PROVING DIABETES IS A DISABILITY

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Introduction

Several federal laws protect persons with a disability from employment discrimination, including the Americans with Disabilities Act, the Rehabilitation Act of 1973, and the Congressional Accountability Act of 1995. All of these laws define an individual with a disability as follows: (1) a person with a physical or mental impairment that substantially limits one or more major life activities (referred to below as an "actual disability"); (2) a person with a record of such an impairment; or (3) a person who is regarded as having such an impairment.[1] Each of these prongs will be discussed below.

The courts have produced an "onslaught of miserly decisions" regarding the definition of disability, including the Supreme Court's *Sutton* trilogy issued in 1999.[2] These three cases—*Sutton*,[3] *Murphy*,[4] and *Kirkingburg*[5]—require that disability be assessed in light of the mitigating measures a

[1] 42 U.S.C. § 12102(2) [ADA]; 29 U.S.C. §§ 705(9)(B) and 705(20)(B) [Rehabilitation Act]. The definition of an actual disability thus has three elements: (a) impairment; (b) major life activity; and (c) substantial limitation. None of these elements is defined by the ADA, but the first source of guidance is the federal regulations promulgated under § 504, which are entitled to deference. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 193–194 (2002). While each agency has issued its own set of regulations under § 504, the "coordinating regulations" are found at 45 C.F.R. § 84.3.

A second source of guidance is the federal regulations designed to enforce the ADA. These include the EEOC's Title I regulations (29 C.F.R. Part 1630), and the rules promulgated by the Department of Justice to enforce Title II (28 C.F.R. Part 35) and Title III (28 C.F.R. Part 36). The Supreme Court has not decided exactly what deference to give to these ADA regulations. *Compare Toyota, supra*, 534 U.S. at 194 (refusing to decide regarding the Title I regulations); *Olmstead v. L.C.*, 527 U.S. 581, 598 (1999) (agency views regarding Title II "warrant respect"); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) ("the well-reasoned views of the agencies implementing a statute [Title III] 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"). The ADA regulations are frequently followed by the lower courts, however.

[2] For a critique of the case law, see the National Council on Disability's ADA Policy Brief No. 6: *Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity* (2/13/03), http://www.ncd.gov/newsroom/publications/2003/extentoflimitations.htm. Many of these opinions are reflected in the striking statistics regarding the outcome of ADA cases on appeal, analyzed in *2004 Employment Decisions Under the ADA Title I—Survey Update*, 29 Mental and Physical Disability L. Rep. 513 (ABA July–August 2005).

[3] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

[4] *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999).

[5] *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

person uses. Although the class of persons protected by the ADA has been narrowed by the Court's interpretation in *Sutton*[6] and other cases, it is still possible to prove a disability. It is important to understand that diagnoses or labels will rarely determine whether someone has a disability.[7] Consider instead analyzing a case using the steps set out below.[8]

Note that the courts are not uniform in their view of whether disability is a question of law for the court to resolve, or a fact question to be determined by the jury.[9]

A. Actual Disabilities

1. Identify all of the client's impairments.

The term "impairment" is defined in the regulations,[10] and it is a very broad term.[11] Only

[6] For a criticism and analysis of the mitigating measures case law, see the National Council on Disability's ADA Policy Brief No. 11, *The Role of Mitigating Measures in the Narrowing of the ADA's Coverage* (March 17, 2003), http://www.ncd.gov/newsroom/publications/2003/mitigatingmeasures.htm.

[7] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002).

Although this means that additional evidence is required, it also means that courts should not rely on (often adverse) determinations in earlier cases regarding the same diagnosis. *See, e.g., Quint v. A.E. Staley Manufacturing Co.*, 172 F.3d 1, 13 (1st Cir. 1999) (court found unpersuasive other decisions rejecting disability claims by persons with the same diagnosis, because of the individualized analysis required); *McInnis v. Alamo Community College Dist.*, 207 F.3d 276 (5th Cir. 2000) (similar); *Durrant v. Chemical/Chase Bank/Manhattan Bank, N.A.*, 81 F. Supp. 2d 518, 520 (S.D.N.Y. 2000) (similar); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1040 (D. Ariz. 1999) (similar).

[8] This step-by-step analysis is consistent with the analysis of both the courts, *see, e.g., Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1167 (1st Cir. 2002); *Rollf v. Interim Personnel, Inc.*, 1999 WL 1095768, at *2 (E.D. Mo. Nov. 4, 1999), and the EEOC. *See Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One–First Definition (EEOC Dec. 13, 1999), online at http://www.eeoc.gov/policy/docs/field-ada.html.

[9] *See, e.g., Bristol v. Board of County Com'rs of County of Clear Creek*, 281 F.3d 1148, 1156, 1160 (10th Cir. 2002) ("impairment" and "major life activity" are questions of law for the court to decide; "substantially limits" is a question of fact for the jury), *rev'd in part on other grounds*, 312 F.3d 1213 (10th Cir. 2002) (en banc); *Gonzalez v. Rite Aid of New York, Inc.*, 199 F. Supp. 2d 122, 135 (S.D.N.Y. 2002) ("question of whether 'extreme physical exercise,' 'strenuous lifting,' and 'strenuous activity' are activities that are of 'central importance to most people's daily lives' is best decided by a jury at trial."); *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 776 (E.D. Tex. 1996) ("courts are to treat the question of whether a given condition is a disability as a mixed question of law and fact"); *Rose v. Home Depot*, 186 F. Supp. 2d 595, 608–609 (D. Md. 2002) (collecting some of the inconsistent authority, and stating that disability is a question of law).

[10] 29 C.F.R. § 1630.2(h) (Title I); 28 C.F.R. § 35.104 (Title II); 28 C.F.R. § 36.104 (Title III). These definitions closely track the earlier definition from the regulations implementing § 504 of the Rehabilitation Act of 1973. See 45 C.F.R. § 84.3(j)(2)(i). The latter regulations are persuasive in interpreting the ADA. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 193–194 (2002). Note also that the definition in the regulation is not intended to be comprehensive, but is just a representative list. *Williamson v. International Paper Co.*, 85 F. Supp. 2d 1184, 1189 n.7 (S.D. Ala. 2000).

[11] Courts have frequently described the regulatory definition of "impairment" as a broad one. *See, e.g., Cella v. Villanova University*, 2003 WL 329147, at *9 (E.D. Pa. Feb. 12, 2003); *Pimentel v. City of New York*, 2001 WL

homosexuality and bisexuality are specifically excluded from the definition of impairment,[12] although the EEOC states that the term also excludes certain common physical characteristics (such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder); environmental, cultural, or economic disadvantages (such as poverty, lack of education or a prison record); pregnancy; a characteristic predisposition to illness or disease; or common personality traits (such as poor judgment or a quick temper) that are not symptoms of a mental or psychological disorder.[13] Advanced age, in and of itself, is also not an impairment, but various medical conditions commonly associated with age would constitute impairments.[14]

Because of the breadth of the term "impairment," advocates should consider every diagnosis or condition that the client has. On the other hand, one of the most common errors in attempting to prove a disability is to mistake diagnosis for disability. At most, a diagnosis merely shows an impairment.[15] But a diagnosis, even a "serious" one, does not reflect whether that impairment substantially limits a major life activity.[16]

Note, too, that while the plaintiff can testify regarding his or her condition, some courts may prevent plaintiffs from testifying about their own *diagnosis*, finding such testimony to be hearsay.[17]

DIABETES CASES: Impairment is rarely contested in a diabetes case, *e.g.*, *Branham v. Snow*, 392 F.3d 896, 902 (7th Cir. 2004) ("The parties agree that diabetes is a physical impairment"), and every court to consider the issue has either assumed, or held, that diabetes is an impairment. *See, e.g.*, *Fraser v. Goodale*, 342 F.3d 1032, 1038 (9th Cir. 2003) ("We have little difficulty in concluding that diabetes is a 'physical impairment' under the ADA.");

1579553, at *11 (S.D.N.Y. Dec. 11, 2001); *London v. Kateri Residence*, 1998 WL 644745, at *6 (S.D.N.Y. Sep. 21, 1998); *Settle v. S.W. Rodgers, Co., Inc.*, 998 F. Supp. 657, 662 n.6 (E.D. Va. 1998); *Cole v. Staff Temps*, 554 N.W.2d 699, 704 (Iowa 1996); *Alexandru v. Northeast Utilities Service Co.*, 1996 WL 684421, at *3 n.1 (D. Conn. Oct. 10, 1996). Even correctable nearsightedness is an impairment. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490 (1999). *But cf.* the National Council on Disability's ADA Policy Brief No. 6: *Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity* (February 13, 2003), at n. 33, http://www.ncd.gov/newsroom/publications/2003/extentoflimitations.htm (collecting some negative authority on this issue, most often relating to obesity).

[12] 42 U.S.C. § 12211(a).

[13] 29 C.F.R. Part 1630 App. § 1630.2(h); *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, Chapter II, § 2.2(a)(i) (EEOC Jan. 1992), http://www.jan.wvu.edu/links/ADAtam1.html.

[14] 29 C.F.R. Part 1630 App. § 1630.2(h), citing ADA's legislative history.

[15] Note that although a diagnosis is usually sufficient to show an impairment, a specific diagnosis is not necessarily required *Scarborough v. Natsios*, 190 F. Supp. 2d 5, 20 (D.D.C. 2002) ("It is the impairment itself—and not the medical diagnosis of the condition—that determines whether a particular ailment is an impairment under the Act.").

[16] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002) ("It is insufficient . . . to merely submit evidence of a medical diagnosis of an impairment.").

[17] *Compare Holt v. Olmsted Township Bd. of Trustees*, 43 F. Supp. 2d 812, 819–820 (N.D. Ohio 1998).

Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001) (same); *Kells v. Sinclair Buick--GMC Truck, Inc.*, 210 F.3d 827, 830–831 (8th Cir. 2000) (noting that "insulin-dependent diabetes" is a "recognized ADA impairment[]" and collecting cases); *Chasse v. Computer Sciences Corp*., 453 F. Supp. 2d 503, 515 (D. Conn. 2006); *Raffaele v. City of New York*, 2004 WL 1969869, at *13 (E.D.N.Y. Sep. 7, 2004) (type 2 diabetes).

2. Determine if the impairments were known to the employer.

In the employment context, courts have repeatedly held that the defendant must be aware of the plaintiff's disability in order for the ADA protections to apply.[18] Knowledge of the complete medical diagnosis should not be required, however. It should be sufficient if the employee informs the employer of the employee's limitations.[19] It should also be sufficient if someone else informs the employer on the employee's behalf.[20] Furthermore, informing the employee's supervisor is sufficient notice to the employer.[21]

3. List every major life activity that could possibly be affected by the impairment.

Although the statute does not define "major life activity,"[22] the word "major" denotes

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[18] *See, e.g., Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 163 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996); *Brohm v. JH Properties, Inc.*, 149 F.3d 517, 522 (6th Cir. 1998) (plaintiff who did not tell his employer that he had a disability, but only that he "might have one," is not protected); *Hamm v. Runyon*, 51 F.3d 721 (7th Cir. 1995) (holding that tardiness is not such an obvious manifestation of disability as to compel the conclusion that the employer knew of the disability); *Martinez v. Cole Sewell Corp.*, 233 F. Supp. 2d 1097, 1128–1129 (N.D. Iowa 2002) (knowledge is required for claims based on both actual and perceived disabilities).

[19] *See, e.g., Mark v. Burke Rehabilitation Hospital*, 1997 WL 189124, at *6 (S.D.N.Y. April 17, 1997) (knowledge of limitations employee experienced after chemotherapy sufficient); *Abbasi v. Herzfeld & Rubin, P.C.*, 1995 WL 303603, at *3 (S.D.N.Y. May 17, 1995) (finding enough disclosure because, although the employee did not specify the disability, he requested specific accommodations including no heavy lifting or stair climbing, and the firm's discharge statement indicated knowledge of some kind of disability). *Compare Scarborough v. Natsios*, 190 F. Supp. 2d 5, 20 (D.D.C. 2002) (court assumed that plaintiff had an impairment because although he never presented a specific diagnosis to his employer until after his termination, the medical documentation that he *did* submit before leaving, although sporadic and contradictory, indicated that he intermittently suffered from various maladies, including pain and diarrhea).

[20] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997), http://www.eeoc.gov/policy/docs/psych.html; *Taylor v. Phoenixville School District*, 184 F.3d 296, 313 (3d Cir. 1999); *Patterson v. Downtown Medical & Diagnostic Center*, 866 F. Supp. 1379, 1381 (M.D. Fla. 1994).

[21] *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 875 (9th Cir. 1989), *cert. denied*, 498 U.S. 814 (1990). *See also Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 777 n.34 (E.D. Tex. 1996) (constructive knowledge of impairment usually sufficient in cases alleging a record or perception of impairment).

[22] While the ADA does not define "major life activity," *Dupre v. Charter Behavioral Health Systems of Lafayette, Inc.*, 242 F.3d 610, 614 (5th Cir. 2001), the term is defined in the ADA enforcing regulations, 29 C.F.R. § 1630.2(i) (Title I); 28 C.F.R. § 35.104 (Title II); 28 C.F.R. § 36.104 (Title III), which closely track the earlier regulations under the old Rehabilitation Act, e.g., 45 C.F.R. § 84.3(j)(1) and (2). The latter regulations are persuasive in interpreting the ADA. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 193–194 (2002). Although the Supreme Court continues to resist expressing its opinion on the amount of deference (if any) to be given to the ADA regulations, *id.*, the lower courts generally follows them. *See, e.g., Aldrup v. Caldera*, 274 F.3d 282, 286 (5th Cir. 2001), noting that the EEOC guidelines, while not controlling, "do constitute a body of experience and informed judgment to

comparative importance, and suggests that the touchstone for determining whether something is a major life activity is its significance.[23] The Supreme Court has also stated that the term major life activity "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled," in order to comport with the legislative findings that some 43 million Americans have one or more physical or mental disabilities.[24] The Court's analysis of the term does not always seem consistent, however.

In *Bragdon v. Abbott*, the Court stated that major life activities are not limited to those aspects of a person's life that have a public, economic, or daily character,[25] or to those things which everyone experiences.[26] The Court noted that "the disability definition does not turn on personal choice."[27] In the recent case of *Toyota Motor Manufacturing v. Williams*, the Supreme Court held that performing manual tasks can be a major life activity, but only if the manual tasks in question are "central to daily life."[28] There seems to be a tension between *Toyota Motor* and *Bragdon*.

Many courts have interpreted *Toyota Motor* as requiring that only those activities that are

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which courts and litigants may properly resort for guidance." *Id.* at n.18.

[23] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002) ("'Major' in the phrase 'major life activities' means important."); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654 (5th Cir. 1999), *quoting Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1233 (9th Cir. 1999), *amended on other grounds*, 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000).

The Fifth Circuit, for example, has looked at such factors as whether the activity is necessary for self-sustenance or to support a family, provides the opportunity for self-expression and for contribution to productive society, involves some degree of social interaction, is an important element of how individuals define themselves and are perceived by others, or provides an opportunity for many of the significant experiences of life. *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654–655 (5th Cir. 1999). *See also McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) (sexuality is a major life activity because of its importance in how we define ourselves and how we are perceived by others, and is a fundamental part of how we bond in intimate relationships), *amended on other grounds*, 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000).

[24] The Court found that "[i]f Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher." *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002). For a critique of this view, see the NCD's ADA Policy Brief No. 4, *Broad or Narrow Construction of the ADA* (12/16/02), http://www.ncd.gov/newsroom/publications/2002/broadnarrowconstruction.htm. It is perhaps more accurate to state that these terms are to be interpreted *strictly enough to be consistent with the Congressional findings*, as viewed by the Supreme Court.

[25] *Bragdon v. Abbott*, 524 U.S. 624, 638–639 (1998).

[26] That is made clear in *Bragdon v. Abbott*, in which the Supreme Court found reproduction and childbearing major life activities, though many people do not experience them, by choice or otherwise.

[27] *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998). While mitigating measures may limit the extent to which an impairment is disabling, a personal choice to limit activities in order to minimize the impairment's effects should not cause a plaintiff to lose the law's protection.

[28] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002). For a critique of the analysis in *Toyota Motor*, see the National Council on Disability's ADA Policy Brief No. 13, *The Supreme Court's ADA Decisions Regarding Substantial Limitation of Major Life Activities* (April 29, 2003), online at http://www.ncd.gov/newsroom/publications/2003/limitation.htm.

"central to daily life" are *major* life activities.[29] In any event, the requirement (if it is one) that an activity be "central to daily life" obviously does not require that it be performed on a daily basis, nor does it need to be an activity that is *necessary* to daily life. The tooth brushing and hygiene mentioned in *Toyota* hardly rise to that level, as many people do not do those things.

The EEOC defines major life activities as "those basic activities that the average person in the general population can perform with little or no difficulty."[30] The enforcing regulations state that major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working,"[31] but the list is meant to be illustrative, not exhaustive.[32] The case law reflects a variety of other major life activities,[33] including the following: caring for oneself,[34] bathing,[35] dressing,[36] toileting,[37] controlling bowels,[38] waste

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[29] *See, e.g., Fenney v. Dakota, Minnesota & Eastern Railroad Co.*, 327 F.3d 707, 715 (8th Cir. 2003); *Mack v. Great Dane Trailers*, 308 F.3d 776, 781 (7th Cir. 2002); *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1167 (1st Cir. 2002); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 337 (6th Cir. 2002); *Weixel v. Board of Educ. of City of New York*, 287 F.3d 138, 147 (2d Cir. 2002).

But cf. EEOC v. United Parcel Service, Inc., 306 F.3d 794, 802 (9th Cir. 2002) (apparently agreeing with the EEOC that *Toyota Motor*'s discussion pertains only to the major life activity of performing manual tasks, and the substantiality of other impairments need not be assessed solely by how severely they restrict a person from doing activities of central importance to daily life).

[30] 29 C.F.R. pt. 1630 App. § 1630.2(i).

[31] 29 C.F.R. § 1630.2(i) (Title I); 28 C.F.R. § 35.104 (Title II); 28 C.F.R. § 36.104 (Title III); 28 C.F.R. § 41.31(b)(2) (Rehabilitation Act). These regulations all state that major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

[32] *Bragdon v. Abbott*, 524 U.S. 624, 638–639 (1998) (interpreting ADA consistently with the Rehabilitation Act); *Oesterling v. Walters*, 760 F.2d 859, 861 (8th Cir. 1985); 29 C.F.R. pt. 1630 App. § 1630.2(i).

[33] *See, e.g.,* National Council on Disability's ADA Policy Brief No. 13, *supra*, at nn.10–73, http://www.ncd.gov/newsroom/publications/2003/limitation.htm. *See also* "Snakes and Ladders: Expanding the Definition of Disability in the Americans with Disabilities Act," 33 Texas Tech L. Rev. 321 (2002).

[34] *Fenney v. Dakota, Minnesota & Eastern Railroad Co.*, 327 F.3d 707, 714 (8th Cir. 2003); *Peters v. Baldwin Union Free Sch. Dist.*, 320 F.3d 164, 168 (2d Cir. 2003) ("The ability to care for oneself is a major life activity recognized under the Rehabilitation Act; it 'encompasses normal activities of daily living; including feeding oneself, driving, grooming, and cleaning [one's] home.'"); *Nawrot v. CPC Int'l*, 277 F.3d 896, 903 (7th Cir. 2002); *Davoll v. Webb*, 194 F.3d 1116, 1134 (10th Cir. 1999); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999), *amended on other grounds*, 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000); *Zenor v. El Paso Healthcare System*, 176 F.3d 847, 859 n.8 (5th Cir. 1999). *See also Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (EEOC March 25, 1997), online at http://www.eeoc.gov/policy/docs/psych.html; *Marinelli v. City of Erie*, 216 F.3d 354, 362–363 (3d Cir. 2000) (caring for oneself means the ability to perform tasks required for living in a healthy and sanitary environment, like washing dishes and picking up trash, but does not include housework beyond basic chores); *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1359 (S.D. Fla. 1999) (finding caring for oneself to be a major life activity, but finding no substantial limitation).

[35] *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999). *See also Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One—First Definition, § IV(C)(4) (EEOC 12/13/99), http://www.eeoc.gov/policy/docs/field-ada.html (cooking and bathing are basic activities of caring for oneself).

elimination,[39] secreting insulin sufficient to process blood glucose,[40] sleeping,[41] getting into or out of bed,[42] getting around outside,[43] getting around inside,[44] keeping house,[45] living independently,[46] eating,[47] drinking,[48] cooking,[49] using stairs,[50] sitting,[51] standing,[52] reaching,[53] throwing,[54] squatting,[55]

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[36] *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999). *See also Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1359 (S.D. Fla. 1999) (finding dressing oneself to be a major life activity, but finding no substantial limitation).

[37] *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999).

[38] *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999).

[39] *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 746–747 (N.D. Ill. 1998).

[40] *Herman v. Kvaerner of Philadelphia Shipyard, Inc.*, 461 F. Supp. 2d 332, 336 (E.D. Pa. 2006).

[41] *McAlindin v. County of San Diego*, 192 F.3d 1226, 1233 (9th Cir. 1999), *amended on other grounds*, 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000); *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir.), *cert. denied*, 528 U.S. 811 (1999); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998); *Bennett v. Unisys Corp.*, 2000 WL 33126583, at *5 (E.D. Pa. Dec. 11, 2000); *Presta v. Southeastern Pa. Transp. Authority*, 1998 WL 310735, at *7 (E.D. Pa. June 11, 1998); *Silk v. City of Chicago*, 1997 WL 790598, at *7 (N.D. Ill. Dec. 17, 1997), *aff'd on other grounds*, 194 F.3d 708 (7th Cir. 1999); *Seaman v. C.S.P.H., Inc.*, 1997 WL 538751, at *12 (N.D. Tex. Aug. 25, 1997); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 814 (N.D. Tex. 1994) (finding a genuine dispute about the existence of a disability because plaintiff's diabetes affected the major life activities of eating and sleeping); *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (EEOC Feb. 1, 2000), http://www.eeoc.gov/policy/docs/psych.html.

[42] The studies relied on by the Court in *Sutton* in determining who is a person with a disability suggest that this is a major life activity. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 485 (1999).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id. Compare U.S. v. Southern Mgmt. Corp*., 955 F.2d 914, 919 (4th Cir. 1992) (referring to the ability to obtain housing in a case decided under the Fair Housing Act's substantially similar definition of disability).

[47] *Waldrip v. General Electric Co.*, 325 F.3d 652, 655 (5th Cir. 2003); *Lawson v. CSX Transportation, Inc*., 245 F.3d 916, 923 (7th Cir. 2001); *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 151 (2d. Cir. 1999); *Amir v. St. Louis University*, 184 F.3d 1017, 1027 (8th Cir. 1999); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 814 (N.D. Tex. 1994) (finding a genuine dispute about the existence of a disability because plaintiff's diabetes affected the major life activities of eating and sleeping).

[48] *Amir v. St. Louis University*, 184 F.3d 1017, 1027 (8th Cir. 1999).

[49] *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1359 (S.D. Fla. 1999) (finding cooking for oneself to be a major life activity, but finding no substantial limitation). *See also Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One—First Definition, § IV(C)(4) (EEOC 12/13/99), http://www.eeoc.gov/policy/docs/field-ada.html (cooking and bathing are basic activities of caring for oneself).

[50] *Nodelman v. Gruner & Jahr USA Publishing*, 2000 WL 502858, at *7 (S.D.N.Y. April 26, 2000). Also, the studies relied on by the Court in *Sutton* in determining who is a person with a disability suggest that this is a major life

bending,[56] lifting,[57] carrying,[58] performing manual tasks that are central to daily life,[59] walking,[60]

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activity. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 485 (1999).

[51] *Davoll v. Webb*, 194 F.3d 1116, 1134 (10th Cir. 1999); *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999); *Oesterling v. Walters*, 760 F.2d 859, 861 (8th Cir. 1985). *See also* 29 C.F.R. pt. 1630 App. § 1630.2(i).

[52] *Id.*

[53] *Davoll v. Webb*, 194 F.3d 1116, 1134 (10th Cir. 1999); *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999); *Lukens v. National R.R. Passenger Corp.*, 2000 WL 1622745, at *5 (E.D. Pa. Oct. 25, 2000). *See also* 29 C.F.R. pt. 1630 App. § 1630.2(i).

[54] *Prince v. Claussen*, 1999 WL 152282, at *5 (10th Cir. 1999) (unreported decision).

[55] *Id.*

[56] *Weiss-Clark v. Kaiser Foundation Health Plan of the Northwest*, 2001 WL 204823, at *4 (D. Or. Feb. 7, 2001); *Webner v. Titan Distribution, Inc.*, 101 F. Supp. 2d 1215, 1222 (N.D. Iowa 2000); *Miller v. Cohen*, 52 F. Supp. 2d 389, 395 (M.D. Pa. 1998) (major life activities include, but are not limited to, walking, lifting, standing, reaching, and bending, citing 29 C.F.R. Part 1630 App. § 1630.2(i)); *United States v. City & County of Denver*, 49 F. Supp. 2d 1233, 1253 (D. Colo. 1999), *aff'd without deciding this point*, 194 F.3d 1116 (10th Cir. 1999); *Whitfield v. Pathmark Stores, Inc.*, 39 F. Supp. 2d 434 (D. Del. 1999); *Boyd v. Borg-Warner Protective Servs.*, 1999 U.S. Dist. LEXIS 13974, at *7 (S.D. Fla. 1999); *Yerby v. Wal-Mart Stores, Inc.*, 1997 WL 902108, at *6 (E.D. Okla. Aug. 29, 1997), *aff'd*, 145 F.3d 1347 (10th Cir. 1998) (unreported decision). *See also Cook v. Rhode Island*, 10 F.3d 1725 (1st Cir. 1993) (belief that plaintiff's morbid obesity interfered with her ability to undertake physical activities -- including walking, lifting, bending, stooping, and kneeling -- was sufficient for jury to find that defendant viewed plaintiff's impairment as interfering with major life activities); *Miecznikowski v. UPS*, 1998 U.S. Dist. LEXIS 21581, at *9 (M.D. Fla. 1998) (because of his hip condition, plaintiff could not perform as the average man of his age in areas such as lifting, bending and stooping), *aff'd*, 196 F.3d 1260 (11th Cir. 1999) (without reported opinion).

[57] *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 21 (1st Cir. 2002); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996); *Vaughn v. Federal Express Corp.*, 1997 WL 625495, at *2–3 (E.D. La. Oct. 7, 1997); 29 C.F.R. pt. 1630 App. § 1630.2(i). See also the studies relied on by the Court in *Sutton* in determining who is a person with a disability, which suggest that lifting is a major life activity. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 485 (1999).

The Eight Circuit rule is confusing. *Compare Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 948 (8th Cir. 1999) (lifting is a major life activity); *Gutridge v. Clure*, 153 F.3d 898, 900 (8th Cir. 1998) (though regulations list lifting as a major life activity, a general lifting restriction from a doctor, without more detail, is not proof of a disability). *Compare Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 491 (8th Cir. 2002) (symptoms indicated a permanent disability beyond simply a lifting restriction, because there was evidence—including chilling occurring several times a week and lasting approximately 45 minutes, chronic neck pain present approximately 90 percent of the time, weakness, numbness in his groin and hands, upper arm pain, and headaches—that plaintiff was substantially limited in working).

[58] The studies relied on by the Court in *Sutton* in determining who is a person with a disability suggest that this is a major life activity. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 485 (1999).

[59] *Toyota Motor Manufacturing, Kentucky, Inc.*, 534 U.S. 184, 198 (2002). The Court stated that some of the manual tasks to look at are those involving personal hygiene (like tooth brushing and bathing) and personal or household chores. *Id.* at 201–202.

Compare Thornton v. McClatchy Newspapers, Inc., 292 F.3d 1045 (9th Cir. 2002) (finding that *continuous* keyboarding is not central to most people's daily lives, although not deciding whether a condition that prevents *any* keyboarding would be a disability).

For some pre-*Toyota Motor* cases, *see, e.g., Davoll v. Webb*, 194 F.3d 1116, 1134 (10th Cir. 1999); *EEOC v. Wal-Mart Stores, Inc.*, 11 F. Supp. 2d 1313, 1319 (D.N.M. 1998), *aff'd on other grounds*, 202 F.3d 281 (10th Cir. 1999)

running,[61] seeing,[62] hearing,[63] speaking,[64] breathing,[65] reading,[66] writing,[67] thinking,[68] learning,[69] concentrating,[70] cognitive functions,[71] reproducing or bearing children,[72] sexual activities,[73]

(unreported decision).

[60] *Zenor v. El Paso Healthcare System*, 176 F.3d 847, 859 n.8 (5th Cir. 1999); *Davoll v. Webb*, 194 F.3d 1116, 1134 (10th Cir. 1999); *Canis v. Coca-Cola Enterprises*, 49 F. Supp. 2d 73, 78–80 (D.R.I. 1999); *Stafne v. Unicare Homes, Inc.*, 1999 WL 1068490, at *7 (D. Minn. March 3, 1999), *aff'd on other grounds*, 266 F.3d 771 (8th Cir. 2001); *Nedder v. Rivier College*, 908 F. Supp. 66, 74 (D.N.H. 1995).

[61] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999) ("individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk *or run*.") (emphasis added). *See also Morrison v. Pinkerton, Inc.*, 7 S.W.3d 851, 856 (Tex App.—Houston [1st Dist.] 1999, no writ history) (decided under substantially similar state law definition).

[62] *Zenor v. El Paso Healthcare System*, 176 F.3d 847, 859 n.8 (5th Cir. 1999); *Horsewood v. Kids "R" Us*, 27 F. Supp. 2d 1279, 1286 (D. Kan. 1998).

[63] *Zenor v. El Paso Healthcare System*, 176 F.3d 847, 859 n.8 (5th Cir. 1999).

[64] *Zenor v. El Paso Healthcare System*, 176 F.3d 847, 859 n.8 (5th Cir. 1999). *See also Pridemore v. Rural Legal Aid Society*, 625 F. Supp. 1180, 1183–1184 (S.D. Ohio 1985) (finding no substantial limitation in the major life activity of speaking); *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 706 (Tenn. 2000) ("communicating by speech").

[65] *Land v. Baptist Medical Ctr.*, 164 F.3d 423, 424 (8th Cir. 1999) (citing *inter alia* the language in *Bragdon v. Abbott* that major life activities include those "central to the life process itself"); *Muller v. Costello*, 187 F.3d 298, 312 (2d Cir. 1999); *Radaszewski v. Metropolitan Water Reclamation Dist.*, 2000 WL 134709, at *7 (N.D. Ill. Feb. 2, 2000).

[66] *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69, 80 (2d Cir. 2000); *Walsted v. Woodbury County, Iowa*, 113 F. Supp. 2d 1318, 1329 (N.D. Iowa 2000); *Sweet v. Electronic Data Systems*, 1996 WL 204471, at *6 (S.D.N.Y. Apr. 26, 1996) (holding reading a major life activity, but finding insufficient evidence of a substantial limitation); *Pridemore v. Rural Legal Aid Society*, 625 F. Supp. 1180, 1183–1184 (S.D. Ohio 1985) (similar).

[67] *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094, 1117 (S.D.N.Y. 1997), *aff'd on other grounds*, 226 F.3d 69 (2d Cir. 2000).

[68] *Taylor v. Phoenixville School District*, 184 F.3d 296, 306 (3d Cir. 1999); *Walsted v. Woodbury County, Iowa*, 113 F. Supp. 2d 1318, 1329–1330 (N.D. Iowa 2000). *See also Mattice v. Memorial Hosp. of South Bend, Inc.*, 249 F.3d 682, 684 (7th Cir. 2001); *EEOC Compliance Manual* § 902.3(b), http://www.eeoc.gov/policy/docs/902cm.html.

[69] *Amir v. St. Louis University*, 184 F.3d 1017, 1027 (8th Cir. 1999); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 155 (1st Cir. 1998) (educational claim under Rehabilitation Act); *Bingham v. Oregon School Activities Association*, 24 F. Supp. 2d 1110, 1116 (D. Or. 1998) (similar); *Walsted v. Woodbury County, Iowa*, 113 F. Supp. 2d 1318, 1329 (N.D. Iowa 2000).

[70] *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 569 (3d Cir. 2002); *Walsted v. Woodbury County, Iowa*, 113 F. Supp. 2d 1318, 1330 (N.D. Iowa 2000); *Herbst v. General Accident Insurance Company*, 1999 WL 820194, at *5 n.6 (E.D. Penn. Sep. 30, 1999); *EEOC Compliance Manual* § 902(3)(b), online at <http://www.eeoc.gov/policy/docs/902cm.html; *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (EEOC Feb. 1, 2000), http://www.eeoc.gov/policy/docs/psych.html. *But cf. Pack v. K-Mart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999) (rejecting EEOC guidance, and finding that concentrating is not a major life activity).

[71] *Brown v. Cox*, 286 F.3d 1040, 1045 (8th Cir. 2002).

working,[74] attending school,[75] traveling,[76] driving,[77] interacting with others,[78] interpersonal relations

[72] *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998).

[73] *McAlindin v. County of San Diego*, 192 F.3d 1226, 1233 (9th Cir. 1999), *amended on other grounds*, 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000); *Keller v. Board of Educ. of City of Albuquerque*, 182 F. Supp. 2d 1148, 1155 (D.N.M. 2001). There is also support for this in *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) ("Reproduction falls well within the phrase 'major life activity.' Reproduction and the sexual dynamics surrounding it are central to the life process itself."). *But cf. Contreras v. Suncast Corp.*, 237 F.3d 756, 764 (7th Cir. 2001) (statement that due to back injury, sexual activity decreased from 20 times per month to two times per month was insufficient).

[74] Although the Supreme Court questioned the logic of including working as a major life activity in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999), courts have since continued to hold that it is one. *Mullins v. Crowell*, 228 F.3d 1305 (11th Cir. 2000) (trial court erred in relying on Sutton for the proposition that working is not a major life activity; circuit precedent holds that it is); *Sinkler v. Midwest Property Management*, 209 F.3d 678, 684 n.1 (7th Cir. 2000); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654–655 (5th Cir. 1999); *Davoll v. Webb*, 194 F.3d 1116, 1134 (10th Cir. 1999); *Muller v. Costello*, 187 F.3d 298, 312 (2d Cir. 1999). *Also compare Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 706 (Tenn. 2000) ("ability to report for work").

[75] The studies relied on by the Court in *Sutton* in determining who is a person with a disability suggest that this is a major life activity. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 485 (1999).

[76] *Lemire v. Silva*, 104 F. Supp. 2d 80, 86–87 (D. Mass. 2000).

Note that several courts have rejected driving as a major life activity, *e.g.*, *Chenoweth v. Hillsborough County*, 250 F.3d 1328 (11th Cir. 2001), *cert denied*, 534 U.S. 1131 (2002), although there is contrary authority. *Weiss-Clark v. Kaiser Found. Health Plan*, 2001 WL 204823, at *3 (D. Or. Feb. 7, 2001); *United States v. City & County of Denver*, 49 F. Supp. 2d 1233 (D. Colo.), *aff'd on other grounds sub nom Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999); *Norris v. Allied-Sysco Food Servs*., 948 F. Supp. 1418, 1434 n.13 (N.D. Cal. 1996), *aff'd on other grounds*, 191 F.3d 1043 (9th Cir. 1999), *cert. denied*, 528 U.S. 1182 (2000). ("The jury also could have concluded that Norris's back injury substantially limited her ability to drive, and the jury could have reasonably felt that, at least in California, driving is a major life activity.").

[77] *Weiss-Clark v. Kaiser Foundation Health Plan of the Northwest*, 2001 WL 204823, at *4 (D. Or. Feb. 7, 2001); *United States v. City & County of Denver*, 49 F. Supp. 2d 1233 (D .Colo), *aff'd on other grounds sub nom Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999); *Norris v. Allied-Sysco Food Servs.*, 948 F. Supp. 1418, 1434 n.13 (N.D. Cal. 1996) ("The jury also could have concluded that Norris's back injury substantially limited her ability to drive, and the jury could have reasonably felt that, at least in California, driving is a major life activity."), *aff'd on other grounds*, 191 F.3d 1043 (9th Cir. 1999), *cert. denied*, 528 U.S. 1182 (2000). *Contra: Chenoweth v. Hillsborough County*, 250 F.3d 1328 (11th Cir. 2001), and authorities cited.

[78] *McAlindin v. County of San Diego*, 192 F.3d 1226, 1133 (9th Cir. 1999), *amended on other grounds*, 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000); *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 160 (E.D.N.Y. 2002); *Zale v. Sikorsky Aircraft Corp*., 2000 WL 306943 (D. Conn. Feb.7, 2000); *Bennett v. Unisys Corp.*, 2000 WL 33126583, at *5 (E.D. Pa. Dec. 11, 2000); *Krocka v. Bransfield*, 969 F. Supp. 1073, 1084 (N.D. Ill. 1997), *aff'd on other grounds sub nom Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000).

Compare Anderson v. Independent School Dist. No. 281, 2002 WL 31242212, at *6 (D. Minn. Oct. 4, 2002) (plaintiff's evidence of disability included his difficulty in interacting with groups of people).

See also EEOC Compliance Manual § 902, http://www.eeoc.gov/policy/docs/902cm.html; *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (EEOC Feb. 1, 2000), http://www.eeoc.gov/policy/docs/psych.html. The Court deferred to this Enforcement Guidance in *Olson v. Dubuque Community School District*, 137 F.3d 609, 612 (8th Cir. 1998), but found no evidence that the plaintiff's conflicts with her employer were the manifestation of a disability.

But cf. Amir v. St. Louis University, 184 F.3d 1017, 1027 (8th Cir. 1999) (questioning but not deciding whether interacting with others is a major life activity); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (similar).

and socializing.[79]

Note, however, that not all courts will recognize all of the above as major life activities, and advocates should also consider the weight that will be given to case law decided pre-*Toyota Motor*.

It is important to remember that working should be the last major life activity to consider.[80] In part this is because the Supreme Court has questioned (without deciding) whether working is a major life activity under the ADA,[81] although every circuit to address the question has held that it is.[82] More importantly, a substantial limitation in working requires a showing that the plaintiff is significantly restricted in the ability to perform either a *class of jobs or a broad range of jobs* in various classes.[83] Many plaintiffs alleging employment discrimination seem to presume that they must show a substantial limitation in working, but the Supreme Court has rejected this narrow view in *Toyota Motor*.[84]

Other potential resources include the list of activities found in the World Health Organization's *International Classification of Impairments, Activities and Participation* (ICIDH-2), and a "daily inventory" of activities kept by the person with a disability.[85]

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[79] *Garvey v. Jefferson Smurfit Corp.*, 2000 WL 1586077, at *3 (E.D. Pa. Oct. 24, 2000).

[80] Under the EEOC guidance, working should be considered only if no other life activity is affected. 29 C.F.R. pt. 1630 App. § 1630.2(j), cited in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999). Note that the Court hinted in *Sutton* that the results might have been more favorable to the plaintiffs if they had focused on the life activity of seeing, rather than working. *Id.*, 527 U.S. at 490.

[81] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999). For a critique of this part of *Sutton*, see the National Council on Disability's ADA Policy Brief No. 13, *The Supreme Court's ADA Decisions Regarding Substantial Limitation of Major Life Activities*, at nn.74-89 (April 29, 2003), available online at http://www.ncd.gov/newsroom/publications/2003/limitation.htm. Note, too, that although the Supreme Court questioned whether working is properly considered a major life activity under the ADA, it expressly followed the EEOC guidance in this area. *Sutton*, 527 U.S. at 492.

[82] *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999); *Davoll v. Webb*, 194 F.3d 1116, 1134 (10th Cir. 1999); *Muller v. Costello*, 187 F.3d 298, 312 (2d Cir. 1999).

[83] 29 C.F.R. § 1630.2(j)(3)(i).

[84] The Court found "no support" in the ADA, its previous opinions, or the regulations for the idea that the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace. The fact that the ADA's definition of disability applies not only to Title I, but also to the other portions of the Act, demonstrates that the definition is intended to cover individuals with disabling impairments regardless of whether the individuals have any connection to a workplace. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 201 (2002).

Perhaps the Court's language will help rebut cases like *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220 (11th Cir. 1999), which seem to require a nexus between the major life activity affected and the job. As the Court seems to recognize here (and in *Bragdon*), actionable discrimination does not have to be based on the major life activity that qualifies the plaintiff for coverage. This point is more clearly made in *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999), *amended*, 201 F.3d 1211 (9th Cir. 2000), *cert. denied*, 530 U.S. 1243 (2000). *See also Morris v. Dempsey Ing, Inc.*, 1999 WL 1045032, at *2 (N.D. Ill. Nov.12, 1999) (finding nothing inconsistent in the assertion that the plaintiff is substantially limited in some aspects of his life, but not in those related to his employment).

[85] These suggestions are found in Arlene B. Mayerson and Kristan S. Mayer, *Defining Disability in the*

DIABETES CASES: There are a variety of specialized resources being developed after *Sutton*, designed to identify some of the major life activities that are typically limited by specific conditions. Some of the best resources are available online from the American Diabetes Association. See, for example, Shereen Arent, *Background Materials on Diabetes and Functional Limitations For Lawyers Handling Diabetes Discrimination Cases* (9/30/05), pp. 6–9, http://www.diabetes.org/Advocacy/Background_Materials_for_Lawyers2002.pdf. That article provides information about diabetes, lists possible major life activities affected, addresses how diabetes may substantially limit major life activities, and provides resources to learn more about the disease.

Some of the more successful recent diabetes cases focused on the major life activity of eating. *See, e.g., Branham v. Snow*, 392 F.3d 896, 903–904 (7th Cir. 2004); *Fraser v. Goodale*, 342 F.3d 1032, 1041–1043 (9th Cir. 2003); *Lawson v. CSX Transp., Inc*., 245 F.3d 916, 924–926 (7th Cir. 2001); *Miller v. Verizon Communications, Inc*., 474 F. Supp. 2d 187, 197 (D. Mass. 2007) (lack of medical evidence would not prevent jury from tying eating limitations to Plaintiff's diabetes because the connection is generally understood by lay people); *Countryman v. Nordstrom, Inc*., 2007 WL 38912, at *5 (D. Minn. Jan. 5, 2007); *Davenport v. Idaho Dept. of Env. Quality*, 469 F. Supp. 2d 861, 873–875 (D. Idaho 2006), *opinion withdrawn in part on other grounds*, 2007 WL 914191 (D. Idaho Mar. 23, 2007); *Amick v. Visiting Nurse and Hospice Home*, 2006 WL 2989277, at *5 (N.D. Ind. Oct. 18, 2006); *Downs v. AOL Time Warner***,** 2006 WL 162563, at *6–7 (S.D. Ohio Jan. 20, 2006); *U.S. v. Mississippi Dept. of Public Safety*, 309 F. Supp. 2d 837, 840 (S.D. Miss. 2004). *See also Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 746–748 (N.D. Ill. 1998); *Shirley v. Westgate Fabrics, Inc*., 1997 WL 135605, at *3 (N.D. Tex. March 17, 1997); *Gonsalves v. J.F. Fredericks Tool Co., Inc*., 964 F. Supp. 616, 621 (D. Conn. 1997); *Coghlan v. H.J. Heinz Co*., 851 F. Supp. 808, 813–814 (N.D. Tex.1994). *See also Brion v. Adrian Steel Co***.,** 2006 WL 2123756, at *9 (E.D. Mich. July 27, 2006) (relying on testimony that plaintiff had been unable to eat for five days).

Not all such claims are successful, of course, *e.g., Collado v. United Parcel Service*, 419 F.3d 1143 (11th Cir. 2005); *Varatharajan v. Parkdale Pharmaceuticals, Inc.*, 2006 WL 2385037, at *15 (E.D. Mich. Aug. 17, 2006); *Darst v. Vencor Nursing Centers, Ltd. Partnership*, 2003 WL 22016374, at *10 (S.D. Ind. July 30, 2003), and the argument cannot be raised for the first time on appeal. *Orr v. Wal-Mart Stores, Inc*., 297 F.3d 720, 724–725 (8th Cir. 2002).

Other successful diabetes cases have relied on the major life activities of walking, *EEOC v. Sears, Roebuck & Co*., 417 F.3d 789, 802 (7th Cir. 2005); *Lutz v. Glendale Union High Sch., Dist. No. 205*, 8 Fed. Appx. 720, 721–722 (9th Cir.2001) (mem.); *Chasse v. Computer Sciences Corp*., 453 F. Supp. 2d 503, 516 (D. Conn. 2006), sleeping, *Gonsalves*, supra, 964 F. Supp. at 621; *Coghlan*, supra, 851 F. Supp. at 813–814, thinking, *Nawrot v. CPC Intern*.,

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Aftermath of Sutton: Where Do We Go from Here?, Human Rights (ABA Winter 2000), online at http://www.abanet.org/irr/hr/winter00humanrights/mayerson.html. The ICIDH-2 mentioned above is available online at http://www3.who.int/icf/onlinebrowser/icf.cfm.

277 F.3d 896, 904905 (7th Cir. 2002); *Herman v. Kvaerner of Philadelphia Shipyard, Inc.*, 461 F. Supp. 2d 332, 336 (E.D. Pa. 2006); *Amick v. Visiting Nurse and Hospice Home*, *supra*, 2006 WL 2989277, at *6, secreting insulin sufficient to process blood glucose, *Herman*, *supra*, 461 F. Supp. 2d at 336,[86] caring for oneself, *id*.; *Countryman v. Nordstrom, Inc*., *supra*, 2007 WL 38912, at *5; *Amick v. Visiting Nurse and Hospice Home*, *supra*, 2006 WL 2989277, at *5,[87] performing manual tasks, *Bugg-Barber v. Randstad US, L.P.*, 271 F. Supp. 2d 120, 128 (D.D.C. 2003), waste elimination, *Erjavac*, supra, 13 F. Supp. 2d at 746–748, seeing, *Brion v. Adrian Steel Co***.,** 2006 WL 2123756, at *9 (E.D. Mich. July 27, 2006), and other things. *Farrell v. Tri-County Metropolitan Transp. Dist. of Or*., 2005 WL 1307695, at *11 (D. Or. May 31, 2005) (sufficient evidence in doctor's statement that plaintiff with "adult-onset diabetes," hypertension, arthritis, and chronic lung disease was substantially limited in one or more of the following: walking, breathing, performing manual tasks, caring for himself, lifting, sleeping, working, reproducing, and running).[88]

One court has recognized that diabetes might substantially limit the major life activities of thinking and communicating as well, but it found insufficient evidence of such a limitation under the facts presented. *Fraser*, *supra*, 342 F.3d at 1044.

4. List all mitigating measures used.

While mitigating measures must be considered in light of *Sutton*, the advocate must be aware of what measures are properly included in that analysis. *Sutton* commands that the focus be on what *is* ("the present indicative tense," to use the court's language), not on what might, could, or should be.[89] This focus has several results.

First, there is a time limitation. An actual disability is generally gauged at the time of the discriminatory action or request for accommodation,[90] not at some time in the future.[91] Likewise,

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[86] Although plaintiffs have rarely argued that "secreting insulin" is a major life activity, such an argument is consistent with other recent cases that have identified biological functions as major life activities. *See, e.g., Heiko v. Colombo Savings Bank, FSB*, 434 F.3d 249, 255 (4th Cir. 2006) (elimination of bodily waste is a major life activity).

[87] The major life activity of caring for oneself could be implicated in two ways—by evidence of the constant management activities that are required (similar to the cases analyzing the activity of eating), or by evidence of frequent periods of uncontrolled blood sugar levels resulting in debilitation. *Fraser*, *supra*, 342 F.3d at 1043–1044 (finding insufficient evidence of the latter).

[88] Note that at least one court has held that "maintaining stable blood sugar levels" is not a major life activity. *Simms. v. City of New York*, 106 F. Supp. 2d 398, 403–404 (E.D.N.Y. 2001).

[89] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1037 (D. Ariz. 1999); *Nawrot v. CPC Int'l*, 277 F.3d 896, 904 (7th Cir. 2002) (*Sutton* is not "license for courts to meander in 'would, could, or should-have' land.").

[90] *Cash v. Smith*, 231 F.3d 1301, 1306 n.5 (11th Cir. 2000); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 884 (6th Cir. 1996); *Eber v. Harris County Hosp. Dist.*, 130 F. Supp. 2d 847, 858 (S.D. Tex. 2001); *Leicht v. Hawaiian Airlines, Inc.*, 77 F. Supp. 2d 1134, 1147 (D. Hawaii 1999) ("Whether an impairment is substantially limiting is measure at the time of the requested accommodation."); 29 C.F.R. Part 1630 App. § 1630.2(m); *Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Background

the fact that the effects of one's impairment were "mitigated" at some time in the past does not matter, if the person currently has a substantial limitation of a major life activity.[92]

For the same reason, speculating about "possible" mitigating measures is precluded by the *Sutton* analysis. Thus, defendants should not be able to claim that a person does not have a disability because they choose not to use mitigating measures, which if used, would prevent any substantial limitation of a major life activity.[93] This reading is also consistent with the Supreme Court's statement in *Bragdon* that "the disability definition does not turn on personal choice."[94] Although there is some contrary authority post-*Sutton*,[95] such cases are not only at odds with *Sutton*, but they

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(EEOC 12/13/99), http://www.eeoc.gov/policy/docs/field-ada.html.

Note, however, that a person who has no *actual* disability because of the use of mitigating measures may still have a *record of* a disability at a time in the past before using such measures. See § B(1) below.

[91] Note, however, that evidence of abilities at a later date may still be relevant to the issue of the plaintiff's abilities at the time of the discriminatory action. *See, e.g., EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 802 (7th Cir. 2005) (evidence that diabetic neuropathy deteriorated during the two years following discrimination is evidence that it was not merely short term); *Swanson v. University of Cincinnati*, 268 F.3d 307, 316 (6th Cir. 2001).

[92] *Compare Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1037–1038 (D. Ariz. 1999). In that case, the employer cited the testimony of Plaintiff's expert, who said he thought the plaintiff "would benefit from hearing aids." The Court rejected the argument because, regardless of the doctor's opinion, the plaintiff did not use them. She had tried them in the past, but they picked up background noise. The Court noted that *Sutton* requires a case-by-case analysis of the limitations an individual faces in his or her current state.

[93] *Nawrot v. CPC Int'l*, 277 F.3d 896, 904 (7th Cir. 2002) (courts should consider only those mitigating measures actually taken; those who discriminate take their victims as they find them); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1037–1038 (D. Ariz. 1999); *Kuechle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 221 (Minn. App. 2002) (following federal law). *See also Capizzi v. County of Placer*, 135 F. Supp. 2d 1105, 1113 (E.D. Cal. 2001) (failure to take mitigating measures does not defeat claim, but could affect the damages recoverable); *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318, 325–326 (S.D.N.Y. 2000) (fact that fertility treatment existed was irrelevant, because no treatment had been successful to date for the plaintiff), *aff'd in part on other grounds*, 316 F.3d 337 (2d Cir. 2003).

[94] *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998). While mitigating measures may limit the extent to which an impairment is disabling, a personal choice to limit activities in order to minimize the impairment's effects should not cause a plaintiff to lose the act's protection.

[95] *See Tangires v. Johns Hopkins Hospital*, 79 F. Supp. 2d 589, 595–596 (D. Md.) (since plaintiff's asthma was correctable by steroidal medication, and since she voluntarily refused the recommended medication based on her subjective and unsubstantiated belief that such use would adversely affect her pituitary adenoma, her asthma did not substantially limit her in any major life activity), *aff'd by unpublished opinion*, 230 F.3d 1354 (4th Cir. 2000).

Tangires has been called "a perverse stretch of *Sutton*." Van Detta & Gallipeau, "Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury?," 19 Rev. Litig. 505, 520 n.36 (Summer 2000). *But see also Johnson v. Maynard*, 2003 WL 548754, at *4 (S.D.N.Y. Feb. 25, 2003) (fact that plaintiff could not work or take care of herself when she did not take her medication does not indicate that any life activity was substantially impaired by her illness, because she had medication available to her and knew that she could function normally if she took it); *Rose v. Home Depot USA, Inc.*, 186 F. Supp. 2d 595, 613–614 (D. Md. 2002) ("failure to take the proper measures to gain a proper diagnosis necessary to a proper treatment plan is the legal equivalent of a refusal to avail oneself of proper treatment;" plaintiff therefore failed to present proof that he has a disability as defined in the ADA). There are also a few pre-*Sutton* cases suggesting this result, but they generally involve workplace misconduct, rather than mitigating measures.

should be rejected on public policy grounds.[96]

Remember, too, that mitigating measures do not include reasonable accommodations provided by, or sought from, the defendant. The measures a defendant provides are relevant not to the threshold analysis of whether an individual is disabled, but only to the subsequent analysis of whether the employer has provided a reasonable accommodation. To conclude otherwise would mean, for example, that an employer could provide a reasonable accommodation, and then terminate the employee with impunity, claiming that the employee is not disabled due to the use of the accommodation.[97]

Moreover, not everything used by the client to compensate for an impairment is a mitigating measure.[98] For example, measures such as lip-reading and telephone lights do not mitigate a person's deafness, because although they improve the person's ability to communicate, they do not improve the ability to hear.[99] Likewise, the use of a wheelchair may improve a person's mobility without improving a person's ability to walk.[100] On the other hand, in cases involving monocular vision that limits depth perception rather than visual acuity, the brain's own ability to compensate is a mitigating measure, since it may actually improve depth perception.[101]

Finally, note that a person may have a disability discrimination claim if the defendant prevents the use of mitigating measures that might control the symptoms of an impairment.[102]

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[96] In the employment context, the EEOC has rejected this argument since in effect it would allow employers to condition a job on the employer's opinion about the efficacy of a particular medical treatment. The EEOC has expressed interest in assisting in litigating this issue.

[97] *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1037–1038 and n.4 (D. Ariz. 1999).

[98] *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999) (the use of a wheelchair may improve a person's mobility without improving a person's ability to walk); *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 23 (1st Cir. 2002) (plaintiff's "lack of a hand will substantially limit her ability to lift notwithstanding her extraordinary efforts to compensate for her impairment."); *EEOC v. Walden*, 2002 WL 31011859, at *17 (S.D.N.Y. Sep. 9, 2002) (court unpersuaded by argument that plaintiff's twisting in his seat, sliding forward, leaning back, stretching while seated, and standing to stretch constituted "corrective measures" that reduced the severity of his limitation in sitting); *Bartlett v. New York State Bd. of Law Examiners*, 2001 WL 930792, at *31–35 (S.D.N.Y. Aug. 15, 2001) (court refused to take into account those measures that did not affect an applicant's ability to perform the major life activity of reading, such as having other people read to her, or participating in study groups); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1041–1042 (D. Ariz. 1999); *EEOC v. United Parcel Services, Inc.*, 149 F. Supp. 2d 1115, 1156 (N.D. Cal. 2000) ("a touch-and-feel substitute for stereopsis does *not* improve vision itself any more than Braille would cure blindness."), *rev'd on other grounds*, 306 F.3d 794 (9th Cir. 2002). *See also LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 766 (W.D. Mich. 2001) ("neither artificial insemination nor *in vitro* fertilization was designed to cure plaintiff's infertility. Rather, these ameliorative measures were an attempt to accomplish through artificial means the results achieved by normally functioning human bodies.").

[99] *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1041–1042 (D. Ariz. 1999).

[100] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999).

[101] *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–567 (1999). Even so, most persons with monocular vision still have a disability. *Id. But cf. EEOC v. United Parcel Service, Inc.*, 306 F.3d 794 (9th Cir. 2003).

[102] *Davis v. Utah State Tax Commission*, 96 F. Supp. 2d 1271, 1287 (D. Utah 2000); *Denney v. Mosey Mfg. Co., Inc.*, 2000 WL 680417, at *10 (S.D. Ind. 2000) (although finding it "inconceivable that such actions by an employer

DIABETES CASES: The most commonly cited mitigating measure in diabetes cases may be the use of insulin. *See, e.g., Orr v. Wal-Mart Stores, Inc*., 297 F.3d 720, 724 (8th Cir. 2002); *Lawson v. CSX Transp., Inc*., 245 F.3d 916, 924 (7th Cir. 2001); *Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA)*, Question 1 (EEOC Oct. 2003), http://www.eeoc.gov/facts/diabetes.html. In dicta, the Supreme Court gave insulin administration as an example of a mitigating measure. *Sutton v. United Air Lines, Inc*., 527 U.S. 471, 483 (1999).

Other mitigating measures may include diet, *Orr*, *supra*, 297 F.3d at 724; *Questions and Answers About Diabetes, supra* (Question 1), testing blood sugar levels, *Sutton*, *supra*, 527 U.S. at 483 (dicta), or the use of other medications or exercise. *Questions and Answers About Diabetes, supra* (Question 1).

Note, too, the difference between the "delicate balance" of mitigating measures that individuals with diabetes use, as opposed to the mitigating measures discussed in *Sutton* (eyeglasses), which could easily, fully, and indefinitely correct the impairment at issue. *Lawson*, *supra*, 245 F.3d at 925–926.

As indicated above, disability is assessed at the time of the discriminatory actions complained of. Thus, for example, the fact that an insulin pump alleviated symptoms was irrelevant because it was not implanted until two years after the employer's failure to accommodate and constructive discharge. *Countryman v. Nordstrom, Inc*., 2007 WL 38912, at *5 (D. Minn. Jan. 5, 2007).

5. Even with the mitigating measures used, detail how each major life activity is affected.

The Supreme Court expressly recognizes that a person using mitigating measures that do not fully control their symptoms may have a disability. For example, the Court pointed out that "individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run."[103] The Court also noted that a person may remain substantially limited despite taking medicine that improves functioning.[104] Finally, the Court stated that even in light of body's own internal compensations, a person with monocular vision would "ordinarily" be a person with a disability under the ADA.[105]

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would be entirely beyond the reach of the ADA on the theory that the employee does not have a 'disability' under the ADA," the court found no evidence that employer actually interfered with plaintiff's efforts to control his diabetes). *See also Sullivan Vallejo City Unified School Dist.*, 731 F. Supp. 947, 958 (E.D. Cal. 1990) ("as long as the choices the handicapped person makes concerning how to effectively address her circumstances are reasonable, the Rehabilitation Act both protects those choices from scrutiny, and prohibits discrimination against the disabled person on the basis of those choices."). *But compare Hein v. All America Plywood Co.*, 232 F.3d 482, 487–488 (6th Cir. 2000) (plaintiff could not blame employer for the plaintiff's running out of medication).

[103] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999).

[104] *Id*.

[105] *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999). While the Court stated that Kirkingburg was

Other courts have recognized this point as well.[106] In *McAlindin v. County of San Diego*,[107] the Court found a genuine issue of material fact as to whether, even with medication and other treatment, the plaintiff's mental impairment substantially limited his major life activities of sleeping and engaging in sexual relations. In *Taylor v. Phoenixville School District*,[108] a secretary's ongoing symptoms of bipolar disorder, coupled with the side effects of her medication, raised a fact issue as to whether she was substantially limited in thinking.[109] In *Finical v. Collections Unlimited, Inc.*,[110] there was sufficient evidence for a reasonable jury to conclude that the employee was substantially limited in the major life activity of hearing, even taking into account the use of several compensating measures.

The EEOC's *Instructions for Field Offices* list other examples of mitigating measures that only partially control the symptoms or limitations, as well as questions to address in analyzing this issue.[111] This issue is closely tied to the question of "substantial limitation" discussed below at § A(7), so the authorities discussed in that part should also be considered.

DIABETES CASES: In one case, the court rejected the employer's mitigating measures argument because the evidence showed substantial limitations both before and after the plaintiff began using mitigating measures. *Miller v. Verizon Communications, Inc.*, 474 F.

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likely substantially limited, and recognized that "some impairments may invariably cause a substantial limitation of a major life activity," it noted that the impact of monocularity varies, and it is "not the stuff of a per se rule." The Court in *Kirkingburg* also followed the EEOC regulations and guidelines on what constitutes a substantial limitation, stating that it means more than a "mere difference." The Court did not consider whether the plaintiff was "regarded as" a person with a disability, since unlike the *Sutton* and *Murphy* cases, that argument was not presented in this appeal. *Compare EEOC v. United Parcel Services, Inc.*, 306 F.3d 794 (9th Cir. 2002).

[106] *See, e.g., Otting v. J.C. Penney Co.*, 223 F.3d 704, 709 (8th Cir. 2000) ("despite surgery and medication, Otting's seizures were not under control at the time of her termination"); *Service v. Union Pacific R.R. Co.*, 153 F. Supp. 2d 1187, 1191–1192 (E.D. Cal. 2001); *Maxwell v. GTE Wireless Service Corp.*, 121 F. Supp. 2d 649, 654 (N.D. Ohio 2000) (repeated and lengthy medical absences presented jury question as to whether plaintiff's depression, albeit treated by counseling and episodic medication, substantially interfered with a major life activity such as working); *White v. Orange Auto Center*, 101 F. Supp. 2d 485, 494–495 (E.D. Tex. 2000) (vision only correctable to 20/200); *Rowles v. Automated Production Systems Inc.*, 92 F. Supp. 2d 424, 428–429 (M.D. Pa. 2000); *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 2000 WL 1469551, at *6–8 (E.D.N.Y. Aug 21, 2000) (plaintiff with ADD), *aff'd on other grounds*, 280 F.3d 98 (2d Cir. 2001).

[107] *McAlindin v. County of San Diego*, 192 F.3d 1226, 1236 (9th Cir. 1999), *amended on other grounds*, 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000).

[108] *Taylor v. Phoenixville School District*, 184 F.3d 296 (3d Cir. 1999).

[109] The plaintiff maintained that even though lithium has improved her condition and reduced the risk of psychotic episodes, the drug had not perfectly controlled her symptoms, leaving her still substantially limited in her ability to think. Her doctor's notes indicated that she continued to suffer symptoms of her disorder, including paranoia.

[110] *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032 (D. Ariz. 1999).

[111] *Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One–First Definition, at § III (EEOC Dec. 13, 1999), online at http://www.eeoc.gov/policy/docs/field-ada.html.

Supp. 2d 187, 198 (D. Mass. 2007). In another, the plaintiff described the severe symptoms he experienced even when taking his insulin as prescribed and even when complying with his treatment program. *Herman v. Kvaerner of Philadelphia Shipyard, Inc.*, 461 F. Supp. 2d 332, 336 (E.D. Pa. 2006).

6. List any side effects of the mitigating measures, or how they otherwise affect major life activities.

The Court in *Sutton* recognized that a person may also have a disability if the side effects of necessary medication or other mitigating measures cause an impairment.[112] Clearly, then, a person may have a disability despite the use of mitigating measures.[113] Note that it is important to show that side effects are actually experienced; it may not be enough to show that side effects are merely possible.[114]

DIABETES CASES: For many people, the most important side effect to consider is the hypoglycemia that may result from the mitigating measure of using insulin. *Lawson v. CSX Transportation*, 245 F.3d 916, 925–926 (7th Cir. 2001). This actual or potential hypoglycemia may, in turn, greatly affect several major life activities, perhaps most obviously eating.

The major life activity of eating may be affected by the use of a mitigating measure if a person is required to adhere to substantial dietary restrictions or has to maintain a rigid eating schedule. *Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One–First Definition, § IV(C)(3) (EEOC 12/13/99), http://www.eeoc.gov/policy/docs/field-ada.html. More specifically, the EEOC observes that "[b]oth food and lack of food can cause severe short and/or long-term medical problems for people with diabetes. They must consider the impact on the disease of everything they eat, how much they eat, and when they eat." *Id.*[115] The case law also recognizes this fact. *See, e.g., Branham v. Snow*, 392 F.3d 896, 903–904 (7th Cir. 2004)

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[112] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484 (1999).

[113] *See, e.g., McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999) (finding a genuine issue of material fact as to whether, even with medication and other treatment, the plaintiff's mental impairment substantially limited his major life activities of sleeping and engaging in sexual relations), *amended on other grounds*, 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000); *Taylor v. Phoenixville School District*, 184 F.3d 296 (3d Cir. 1999) (secretary's ongoing symptoms of bipolar disorder, coupled with the side effects of her medication, raised a fact issue as to whether she was substantially limited in thinking); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032 (D. Ariz. 1999) (finding sufficient evidence for a reasonable jury to conclude that the employee was substantially limited in the major life activity of hearing, even taking into account the use of several compensating measures).

[114] *Compare Williamson v. International Paper Co.*, 85 F. Supp. 2d 1184, 1189 n.8 (S.D. Ala. 2000) (plaintiff's speculations as to the possibility of a diabetic coma and liver damage from his medication was insufficient to establish a substantial limitation); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448, 454 (S.D. Tex. 1999) (although epilepsy and anti-epileptic drugs have been known to potentially create limitations on the major life activities of thinking and learning, it was not clear from the evidence that plaintiff had experienced a substantial limitation on those functions).

[115] The EEOC thus advises its investigators to ask whether a person's ability to eat and/or eating habits had to be altered, and if so in what ways. *Id.*

("For Mr. Branham, these negative side effects are many," including significant restrictions in eating to respond with sufficient precision to his blood sugar readings).

The mitigating measures used to manage diabetes also have negative effects that may limit the ability to care for oneself. The EEOC recognizes that for individuals with diabetes, "the ability to care for themselves may require significant changes and/or disruptions to their daily activities to control the frequency and severity of incidents of high blood sugar (hyperglycemia) and low blood sugar (hypoglycemia)." *Instructions for Field Offices, supra*, Part One–First Definition, § IV(C)(4).

Note that one court has suggested that avoiding certain major life activities may be analyzed as the side effects of mitigating measures. *Lutz v. Glendale Union High Sch., Dist. No. 205*, 8 Fed. Appx. 720, 721–722 (9th Cir. 2001) (mem.) (plaintiff with "brittle" diabetes was substantially limited in walking because she had to avoid walking "any distance" in order to prevent a low blood sugar reaction with potentially life-threatening consequences). Although the results in that case are no doubt correct, other cases suggest that avoiding a major life activity is not analyzed as a mitigating measure; instead, if a person's impairment requires avoidance of a major life activity, that is simply evidence of a substantial limitation in the activity. *Compare Capobianco v. City of New York*, 422 F.3d 47, 59 n.9 (2d Cir. Sep. 1, 2005). *See also Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) ("the disability definition does not turn on personal choice" and "the limitations on reproduction may be insurmountable" because the plaintiff's "HIV infection controlled her decision not to have a child").

7. Consider whether the limitations are substantial.

Neither the ADA nor the Rehabilitation Act define "substantially limits,"[116] nor do the Rehabilitation Act regulations that were given deference in *Toyota Motor*. The EEOC's Title I regulations, however, do define the term.[117] As suggested above, although the Supreme Court has not expressed its view on the deference due those regulations,[118] most lower courts follow the EEOC guidance on this point.[119]

The Supreme Court has stated that "substantial" means considerable or to a large degree.[120] Clearly, an impairment substantially limits a major life activity if, as a result of the impairment, the individual is unable to perform the major life activity,[121] but substantial limitations need not rise to

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[116] *Dupre v. Charter Behavioral Health Systems of Lafayette, Inc.*, 242 F.3d 610, 614 (5th Cir. 2001).

[117] 29 C.F.R. § 1630.2(j).

[118] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 194 (2002).

[119] *See, e.g., Dupre v. Charter Behavioral Health Systems of Lafayette, Inc.*, 242 F.3d 610, 614 (5th Cir. 2001); *Heyman v. Queens Village Committee for Mental Health*, 198 F.3d 68, 72 (2d Cir. 1999).

[120] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999).

[121] 29 C.F.R. § 1630.2(j), *cited in Pryor v. Trane Co.*, 138 F.3d 1024, 1025 (5th Cir. 1998) (while the statute does not define "substantially limits," the EEOC regulations "provide significant guidance").

the level of "utter inabilities."[122]

A person is also substantially limited if significantly restricted in the condition, manner or duration of performing a major life activity as compared to the average person in the general population.[123] Courts should therefore consider the nature and severity of the impairment,[124] its duration or expected duration,[125] and its actual or expected permanent or long-term impact.[126] Note, however, that the focus is not on whether the individual participates in a major life activity despite an impairment, but, rather, on whether the individual faces significant obstacles when doing so.[127]

Because a substantial limitation is assessed in comparison with the "average person," it may be necessary to submit "comparator" information about the abilities of an average person.[128] Note,

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[122] *Taylor v. Phoenixville School District*, 184 F.3d 296, 307 (3d Cir. 1999), *citing Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999). *See also Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 22 (1st Cir. 2002) ("The focus is not on whether the individual has the courage to participate in the major life activity despite her impairment, but, rather, on whether she faces significant obstacles when she does so.").

[123] 29 C.F.R. § 1630.2(j), *cited in Pryor v. Trane Co.*, 138 F.3d 1024, 1025 (5th Cir. 1998) (while the statute does not define "substantially limits," the EEOC regulations "provide significant guidance").

[124] *Id. See also Leicht v. Hawaiian Airlines, Inc.*, 77 F. Supp. 2d 1134 (D. Hawaii 1999) (fact that plaintiff's lung cancer went into remission after four months did not render condition "temporary" and unprotected because the substantial limitation determination considers not only duration, but nature and severity, and the court could not conclude that as a matter of law, life-threatening cancer is not a disability if it is life-threatening for "only" four months).

[125] 29 C.F.R. § 1630.2(j), *cited in Pryor v. Trane Co.*, 138 F.3d 1024, 1025 (5th Cir. 1998) (while the statute does not define "substantially limits," the EEOC regulations "provide significant guidance").

[126] *Id.*

[127] *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 22 (1st Cir. 2002) (plaintiff's "optimistic self-assessment of her capabilities . . . was more a testament to her determination than to her condition."). *See also Muovich v. Raleigh County Bd. of Educ.*, 58 Fed. Appx. 584, 591 (4th Cir. 2003) (unreported decision) (continuing to work despite illness does not mean plaintiff did not have a disability; "[w]e see no reason to penalize a plaintiff who is willing to continue working, despite substantial discomfort and the risk of worsening--and possibly permanent--injury, when her employer refuses to provide a reasonable accommodation."); *Olsen v. Toyota Technical Ctr.*, 2002 WL 31958183, at *11 (Mich. App. Dec. 27, 2002) (unreported opinion) ("the fact that he stoically continued to work despite the pain and physical limitations does not and should not preclude him from being a person with a disability").

[128] *Compare Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1240–1241 (10th Cir. 2001) (although "comparative evidence is not required as a matter of law to withstand a motion for summary judgment where the impairment appears substantially limiting on its face," when the only restriction recommended by the doctor is the forty pound lifting restriction, plaintiff should describe substantial limitations on day-to-day activities, long-term impact of restriction, or present comparative evidence as to the general population's lifting capabilities); *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 439 (7th Cir. 2000) (reversing summary judgment for the employer, but noting that "evidence of how [plaintiff's] impairment limited her ability to walk in comparison to the average member of the population . . ., if not required, is certainly helpful"); *Vanderpool v. Sysco Food Services of Portland, Inc.*, 177 F. Supp. 2d 1135, 1138 (D. Or. 2001) (comparator information not required when jury was capable of inferring it); *Witt v. Northwest Aluminum Co.*, 177 F. Supp. 2d 1127, 1130–1131 (D. Or. 2001) (comparator evidence may be required, and judicial notice not appropriate, but "in appropriate cases factfinders may draw on their own experience to determine whether particular impairments constitute 'substantial limitations' of major life activities"); *D'Amato v. Long Island R.R. Co.*, 2001 WL 563569, at *4 (S.D.N.Y. May 24, 2001) (testimony of inability to walk more than 50 to 100 feet, along with doctor's supporting affidavit, raises an issue of material fact as to whether plaintiff is "significantly restricted as to the ... manner

however, that there is no hard percentile "cut-off" for the existence of disability, because "average" or "most people" does not intend a precise mathematical average.[129] Moreover, substantial limitations should not depend on quantitative outcomes or "end results" (like good grades or academic success); instead the focus should be on the manner of performing a major life activity.[130] Thus, a person who is able to do major life activities only with a lot of pain may be substantially limited,[131] as is someone who takes excessively long to complete such tasks.[132]

Although the question of whether an impairment is substantially limiting should ordinarily be inappropriate for summary judgment,[133] many courts have taken a restrictive view about what

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or duration" he can walk compared to the average person); *Ward v. Wal-Mart Stores, Inc.*, 140 F. Supp. 2d 1220, 1225 (D.N.M. 2001) (comparative evidence not required because the impairment was substantially limiting on its face). *See also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 668, 672 n.17 (2001) (disability was not contested on appeal, but the Supreme Court noted that Martin had a disability because his degenerative circulatory disorder caused severe pain and prevented him from walking an 18-hole golf course that is 5 miles in length).

But cf. Maynard v. Pneumatic Prods. Corp., 233 F.3d 1344, 1347–1348 (11th Cir. 2000) ("To sustain his burden of proof, Maynard needed to prove that his ability to walk is significantly restricted as compared to the average person in the general population ... [b]ut Maynard offers no proof of how far the average person can walk"), *vacated and superseded on other grounds on rehearing*, 256 F.3d 1259 (11th Cir. 2001); *McCleary v. National Cold Storage, Inc.*, 67 F. Supp. 2d 1288, 1302 n.4 (D. Kan. 1999) ("Admittedly, evidence of comparative abilities is not necessary in every case for the plaintiff to survive summary judgment on the issue of disability . . .[but s]uch evidence . . . is critical here, as the plaintiff offers no evidence of any stringent medical restrictions being placed on his work or physical activities.").

For examples of how some courts treat the comparison process, *see, e.g., Swanson v. University of Cincinnati*, 268 F.3d 307, 316 (6th Cir. 2001) (inability to sleep more than five hours not "optimal," but not substantially limiting); *Schumacher v. General Security Services Corp.*, 230 F.3d 1367 (9th Cir. 2000) (finding no disability after comparing plaintiff to average man of same age); *Wood v. Redi-Mix, Inc.*, 218 F. Supp. 2d 1094, 1101 (S.D. Iowa 2002) (inability to walk more than a half mile without resting is a moderate, but not a substantial, limitation). For a critique of some of this case law, see the NCD's ADA Policy Brief No. 6: *Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity* (Feb. 13, 2003), at n.31, http://www.ncd.gov/newsroom/publications/2003/extentoflimitations.htm .

[129] *Bartlett v. New York State Bd. of Law Examiners*, 2001 WL 930792, at *41 (S.D.N.Y. Aug. 15, 2001).

[130] *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 23 (1st Cir. 2002); *Bartlett v. New York State Bd. of Law Examiners*, 2001 WL 930792, at *37–38 (S.D.N.Y. Aug. 15, 2001). *But cf. Bowen v. Income Producing Mgmt. of Oklahoma*, 202 F.3d 1282, 1287–1288 (10th Cir. 2000).

[131] *See, e.g., Hoskins v. Oakland County Sheriff's Dept.*, 227 F.3d 719, 725 (6th Cir. 2000) (although the plaintiff "'attempt[s] to do everything,' she must sometimes cease for a time performing daily activities because of the pain"); *EEOC v. Walden*, 2002 WL 31011859, at *17 (S.D.N.Y. Sep. 9, 2002); *Wolz v. Deaton-Kennedy Co.*, 2001 WL 699096, at *4–7 (N.D. Ill. June 20, 2001) (finding sufficient evidence in testimony of pain associated with fibromyalgia, and noting that subjective pain "is the very nature of" this condition); *Marasovich v. Pairie Material Sales*, 1999 WL 1101244, at *6 (N.D. Ill. Dec. 1, 1999); *Shelton v. General Electric Aerospace Div.*, 1998 WL 187413, at *9 (N.D.N.Y. April 14, 1997) (inability to perform keyboarding and other tasks involved in job assignment without severe pain, absent significant accommodations). *See also Dropinski v. Douglas County*, 2001 WL 1580201, at *3 (D. Neb. Dec. 5, 2001), *aff'd*, 298 F.3d 704 (8th Cir. 2002).

[132] *Fenney v. Dakota, Minnesota & Eastern Railroad Co.*, 327 F.3d 707, 715–716 (8th Cir. 2003); *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1135 (9th Cir. 2001), *cert. denied*, 535 U.S. 1011 (2002); *EEOC v. Walden*, 2002 WL 31011859, at *16 (S.D.N.Y. Sep. 9, 2002); *Bartlett v. New York State Bd. of Law Examiners*, 2001 WL 930792, at *35–36, 38 (S.D.N.Y. Aug. 15, 2001).

[133] *Gabriel v. City of Chicago*, 9 F. Supp. 2d 974, 982-983 (N.D. Ill. 1998). *See also Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 24 (1st Cir. 2002). Note, too, that in *Toyota Motor*, the Court did not decide

constitutes a substantial limitation,[134] so it is important that the plaintiff introduce sufficient evidence to make a good record on this issue.[135]

Obviously, this analysis requires an individualized assessment,[136] and disability must be

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whether the plaintiff had a disability or not, but instead sent the case back to the lower courts to determine that issue. It did find that the inability to do "repetitive work with hands and arms extended at or above shoulder levels for extended periods of time" in a specialized assembly line job is not sufficient proof of a disability, but it also suggested that the plaintiff's other limitations—that she had to avoid sweeping, quit dancing, occasionally seek help dressing, and reduce how often she played with her children, gardened, and drove long distances—might show a disability, but do not automatically show one.

[134] The Supreme Court has stated that substantial limitation "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled," in order to comport with the legislative findings that some 43 million Americans have one or more physical or mental disabilities. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002). For an analysis and critique of this view, see the National Council on Disability's ADA Policy Brief No. 4, *Broad or Narrow Construction of the ADA* (Dec. 16, 2002), available online at http://www.ncd.gov/newsroom/publications/2002/broadnarrowconstruction.htm.

For an example of the effect of this dicta, *see, e.g., Mahan v. Crowell*, 295 F.3d 585, 591–592 (6th Cir. 2002) (although previous courts found that 50% of jobs was enough to constitute a "broad range" of jobs, the court found that after *Toyota*, 47% is not enough). *See also* Burgdorf, "'Substantially Limited' Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability," 42 Vill. L. Rev. 409 (1997); National Council on Disability's ADA Policy Brief No. 6: *Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity* (Feb. 13, 2003), at nn.29-30, http://www.ncd.gov/newsroom/publications/2002/broadnarrowconstruction.htm; National Council on Disability's ADA Policy Brief No. 13, *The Supreme Court's ADA Decisions Regarding Substantial Limitation of Major Life Activities*, at nn. 98–102 (April 29, 2003), online at http://www.ncd.gov/newsroom/publications/2003/limitation.htm.

[135] *Compare, for example, Pritchard v. Southern Company Services*, 92 F.3d 1130, 1133–1134 (11th Cir. 1996), *modified on other grounds*, 102 F.3d 1118 (11th Cir. 1996) (summary judgment denied; plaintiff showed that her depression and dysautonomia resulted in fatigue, sleep and communication problems, difficulty concentrating, and suicidal thoughts, and required medication and disability leave); *EEOC v. Walden*, 2002 WL 31011859, at *13–18 (S.D.N.Y. Sep. 9, 2002) (extensive documentation of limitation in sitting); *Krocka v. Bransfield*, 969 F. Supp. 1073, 1083 (N.D. Ill. 1997), *aff'd on other grounds sub nom Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000); *MacLean v. State of Arizona*, 986 P.2d 903 (Ariz. App. 1999) (summary judgment denied; plaintiff submitted evidence showing that even with her asthma medication, her breathing was substantially limited); and *Stone v. La Quinta Inns, Inc.*, 942 F. Supp. 261, 264 (E.D. La. 1996) (affidavit regarding visual impairment sufficient), *with Adam v. Dickinson Place Charitable Corp.*, 1997 WL 148020 (N.D. Tex. March 21, 1997) (plaintiff failed to put forth evidence that bipolar disorder substantially impaired activities), *aff'd*, 119 F.3d 1 (5th Cir., unpublished opinion), *cert. denied*, 522 U.S. 916 (1997).

For some other examples of cases with a sufficiently detailed explanation, *see Lawson v. CSX Transportation, Inc.*, 245 F.3d 916 (7th Cir. 2001) (evidence described in detail what it means to have to manage diabetes), and *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2d Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999), *aff'd on remand*, 226 F.3d 69 (2d Cir. 2000). *See also Nawrot v. CPC Int'l*, 277 F.3d 896 (7th Cir. 2002).

For an example of a case without adequate detail, *see Williamson v. International Paper Co.*, 85 F. Supp. 2d 1184, 1189 n.8 (S.D. Ala. 2000) (plaintiff claimed a substantial limitation in sleeping due to frequent urination, but offered "no evidence as to the how many times a night plaintiff is awakened by the urge to urinate, how long he stays awake each time/how quickly he falls back to sleep, whether there are any mitigating measures available, the effect of the irregular sleep on his daily responsibilities and activities").

[136] *Webb v. Garelick Mfg. Co.*, 94 F.3d 484 (8th Cir. 1996) (court must examine individual's particular situation, which includes determining class of jobs relevant to the individual based on the individual's skills and experience; it is error to suggest that plaintiff cannot be disabled as long as there is any job she can do); *Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959, 962–963 (7th Cir. 1996) (district court failed to conduct "meaningful analysis" of the particular situation); *Desai v. Tire Kingdom Inc.*, 944 F. Supp. 1232 (M.D. Fla. 1996); *E.E. Black, Ltd. v.*

assessed on a case-by-case basis.[137] Moreover, after *Sutton*, courts should not rely on the outcome in other cases involving similar impairments, but must analyze each case on its own facts.[138]

There are some basic guidelines, however. Conditions that last for only a few days or weeks and that have no permanent or long-term effect generally are not seen as substantially limiting impairments.[139] For example, common colds, most broken bones, and sprains requiring some bed rest and possibly even hospitalization without permanent injury are insufficient to constitute a substantial impairment.[140]

One unresolved question is whether a limitation can only be "substantial" if it affects the ability to perform some task that is "central to daily life." This interpretation of *Toyota Motor* seems to have been adopted by a few courts.[141]

An impairment need not be permanent to be a disability.[142] If the impairment is severe, and its duration is indefinite or expected to last several months, it may constitute a disability.[143] For

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Marshall, 497 F. Supp. 1088, 1100 (D. Hawaii 1980).

[137] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999). *See also Kapche v. City of San Antonio*, 304 F.3d 493, 497–498 (5th Cir. 2002) (rejecting *per se* exclusions from ADA protections).

[138] *McGinnis v. Alamo Community College Dist.*, 207 F.3d 276 (5th Cir. 2000); *Quint v. A.E. Staley Manufacturing Co.*, 172 F.3d 1, 13 (1st Cir. 1999) (court found unpersuasive other decisions rejecting disability claims by persons with the same diagnosis, because of the individualized analysis required); *EEOC v. Walden*, 2002 WL 31011859, at *13 (S.D.N.Y. Sep. 9, 2002); *Durrant v. Chemical/Chase Bank/Manhattan Bank, N.A.*, 81 F. Supp. 2d 518, 520 (S.D.N.Y. 2000); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1040 (D. Ariz. 1999).

[139] *Blanton v. Winston Printing Co.*, 868 F Supp. 804 (M.D.N.C. 1984). For example, if the only limitation remaining after an employee's return to work from a short leave of absence was the need to attend six monthly therapy sessions, there may not be a substantial limitation. *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir. 1999).

[140] *Hutchinson v. United Parcel Service, Inc.*, 883 F. Supp. 379, 402–403 (N.D. Iowa 1995) (employee not disabled because her injuries, though not minor, were temporary, and any permanent impairment was slight); *Blanton v. Winston Printing Co.*, 868 F. Supp. 804 (M.D.N.C. 1994) (knee injury only precluding plaintiff from working for a few days during each of three consecutive months was not a substantial impairment); 29 C.F.R. pt. 1630 App. § 1630.2(j); *EEOC Compliance Manual* § 902.4(d), http://www.eeoc.gov/policy/docs/902cm.html.

[141] *See Philip v. Ford Motor Co.*, 2002 WL 391348, at *1 et seq. (D. Minn. March 8, 2002); *Alexander v. The Northland Inn*, 2002 WL 236703, at *4 (D. Minn. Feb. 15, 2002).

[142] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002) (impairment's impact must be either "permanent or long term").

[143] *EEOC Compliance Manual* § 902.4(d), http://www.eeoc.gov/policy/docs/902cm.html; *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (EEOC March 25, 1997), Question 7, http://www.eeoc.gov/policy/docs/psych.html; *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1270 (10th Cir. 1998); *Patterson v. Downtown Medical & Diagnostic Center*, 866 F. Supp. 1379, 1381 (M.D. Fla. 1994); *Demarah v. Texaco Group, Inc.*, 88 F. Supp. 2d 1150, 1155 (D. Colo. 2000); *Leicht v. Hawaiian Airlines, Inc.*, 77 F. Supp. 2d 1134 (D. Hawaii 1999) (fact that plaintiff's lung cancer went into remission after four months did not render condition "temporary" and unprotected because the substantial limitation determination considers not only duration, but nature and severity, and the court could not conclude that as a matter of law, life-threatening cancer is not a disability if it is life-threatening for "only" four months); *Shannon v. City of Philadelphia*, 1999 WL 1065210, at *3–4 (E.D. Pa. Nov. 23, 1999) (plaintiff

example, a person who is blinded or paralyzed but is expected to recover fully at some indefinite future date is disabled.[144] In addition, even a temporary mood disorder is a disability if it requires ten months of hospitalization followed by intensive outpatient therapy.[145] Moreover, some impairments that appear to be temporary may have long-term residual effects; that is, the impairment may have a long-term impact on the individual's ability to perform one or more major life activities.

The holding in *Bragdon* makes clear that a disease need not produce continuous symptoms, or even visible ones, in order to constitute a disability.[146] Chronic conditions that are substantially limiting impairments when active, and conditions that are highly likely to recur in substantially limiting forms, are also disabilities.[147] Similarly, conditions that are severe only during "flare-ups" may still constitute a disability.[148] Moreover, certainty of consequences is not required.[149] If there is a significant risk of adverse effects on a major life activity, and it remains even after mitigating measures, the person may still have a substantial limitation.[150]

In *Taylor v. Phoenixville School District*,[151] although the plaintiff was clearly substantially

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who started experiencing symptoms in January, was diagnosed with major depression in June, and then hospitalized for 12 days, had a disability); *Potvin v. Champlain Cable Corp.*, 687 A.2d 95, 98 (Vt. 1996) (impairment that lasted for at least five months and was the result of a long-term illness that required three separate surgeries was not too fleeting to be covered under state law that adopted the ADA's definition of disability). *But cf. Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462, 468–470 (4th Cir. 2002) (9-month recovery period after surgery insufficient).

[144] *EEOC Compliance Manual* § 902.4(d), http://www.eeoc.gov/policy/docs/902cm.html.

[145] EEOC Compliance Manual § 902.4(d) (second Example 2) (as modified Feb. 1, 2000), online at http://www.eeoc.gov/policy/docs/902cm.html.

[146] *Bragdon v. Abbott*, 524 U.S. 624 (1998).

[147] *See, e.g., Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 680 (8th Cir. 2001); *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 439 n.4 (7th Cir. 2000); *Service v. Union Pacific R.R. Co.*, 153 F. Supp. 2d 1187, 1192 (E.D. Cal. 2001); EEOC Compliance Manual § 902.4(d), http://www.eeoc.gov/policy/docs/902cm.html.

[148] *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 309 (3d Cir. 1999) (chronic, episodic conditions can easily limit how well a person performs an activity, and repeated flare-ups can have a cumulative weight that wears down a person's resolve and continually breaks apart longer-term projects); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 780–781 (6th Cir. 1998); *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 599–600 (7th Cir. 1998); *Barnes v. Northwest Iowa Health Ctr.*, 238 F. Supp. 2d 1053, 1074–1078 (N.D. Iowa 2002); *Service v. Union Pacific R.R. Co.*, 153 F. Supp. 2d 1187, 1192 (E.D. Cal. 2001) ("Plaintiff need not be in a constant state of distress or suffer an asthmatic attack to qualify as disabled under the ADA."); *Lanci v. Arthur Andersen, LLP*, 2000 WL 329226, at *4 (S.D.N.Y. March 29, 2000); *Dutton v. Johnson County Board of County Commissioners*, 859 F. Supp. 498, 506 (D. Kan. 1994). *But cf. Brown v. Holy Name Churc*, 80 F. Supp. 2d 1261, 1269 (D. Wyo. 2000) ("Notwithstanding plaintiff's claims that she is in constant pain, which she treats by taking large amounts of ibuprofen and that she generally sleeps sitting in a chair, the Court concludes that plaintiff is not disabled").

[149] *See, e.g., Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 743 (N.D. Ill. 1998), *citing Bragdon v. Abbott*; *Berk v. Bates Advertising USA, Inc.*, 25 F. Supp. 2d 265, 269 (S.D.N.Y. 1998).

[150] *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) (finding the evidence that medication could reduce the risk of perinatal HIV transmission from about 25% to 8% did not mean that plaintiff was not substantially limited in the major life activity of reproduction).

[151] *Taylor v. Phoenixville School District*, 184 F.3d 296, 308–309 (3d Cir. 1999) (secretary who took lithium for

limited while she was hospitalized, she did not need to prove that she continued to experience symptoms of that magnitude, since paranoia and distorted mood caused by bipolar disease can have a "substantial" or "considerable" impact on thinking well before they force hospitalization. The ongoing impact of her condition was evidenced by her need for frequent treatment, careful monitoring of medication every day, and a subsequent medical leave. Nor was her claim defeated by the fact that she did not experience problems every day. The court recognized that chronic, episodic conditions can easily limit how well a person performs an activity as compared to the rest of the population, since repeated flare-ups of poor health can have a cumulative weight that wears down a person's resolve and continually breaks apart longer-term projects.

Note, too, that Social Security determinations of disability, while not dispositive, can be relevant and significant evidence in showing that a disability exists for ADA purposes.[152]

Finally, keep in mind that the focus should not be on all of the things that the plaintiff can do, but rather on those activities that he or she cannot do, or is substantially limited in doing.[153] Otherwise, the ADA would be "inapplicable to those individuals most likely to have the capacity to perform various jobs capably if provided with reasonable accommodations."[154]

Many courts have found satisfactory evidence of a substantial limitation, and other examples may be found in the EEOC's *Instructions for Field Offices*, which also includes a list of questions to address in analyzing this issue.[155]

Note that this issue is closely tied to the question of incomplete mitigation discussed above at § A(5), so the authorities discussed in that part should also be considered.

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her bipolar disorder raised a fact issue regarding whether she had a disability even after taking medication).

[152] *Lawson v. CSX Transportation, Inc.*, 245 F.3d 916, 927 (7th Cir. 2001); *Gonzales v. Columbia Hospital*, 2002 WL 31245379, at *3 (N.D. Tex. 2002). *But cf. Lebron-Torres v. Whitehall Laboratories*, 251 F.3d 236, 241–242 (1st Cir. 2001) (worker compensation award for 20% disability to back during medical leave from employment, while suggestive of possible disability, was insufficient).

Note, too, that applications for such disability benefits can also pose an obstacle to ADA Title I claims, based on the defense of "judicial estoppel." *See, e.g., Giles v. General Elec. Co.*, 245 F.3d 474, 483–485 (5th Cir. 2001).

[153] *See, e.g., Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 22 (1st Cir. 2002) ("The key question is not whether a handicapped person accomplishes her goals, but whether she encounters significant handicap-related obstacles in doing so."); *Belk v. Southwestern Bell*, 194 F.3d 946, 950 (8th Cir. 1999) (finding the plaintiff had a disability, notwithstanding the employer's litany of all of the activities that the plaintiff could engage in); *Carter v. Northwest Airlines, Inc.*, 2003 WL 403131, at *3 (N.D. Ill. Feb. 20, 2003) (although defendant placed great importance on plaintiff's ability to drive to a health club, sit in the hot tub, swim in the pool, use an upper body weight lifting machine, and ride a stationary bike, those activities are not relevant to whether plaintiff's impairment substantially limited his ability to walk); *EEOC v. United Parcel Services, Inc.*, 149 F. Supp. 2d 1115, 1156 (N.D.Cal. 2000) ("the fact that claimants lead normal lives proves little"), *rev'd on other grounds*, 306 F.3d 794 (9th Cir. 2002); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1038–1039 (D. Ariz. 1999).

[154] *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1038–1039 (D. Ariz. 1999).

[155] *Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One–First Definition, § III (EEOC Dec. 13, 1999), available online at http://www.eeoc.gov/policy/docs/field-ada.html.

Note, too, that some employers have contended that they should not be held liable for discriminatory actions if they based their decisions on an "honest," though mistaken, belief that the employee was not a qualified individual with a disability. But in such cases, the "key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action," and it is therefore improper to use the so-called "honest belief" defense in such a way that it "credits an employer's belief without requiring that it be reasonably based on particularized facts."[156]

DIABETES CASES: As noted above, persons with diabetes may be substantially limited in one or more major life activities because they "must be constantly vigilant in closely controlling blood sugar levels. This involves monitoring body signals for fluctuations in blood sugar levels, checking blood sugar levels mechanically, and, based on those levels, adjusting food intake, physical activity, and medications (including insulin and oral medications)." *EEOC Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One–First Definition, § IV(C)(4) (Dec. 1999), http://www.eeoc.gov/policy/docs/field-ada.html.

For case law accepting similar arguments, see, e.g., *Branham v. Snow*, 392 F.3d 896, 903–904 (7th Cir. 2004) ("For Mr. Branham, these negative side effects are many," including significant restrictions in eating to respond with sufficient precision to his blood sugar readings); *Lutz v. Glendale Union High Sch., Dist. No. 205*, 8 Fed. Appx. 720, 721–722 (9th Cir.2001) (mem.) (plaintiff with "brittle" diabetes was substantially limited in walking because she could not walk "any distance" without risking a low blood sugar reaction with potentially life-threatening consequences); *Fraser v. Goodale*, 342 F.3d 1032, 1041–1043 (9th Cir. 2003) (control regimen substantially limited eating); *Lawson v. CSX Transp., Inc*., 245 F.3d 916, 924–926 (7th Cir. 2001) (similar); *Downs v. AOL Time Warner***,** 2006 WL 162563, at *6–7 (S.D. Ohio Jan. 20, 2006) (similar case involving type 2 diabetes); *U.S. v. Mississippi Dept. of Public Safety*, 309 F. Supp. 2d 837, 840 (S.D. Miss. 2004) (similar); *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 746–748 (N.D. Ill. 1998) (eating and waste elimination); *Shirley v. Westgate Fabrics, Inc*., 1997 WL 135605, at *3 (N.D. Tex. March 17, 1997) (similar).

A person with diabetes may also be substantially limited during periods of high or low blood sugar levels. *Instructions for Field Offices, supra*, Part One–First Definition, § III(A)(1) ("frequent and severe headaches, blurred vision, urination, thirst, and other symptoms of high levels of blood sugar (hyperglycemia) for a person with diabetes."). For case law adopting similar analysis, see, e.g., *Nawrot v. CPC Intern*., 277 F.3d 896, 904–905 (7th Cir. 2002) (plaintiff with "brittle" diabetes substantially limited in thinking and caring for himself); *Bugg-Barber v. Randstad US, L.P.*, 271 F. Supp. 2d 120, 128 (D.D.C. 2003) ("diabetes substantially affects her abilities to perform manual tasks when it is wildly out of kilter."); *Gonsalves v. J.F. Fredericks Tool Co., Inc*., 964 F. Supp. 616, 621 (D. Conn. 1997) (diabetes affected eating and sleeping); *Coghlan v. H.J. Heinz Co*., 851 F. Supp. 808, 813–

[156] *Lowe v. Alabama Power*, 244 F.3d 1305, 1308 (11th Cir. 2001), *citing Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998). *See also Holiday v. City of Chattanooga*, 206 F.3d 637 (6th Cir. 2000) (employer violated ADA in rejecting applicant with HIV disease based on medical exam that was not sufficiently individualized and had no objective medical or scientific support).

814 (N.D. Tex.1994) (similar).

Diabetes complications also "may result in substantial limitations in major life activities." These complications may include "eye disease (seeing); nerve damage (sitting, standing, walking, eating); blood vessel disease (walking); and difficulties with reproduction. These are all complications that are not controlled by insulin." *Id*. at § III(A)(8). *See also EEOC v. Sears, Roebuck & Co*., 417 F.3d 789, 802 (7th Cir. 2005) (diabetic neuropathy substantially limited plaintiff's walking in light of evidence that she could not walk one city block without right leg and feet becoming numb—and walking becoming "nearly impossible and extremely slow"—together with evidence that condition was long term, deteriorating over a period of two years); *Needle v. Alling & Cory, Inc.*, 88 F. Supp. 2d 100, 105 (W.D.N.Y. 2000) (warehouse worker was substantially limited in walking as result of his diabetes, which led to amputation of all of his toes on his right foot, surgical removal of his left heel and vision problems, and permanent medical restrictions on walking).

Finally, courts should recognize that "determining the severity of impairment necessary to constitute a disability is a fact-intensive inquiry, and there is little absolute guidance for trial courts other than allowing the fact finder to sort out the issue." *Herman v. Kvaerner of Philadelphia Shipyard, Inc.*, 461 F. Supp. 2d 332, 336 (E.D. Pa. 2006).

8. **Consider separately whether the limitations on working are substantial.**

As stated above, "working" should be the last major life activity considered,[157] since a substantial limitation in working requires a showing that the plaintiff was regarded as precluded from a broad range or class of jobs.[158] The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[159] On the other hand, the fact that a plaintiff finds a new job does not prevent showing that he or she is substantially limited in working.[160]

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[157] Many employment discrimination cases under the ADA are lost because the only life activity that the person alleged was affected was working. But a claim of disability discrimination, even disability discrimination in employment, may be based on a limitation in activities other than working, because a person may have a disability under the ADA without any limitation in working whatsoever. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 201 (2002). *See also* the amicus brief filed by the United States in *Toyota Motor*, and apparently relied on by the Supreme Court in its analysis. 2001 WL 747852, at *19 (June 29, 2001) ("It would be perverse to suggest that individuals substantially limited in some other major life activity could be deprived of Title I protection because work-related functions are not impaired.").

[158] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999) (following EEOC guidance); *Aldrup v. Caldera*, 274 F.3d 282, 286–287 (5th Cir. 2001). *Compare Butterfield v. Sidney Public Schools*, 32 P.3d 1243, 1246 (Mont. 2001) (tracking federal law, but finding it sufficient that plaintiff was limited in a class of jobs; he need not prove a limitation in a "substantial class" of jobs).

[159] 29 C.F.R. § 1630.2(j)(3)(I), cited in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999); *Dupre v. Charter Behavioral Health Systems of Lafayette Inc.*, 242 F.3d 610, 614 (5th Cir. 2001); *Aldrup v. Caldera*, 274 F.3d 282, 287 (5th Cir. 2001) (depression caused by "the stress and anxiety of having to work with certain employees" merely shows an inability to work at one specific location, and is not evidence of a general inability to perform a class of jobs). Note that neither the Title II nor the Title III regulations include this limiting language.

[160] *E.g., Smith v. Quikrete Companies, Inc.*, 204 F. Supp. 2d 1003, 1009 (W.D. Ky. 2002); *Bergdale v. Uni-*

A class of jobs is defined as including jobs utilizing similar training, knowledge, skills or abilities.[161] There is authority supporting various classes of jobs, including: semi-skilled jobs,[162] heavy labor,[163] laborer/maintenance worker,[164] manufacturing jobs,[165] assembly line work,[166] production jobs,[167] keyboarding,[168] data entry jobs,[169] truck driving,[170] safety-sensitive transit positions (including driver and conductor),[171] transportation jobs involving moving vehicles and equipment,[172] mechanic,[173] airplane mechanic,[174] pilot,[175] supervisory jobs,[176] manager or administrator,[177] teaching,[178] psychotherapy jobs,[179] registered nurse,[180] jobs using legal training or

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Select USA, Inc., 2002 WL 1362229 (N.D. Iowa 2002).

[161] 29 C.F.R. § 1630.2(j)(3)(ii)(B).

[162] 29 C.F.R. Part 1630 App. § 1630.2(j).

[163] 29 C.F.R. Part 1630 App. § 1630.2(j); *EEOC Compliance Manual* § 902.8(f), *citing E.E.Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1091 (D. Hawaii 1980).

[164] *White v. Stroh Brewery Co.*, 15 F. Supp. 2d 734, 738–739 (E.D. Pa. 1998).

[165] *Henderson v. Ardco, Inc.*, 247 F.3d 645, 654 (6th Cir. 2001).

[166] *Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998); *DePaoli v. Abbott Laboratories*, 140 F.3d 668, 673 (7th Cir. 1998) (jobs requiring a specialized license, or for which a person would need to undergo significant new training, can help draw the line between classes of jobs). *But cf. McKay v. Toyota Motor Manufacturing, USA, Inc.*, 110 F.3d 369, 373–374 (6th Cir. 1997) (assembly line jobs requiring repetitive motion of the right hand not a class).

[167] *Bones v. Honeywell Int'l, Inc.*, 223 F. Supp. 2d 1203, 1220–1222 (D. Kan. 2002) (suggesting such a class, but finding insufficient evidence of a significant restriction). *See also Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 676 (7th Cir. 1998) (production associate).

[168] *Shelton v. General Electric Aerospace Div.*, 1998 WL 187413, at *9 (N.D.N.Y. April 14, 1997).

[169] *Johnson v. Univ. of Pennsylvania*, 1997 WL 379191, at *4 (E.D. Pa. June 26, 1997).

[170] *Black v. Roadway Express, Inc.*, 297 F.3d 445, 453 n.12 (6th Cir. 2002).

[171] *Stewart v. New York City Transit Authority*, 2001 WL 279772, at *5 (E.D.N.Y. Feb. 16, 2001).

[172] *Coleman v. Southern Pacific Transp. Co.*, 997 F. Supp. 1197, 1205–1206 (D. Ariz. 1998).

[173] *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 524–525 (1999).

[174] *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1445 (10th Cir. 1996).

[175] *Sutton v United Air Lines, Inc.*, 130 F.3d 893, 905 (10th Cir. 1997), *aff'd on other grounds*, 527 U.S. 471 (1999). *But cf. Witte v. Delta Air Lines, Inc.*, 138 F.3d 1336, 1370–1371 (11th Cir. 1998) (pilot is a subclass of a broader class that includes ground trainer, flight instructor, and airline management or administrative employees).

[176] *Cline v. Wal-Mart Stores, Inc.*, 114 F.3d 294, 304 (4th Cir. 1998).

[177] *Herbst v. Geberal Accident Ins. Co.*, 1999 WL 820194, at *5 n.7 (E.D. Pa. Sep. 30, 1999).

law degrees,[181] law enforcement,[182] public safety jobs,[183] security jobs (including jail and prison guards, and security officers),[184] and reinsurance broker.[185] There are also various authorities explaining what a "broad range" of jobs is.[186]

The following factors may be considered in determining whether an individual is substantially limited in the major life activity of working: (1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified, and the number and types of jobs utilizing similar training, knowledge, skills or abilities from which the individual is also disqualified (class of jobs); and/or (3) the number and types of other jobs not utilizing similar training, knowledge, skills or abilities from which the individual is also disqualified (broad range of jobs in various classes).[187]

Although this evidentiary burden on the plaintiff (to show the number and types of jobs precluded) is not intended to be onerous,[188] many courts take a very restrictive view on this issue. It

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[178] *Patterson v. Chicago Ass'n for Retarded Citizens*, 150 F.3d 719, 725 (7th Cir. 1998).

[179] *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 507 (7th Cir. 1998).

[180] *Powderly v. Muir*, 1999 WL 447598, at *5 (N.D. Cal. June 24, 1999).

[181] *Bartlett v. New York State Bd. of Law Examiners*, 226 F.3d 69, 83 (2d Cir. 2000).

[182] *McKenzie v. Dovala*, 242 F.3d 967, 971–972 (10th Cir. 2001).

[183] *Edge v. City of St. Paul*, 2002 WL 31260012, at *5 (D. Minn. Oct. 7, 2002). *But cf. Crocker v. City of Kenner*, 2002 WL 31115255, at *8 (E.D. La. Sep. 23, 2002) (firefighting not a class of jobs).

[184] *Muller v. Costello*, 187 F.3d 298, 313 (2d Cir. 1999).

[185] *Bullock v. Balis & Co.*, 2001 WL 253857, at *8 (E.D. Pa. March 14, 2001).

[186] For some examples, *see, e.g.*, 29 C.F.R. § 1630.2(j)(3); 29 C.F.R. Part 1630 app. § 1630.2; EEOC Compliance Manual §§ 902.4 and 902.8(f)(Example 3) (as modified, Feb. 1, 2000), online at http://www.eeoc.gov/policy/docs/902cm.html. *See also Taraila v. City of Wilmington*, 2000 WL 1708218, at *4 (D. Del. 2000) ("substantial limitation on a 'broad range'"of jobs means more than a few job types. Instead, it is an across the board limitation impacting many different professions in many different environments."). *But cf. Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) ("if a host of different types of jobs are available, one is not precluded from a broad range of jobs").

[187] 29 C.F.R. § 1630.2(j)(3)(ii). *See also Leslie v. St. Vincent New Hope, Inc.*, 916 F. Supp. 879, 884–885 (S.D.Ind. 1996).

Note that some courts seem to *require* that the plaintiff offer evidence of these factors. *Compare Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110, 1116–1117 (D.C. Cir.) (en banc), *cert. denied*, 534 U.S. 818 (2001)

[188] *See, e.g., EEOC v. Rockwell Intern. Corp.*, 243 F.3d 1012, 1017 (7th Cir. 2001), *citing* 29 C.F.R. Pt. 1630, App. § 1630.2(j); *Quint v. A.E. Staley Manufacturing Co.*, 172 F.3d 1, 12 (1st Cir. 1999). *See also Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110, 1116–1117 (D.C.Cir.) (en banc), *cert. denied*, 534 U.S. 818 (2001) ("[T]he evidentiary burden [of proffering testimony or data on the class of jobs or range of jobs from which the plaintiff is disqualified] ... is not onerous. [Plaintiff] need not necessarily produce expert vocational testimony, although such evidence might be very persuasive. In the proper case simple government job statistics may suffice."); *Mullins v. Crowell*, 228 F.3d 1305, 1314 n. 18 (11th Cir.2000) ("[E]xpert vocational evidence, although instructive, is not

is still possible to prevail,[189] however, especially with the help of a vocational expert who can assist by establishing the number and types of jobs within a certain geographical area that the plaintiff is now precluded from performing.[190]

On the other hand, the plaintiff must, despite substantial limitation, be able to perform the essential functions of his or her job with or without reasonable accommodation, so the impairment must not be overstated. This tension must be discussed with the plaintiff to avoid adverse admissions on documents and during deposition.

Early depositions of the employer's unschooled first- and second-level supervisors may yield helpful admissions regarding the range of jobs that the employee is unable to perform.[191] The

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necessary to establish that a person is substantially limited in the major life activity of working. Furthermore, a plaintiff could testify from his or her own extensive job search whether other jobs that he or she could perform were available in the geographical area."); *Vanderpool v. Sysco Food Services of Portland, Inc.*, 177 F. Supp. 2d 1135, 1138 (D. Or. 2001) (geographical area analysis is not intended to be overly rigid; jury could extrapolate citywide figures to the state).

[189] *See, e.g., Dupre v. Charter Behavioral Health Systems of Lafayette Inc.*, 242 F.3d 610, 614–615 (5th Cir. 2001) (plaintiff's testimony that she was unable to perform any manual labor, citing only digging holes or repairing railroad track as examples, was insufficient evidence to show that she was disqualified from all manual labor); *Scott v. Montgomery County Government*, 164 F. Supp. 2d 502, 506 (D. Md. 2001) (since plaintiff's sleep apnea meant that he might fall asleep at anytime with little warning, a whole range of jobs at his skill level is unavailable to him, including positions that require operation of heavy machinery or driving of any sort); *Hansen v. Smallwood, Reynolds, Stewart, Stewart & Associates, Inc.*, 119 F. Supp. 2d 1296, 1300–1301 (M.D. Fla. 2000).

[190] *See, e.g., Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 491–492 (8th Cir. 2002); *Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 680 (8th Cir. 2001); *Smith v. Quikrete Companies, Inc.*, 204 F. Supp. 2d 1003, 1009 (W.D. Ky. 2002); *Vanderpool v. Sysco Food Services of Portland, Inc.*, 177 F. Supp. 2d 1135, 1137–1138 (D. Or. 2001); *Capizzi v. County of Placer*, 135 F. Supp. 2d 1105, 1113 (E.D. Cal. 2001); *Dropinski v. Douglas County*, 2001 WL 1580201, at *4 (D. Neb. Dec. 5, 2001), *aff'd*, 298 F.3d 704 (8th Cir. 2002); *Haysman v. Food Lion*, 893 F. Supp. 1092 (S.D. Ga. 1995) (vocational expert's testimony that plaintiff precluded from 90% of all jobs in national economy is enough to preclude summary judgment); *Scharff v. Frank*, 791 F. Supp. 182 (S.D. Ohio 1991) (summary judgment denied because vocational expert testified that plaintiff would be prevented from performing one-half of unskilled jobs in local economy).

Compare E.E.O.C. v. Rockwell Intern. Corp., 243 F.3d 1012, 1018 (7th Cir. 2001) ("Although the Commission is not required to calculate an exact percentage of jobs from which Rockwell perceived the claimants as foreclosed, it cannot survive summary judgment in a case like this with no evidence of the demographics of the relevant labor market."); *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110, 1116–1117 (D.C.Cir.) (en banc), *cert. denied*, 534 U.S. 818 (2001) ("[T]he evidentiary burden [of proffering testimony or data on the class of jobs or range of jobs from which the plaintiff is disqualified] . . . is not onerous. [Plaintiff] need not necessarily produce expert vocational testimony, although such evidence might be very persuasive. In the proper case simple government job statistics may suffice."); *Quint v. A.E. Staley Manufacturing Co.*, 172 F.3d 1, 12 (1st Cir. 1999) (unobjected to vocational testimony of neurologist sufficient to raise fact question); *Palao v. Fel-Pro., Inc.*, 117 F. Supp. 2d 764, 767–769 (N.D. Ill. 2000) (similar).

Other courts have stated that vocational testimony is not necessary when the limitations are obvious. *Gelabert-Ladenham v. American Airlines, Inc.*, 252 F.3d 54, 60 (1st Cir. 2001). *See also May v. Pace Heritage Div.*, 2002 WL 1008461, at *4 (N.D. Ill. May 17, 2002) (plaintiff's own testimony that she was rejected for numerous different kinds of jobs because of her impairment was enough to create a fact issue).

Some courts have rejected vocational testimony if it is merely conclusory. *See, e.g., Mellon v. Federal Express Corp.*, 239 F.3d 954, 957 (8th Cir. 2001); *McKay v. Toyota Motor Mfg. USA, Inc.*, 878 F. Supp. 1012 (E.D. Ky. 1995).

Many courts have rejected ADA claims in the absence of any vocational evidence. *See, e.g., Cote v. MTP, Inc.*, 2003 WL 1477853, at *2 (N.D. Ill. March 21, 2003).

[191] *Doane v. Omaha*, 115 F.3d 624, 628 (8th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998) (police chief

employee's unsuccessful application for other jobs with the same employer may also help to prove this.[192] Early consultation with medical and vocational experts can also be important.

DIABETES CASES: Some cases have found sufficient evidence that the plaintiff's diabetes substantially limited the major life activity of working. *See, e.g., Gilday v. Mecosta County*, 124 F.3d 760, 765 (6th Cir.1997) (finding irritability associated with plaintiff's diabetes condition sufficient to show plaintiff was substantially limited in major life activity of working for purposes of withstanding summary judgment);[193] *Carruth v. Cont'l Gen. Tire, Inc.*, 2001 WL 1775992, at *9 (S.D. Ill. June 21, 2001) (holding that plaintiff's inability to work, due to flare-ups of his diabetes, for 21 days in a six month period was sufficient to support a finding that plaintiff was substantially limited in the major life activity of working)

Several other cases have found sufficient evidence that the employer *regarded* diabetes as substantially limiting the ability to work.[194] *See, e.g., Rodriguez v. Conagra Grocery Products Co.*, 436 F.3d 468 (5th Cir. 2005) (summary judgment for plaintiff based on employer's refusal to consider plaintiff for *any* of its jobs, rejecting the plaintiff for an unskilled job that any able-bodied person could do, and relying on uninformed, stereotyping assessments); *Davis v. Ozarks Elec. Co-op***.,** 2006 WL 931903, at * 3–4 (W.D. Ark. Apr. 10, 2006) (employer thought plaintiff with type 2 diabetes "might pass out at any time"); *Holopirek v. Kennedy and Coe, LLC*., 303 F. Supp. 2d 1223, 1232 (D. Kan. 2004); *EEOC v. Northwest Airlines, Inc*., 246 F. Supp. 2d 916, 924–925 (W.D. Tenn. 2002); *Zenaty-Paulson v. McLane/Sunwest, Inc.*, 2000 WL 33300666, at *7 (D. Ariz. Mar. 20, 2000). There is contrary authority, of course. *See, e.g., Burden v. Southwestern Bell Telephone Co.*., 2005 WL 2444622, at *6–7 (N.D. Tex. Oct. 3, 2005) (plaintiff alleged only that he was regarded as substantially limited in the major life activity of working, and the court held that his exclusion from driving jobs did not constitute a perception that he was unable to do a broad range or class of jobs), *aff'd on other grounds*, 183 Fed. Appx. 414 (5th Cir. 2006); *Bivins v. Gonzales***,** 2005 WL 2864746, at *4 (D. Md. Oct. 26, 2005) (similar). *See also McCarty v. Adrian Steel Co*., 2006 WL 212036, at *8 (E.D. Mich. Jan. 27, 2006) (not specifically identifying working as the major life activity, but relying on fact that employer perceived the plaintiff would suffer work absences in the future).

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testified that he recommended rejecting plaintiff's application because he perceived plaintiff's vision problems as significant); *Garza v. Abbott Laboratories*, 940 F. Supp. 1227 (N.D. Ill. 1996) (employer's placement director admitted plaintiff was not able to perform any of 100 jobs in the company); *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1168–1169 (E.D. Mich. 1996) (employer representative testified that plaintiff's failure to pass medical exam disqualified him from numerous other jobs besides the one applied for).

[192] *Kohnke v. Delta Airlines, Inc*., 1995 WL 505973, at *4–6 (N.D. Ill. Aug. 23, 1995) (plaintiff produced sufficient evidence of a record of a disability, and that the employer may have regarded his impairment as preventing him from performing several jobs within customer service agent classification, and therefore believed that he was disqualified him from a broad class of jobs). Note, however, that the law should not require proof that the plaintiff has been denied other jobs in order to be "regarded as" having a disability. *Cook v. State of Rhode Island*, 10 F.3d 17, 25–26 (1st Cir. 1993) (Rehabilitation Act).

[193] Note that *Gilday* was decided prior, and contrary, to *Sutton*, although its analysis still has precedential value when limited to the time period prior to Gilday's use of mitigating measures.

[194] For an analysis of the "regarded as" prong, see Part C below.

In *Lawson v. CSX Transp., Inc*., 245 F.3d 916, 926–927 (7th Cir. 2001), the court found that the plaintiff had a *record of* a substantial limitation in working as a result of pre-mitigation diabetes.[195]

9. If no single condition or side effect is substantially limiting, consider whether they are in combination.

An individual with two or more impairments that are not, by themselves, substantially limiting but that taken together substantially limit one or more major life activities, has a disability.[196]

Likewise, if a person uses two or more mitigating measures, and the side effects of each are not substantially limiting by themselves, the negative effects of all the mitigating measures together may substantially limit one or more major life activities. They may also be substantially limiting when viewed in combination with the residual effects of incomplete mitigation. For example, a person with Attention Deficit Disorder (ADD) and depression may take medications to treat each condition. Each medication, by itself, affects the ability to sleep (a major life activity), but may not substantially limit it. However, the combined effect of the two medications may substantially limit the person's sleep.[197]

DIABETES CASES: *See, e.g., Chasse v. Computer Sciences Corp*., 453 F. Supp. 2d 503, 516 (D. Conn. 2006) ("while a typical ankle break might not substantially limit a major life activity, plaintiff's conditions of diabetes and Charcot Cartilage could be found to have exacerbated the effects of her break such that she was left with a long-term impairment.").

10. Determine if you have expert support, and if there are *Daubert* issues.

While expert testimony may not be required,[198] it is often advisable.[199] Note, too, that even

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[195] For an analysis of the "record of" prong, see Part B below.

[196] 29 C.F.R. pt. 1630 App. § 1630.2(j) (multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute disability); *EEOC Compliance Manual* § 902.4(e), http://www.eeoc.gov/policy/docs/902cm.html. *See also Switala v. Schwan's Sales Enterprise*, 231 F. Supp. 2d 672, 681 (N.D. Ohio 2002) (court "must consider whether plaintiff's impairments, together or separately, prevent or severely restrict him from [major life] activities").

Note, however, that while various impairments may be cumulated for the purpose of assessing substantial limitation, at least one court has refused to cumulate various minor activities to form a single "major" life activity. *Barnes v. Northwest Iowa Health Ctr.*, 238 F. Supp .2d 1053, 1072–1073 (N.D. Iowa 2002). *But compare Scarborough v. Natsios*, 190 F. Supp. 2d 5, 20 (D.D.C. 2002) (court assumed that plaintiff had an impairment because although he never presented a specific diagnosis to his employer until after his termination, the medical documentation that he *did* submit before leaving, although sporadic and contradictory, indicated that he intermittently suffered from various maladies, including pain and diarrhea).

[197] *Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One–First Definition, § IV(B) (EEOC Dec. 13, 1999), available online at http://www.eeoc.gov/policy/docs/field-ada.html.

[198] *See, e.g., Butt v. Greenbelt Home Care Agency*, 2003 WL 685026, at *14, n.7 (N.D. Iowa Feb. 28, 2003)

expert testimony may be inadequate if it is speculative,[200] conclusory,[201] or subject to a *Daubert* challenge.[202]

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[203] the Supreme Court focused on the

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(collecting authorities); *EEOC v. Walden*, 2002 WL 31011859, at *14 (S.D.N.Y. Sep. 9, 2002) (defendant argued that plaintiff's claim must fail "without comparative evidence in the form of expert testimony that addresses the capability of the average person. . . . The Court disagrees."). *See also Marinelli v. City of Erie*, 216 F.3d 354, 360 (3d Cir. 2000) ("the necessity of medical testimony turns on the extent to which the alleged impairment is within the comprehension of a jury that does not possess a command of medical or otherwise scientific knowledge."); *Martyne v. Parkside Medical Services*, 2000 WL 748096, at *4 (N.D. Ill. June 8, 2000) (expert testimony has been required only if there are no objective manifestations of disability); *Hood v. Diamond Products, Inc.*, 658 N.E.2d 738, 742 (Ohio 1996) (court stated that while "the better practice in this type of situation would have been to submit expert medical testimony, we do not believe that under the circumstances of this particular case such testimony was required").

In several other cases, courts have implicitly found sufficient evidence of disability without expert evidence, albeit without discussing the issue. *See, e.g., McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999) (plaintiff's testimony about impotence was sufficient to raise fact issue for trial), *amended on other grounds*, 201 F.3d 1211 (9th Cir.), *cert. denied*, 530 U.S. 1243 (2000); *Seaman v. C.S.P.H., Inc.*, 1997 WL 538751, at *11 (N.D. Tex. Aug. 25, 1997) (plaintiff's testimony that he had trouble sleeping, and that his physician told him that this problem was partially attributable to his mental disorder, was sufficient evidence to survive summary judgment, at least when there was consistent information in medical records in evidence).

But cf. Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 795 n.2 (9th Cir. 2001) (court refused to take judicial notice that inability to use keyboard would limit class of clerical jobs), *clarified on other grounds*, 292 F.3d 1045 (9th Cir. 2002); *Douglas v. Victor Capital Group*, 21 F. Supp. 2d 379, 391–392 (S.D.N.Y. 1998) (plaintiff "has not submitted any *admissible* medical evidence to support his claim that he cannot walk without a cane or crutches and is physically impaired as to walking. . . . The only medical evidence he submitted, several doctor letters . . . are inadmissible hearsay"); *Sabrah v. Lucent Technologies, Inc.*, 1998 WL 792503, at *9 (N.D. Tex. Nov. 6, 1998) (collecting cases, and stating that plaintiff's own testimony, unsupported by medical evidence, was insufficient to show that she her endometriosis substantially limited her ability to give birth), *aff'd without reported opinion*, 200 F.3d 815 (5th Cir. 1999).

[199] *See, e.g., Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 748 (N.D. Ill. 1998) (distinguishing other cases on the basis of their lack of expert testimony).

[200] *Compare Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999).

[201] *Caleff v. Gillette Co.*, 322 F.3d 75, 83 (1st Cir. 2003) (conclusory statement by doctor insufficient); *Broussard v. University of California, at Berkeley*, 192 F.3d 1252, 1257–1258 (9th Cir. 1999); *Kellogg v. Union Pacific Railroad*, 2000 WL 766281, at *5 (D. Neb. Jan. 28, 2000), *aff'd on other grounds*, 233 F.3d 1083 (8th Cir. 2000); *McCleary v. National Cold Storage, Inc.*, 67 F. Supp. 2d 1288, 1299 (D. Kan. 1999); *Heiman v. United Parcel Service, Inc.*, 1999 WL 1179647, at *4 (D. Kan. Dec. 2, 1999), *aff'd on similar grounds in unpub. opinion*, 12 Fed. Appx. 656, 661–664 (10th Cir. 2001). *Compare Mellon v. Federal Express Corp.*, 239 F.3d 954, 957 (8th Cir. 2001) (no showing that vocational expert had "either personal knowledge or expertise on the medical claims that would justify using his affidavit to fill in the deficiencies in plaintiff's showing of a physical disability;" court also inferred that expert "does not comprehend or disagrees with the case-law construing the statutory definition of disability").

But cf. Patten v. Wal-Mart Stores East, Inc., 2001 WL 631258, at *5 (D.Me. June 7, 2001) (court denied summary judgment relying in part on affidavit of treating physician that stated: "Throughout the time that I have treated . . . [plaintiff], her . . . [condition] has rendered her substantially limited in her ability to walk and run. She has been significantly limited in her ability to walk and run if compared to an adult who does not have CMT with otherwise similar attributes").

[202] *See, e.g., E.E.O.C. v. Rockwell Intern. Corp.*, 243 F.3d 1012 (7th Cir. 2001).

[203] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

admissibility of scientific expert testimony and discussed certain specific factors which would be helpful in determining the reliability of a particular scientific theory or technique. The Court determined that the trial judge has a "gatekeeping" obligation to determine whether expert testimony is admissible under Fed. R. Evid. 702. In *Kumho Tire Company, Ltd. v. Carmichael*,[204] the Court concluded that *Daubert* applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge. Thus, the gatekeeping duty applies to all expert testimony. These cases represent a judicially-created attempt to rid the courts of "junk science." Many cases involving *Daubert* questions deal with the issue of causation, such as toxic torts cases in which the question is whether a particular manifestation is linked to a specific product or chemical.

Most of the cases interpreting *Daubert* and *Kumho* are not relevant in the context of employment discrimination, since the causation question is very different. It does not matter in most such cases whether or not science can explain what causes a particular impairment,[205] and there are a number of "impairments" that are "substantially limiting" for which we do not have any useful understanding of causation. "Causation" in the *Daubert* sense is probably only relevant in such cases in which a question is raised as to whether or not the client's diagnosis is real. Conditions likely to trigger a *Daubert* challenge may include controversial or little-understood conditions such as multiple chemical sensitivity (MCS).[206]

Note, however, that some courts have excluded expert testimony in ADA cases relying on *Daubert*. While this usually involved vocational testimony,[207] one court rejected the testimony of the plaintiff's own allergy doctor as unreliable under *Daubert*.[208] Though such results should be

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[204] *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999).

[205] *Compare LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 764 (W.D.Mich. 2001) (defendant's argument that testimony of treating physician was insufficient, faulting him for not pinpointing the physiological cause of the diagnosis of infertility, was unreasonable).

[206] ADA claims based on MCS have often been unsuccessful to date. Some courts find inadequate evidence of its existence, and exclude evidence based on a *Daubert* challenge, *e.g. Gabbard v. Linn-Benton Housing Authority*, 219 F. Supp. 2d 1130, 1134–1135 (D.Or. 2002) (and cases cited). Other courts base the result on inadequate evidence of a substantially limiting impairment. *See, e.g., Keck v. New York State Office of Alcoholism and Substance Abuse*, 10 F. Supp. 2d 194 (N.D.N.Y. 1998) (summary judgment granted because there was no evidence that MCS substantially limits a major life activity); *Minor v. Stanford University*, 1999 WL 414305, at *3–5 (N.D.Cal. June 14, 1999) (similar).

There is somewhat more positive authority, however. *Compare Muovich v. Raleigh County Bd. of Educ.*, 58 Fed. Appx. 584 (4th Cir. 2003) (unreported decision) (plaintiff withdrew her allegation of MCS, and established a different impairment at trial); *Gits v. Minn. Mining & Manufacturing, Inc.*, 2001 WL 1409961 (D. Minn. June 15, 2001) (finding MCS an impairment, but also finding insufficient evidence that it was substantially limiting).

[207] *EEOC v. Rockwell Int'l Corp.*, 60 F. Supp. 2d 791, 794–798 (N.D. Ill. 1999), *aff'd*, 243 F.3d 1012 (7th Cir. 2001); *Paulus v. Kaiser Permanente Medical Group*, 1999 WL 352041, at *3 (N.D. Cal. May 24, 1999).

[208] *Little v. Ford Motor Co.*, 1999 U.S. Dist. LEXIS 13552, at *8 n.3 (W.D. Mo. 1999) (using the *Daubert* challenge as a basis for finding the plaintiff's ADA claim frivolous and unreasonable, justifying an award of attorneys fees to the employer). In this instance, the exclusion was based on the fact that the doctor did not physically examine the plaintiff, did not perform any standardized testing, and based his information about the plaintiff's working environment on a ten minute telephone interview.

unusual, and the exclusion of vocational evidence may constitute an abuse of discretion,[209] these cases suggest the need for careful expert preparation, even of those persons traditionally qualified as experts.

B. Record of a disability

Even if a person does not have an actual disability under the above analysis, he or she may be protected under the law because of a record of a disability.[210] The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability.[211] The case law suggests that a record of a disability can be established in various ways,[212] including through the use of paid disability leave,[213] multiple hospitalizations and ongoing treatments for severe and permanent back condition,[214] the plaintiff presenting employer with documents evidencing various restrictions,[215] the employer's awareness that plaintiff had been hospitalized for cancer surgery,[216] and employee statements in job interview.[217]

1. Determine if the client has a record of a past impairment.

A person has a disability if there is a record of an impairment that at one time substantially limited a major life activity.[218] Such a record may exist, for example, for a time prior to the

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[209] *E.g.*, *Deppe v. United Airlines*, 217 F.3d 1262, 1266 (9th Cir. 2000) (finding abuse of discretion in excluding vocational testimony in "regarded as" case); *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 785–786 (3d Cir. 1998) (trial court should not have rejected vocational evidence).

[210] 42 U.S.C. § 12102(2)(B) (ADA); 29 U.S.C. § 705(20)(B)(iii) (Rehabilitation Act).

[211] *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1159 (10th Cir. 2002).

[212] *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 510 (7th Cir. 1998) (diagnosis alone is insufficient to establish record of disability; plaintiff must show records reflecting substantial limitation in major life activity, and that employer was aware of this history; here, plaintiff with attention deficit disorder produced sufficient evidence to defeat summary judgment); *Pace v. Paris Maintenance Co.*, 107 F. Supp. 2d 251, 260–261 (S.D.N.Y. 2000) (rejecting requirement that recovering alcoholic produce medical records of his past disability).

[213] *Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1134 (11th Cir. 1996), *modified on other grounds*, 102 F.3d 1118 (11th Cir. 1996).

[214] *Wheaton v. Ogden Newspapers, Inc.*, 66 F. Supp. 2d 1053, 1064–1065 (N.D. Iowa 1999).

[215] *Martinez v. Cole Sewell Corp.*, 233 F. Supp. 2d 1097, 1131 (N.D. Iowa 2002) (medical records and other evidence raised fact issue whether plaintiff had a record of an impairment to her right thumb, wrist, and shoulder that substantially limited the major life activity of lifting); *Murray v. Surgical Specialties Corp.*, 1999 WL 46583, at *5 (E.D. Pa. Jan. 14, 1999) (plaintiff provided employer with doctor's note stating that plaintiff was unable to work for an unspecified period due to back pain, as well as applications for short-term disability insurance benefits).

[216] *Mark v. Burke Rehabilitation Hospital*, 1997 WL 189124, at *3–4 (S.D.N.Y. April 17, 1997).

[217] *Lawson v. CSX Transportation, Inc.*, 245 F.3d 916, 927 n.10 (7th Cir. 2001) (plaintiff explained in interview that his lack of work experience was due to his diabetic condition, explained that he had been "totally disabled for a number of years," and said that he was presently receiving disability benefits.).

[218] To prove a record of a disability, the plaintiff must show not only that he or she has a record of an injury or impairment, but the evidence must also show that the impairment substantially limited a major life activity. *Dupre v.*

plaintiff's use of a mitigating measure, or prior to such a measure's effective control.[219] Again, the EEOC's *Instructions for Field Offices* list numerous other examples, as well as questions to address in analyzing such cases.[220]

> **DIABETES CASES**: As suggested above, the EEOC states that "[e]ven if diabetes is not currently substantially limiting because it is controlled by diet, exercise, oral medication, and/or insulin, and there are no serious side effects, the condition may be a disability because it was substantially limiting in the past (i.e., before it was diagnosed and adequately treated)." *Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA)*, Question 1 (EEOC Oct. 29, 2003), http://www.eeoc.gov/facts/diabetes.html. The case law also recognizes this fact. *Lawson v. CSX Transp., Inc*., 245 F.3d 916, 926–927 (7th Cir. 2001) (plaintiff had a *record of* a substantial limitation in working as a result of pre-mitigation diabetes).

2. If so, determine if the records reflect a substantial limitation.

There must be a record of an impairment that did in fact substantially limit a major life activity, and some courts have suggested that the record itself must reflect the limitations, and not simply the impairment.[221]

> **DIABETES CASES**: At least one circuit found a sufficient record that diabetes resulted in a past substantial limitation in the major life activity of working. *Lawson v. CSX Transp., Inc*., 245 F.3d 916, 926–927 (7th Cir. 2001) (evidence included fact that plaintiff received Social Security disability benefits for a dozen years). Note, too, that some older diabetes cases have found sufficient evidence to establish a "record of" claim without specifically identifying the major life activities that were substantially limited. *See, e.g., Testerman v. Chrysler Corp*., 1998 WL 71827, at *9 (D. Del. Feb. 11, 1998); *Shirley v. Westgate Fabrics, Inc*., 1997 WL 135605, at *3 (N.D. Tex. March 17, 1997) (evidence included multiple prior

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Charter Behavioral Health Systems of Lafayette, Inc., 242 F.3d 610, 615 (5th Cir. 2001). A record with only a "vague mention of the existence and treatment" of a back problem, and that did not indicate whether or how this problem substantially limited any major life activity, was insufficient. *Id.*

[219] *Stensrud v. Szabo Contracting Company, Inc.*, 1999 WL 592110, at *5 (N.D. Ill. Aug. 2, 1999) (although truck driver with on-the-job injuries and psoriatic arthritis did not have an actual disability, he had a record of one, since he was unable to work as a truck driver for a year and a half before recovery); *Leicht v. Hawaiian Airlines, Inc.*, 77 F. Supp. 2d 1134 (D. Hawaii 1999) (question of fact raised as to whether plaintiff hospitalized for four months with heart ailments and lung cancer had "record of" disability), *rev'd on other grounds*, 15 Fed. Appx. 552 (9th Cir. 2001) (unpublished).

[220] *Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One–Second Definition, § I (EEOC 12/13/99), http://www.eeoc.gov/policydocs/field-ada.htmj>.

[221] *Compare Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 510 (7th Cir. 1998) (diagnosis alone is insufficient to establish record of disability; plaintiff must show records reflecting substantial limitation in major life activity, and that employer was aware of this history; here, plaintiff with attention deficit disorder produced sufficient evidence to defeat summary judgment); *EEOC v. R.J. Gallagher Company*, 181 F.3d 654, 655 (5th Cir. 1999) (similar); *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1457 (7th Cir. 1995).

hospitalizations and eye surgery to correct diabetes-related hemorrhaging);[222] *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 815 (N.D. Tex. 1994) (relying on a variety of facts, including past hospitalizations).[223]

But it is important to recall that *proving a record of diabetes is not enough*. The record must reflect that this impairment was substantially limiting at some time in the past (or was misclassified as such). *See, e.g., Walz v. Marquis Corp.*, 2005 WL 758253, at *6 (D. Or. Apr. 4, 2005) ("Although Marquis' records reveal that Walz suffers from Type II insulin-dependent diabetes, they fail to reveal a level of impairment that substantially limits one or more major life activities.").

3. Determine if the defendant was aware of the record.

Although the defendant may not need to be aware of the plaintiff's record of a substantially limiting impairment in order to prove a disability, without such evidence it is hard to see how the plaintiff could ever show that the defendant acted "because of" the record of a disability (in order to find that discrimination occurred).[224]

C. Perceived Disability

Even if a person has neither an actual disability nor a record of one under the above analysis, he or she may be protected if regarded as having a disability.[225] One does not have to have some obvious specific handicap in order to fall into this category,[226] but the plaintiff is not "regarded as" having a disability unless the defendant regards the plaintiff as having a condition that substantially limits a major life activity.[227] Also note that, as with actual disabilities, it is important to consider major life activities other than working, even in an employment case.[228]

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[222] For a case reaching a contrary result on somewhat similar facts, see *Rohland v. St. Cloud Christian School*, 2004 WL 2940889, at *8 (Minn. App. Dec. 21, 2004).

[223] Although both the *Testerman* and *Coghlan* cases preceded *Sutton*, a close reading of them indicates that the notion of mitigating measures did not affect the "record of" analysis in those cases.

[224] *Compare Todd v. McCahan*, 158 F. Supp. 2d 1369 (N.D. Ga. 2000), and authorities cited; *Pace v. Paris Maintenance Co.*, 107 F. Supp. 2d 251, 261–262 (S.D.N.Y. 2000). *See also Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One–Second Definition, § I(C)(2) (EEOC 12/13/99), online at http://www.eeoc.gov/policy/docs/field-ada.html. See also the discussion at § A(2) above.

[225] 42 U.S.C. § 12102(2)(C) (ADA); 29 U.S.C. § 705(20)(B)(iii) (Rehabilitation Act); *Peters v. Baldwin Union Free School Dist.*, 320 F.3d 164, 168 (2d Cir. 2003); *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1290 (llth Cir. 2002).

[226] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999) (that plaintiff has failed to state a claim that they are actually disabled does not end the inquiry); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 654, 656 (5th Cir. 1999) (similar); *Johnson v. American Chamber of Commerce Publishers, Inc.*, 108 F.3d 818, 819 (7th Cir. 1997).

[227] *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

[228] *See, e.g., Mclnnis v. Alamo Community College Dist.*, 207 F.3d 276 (5th Cir. 2000) (plaintiff established that he was a person with a disability based on the employer's perception that the plaintiff was substantially limited in the major life activity of speaking). See also text at notes 80–84 above.

In *Sutton*, the Court expressly recognized that notwithstanding mitigating measure, there may be a perception of a disability, based on unwarranted stereotypes.[229] The Court noted that a person is regarded as having a disability if (a) the person does not have any impairment, but is mistakenly regarded as having an impairment that substantially limits a major life activity,[230] or (b) has an impairment that is not in fact substantially limiting, but which is mistakenly regarded as substantially limiting.[231] In addition, a person may have an impairment that is substantially limiting simply because of the attitudes of others toward the impairment.[232]

There are obvious difficulties in getting "into the mind" of the defendant,[233] but it is possible. Courts have held that the following may be evidence that a person was regarded as having a disability: the employer's awareness of past medical history;[234] the employer's suggestion that the employee seek treatment;[235] the employer's suggestion that the employee needed to retire;[236]

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[229] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

[230] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

[231] *Id*. The Court in *Sutton* also recognized that even one who is "cured" by medication may be regarded as disabled, and thus protected by the ADA. *Id*., 527 U.S. at 488.

[232] 45 C.F.R. § 84.3G)(2)(iv)(B) (Rehabilitation Act coordinating regulations); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 283 (1987) (deciding under the Rehabilitation Act that "an impairment might not diminish a persons's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reaction of others"); *Baulos v. Roadway Express, Inc.*, 139 F.3d 1147, 1154 (7th Cir. 1998) (citing 29 C.F.R. § 1630.2(1)); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 884–885 (6th Cir. 1996) (citing 29 C.F.R. pt. 1630, App. B, § 1630.2(1)); *Rollf v. Interim Personnel, Inc.*, 1999 WL 1095768, at *5 (E.D. Mo. Nov. 4, 1999) (the ADA is also designed to protect people from the problems stemming from the public's unfamiliarity with and insensitivity to the difficulties confronting those with disabilities); *Butterfield v. New York State*, 1998 WL401533, at *11–13 (S.D.N.Y. July 15, 1998). *See also Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 781 (6th Cir. 1998) (concluding plaintiff raised a fact issue on actual disability, noting that "[b]ecause the psoriasis causes persistent skin irritations, Cehrs is constantly afraid of other people's reactions to her condition. Her entire appearance, including the clothes she wears, is dictated by her psoriasis."); Hoffman, "Employment Discrimination Based on Cancer History: The Need for Federal Legislation," 59 Temple L.Q. 1, 4–6 (1986) (describing myths associated with cancer). Note that a person claiming discriminatory attitudes may need to put on evidence of such attitudinal barriers. *Deas v. River West*, LP, 152 F.3d 471, 478 n.16 (5th Cir. 1998).

[233] *See* National Council on Disability's ADA Policy Brief No. 6: *Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity* (2/13/03), at n. 32, http://www.ncd.gov/newsroom/publications/2003/extentoflimitations.htm.

[234] *Deppe v. United Airlines*, 217 F.3d 1262, 1265–1266 (9th Cir. 2000) (fact dispute created by conflicting testimony in light of plaintiff s known medical restrictions); *Olson v. General Elec. Astrospace*, 101 F.3d 947 (3d Cir. 1996) (although plaintiff was not disabled, employer's knowledge of plaintiff s hospitalization and illness and fact that his health was discussed during his interview create fact question as to whether employer regarded him as disabled); *Murray v. Surgical Specialties Corp.*, 1999 WL 46583, at *5 (E.D. Pa. Jan. 14, 1999) (fact issue raised by knowledge of physician's note documenting disease, and by knowledge of application for disability benefits). *But cf. Gorbitz v. Corvilla, Inc.*, 196 F.3d 879, 882 (7th Cir. 1999) (awareness of employee's numerous medical appointments after car accident, without more, is insufficient).

[235] *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1290 (11th 2002); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996) (evidence that employer encouraged employee to seek counseling and received doctor's reports diagnosing

evidence of prejudice or of concern about third parties' prejudices;[237] the entity's opinion that the plaintiff suffers from a specific condition, which, if true, would disqualify the plaintiff from the occupation;[238] concern about the employee's workers' compensation history or concern about the effect an employee may have on insurance premiums;[239] fear of injury;[240] fear that an employee would require too much time off;[241] reassignment or providing or offering accommodations, disability benefits, light duty or medical leave to an employee;[242] the employer's reliance on the use

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symptoms of various conditions was sufficient to raise fact issue as to whether it perceived him as disabled, even if he did not have disability); *Baucom v. Potter*, 225 F. Supp. 2d 585, 592 (D. Md. 2002) (recommendation by employer's doctor that plaintiff get career counseling, but only after health issues secondary to alcoholism were addressed, could reflect a perception that the plaintiff could do no work until condition improved).

[236] *Johnson v. Paradise Valley Unified School Dist.*, 251 F.3d 1222, 1228 (9th Cir. 2001) (suggesting resignation), *cert. denied*, 534 U.S. 1055 (2001); *Atkins v. USF Dugan, Inc.*, 106 F. Supp. 2d 799, 808 (M.D.N.C. 1999).

[237] *School Board of Nassau County v. Arline*, 480 U.S. 273, 283 (1987) (deciding under Rehabilitation Act that "an impairment might not diminish a persons's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reaction of others"); *McKenzie v. Dovala*, 242 F.3d 967, 970–971 (10th Cir. 2001) (concerns about public "trust" if former deputy with psychiatric history was rehired); *Thalos v. Dillon Cos., Inc.*, 86 F. Supp. 2d 1079, 1086 (D. Colo. 2000); *Ferrier v. Raytheon Corp*., 1997 WL 695552 (E.D. La. Nov. 4, 1997), *aff'd without pub. opin*., 198 F.3d 241 (5th Cir. 1999) (evidence included disclosure of plaintiff s panic disorder to third party contractor, who told employer he felt lack of trust in plaintiff); *Nedder v. Rivier College*, 944 F. Supp. 111 (D.N.H. 1996) (college may, due to stereotypes, have regarded obese faculty member as substantially limited in ability to work, and evidence that employer believed others would perceive her as less capable is relevant to this determination).

[238] *Lee v. Trustees of Dartmouth College*, 958 F. Supp. 37 (D.N.H. 1997) (school officials may have perceived resident as having multiple sclerosis; such perception would amount to perception of substantially limiting condition).

[239] *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 960–961 (10th 2002); *Haiman v. Village of Fox Lane*, 55 F. Supp. 2d 886 (N.D. I11. 1999) (supervisor complained of rising health care costs and employee's unreliability due to artery disease); *Sakellarides v. Sea-Land Service, Inc*., 2000 WL 37941 (E.D. La. Jan. 14, 2000) (issue of fact as to whether employer erroneously regarded applicant as having impairment that substantially limited the major life activity of working where EEOC found cause, and where applicant received rejection letters citing reports indicating prior claim for asbestos-related injuries); *Kresge v. Circuitek, Division of TDI*, 958 F. Supp. 223 (E.D. Pa.1997) (evidence that employer refused to hire individual because of workers' compensation history and concern about effect on insurance rates creates fact issue as to whether he was "regarded as" disabled). *See also EEOC Compliance Manual* § 902.8(a) (Example) (as modified Feb. 1, 2000), http://www.eeoc.gov/policy/docs/902cm.html (employer, who withdraws job offer because of concerns about insurance costs and attendance as a result of healthy applicant's genetic susceptibility to cancer, is regarding the applicant as substantially limited).

[240] *Munoz v. H&M Wholesale, Inc.*, 926 F. Supp. 596, 606 (S.D. Tex. 1996).

[241] *McMunn v. Memorial Sloan-Kettering Cancer Ctr*., 2000 WL 1341398, at *3–4 (S.D.N.Y. Sep. 15, 2000). *See also EEOC Compliance Manual* § 902.8(a) (Example) (as modified Feb. 1, 2000), http://www.eeoc.gov/policy/docs/902cm.html (employer, who withdraws job offer because of concerns about insurance costs and attendance as a result of healthy applicant's genetic susceptibility to cancer, is regarding the applicant as substantially limited).

[242] *Brown v. Cox*, 286 F.3d 1040, 1045 (8th 2002) (supervisors used stress as an excuse to get plaintiff out of the surgical unit, reassigning her to a temporary clerical position, from which she was expected to look elsewhere for work); *McGinnis v. Alamo Community College Dist*., 207 F.3d 276, 281–282 (5th Cir. 2000) (perceived disability shown by statements of employer's ADA coordinator, and by past transfer admittedly given as "accommodation"); *Riemer v. Illinois Dept. of Transportation*, 148 F.3d 800, 806–807 (7th Cir. 1998) (disregarding treating physician's assurance and reassigning based on recommendations of employer's doctor); *Best v. Shell Oil Co.*, 107 F.3d 544 (7th Cir. 1997) (employer relied on doctor's report and placed plaintiff on long-term disability leave; this evidence raised fact question

of medical leave;[243] stereotypes about a nondisabling condition;[244] the defendant's past experience with other people having similar diagnoses;[245] the employer's failure to distinguish between a disability and a lack of qualifications;[246] the use of mitigating measures;[247] reliance on medical reports reflecting a serious impairment;[248] comments reflecting a generalized fear or bias;[249]

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about whether employer perceived plaintiff as disabled from all truck-driving jobs); *Scott v. Montgomery County Government*, 164 F. Supp. 2d 502, 506–507 (D. Md. 2001); *Ragan v. Jeffboat, LLC*, 149 F. Supp. 2d 1053, 1069 (S.D. Ind. 2001); *Wheaton v. Ogden Newspapers, Inc.*, 66 F. Supp. 2d 1053, 1066 (N.D. Iowa 1999); *Dipol v. New York City Transit Authority*, 999 F. Supp. 309 (E.D.N.Y. 1998) (placing plaintiff on restricted duty after learning of his diabetic condition was evidence employer regarded plaintiff as disabled); *Dvorak v. Mostardi Platt Associates, Inc*., 2000 WL 1774077, at *4 (N.D. Ill. Dec. 1, 2000); *Hall v. Masterlock Co.*, 1999 WL 1458673 (M.D. Ala. Aug. 12, 1999); *Dacasin v. Bay Area Rapid Transit Dist.*, 1998 WL 827697 (N.D. Cal. Nov. 23, 1998) (putting plaintiff in program to find alternative work for injured workers, and developing vocational rehabilitation plan for him); *Vendetta v. Bell Atlantic Corp.*, 1998 WL 575111, at *8 (E.D. Pa. Sep. 8, 1998) (convening accommodations committee); *Ferrier v. Raytheon Corp.*, 1997 WL 695552 (E.D. La. Nov. 4, 1997) (evidence included excusing plaintiff from travel based on doctor's advice), *aff'd without published opinion*, 198 F.3d 241 (5th Cir. 1999); *Wagner v. Kester Solder Co*., 1995 WL 399484, at *9 (N.D. Ill. June 28, 1995) (evidence that employer offered individual disability benefits suggests that employer believed he could no longer perform duties, and raises fact question about whether he was perceived as disabled).

But cf. Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 798 (10th Cir. 2001) (employer does not concede that it regards an employee as having a disability when it takes steps to accommodate the employee's restrictions); *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 599 (8th Cir. 1998) (neither request for mental evaluation nor offer of medical leave shows plaintiff was perceived as substantially limited in major life activity). One court has suggested that accommodations do not reflect a perceived disability, at least to the extent that the accommodations were those prescribed by the treating doctor. *Mahon v. Crowell*, 295 F.3d 585, 592 (6th Cir. 2002). *See also Plant v. Morton International, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000).

[243] *Wilcock v. National Distributors, Inc*., 2001 WL 877547, at *6 (D. Me. Aug. 2, 2001); *Julia v. Janssen, Inc*., 92 F. Supp. 2d 25, 37 (D.P.R. 2000); *Kolovos v. Sheahan*, 1999 WL 1101919 (N.D. Ill. Nov. 30, 1999).

[244] *Cerrato v. Durham*, 941 F. Supp. 388 (S.D.N.Y. 1996) (plaintiffs pregnancy is not disability; employer's misperception that pregnancy impaired her could form basis for claim); *DiSante v. Henderson*, 2000 WL 250225 (E.D. Pa. March 2, 2000) (employer believed that plaintiff was "seeing things," and had him escorted out "for his own safety"); *Hall v. Masterlock Co.*, 1999 WL 1458673 (M.D. Ala. 1999) (employee put on short-term disability, and employer feared that "anything could happen" when plaintiff was terminated).

[245] *Heymann v. Queens Village Committee for Mental Health*, 198 F.3d 68, 73 (2d Cir. 1999) (past experiences involving employee with lymphoma); *Keller v. Board of Educ. of City of Albuquerque*, 182 F. Supp. 2d 1148, 1156 (D.N.M. 2001) (similar).

[246] *Barnes v. Cochran*, 944 F. Supp. 897 (S.D. Fla. 1996) (applicant established prima facie case of perceived disability; employer claimed that it did not perceive applicant as disabled but rather as not meeting job qualifications, but employer seemed to confuse two concepts).

[247] *Gasser v. Ramsey*, 125 F. Supp. 2d 1, 3–4 (D.D.C. 2000) (use of anti-clotting medication); *Wilson v. Gayfers Montgomery Fair Co.*, 953 F. Supp. 1415 (M.D. Ala.1996) (suggesting that wearing corrective hearing devices to compensate for hearing loss may be sufficient to establish "regarded as").

[248] *Best v. Shell Oil Co.*, 107 F.3d 544 (7th Cir. 1997) (employer relied on doctor's report and placed plaintiff on long-term disability leave; this evidence raised fact question about whether employer perceived plaintiff as disabled from all truck-driving jobs); *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1520–1522 (9th Cir. 1995) (similar results under state law); *Fink v. City of New York*, 129 F. Supp. 2d 511, 529–531 (S.D.N.Y. 2001) (inaccurate hearing-test results would have precluded plaintiff from a broad range of jobs); *Fliss v. Movado Group, Inc.*, 2000 WL 1154633, at *7 (N.D. I11. Aug. 14, 2000) (jury could conclude from employer's failure to contact plaintiff or her doctor after receiving doctor's restrictions letter that employer believed plaintiff was unable to perform a broad range of jobs); *EEOC v. Texas Bus*

rejecting an applicant without individualized testing;[250] disqualifying an employee because of limitations on activities not required for the job;[251] other admissions by the defendant;[252] forced demotions;[253] the failure to provide job descriptions to a medical examiner;[254] evidence of pretext;[255]

Lines, 923 F. Supp. 965, 974–979 (S.D. Tex. 1996) (plaintiff was regarded as disabled; employer relied on doctor's erroneous opinion that plaintiff could not drive bus safely due to her obesity); *EEOC v. Williams Electronics Games, Inc.*, 1997 WL 201584 (N.D. I11. April 18, 1997) (employer's reliance on report listing serious back problems suggests that it perceived applicant as having back condition that caused permanent or long-term impairment, and supports inference that he was regarded as disabled). *But cf. Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 190–192 (3d Cir. 1999) (employer who relies on erroneous medical information has limited defense in cases in which error was caused by plaintiff).

[249] *Brown v. Cox*, 286 F.3d 1040, 1045 (8th Cir. 2002) (sufficient evidence that defendant perceived MS as making plaintiff unfit for any job with defendant); *Chandler v. Specialty Tires of America (Tennessee), Inc.*, 283 F.3d 818, 824 (6th Cir. 2002) (under identical definition in state law, court found sufficient the evidence that supervisor lost confidence in plaintiff after he discovered that she had taken an overdose of pills in a suicide attempt); *McKenzie v. Dovala*, 242 F.3d 967, 970–971 (10th Cir. 2001); *Ross v. Campbell Soup Co*., 237 F.3d 701, 708 (6th Cir. 2001) (referring to plaintiff as a "back case"); *Wordekemper v. Western Iowa Homes & Equipment, Inc.*, 2003 WL 1222443, at *9 (N.D. Iowa March 17, 2003) (similar); *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 161 (E.D.N.Y. 2002) (perception that plaintiff was "extremely emotional" and "irrational," coupled with employer's knowledge of mental impairment and supervisor's suggestion that plaintiff should see a psychiatrist, was sufficient to create fact issue as to whether plaintiff was regarded as substantially limited in interacting with others); *Gonzalez v. Rite Aid of New York, Inc.*, 199 F. Supp. 2d 122, 135 (S.D.N.Y. 2002) (refusing to promote plaintiff because of "his health"); *Ragan v. Jeffboat, LLC*, 149 F. Supp 2d 1053, 1068–1070 (S.D. Ind. 2001); *EEOC v. Automatic Systems Co.*, 169 F. Supp. 2d 1001, 1007 (D. Minn. 2001) (sufficient evidence that employer believed plaintiffs heart condition rendered him unable to work in any job with supervisory or managerial duties); *Bullock v. Balis & Co., Inc.*, 2001 WL 253857, at *6–8 (E.D. Pa. 2001) (some evidence that supervisors believed ADD caused inattention to detail, precluding any job in the class of reinsurance brokers); *Zakaras v. United Airlines, Inc.*, 121 F. Supp. 2d 1196, 1217 (N.D. I11. 2000) (employer believed plaintiff could not supervise others); *Julia v. Janssen, Inc*., 92 F. Supp. 2d 25, 37 (D.P.R. 2000) (statements questioning if the plaintiff could work at all); *Orme v. Swifty Oil Co., Inc.*, 2000 WL 682678, at *7 (S.D. Ind. March 28, 2000); *Coleman v. Southern Pacific Transp. Co.*, 997 F. Supp. 1197, 1206 (D. Ariz. 1998) (comments suggested employer thought plaintiff unable to work in any job in class of railroad or transportation positions); *Thalos v. Dillon Cos., Inc.*, 86 F. Supp. 2d 1079, 1086 (D. Colo. 2000); *EEOC v. Automatic Systems Co.*, 2001 WL 470936, at *5 (D. Minn. 2001) (similar); *Diante v. Henderson*, 2000 WL 250225, at *10 (E.D. Pa. 2000) (employer believed plaintiff was "seeing things"); *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 707 (Tenn. 2000) (employer's statement that plaintiff was laid off because he had Bell's Palsy and missed work supported inference that employer believed impairment interfered with plaintiffs ability to show up for any work); *Winslow v. IDS Life Ins. Co.*, 1999 WL 33209625, at *3–4 (D. Minn. Dec. 14, 1999) (fear of inability to work because of mental health treatment); *Rollf v. Interim Personnel, Inc.*, 1999 WL 1095768, at *4–5 (E.D. Mo. Nov. 4, 1999) (irrational fear of transmitting hepatitis C to co-workers reflected a perceived disability, since this belief reflects a perception of an inability to do almost any job); *Olbrotv. Denny's, Inc*., 1998 WL 525174, at *2–3 (N.D. I11. Aug. 19, 1998) (although managers testified that they did not believe plaintiffs cancer or treatment affected her ability to do restaurant work, the evidence of their treatment of plaintiff called their credibility into question); *Vendetta v. Bell Atlantic Corp.*, 1998 WL 575111 (E.D. Pa. Sep. 8, 1998); *Johnson v. University of Pennsylvania*, 1997 WL 379191 (E.D. Pa. 1997).

[250] *McKenzie v. Dovala*, 242 F.3d 967, 971 (10th Cir. 2001).

[251] *Ragan v. Jeffboat, LLC*, 149 F. Supp. 2d 1053, 1072 (S.D. Ind. 2001).

[252] *McGinnis v. Alamo Community College Dist.*, 207 F.3d 276, 281–282 (5th Cir. 2000) (perceived disability shown through admissions made by employer's ADA coordinator, and by past transfer admittedly given as "accommodation"). *But cf. Wright v. Illinois Dept. of Corrections*, 204 F.3d 727 (7th Cir. 2000) (finding insufficient evidence even in light of the employer's interrogatory answer that it considered plaintiff "to be disabled").

[253] *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 656–657 (5th Cir. 1999).

failure to consider accommodation in certain circumstances;[256] the use of "100% healed" policies;[257] and the employer's failure to consider an employee for other jobs.[258]

In addition, a person without an actual impairment may be regarded as having a disability if he or she is undergoing psychological counseling for relationship problems,[259] or is perceived as delusional[260] or mildly depressed.[261]

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[254] *Coleman v. Keebler Co.*, 997 F. Supp. 1094, 1114 (N.D. Ind 1998).

[255] *Johnson v. Paradise Valley Unified School Dist.*, 251 F.3d 1222, 1229 (9th Cir. 2001), *cert. denied*, 534 U.S. 1055 (2001); *Ross v. Campbell Soup Co.*, 237 F.3d 701, 708 (6th Cir. 2001) ("evidence that the company created a pretextual reason for Ross's firing may tend to prove that it regarded Ross as a disabled employee."). *But cf. Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1165–1166 (10th Cir. 2002) (although pretext evidence may also show that employer regarded employee as having a disability, issue of pretext and issue of perceived disability are separate).

[256] *Ragan v. Jeffboat, LLC*, 149 F. Supp. 2d 1053, 1072 (S.D. Ind. 2001).

[257] *Johnson v. Paradise Valley Unified School Dist.*, 251 F.3d 1222, 1228 (9th Cir. 2001), *cert. denied*, 534 U.S. 1055 (2001); *Henderson v. Ardco, Inc*., 247 F.3d 645, 651 (6th Cir. 2000).

[258] *Buskirk v. Apollo Metals*, 307 F.3d 160, 167 (3d Cir. 2002); *Johnson v. Paradise Valley Unified School Dist*., 251 F.3d 1222, 1228 (9th Cir. 2001), *cert. denied*, 534 U.S. 1055 (2001); *Henderson v. Ardco, Inc*., 247 F.3d 645, 654 (6th Cir. 2001); *McKenzie v. Dovala*, 242 F.3d 967, 971–972 (10th Cir. 2001); *Doane v. Omaha*, 115 F.3d 624, 628 (8th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998) (police chief testified that he recommended rejecting plaintiffs application because he perceived plaintiffs vision problems as significant); *Snyder v. Fry's Food Stores of Arizona*, 1999 WL 1021463 (9th Cir. 1999) (unpublished) (because employer only offered employee clerical work, he may have been regarded as substantially limited in working); *Ragan v. Jeffboat, LLC*, 149 F. Supp. 2d 1053, 1067–1068 (S.D. Ind. 2001); *Larsen v. Miller-Dwan Medical Center*, 2001 WL 1325963, at *4 (D. Minn. Oct. 2, 2001) (there was some evidence that plaintiffs widely diverse hospital duties constituted more than a single job, and thus employer's belief that plaintiff could no longer perform her job supported the claim that employer regarded her as unable to work a broad range of jobs); *Herman v. Raytheon Aircraft Co.*, 97 F. Supp. 2d 1249, 1255 (D. Kan. 2000); *Sakellarides v. Sea-Land Service, Inc.*, 2000 WL 37941 (E.D. La. 2000) (because it was unclear whether employer believed that plaintiff was unable to work any job at company, and because this was uniquely within defendant's knowledge, summary judgment was denied); *Phillips v. Jenny Craig Weight Loss Centres, Inc.*, 1998 WL 919354, at *5 (S.D. Cal. Aug. 4, 1998); *Johnson v. University of Pennsylvania*, 1997 WL 379191 (E.D. Pa. June 26, 1997); *Garza v. Abbott Laboratories*, 940 F. Supp. 1227 (N.D. I11. 1996) (employer's placement director admitted plaintiff was not able to perform any of 100 jobs in the company); *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1168–1169 (E.D. Mich. 1996) (employer representative testified that plaintiffs failure to pass medical exam disqualified him from numerous other jobs besides the one applied for). *See also Kohnke v. Delta Airlines, Inc.*, 1995 WL 505973, at *6 (N.D. I11. Aug. 23, 1995) (plaintiffs showing that employer regarded his disability as preventing him from performing several jobs within customer service agent classification raised fact issue as to whether he had record of impairment that disqualified him from broad class of jobs). Note, however, that the law does not require that the plaintiff be denied other jobs in order to be "regarded as" disabled. *Cook v. State of Rhode Island Dept. of Mental Health, Retardation & Hospitals*, 10 F.3d 17, 25–26 (1st Cir. 1993) (Rehabilitation Act). Note also that although such evidence may be sufficient to show a perceived disability, additional evidence may be required to show an actual disability. *See Martinez v. Cole Sewell Corp.*, 233 F. Supp. 2d 1097, 1131 (N.D. Iowa 2002) (plaintiff produced evidence that she could not perform any of the jobs available at one of the employer's plants, but she did not produce any evidence that she was unable to perform a class or broad range of jobs).

[259] *EEOC Compliance Manual* § 902.8(e) (Example 2) (as modified Feb. 1, 2000), http://www.eeoc.gov/policy/docs/902cm.html.

[260] *Biddle v. Ruben*, 1995 WL 382961, at *2 (N.D. I11. 1995).

[261] *EEOC Compliance Manual* § 902.8(f) (Example 3) (as modified Feb. 1, 2000), online at

In addition, the EEOC takes the position that employer action based on genetic characteristics may reflect a perceived disability.[262]

Although some courts have held that merely referring a person for a medical evaluation or monitoring is not evidence of a perceived disability,[263] such conduct may reflect discrimination depending on the circumstances.[264]

The EEOC's *Instructions for Field Offices* list various questions to address in analyzing such cases, including identifying the impairment that the employer knew (or believed) the employee had, and the reason for the adverse job action; determining if the employer believed that the impairment caused the problems on the job; determining whether the reasons for the adverse job action involve performing a major life activity (whether working or otherwise); and determining whether the employer believed that the employee was substantially limited in the major life activity.[265]

Remember, though, that an employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes the employee is incapable of performing a particular job.[266]

1. Determine if the defendant incorrectly believed that the plaintiff had a condition or impairment that he/she did not have.

2. If so, determine if the supposed impairment would substantially limit any major life activity.

3. If so, determine if the employer believed that the supposed impairment substantially limited any major life activity.

4. Determine if the defendant believed that the plaintiff's condition or impairment was

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http://www.eeoc.gov/policy/docs/902cm.html.

[262] *See EEOC Compliance Manual* § 902.8 (citing legislative history), online at http://www.eeoc.gov/policy/docs/902cm.html; *Policy Guidance on Executive Order 13145: To Prohibit Discrimination in Federal Employment Based on Genetic Information*, Question 17 (EEOC July 26, 2000), http://www.eeoc.gov/policy/docs/guidance-genetic.html.

[263] *Krocha v. City of Chicago*, 203 F.3d 507, 514 (7th Cir. 2000); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 810–811 (6th Cir. 1999), *cert. denied*, 530 U.S. 1262 (2000); *McConnell v. Pioneer Hi-Bred Int'I, Inc.*, 2000 WL 234672, at *7–8 (D.S.D. 2000) (employer "should not be punished for seeking to eliminate any misperceptions" about the plaintiffs abilities).

[264] *Tice v. Centre Area Transportation Authority*, 247 F.3d 506, 515–516 (3d Cir. 2001) (such evaluations may be illegal if they are too broad in scope, or if there is no reasonable basis to request one).

[265] *Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"* Part One–Third Definition, §§ I–III (EEOC 12/13/99), online at http://www.eeoc.gov/policy/docs/field-ada.html.

[266] *See, e.g., Dupre v. Charter Behavioral Health Systems of Lafayette, Inc.*, 242 F.3d 610, 616 (5th Cir. 2001).

substantially limiting, when it was not.

This point was illustrated in *EEOC v. R.J. Gallagher Co.*,[267] one of the Fifth Circuit's first decisions after *Sutton*. In *Gallagher*, the plaintiff was the company president when he was diagnosed with blood cancer. He underwent in-patient therapy for a month, went into remission, returned to work, but was subjected to a lot of speculation about his health, and was demoted. The Court found no actual disability, but found that a jury question existed on whether the plaintiff had a record of a disability and on whether he had a perceived disability.

> **DIABETES CASES**: As with "actual" and "record of" disabilities, the plaintiff must first show that the employer knew of the plaintiff's diabetes or diabetes-related limitations. *See, e.g., Chmiel v. Opto Technology, Inc*., 2004 WL 1611610, at *12 (N.D. Ill. July 19, 2004) (plaintiff could not establish disability because there was no evidence that employer knew about his diabetes or other conditions).
>
> Most successful "regarded as" cases involve claims that the employer perceived the plaintiff's disability as substantially limiting the major life activity of working. *See, e.g., Holopirek v. Kennedy and Coe, LLC*, 303 F. Supp. 2d 1223, 1232 (D. Kan. 2004) (evidence included close temporal proximity between plaintiff's disclosure of diabetes to employer and her termination, together with supervisor statement "You don't have to tell me what diabetes is like, my dad has it," suggesting that the supervisor thought she knew more about diabetes than plaintiff did); *Rodriguez v. Conagra Grocery Products Co.*, 436 F.3d 468 (5th Cir. 2005) (summary judgment *for plaintiff* based on employer's refusal to consider plaintiff for *any* of its jobs, rejecting the plaintiff for an unskilled job that any able-bodied person could do, and relying on uninformed, stereotyping assessments); *Harewood v. Beth Israel Medical Center*, 2003 WL 21373279, at *6 (S.D.N.Y. June 13, 2003) (supervisor's advice to plaintiff to go on permanent disability reflects mistaken impression that her impairment substantially limited her ability to work); *EEOC v. Northwest Airlines, Inc*., 246 F. Supp. 2d 916, 924–925 (W.D. Tenn. 2002) (evidence included employer's proposed restrictions—prohibiting plaintiff from driving, operating heavy equipment, and working at unprotected heights above five feet— which could severely limit plaintiff from performing a wide range of jobs; employer's belief that plaintiff was always at risk of sudden incapacitation due to the threat of a hypoglycemic coma, which could disqualify plaintiff from an array of jobs; and employer's statement that there were no jobs at the airline that plaintiff could perform); *Simms v. City of New York*, 160 F. Supp. 2d 398, 404–405 (E.D.N.Y. 2001) (employer regarded plaintiff with insulin-treated diabetes as substantially limited in working because it relied on departmental regulation to prohibit plaintiff from performing more than one type of job within the fire department); *Zenaty-Paulson v. McLane/Sunwest, Inc*., 2000 WL 33300666, at *7 (D. Ariz. Mar. 20, 2000) (evidence included fact that employer's perception of plaintiff's condition was not based on medical fact but on inaccurate assumptions, including exaggerated and uninformed reports of plaintiff's hypoglycemic episodes and the belief that they are analogous to neurological seizures; employer put plaintiff on medical leave that she did not request and that her doctor found unnecessary; employer threatened termination if it received another report of a hypoglycemic episode on the job; and employer

[267] *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999).

perceived plaintiff's diabetes as disqualifying her from any job involving driving, causing it to misapply state department of transportation regulations and its demand that plaintiff have her driver's license reinstated although it had never been suspended); *Atkins v. USF Dugan, Inc.*, 106 F. Supp. 2d 799, 808 (M.D.N.C. 1999) (employers' statement to employee on medical leave that he "needed to retire" rather than return to his old job reflected a perception that plaintiff was completely incapable of holding *any* job); *Rule v. Missouri Gaming Co., Inc.*, 11 A.D. Cas. (BNA) 561, 1999 U.S. Dist. LEXIS 22438, at *15–16 (W.D. Mo. 1999) (a court must look to the rationale behind the employer's conclusion that a prospective employee is significantly restricted from performing a specific job; employer provided a list of essential job functions but did not specify which of these tasks plaintiff would be unable to perform due to his diabetes [which employer believed was "out of control"], and many were simple tasks that are present in a broad range of jobs; employer's perception would at least have prevented plaintiff from obtaining any type of security job and perhaps an even broader class of jobs involving any type of physical exertion or safety responsibility); *Dipol v. New York City Transit Authority*, 999 F. Supp. 309, 313 (E.D.N.Y. 1998) (employer regarded plaintiff with diabetes as substantially limited in working when it severely limited the type and amount of work he could perform).

See also Shirley v. Westgate Fabrics, Inc., 1997 WL 135605, at *1 (N.D. Tex. March 17, 1997) (employer was aware of plaintiff's diabetes, that she had left her previous job because of diabetes complications, that she had periodic vomiting and diarrhea at work, and that she had to make periodic visits to her doctor; in addition, her employer uncharacteristically asked about her medical visits, and remarked on one occasion that she "looked pale and thin and that her doctor needed to change her medication"); *Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA)*, Question 1 (EEOC Oct. 2003), http://www.eeoc.gov/facts/diabetes.html ("diabetes is a disability when it does not significantly affect a person's everyday activities, but the employer treats the individual as if it does. For example, an employer may assume that a person is totally unable to work because he has diabetes.").

Other "regarded as" cases involve different major life activities. *See, e.g., Amick v. Visiting Nurse and Hospice Home*, 2006 WL 2989277, at *6 (N.D. Ind. Oct. 18, 2006).

5. Determine if the client has a condition or impairment that was substantially limiting because of the attitude of others.

6. Determine if the employer offered the client another job, or indicated that there were other jobs that the client could do.

An employer's refusal to consider an employee for other jobs may help to prove the broad scope of work for which the defendant believes the plaintiff is disqualified.[268] On the other hand, an employer that offers the plaintiff another job often rebuts a claim that it perceived the employee as substantially limited in the major life activity of working, since it then appears that the employer

[268] See note 258 above.

only thought plaintiff was unable to do one job, not a broad range or class of jobs.[269] Note, however, that any shield created by a job offer vanishes if the jury could believe that the "offer" was designed to force the employer to quit (e.g., a 50% pay cut).[270]

> **DIABETES CASES**: *See, e.g.*, *Rodriguez v. Conagra Grocery Products Co.*, 436 F.3d 468, 477 (5th Cir. 2005) (summary judgment *for plaintiff* based on employer's refusal to consider plaintiff for *any* of its jobs and its rejection of plaintiff for an unskilled job that any able-bodied person could do); *EEOC v. Northwest Airlines, Inc*., 246 F. Supp. 2d 916, 924–925 (W.D. Tenn. 2002) (employer stated that there were no jobs at the airline that plaintiff could perform); *Simms v. City of New York*, 160 F. Supp. 2d 398, 404–405 (E.D.N.Y. 2001) (employer relied on departmental regulation to prohibit plaintiff from performing more than one type of job within the fire department).

[269] *See, e.g.*, *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1164 (10th Cir. 2002). *Compare EEOC v. R.J. Gallagher Co*., 181 F.3d 645, 656 (5th Cir. 1999) (offering job in the same class may show that the defendant did not regard the plaintiff as substantially limited in working).

[270] *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 656-657 (5th Cir. 1999).