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In the Meantime: State Protection of Disability Civil Rights

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I. INTRODUCTION

The traditional late-twentieth century United States approach to civil rights protection looked to the federal government for leadership. In recent years, however, federal courts have cut back significantly on the scope and effectiveness of federal remedies for civil rights violations. While disappointing, this development should not trigger pessimism in the long term. The federal civil rights pendulum periodically reverses directions with remarkable consistency. History thus suggests that renewed activism at the federal level will eventually follow the current era of weaker federal civil rights enforcement. Meanwhile, much is happening in state civil rights law. Justice Brandeis once observed that a "single courageous State" could serve as a laboratory for experiments that might lead to advances for society as a whole.[1] This paper will, in effect, explore Brandeis's thesis, focusing on state protection of the rights of people with disabilities. Developments in the various states, I suggest, will ultimately make federal civil rights protections more effective, when the pendulum reverses yet again.

In a recent, well-done article, Claudia Center and Andrew Imparato argue that the federal definition of disability should be

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1. New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

redrafted to better protect the rights of people with disabilities,[2] effectively overturning at least some of the recent Supreme Court decisions in the area. Although I agree with Center and Imparato that a new and better definition of disability would help in the struggle for civil rights, based on the history of federal civil rights protections discussed in Part II, I am not hopeful that any such new definition will be enacted in the near future. Until the federal government broadens its definition of disability, I look to the States to continue developing new and more effective ways to remedy discrimination on the basis of disability.

Part II reviews the broad swings of the federal civil rights pendulum. Although this history is not new, it bears remembering, if only to place current disappointments in context. In the course of reviewing the broad outlines of federal civil rights history, Part II suggests that developments in the federal protection of people with disabilities can be usefully understood as part of a much larger tapestry. In the area of disability rights, federal protections have been substantially limited in recent years. However, history illustrates that this current retreat should not be viewed as permanent.

In the meantime, there is useful work to be done at the state level. Part III explores various states' current experiments in the protection of persons with disabilities, focusing on three specific issues: (1) the definition of disability as a substantial impairment/limitation of a major life activity, (2) the use of mitigating measures in determining whether someone is disabled, and (3) the requirement to participate in an "interactive process." In each context, advocates for the reinvigoration of federal protections would do well to heed the results of these state experiments.[3]

II. THE FEDERAL CIVIL RIGHTS PENDULUM

Expansive federal protection of civil rights first emerged from the schisms of the American Civil War. The Civil Rights Act of 1871, Section 1 of which is now codified as 42 U.S.C. § 1983 ("Section 1983"), followed the Thirteenth, Fourteenth, and Fifteenth

2. Claudia Center & Andrew Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections to All Workers*, 14 STAN. L. & POL'Y REV. 321, 323–24 (2003).

3. The appendix to this Article provides a summary outline of State laws that protect people with disabilities, but does not purport to be exhaustive.

Amendments (collectively "The Civil War Amendments"). Enacted "for the purpose of enforcing the provisions of the Fourteenth Amendment,"[4] Section 1983 authorizes relief whenever someone acting under color of state law violates a party's federally protected rights.[5]

These first civil rights laws reflected a substantial extension of federal power over the states. Congress found a federal remedy for deprivations of federal rights necessary because it believed state authorities appeared either unable or unwilling to control widespread violence against African Americans.[6] In particular, the 1871 Congress mistrusted the integrity and ability of the fact-finding processes of state courts adjudicating protected rights. Section 1983 was therefore enacted to create a federal remedy that "protect[s] the people from unconstitutional action under color of state law."[7] During the same period, Congress enacted other laws that complemented or further enforced the Civil War Amendments, granting federal habeas corpus jurisdiction over state judgments in 1867[8] and establishing general federal-question jurisdiction in 1875.[9] Taken collectively, the Civil War Amendments, Civil Rights Acts, and new jurisdictional statutes, all emerging from the caldron of the Civil War, marked a fundamental shift in the relationship among individuals, the states, and the federal government.[10]

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4. Ngiraingas v. Sanchez, 495 U.S. 182, 187 (1990); Quern v. Jordan, 440 U.S. 332, 350 n.2 (1979) (Brennan, J., concurring).

5. The current version of the statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

6. Wilson v. Garcia, 471 U.S. 261, 276 (1985) ("The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights.").

7. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

8. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.

9. Act of Mar. 3, 1875, ch. 137 §§ 1–2, 18 Stat. pt.3, 470, 470-71.

10. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 6

Certainly, this transformation to dominance by federal law in the civil rights area was not accidental. As the Supreme Court stated in *Mitchum*:

> Congress clearly conceived that it was *altering the relationship between the States and the Nation with respect to the protection of federally created rights*; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.
>
> Section 1983 was thus a product of *a vast transformation from the concepts of federalism* that had prevailed in the late 18th century .... The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."[11]

Thus, the Civil War, itself the ultimate exercise of federal power, and the Reconstruction that followed it "established a new legal order that contemplated direct federal intervention in what had [previously] been considered [exclusively] to be state affairs, a system in which federal courts were to enforce newly created federal constitutional rights against state officials through civil remedies and criminal sanctions."[12]

With the election of 1876, however, Reconstruction effectively came to an end. A disputed presidential race was resolved by an agreement to recognize Republican Rutherford B. Hayes as President in exchange for a promise to withdraw federal troops from the South.[13] Prior to the War, the South had been controlled by Democrats. In a series of state elections bracketing that presidential

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(1985). *See also*, FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 64–65 (1928).

11. *Mitchum*, 407 U.S. at 242 (quoting *Ex Parte* Virginia., 100 U.S. 339, 346 (1879) (emphases added).

12. Blackmun, *supra* note 10, at 7–8.

13. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 61–62 (1976).

election, white Democrats retook control of all of the southern state governments.[14] Almost immediately, African Americans were disenfranchised. Federal prosecutions under the Civil Right Acts declined precipitously. In 1873, 1304 prosecutions were brought, of which 1271 were brought in the South.[15] By 1878, that figure had dropped markedly to 25.[16]

In 1894, Congress repealed a number of the provisions of the Civil Rights Acts, including 39 sections of the Revised Statutes dealing with the right to vote.[17] In 1890, Mississippi passed a new suffrage law, imposing a $2 poll tax and exhaustive literacy requirements.[18] In 1895, South Carolina passed a similar law, adding an imposing property requirement.[19] Louisiana also passed a similar statute, with prohibitive education and property requirements, but a grandfather clause nevertheless preserved the right of poor, illiterate whites to vote.[20] By 1910, every Southern State had followed suit.[21] In 1896, 130,344 African Americans were registered to vote in Louisiana.[22] By 1900, only 5320 remained on the books.[23]

The first segregation laws were passed in 1892, requiring railroads to assign African American passengers to separate cars. Jim Crow Laws spread from passenger trains to streetcars, restaurants, washrooms, and residential communities. Without the enforcement of federal civil rights laws, lynch mobs reared their ugly heads. Some 3000 lynchings were committed from 1883 to 1903 with few, if any, reprisals against the perpetrators.[24]

At the same time, the Supreme Court "cut the heart out of the Civil Rights Acts" through narrow readings of the Civil War Amendments.[25] In the *Slaughter-House Cases*,[26] decided in 1872,

14. *See id.* at 58–62.
15. William W. Davis, *The Federal Enforcement Act*, *in* STUDIES IN SOUTHERN HISTORY AND POLITICS 205, 224 (James W. Gamer ed., 1994).
16. *Id.*
17. Act of Feb. 8, 1894, ch. 25, 28 Stat. 36.
18. KLUGER, *supra* note 13, at 67.
19. *Id.*
20. *Id.* at 67–68.
21. *Id.* at 68.
22. *Id.*
23. *Id.*
24. *Id.*
25. Blackmun, *supra* note 10, at 9.
26. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

the Court held that the Privileges and Immunities Clause of the Fourteenth Amendment did not federalize any substantive rights not already incidental to national citizenship.[27] The Court then reviewed a series of actions brought under the Civil Rights Acts and held in each that Congress' power under the Amendment was limited to addressing direct encroachment of civil rights by states.[28] In the *Civil Rights Cases*,[29] decided in 1883, the Court invalidated the 1875 Act's prohibition of private racial discrimination in accommodations and public conveyances.[30] The Act could not be upheld under the Fourteenth Amendment, the Court ruled, because it did not target state action despite the fact that states licensed most of the public accommodations at issue.[31] Nor could it be upheld under the Thirteenth Amendment, because even though that Amendment reached private action, denial of admission to a public place was not a badge or incident of slavery.[32] As a result of these and other decisions, "major provisions of the [Civil Rights] Acts either were declared unconstitutional or were emasculated . . . . Those sections that were not struck down were largely forgotten."[33] Less than twenty years after the close of the Civil War, the federal government's commitment to the protection of civil rights had all but disappeared. When segregation became law, *Plessy v. Ferguson*[34] completed the retreat, upholding Jim Crow Laws notwithstanding the fact that they indisputably constituted state action.[35]

The issue lay essentially dormant until after World War II, when calls for desegregation and civil rights for African Americans grew into a powerful political and social movement. By the 1950s and 1960s, the new movement had clogged the federal courts with cases challenging the segregation laws on federal constitutional grounds.[36]

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27. *Id.* at 74.
28. *Id.* at 80–81.
29. The Civil Rights Cases, 109 U.S. 3 (1883).
30. *Id.* at 17, 24.
31. *Id.* at 11–14.
32. *Id.* at 24–25.
33. Blackmun, *supra* note 10, at 10.
34. Plessy v. Ferguson, 163 U.S. 537 (1896).
35. *Id.* at 550–51.
36. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 306–17 (1994) (describing sit-in cases litigated by the NAACP Legal Defense Fund in the Supreme Court); MORTON J. HORWITZ, THE WARREN COURT AND THE

This forced the federal government to choose between the high ideals of equality its founders had articulated (although not implemented) and a system of racial oppression profoundly at odds with those ideals.[37] The Supreme Court eventually responded by resurrecting the Reconstruction-era civil rights laws; Congress responded by adopting a series of new civil rights statutes, including the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965.[38] These actions by the federal government caused a sweeping change in American society—a transformation so remarkable it is sometimes called "the Second Reconstruction."[39]

Brown v. Board of Education[40] was itself a Section 1983 case, even though the Supreme Court's opinion made no mention of the Civil Rights Act.[41] Most of the major desegregation cases that followed, in which the Court expanded *Brown* to beaches, buses, and other public accommodations, were also Section 1983 cases.[42] The case that most clearly announced the revival of Section 1983, however, was *Monroe v. Pape*,[43] decided in 1961. At least on its face, *Monroe* had nothing to do with race, segregation, or any of the social issues that had led to the Civil War. Instead, the issue was whether Chicago police officers charged with conducting an unconstitutional search and arrest could be liable under Section 1983

PURSUIT OF JUSTICE 38–48 (1998) (describing the civil disobedience decisions of the Supreme Court between 1964 and 1967); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 227–29 (2000) (describing sit-in cases of 1963 and 1964).

37. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 487–88 (2000).

38. *See id.* at 487.

39. *See e.g.*, MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1990 (2d ed. 1991); CARL M. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION (1977); Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 378 (Chandler Davidson & Bernard Grofman eds., 1994).

40. Brown v. Board of Education, 347 U.S. 483 (1954).

41. Blackmun, *supra* note 10, at 19.

42. Gayle v. Browder, 352 U.S. 903 (1956) (concerning city and state laws requiring racial segregation on public buses); Mayor of Balt. v. Dawson, 350 U.S. 877 (1955) (concerning racial segregation of public beaches maintained by public authorities);

43. Monroe v. Pape, 365 U.S. 167 (1961).

even though state law did not specifically authorize their actions.[44] The Court surveyed the legislative history of the Act and found it

> abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[45]

After *Monroe*, the number of cases brought under Section 1983 increased dramatically, and the types of problems these cases addressed expanded radically. While a mere 270 federal civil rights actions were filed in 1961, by the end of the 1990s, tens of thousands of Section 1983 actions were filed in federal court each year.[46] These actions included desegregation cases as well as cases challenging state restrictions on the right to vote, from poll taxes and white primaries to unequal apportionment schemes.[47] In the First Amendment context, Section 1983 was invoked to strike down state-mandated loyalty oaths[48] and Louisiana's Subversive Activities and Communist Control Law.[49] A Section 1983 case established that a welfare recipient has a right to notice and a hearing before a state can terminate his benefits,[50] and other Section 1983 cases have since confirmed the due process rights of recipients of utility service,[51]

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44. *See id.* at 203–04 (Frankfurter, J., dissenting).

45. *Id.* at 180.

46. *See* Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

47. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 622 (1969) (challenging the constitutionality of a New York law limiting school district voter eligibility to those owning property in the district and those having children enrolled in the district); Harper v. Va. Bd. of Elections, 383 U.S. 663, 664 (1966) (challenging the constitutionality of a poll tax); Reynolds v. Sims, 377 U.S. 533, 537 (1964) (challenging the appointment of seats in the Alabama legislature); Gray v. Sanders, 372 U.S. 368, 370 (1963) (challenging primary election system giving greater weight to the votes of citizens of rural counties than those of citizens of urban counties).

48. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

49. Dombrowski v. Pfister, 380 U.S. 479 (1965).

50. Goldberg v. Kelly, 397 U.S. 254 (1970).

51. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

public employees,[52] employees entitled under state law to seek redress for unlawful discharge,[53] and debtors whose property is about to be seized by individuals or the state.[54] Section 1983 cases successfully challenged unequal age limitations for males and females on the sale of beer[55] and limitations on the right to marry the person of one's choice.[56] Moreover, they granted mental patients and prisoners First Amendment freedoms, basic medical care, and due process rights notwithstanding their institutionalization.[57]

Unsurprisingly, this Second Reconstruction met stiff initial resistance from the states. In particular, Southern states resisted federal rules that challenged their traditional racially oppressive practices. The South's filibuster of the 1965 civil rights bill in the Senate, for example, "was the longest on record, eighty-two days," taking up "63,000 pages of the *Congressional Record*."[58] This protracted struggle, however, fundamentally altered the ways in which Americans reasoned about national power, federalism, and liberty.[59] In time, resistance gave way to national consensus. At least in principle, Americans came to celebrate the protection of civil rights as one of the defining characteristics of their nation.[60] By the

52. Bd. of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

53. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

54. Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982).

55. Craig v. Boren, 429 U.S. 190 (1976).

56. Zablocki v. Redhail, 434 U.S. 374 (1978).

57. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975) (holding for a patient who brought suit against a state mental hospital under § 1983 for keeping him against his will); Estelle v. Gamble, 429 U.S. 97 (1976) (holding for a prisoner who brought suit against a state prison under § 1983 for subjecting him to cruel and unusual punishment); Wolff v. McDonnell, 418 U.S. 539 (1974) (holding for a prisoner who brought suit against a state prison under § 1983 for violating his due process); Cruz v. Beto, 405 U.S. 319 (1972) (holding for a prisoner who brought suit against a state prison under § 1983 for religious discrimination).

58. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 233 (2000). "[T]he Civil Rights Act passed the House of Representatives by the overwhelming bipartisan margin of 290–130, 104 of the dissenters being southern Democrats, who fully understood that this bill was aimed directly at the white South." *Id.* at 232.

59. Post & Siegel, *supra* note 37, at 492.

60. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 137 (1991) (discussing how *Brown v. Board of Education*, 347 U.S. 483 (1954),

end of the 1960s, authority to protect civil rights, placed in federal hands by the framers of the Fourteenth Amendment but removed by politics and the Supreme Court for almost a century, had been returned to the national government.[61]

For some time now, of course, the pendulum has been swinging in the opposite direction—cutting against expanded civil rights protections. The Court has limited damages awards available under Section 1983 by expanding the Eleventh Amendment immunity of states,[62] establishing absolute immunity for judges and legislators,[63] and granting good-faith immunity for other state and local officials unless a federal court defines the exact requirements of the constitutional right at issue prior to the alleged violation.[64]

In *Seminole Tribe of Florida v. Florida*,[65] the Court held that Congress had no power under the Commerce Clause to abrogate the states' Eleventh Amendment immunity.[66] As a result, Congress can now authorize private suits against the states only pursuant to Section 5 of the Fourteenth Amendment.[67] In *Kimel v. Florida Board of Regents*,[68] the Court held that since the Age Discrimination in Employment Act was vastly overbroad, prohibiting many state acts not themselves unconstitutional, its purported abrogation of the Eleventh Amendment immunity for state actors in age discrimination suits was invalid.[69]

A common thread running through many of these decisions is the Court's concern about federalism,[70] which is often used as

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"became a symbol energizing a multiracial coalition of blacks and whites into an escalating political struggle against institutionalized racism").

61. Post & Siegel, *supra* note 37, at 508.

62. Quern v. Jordan, 440 U.S. 332 (1979).

63. Supreme Court of Va. v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980).

64. Davis v. Scherer, 468 U.S. 183, 197 (1984).

65. Seminole Tribe v. Florida, 517 U.S. 44 (1996).

66. *Id.* at 76.

67. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (reasoning that the Fourteenth Amendment, which was adopted after the Eleventh Amendment, places express limits on the states and provides Congress with the power to enforce these limits).

68. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

69. *Id.* at 91.

70. *See* Daan Braveman, *Enforcement Of Federal Rights Against States:* Alden *and Federalism Non-Sense*, 49 AM. U. L. REV. 611 (2000); Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine*: Judicial Review, Sovereign*

shorthand for a new doctrine of "states' rights"—protecting the rights of states against federal action.[71] Since federal protection of civil rights originated as an expression of distrust of the states and as a deliberate encroachment into areas previously reserved to the states, these decisions have been, at best, controversial.[72]

It is against this background that we should understand the history of and recent developments in federal disability rights law. In the United States, people with disabilities have long been the subject of discrimination.[73] Until the late-nineteenth or early-twentieth century, disability was generally viewed as a punishment or test imposed by God. "'God, in His mysterious wisdom, had afflicted someone with this particular burden, and they were supposed to bear it with patience and faith . . . .'"[74] Disabilities

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Immunity and the Rehnquist Court, 33 LOY. L.A. L. REV. 1283 (2000); Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31 (2001); Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity from Private Damage Suits After* Boerne, 24 N.Y.U. REV. L. & SOC. CHANGE 481 (1998). ; .

71. Literal meaning of federalism is the division of powers among national and subordinate governments. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502 (1994) (suggesting that there are "two sides to federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable"); Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 135–37 (1996) (discussing balance of powers contemplated by federalism).

72. *See* Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304 (1999) (arguing against expanded federalism and demonstrating that courts are using federalism doctrine for political or ideological reasons); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000) (explaining that the Supreme Court's Eleventh Amendment decisions cause harm while failing to promote any coherent conception of state autonomy); James G. Wilson, *The Eleventh Amendment Cases: Going "Too Far" with Judicial Neofederalism*, 33 LOY. L.A. L. REV. 1687, 1687 (2000) (labeling the Supreme Court's recent Eleventh Amendment decisions as "some of its worst in decades" for improperly "dilut[ing] the constitutional and federal statutory rights of millions of people")..

73. People with disabilities suffered tremendous persecution throughout history. *See generally* Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855 (1975) (discussing the historically unequal treatment of the disabled).

74. Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should be Revised to*

reflected "the external expression of an individual's sinfulness and moral impurity."[75] Disability was "brought on by sin."[76]

Around a century ago, this harsh moral model gradually gave way to a more compassionate medical/charity model, which instead viewed people with disabilities as objects of pity, philanthropy, and paternalistic rehabilitation.[77] In 1918, the Smith-Sears Veterans' Rehabilitation Act established a federal rehabilitation program for disabled soldiers.[78] In 1920, Congress passed the Smith-Fess Act for civilians.[79] In 1934, consistent with this new model, the first Easter Seal pictured a sad boy with leg braces and crutches with the text: "Help Crippled Children."[80] When Congress created Social Security in 1935, it included a disability insurance component.[81] A number of states created welfare programs at about the same time; most included provisions for people with disabilities. These state programs, for the most part, were subsumed in the federal Supplemental Security Income program in the mid-1970s.[82]

The medical/charity model was focused on the disability. The disability presented the problem; it limited the individual's role in society. Absent either a cure or a technological advance, a disabled person would be excluded from work and social activities due to her disability and therefore, through no fault of society, would remain an

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Eliminate the Substantial Limitation Requirement, 65 MO. L. REV. 83, 88 (2000) (citation omitted).

75. Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Anti-Discrimination Law*, 18 YALE L. & POL'Y REV. 1, 5 (1999).

76. JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 30 (1993).

77. *Id.*

78. Chai R. Feldblum, *Definition Of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 95 (2000).

79. *Id.* at 95–96. In 1943, Congress passed the Vocational Rehabilitation Amendments adding physical rehabilitation and certain health care services. Vocational Rehabilitation Act Amendments of 1943, ch. 190, § 3(a)(3), 57 Stat. 374, 376.

80. In 1938, the March of Dimes also adopted a medical/charity mode of disability-related fundraising, portraying children with disabilities as the natural objects of charity.

81. *See* SHAPIRO, *supra* note 76, at 62.

82. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329.

object of pity and charity. The model expected individuals with disabilities to "fix" themselves, using medicine, rehabilitation, and training. Apart from pity and philanthropy, it asked nothing of society; in particular, it did nothing to challenge society's view of people with disabilities as different and inferior.

The civil rights movements of the 1960s and 1970s stimulated development of a new model of disability, a civil rights model, which challenged the medical/charity paradigm.[83] This new model asserted that disability, like race, primarily stemmed from a social construct—a series of decisions by society to make disability matter.[84] Under this new model, people with disabilities were not inherently different from those without disabilities in any substantive way.[85] Instead, society had unnecessarily constructed a world that made disabilities relevant. The disability, itself, did not create the barrier; the stairs imposed the barrier. They had been built as the result of a societal decision to favor stairs over ramps—to favor people who walked over those using wheelchairs. Society, not the large minority who had difficulties with stairs, had created the barriers. Problems people with disabilities faced were thus reframed as the result of societal attitudes and discrimination, not the inevitable consequences of the disabilities themselves.[86]

Modeled after civil rights laws applicable to other groups, the Rehabilitation Act of 1973,[87] the Individuals with Disabilities Education Act of 1975,[88] the Fair Housing Amendments Act of

83. Feldblum, *supra* note 78, at 97.

84. Berg, *supra* note 75, at 9.

85. *See id.*

86. *Id.* (Disabilities are "'socially constructed phenomena brought about by attitudes toward people with disabilities which, once embedded in social practices and institutions, sustain the disadvantageous social condition of people with disabilities.'"(quoting JEROME E. BICKENBACH, PHYSICAL DISABILITY AND SOCIAL POLICY 13 (1993)).

87. Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796 (2000).

88. Individuals with Disabilities Education Act of 1973, 20 U.S.C. §§ 1400–1487 (2000). Consistent with the early harsh affliction paradigm, the first public schools excluded children with disabilities. Instead, families were expected to educate their disabled children at home. Adoption of a medical/charity model did little to change the situation. Prior to 1975, public education of children with special needs was not legally required. The civil rights paradigm, however, brought change. In education, the IDEA embodied the new paradigm. The IDEA represented the first nationwide effort to promote the education of children with disabilities; it reflected Congress's

1988,[89] and the Americans with Disabilities Act of 1990 ("ADA")[90] all invoked this civil rights model.[91] The aforementioned acts shared a common premise: People with disabilities were people like everyone else, but they faced special barriers that fear, stereotyping, and prejudice had erected against them.[92] Instead of expecting people with disabilities to overcome those barriers themselves, these new acts required society to affirmatively dismantle any unreasonable barriers it had created.[93] The assumption centered around the idea that after the removal of those barriers, people with disabilities would integrate into the mainstream.[94]

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concern that most children with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" H.R. REP. NO. 94-332, at 2 (1975). Disability advocates then invoked *Brown v. Board of Education* to argue for the inclusion of students with disabilities in regular classrooms. Disability advocates argued that the use of separate facilities to educate students with disabilities was similarly inherently unequal. Consequently, the IDEA was amended to provide that students with disabilities should be provided educational services in the "least restrictive environment." 20 U.S.C. 1412(a)(5).

89. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3619 (2000)). The Fair Housing Act was originally enacted to combat housing discrimination on the basis of race, color, religion, or national origin. 42 U.S.C. § 3604(a) (1968). In 1988, it was extended by the Fair Housing Amendments Act ("FHAA") to prohibit discrimination against people with disabilities as well. Feldblum, *supra* note 78, at 121. The FHAA defines "handicap" in a manner consistent with the Rehabilitation Act—which is to say, broadly. 42 U.S.C. § 3602(h) (2000). The Report of the Judiciary Committee of the House of Representatives ("Report") sets forth the public policy in support of fair housing for people with disabilities in all residential areas. H.R. REP. NO. 100-711, at 17–18 (1988). It rejects the use of generalized perceptions about disabilities and unfounded speculations about threats to safety as grounds for excluding people with disabilities from residential neighborhoods. *Id.* at 18. It further states that "reasonable accommodations" must be provided to permit people with disabilities to live in a dwelling of their choice. *Id.* at 24.

90. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

91. *See* Feldblum, *supra* note 78, at 98.

92. *See* Burgdorf & Burgdorf, *supra* note 73, at 883–89.

93. *See generally*, Arlene Mayerson, *The History of the ADA: A Movement Perspective*, Disability Rights Education and Defense Fund (1992), *at* http://www.empowermentzone.com/ada_hist.txt (discussing the history of legislation leading to the passage of the ADA).

94. *See id.*

Their language and legislative histories make clear the depth of Congress's conversion and commitment to the civil rights model in enacting these statutes. The Rehabilitation Act of 1973, for example, was enacted, in part, to prevent discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational services, in relation to federal financial assistance in the areas of employment, housing, transportation, education, health services, or any other federally-aided programs.[95] Its most important operative provision, Section 504, was patterned directly after Section 601 of the Civil Rights Act of 1964,[96] which prohibited discrimination on the basis of race, color, or national origin.[97] In classic civil rights language, Section 504 stated: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[98] The remedies available under Section 504 of the Rehabilitation Act were the same as those available under Title VI of the Civil Rights Act of 1964.[99] Even the process of implementing these acts followed the civil rights model: Massive demonstrations forced the issuance of regulations implementing the Rehabilitation Act.[100]

The ADA, on which this article will focus, adopted a similarly explicit civil rights approach to the problems people with disabilities

95. *See* 29 U.S.C. § 701(a)–(b). Initially, the Rehabilitation Act used the term "individual with handicaps" to described the class it was intended to protect. 29 U.S.C. § 706(8)(B) (1988). In 1992, after passage of the Americans with Disabilities Act, the language of the Rehabilitation Act was amended to conform to the terminology of that new act. "Individual with handicaps" became "individuals with a disability." 29 U.S.C. § 706 (2002).

96. Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000).

97. Alexander v. Choate, 469 U.S. 287, 292–93 (1985).

98. 29 U.S.C. § 794(a) (2000).

99. Sande Buhai & Nina Golden, *Adding Insult to Injury: Discriminatory Intent as a Prerequisite to Damages Under the ADA*, 52 RUTGERS L. REV. 1121, 1128–29 (2000). *See* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans With Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1093–95 (1995).

100. In 1977, after disability rights activists held sit-ins and demonstrations across the country, including a sit-in of twenty-eight days in San Francisco, the Department of Health Education and Welfare finally issued the regulations. Weber, *supra* note 99, at 1095.

encounter in the workplace. The statute itself declared that it had been enacted to protect a "discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment."[101] The ADA describes its stated purpose as follows:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[102]

It characterized adverse employment decisions based on disabilities to be a form of "discrimination" and identified the denial of accommodations in the workplace as a form of discrimination as well.[103] The Executive Director of the Leadership Conference on Civil Rights, speaking in support of its passage, described the proposed Act as "'the most comprehensive civil rights measure in the past two and a half decades.'"[104] Senator Edward Kennedy called it a "bill of rights"[105] and an "emancipation proclamation"[106] for people

101. 42 U.S.C. § 12101(a)(7). Prior to the passage of the ADA, the Rehabilitation Act required federal agencies and federally funded programs to provide reasonable accommodations to persons with disabilities. Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994). *See also* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984) (chronicling the history of the Rehabilitation Act of 1973).

102. 42 U.S.C. § 12101(b)(1)–(4).

103. *Id.* § 12112.

104. Nathaniel C. Nash, *Bush and Senate Leaders Support Sweeping Protection for Disabled*, N.Y. TIMES, Aug. 3, 1989, at A1 (quoting Ralph G. Neas).

105. 135 CONG. REC. S10717 (statement of Sen. Kennedy).

106. Helen Dewar, *Disability Legislation Approved; Senate Votes Ban on Discrimination in Jobs, Services*, WASH. POST, Sept. 8, 1989, at A1.

with disabilities. Senator Orrin Hatch called it "the most sweeping piece of civil rights legislation since the Civil War era."[107]

Many critiques have been written about the failure of the ADA to live up to expectations.[108] Authors have blamed Congress, the Equal Opportunity Employment Commission ("EEOC"), and the courts for this failure.[109] At least part of the problem, I suggest, is that the ADA has fallen victim to the same adverse swing of the federal civil rights pendulum that has limited enforcement of other federal civil rights laws.

For example, after the *Kimel* decision invalidating the Age Discrimination in Employment Act's abrogation of state sovereign immunity, lower courts have split on whether the ADA could be enforced against the states.[110] Congress had explicitly abrogated the

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107. 135 CONG. REC. S10714 (statement of Sen. Hatch).

108. *See, e.g.*, Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (arguing that defendants prevail in ADA lawsuits due to both the courts' abuse of the summary judgment device and their failure to defer to agency guidance in ADA interpretation); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621 (1999) (arguing that imprecision in defining "disability" has caused the large amount of litigation under the ADA); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335 (2001) (arguing that Congress should have based the ADA on human rights principles rather than on civil rights principles); .

109. *See* sources cited *supra* note 108.

110. The Tenth Circuit and the Second Circuit upheld the ADA as applied to the states after *Kimel*. *See* Cisneros v. Wilson, 226 F.3d 1113, 1128 (10th Cir. 2000); Kilcullen v. N.Y. State Dep't of Labor, 205 F.3d 77, 81–82 (2d Cir. 2000). Other courts also decided cases in favor of applying the ADA to the states prior to *Kimel*. *See* Garrett v. Univ. of Ala. Bd. of Trs., 193 F.3d 1214, 1218 (11th Cir. 1999); Dare v. California, 191 F.3d 1167, 1175 (9th Cir. 1999); Muller v. Costello, 187 F.3d 298, 311 (2d Cir. 1999); Amos v. Md. Dep't of Pub. Safety & Corr. Servs., 178 F.3d 212, 222–23 (4th Cir. 1999); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998); Jones v. Commonwealth, 2000 WL 15073, at *1 (E.D. Pa. 2000); Johnson v. State Tech. Ctr. at Memphis, 24 F. Supp. 2d 833, 842 (W.D. Tenn. 1998); Thrope v. Ohio, 19 F. Supp. 2d 816, 821–22 (S.D. Ohio 1998); Lamb v. John Umstead Hosp., 19 F. Supp. 2d 498, 510 (E.D.N.C. 1998); Meekison v. Voinovich, 17 F. Supp. 2d 725, 730 (S.D. Ohio 1998); Anderson v. Dep't of Pub. Welfare, 1 F. Supp. 2d 456, 468 (E.D. Pa. 1998); Williams v. Ohio Dep't of Mental Health, 960 F. Supp. 1276, 1282–83 (S.D. Ohio 1997).

The Second and the Seventh Circuits found that the ADA was invalid after *Kimel*. *See* Lavia v. Pennsylvania, 224 F.3d 190, 204–05 (3d Cir. 2000); Erickson v. Bd. of Governors, 207 F.3d 945, 952 (7th Cir. 2000). Other

states' immunity under Section 12202 of the ADA, declaring that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court."[111] In 2001, in *Board of Trustees of the University of Alabama v. Garrett*,[112] the Supreme Court settled the issue, ruling that states are immune from private suits for money damages under the ADA.[113] In an unusually nondeferential review of congressional fact-finding, the Court found that the record did not support Congress's finding of a pattern of discrimination by the states.[114] While acknowledging that Congress had made findings of discrimination against specific individuals with disabilities, the Court concluded that these findings did not show a pattern of discrimination by the states,[115] characterizing them instead as "unexamined, anecdotal accounts of 'adverse, disparate treatment by state officials.'"[116] The Court further stated that even if the legislative history could be interpreted to show a pattern of disability discrimination by the states, under *Kimel*, the remedies afforded private litigants by the ADA were not "congruent and proportional" to the harm caused by that discrimination[117]—in other words, the ADA's remedies were overbroad as applied to the states. State responses to the ADA's requirement that employers reasonably accommodate disabilities might be unlawful under the ADA but might nevertheless be reasonable under the Equal Protection

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jurisdictions also held that the ADA was not valid as applied to the states before *Kimel*. *See* DeBose v. Nebraska, 186 F.3d 1087, 1088 (8th Cir. 1999); Alsbrook v. City of Maumelle, 184 F.3d 999, 1009–10 (8th Cir. 1999); Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698, 708 (4th Cir. 1999); Hedgepeth v. Tennessee, 33 F. Supp. 2d 668, 675 (W.D. Tenn. 1998); Nihiser v. Ohio Envtl. Prot. Agency, 979 F. Supp. 1168, 1175–76 (S.D. Ohio 1997).

111. 42 U.S.C. § 12202 (2002).

112. Bd. of Trs. of the Univ. of Ala. V. Garrett, 531 U.S. 356 (2001).

113. *Id.* at 374.

114. *Id.* at 372–74.

115. *Id.* at 370.

116. *Id.* (quoting *id.* at 379 (Breyer, J., dissenting)).

117. *Id.* at 370–74.

Clause.[118] In consequence, the Court concluded that the ADA did not validly abrogate the states' Eleventh Amendment immunity.[119]

III. CONTRASTING DEVELOPMENTS IN THE INTERPRETATION OF STATE DISABILITY PROTECTIONS

As Justice Brandeis noted, the states can and often do serve as laboratories for the development of new solutions to common legal problems.[120] In view of current retrenchments at the federal level, it may be useful to take solace in more encouraging developments at the state level, with the thought that successful state experiments may eventually reinvigorate federal law. This Part will explore state treatment of three issues as to which disability advocates argue that federal law has failed adequately to protect the rights of persons with disabilities: (1) the requirement of a substantial impairment of a major life activity, (2) the requirement that mitigating measures be considered when determining if someone is disabled, and (3) the use of the interactive process in deciding on reasonable accommodations.

A. Substantial Impairment of a Major Life Activity

1. Federal law

The first area to consider is the definition of disability as requiring a substantial impairment of a major life activity. In 2002, the U.S. Supreme Court again addressed the issue of what constitutes a major life activity for purposes of the definition of "disability."[121] This issue had been addressed in a famous Rehabilitation Act case (a 7-2 Supreme Court decision in 1987), *School Board v. Arline*.[122] Arline was an elementary school teacher discharged after suffering a

118. *Id.* at 372–74 (The ADA "makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer.")

119. *Id.* at 372–76. *But see* Tennessee v. Lane, 124 S. Ct. 1978 (2004) (Two persons who used wheelchairs for mobility were forced to crawl up the steps of a state courthouse to enter. The Court ruled 5-4 that Congress can more easily authorize suits against state governments when the case involves a fundamental right such as accessing the court.).

120. New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

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

122. Sch. Bd. v. Arline, 480 U.S. 273 (1987).

third relapse of tuberculosis in two years.[123] She sued under Section 504 of the Rehabilitation Act.[124] The Supreme Court found that Arline had a disability.[125] The Court, led by Justice Brennan, looked to the intent of Congress to interpret the statute.[126] Justice Brennan began with Senator Humphrey's statements in the legislative history of the Act, describing the broad goals of achieving equal opportunities for people with disabilities.[127] Justice Brennan then noted that the Act "reflected Congress'[s] concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws.'"[128] Justice Brennan also relied on the regulations the responsible federal agencies promulgated, finding them to be "of significant assistance"[129] and "'an important source of guidance on the meaning of § 504.'"[130]

The Court identified two separate issues: (1) whether Arline had a disability and (2) whether she was qualified to perform the essential functions of her job without posing a direct threat to others.[131] The direct threat defense affected only her qualifications, not whether she had a disability. This approach led to a broad view of the definition of disability.[132] Because tuberculosis affects the respiratory system and requires hospitalization, the majority found it substantially limited major life activities.[133] The Supreme Court suggested that contagiousness alone may be enough to justify treating a disease as an impairment.[134] Justice Brennan stated that allowing discrimination because of "contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504,

123. *Id.* at 276.
124. *Id.*
125. *Id.* at 281.
126. *Id.* at 277–80.
127. *Id.* at 277 (citing 123 CONG. REC. 13,515 (1977)) (statement of Sen. Humphrey).
128. *Id.* at 279.
129. *Id.*
130. *Id.* (quoting Alexander v. Choate, 469 U.S. 287, 304 n.24 (1985)).
131. *Id.* at 275, 280, 287.
132. *See* Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53 (2000).
133. *Arline*, 480 U.S. at 281.
134. *See id.* at 282.

which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."[135]

Justice Brennan's opinion rejected the idea that people with disabilities are fundamentally different from general society.[136] Instead, it reflected a social understanding of disability—the notion that social attitudes, rather than physical impairments, cause individuals with disabilities to be treated differently.[137] Justice Brennan's opinion tries to remove the effects of those social attitudes to allow people with disabilities to be a part of a collective whole, rather than a fundamentally separate group.[138]

The dissenters, Chief Justice Rehnquist and Justice Scalia, tried to meld the two definitional issues of disability and qualification. The dissent contended that because Arline was contagious, she was a direct threat to her students/coworkers.[139] According to the dissent, as a direct threat, Arline was not qualified to perform the job, and was thus not a person with a disability.[140] This construction would benefit state actors, as defendants, because the question of whether the plaintiff is a person with a disability presents a question of law amenable to disposition on summary judgment, whereas the question of whether a particular individual is qualified for a particular job presents a question of fact less amenable to summary judgment. Qualification mandates a factual inquiry into the essential functions of the job, whether the employee can perform those essential functions, whether the employee poses a threat to others, and whether reasonable accommodations would permit the employee to do the job and/or eliminate the threat.[141]

The dissent's approach skips much of the factual analysis and allows stereotypes and fear to keep people out of work unnecessarily. This struggle between those Justices who want to make disability

135. *Id.* at 284.
136. *See id.* at 282–86.
137. *See id.* at 283.
138. *See id.* at 273–79.
139. *Id.* at 291 (Rehnquist, C.J., dissenting).
140. *Id.* at 291–92 (Rehnquist, C.J., dissenting).
141. It is interesting to note that on remand, Arline prevailed because she was no longer contagious at the time of her discharge and was therefore qualified to work as a teacher. Arline v. Sch. Bd., 692 F. Supp. 1286 (M.D. Fla. 1988).

rights coverage a summary judgment issue and those who demand a full factual analysis continues in the Court's current disability definition jurisprudence.

In 2002, only one of the original *Arline* majority remained on the Court—Justice O'Connor. As her opinions in the *Sutton* trilogy demonstrate discussed below, she narrowed her view of the definition of disability since the 1987 *Arline* decision. Justice O'Connor delivered the *Toyota* opinion for a unanimous Court on January 8, 2002.[142]

In that case, the plaintiff, Williams, had carpal tunnel syndrome that prevented her from lifting more than twenty pounds, working with her arms raised, and doing repetitive wrist or elbow movements.[143] Her work included paint inspection and assembly inspection at a Toyota factory.[144] Toyota added body auditing and surface repair to Williams's job.[145] To perform these tasks, Williams had to wipe the cars by holding her arms at shoulder height for several hours at a time.[146] Her carpal tunnel syndrome bothered her, and she requested to be reassigned to paint and assembly inspection, but Toyota refused.[147] Instead, Williams was placed under a no-work restriction and fired.[148]

The district court granted summary judgment to Toyota, holding that Williams was not disabled as a matter of law.[149] The district court held that gardening, housework, and playing with children did not constitute major life activities.[150] They found insufficient evidence of limits on lifting or working because she could do other assembly jobs (paint and auto inspection).[151] The Sixth Circuit Court of Appeals reversed and ordered summary judgment for Williams, holding that she was substantially limited in the major life activity of performing manual tasks.[152]

142. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 184.
143. *Id.* at 187–88.
144. *Id.* at 188.
145. *Id.*
146. *Id.* at 189.
147. *Id.*
148. *Id.* at 190.
149. *Id.*
150. *Id.* at 191.
151. *Id.*
152. *Id.* at 191–92.

The Supreme Court unanimously reversed the Sixth Circuit, finding that Williams could not be considered disabled as a matter of law on summary judgment.[153] Nevertheless, the Supreme Court did not decide the issue of Williams's alleged disability but remanded it to the district court.[154]

The Court noted that the ADA protects individuals who are substantially limited in one or more major life activities.[155] Williams alleged that performing manual tasks was the major life activity at issue in her case.[156] Justice O'Connor found that a person is disabled in the major life activity of performing manual tasks only if she is substantially limited in activities that are of "central importance to most people's daily lives."[157] The Supreme Court's analysis did not give any greater importance to work-related manual tasks than to home-related tasks, even though the case arose in a work-related context. The Court explicitly compared working with brushing teeth in terms of their significance to its analysis.[158]

The *Toyota* opinion included a qualitative assessment of the importance of the tasks at issue by noting that they were "of central importance."[159] Also, the opinion focused on an objective perspective ("most people's"), rather than the importance of the task to the individual at issue.[160] The *Toyota* Court adopted Justice Rehnquist's quantitative analysis requiring activities to occur frequently or daily, at least in the context of the major life activity of performing manual tasks.[161]

Notably, the Court did not focus to any extent on the legislative history or the opinions of the enforcing federal agency. Instead, the Justices' decision was "guided first and foremost by the words of the disability definition itself" and by the dictionary definitions of "substantial" and "major."[162] This clearly exemplifies a strict textual approach to statutory interpretation. The Court stated that "these

153. *Id.* at 202–03.
154. *Id.*
155. *Id.* at 197.
156. *Id.* at 190.
157. *Id.* at 198.
158. *Id.* at 202.
159. *Id.* at 198.
160. *Id.*
161. *Id.* at 201.
162. *Id.* at 196–97.

terms need to be interpreted strictly to create a demanding standard for qualifying as disabled," relying on the ADA's note that 43 million people had disabilities in the United States.[163] The Court, therefore, held that, to be a substantial limitation, an impairment must "prevent[] or severely restrict[]" the individual's performance of major life activities.[164]

On its face, the *Toyota* opinion deals solely with the major life activity of performing manual tasks. Congress, itself, defined performing manual tasks as a major life activity.[165] However, by holding in essence that only *major* manual tasks constitute major life activities, the *Toyota* Court added a new limitation. There are reasons to suppose *Toyota* may be limited to the activity of manual tasks. The case addressed a disability—carpal tunnel syndrome—about which our society (and our courts) have mixed, and often negative, feelings—with many people doubting the seriousness of the disorder. Thus, courts may take a more lenient view in other cases.

The Court's decision in *Toyota* indicates a further restriction of its approach to substantial limitation. The Court admonished the district court to assess what the plaintiff *can* do and to weigh this assessment against what she *cannot* do.[166] Only if the impossible tasks outweigh or outnumber the possible ones will the plaintiff be substantially limited in performing manual tasks.[167] This approach, in effect, may require plaintiffs to show that they are nearly unable to perform a major life activity, rather than simply being limited. This approach would conflict with the statutory language calling for assessment of the limitations, not the capabilities of the person with a disability.

Again, looking beneath the actual text of the opinion to determine the driving force behind this cutback of civil rights for persons with disabilities, it appears that three primary underlying

163. *Id.* at 197. The Court has relied on this number repeatedly to justify narrow coverage. *See* US Airways, Inc. v. Barnett, 535 U.S. 391, 404–05 (2002); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001); Sutton v. United Air Lines, 527 U.S. 471, 484 (1999). The legislature, itself, apparently believed 43 million was a large number, justifying broad coverage.

164. *Toyota, 534 U.S.*. at 198.

165. *Id.* at 197–98.

166. *Id.* at 200–02.

167. *Id.*

reasons exist. First, as mentioned above, carpal tunnel syndrome is viewed with suspicion. Many people do not understand the medical nature of the problem. Second, concern exists over the broad reach of the ADA if carpal tunnel syndrome qualifies as a protected disability. Finally, if someone with carpal tunnel syndrome is considered "disabled," the distinction between "them" and "us" becomes blurred. This is because people with carpal tunnel syndrome are not natural objects of pity, so charity does not appear to fit. In fact, even a "normal" person could have carpal tunnel syndrome. Thus, the need to separate people with disabilities into a segregated and pitiable group is self-evident from the Court's decision.

Although many states enacted anti-discrimination protections for persons with disabilities in their laws prior to the passage of the ADA, many of those states amended their statutes to follow the federal definition in the early 1990s.[168] Still, some states have kept additional protection as discussed below. In fact, it is interesting to note that at least six states have passed laws prohibiting discrimination in employment based on genetic testing, including Arizona, Illinois, New Jersey, New York, Oregon, and Wisconsin.[169]

2. California

In California, the Fair Employment and Housing Act ("FEHA") merely requires that the physical disability "limit" a major life activity,[170] as opposed to the ADA, which requires that the physical disability "*substantially* limit[]" a major life activity.[171] The California law also includes a broad definition of "physical disability."[172] In early cases, the courts found that the FEHA covers many types of disabilities. For example, in *American National Insurance Co. v. Fair Employment and Housing Commission*,[173] the California Supreme Court found that the FEHA covered high blood

168. *See* Center & Imparato, *supra* note 2, at 334.

169. *See infra* app. Not surprisingly, these states are also more likely to provide more protection for persons with disabilities.

170. CAL. GOV'T CODE §§ 12900–12995 (West 1992 & Supp. 2004).

171. 42 U.S.C. § 12102(2)(A) (2000)(emphasis added).

172. CAL. GOV'T CODE § 12926(h).

173. Am. Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n, 651 P.2d 1151 (1982).

pressure that would pose a risk of future disability.[174] Indeed, a unanimous California Supreme Court held clearly, in *Colmenares v. Braemar Country Club, Inc.*,[175] that the FEHA requires a physical condition merely to limit, not to substantially limit, participation in major life activities.[176]

The California Supreme Court in *Colmenares* reversed the decision of the lower court that the federal standard applied. Colmenares had worked for Braemar since 1972.[177] In 1981, he injured his back at work and was assigned to light duty.[178] In 1982, Colmenares was promoted to foreman and received positive work reviews until 1995.[179] At that point, a new supervisor began giving him unfavorable performance reviews.[180] He was terminated in 1997.[181] The lower court granted summary judgment for Braemar because Colmenares had stipulated that he did not meet the federal standard of "substantially limited in a major life activity" but argued that he did meet the California standard.[182] The California Supreme Court remanded the case for review as to whether any other ground for summary judgment could be sustained.[183] Unfortunately for Colmenares, on remand the Court of Appeal, in an unpublished decision, found that even assuming he was a qualified individual with a disability, he was terminated for a legitimate nondiscriminatory reason.[184]

3. Florida

The Florida statute does not include a specific definition of disability. However, the administrative agencies in Florida have developed a subjective test that generally provides more protection than the ADA. In *Johnson v. ITT Thompson Industries, Metal*

174. *Id.* at 1155.
175. Colmenares v. Braemar Country Club, Inc., 29 Cal. 4th 1019, 63 P.3d 220, 130 Cal. Rptr. 2d 662 (2003).
176. *Colmenares*, 29 Cal. 4th at 1031.
177. *Id.* at 1023.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 1024.
183. *Id.* at 1031.
184. Colmenares v. Braemar Country Club, No. B142962, 2003 Cal. App. Unpub. LEXIS 7854 (Aug. 19, 2003).

Division,[185] the agency defined a person with a disability as someone who "'does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties.'"[186] This has been held to protect persons with impairments such as obesity[187] and asbestosis.[188]

4. Vermont

Vermont's disability statute includes the ADA language of substantially limiting one or more major life activities, but also sets forth a list of impairments that *automatically* qualify as disabilities. The Vermont statute lists cerebral palsy, epilepsy, cancer, heart disease, diabetes, alcoholism, multiple sclerosis, and muscular dystrophy as protected disabilities, removing the need for individual analysis.[189] This is significant, as many of these conditions may not qualify as a substantial impairment under the federal interpretation.

5. New Jersey

The state of New Jersey also has an extensive list of presumed disabilities.[190] This list includes some disabilities that federal law most likely does not protect, such as: "any degree of paralysis, amputation, lack of physical coordination [, and] physical reliance on a service or guide dog, wheelchair or other remedial . . . device."[191] In addition, the statute includes a subjective catchall clause that covers any "physical disability, infirmity, malformation or disfigurement"[192] with no mention of a substantial limitation requirement.

185. Johnson v. ITT Thompson Indus., Metal Div., No. 88-0110, 1988 Fla. Div. Adm. Hear. LEXIS 4240 (Fla. Div. Admin. Hearings Feb. 6, 1989).

186. *Id.* at *10.

187. *See* Harvey v. Alachua County Bd. of Comm'rs, No. 89-1548, 1989 Fla. Div. Adm. Hear. LEXIS 6838 (Fla. Div. Admin. Hearings Jan. 16, 1990).

188. *See* Brand v. Fla. Power Corp., 633 So. 2d 504 (Fla. Dist. Ct. App. 1994). *But see* Solomon v. Dep't. of Transp., 541 So. 2d 691 (Fla. Dist. Ct. App. 1989).

189. *See* VT. STAT. ANN. tit. 21, § 495d(7)(c) (1987).

190. N.J. STAT. ANN. § 10:5-5(q) (West 2002).

191. *Id.*

192. *Id.*

6. Maryland

Maryland's statute is very similar to New Jersey's. It also contains an extensive list of presumed disabilities and a very broad catchall provision.[193]

7. New York

Arguably, New York has the broadest and most protective state statute. The New York law protects an employee with any physical or mental impairment that prevents the exercise of normal bodily functions or is demonstrated by medically accepted clinical or laboratory diagnostic techniques.[194] In *Reeves v. Johnson Controls World Services, Inc.*,[195] the court found that an air operations supervisor who had panic disorder with agoraphobia was disabled under New York law even though he would not be so considered under federal law.

8. Washington

In *McClarty v. Totem Electric*,[196] the court held that McClarty correctly argued that he presented factual evidence in the form of a doctor's release indicating he suffered from bilateral carpal tunnel syndrome. This evidence satisfied the state statute's physical abnormality requirement.[197] In footnote 7, the court stated:

> Totem points out that the United States Supreme Court recently determined that, under the Americans with Disabilities Act, carpal tunnel syndrome, as a matter of law, is not a disability that substantially limits an employee's major life activity of working, citing *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (citations omitted). The *Pulcino* test contemplates only those activities that interfere with the employee's job performance, whereas the Americans with Disabilities Act considers physical impairments in the context of a person's major life activities, not just work. 42 U.S.C.

193. MD. ANN. CODE art. 49(B), § 15(g) (1957).
194. N.Y. EXEC. LAW § 292(21) (McKinney 2001 & Supp. 2004).
195. Reeves v. Johnson Controls World Servs., Inc., 104 F.3d 144 (2d Cir. 1997).
196. McClarty v. Totem Elec., 81 P.3d 901 (2003).
197. *See id.* at 908.

§ 12102(2)(A). Thus, it is easier to establish substantial limitation under the WLAD than under the ADA.[198]

Washington Courts have also held that a person who has sensitivity to secondhand smoke is covered under state law.[199]

9. Connecticut

In an unpublished decision, the court held that a genuine issue of fact existed as to whether carpal tunnel syndrome qualified as a disability.[200] People's Bank contended that the court should look to the ADA to determine whether Christophe had a "disability" and argued that according to federal precedent, carpal tunnel syndrome was not a "disability" unless it substantially limited an employee from performing a major life activity.[201] Christophe countered that carpal tunnel syndrome has been included within the term "physical disability" under Connecticut law.[202] She brought her case under General Statutes of Connecticut § 46a-60.[203]

The court found that, unlike the ADA, the Connecticut statute does not define a disability in terms of whether it substantially limits a major life activity.[204] "Moreover, although our Supreme Court has not addressed the issue specifically, our trial courts have held that carpal tunnel syndrome can be a physical disability under § 46a-60, particularly when the condition is chronic."[205] In footnote 6, the

198. *Id.* at 908 n.7.

199. Hinman v. Yakima Sch. Dist., 850 P.2d 536 (Wash. App. 1993).

200. Christophe v. People's Bank, No. 385621, 2003 Conn. Super. LEXIS 1086, at *15 (Conn. Super. Ct. Feb. 19, 2003).

201. *Id.* at *11–*12.

202. *Id.* at *12.

203. *Id.*

204. *Id.* at *12–*13.

205. *Id.* The court referred to many lower court decisions. *See* Farahani v. State, No. CV010809033S, 2002 Conn. Super. LEXIS 2337, at *3 (Conn. Super. Ct. July 9, 2002) (finding carpal tunnel syndrome qualifies as a physical disability under § 46a-51); Infante v. Thomas, No. CV970395925S, 2001 Conn. Super. LEXIS 1726, at *9–*10 (Conn. Super. Ct. June 20, 2001) (holding carpal tunnel syndrome is a physical disability for purposes of the ADA and § 46a-60); Gilman Bros. Co. v. Conn. Comm'n on Human Rights and Opportunities, No. CV950536075, 1997 Conn. Super. LEXIS 1311, at *14–*16 (Conn. Super. Ct. May 13, 1997) (upholding Connecticut Commission on Human Rights and Opportunities ("CHRO") decision that chronic carpal tunnel syndrome is a physical disability under § 46a-51(15)); Gen. Dynamics, Corp. v. Comm'n on Human Rights and Opportunities, No.

court observed, "While our courts have often looked to federal employment discrimination law for guidance in enforcing our own anti-discrimination statutes 'we have also recognized that, under certain circumstances, federal law defines the beginning and not the end of our approach to the subject.'"[206]

10. Texas

In Texas, the definition of "disability" tracks that of the federal ADA. However, in a 2002 case, a Texas court found that carpal tunnel syndrome could be a protected disability. In *Haggar Apparel Co. v. Leal*,[207] that court determined that the jury had before it sufficient evidence to conclude that disability discrimination was a motivating factor in Haggar's decision to terminate Leal.[208] "Based on the evidence,[209] a reasonable jury could have concluded that

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524412, 1993 Conn. Super. LEXIS 1984, at *13, *23 (Conn. Super. Ct. Aug. 6, 1993) (upholding a CHRO decision in which, at trial, parties agreed carpal tunnel syndrome is a disability according to § 46a-51(15)).

206. *Christophe*, 2003 Conn. Super. LEXIS, at *14 n.6 (quoting State v. Comm'n on Human Rights & Opportunities, 559 A.2d 1120, 1124 (Conn. 1989) (citations omitted)(internal quotation marks omitted)).

207. Haggar Apparel Co. v. Leal, 100 S.W.3d 303 (Tex. App. 2002).

208. *Id.* at 308.

209. The evidence showed:

> Leal worked for Haggar from 1979 until 1994 performing repetitive assembly-line work. In 1983, she was first diagnosed with carpel tunnel syndrome, which was successfully treated with surgery. Leal suffered a recurrence of this condition in 1993. Leal underwent substantial medical treatment and was generally given somewhat modified duties at Haggar. In the spring and summer, two of her treating doctors concluded that she had reached maximum medical improvement and that she suffered a medical impairment or partial permanent disability. These physicians recommended surgery or continued modified duties, in one instance "for the rest of her life." Less than three months later, Haggar terminated Leal for alleged violations of its absenteeism policy. Leal testified that while she was working for Haggar, her supervisors told her that she "was to leave the place for somebody else that was younger, because the ball of years on my back was getting [too] heavy for me to be working there any more," that it "was probably arthritis, rheumatism, since [she] was too old to perform any more." Leal testified that she asked why she had been terminated, and Bill Pitchford, the plant manager, told her that "It's too much, like this injury, supposedly you say that you hurt and this and that, it's going on too long. We cannot keep people like you

Haggar believed that Leal had a substantially limiting impairment that she did not have or that she had a substantially limiting impairment when, in fact, the impairment was not so limiting."[210]

11. West Virginia

In *Stone v. St. Joseph's Hospital*,[211] a paramedic with a back strain sued his employer because the latter temporarily moved him from his regular job to a dispatcher job until more information about his injury could be discovered.[212] Since he received the same pay, the court ultimately held that this was not disability discrimination; it did, however, find that he was a person with a disability under the state law.[213] The court noted several areas where West Virginia and federal law diverge.[214] In footnote 21, the court cited the following cases:

> It should also be noted that differences between our developing disability discrimination jurisprudence and federal jurisprudence already appear to have developed in several areas. *Compare, e.g., Benjamin R. v. Orkin Exterminating Co.*, 390 S.E.2d 814 ([W. Va.] 1990) (a person with asymptomatic HIV infection is a person with a disability who has standing to invoke disability discrimination laws) (citation omitted) *with Runnebaum v. NationsBank*, 123 F.3d 156 (4th Cir. 1997) (a person with asymptomatic HIV infection does not have protected status to invoke discrimination laws) *and with Bragdon v. Abbott*, 524 U.S. 624 (1998) (*some* persons with asymptomatic HIV infection may be able to invoke the protection of disability discrimination laws) (citations omitted); *compare also Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995) (stating that in the Fourth Circuit, reassignment to a vacant position is not a form of reasonable accommodation) *with* Syllabus

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around." At trial, Pitchford directly testified that he would not rehire Leal "[a]ssuming that she could not do a ten hour workday." *Id.* at 310–11.

210. *Id.* at 311.

211. Stone v. St. Joseph's Hosp., 538 S.E.2d 389 (W. Va. 2000).

212. *Id.* at 393–94.

213. *Id.* at 407–08.

214. *Id.* at 404.

> Point 4 of *Skaggs v. Elk Run Coal Co., Inc.*, 479 S.E.2d 561, ([W. Va.] 1996) (Justice Cleckley writing for the Court, holding that reassignment to a vacant position *may* in a given case be a form of reasonable accommodation) (citation omitted); *compare also Haynes v. Rhone-Poulenc*, 521 S.E.2d 331 ([W. Va.] 1999) (holding that a temporarily totally disabled person may invoke protection under disability discrimination laws) (citation omitted) *with McDonald v. Pennsylvania*, 62 F.3d 92 (3d Cir. 1995) (a nurse recovering from abdominal surgery was held not able to invoke the ADA, because her inability to work was not permanent).[215]

Therefore, the court held, "[b]ased on the foregoing discussion, we recognize that the West Virginia Human Rights Act, as created by our Legislature and as applied by our courts and administrative agencies, represents an independent approach to the law of disability discrimination that is not mechanically tied to federal disability discrimination jurisprudence."[216] Interestingly, the West Virginia court looked at the laws in other states to bolster its holding. The court found cases from Maryland, Wisconsin, Colorado, Ohio, Illinois, Louisiana, California, and Iowa, as well as one First Circuit federal court case, helpful to support its decision.[217]

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215. *Id.*

216. *Id.*

217. *Id.* In support of its decision, the court noted:

> In *Office of Occupational Medicine v. Baltimore Community Relations Commission*, 594 A.2d 1237 ([Md.] 1991) (citation omitted), the court held that a fire fighter job applicant could invoke the jurisdiction of the state law against disability discrimination, when an employer perceived him to have a possible future disability due to a bullet that was lodged in his spine. The applicant was a military veteran who was not actually impaired by the bullet. The court said that the finder of fact could permissibly conclude that the employer had treated the applicant as having a possible future impairment that could "impair major life activities, *e.g.*, earning a living."

Id. at 405 (quoting Office of Occupational Med. v. Balt. Cmty. Relations Comm'n, 594 A.2d 1237, 1242 (Md. Ct. Spec. App. 1991).

In footnote 23, the court continued:

> [In] *City of LaCrosse Police & Fire Commission v. Labor and Industry Review Commission*, 407 N.W.2d 510 ([Wis.] 1987) (citation omitted), where a job applicant was denied eligibility for a job because of perceived "back deficiencies which possibly would not permit him

to perform physical duties required of a . . . police officer." *Id.* at 513. The court held that the applicant, who had no actual physical limitations, was nevertheless entitled to invoke the protections of state law against "regarded as" disability discrimination. In *Colorado Civil Rights Commission v. N. Washington Fire Protection District*, 772 P.2d 70 ([Colo.] 1989), the Colorado Supreme Court held that applicants for firefighter positions could invoke the protection of state law against disability discrimination. Some of the applicants had prior orthopedic injuries that were not currently disabling, but which the employer perceived as making the applicants ineligible. The Colorado court said that "the District [claims that it] did not treat the applicants as being substantially limited in one or more of their major life activities, but rather as being limited only with regard to specific job-related functions and risks of fighting fires. We find this argument irrelevant to the question of whether an applicant is handicapped . . . by virtue of an erroneous perception of handicap." *Id.* at 78. In *City of Cleveland v. Ohio Civil Rights Commission*, 648 N.E.2d 516 ([Ohio] 1994) (citation omitted), the employer argued that an aspiring firefighter could not invoke the coverage of state law prohibiting disability discrimination, where the firefighter had a congenital malformation that prevented him from closing his right eyelid. The employer argued that despite the fact that the employer viewed the applicant's eye condition as a bar to the job, the employer did not view the applicant's eye condition as a "handicap." The court rejected this argument, holding that the employer's reliance on the perceived disqualifying condition allowed the employee to invoke the law against disability discrimination. *See also AT & T Tech[s.], Inc. v. Royston*, 772 P.2d 1182 (Colo. App. 1989) (under state law a person who had a muscle strain in his back that caused him pain, required him to avoid heavy lifting and carrying, and restricted the use of his arms, was qualified to invoke the law against disability discrimination); *Cisco Trucking Co., Inc. v. Human Rights Comm'n[]*, 653 N.E.2d 986 ([Ill. App. Ct.] 1995) (truck driver who had injured his back and was laid off was permitted to invoke the protection of the state disability discrimination law because the layoff was allegedly based on a perceived physical handicap) (citation omitted); *Turner v. City of Monroe*, 634 So.2d 981 (La. Ct. App. 1994) (an employee who was treated as unable to return to his job as a signal technician following back surgery, after his treating physician had given him a clean bill of health, could invoke the protection of state law against disability discrimination); *Am[.] Nat[']l Ins[.] Co[.] v. Fair Employment and Hous[.] Comm[']n*, 32 Cal. 3d 603, 609, 651 P.2d 1151, 1155, 186 Cal. Rptr. 345, 349 (1982) ("The law clearly was designed to prevent employers from acting arbitrarily against physical conditions that, whether actually or potentially handicapping, may present no current job disability or job-related health risk."); *Howell v. Merritt Co.*, 585 N.W.2d 278 (Iowa 1998) (it was a jury question whether an employer terminated an employee in part because of a

B. Mitigating Measures

The second issue is whether the determination of disability should include the consideration of mitigating measures. In other words, there is a question whether an insulin-dependent diabetic would be considered disabled such that she would be protected by the civil rights laws although her insulin shots keep her blood sugar within safe limits.

1. Federal law

With regard to mitigating measures, the restrictions on the class of persons entitled to protection under the ADA arose out of a series of Supreme Court decisions: *Sutton v. United Air Lines, Inc.*,[218] *Murphy v. United Parcel Service, Inc.*,[219] and *Albertson's, Inc. v. Kirkingburg*.[220] These cases held that in determining whether an individual is disabled for purposes of protection under the ADA, mitigating measures must be taken into consideration.[221]

In *Sutton*, the Court explained that the determination of "whether an individual is disabled should be made with reference to *measures that mitigate the individual's impairment*."[222] In this case, the plaintiffs were twin sisters with uncorrected vision of 20/200 in one eye and 20/400 in the other eye.[223] With corrective lenses, their vision was 20/20.[224] The plaintiffs sought positions as pilots with United Air Lines but were refused employment due to United's

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perception of disability associated with her use of a TENS device for back pain); *Katz v. City Metal Co., Inc.*, 87 F.3d 26 (1st Cir. 1996) (applying state and federal law, holding that while it was a close question whether the plaintiff was "actually disabled" by his heart condition, he could invoke law against disability discrimination where he showed that his employer treated him as having a substantially limiting condition).

Id. at 405–06 n.23.

218. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

219. Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).

220. Albertson's, Inc., v. Kirkingburg, 527 U.S. 555 (1999).

221. *See Sutton*, 527 U.S. at 475; *Murphy*, 527 U.S. at 521; *Kirkingburg*, 527 U.S. at 565–66.

222. *Sutton*, 527 U.S. at 475 (emphasis added).

223. *Id.*

224. *Id.*

policy requiring pilots to have uncorrected vision of 20/100 or better in each eye.[225] The plaintiffs sued under Title I of the ADA.[226]

The issues presented were whether the plaintiffs were substantially limited in major life activities and whether the decision should be based on their condition before or after their use of corrective lenses (i.e., before or after their use of mitigating measures taken to alleviate the ramifications of their visual impairments).[227] The only issue on appeal was the "substantial limitation" question; the Court did not comment on the impairment question.[228]

The Supreme Court, in a 7-2 decision authored by Justice O'Connor, affirmed the decision of the Tenth Circuit.[229] In deciding not to follow the EEOC's guidelines indicating that mitigating measures should not be considered, the Court reasoned that no agency had been delegated authority to interpret the term "disability" under the ADA, because the term fell outside Titles I-V.[230] The Court found that Congress had not delegated authority to the EEOC to promulgate regulations with respect to any term that was not unique to Title I.[231] Therefore, the EEOC's guidance was not entitled to judicial deference.[232]

The Court took an explicitly textual approach to the analysis of the statute. The majority used the plain language rule of statutory construction and found that the term "substantially limits" was not ambiguous and, therefore, they need not look to secondary sources such as legislative history.[233] They relied solely on the plain language of the statute and grammatical rules. They found that "substantially limits" includes mitigating measures for the following reasons:

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225. *Id.* at 475–76.
226. *See id.* at 476.
227. *See id.* at 481.
228. *See id.* at 481–82.
229. *Id.* at 494.
230. *Id.* at 479.
231. *Id.*
232. *Id.* However, the Court has continued to cite other aspects of the EEOC's definition of disability, such as its definition of the major life activity of "working." It has not explained why it should give deference to some, but not all, of EEOC's regulations with respect to the term "individual with a disability." *Id.* at 480.
233. *Id.* at 482.

a) The use of the present indicative form of the verb "limits" indicates assessment of the current state of the limitation, not potential or hypothetical state;[234]

b) The requirement of an individualized inquiry requires assessment of the actual limit on this person, not the general limits;[235]

c) As a matter of public policy, courts and employers should not be asked to speculate about hypothetical effects of impairments.[236]

Even assuming the majority were to look at congressional intent, the Court found that the legislative intent indicated that not all persons who use glasses should be covered.[237] The Court relied upon the statutory language stating that there are 43 million people with disabilities in the United States.[238] Accordingly, the Court concluded that if everyone who wore glasses were included, the figure would have been much higher.[239]

Justices Stevens and Breyer in their dissent took an intentionalist approach, modeled after Justice Brennan's opinion in *School Board of Nassau County v. Arline*.[240] The dissent argued that the majority's interpretation reached a "bizarre result;" it would penalize people for trying to overcome their physical and mental limitations.[241] Under the majority approach, a person with controlled epilepsy or diabetes could be fired because of their impairment, but could not seek redress because they are not disabled enough.[242] Moreover, people with such impairments could be denied the reasonable accommodations they need to maintain control of their impairments (e.g., regular meal breaks or time to test blood) because they are not considered disabled. The denial of accommodations could lead to

234. *Id.*
235. *Id.* at 483 (citing Bragdon v. Abbott, 524 U.S. 624 (1998).
236. *Id.* at 483–84.
237. *Id.* at 484.
238. *Id.*
239. *Id.* at 487. The fact of the matter is that Congress did not engage in any real fact-finding with regard to that figure. *See id.* at 484.
240. Sch. Bd. v. Arline, 480 U.S. 273 (1987).
241. *Sutton*, 527 U.S. at 499 (Stevens, J., dissenting).
242. *Id.* at 509–10 (Stevens, J., dissenting).

the loss of control of the disease, making a person unqualified to perform a job.[243]

The dissenters interpreted the language in light of the statute's stated purpose to provide a "clear and comprehensive national mandate."[244] They also relied on the opinion of the agency charged with interpreting and enforcing the law, finding that the EEOC's interpretation was consistent with the statute's purpose.[245] "[E]ach of the three Executive agencies charged with implementing the Act ha[d] consistently interpreted the Act as mandating that the presence of disability turns on an individual's uncorrected state."[246] They also found support for the EEOC's interpretation in the legislative history.[247] For example, the Senate Report from which the ADA originated states that "'whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.'"[248] The history refers repeatedly to correctable impairments such as epilepsy and diabetes.[249]

The majority and dissenting opinions in this case set out most clearly the distinction between intentionalist (Stevens) and textualist (O'Connor) approaches. Today, we are witnessing the "bizarre" results the dissent predicted.. It is nearly impossible to succeed in an ADA case if one has epilepsy, diabetes, or depression, because if medication mitigates the problem, one is not disabled. If medication does not work, one is not qualified because one cannot do the job.

In *Kirkingburg*, the plaintiff had amblyopia, an uncorrectable condition that leaves him with 20/200 vision in his left eye, and 20/20 correctable vision in his right eye.[250] Because he only used his right eye to see, he had monocular vision.[251] Albertson's, a grocery chain, fired Kirkingburg from his job as a truck driver after

243. *Id.* (Stevens, J., dissenting).
244. *Id.* at 496–97 (Stevens, J., dissenting).
245. *Id.* at 502–03 (Stevens, J., dissenting).
246. *Id.* at 501 (Stevens, J., dissenting). Eight of the nine Federal Courts of Appeals that had ruled on this issue had agreed with the EEOC. *Id.* at 495–96 & n.1 (Stevens, J., dissenting).
247. *Id.* at 497, 502 (Stevens, J., dissenting).
248. *Id.* at 499 (Stevens, J., dissenting)(citations omitted).
249. *See id.* at 500 (Stevens, J., dissenting).
250. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 559 (1999).
251. *Id.*

determining that he could not meet its vision standard.[252] Kirkingburg sued Albertson's under the ADA.[253] The trial court granted summary judgment for the defendant-employer, and a divided panel of the Ninth Circuit reversed.[254] The Ninth Circuit found that Kirkingburg was disabled because his vision was effectively monocular and that "'the *manner* in which he sees differs significantly from the *manner* in which most people see.'"[255]

The issue presented to the Supreme Court was whether the lower court's determination that Kirkingburg was an individual with a disability was correct.[256] In overruling the Ninth Circuit's determination that Kirkingburg was "an individual with a disability" the Supreme Court criticized two key aspects of the Ninth Circuit's analysis.[257]

First, the Court found that the Ninth Circuit did not use a sufficiently rigorous "substantial limitation" requirement.[258] While noting that a substantial limitation does not have to rise to the level of an utter inability, the Court nonetheless found that a showing of a "mere difference" is not sufficient to meet this requirement.[259] The Court held that Kirkingburg had shown that he saw "differently" from the rest of the population, but had not shown that that different method of seeing constituted a substantial limitation of the ability to see.[260]

Second, based on the *Sutton* decision, the Court held that Kirkingburg's limitations should be considered in light of mitigating measures.[261] In this case, those measures were self-corrective. "'[T]he individual had learned to compensate for the disability by making subconscious adjustments to the *manner* in which he sensed depth and perceived peripheral objects.'"[262] Thus, self-correcting

252. *Id.* at 560.
253. *Id.*
254. *Id.* at 561.
255. *Id.* (quoting Kirkingburg v. Albertson's, Inc., 143 F.3d 1228, 1232 (9th Cir. 1998)).
256. *See id.* at 563.
257. *Id.* at 562.
258. *Id.* at 565.
259. *Id.*
260. *Id.*
261. *Id.* at 565–66.
262. *Id.* at 565 (quoting Kirkingburg v. Albertson's, Inc., 143 F.3d 1228, 1232 (9th Cir. 1998)).

measures must be considered in assessing the substantiality of a limitation. The Court stated: "We see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[263] The Court here further expanded the "mitigating measure" rule.[264]

These decisions illustrate how the Court uses a textualist approach to define people with disabilities as fundamentally distinct from the general population—in other words, to define them as the "natural objects of pity." Underlying each of these decisions is the Court's stated fear that if these people have disabilities, then there are many people who have disabilities. The Court prefers to see people with disabilities as a small class of people who bear little resemblance to the Justices themselves. These special people will be entitled to legal protection, not because such protection is fair or addresses a historical wrong as a matter of civil rights, but because these people need extra help. Thus, the Court treats civil rights protection as charity, to be given only to those who cannot help themselves.

Mitigating measures can include visual aids, medicines, medical devices, and even natural responses of the body that compensate for a physical or mental impairment.[265] In the wake of *Sutton*, many courts have construed state laws protecting disabled individuals to require the consideration of mitigating measures in making disability determinations.[266] Unfortunately, consideration of mitigating measures often strips individuals with disabilities of protections they may have otherwise had under their state disability laws. However, some states continue to refuse to consider mitigating measures under state statutes, even under the federal mandate of *Sutton* as applied to the ADA.

In this section, I examine state court opinions issued after the United States Supreme Court's decision in *Sutton*, including cases from California, Michigan, Minnesota, District of Columbia,

263. *Id.* at 565–66.
264. *Id.*
265. *Id.*
266. *Id.*

Tennessee, Texas, Louisiana, and Massachusetts.[267] Some of these cases demonstrate that the state experiment is still working, while others show that federal decisions have stifled experimentation and evolution.

2. California

California protects disabled individuals under the FEHA.[268] The FEHA defines a "physical disability" as a "physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss" that both affects a body system and limits a major life activity.[269] The FEHA also incorporates by reference the ADA definition of "disability" in the event that its alternative definition would provide an individual with broader protection.[270]

The FEHA was amended to include a new section specifying that "'[l]imits' shall be determined *without* regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity."[271] It seems that the California statute may indeed have the effect of providing broader protection in this respect, although this specific issue does not yet appear to have been ruled on in California post-*Sutton*. However, a California appellate court has recognized, without passing judgment on the issue, that the FEHA specifies:

> The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990. Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.[272]

To be sure, even in the post-*Sutton* era, not all disability claims brought under the FEHA have failed for lack of a finding

267. This article does not purport to provide an exhaustive review of all state case law.
268. CAL. GOV'T CODE § 12900–12995 (West 1992 & Supp. 2004).
269. *Id.* § 12926(k)(1).
270. *Id.* § 12926(l).
271. *Id.* § 12926(k)(1)(B)(i) (emphasis added).
272. *Id.* § 12926.1(a) (citation omitted).

of "disability." This has been so even in the presence of mitigating measures.

In *Rebhan v. Atoll Holdings, Inc.*,[273] Rebhan, an insulin-dependent diabetic, had worked in the accounting department at Escorp for nine years.[274] Because of her impairment, she had to test her blood sugar level several times a day, inject insulin three times daily, and follow a strict diet and exercise plan.[275] She also suffered from diabetic hypoglycemia, a common side effect of insulin in which the blood sugar level drops too low.[276] Effects of diabetic hypoglycemia include answering questions slowly or inappropriately, staring off into space, losing concentration, experiencing lapses in memory, and possibly even losing consciousness.[277] During her nine years at Escorp, Rebhan had experienced such insulin reactions while at work, as often as once per month according to her supervisor.[278] After company-wide layoffs at Escorp, Rebhan was assigned the additional responsibility of acting as Escorp's receptionist.[279] One day, while answering the telephones, she experienced a severe insulin reaction and lost consciousness.[280] The incident resulted in Rebhan receiving a written warning, which placed her "on 'notice that the next time [she was] unable to perform [her] duties as [a] receptionist, due to [her] having a diabetic episode where [she fell] into a catatonic state, [Escorp would] be forced at that time to terminate [her] employment.'"[281] Seven months later, she had an insulin reaction during which she lost consciousness.[282] When it happened, she was working at her desk in the accounting department and was not at the receptionist station answering phones. Nevertheless, Escorp terminated her at the end of the day because of the incident.[283]

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273. Rebhan v. Atoll Holdings, Inc., No. B140612, 2001 Cal. App. Unpub. LEXIS 244 (Cal. Ct. App. Oct. 2, 2001).
274. *Id.* at *2.
275. *Id.* at *3.
276. *Id.*
277. *Id.*
278. *Id.* at *4.
279. *Id.* at *2.
280. *Id.* at *4.
281. *Id.* at *5.
282. *Id.*
283. *Id.* at *6.

The trial court initially found that Rebhan had been unlawfully terminated based on her disability by concluding that *Sutton* did not apply to the FEHA and that Rebhan had a disability when evaluated in her unmitigated state.[284] On appeal, the court noted the discrepancy between the *Sutton* requirements to consider mitigating measures under the ADA, and the FEHA's explicit requirement that mitigating measures *not* be considered.[285] However, the court did not resolve the discrepancy or even opine on the issue.[286] Rather, the court distinguished the case from *Sutton* by finding that Rebhan, even in her medicated condition, was limited in a major life activity (apparently applying the more lenient FEHA standard of "limited" vs. "substantially limited").[287] Thus, Rebhan ultimately prevailed in her FEHA discrimination claim against Escorp for her wrongful termination.[288]

In *Christensen v. City of Los Angeles*,[289] on the other hand, the FEHA plaintiff was not successful.[290] Christensen was an amputee who had lost his left leg below the knee shortly after birth.[291] As a result, he had worn a prosthetic leg almost his entire life.[292] With his prosthetic, Christensen was able to run and play softball and baseball.[293] Additionally, even without his prosthetic, he could ski.[294]

When Christensen applied to become a police officer with the City of Los Angeles, he passed an initial battery of tests and received a provisional offer contingent upon successful completion of a medical evaluation.[295] Unfortunately, he did not pass that evaluation because he was found to have a medical condition, which "'either limit[ed his] ability to perform an essential job task or

284. *Id.*
285. *Id.* at *8–*9.
286. *See id.* at *9.
287. *Id.* at *10–*11.
288. *Id.* at *1–*2.
289. Christensen v. City of L.A., No. B149031, 2002 Cal. App. Unpub. LEXIS 1680 (Cal. Ct. App. May 30, 2002).
290. *Id.* at *2.
291. *Id.* at *2–*3.
292. *Id.* at *3.
293. *Id.*
294. *Id.*
295. *Id.* at *3–*4.

which would create a direct risk of harm if [he] were employed in the . . . job [applied for].'"[296]

Christensen filed suit for unlawful discrimination based on disability in violation of the FEHA.[297] The court found that he was not covered by the FEHA because, "by his own admission, he [was] capable of participating in major life activities" and therefore did not have a protected physical disability as defined by the FEHA.[298] While it may seem that the court must have considered Christensen's mitigating measure (his prosthesis) in its disability determination, which would be against the proscription of the FEHA, that may not have actually happened. Christensen had admitted that he was able to ski without his prosthesis.[299] On the other hand, his ability to ski was facilitated by modified skis including a single ski with outriggers.[300] Apparently, either such a device is not considered a mitigating measure, or the court did consider mitigating measures in its decision.

3. Michigan

Michigan protects disabled individuals under its Persons with Disabilities Civil Rights Act.[301] Its definition of "disability" is similar to that of the ADA.[302] However, since *Sutton* the issue of whether or not mitigating measures should be considered in making disability determinations under the Michigan act has not been brought before the courts. Interestingly, that issue has been raised post-*Sutton* in the context of Michigan's Worker's Disability Compensation Act of 1969.[303]

The worker's compensation act provides for payments to workers who are injured or become disabled on the job.[304] Various types of claims may be brought under the Michigan act, including claims under a general disability provision,[305] a "specific injuries"

296. *Id.* at *9.
297. *Id.* at *12.
298. *Id.* at *14.
299. *Id.* at *3.
300. *Id.*
301. MICH. COMP. LAWS §§ 37.1101–.1607 (2003).
302. *See id.* § 37.1103(d); 42 U.S.C. § 12102(2) (2000).
303. MICH. COMP. LAWS §§ 418.101–.941 (2003).
304. *Id.* § 418.301(1).
305. *Id.*

provision for loss of certain body parts,[306] and a "total and permanent disability" provision for certain enumerated injuries.[307] The act does not specify, however, whether a general disability, specific injury, or total and permanent disability should be measured with regard to mitigating measures that might be employed in the wake of an injury.[308]

In *Cain v. Waste Management, Inc.*,[309] Cain was working as a truck driver and trash collector for Waste Management when, as he was standing behind his vehicle and emptying a trash receptacle, he was struck by an automobile that crashed into the back of his truck.[310] His right leg had to be amputated and he was fitted with a prosthesis, after which he returned to work at Waste Management, Inc. in a clerical role.[311] His left leg, which had also been injured but was not amputated, continued to deteriorate until the point that he could not support himself on the leg without the use of a specially designed brace.[312]

Initially, Cain prevailed before a magistrate in his claim for benefits to compensate for total and permanent disability caused by the loss of industrial use of both legs.[313] Nevertheless, Waste Management and its insurer successfully appealed the decision to the Worker's Compensation Appellate Commission ("WCAC").[314] The WCAC concluded that the magistrate should have applied a "corrected" standard, similar to that used in *Sutton,* when considering the remaining usefulness of Cain's *braced* leg, such that due to the brace, Cain was not totally and permanently disabled.[315]

However, the Michigan Court of Appeals reversed, recognizing that precedent required it to use a "corrected" test in vision cases and cases involving implants, but refusing to expand the test to cases involving prosthetics or braces, which it classified as

306. *Id.* § 418.361(2).
307. *Id.* § 418.361(3).
308. *Id.* § 418.301, .361.
309. Cain v. Waste Mgmt, Inc., 638 N.W.2d 98 (Mich. 2002).
310. *Id.* at 100–01.
311. *Id.* at 101.
312. *Id.*
313. *Id.*
314. *Id.* at 102.
315. *Id.*

different types of corrective devices.[316] The court distinguished the two types of corrective devices based on their permanence, noting in particular that Cain's brace was not permanently attached to his leg.[317]

Ultimately, the Supreme Court of Michigan reversed, holding that the terms "permanent" and "total" in the statutory language indicated that the "corrected" test should apply.[318] Thus, in the wake of *Sutton*, the court reinstated the WCAC's determination that Cain was not totally and permanently disabled under the "corrected" test.[319]

4. Minnesota

Minnesota protects disabled individuals under its Minnesota Human Rights Act ("MHRA").[320] The Minnesota Statutes' definition of "disability," which applies to the MHRA, is similar to that in the ADA.[321] As such, Minnesota courts follow the federal model of the ADA in determining whether a person is disabled. Thus, it appears likely that Minnesota courts would be inclined to follow the *Sutton* mitigating measures rule in making disability determinations.

While the issue has not been squarely addressed in Minnesota since *Sutton*, Minnesota courts have adhered to other ADA guidelines since that time. Also, Minnesota follows the *Sutton* mitigating measures approach in situations where impaired individuals do not utilize mitigating measures, though they could. That is to say, Minnesota courts consider individuals in their actual present state, whether mitigating measures are employed or could be employed. Thus, it appears likely that mitigating measures would be considered in MHRA disability determinations if they were involved in a case brought under that statute.

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316. *Id.* *See* ; O'Connor v. Binney Auto Parts, 513 N.W.2d 818 (Mich. 1994); Hakala v. Burroughs Corp., 338 N.W.2d 165 (Mich. 1983).
317. Cain, 638 N.W.2d at 102.
318. *Id.* at 104.
319. *Id.* at 107.
320. MINN. STAT. §§ 363A.01–.17, .19–.20, .38 (2003).
321. *See id.* § 363A.03 Subdivision 13.

Kuechle v. Life's Companion P.C.A..[322] is a post-*Sutton* case in which Minnesota followed the mitigating measures rule of *Sutton*, though it was applied in a situation that did not involve the use of mitigating measures.[323] Kuechle was a nurse in a home health care business who had been diagnosed with agoraphobia, a panic disorder causing her to fear leaving her home and to avoid traveling.[324] She sought treatment but declined to take the medication recommended by psychologists and psychiatrists out of fear of addiction.[325] Instead of medication, Kuechle combated her disorder by taking Fridays off of work during the winter months and "forcing herself to go to public places during the day, when fewer people were around."[326] She found that this process acclimated her to leaving home.[327]

Initially, Kuechle's employer allowed her to take Fridays off but later took away the accommodation and eventually terminated her.[328] Before she was terminated, but after her multiple requests for Fridays off were denied, Kuechle filed a disability discrimination claim under the MHRA.[329] The employer argued that Kuechle was not a qualified individual under the MHRA because, if medicated, she would not suffer from the symptoms of agoraphobia.[330] Applying the *Sutton* rule, the court disagreed.[331]

The court followed the guidance of the ADA, and in its analysis discussed the holding of *Sutton*, that persons are not to be evaluated in their hypothetical, uncorrected state when determining if a person has a disability under the ADA.[332] The court went on to explain that "[t]he use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on

322. Kuechle v. Life's Companion P.C.A., 653 N.W.2d 214 (Minn. Ct. App. 2002).
323. *See id.*
324. *Id.* at 217.
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.* at 217–18.
329. *Id.* at 217.
330. *Id.* at 220.
331. *Id.* at 221.
332. *Id.*

whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting."[333]

In recognizing that *Sutton* emphasized current, actual limitations, the Minnesota court found that Kuechle was disabled because in her unmedicated state, her disability continued to limit major life activities.[334] Thus, Kuechle was held to be a qualified person under the ADA and, hence, under the MHRA as well.[335]

5. District of Columbia

The District of Columbia protects disabled individuals under its District of Columbia Human Rights Act ("DCHRA").[336] The DCHRA defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual having a record of such an impairment or being regarded as having such an impairment."[337] Thus, the definition of "disability" under the DCHRA is substantially similar to that of the ADA.

Since *Sutton*, D.C. courts have sometimes declined to find a disability when considering mitigating measures, but the courts have not always been consistent in this regard. Thus, it is still possible for certain conditions, even when treated, to qualify as disabilities for purposes of protection under the DCHRA.

In *Grant v. May Department Stores Co.*,[338] Grant was an insulin-dependent diabetic who requested an altered work schedule at a cosmetics counter in May Department Stores.[339] "Through diligent monitoring, diet, and insulin use, [she] was able to control her blood sugar levels."[340] She even stated that while on insulin "she felt 'pretty good,' could take care of herself, and did not have problems with her vision or walking."[341]

During Grant's periodic reviews, the department store managers gave her negative evaluations, based in part on her unwillingness to

333. *Id.* (citing Sutton v. United Air Lines, Inc., 527 U.S. 471m 488 (1999).
334. *Id.*
335. *Id.*
336. D.C. CODE ANN. §§ 2-1401.01 to -1411.06 (2001).
337. *Id.* § 2-1401.02(5A).
338. Grant v. May Dep't Stores, Co., 786 A.2d 580 (D.C. 2001).
339. *Id.* at 581.
340. *Id.*
341. *Id.* at 585.

maintain a normal working schedule, and refused to alter her work schedule for several months until shortly before she left for maternity leave.[342] Upon her return to work, her position was no longer available.[343]

Grant sued the department store for failure to reasonably accommodate her disability in violation of the DCHRA.[344] The court applied the *Sutton* mitigating measures rule in its analysis of whether Grant was covered under the DCHRA, considered her use of insulin as a mitigating measure, and concluded that she was not disabled under the DCHRA.[345] The court specifically recognized that Grant's impairment was mitigated by insulin use, and decided that when taking insulin, Grant was not substantially limited in any major life activities.[346]

It is still possible, however, for a condition to qualify as a disability under the DCHRA, even where medication is involved as a mitigating measure.[347] In *Strass*, the plaintiff, Strass, was Director of Public Affairs for Kaiser Foundation Health Plan.[348] After several years, the public affairs department substantially reduced its staff, leaving Strass with increased responsibilities, duties, and pressures.[349] She began experiencing headaches, fatigue, an inability to relax, and insomnia.[350] After conducting medical tests, her doctor diagnosed Strass as having hypertension, and attributed it to her work situation.[351] Strass informed Kaiser, through various channels, that the stress of the job, exacerbated by inadequate staff, was making her ill.[352] She applied for a different position within Kaiser, but she did not receive it.[353] Kaiser did, however, attempt to have Strass enroll in their Compass Career

342. *Id.* at 581–82.
343. *Id.* at 582.
344. *Id.* at 583.
345. *Id.* at 584–85.
346. *Id.* at 585.
347. *See* Strass v. Kaiser Found. Health Plan of Mid-Atlantic, 744 A.2d 1000 (D.C. 2000).
348. *Id.* at 1003.
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.* at 1004.
353. *Id.*

Reappraisal Program, which she declined to do.[354] Eventually, she was terminated.[355]

Strass sued Kaiser alleging that her employment had been terminated because of her physical handicap (hypertension) in violation of the DCHRA.[356] The court upheld the jury determination that Strass was disabled under the DCHRA.[357] Specifically citing *Sutton* and considering Strass' medication as a mitigating measure, the court still found that there was "ample evidence from which the jury could find . . . that Strass' condition, although controlled by medication, was a disability within the meaning of the Act."[358]

Thus, in the District of Columbia it remains possible, even after *Sutton* to prove disability where mitigating measures such as medication are employed.

6. Tennessee

Tennessee's disability discrimination statute, entitled the Tennessee Handicap Act ("THA"),[359] does not define "handicap."[360] Therefore, Tennessee courts look to three sources to interpret this term: (1) the Tennessee Human Rights Act ("THRA"),[361] which defines "handicap"; (2) the ADA[362] and Federal Rehabilitation Act;[363] and (3) federal and state case law interpreting those statutes.[364]

Because Tennessee law relies on the federal acts and interpretations thereof to define "disability" or "handicap," its scope of protection for handicapped individuals has dwindled as much as the ADA's since the ruling on *Sutton*.[365]

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354. *Id.*
355. *Id.*
356. *Id.* at 1003.
357. *Id.* at 1010.
358. *Id.* at 1010 n.18.
359. TENN. CODE ANN. § 8-50-103 (2002).
360. Davis v. Computer Maint. Serv., Inc., No. 01A01-9809-CV-00459, 1999 Tenn. App. LEXIS 661, at *16 (Tenn. Ct. App. Sept. 29, 1999).
361. TENN. CODE ANN. § 4-21-102(9) (1998).
362. *See* 42 U.S.C. § 12102(2) (2002).
363. *See* 29 U.S.C. § 706(8).
364. *Davis*, 1999 Tenn. App. LEXIS 661, at *16.
365. *See id.* at *16–*28.

In *Davis*, the plaintiff was hired as a purchasing agent for Computer Maintenance Service, Inc. ("CMS"), a job that "required him to order and price parts over the phone, return defective merchandise to manufacturers, receive incoming parts," and lift heavy computer equipment.[366] Davis was an insulin-dependent diabetic who took multiple daily insulin injections, as well as an oral medication to aid in digestion.[367] One side effect of the oral medication was a frequent, dry cough,[368] which apparently affected his ability to conduct business over the telephone and perform other job duties.[369]

Two days after Davis began working, he had a meeting with a CMS supervisor, during which he was terminated.[370] Apparently, the supervisor cited concerns regarding Davis' medical condition during this meeting.[371] Davis subsequently brought suit under the THA, which provides that "[t]here shall be no discrimination in . . . hiring [or] firing . . . upon any physical, mental or visual handicap of the applicant."[372] Turning to the THRA for its definition of "handicap," Davis argued that his diabetes was a physical condition that substantially limited major life activities.[373] Davis specifically noted his need to administer insulin shots daily, "take oral medication, monitor his condition, and comply with a strict diet and exercise program."[374] The court engaged in a substantial analysis of *Sutton* and found that Davis "clearly [did] not meet the first prong of the definition of 'handicap' set forth in the THRA."[375] The court noted Davis' use of mitigating measures, but pointed out that Davis did not identify any major life activity that was substantially limited by his diabetes.[376] Therefore, Davis' diabetes, in view of his ability to control it through mitigating

366. *Id.* at *2.
367. *Id.*
368. *Id.*
369. *Id.* at *7, *9.
370. *Id.* at *2.
371. *Id.* at *2–*3.
372. *Id.* at *3, *15–*16.
373. *Id.* at *16–*18.
374. *Id.* at *18.
375. *Id.* at *24.
376. *Id.*

measures, did not qualify him as a protected individual under the THRA.[377]

7. Texas

Texas' state disability law is entitled the Texas Commission on Human Rights Act ("TCHRA").[378] One of the purposes behind the TCHRA is to "provide for the execution of the policies embodied in Title I of the [ADA] . . . and its subsequent amendments."[379] Not surprisingly, the TCHRA defines "disability" in relevant part as "a mental or physical impairment that substantially limits at least one major life activity."[380] This definition is, of course, similar to that contained in the ADA.[381] Also, because of the TCHRA's stated purpose to promote federal policy, Texas courts routinely look to analogous federal precedent for disability discrimination suits.

Since *Sutton*, Texas courts have not been likely to find that a plaintiff, who treats his impairment with a mitigating measure, is "disabled" for purposes of the TCHRA. Texas courts consistently apply the mitigating measures rule of *Sutton* to Texas disability law, which seems to have generally precluded findings of disability against which discrimination would otherwise be prohibited under the TCHRA.

In *Little*, the plaintiff, Little, was impaired after she had the lower half of her leg amputated as the result of an accidental shotgun wound.[382] Some twenty years later, during a two and a half year period, she applied on fourteen separate occasions to the Texas Department of Criminal Justice ("TDCJ") for a food service manager position at various prisons.[383] She was not hired for any of the positions.[384] Little brought a discrimination claim under the TCHRA for a pattern of discrimination in the TDCJ hiring practices.[385] The issue before the court was whether Little had a "disability" as

377. *Id.* at *24, *28.
378. TEX. LAB. CODE ANN. §§ 21.001-.556 (Vernon 1996).
379. Little v. Tex. Dep't. of Criminal Justice, No. 01-02-00733-CV, 2003 Tex. App. LEXIS 2734, at *4–*5 (Tex. App. Mar. 27, 2003).
380. TEX. LAB. CODE ANN. § 21.002(6).
381. *See* 42 U.S.C. § 12102(2)(2002).
382. *Little*, 2003 Tex. App. LEXIS 2734, at *1.
383. *Id.* at *2.
384. *Id.*
385. *Id.* at *2 n.1.

defined by the TCHRA.[386] The court held that Little's amputated leg qualified as a physical impairment, but questioned whether the impairment rose to the level of "disabled" in view of the prosthesis she regularly used.[387]

Little testified that even with her prosthesis, she could not "sit or walk like other people," she could not "walk quickly," and "[could not] run at all."[388] She argued that although her prosthesis enabled her to walk, she remained "disabled" because of substantial limitations on her ability to walk or run.[389]

After a discussion of *Sutton* and its requirement to consider mitigating measures, the court concluded that there was no summary judgment evidence that her impairment, coupled with her prosthesis, constituted a substantial limitation on a major life activity as defined by the TCHRA.[390] The court recognized that there was some evidence of Little's "impairment," but found that the evidence also showed that Little could "walk well with the use of her prosthesis, although with a slight limp and at a slower pace."[391] This was insufficient to constitute a disability.[392]

In *Stucky v. City of Houston*,[393] Stucky was a zookeeper who brought suit under the TCHRA for unlawful termination by the City because of a hearing impairment.[394] Stucky was employed by the City in October 1997, and was

> terminated at the end of his one-year probationary period for alleged poor performance. He was hearing impaired to some extent in both ears, but was able to wear a hearing aid in only one ear. At the time he was interviewed for the position, he made known to his supervisor[s] . . . that he had a "hearing problem" and wore a hearing aid.[395]

386. *See id.* at *3.
387. *Id.* at *8–*9.
388. *Id.* at *7 (internal quotation marks omitted).
389. *Id.*
390. *Id.* at *8–*9.
391. *Id.*
392. *Id.* at *9.
393. Stucky v. City of Houston, No. 07-01-0299-CV, 2002 Tex. App. LEXIS 2597 (Tex. App. Apr. 5, 2002).
394. *Id.* at *5.
395. *Id.*

"In requests for admissions, [Stucky] admitted [that] his hearing disability posed no limitation on his ability to perform the essential functions of his position at the zoo, and he testified in his deposition that his hearing loss or impairment did not affect his ability to do his job."[396] However, the unavailability of quality radios at the zoo, with which personnel communicated, made Stucky's job a frustrating experience at times.[397]

The court followed *Sutton* and recognized that Stucky had the burden to show that his hearing condition with the use of a hearing aid substantially limited a major life activity.[398] Not surprisingly, the court found that Stucky failed to meet this burden because he was not particularly limited in any major life activity when he used his hearing aid.[399] The court recognized that Stucky's complaints regarding the functioning of the radios were also made by other employees.[400] Thus, while the zoo may have needed better quality telephones and radios in general, and while the zoo may have been a noisy environment at times, the court found that Stucky failed to show that the problems he suffered distinguished him from the general population.[401] Therefore, his hearing problems could not be considered incapacitating in view of the mitigating effect of his hearing aid, and Stucky was not sufficiently disabled to qualify for protection under the TCHRA.[402]

In another worker disability case, *Kiser v. Original, Inc.*,[403] Kiser was a restaurant waiter who brought suit under the TCHRA for wrongful termination based upon his seizure disorder.[404] Kiser's seizures were generally controlled by medication and avoiding sleep deprivation.[405] However, despite his attempts to control his seizures, he still occasionally suffered from "mild to moderate" seizures.[406] Usually, he would be able to predict the onset of a

396. *Id.* at *6.
397. *Id.* at *5–*7.
398. *Id.* at *7.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. Kiser v. Original, Inc., 32 S.W.3d 449 (Tex. App. 2000).
404. *Id.* at 449–50.
405. *Id.* at 451.
406. *Id.*

seizure about ten to fifteen minutes before it occurred, though sometimes he would experience them without warning.[407]

Kiser had two or three seizures during work at the restaurant.[408] After each seizure, the restaurant required that he obtain a physician's release before returning to work.[409] Upon his return to work after one such seizure, his supervisor terminated him because of his seizure disorder.[410]

The court had to decide whether Kiser's seizure disorder, in light of the mitigating measures, qualified as a disability under the TCHRA.[411] The conclusion was that it did not.[412] Citing *Sutton*, the court noted that Kiser admitted his seizures were "generally controlled by medication and rest, and that any seizures he did have were only occasional and, at worst, moderate."[413] The court found that "[w]hile there was some evidence of impairment, there was no evidence such impairment constituted a substantial limitation of a major life activity."[414]

Clearly, it would be difficult to bring a successful claim under the TCHRA in any case involving the use of mitigating measures. There does not appear to be any post-*Sutton* example of a mitigated impairment that rises to the level of a TCHRA disability.

8. Louisiana

Louisiana's state disability law is encompassed within its Louisiana Human Rights Act ("LHRA").[415] One of the stated purposes of the state act is "to safeguard all individuals within the state from discrimination because of . . . disability."[416] Among other things, the LHRA prohibits discrimination "in connection with employment" and states that disabled persons should have "full productive capacities in employment."[417] Under the LHRA a person

407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.*
413. *Id.* at 453.
414. *Id.*
415. LA. REV. STAT. ANN. §§ 51:2231–:2265 (West 2003).
416. *Id.* § 51:2231(A).
417. *Id.*

is "disabled" if he or she suffers from "a physical or mental impairment that substantially limits one or more of the major life activities of the individual."[418] Thus, it bears similarity to the ADA definition of "disability." Because of this and other similarities, Louisiana courts look to federal law and precedent, including the ADA and the Federal Rehabilitation Act, to define, interpret, and apply the LHRA in state disability actions.[419]

In *Hook*, the plaintiff, Hook, was terminated from his position as the manager of transportation and distribution for defendant corporation's Louisiana plant three days after an angry confrontation with the plant manager.[420] Shortly before the incident, "Hook had been diagnosed with attention deficit hyperactivity disorder (ADHD) and was being treated" with medication.[421] Hook asserted that the confrontation occurred because the medication resulted in irritation and an inability to control his emotions.[422] Therefore, he argued, his termination was the result of a disability.[423] He brought suit under the LHRA.[424]

The trial court found that Hook was both disabled and protected under the LHRA, and that the defendant corporation unlawfully discriminated against him.[425] He was awarded more than $2 million in damages.[426]

On appeal, the court reversed the decision, holding that Hook was not disabled and, therefore, was not qualified for protection under the LHRA.[427] The court began its analysis by noting that "[b]ecause the LHRA is similar in scope to [the ADA] and provides for the execution of the federal anti-discrimination policies, Louisiana courts appropriately consider interpretations of [the ADA] when interpreting our own state laws."[428] Thus, *Sutton* applied to the disability determination that is necessarily the threshold

418. *Id.* § 51:2232(11)(a).
419. Hook v. Georgia-Gulf Corp., 788 So. 2d 47, 53 n.8 (La. Ct. App. 2001).
420. *Id.* at 49.
421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.*
427. *Id.*
428. *Id.* at 53 n.8.

question in any disability claim under the LHRA.[429] The court then recognized that, under *Sutton*, courts must take into account both positive and negative effects of any mitigating measures when making a disability determination.[430]

Although ADHD qualifies as an impairment that, in some instances, may substantially limit an individual's major life activities, the experts who testified on Hook's behalf failed to address how the medication affected his ability to learn.[431] The court found insufficient evidence that Hook was substantially limited in his ability to learn despite the medication and thus did not consider him disabled.[432]

On the other hand, not all cases in which courts consider mitigating measures necessarily culminate in a finding that the individual is not disabled. *Bazert v. Louisiana Department of Safety and Corrections*,[433] which involved the ADA rather than a state disability law,[434] is an example of a post-*Sutton* case in which a court considered the plaintiff's mitigating measures but determined that the plaintiff had a "disability" within the scope of the ADA.[435]

The Department of Corrections employed Bazert at the Louisiana State Penitentiary for about sixteen years when his employer forced him to take sick leave because of his asthma condition.[436] Medications controlled Bazert's asthma quite successfully for many years, until he was reassigned to a confined area in the prison dormitories.[437] There, he faced increased exposure to cigarette smoke, aftershave lotions, cologne, and cleaning chemicals—all of which worsened his asthma condition.[438] The corrections department refused to change his

429. *Id.* at 53 (citing Talk v. Delta Airlines, Inc., 165 F.3d 1021, 1024 (5th Cir. 1999)).
430. *Id.*
431. *Id.* at 54.
432. *Id.*
433. Bazert v. La. Dep't of Safety & Corr., 768 So. 2d 279 (La. Ct. App. 2000).
434. Yet, a determination as to the scope of the ADA is squarely applicable to Louisiana state disability law, as described above.
435. *Id.* at 283.
436. *Id.* at 280.
437. *Id.* at 280–81.
438. *Id.* at 281.

assignment, move him to a more open area, or otherwise provide him with reasonable accommodations.[439] Instead, the department forced him to take sick leave.[440]

The court found that mitigating medical measures did not correct Bazert's condition because his asthma limited his breathing in both a medicated and an unmedicated state.[441] Therefore, the court held that Bazert had a physical impairment that substantially limited him in a major life activity (breathing), and he thus qualified as a disabled individual under the ADA.[442]

Although Bazert brought this case under the ADA rather than a state disability law, the federal rules apply to the Louisiana statute. It therefore follows that although Louisiana considers mitigating measures in disability determinations under the state statute, because those measures do not always result in a "no disability" finding under the ADA, they should not necessarily result in a "no disability" finding under the LHRA.

9. Massachusetts

Massachusetts prohibits discrimination against individuals with disabilities under its antidiscrimination statute.[443] As with many other state disability laws, the statute defines "handicap" as "a physical or mental impairment which substantially limits one or more major life activities of a person."[444] Thus, it bears similarity to the ADA definition of "disability."[445] However, Massachusetts does not consider mitigating measures in making disability determinations under the anti-discrimination statutes. Even since *Sutton*, Massachusetts courts have consistently rejected arguments that mitigating measures should be considered in such decisions.

In *Dahill v. Police Department*,[446] Dahill was born with a severe hearing impairment, such that without the use of hearing aids, his hearing was significantly impaired.[447] With the use of hearing

439. *Id.*
440. *Id.*
441. *Id.* at 283.
442. *Id.*
443. MASS. GEN. LAWS ch. 151B, §§ 1–10 (2003).
444. *Id.* § 1(17).
445. *See* 42 U.S.C. § 12102(2) (2002).
446. Dahill v. Police Dep't, 748 N.E.2d 956 (Mass. 2001).
447. *Id.* at 958.

aids, however, Dahill's auditory ability was corrected to within normal limits.[448] He obtained a provisional employment offer with the Boston Police Department and entered its academy's training program.[449] At the academy, several episodes raised concerns that Dahill's hearing might make him unfit to be a police officer.[450] For example, he did not respond to an oral instruction during a training session, did not respond to a radio call, and failed to hear a gunshot during a firearms training exercise.[451] After a series of auditory tests, a medical specialist reported to the Police Department that Dahill's hearing impairment raised a major question of safety regarding his ability to perform the duties of a police officer.[452] The Department terminated him on the basis that his "auditory deficiencies" rendered him "incapable of effectively and safely performing the essential duties of a Police Officer."[453]

In Dahill's claim under the Massachusetts anti-discrimination statute, the issue before the court was whether his use of hearing aids should be considered in determining whether he was "disabled."[454] The Police Department urged the court to follow the guidance of *Sutton* in applying mitigating measures to disability determinations.[455] After a thorough review of Massachusetts' legislative intent, the court concluded that the anti-discrimination statute provided a broad mandate for protection against disability discrimination, under which the term "handicap" did not require consideration of corrective devices.[456] Accordingly, the court did not consider Dahill's hearing aids in its disability determination, and he was held to be a qualified individual within the protective scope of the anti-discrimination statute.[457]

Although mitigating measures are not considered in disability determinations under the state anti-discrimination statute, Massachusetts must of course consider mitigating measures in claims

448. *Id.*
449. *Id.*
450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.* at 959 (internal quotation marks omitted).
454. *Id.*
455. *Id.*
456. *Id.* at 959–62.
457. *Id.* at 964.

brought under the ADA. In one post-*Sutton* example, *Shedlock v. Department of Correction*,[458] a prisoner brought an ADA claim against the Department of Correction ("DOC") for unlawful discrimination against him on the basis of a physical handicap.[459] Shedlock had been in a serious motor vehicle accident before his incarceration, which resulted in chronic lower back pain and arthritis in his ankle.[460] When the DOC attempted to move him to a new housing cell on the second floor, which was accessible only by stairs, Shedlock refused the assignment and requested a first floor cell because his "disability" prevented him from being able to climb stairs.[461] The DOC did not accommodate Shedlock's request, and he eventually brought a discrimination suit under the ADA.[462]

The court cited *Sutton* in its decision to consider the cane that Shedlock used in determining whether he had a disability.[463] Thus, in deciding whether Shedlock was substantially limited in his ability to walk, a major life activity, the court considered that ability as assisted by a cane.[464] With his cane, Shedlock was able "to get out and walk for an hour" on an average day at the prison.[465] He was sometimes able to walk for two hours, and twice a day he stood in line at the health unit for between twenty and forty minutes to receive sinus medication.[466] Shedlock also was able to climb stairs to obtain cleaning supplies for his cell and to attend computer classes three times a week.[467] Based on this evidence of Shedlock's ability to walk with the assistance of a cane, the court concluded that he was not substantially limited in doing so and therefore was not "disabled" for purposes of protection under the ADA.[468]

Taking their lead from the Supreme Court's decision in *Sutton*, some state judiciaries have reduced the scope of their own states'

458. Shedlock v. Dep't of Corr., No. 98-3631-F, 2002 WL 31356205, at *1 (Mass. Super. Ct. Oct. 3, 2002).
459. *Id.* at *2–*3.
460. *Id.* at *1–*2.
461. *Id.* at *1.
462. *Id.* at *1–*3.
463. *Id.* at *4.
464. *Id.*
465. *Id.*
466. *Id.*
467. *Id.*
468. *Id.* at *4–*5.

disability statutes by construing them to require consideration of mitigating measures. However, because state laws may provide more protection than that afforded by similar federal statutes, state judiciaries do not necessarily have to make such statutory constructions.

Statutes that are based upon, that are derived from, or that incorporate the policies, language, or definitions of the ADA are more likely to now require consideration of mitigating measures. Such statutes are found in states such as Minnesota, District of Columbia, Tennessee, Texas, and Louisiana.[469] On the other hand, state statutes that are more independently defined need not be so restricted. Examples include the California, Michigan, and Massachusetts statutes.[470] The result is that most states now consider mitigating measures in disability determinations under their state laws, and only a handful continue either to refuse to consider mitigating measures or to refuse to recognize a disability despite mitigating measures in the wake of *Sutton*.

C. Interactive Process

This section examines various courts' interpretations of the Interactive Process of the Federal Americans with Disabilities Act[471] outlined by the EEOC. The Interactive Process is a problem-solving approach employees and employers use to determine the appropriate reasonable accommodation for the disabled employee.[472] When the appropriate accommodation is obvious, the employer and the employee may not need to engage in the Interactive Process to determine a reasonable accommodation.[473]

> For example, if an employee who uses a wheelchair requests that his or her desk be placed on blocks to elevate the desktop above the arms of the wheelchair and the employer complies, an appropriate accommodation has been requested, identified, and provided without either the employee or employer being aware of having engaged in any sort of "reasonable accommodation process."

469. *See* discussion *supra* Part III.B.4–8.
470. *See* discussion *supra* Part III.B2–3, 9.
471. 29 C.F.R. § 1630 (2003).
472. *Id.* § 1630.2.
473. *Id.* § 1630.9 app. at 364.

> However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process, such as the step-by-step process described [below], as part of its reasonable effort to identify the appropriate reasonable accommodation.[474]

First, the employer should determine the purpose and essential functions of the individual's job.[475] Next, the employer and employee should discuss the exact job-related limitations and the ways in which a reasonable accommodation might help.[476] Both parties should then make a list of potential accommodations and identify how each accommodation would prove effective in overcoming the limitations and enabling the individual to perform the essential functions of his or her job.[477] Finally, the employer should implement the most appropriate accommodation, taking into consideration the preference of the individual and resources available to the employer.[478] If more than one reasonable accommodation is possible, the employer should give primary consideration to the one the employee prefers.[479] The employer, however, makes the ultimate decision as to which accommodation to provide. As a result, the employer may opt to furnish the accommodation that is the least expensive or the easiest to implement.[480]

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474. *Id.*
475. *Id.*
476. *Id.*
477. *Id.*
478. *Id.*
479. *Id.*
480. *Id.*

1. Federal law

The United States Supreme Court has not yet ruled on this issue. However, an examination of recent circuit court cases suggests it is likely that the Court will consider this issue because of the variety of approaches taken in the different circuits. In keeping with recent Supreme Court opinions, it appears that when the Court does consider this issue, it will probably not rule favorably to protect the civil rights of persons with disabilities. The next section looks at the different circuit court opinions and highlights the differences in those courts. Until the Supreme Court rules on this issue, the circuit courts are able to experiment in their different jurisdictions.

The first question that arises is whether an employer's failure to participate in the interactive process creates automatic liability independent from a failure to accommodate an employee's disability. The federal circuit courts of appeals are split on the issue of whether employers have a duty to engage in the interactive process and whether independent liability exists if an employer fails to engage in the interactive process.[481] While all courts agree that employers should engage in an interactive process with their employees, the Eleventh Circuit would not permit a cause of action against an employer who fails to engage in an interactive process.[482] The First Circuit has taken the schizophrenic position that the interactive process is merely permissive, but that situations may exist where it is mandatory.[483] The Third, Fifth, Seventh, Eighth, and Ninth Circuits have taken the position that once an employee requests a reasonable accommodation, the employer has a duty to engage in an interactive

481. *See infra* notes 482–87 and accompanying text.

482. *See* Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (holding that the employee has the burden of showing available accommodations and that the employer cannot be found "liable merely for failing to engage in the [interactive] process itself").

483. The First Circuit appears to take the position that EEOC regulations are permissive rather than mandatory. *See* Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 513 (1st Cir. 1996) ("The regulations' use of 'may' clearly suggests that Congress, while it could have imposed an affirmative obligation upon employers in all cases, chose not to."). However, the First Circuit also stated, "There may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA." *Id.* at 515.

process.[484] However, of those circuits requiring employer participation in the interactive process, only the Seventh Circuit appears willing to assign independent liability for failure to engage in the interactive process.[485] Rather than impose independent liability, those circuits recognizing a duty to engage in the interactive process have held that the employee still has the burden of proving that a reasonable accommodation could have been made,[486] and evidence that an employer acted in bad faith in the interactive process only precludes summary judgment for the employer.[487]

In *Willis*, the Eleventh Circuit held that employers cannot be held independently liable for failing to engage in the interactive process.[488] Willis was an employee at Lever Brothers (Conopco) who had sensitivity to enzymes in the laundry detergent she packaged.[489] To accommodate Willis, Conopco attempted to minimize her exposure to the enzymes by transferring her to a new position and by directing her to wear a mask when crossing the packing area floor.[490] Following unrelated foot surgery, Willis

484. *See, e.g.*, Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114 (9th Cir. 2000) ("[T]he interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA."), *vacated on other grounds by* 535 U.S. 391 (2002); Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999) ("[W]hen the disabled individual requests accommodation, it becomes necessary to initiate the interactive process."); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 314–15 (3d Cir. 1999) (holding that the employer's duty to engage in the interactive process is triggered "[o]nce the employer knows of the disability and the employee's desire for accommodations" and that the employer must "'meet the employee half-way'" by requesting additional information (quoting Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1990))); Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996) (finding that an employee's request for accommodation obligates the employer to participate in the interactive process of determining a reasonable accommodation); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135–37 (7th Cir. 1996) (holding that both parties have a responsibility to participate in an interactive process).

485. *See, e.g.*, Gile v. United Airlines, Inc., 213 F.3d 365, 373 (7th Cir. 2000) (upholding jury verdict for employee because employer failed to engage in an interactive process).

486. *See Barnett*, 288 F.3d at 1114; *Fjellestad*, 188 F.3d at 952; *Phoenixville*, 184 F.3d at 315; *Principal Fin. Group*, 93 F.3d at 165.

487. *See Barnett*, 288 F.3d at 1116; *Fjellestad*, 188 F.3d at 953; *Phoenixville*, 184 F.3d at 318.

488. Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997).

489. *Id.* at 283.

490. *Id.*

provided Conopco with a doctor's letter stating that she had an immune system abnormality and should stop working at the plant.[491] At this point, Willis refused to return to work and requested that Conopco either reassign her to a new building or enclose the area in which she worked.[492] Conopco then arranged for a doctor to examine Willis, and the doctor determined that she was able to return to work.[493] When Willis failed to return to work, Conopco terminated her employment.[494]

The Eleventh Circuit affirmed the district court's granting of summary judgment in favor of Conopco.[495] The court held that "where a plaintiff cannot demonstrate 'reasonable accommodation,' the employer's lack of investigation into reasonable accommodation is unimportant."[496] The court expressed fear of potential employer liability for failing to engage in the interactive process in instances where an investigation into reasonable accommodations "would [be] fruitless."[497] The court also stated that the punitive approach of automatic employer liability for failure to participate in an interactive process is inconsistent with the basic remedial goals of the ADA, which work to ensure that individuals with disabilities "can fully participate in all aspects of society, including the workplace."[498]

The First Circuit in *Jacques v. Clean-Up Group, Inc.*[499] could not decide whether the interactive process was mandatory or permissive.[500] He was employed as an all-purpose cleaning person.[501] Jacques suffered from epilepsy and was not permitted to drive a motor vehicle.[502] Jacques was able to travel to work by walking, riding a bicycle, or riding in one of the Clean-Up Group's vans prior to being laid off on February 19, 1994.[503] On February 24,

491. *Id.*
492. *Id.*
493. *Id.* at 284.
494. *Id.*
495. *Id.* at 287.
496. *Id.* at 285 (quoting Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 448 (11th Cir. 1996)).
497. *Id.* (quoting *Moses*, 97 F.3d at 448).
498. *Id.*
499. Jacques v. Clean-up Group, Inc., 96 F.3d 506 (1st Cir. 1996).
500. *Id.* at 513–14.
501. *Id.* at 509.
502. *Id.*
503. *Id.*

1994, the Clean-Up Group offered Jacques a position cleaning an ice arena approximately three miles from his home.[504] Jacques was informed that the company van would not be provided to transport him to and from work and that he would have to arrange for his own transportation.[505] Jacques informed the Clean-Up Group that he could take a bus but could not arrive to work until sometime between 10:00 A.M. and 10:30 A.M. pursuant to the relevant bus schedule.[506] The Clean-Up Group could not accommodate him because the arena had to be completed at 9:30 A.M.[507] Subsequently, Jacques argued that the group failed to engage in an informal interactive process with him.[508]

The First Circuit held in favor of the employer Clean-Up Group stating that "[t]he [EEOC] regulations' use of 'may' clearly suggests that Congress, while it could have imposed an affirmative obligation upon employers in all cases, chose not to."[509] However, the court also stated, "There may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA."[510] Clearly, the question of whether the interactive process is mandatory in the First Circuit remains unanswered.[511]

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504. *Id.*
505. *Id.*
506. *Id.*
507. *Id.* at 509–510.
508. *Id.*
509. *Id.* at 513.
510. *Id.* at 515.
511. *See* Calero-Cerezo v. United States Dep't of Justice, 355 F.3d 6 (1st Cir. 2004); Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001); Phelps v. Optima Health, Inc., 251 F.3d 21 (1st Cir. 2001); Reed v. Lepage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000); Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29 (1st Cir. 2000); Soto-Ocasio v. Fed. Express Corp., 150 F.3d 14 (1st Cir. 1998); Rodriguez v. Pfizer Pharm., Inc., 286 F. Supp. 2d 144 (D.P.R. 2003); Dudley v. Hannaford Bros. Co., 190 F. Supp. 2d 69 (D. Me. 2002); Sprague v. United Airlines, Inc., No. CIV.A.97-12102-GAO, 2002 WL 1803733 (D. Mass. Aug. 7, 2002); Rennie v. United Parcel Serv., 139 F. Supp. 2d 159 (D. Mass. 2001); Ladenheim v. Am. Airlines, Inc., 115 F. Supp. 2d 225 (D.P.R. 2000); Littlefield v. York County, No. 99-277-P-C, 2000 WL 760959 (D. Me. Apr. 28, 2000); Cruz v. McAllister Bros., 52 F. Supp. 2d 269 (D.P.R. 1999); Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997).

In *Taylor v. Phoenixville School District*,[512] the Third Circuit held that employers have a duty to engage in an interactive process with an employee to determine an appropriate reasonable accommodation.[513] Taylor worked for twenty years as a principal's secretary in the Phoenixville School District.[514] In late August 1993, Taylor began to suffer from the onset of bipolar disorder.[515] During Taylor's leave of absence, Taylor's son stated that he had numerous phone conversations with the school district's administrative assistant for personnel, including one conversation in which he stated that his mother would require accommodations when she returned to work.[516] Upon Taylor's return to work in October 1993, her principal immediately began to document her errors.[517] In September 1994, Taylor was placed on thirty days probation and eventually terminated in October 1994.[518] Taylor then brought suit under the ADA alleging that the school district failed to provide her reasonable accommodations for her mental illness.[519]

The Third Circuit held in favor of Taylor stating that the interactive process required employers to make a good-faith effort to seek accommodations.[520] Further, the court concluded that the "interactive process does not dictate that any particular concession must be made by the employer; nor does the process remove the employee's burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the job's essential functions."[521]

Similarly, in *Taylor v. Principal Financial Group, Inc.*,[522] the Fifth Circuit held that an employee's request for accommodation obligates the employer to participate in the interactive process of determining a reasonable accommodation.[523] Taylor suffered from

512. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999).
513. *Id.* at 319.
514. *Id.* at 302.
515. *Id.*
516. *Id.* at 303.
517. *Id.* at 304.
518. *Id.* at 305.
519. *Id.* at 301.
520. *Id.* at 317.
521. *Id.*
522. Taylor v. Principal Fin. Group, Inc., 93 F.3d 155 (5th Cir. 1996).
523. *Id.* at 165.

bipolar disorder.[524] The employer was unhappy with Taylor's performance, and the parties had met in the past to determine how Taylor could become more productive.[525] During one of the meetings, Taylor informed his supervisor that he was struggling with a mental illness and asked his supervisor to research the disease so that the employer could gain a better understanding of the symptoms.[526] In addition, Taylor asked for a reduction in his performance objectives and less "pressure."[527] Taylor's supervisor asked him if he was "all right," to which Taylor replied "yeah."[528] Taylor then sent an e-mail to his employer detailing his belief that he could meet his performance expectations.[529] When Taylor did not meet his objectives, the employer granted him an extension.[530] Taylor took a leave of absence due to his illness and subsequently filed suit alleging that the employer was liable under the ADA for failing to provide a reasonable accommodation.[531]

The Fifth Circuit held that Taylor failed to notify his employer that his disability caused limitations, so the need for reasonable accommodation and the interactive process did not arise.[532] The Fifth Circuit, however, noted that had a request for accommodation been made, "the responsibility for fashioning a reasonable accommodation [would have been] shared between the employee and employer."[533] The court recognized that an employer has an affirmative obligation to participate in a flexible, interactive process, or the employer may be liable for failing to provide a reasonable accommodation.[534]

Likewise, in *Beck v. University of Wisconsin Board of Regents*,[535] the Seventh Circuit held that both parties have a responsibility to participate in an interactive process.[536] Beck, a

524. *Id.* at 159.
525. *Id.* at 158–59.
526. *Id.* at 159.
527. *Id.*
528. *Id.*
529. *Id.* at 159–60.
530. *Id.* at 160.
531. *Id.* at 160–61.
532. *Id.* at 163–64.
533. *Id.* at 165 (citing 29 C.F.R. § 1630.9 app. (1995)).
534. *Id.*
535. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130 (7th Cir. 1996).
536. *Id.* at 1135–37.

secretarial employee, suffered from osteoarthritis and depression.[537] After a three month medical leave, Beck was assigned to a new position and given a month to learn a word processing program.[538] Thereafter, Beck suffered from osteoarthritis aggravated by repetitive keyboarding.[539] Beck's doctors recommended that she avoid repetitive keyboarding.[540] A few months later, Beck was hospitalized with severe depression and anxiety.[541] When she returned to work, Beck had a note from her doctor indicating that she may require some reasonable accommodation so that she would not have a recurrence.[542]

The University then requested that Beck sign a release allowing them to obtain further medical information from her doctor, which she refused to do.[543] Beck then took a second medical leave, and on her return to work, she had another letter from her doctor indicating that she may require assistance with her workload and an adjustable keyboard.[544] The University told Beck that they needed more information to understand what accommodations she needed.[545] Beck was also temporarily moved to a new room, given a wrist pad, and given a reduced workload.[546] Beck was not satisfied with the new assignment and complained that the new room was not properly ventilated.[547] Beck then took a third medical leave and was granted a six-month unpaid medical leave of absence.[548] During her medical leave of absence, Beck filed a charge with the EEOC and subsequently filed suit in the district court under the ADA.[549] After filing suit, Beck requested that she be reinstated at the University in a different department.[550] The University denied her request and told

537. *Id.* at 1132.
538. *Id.*
539. *Id.*
540. *Id.*
541. *Id.*
542. *Id.* at 1132–33.
543. *Id.* at 1133.
544. *Id.*
545. *Id.*
546. *Id.*
547. *Id.*
548. *Id.*
549. *Id.*
550. *Id.*

her to report to work in the same department.[551] When she did not report to work, she was terminated by the University.[552]

The Seventh Circuit held in favor of the University concluding that the University had properly engaged in the interactive process and Beck had caused the breakdown by failing to provide requested medical information and refusing to sign a medical release.[553] The court noted that before a failure to provide a reasonable accommodation triggers ADA liability, the employee bears the initial burden of informing the employer of the disability.[554] However, the Fifth Circuit further acknowledged that the EEOC regulations envisioned an interactive process in which both parties participate.[555] Accordingly, the court held that once an employer knows of an employee's disability, and the employee has requested reasonable accommodations, the parties are required to engage in an interactive process to determine what accommodations are necessary, and liability for failure to provide reasonable accommodations ensues only when the employer is responsible for a breakdown in the process.[556]

The Eighth Circuit in *Fjellestad v. Pizza Hut of America, Inc.*[557] held that "when the disabled individual requests accommodation, it becomes necessary to initiate the interactive process."[558] There, Fjellestad had been a successful unit manager of the Yankton, South Dakota, Pizza Hut restaurant for more than sixteen years prior to her automobile accident on December 14, 1994.[559] Fjellestad's injuries were serious and required hospitalization and extensive recovery time.[560] On April 28, 1995, Fjellestad's doctors released her to work two hours every other day. However, in early May 1995, Fjellestad suffered another accident and was again prohibited from working.[561]

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551. *Id.*
552. *Id.*
553. *Id.* at 1136–37.
554. *Id.* at 1134.
555. *Id.* at 1135.
556. *Id.* at 1137.
557. Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944 (8th Cir. 1999).
558. *Id.* at 952.
559. *Id.* at 947.
560. *Id.*
561. *Id.*

Fjellestad returned to work in June 1995 when her doctors released her to work four hours every other day for a total of twelve hours per week.[562] However, for the next four months, Fjellestad was cited for poor performance.[563] On October 23, 1995, a Pizza Hut supervisor met with Fjellestad and told her that once she had exhausted her available leave time under the Family Medical Leave Act, she would be welcomed back to the full-time unit manager position.[564] Swanson also advised Fjellestad that if she was unable to work the required fifty hours per week, she would be demoted to shift manager.[565]

In response Fjellestad filed a grievance letter with Pizza Hut requesting reasonable accommodations.[566] Pizza Hut placed her on a sixty-day performance plan that included bi-weekly evaluations.[567] On January 16, 1996, Fjellestad's doctors concluded that she had reached her maximum recovery and limited her to working thirty-five to forty hours per week with no more than three consecutive days of work.[568] On February 8, 1996, twelve days before the end of the sixty-day performance plan, Swanson terminated Fjellestad for allegedly failing to make adequate progress in meeting the targets set forth in the performance plan.[569]

The Eighth Circuit decided in favor of Fjellestad and held that employers who receive notice that a reasonable accommodation is requested have a duty to engage in an interactive process with the requesting employee.[570] However, the court also held that no *per se* liability exists under the ADA if an employer fails to engage in the interactive process.[571]

Lastly, the Ninth Circuit in *Barnett v. U.S. Air, Inc.*[572] emphatically held that employers are required to take part in the

562. *Id.*
563. *Id.* at 948.
564. *Id.* at 948 n.1.
565. *Id.*
566. *Id.* at 948, 952.
567. *Id.* at 948.
568. *Id.* at 948–49.
569. *Id.* at 948.
570. *Id.* at 953 (citing Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 162 (3d Cir. 1999)).
571. *Id.* at 952.
572. Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), *vacated on other grounds by* 535 U.S. 391 (2002).

interactive process.[573] There, Barnett, a ten-year employee of U.S. Air injured his back while handling cargo at work.[574] Barnett's restrictions included prohibitions from excessive bending, twisting, turning, prolonged standing or sitting, and from lifting twenty-five pounds or more.[575] When Barnett could no longer perform the physical requirements of his job because of his back injury, he used his seniority to obtain a position in the mailroom.[576] However, approximately two years later, Barnett learned that two individuals, who were higher in U.S. Air's seniority system, sought to transfer to the mailroom.[577] Fearing that he would lose his mailroom position, Barnett asked for an ADA accommodation, seeking an exception to the company's seniority system that would allow him to remain in the mailroom.[578] U.S. Air declined to supersede its seniority system, but for the next five months placed Barnett on "limited duty," allowing him to work in a temporary swing-shift mailroom position.[579] Subsequently, Barnett was placed on job injury leave, which continued his salary for one month.[580] Barnett then requested two other forms of accommodation that U.S. Air denied.[581]

The Ninth Circuit decided in favor of Barnett in holding that the "interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and that this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation."[582] The court went one step further and announced that "[i]n circumstances in which an employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process."[583]

573. *Id.* at 1114.
574. *Id.* at 1108.
575. *Id.* at 1123 (O'Scannlain, J., dissenting).
576. *Id.* at 1108.
577. *Id.* at 1108–09.
578. *Id.* at 1109.
579. *Id.*
580. *Id.*
581. *Id.*
582. *Id.* at 1114.
583. *Id.*

While the majority of circuits recognize an employer's duty to participate in the interactive process, they fail to impart independent liability when an employer avoids this obligation. Without such liability, it is difficult to perceive how the EEOC's interactive process will protect the rights of the disabled.

There is little state case law about the duty to use an interactive process, but some examples follow. Also, it is interesting to note that some states have statutory schemes that require a different calculation in the reasonable accommodation analysis. In Arizona, the practice of reassigning a disabled person to a vacant position, as a reasonable accommodation, is not required only as a last resort, as it is under the ADA. Therefore, under Arizona law, the process of reasonable accommodation must discuss the possibility of reassignment from the start.[584] In Delaware, an accommodation that costs less than five percent of an employee's annual salary is presumed reasonable.[585]

2. West Virginia

In *Skaggs v. Elk Run Coal Co.*,[586] the court held that both the employer and employee have a duty to work together.[587] The court said:

> Neither the West Virginia statutes nor the federal law assigns responsibility for when the interactive process is not meaningfully undertaken, but we infer that neither party should be able to cause a breakdown in the process . . . . A party that obstructs or delays the interactive process or fails to communicate, by way of initiation or response, is acting in bad faith.[588]

3. Wisconsin

In *Crystal Lake Cheese Factory v. Labor and Industry Review Commission*,[589] the court upheld the Labor and Industry Review

584. *See* Ransom v. Ariz. Bd. of Regents, 983 F. Supp. 895 (D. Ariz. 1997).
585. DEL. CODE ANN. tit. 19, § 722(6)(e) (Supp. 2003).
586. Skaggs v. Elk Run Coal Co., 479 S.E.2d 561 (W. Va. 1996).
587. *Id.* at 577.
588. *Id.* at 577–78.
589. Crystal Lake Cheese Factory v. Labor & Indus. Review Comm'n, 664 N.W.2d 651 (Wis. 2003).

Commission's ("LIRC") interpretation of the Wisconsin Fair Employment Act's ("WFEA")[590] ban on employment discrimination on the basis of disability.[591] The LIRC's interpretation requires an employer to reasonably accommodate an employee that cannot perform all of his or her job duties as opposed to the ADA's requirement to make accommodations only to those who can perform the "essential functions" of a position.[592] Catlin, the disabled employee, asserted that as department head, her primary responsibility was to process orders and inventory sheets, tasks she still could perform after a non-work related car accident that left her a quadriplegic.[593] Crystal Lake argued that "federal courts have routinely held that reasonable accommodation does not require an employer to eliminate job duties, create a new job, or employ others to perform functions that a disabled employee cannot perform" and "[c]onsequently, ask[ed the court] to find that the WFEA's reasonable accommodation provision does not require an employer to create a new position for a disabled employee."[594]

Under the WFEA, once a complainant shows he or she is handicapped and the employer has taken one of the enumerated actions, the burden shifts to the employer to prove hardship of imposing a reasonable accommodation or that even with a reasonable accommodation, the employee cannot adequately undertake the job-related responsibilities.[595] If the employer is unable to do so, the employer violates the WFEA.[596]

Section 111.34 of the Wisconsin Statutes requires employers dealing with handicapped employees to evaluate the individual to determine whether he or she can meet the requirements of the job in question.[597] In *Crystal Lake*, "Catlin point[ed] out that Crystal Lake never inquired of her as to what accommodations she needed."[598] Instead, Crystal Lake hired a job analysis evaluator to examine the job with regard to what accommodations were required for a person

590. WIS. STAT. ANN. §§ 111.31–.395 (West 2002).
591. *Crystal Lake*, 664 N.W.2d at 654–55.
592. *See id.* at 664.
593. *Id.* at 655, 663.
594. *Id.* at 662.
595. *See id.* at 664.
596. *Id.* at 669.
597. *Id.* at 671.
598. *Id.* at 663.

who used a wheelchair.[599] This failure violates the intent of the WFEA.[600]

4. New Jersey

In *Tynan v. Vicinage 13 of the Superior Court*,[601] the court found that the definition of "handicapped" is broader under the New Jersey Law Against Discrimination ("LAD")[602] than the ADA.[603] Under LAD, "handicapped" does not require the alleged handicapping condition result in substantial limitation of a major life activity.[604] Thus, stress disorders may constitute a disability under LAD and not under the ADA.[605] In this case, Tynan, according to her doctor, suffered from post-traumatic stress disorder, migraine headaches, hypertension, and anxiety panic attacks.[606] While on medical leave, her doctor recommended in writing that "Tynan must report to a different administration upon return" because her disabilities were exacerbated by her conflicts with her supervisor, Pardo.[607] The Human Resources Division had documentation from Tynan's physician directing that she have no contact with Pardo, but Tynan was forced to make an extended leave request to Pardo.[608] Pardo denied her request for an extended leave.[609] After Tynan asked if she could appeal Pardo's denial of the extended leave request, specifically stating that her disability had not been accommodated, she was advised that her failure to return to work two days earlier "ha[d] been treated as a resignation."[610]

The trial court granted defendants' motion for summary judgment.[611] The trial judge was concerned with Tynan's failure to

599. *Id.* at 671.
600. *Id.*
601. Tynan v. Vicinage 13 of the Superior Court, 798 A.2d 648 (N.J. Super. Ct. App. Div. 2002).
602. N.J. STAT. ANN. §§ 10:5-1 to -42 (West 2002 & Supp. 2003).
603. *Tynan*, 798 A.2d at 655.
604. *Id.*
605. *See id.*
606. *Id.* at 656.
607. *Id.* at 653 (internal quotation marks omitted).
608. *Id.*
609. *Id.*
610. *Id.* at 653–54.
611. *Id.* at 654.

specifically indicate the accommodation she requested.[612] The Superior Court of New Jersey reversed and remanded, holding that although employees must request accommodation, they need not make specific requests for what they seek.[613] An employee may use plain English to make clear that assistance for his or her disability is desired, but is not required to mention the ADA or any other legal authority for that assistance.[614] "Once a handicapped employee has requested assistance, it is the employer who must make the reasonable effort to determine the appropriate accommodation."[615]

The court held that the vicinage was aware of Tynan's disabilities and desire for assistance.[616] Thus, the burden was on the vicinage to implement the interactive process.[617] By failing to do so, the vicinage forced Tynan's termination by requiring her to return to work without any accommodation.[618]

5. Pennsylvania

In *Stultz v. Reese Bros., Inc.*,[619] the court held that Reese Brothers violated the Pennsylvania Human Relations Act ("PHRA")[620] by failing to participate in the interactive process.[621] Reese Brothers "had an obligation to consult with [Stultz] to ascertain the precise job-related limitations imposed by [his] disability and, following [Reese Brothers'] own preliminary investigation, had an obligation to share both its findings with [Stultz] and consult with him to identify alternative accommodations."[622]

Stultz, who was visually impaired, applied for a job with Reese Brothers.[623] He provided his interviewer with two catalogs of visual aid products after discussing available aids to assist him in

612. *Id.*
613. *Id.* at 656.
614. *Id.* at 657.
615. *Id.*
616. *Id.* at 658.
617. *Id.*
618. *Id.*
619. Stultz v. Reese Bros., Inc., 835 A.2d 754 (Pa. Super. Ct. 2003).
620. 43 PA. CONS. STAT. §§ 951–63 (1991 & Supp. 2003).
621. *Stultz*, 835 A.2d at 762–63.
622. *Id.* at 763.
623. *Id.* at 758.

performing his potential job.[624] These catalogs were forwarded to Marchey, the manager in the Information Technology Department.[625] Marchey contacted EIS International, the developer of the software program Reese Brothers used.[626] EIS advised Marchey that the software-driven visual aid products in the catalogue were not compatible with the EIS software program, and that installation of such software would void license and maintenance agreements with EIS.[627] After receiving this information, Marchey decided no reasonable accommodation could be made for Stultz.[628]

Although the employer's duty to participate in the interactive process was triggered, there was no interaction between Reese Brothers and Stultz, because Reese Brothers refused to participate in the process.[629] In fact, after the interactive process was triggered, Reese Brothers only contacted Stultz once, to deny him employment.[630]

> Although [Reese Brothers] did not have an affirmative duty to prove there was no reasonable accommodation available, it did have a duty to engage in a meaningful dialogue with [Stultz] to determine if a reasonable accommodation could be made for him . . . . [H]owever, in order to prove that the employer failed to participate in the interactive process the individual must still demonstrate he reasonably could have been accommodated and performed the job.[631]

IV. CONCLUSION

One cannot help drawing a parallel between the current Court's cutback of civil rights and the national amnesia about the Civil War and Reconstruction Civil Rights Acts as the Reconstruction Era drew to a close. The history of civil rights laws in America informs us that the dismantling of slavery and desegregation were both based upon national consensus arrived at as the results of intense social and

624. *Id.*
625. *Id.* at 759.
626. *Id.*
627. *Id.*
628. *Id.*
629. *Id.* at 763.
630. *Id.*
631. *Id.*

political struggles. Both were achieved by the exercise of federal authority against the then-unwilling States. On both points, i.e., slavery and segregation, history has unequivocally shown that the unwilling Southern States were in the wrong and the federal intervention was right morally, politically, and practically. This judgment of history serves, more than anything, as the stabilizing basis for a continuing and increasingly solid national consensus over issues that once bitterly divided the nation.

As the pendulum swings again, and civil rights protections again become a national focus, the experiments of the various states may help to develop a solid national commitment to protecting the civil rights of all people, including those with disabilities.

APPENDIX: A SUMMARY OF STATE DISABILITY LAW

ALABAMA

Alabama's disability nondiscrimination law prohibits discrimination against the "physically disabled" in public employment, housing accommodations, and public accommodations. ALA. CODE §§ 21-7-2 to -7-9 (1997 & Supp. 2003). "Physically disabled" is not defined by statute.

> It is the policy of this state that the blind, the visually handicapped and the otherwise physically disabled shall be employed in the state service, the service of the political subdivisions of the state, in the public schools and in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.

Id. § 21-7-8. Alabama does not have a disability nondiscrimination law applicable to private employers.

ALASKA

The Alaska Human Rights Law prohibits discrimination in public and private employment, housing, and credit and financing based on "disability," and incorporates the federal definition of disability. ALASKA STAT. § 18.80.300(9), (12)-(13) (Michie 2003).

Section 18.80.220(a) impliedly imposes a duty on employers to make reasonable accommodations for disabled employees. Moody-Herrera v. State Dept. of Natural Res., 967 P.2d 79, 87 (Alaska 1998). This Alaska statute is modeled on federal law.

ARIZONA

The Arizona Civil Rights Act prohibits discrimination in public and private employment and housing on the basis of "handicap." ARIZ. REV. STAT. ANN. §§ 41-1463(B), -1491.19(A) (West 1999 & Supp. 2003). The definition of handicap incorporates the federal definition of disability. *Id.* § 41-1461.

In 2002, the word handicap in section 41-1463(B)(1) was changed to "disability." *Id.* § 41-1463(B)(1).

Title VII case law is persuasive in interpreting the Arizona Civil Rights Act since the Act is modeled after federal employment discrimination laws. Timmons v. City of Tucson, 830 P.2d 871, 875 (Ariz. Ct. App. 1991).

Cancer is a disability covered by section 41-1463(B)(1) (as noted above, "disability" was termed "handicap" at the time of this decision). Burris v. City of Phoenix, 875 P.2d 1340, 1345 (Ariz. Ct. App. 1993).

ARKANSAS

The Arkansas Civil Rights Act prohibits discrimination in public and private employment, public accommodations, property transactions, finance and credit, and voting and participation in the political process on the basis of "any sensory, mental, or physical disability." ARK. CODE ANN. § 16-123-107(a) (Michie Supp. 2003). "Disability" is defined as "a physical or mental impairment that substantially limits a major life function . . . ." *Id.* § 16-123-102(3).

CALIFORNIA

California's FEHA prohibits discrimination based on "physical disability, mental disability, [or] medical condition" in public and private employment. CAL. GOV'T CODE § 12940(a) (West Supp. 2004). The definitions for "mental disability" and "physical disability" explicitly use the federal definition as a floor for coverage. *Id.* § 12926(i), (k). It further prohibits discrimination based on disability with regard to housing accommodations. The definition of "disability" incorporates the federal definition. *Id.* § 12955.3. *See* CAL. CODE REGS. tit. 9, § 7025 (2004).

California's Unruh Civil Rights Act prohibits discrimination based on "disability" in public accommodations or business establishments, as does the Disabled Persons Act. CAL. CIV. CODE §§ 51, 54 (West

1982 & Supp. 2004). The Disabled Persons Act incorporates the federal definition of disability. *Id.* § 54. A violation of the ADA is deemed a violation of these state laws. *Id.* §§ 51, 54.

California law prohibits discrimination against individuals with disabilities, as defined by federal law, in programs or activities receiving financial assistance from the state. CAL. GOV'T CODE § 11135 (West 1992 & Supp. 2004).

Section 12926 of the California Code was passed to clarify that the California Code is independent of and provides greater protection than the ADA. Additionally, this provision provides a non-exhaustive list of disabilities covered under California law, including diabetes and heart disease. Unlike the ADA, California does not require a "substantial" impairment.

COLORADO

Colorado's Anti-Discrimination Act prohibits discrimination in public and private employment, housing, and public accommodation on the basis of "disability." COLO. REV. STAT. §§ 24-34-402, -502, -601(2) (2001). The definition of "disability" incorporates the federal definition. *Id.* § 24-34-301(2.5).

In employment practices it is not a violation to discriminate against disabled persons if "there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job." Id. § 24-34-402.

In *Phelps v. Field Real Estate Co.*, 793 F. Supp. 1535, 1544 (D. Colo. 1991), *aff'd* 991 F.2d 645, 650 (10th Cir. 1993), the defendant conceded that HIV infection is a disability under Colorado law.

CONNECTICUT

The Connecticut Human Rights and Opportunities Act prohibits "physical disability" discrimination in public and private employment, housing, public accommodations, and other areas.

CONN. GEN. STAT. ANN. §§ 46a-58 to –81r (West Supp. 2003). "Physically disabled" is defined as "chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device." *Id.* § 46a-51(15). There is no requirement for substantial limitation on major life activity. Beason v. United Techs. Corp., 337 F.3d 271, 276 (2d Cir. 2003).

DELAWARE

The Delaware Handicapped Persons Employment Protections Act ("DHPEPA") prohibits discrimination in public and private employment and incorporates the federal definition of disability, but defines "substantially limits" to mean that the "impairment so affects a person as to create a likelihood that such person will experience difficulty in securing, retaining or advancing in employment because of a handicap." DEL. CODE ANN. tit. 19, § 722(4)(c)(4) (1995). The definition of "regarded as having an impairment" includes "a physical or mental impairment that substantially limits major life activities because of the attitudes of others." *Id.* § 722(4)(c)(3). The DHPEPA further provides that the "regarded as" having an impairment provision "is intended to be interpreted in conformity with the federal Rehabilitation Act." *Id.*

Employers are not required to make accommodations for newly employed handicapped persons if "the cost of such changes would exceed 5 percent of the annual salary or annualized hourly wage of the job in question." *Id.* § 722(6)(d)(1).

FLORIDA

The Florida Civil Rights Act provides that "[a]ny person with or perceived as having acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, or human

immunodeficiency virus shall have every protection made available to handicapped persons." FLA. STAT. ANN. § 760.50(2) (West Supp. 2004).

An employee has a duty to mitigate damages byseeking employment elsewhere. Reiner v. Family Ford, Inc., 146 F. Supp. 2d 1279 (M.D. Fla.2001).

The Florida Civil Rights Act prohibits discrimination in public and private employment on the basis of handicap. FLA. STAT. ANN. §§ 760.01-.11.

However, public accommodation, housing accommodation, and public employment nondiscrimination rights are granted to the "physically disabled," which is defined as "any person having a physical impairment that substantially limits one or more major life activities." *Id.* § 413.08(6)(a).

Florida prohibits the use of HIV testing as a condition of employment and prohibits discrimination against any individual on the basis of "knowledge or belief that the individual has taken a[n HIV] test or the results or perceived results of such test." *Id.* § 760.50(3)(b).

GEORGIA

The Georgia Equal Employment for Persons with Disabilities Code prohibits discrimination in public and private employment on the basis of "disability." GA. CODE ANN. § 34-6A-4 (West 2003). "Disability" incorporates the federal definition. *Id.* § 34-6A-2. Nondiscrimination provisions do not apply to an applicant for employment who has "[a]ny communicable disease, either carried by or afflicting the applicant." *Id.* § 34-6A-3(b)(2).

HAWAII

The Hawaii Civil Rights Act prohibits discrimination in access to state services, employment, public accommodations, and housing on the basis of "disability." HAW. REV. STAT. §§ 368-1.5(a), 378-

2(1)(A), 489-3, 515-3 (1993). The definition of disability incorporates the federal definition. *Id.* § 368-1.5(b).

"The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy." *Id.* § 368-1.

Section 368-13(d) of the Act states:

> When the executive director [of the civil rights commission] determines after [an] investigation that there is reasonable cause to believe that an unlawful discriminatory practice within the commission's jurisdiction has been committed, the executive director shall immediately endeavor to eliminate any alleged unlawful discriminatory practice by informal methods such as conference, conciliation, and persuasion.

Id. § 368-13(d).

IDAHO

The Idaho Commission on Human Rights Act prohibits discrimination in public and private employment as well as real estate transactions and financing on the basis of "disability." IDAHO CODE § 67-5909(1)-(4), (7)-(10) (Michie 2001).

The statutory definition of "disability" incorporates the federal definition, although "substantial limitation" is not specified as being imposed on a major life activity. *Id.* § 67-5902(15).

ILLINOIS

The Illinois Human Rights Act prohibits discrimination in public and private employment, housing, credit and financing, and public accommodations on the basis of "handicap," which is defined as a

> determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the person's use of a

> guide, hearing or support dog, the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder.

775 ILL. COMP. STAT. ANN. 5/1-103(I) (West 2001).

For purposes of employment, the characteristic must be "unrelated to the person's ability to perform the duties of a particular job or position;" for purposes of housing, the characteristic must be "unrelated to the person's ability to acquire, rent or maintain a housing accommodation;" for purposes of credit, the characteristic must be "unrelated to a person's ability to repay;" and for purposes of public accommodations, the characteristic must be "unrelated to the person's ability to utilize and benefit from a place of public accommodation." *Id.* 5/1-103(I)(1)-(4).

INDIANA

The Indiana Civil Rights Law prohibits discrimination in public and private employment, housing, public accommodations, and education based on "disability." IND. CODE ANN. § 22-9-1-2(a) (Michie 1997). "Disability" is defined as "the physical or mental condition of a person that constitutes a substantial disability." *Id.* § 22-9-1-3(r).

IOWA

The Iowa Civil Rights Act prohibits discrimination in public and private employment, housing, and public accommodations on the basis of disability, which is defined to include "the condition of a person with a positive human immunodeficiency virus test result, a diagnosis of [AIDS], a diagnosis of [AIDS]-related complex, or any other condition related to [AIDS]." IOWA CODE ANN. § 216.2.5 (West 2000). The inclusion of positive HIV test results within the definition of disability explicitly does "not preclude" the inclusion of other "conditions resulting from other contagious or infectious diseases" from that definition. *Id.*

The Iowa Administrative Code incorporates the federal definition of disability. IOWA ADMIN. CODE r.161-8.26(216) (2003).

KANSAS

The Kansas Act Against Discrimination prohibits discrimination in public and private employment, public accommodations and services, and housing on the basis of "disability." KAN. STAT. ANN. § 44-1002 (2000). "Disability" incorporates the federal definition. *Id.* § 44-1002(j).

KENTUCKY

"'Physical disability' means the physical condition of a person whether congenital or acquired, which constitutes a substantial disability to that person and is demonstrable by medically accepted clinical or laboratory diagnostic techniques." KY. REV. STAT. ANN. § 207.130(2) (Michie 1999).

Employers may make pre-employment inquiries concerning the existence of an applicant's disability and about the extent to which that disability has been overcome by treatment or medication. *Id.* § 207.140(1). Nondiscrimination protections do not apply in the case of applicants for employment or housing who have "any communicable disease." *Id.* § 207.140(2).

LOUISIANA

The Louisiana Civil Rights Act for Handicapped Persons prohibits discrimination in employment, education, housing, and public services on the basis of "handicap." LA. REV. STAT. ANN. §§ 46:2211, :2254 (West 1999). "Handicap" incorporates the federal definition of disability: "[A]ny person who has an impairment which substantially limits one or more life activities or (a) has a record of such an impairment or (b) is regarded as having such an impairment." *Id.* § 46:2253(1).

"'Impairment' means retardation; any physical or physiological disorder or condition, or prior mental disorder or condition, but does not include chronic alcoholism or any other form of active drug

addiction; any cosmetic disfigurement; or an anatomical loss of body systems." *Id.* § 46:2253(2).

"'Major life activities' mean functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 46:2253(3).

MAINE

The Maine Human Rights Act prohibits discrimination in public and private employment, housing, public accommodations, financing, and education on the basis of "physical or mental disability." ME. REV. STAT. ANN. tit. 5, § 4552 (West 2002). "Disability" is defined as "any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness, and includes the physical or mental condition of a person that constitutes a substantial disability as *determined by a physician* or, in the case of [a] mental disability, by a psychiatrist or psychologist, as well as any other health or sensory impairment that requires special education, vocational rehabilitation or related services. *Id.* § 4553 (7-A) (emphasis added).

The statute defines a "person with physical or mental disability" or an "individual with a physical or mental disability" as a person who: "(A) [h]as a physical or mental disability; (B) [h]as a record of a physical or mental disability; or (C) [i]s regarded as having a physical or mental disability. *Id.* § 4553 (7-B).

As noted in *Abbott v. Bragdon*, 107 F.3d 934, 937 n.1 (1st Cir. 1997), the concept of disability under the Maine Human Rights Act is co-extensive with that of the Americans with Disabilities Act.

MARYLAND

The Maryland Human Rights Act prohibits discrimination in public accommodations and retail services, by persons licensed or regulated by the State Department of Labor, Licensing, and Regulation, in

public and private employment, and in housing on the basis of physical or mental handicap. MD. ANN. CODE, art. 49B, §§ 5(b), 8(a), 16(a), 22(a) (1998). Disability is defined as

> any physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impediment or physical reliance on a seeing eye dog, wheelchair, or other remedial appliance or device; and any mental impairment or deficiency as, but not limited to, retardation or such other which may have necessitated remedial or special education and related services.

Id. § 15(g).

The Maryland Commission on Human Relations has interpreted the statutory definition as including "infection with human immunodeficiency virus." MD. REGS. CODE tit. 14, § 14.03.02.02B(6)(a) (1999). In its interpretation of the Act, the Commission incorporated the federal definition of disability, including a provision similar to the ADA's "perceived-as" disabled element. *See id.* § 14.03.02.02B(6)(e).

The statute prohibits discrimination against public school teachers on the basis of "handicap." MD. CODE ANN., EDUC. § 6-104(b) (2001). However, "handicap" is not defined.

MASSACHUSETTS

The Massachusetts Unlawful Discrimination Law prohibits discrimination in public and private employment and real estate transactions on the basis of "handicap." MASS. GEN. LAWS ch. 155B, § 4 (1996 & Supp. 2003). "Handicap" incorporates the federal definition of disability—but does not include current, illegal use of a controlled substance. *Id.* ch. 151B, § 1(17).

MICHIGAN

The Michigan Handicappers' Civil Rights Act prohibits discrimination in public and private employment, public accommodations, public services, housing and real estate, and educational facilities for handicapped individuals. MICH. COMP. LAWS § 37.1102(1) (2001). "Handicap" incorporates the federal definition, but instead of impairment, the statute uses the term "determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder." *Id.* § 37.1103(d)(i).

Disability does not include: "[a] determinable physical or mental characteristic caused by the current illegal use of a controlled substance by that individual," or "[a] determinable physical or mental characteristic caused by the use of an alcoholic liquor by that individual, if that physical or mental characteristic prevents that individual from performing the duties of his or her job." *Id.* § 37.1103(f)(i)-(ii).

In *Robinson v. Henry Ford Health Systems*, 892 F. Supp. 176, 180 (E.D. Mich. 1994), *aff'd without opinion*, 86 F.3d 1156 (6th Cir. 1996), the court noted that persons "who have tested positive for AIDS or the AIDS-related HIV virus are covered as handicapped or disabled individuals under both the Michigan and federal [rehabilitation] acts."

MINNESOTA

The Minnesota Human Rights Act prohibits discrimination in public and private employment, public accommodations, housing, public services, and education on the basis of "disability." MINN. STAT. § 363A.02 (1991 & Supp. 2004). The statutory definition of "disability" incorporates the federal definition, although impairment may be "physical, sensory, or mental" and the limitation on one or more major life activities must be "material[]." *Id.* § 363A.03(12).

The Minnesota Court of Appeals interpreted this provision to apply to asymptomatic HIV infection in *Beaulieu v. Clausen*, 491 N.W.2d

662, 666 (Minn. Ct. App. 1992), on the basis that individuals with HIV are materially limited in several major life activities, including social participation (because of emotional problems as well as ostracism), sexual activities, child-bearing, access to insurance coverage, and limitations on career choices involving extensive training resulting from limited life expectancy, and limitations on ability to work due to need for medical care.

MISSISSIPPI

Mississippi's employment law prohibits discrimination in public employment and by employers receiving state funding on the basis of "handicap." MISS. CODE ANN. § 25-9-149 (2003). However, there is no statutory definition of "handicap."

Mississippi does not have a nondiscrimination law covering private employment or other areas.

MISSOURI

The Missouri HIV and Public Health Act provides that the Missouri Human Rights Act, MO. REV. STAT. §§ 213.010-.137 (1996 & Supp. 2004), "shall apply to individuals with HIV infection. . . ." *Id.* § 191.665.

The Missouri Human Rights Act ("MHRA") prohibits discrimination in housing, commercial real estate loans, employment, and public accommodations, on the basis of "disability." *Id.* §§ 213.040-.065. The statutory definition of "disability" incorporates the federal definition. *Id.* § 213.010(4). The MHRA also includes "associational" discrimination. *Id.* § 213.070(4).

> [T]he term "disability" does not include current, illegal use of or addiction to a controlled substance . . . however, a person may be considered to have a disability if that person: (a) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of, and is not currently addicted to, a controlled substance or has otherwise been rehabilitated successfully and is no longer engaging in such use and is not currently

> addicted; (b) Is participating in a supervised rehabilitation program and is no longer engaging in illegal use of controlled substances; or (c) Is erroneously regarded as currently illegally using, or being addicted to, a controlled substance.

Id. §§ 213.010(4)(a)-(c).

MONTANA

The Montana Human Rights Act prohibits discrimination in public and private employment, public accommodations, housing, and education, on the basis of "disability." MONT. CODE ANN. §§ 49-2-303 to -309 (2003). "Disability" incorporates the federal definition. *Id.* § 49-2-101(19).

NEBRASKA

The Nebraska Individual Rights Act prohibits discrimination in public and private employment, housing, education, and public accommodations on the basis that the individual discriminated against "is suffering or is suspected of suffering from human immunodeficiency virus infection or acquired immunodeficiency syndrome." NEB. REV. STAT. § 20-168 (1997). Each agency of the state government was required to "examine policies and practices within its jurisdiction that [might] intentionally or unintentionally result in discrimination against a person who ha[d] taken a[n] [HIV] antibody or antigen test or who ha[d] been diagnosed as having [AIDS] or [ARC] to ascertain the extent and types of discrimination that [might] exist," and to report its findings to the state legislature by December 1, 1988. *Id.* § 20-167.

The Nebraska Fair Employment Practice Act prohibits discrimination in public and private employment on the basis of "disability." NEB. REV. STAT. § 48-1101 (1998). Nebraska's definition of "disability" incorporates the federal definition. *Id.* § 48-1102(9). "Disability shall not include homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender-identity disorders not resulting in physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania,

pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs." *Id.*

NEVADA

The Nevada Equal Opportunity for Employment Law prohibits discrimination in public and private employment on the basis of "disability." NEV. REV. STAT. 613.330(1) (2003). Nevada's definition of "disability" incorporates the federal definition. *Id.* 613.310(1).

The Nevada Fair Housing Law prohibits discrimination in housing on the basis of "disability." *Id.* 118.020(1). The term "disability" in this provision incorporates the federal definition. *Id.* 118.045.

NEW HAMPSHIRE

The New Hampshire Law Against Discrimination prohibits discrimination in public and private employment, housing, and public accommodations on the basis of "physical or mental disability." N.H. REV. STAT. ANN. § 354-A:1 (1995). The New Hampshire definition of "disability" incorporates the federal definition. N.H. REV. STAT. ANN. § 354-A:2.IV (1995 & Supp. 2003).

NEW JERSEY

The New Jersey Law Against Discrimination prohibits discrimination in public and private employment, public accommodations and facilities (including public and private schools), public and private housing, and real estate transactions on the basis of "handicap," which includes "AIDS or HIV infection." N.J. STAT. ANN. §§ 10:5-4.1,:5-5(q) (West 2002 & Supp. 2004).

> "Handicapped" means suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment,

> deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Handicapped shall also mean suffering from AIDS or HIV infection.

Id. § 10:5-5(q). "HIV infection" is defined as "infection with the human immunodeficiency virus or any other related virus identified as a probable causative agent of AIDS." *Id.* § 10:5-5(gg).

In *Poff v. Caro*, 549 A.2d 900, 903 (N.J. Super. Ct. Law Div. 1987), the court ruled that New Jersey law prohibits housing discrimination based on the perception that an individual has AIDS or the "potential" to develop AIDS, noting that there is no rational basis for distinguishing between those with a disability and those so perceived.

NEW MEXICO

New Mexico's Human Immunodeficiency Virus Related Test Limitation Law prohibits employers from requiring disclosure of HIV-related test results for purposes of hiring, promotion, or continued employment. N.M. STAT. ANN. § 28-10A-1 (Michie 2000).

New Mexico's Human Rights Act prohibits discrimination in public and private employment, housing, and public accommodations on the basis of "physical or mental handicap" or "serious medical condition." N.M. STAT. ANN. § 28-1-7 (Michie 2000 & Supp. 2003). "Handicap" incorporates the federal definition of disability. *Id.* § 28-1-2(M) (repealed effective July 1, 2006).

NEW YORK

The New York Human Rights Law prohibits discrimination in public and private employment, public accommodations, housing, and financing based on "disability." N.Y. EXEC. LAW §§ 296, 296-a (McKinney 2003 & Supp. 2004). "Disability" is defined as

> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment.

Id. § 292(21).

The New York Division on Human Rights has interpreted this provision to include HIV infection. *N.Y. Division on Human Rights: Policy Statement on AIDS-Based Discrimination*, , [8B Fair Emp. Pracs. Manual] Lab. Rel. Rep. (BNA) 455:3081 (Aug. 1992). *See Petri v. Bank of New York Co.*, 582 N.Y.S.2d 608, 611 (Sup. Ct. 1992) (explaining that asymptomatic HIV infection, whether actual or perceived, is a disability under New York law).

NORTH CAROLINA

The North Carolina Persons With Disabilities Act ("NCPDA") prohibits discrimination in employment, public accommodations, public services, and public transportation on the basis of handicap. N.C. GEN. STAT. § 168A-5 to –8 (2003). The NCPDA incorporates the federal definition of disability. A "[p]hysical or mental impairment" is defined as:

> (i) any physiological disorder or abnormal condition, cosmetic disfigurement, or anatomical loss, caused by bodily injury, birth defect or illness, affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental disorder, such as mental

> retardation, organic brain syndrome, mental illness, specific learning disabilities, and other developmental disabilities, but (iii) excludes (A) sexual preferences; (B) active alcoholism or drug addiction or abuse; and (C) any disorder, condition or disfigurement which is temporary in nature leaving no residual impairment.

Id. § 168A-3(7a)(a).

However, the NCPDA allows HIV testing of job applicants, denial of employment to job applicants based on HIV status, and HIV testing as an annual medical examination routinely required of all employees by the employer. *Id.* § 168A-5(b). Reassignment or termination of employment is allowed if the employee poses a significant risk to the employee or others, or if the employee is unable to perform the normally assigned duties of the job. *Id.* While the NCPDA includes "working" among the activities identified as major life activities, it allows an employer to inquire whether "a person has the ability to perform duties of the job in question." *Id.* §§ 168A-3(7a)(b), -5(b)(5).

In *Burgess v. Your House of Raleigh, Inc.*, 388 S.E.2d 134 (N.C. 1990), the Supreme Court of North Carolina interpreted the North Carolina statute (then titled the North Carolina Handicapped Persons Protection Act) as not applying to HIV infection because (1) the statute exempted "communicable diseases" from the definition of handicap and (2) though HIV might limit a person's ability to work, HIV did not limit a "major life activity" as defined by the act. *Id.* at 137-39. At the time of the *Burgess* decision, the North Carolina statute did not include "working" as a "major life activity." Thus, because "working" is now included in the definition of a "major life activity," the statute may now apply to HIV. N.C. GEN. STAT. § 168A-3(7a)(b).

NORTH DAKOTA

The North Dakota Human Rights Act prohibits discrimination in public and private employment, housing, property rights, public accommodations, public services, and credit transactions on the basis of "disability." N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-17,

(1997). "Disability" incorporates the federal definition: "a physical or mental impairment that substantially limits one or more major life activities, a record of this impairment, or being regarded as having this impairment." *Id.* § 14-02.4-02.

OHIO

The Ohio Civil Rights Commission Act prohibits discrimination in public and private employment, public accommodations, housing, and granting of credit on the basis of "disability." OHIO REV. CODE ANN. § 4112.02 (Anderson 2001 & Supp. 2002). The statute incorporates the federal definition of disability, setting forth as major life activities the "functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 4112.01(13).

Additionally, the statute sets forth specific inclusions and exclusions from coverage as follows:

> (a) "[P]hysical or mental impairment" includes any of the following:
>
> > (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary, hemic and lymphatic; skin; and endocrine;
> >
> > (ii) Any mental or psychological disorder, including, but not limited to, mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;
> >
> > (iii) Diseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus infection, mental retardation, emotional illness, drug addiction, and alcoholism.

> (b) "Physical or mental impairment" does not include any of the following:
>
> (i) Homosexuality and bisexuality;
>
> (ii) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
>
> (iii) Compulsive gambling, kleptomania, or pyromania;
>
> (iv) Psychoactive substance use disorders resulting from current illegal use of a controlled substance.

Id. § 4112.01(16)(a)–(b).

Ohio Civil Rights Commission regulations include "perceived as" handicapped within the definition:

> "Disabled person" includes any person who presently has a disability as defined by division (A)(13) of section 4112.01 of the Revised Code or any person who has had a disability as defined by division (A)(13) of section 4112.01 of the Revised Code, who no longer has any functional limitation, but who is treated by a respondent as having such a disability, or any person who is regarded as disabled by a respondent.

OHIO ADMIN. CODE § 4112-5-02(H) (1997). *See* Cleveland v. Ohio Civil Rights Comm'n, 648 N.E.2d 516, 518 (Ohio Ct. App. 1994).

OKLAHOMA

The Oklahoma Anti-Discrimination Act prohibits discrimination in public and private employment, public accommodations, and housing on the basis of "handicap." OKLA. STAT. tit. 25, §§ 1302-1311, 1402, 1452-1453 (2002). "Handicap" incorporates the federal definition of disability: "a person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such an impairment or is regarded as having such an impairment." *Id.* § 1301(4).

OREGON

The Oregon Civil Rights of Disabled Persons Act prohibits discrimination in public and private employment, public accommodations, and housing on the basis of "disability." OR. REV. STAT. §§ 659A.112, .142, .145 (2001). "Disability" generally incorporates the federal definition, but defines "major life activity" as including, but not limited to, "self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property." *Id.* § 659A.100(1)-(2)(a).

"Substantially limits" is defined as:

> (A) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or
>
> (B) The impairment significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

Id. § 659A.100(2)(d).

PENNSYLVANIA

The Pennsylvania Human Relations Act covers handicap discrimination, including discrimination on basis of perceived handicap, in employment, housing, and public accommodations on the basis of "handicap or disability." PA. CONS. STAT. tit. 43, §§ 954-55 (West 2003). "Handicap or disability" incorporates the federal definition of disability. *Id.* § 954(p.1).

RHODE ISLAND

The Rhode Island Civil Rights of People with Disabilities Act prohibits discrimination in employment, housing, and public accommodations on the basis of "disability." R.I. GEN. LAWS § 42-87-2 (1998 & Supp. 2003).

The Act incorporates the federal definition of disability and cross-references the federal Rehabilitation Act and Americans with Disabilities Act for its definition of prohibited, discriminatory acts or conduct. *Id.* § 42-87-1(1)-(2).

The Rhode Island Equal Opportunity and Affirmative Action Act prohibits discrimination in public and private employment on the basis of "disability." "Disability" incorporates the federal definition and "includes any disability which is provided protection under the [ADA] and federal regulations pertaining to the [ADA]." *Id.* § 28-5-6(4) (2003) (citations omitted).

SOUTH CAROLINA

The South Carolina Human Affairs Law prohibits discrimination in public and private employment on the basis of "disability." S.C. CODE ANN. § 1-13-80 (Law. Co-op. Supp. 2003). "Disability" incorporates the federal definition and provides that the term "must be interpreted in a manner consistent with federal regulations promulgated pursuant to the [ADA]." *Id.* § 1-13-30(n).

The South Carolina Bill of Rights for Handicapped Persons prohibits discrimination in public accommodations, public services, and housing on the basis of "handicap." S.C. CODE ANN. § 43-33-530 (Law. Co-op. 1986 & Supp. 2003). "Handicap" is defined as "a substantial physical or mental impairment . . . acquired by . . . disease, where the impairment is verified by medical findings and appears reasonably certain to continue throughout the lifetime of the individual without substantial improvement." *Id.* § 43-33-560. The definition excludes individuals who are "only regarded as being handicapped." *Id.* The definition of "handicapped person" for purposes of South Carolina law incorporates the federal definition and "any other definition prescribed by federal law or regulation for use by agencies of state government which serve handicapped persons." S.C. CODE ANN. § 2-7-35 (1986).

SOUTH DAKOTA

The South Dakota Human Rights Act Law prohibits discrimination in public and private employment, housing, education, and public accommodations on the basis of "disability." S.D. CODIFIED LAWS §§ 20-13-10 to –11, -20, -22 to -23 (Michie 2003). "Disability" incorporates the federal definition. *Id.* § 20-13-1(4).

TENNESSEE

The Tennessee Human Rights Act prohibits discrimination in public and private employment, public accommodations, and housing on the basis of "handicap." TENN. CODE ANN. §§ 4-21-401 to -404, -501, -601 (1998). "Handicap" incorporates the federal definition of disability. *Id.* § 4-21-102(9)(A).

TEXAS

The Texas Commission on Human Rights Act prohibits discrimination in public and private employment based on "disability" and incorporates the federal definition of disability. TEX. LAB. CODE ANN. § 21.002(6) (Vernon 2002 & Supp. 2004).

The Texas Rights and Responsibilities of Persons with Disabilities Act prohibits discrimination in housing accommodations and public facilities based on "disability." TEX. HUM. RES. CODE ANN. § 121.001-121.011 (Vernon 2002 & Supp. 2004). "Disability" is defined as a "mental or physical disability, including mental retardation, hearing impairment, deafness, speech impairment, visual impairment, or any health impairment that requires special ambulatory devices or services." *Id.* § 121.002(4).

UTAH

The Utah Anti-Discrimination Act prohibits discrimination in public and private employment on the basis of "disability," which incorporates the federal definition of disability. UTAH CODE ANN. § 34A-5-102 (2003).

VERMONT

The Vermont Fair Employment Practice Act prohibits discrimination in public and private employment on the basis of "a person's having a positive test result from an HIV-related blood test." VT. STAT. ANN. tit. 21, § 495(a)(6) (1987 & Supp. 2003).

The Vermont Discrimination Law prohibits discrimination in public accommodations and housing on the basis of "disability." "Disability" incorporates the federal definition. *Id.* tit 9, § 4501.

VIRGINIA

The Virginians with Disabilities Act prohibits discrimination in public and private employment, education, public accommodations, and housing on the basis of "disability." VA. CODE ANN. §§ 51.5-41 to –42, -44 to -45 (Michie 2003). "Disability" incorporates the federal definition. *Id.* § 51.5-3.

WASHINGTON

The Washington Law Against Discrimination prohibits discrimination in public and private employment, public accommodations, housing and real estate transactions, and financing and credit transactions on the basis of "sensory, mental, or physical disability." WASH. REV. CODE ANN. § 49.60.010 (West 2002). No definition of disability is provided.

WEST VIRGINIA

The West Virginia Human Rights Act ("WVHRA") prohibits discrimination in employment, public accommodations, and housing on the basis of "disability." W. VA. CODE ANN. § 5-11-4 (Michie 2002 & Supp. 2003).

"Disability" incorporates the federal definition of disability. *Id.* § 5-11-3(m).

In *Benjamin R. v. Orkin Exterminating Co.*, 390 S.E.2d 814, 818 (W. Va. 1990), the West Virginia Supreme Court of Appeals ruled that HIV infection is a handicap under the WVHRA on the basis that HIV infection substantially impairs or limits the major life activity of "socialization" because of the psychological impact resulting from knowledge of one's HIV status; the WVHRA was subsequently amended to conform more precisely to federal law.

WISCONSIN

The Wisconsin Fair Employment Act prohibits discrimination in public and private employment on the basis of "disability." WIS. STAT. ANN. § 111.321 (West 2003). "Disability" incorporates the federal definition of disability. *Id.* § 111.32.

WYOMING

The Wyoming Fair Employment Practices Act prohibits discrimination in public and private employment on the basis of "handicap." WYO. STAT. ANN. § 27-9-105 (Michie 2003). The statute provides no definition for handicap. *Id.* § 27-9-102. The Wyoming Department of Employment Disability Discrimination Rules, ch. 5 § 2(a), incorporates the federal definition of disability.