. §§ 8101-8193 (1994).

226. See *Nichols*, 42 F.3d at 506.

227. See *id.* at 515.

228. See *id.* at 515-16.

229. *Id.* The Ninth Circuit based its conclusion that post-traumatic stress disorder was a disease on the fact that it is a diagnosis in the *Diagnostic and Statistical Manual of the American Psychiatric Association*. See *id.* at 515.

230. See *id.* at 515-16.



These cases implicate intersectionality concerns<sup>231</sup> and are more complex than the current structure of legal claims permits. The intersectionality implicates both the experience of the individual *and* the discriminating attitudes faced by the individual. For example, harmful and mistaken stereotypes about African-Americans may include laziness or, in the case of African-American males, violence. Harmful and mistaken stereotypes about people with learning disabilities or mental illness may also include assumptions that people with these disabilities are lazy or violent. Thus, the kind of discrimination that an African-American with a learning disability or a mental illness experiences may be either more easily triggered or more intense because the two stereotypes operate to reinforce each other. The kinds of stereotypes that operate against women in general include assumptions about irrationality and emotionalism. Therefore, employers may regard women more readily as psychiatrically disabled; on the other hand, employers may take women's reports of psychiatric disability less seriously.

Whether concurrent or cause and effect, it is clear that in the real life of workers, sexual or racial harassment is inextricably intertwined with stress, anxiety, and depression, in a dynamic that drains the worker and whose accumulated effects may drive him or her into temporary or permanent psychiatric disability. Any claim for disability benefits, however, may erase or at least threaten the discrimination claim.<sup>232</sup>

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231. Intersectionality describes the way in which the experiences of individuals who belong to two or more marginalized or minority groups are not reflected in the paradigms that describe discrimination for any of the groups. These individuals are doubly or triply burdened by being subjected to the dominant practices of several different hierarchies, without legal recourse or even narrative description of their experiences. For example, as conceptualized by Kimberle Crenshaw, black women find themselves at the intersection of race and gender discrimination. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-44 (1991). In this case, Nichols was subject to the intersection of gender, physical, and psychiatric disability; there is no legal structure available that encompasses the damage and injuries she suffered.

232. For some time, courts appeared to be heading towards a per se rule that any claim for disability benefits created an irrebutable presumption that a plaintiff was not a qualified employee. See, e.g., *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 619 (3rd Cir. 1996). However, carefully written court decisions and EEOC policy guidance explaining the difference between the definitions of disability for disability benefits purposes and ADA purposes appear to have slowed

Thus, discrimination law as it currently exists has no mechanism for dealing with the cumulative or synergistic effects of different kinds of discrimination, and in fact further disadvantages individuals who suffer several kinds of discrimination. An individual with a disability who is a member of an ethnic minority may not even know the source of adverse treatment by an employer and, indeed, to assume that this is knowable, identifiable, or separable into distinct categories is an assumption that may be mistaken.

4. "The employee is ill-suited in temperament or skill for the job and this poor fit will necessarily create stress"

This statement clearly describes the stress that many people feel in their jobs, but it appears to describe only a few of the cases brought by people with psychiatric disabilities under the ADA.<sup>233</sup> As noted at the beginning of this Article, most of the plaintiffs in these cases are well-qualified to perform the technical aspects of their jobs. The problem presented in cases involving people with psychiatric disabilities, unlike cases involving people with physical disabilities, is rarely whether they can do the job itself. As stated by one court in a case involving psychiatric disability: "[the plaintiff] incorrectly assumes that the essential functions of the job of shift electrician require only technical ability and experience as an electrician."<sup>234</sup> Under most circumstances, people with psychiatric disabilities choose jobs carefully, precisely to get "a good fit."<sup>235</sup> Therefore, it is rarely the case that the stress felt by these plaintiffs arises from their lack of skill. It arises, rather, from interpersonal difficulties or from being asked to perform for too many hours.

The court in *Dewitt v. Carsten*<sup>236</sup> opened its opinion by laying out

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down this general trend. See, e.g., *Talavera v. School Bd.*, 129 F.3d 1214, 1216-21 (11th Cir. 1997); *Weigel v. Target Stores*, 122 F.3d 461, 463-69 (7th Cir. 1997); *Swanks v. Washington Metro. Area Transit Auth.*, 116 F.3d 582, 584-87 (D.C. Cir. 1997); *Robinson v. Neodata Servs., Inc.*, 94 F.3d 499, 502 n.2 (8th Cir. 1996); *Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is 'a Qualified Individual with a Disability' Under the Americans with Disabilities Act of 1990*, 3 EEOC Compl. Man. (BNA) § 2281 (Feb. 1997).

233. See *Johnston v. Morrison*, 849 F. Supp. 777, 778-79 (N.D. Ala. 1994) (noting that waitress who could not handle pressure of working on crowded nights or memorizing frequent menu changes was not qualified to perform essential functions of the job).

234. *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 674 (1st Cir. 1995).

235. MANCUSO, *supra* note 183, at 35.

236. 941 F. Supp. 1232 (N.D. Ga. 1996), *aff'd mem.*, 122 F.3d 1079 (11th Cir. 1997).

all possible sources of stress on the job but ultimately did not pursue this line of reasoning. The plaintiff claimed that the boss's yelling at her and her working with jail inmates caused her stress,<sup>237</sup> two very distinct sources of stress according to the court's own rubric. However, the court simply concluded that stress was not a disability and that "an employer may not be required to transfer a stressed, dissatisfied employee."<sup>238</sup> Thus, in *Dewitt*, the court joined all other courts, which treat "stress" as a macro-concept without regard to its origin, cause, or interaction with disability. It effectively declared that tolerating stress was an essential function of all jobs, and that transfer to ameliorate stress would never be a reasonable accommodation.

#### IV. USING THE ADA TO ATTACK OBJECTIVELY ABUSIVE OR UNREASONABLY STRESSFUL WORKPLACE ENVIRONMENTS

Employment discrimination against persons with psychiatric disabilities is not primarily about exclusion from job opportunities because of myths about mental illness. Rather, it is about the disparate impact of the *extremes* of abuse and stress in the American workplace on people with psychiatric disabilities.<sup>239</sup> Just as an employer's failure to have an elevator or accessible bathroom hinders a person in a wheelchair from performing a job, an employer's antagonistic, hostile, or extremely stressful work environment prevents a person with a psychiatric disability from performing a job that the person is qualified to perform and is completely capable of performing.

Neither the absence of an accessible bathroom nor the presence of a hostile and abusive environment necessarily indicates intentional hostility toward people with disabilities. However, the ADA prohibits actions with a disparate impact on disabled people.<sup>240</sup> Both the failure to provide accessible bathrooms and the presence of an abusive environment operate to exclude people with particular disabilities.

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237. *See id.* at 1234.

238. *Id.* at 1237.

239. When I underscore *extremes*, I wish to emphasize that I am not discussing a plaintiff who perceives slights and takes offense where others would not. I am discussing an individual whose reaction to conduct and conditions that *all* employees would characterize as upsetting and offensive is disabling to that individual.

240. *See infra* text accompanying notes 240-49.

*A. Abusive Workplaces Have a Disparate Impact on Individuals with Psychiatric Disabilities*

Disparate impact discrimination is prohibited under the ADA. The statute defines discrimination to include "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability . . . or that perpetuate the discrimination of others who are subject to common administrative control."<sup>241</sup>

The legislative history of the ADA confirms that Congress fully intended to prohibit disparate impact discrimination. The legislative history of the ADA states that "[d]iscrimination results from actions or inactions that discriminate by effect as well as by intent or design."<sup>242</sup> Specifically, the Senate Committee Report explaining the meaning of "discrimination" for Title I declared: "[s]ubparagraphs (B) and (C) incorporate a disparate impact standard to ensure that the legislative mandate to end discrimination does not ring hollow. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander v. Choate*."<sup>243</sup> If there were any doubt remaining as to the viability of a disparate impact cause of action under Title I of the ADA, it was removed by the passage of the Civil Rights Act of 1991,<sup>244</sup> which, in providing for compensatory and punitive damages for intentional discrimination under Title I of the ADA, specifically distinguishes such a claim from "an employment practice that is unlawful because of its disparate impact."<sup>245</sup>

In addition, most circuit courts acknowledge the existence of a cause of action under the ADA based on disparate impact,<sup>246</sup> although it is rarely invoked, and even more rarely invoked in employment discrimination cases.<sup>247</sup> However, it is clear that "the

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241. 42 U.S.C. § 12112(b)(3) (1994).

242. S. REP. NO. 101-116, at 6 (1989). The equivalent House report contains identical language. See H.R. REP. NO. 101-485, pt. 2, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310.

243. S. REP. NO. 101-116, at 30. Again, the equivalent House report contains identical language. See H.R. REP. NO. 101-485, pt. 2, at 61, *reprinted in* 1990 U.S.C.C.A.N. at 343. In *Alexander v. Choate*, the Supreme Court "reject[ed] the boundless notion that all disparate impact showings constitute prima facie cases under § 504." 469 U.S. 287, 299 (1985).

244. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C.).

245. 42 U.S.C. § 1981a(a)(2) (1994).

246. See, e.g., *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1195-96 (7th Cir. 1997); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1178 & n.5 (6th Cir. 1996); *Helen L. v. Didario*, 46 F.3d 325, 335 (3d Cir. 1995).

247. When disparate impact cases are brought under the ADA, they are al-

Americans with Disabilities Act requires employers to eliminate ostensibly neutral barriers that disparately impact the disabled."<sup>248</sup>

If a facially neutral practice, such as an objectively abusive work environment, operates to exclude psychiatrically disabled employees, and an employee requests that abusiveness be minimized as a reasonable accommodation, the law requires employers to reasonably accommodate disabled individuals unless such accommodation imposes an undue hardship.<sup>249</sup> Furthermore, employers must eliminate qualification standards or job requirements that disparately disadvantage the disabled unless such requirements are job-related and consistent with business necessity.<sup>250</sup>

Although this is a claim about hostile work environments, it is not, in this particular iteration,<sup>251</sup> a hostile work environment claim in the technical sense. While the Supreme Court has recognized the right to work in an environment free from intimidation, insult, and ridicule based on one's membership in a protected class,<sup>252</sup> this is a far cry from recognizing a right to work in an environment free from free-ranging, universally applicable intimidation, insult, and ridicule.<sup>253</sup> Hostile environment claims are another form of the intentional discrimination, or disparate treatment claim. While hostile environment claims have been recognized under the ADA,<sup>254</sup> they require animus against disabled people, or against the plaintiff individually because of his or her disability.

Yet cases where the supervisor is explicitly hostile to the disability, although they certainly exist, are less frequent than cases where the supervisor is exempt from liability precisely because he or she exhibits hostility indiscriminately. One court noted, "[plaintiff's supervisor] denies ever having harassed the plaintiff or having discrimi-

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most always brought as Title II or Title III cases against state or local governments. See, e.g., *Crowder v. Kitagawa*, 81 F.3d 1480, 1483-84 (9th Cir. 1996); *Inmates of Alleghany County Jail v. Wecht*, 93 F.3d 1124, No. 95-3402, 1996 WL 474106, at \*5 (3d Cir.), *vacated*, 93 F.3d 1146 (3d Cir. 1996); *Helen L.*, 46 F.3d at 331-32; *Wolford v. Lewis*, 860 F. Supp. 1123, 1134 (S.D. W.Va. 1994) (involving claims under section 504 of the Rehabilitation Act).

248. *Monette*, 90 F.3d at 1178 n.5.

249. See 42 U.S.C. § 12112(b)(5)(A); *Monette*, 90 F.3d at 1179.

250. See 42 U.S.C. § 12112(b)(6); *Monette*, 90 F.3d at 1179.

251. See *infra* text accompanying notes 258-61.

252. See *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 65-66 (1986).

253. Indeed the Supreme Court has just underscored that Title VII provides no constraints against such environments. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998).

254. See *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1106-07 (S.D. Ga. 1995); see also cases cited *supra* note 185.

nated against him in any way. The record indicates that [the supervisor] did express hostility toward her subordinates, but that she did so indiscriminately.”<sup>255</sup> Another court noted “the fact that black employees and non-handicapped employees complained of the same kind of bullying and harassment makes it difficult for the court to find a discriminatory motivation behind the undeniably bad treatment [plaintiff] received.”<sup>256</sup>

Although judges in some of these cases have indicated that the plaintiff produced clear evidence that the abusive work environment had a much greater impact on him or her than on other employees because of his or her disability, at least one judge required the plaintiff to specifically request that the abuse be curtailed as a reasonable accommodation to his disability.<sup>257</sup> This was required even though the employer was particularly—even uniquely—well situated to be aware of the disparate impact of its treatment on the plaintiff:

It is clearly the case that plaintiff, because of his PTSD, was unusually sensitive to the bullying management style of his . . . supervisors. This might be viewed as raising an issue of accommodation. While one would expect management at a veterans hospital to be aware of and sensitive to the difficulties experienced by veterans with Post-Traumatic Stress Disorder, the record suggests that at no time did plaintiff and his doctors make a real effort to educate management adequately about PTSD . . . . Given the difficulties of trying to accommodate an employee whose disability is aggravated by job-related stress, the court believes more was required of [the plaintiff] than a generalized complaint about working conditions to immediate supervisors to trigger an obligation on defendant’s part to accommodate.<sup>258</sup>

However, as will be seen below, even employees’ specific requests to lower the level of hostility at work because of its deleterious effect on a disability has not succeeded with some courts.

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255. *Mazarella v. United States Postal Serv.*, 849 F. Supp. 89, 91-92 (D. Mass. 1994) (citations omitted).

256. *Pavone v. Brown*, No. 95-C-3620, 1997 WL 441312, at \*9 (N.D. Ill. July 29, 1997).

257. *See id.* at \*8.

258. *Id.*

*B. Disparate Treatment: Ending Workplace Abuse as a Reasonable Accommodation*

The disparate impact model shades quickly into the disparate treatment model if the employee requests a less abusive workplace as a reasonable accommodation to his or her disability, and is denied that request. While an employer may not intentionally discriminate against people with psychiatric disabilities by maintaining an abusive or unnecessarily stressful work environment, intentional discrimination may come into play if an employer is made aware of the impact of workplace abuse on an employee—and the nexus between workplace conditions and the employee's disability—and refuses to make any changes.

In a few cases where plaintiffs have identified themselves as being disabled, and asked for accommodations such as "a nonhostile working environment,"<sup>259</sup> or "softer management approaches,"<sup>260</sup> courts have not shown that they comprehend the connection between psychiatric disability and a hostile work environment. For example, one court noted the plaintiff:

has provided nothing to show that even if she were a qualified individual with a disability [the defendant] failed to make reasonable accommodations for her.

...

In regard to her second request for accommodation, the record shows that at the civil service hearing she *merely* asked for a non-hostile working environment. Even if this could be considered a genuine request for accommodation for her mental condition involving panic attacks and stress, it occurred about 1½ years after her suspension and long after she filed this complaint—and that was way too late.<sup>261</sup>

While race discrimination and gender discrimination laws have not eliminated racism and sexism from the workplace, they have established a common understanding that such behavior is unacceptable. Because of public education and litigation, employers now perceive that the employee who sexually harasses another employee or makes racist remarks or jokes is the problem employee, rather than the employee who is harassed or is the butt of the racist jokes.

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259. *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1013 (7th Cir. 1997).

260. *Boldini v. Postmaster Gen.*, 928 F. Supp. 125, 131 (D.N.H. 1995).

261. *See Hunt-Golliday*, 104 F.3d at 1012-13 (emphasis added).

The same transformation of understanding must take place with regard to the supervisor who is harsh or abusive to his or her employees. Presently, it is the employee who is viewed as having the problem, as being "too fragile" to work, even in the face of extensive and excellent work histories. The stressful or abusive workplace is still commonly defended as the employer's prerogative.

Making working conditions more pleasant or less abusive may appear to be far less expensive than the accommodations required for physically disabled employees. However, any suggestion that these ameliorative measures are required by the ADA is fiercely resisted by employers and dismissed out-of-hand by courts. Requiring such changes in working conditions threatens deeply held beliefs about employer prerogatives far more than building ramps or installing TTY telephones. As has been aptly noted by the foremost empirical researcher into the costs and consequences of the ADA, resistance to the ADA is far more a matter of the culture of the employment environment than it is a matter of expense.<sup>262</sup> Rather than protect workers with psychiatric disabilities, courts have wholeheartedly protected employer prerogatives in this area. As one court stated, "[f]orcing transfers of employees under the guise of reasonably accommodating employees under the ADA inherently would undermine an employer's ability to control its own labor force."<sup>263</sup>

Yet the disparate impact of objectively abusive supervisors on people with psychiatric disabilities exists and can be established fairly easily through empirical literature and expert testimony.

Furthermore, the remedies requested—either the cessation of supervisor abuse or the transfer of the employee—already comport with good management practice. Controlling the abusive supervisor is an accommodation that will benefit all employees in the workplace, and is unlikely to create resentment among the disabled employee's co-workers. It is difficult to justify refusal to transfer a qualified person with a disability, a remedy routinely granted for others—such as victims of sexual harassment—as anything but discrimination. Since courts routinely order transfer as a reasonable accommodation for people with physical disabilities, the reluctance of the courts to order transfer in psychiatric disability cases cannot simply be characterized as unwillingness to interfere with managerial prerogatives in this area.

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262. See, e.g., Barbara Presley Noble, *A Level Playing Field, for Just \$121*, N.Y. TIMES, Mar. 5, 1995, at 21 (quoting Peter Blanck).

263. *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 948 (N.D. Ga. 1995).



*C. Unnecessarily Stressful Environments and Disparate Impact on People with Psychiatric Disabilities*

As noted above, stress is a far more complex subject than workplace abuse. First, workplace abuse in its most extreme forms is concrete and tangible—supervisors screaming, throwing things, hitting employees—and is universally experienced as unpleasant and offensive by workers. Stress, however, is rarely tangible in a similar way. Most sources of stress, even long working hours, are experienced differently by different workers. Different workers with psychiatric disabilities will find different experiences stressful, and require different accommodations.

Second, it is difficult for the employer to point to any benefit that abusive supervisors provide for his or her enterprise. To the extent that stress results from causes other than workplace abuse, it more directly implicates core business functions. Because of downsizing, employees are being asked to take on more responsibility and work longer hours, and this is directly connected to some of the difficulties employees with psychiatric disabilities are experiencing.

Furthermore, there are few existing legal principles that tell us the threshold beyond which no one should be expected to work. Non-professional employees may be entitled to overtime pay, but they may also be forced to work overtime. Union agreements tend to focus on how much notice must be given before an employee is required to work overtime, and whether the extra pay should be time and a half or double time.<sup>264</sup> There are very few cases dealing directly with the amount of work an employer can expect of an employee with a psychiatric disability. In one case involving claims under a state disability discrimination law, an attorney with depression won \$300,000 in damages—and \$800,000 in attorney fees—in an arbitration award after his employer refused his request for one-half-day a week off every time he worked two consecutive weeks in a row of more than forty-five hours a week.<sup>265</sup>

In order to prove an employment discrimination case based on disparate impact under the ADA, a plaintiff must show "that the employer has fixed a qualification that bears more heavily on disabled than on other workers and is not required by the necessities of

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264. See generally BNA, BASIC PATTERNS IN UNION CONTRACTS (14th ed. 1995).

265. See Stevens, *supra* note 33, at B1 (reporting on Putnam v. Pacific Gas & Electric, No. C-9403558-WHO (N.D. Cal. 1995)).

the business or activity in question.”<sup>266</sup> An employer may maintain discriminatory practices only if it can be proven that to change these practices would “impose an undue hardship.”<sup>267</sup> It is difficult to imagine courts conducting the kind of review necessary to determine whether employers’ specific downsizing decisions, or massive layoffs leading to greatly increased hours and responsibilities for the remaining workers, were “necessary.” In addition, unlike the case of controlling the abusive supervisor, accommodations in the form of requiring fewer hours of work from the psychiatrically disabled employee will likely lead to resentment on the part of co-workers who do not receive this accommodation, and that resentment itself may trigger more stress for the employee than working excessive hours. The task of formulating an appropriate conceptual approach to workplace stress caused by excessive hours is beyond the scope of this Article, but it must be done.

In the past, an employee’s vulnerability to stress or highly unpleasant workplace conditions simply established that the employee could not work, and he or she was fired or quit. The lucky people received disability benefits. The advent of the ADA requires a reexamination of who should take responsibility for readjustment of the workplace.

## V. CONCLUSION

The last decade has seen massive corporate mergers and downsizing, with escalating worker hours and increasing stress on the job. Managers and supervisors may be more likely to take out their own work pressures on employees. Workers who are dependent on employment in a particular location or trying to vest pensions may be relatively powerless to change their circumstances, and the powerlessness itself may lead to even greater stress. All of this is happening in workplaces that are increasingly less unionized; unions are in any event more concerned with preserving employment security and benefits than in workplace stress and abuse.<sup>268</sup>

Against this backdrop of the American workplace in the nineties, it should not come as a surprise that employment discrimination claims involving psychiatric disabilities are growing rapidly. Skilled

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266. *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1195-96 (7th Cir. 1997).

267. 42 U.S.C. § 12112(b)(5)(A) (1994).

268. See generally BASIC PATTERNS IN UNION CONTRACTS, *supra* note 264.

and talented workers are being pushed beyond the limits of their endurance and are fighting back in the only way left to many of them. These workers embody the purposes of the ADA in some ways: they are qualified for their jobs, the accommodations they request do not cost money and would lead to a more productive work force in general if implemented.

But these employees are losing their ADA cases because abuse and stress are seen as simply intrinsic to employment, as invisible and inseparable from conditions of employment as sexual harassment was twenty years ago. While apparently the notion that employers are entitled to create a hostile, abusive environment as long as the hostility is generalized and the abuse is universal still predominates, a more careful examination and articulation of the principles of the ADA suggests that such environments have a substantial disparate impact on people with psychiatric disabilities—who are losing opportunities for employment due to practices that have no productive value for the employer.

While extremely abusive environments—for example, constantly screaming or assaultive supervisors—are easy to identify and difficult to justify, stress in the workplace represents an entirely different and more complex set of issues for disability law. It is clear that, except for abusive work environments, no single set of circumstances—not even extremely long hours—are uniformly experienced as stressful by workers. Indeed, an environment of respect and collegiality probably would cushion some of the stress associated with long hours. What is clear from examining the cases brought under the ADA is that courts must begin to parse out the source of stress in deciding whether a worker's ability to withstand it is indeed an "essential function" of the specific job the employee is being asked to do.

Likewise, courts should follow the lead of Judge Posner in looking to the manifestations rather than the etiology of disability in determining whether the plaintiff is disabled under the ADA. People *can* drive each other crazy; hostile, abusive treatment *can* trigger underlying vulnerabilities; extraordinary stress can be the final straw that breaks the worker's back.

Ultimately, integrating skilled people with psychiatric disabilities in the workplace may require that employers have more responsibility to ensure a respectful and non-abusive workplace free of *unnecessary* stress. Almost all of the accommodations required by people with psychiatric disabilities are uncontroversially accepted as good managerial and personnel practice in the business world. Treating

employees with dignity and respect, curbing unnecessary stress, resolving supervisor-employee friction, and promoting flexibility in response to the individual needs of employees will not only accommodate people with psychiatric disabilities but will also work to the advantage of everyone in the workplace.

