Analyzing Social Impairments Under Title I of the Americans with Disabilities Act

Susan D. Carle[*]

This Article starts from the important contributions of the neurodiversity movement, which emphasizes the benefits of an expanded view of protecting human difference. These differences include variations in brain structure, behavior, and social functioning. Social impairments are a potential feature of many disabilities covered under the employment antidiscrimination provisions of Title I of the Americans with Disabilities Act ("ADA"), but the legal literature has not yet focused on the analytic issues social impairments present. This Article analyzes how the ADA's employment protections should apply in the social impairments context.

Congress's enactment of the Americans with Disabilities Act Amendments ("ADAAA") in 2008 made important statutory changes that render obsolete the pre-2008 case law on social impairments. Some courts and commentators have yet to appreciate this, however, so this Article first addresses threshold coverage issues for social impairments, establishing that social impairments qualify for ADA coverage on the same, now more generous, basis as all other impairments under the ADAAA.

 I owe great thanks my colleague Robert Dinerstein for generously sharing his knowledge of disability law with me over many years and also for his excellent comments on an early draft of this Article. I also benefited from helpful comments and/or discussions with Joshua Carle-Friedman, Robert Corrada, Angela Hall, Stacy Hickox, Michelle Travis, Noah Zatz, and many others. I wish to thank the research assistants who have helped me on this Article during its long period of gestation, including Dan Amodeo, Sam DePrimio, Sara Falk, Tiffany Kelley, Danli Lan, Michael Scarantino, Scott Schaefer, Michaela Spero, and Caitlin Whaley. I benefited from opportunities to present parts of this Article at the Indiana Law School 2015 Labor and Employment Law Colloquium, the Michigan State University School of Human Resources and Labor Relations, and the Colorado Bar Association, as well as from conversations on the Employment Discrimination listserv. All mistakes are my own.

Second, this Article investigates how the ADA's reasonable accommodations mandate should apply in social impairments cases. Courts in ADA cases usually accept the need for physical modifications of the workplace. They are less likely, however, to approve modifications in the socially constructed aspects of that space, even though modifications in the social landscape may be precisely what are necessary to accommodate employees with social challenges. And even when the need for a well-accepted type of accommodation applies equally to employees with physical and social impairments, courts show more skepticism towards employees in the latter group. Relying on extensive canvassing of reported cases, this Article evaluates what accommodations courts are most and least likely to approve and offers recommendations for how to cast accommodations requests to increase the likelihood of employers and courts accepting them.

Finally, this Article explores the promising yet underutilized potential of the "regarded as" prong of Title I of the ADA, which protects employees against discrimination based on an employer regarding them as having an impairment. As the social construction model of disability explains, impairments in the workplace may arise because of the attitudes of others rather than because of any relevant limitation in an employee's job functioning. In social impairments cases, it may be the social order in the workplace, by shunning those perceived to behave differently, that creates an impairment.

By prohibiting social impairment discrimination, the ADA has the potential to lower barriers to employment for persons perceived to be different in a wide range of ways. Exploring the analytic issues social impairments raise shows why courts, lawyers, scholars, commentators, and the public should care deeply about protecting employees from discrimination on the basis of a wide variety of differences. Protecting persons from social impairment discrimination advances societal understandings of the benefits of neurodiversity broadly construed. Social impairments thus pose a frontier for theorizing about disability that opens new insights about the meaning and reach of non-discrimination values.

TABLE OF CONTENTS

INTRODUCTION 1113
I. WHAT ARE SOCIAL IMPAIRMENTS? 1117
II. APPLYING THE ADA IN SOCIAL IMPAIRMENT CASES 1121
A. The Structure of the ADA 1121
1. Ability to Perform the Essential Functions of the Job 1122

2. Demonstrating "Substantial Impairment" in "Major Life Activities" 1125
a. Interacting with Others as a Major Life Activity Prior to the ADAAA 1125
b. Appreciating the ADAAA's Significance to Analysis of Substantial Limitations in Major Life Activities 1130
B. Surviving the ADA Threshold Analysis in Social Impairment Cases Today 1136
III. REASONABLE ACCOMMODATIONS FOR SOCIAL IMPAIRMENTS .. 1139
A. Reasonable Accommodations and the ADA's Interactive Process 1142
B. Reasonable Accommodations Listed in the ADA's Text 1143
1. "Making Existing Facilities Accessible" and Using "Equipment and Devices" 1144
2. Providing "Interpreters": Job Coaches, Counselors, and Trainers 1146
3. Leaves of Absences 1151
4. Modified Work Schedules 1152
5. Job Reassignment to a Vacant Position 1155
C. Other Accommodations in Social Impairments Cases 1159
1. Specific Personnel Changes 1161
2. Modifying Supervision Methods 1163
3. Providing for Less Social Interaction 1164
4. Accommodations Courts Are Least Likely to Approve 1166
a. Requests for Reinstatement After Quitting a Job ... 1166
b. Setting Aside Disciplinary Actions 1167
c. "Harm to Others" Cases 1170
IV. USING THE ADA'S "REGARDED AS" PRONG IN SOCIAL IMPAIRMENTS CASES 1170
CONCLUSION 1180

***

> "The nature of injustice is that we may not always see it in our own times."[1]

INTRODUCTION

Title I of the Americans with Disabilities Act ("ADA") bars employers with fifteen or more employees from discriminating against persons with covered disabilities.[2] Its stated goal is to ensure that differences in abilities that are irrelevant or largely irrelevant to job functioning do not bar persons from gaining economic self-sufficiency through paid employment, nor society from benefiting from their labor and talents.[3] The ADA explicitly covers so-called "mental" (i.e., brain-based) disabilities on equal terms with so-called "physical" ones,[4] but, as a large literature documents, many deficits exist in courts' handling of mental disability claims.[5]

Many factors account for these problems. One important one, which has thus far received too little attention, is courts' difficulties in analyzing situations in which an employee's *social functioning* constitutes an important aspect of her impairment. To give a few examples from cases this Article will discuss below: a supervisor's major depressive episode makes extended face-to-face communications with her supervisees unbearable;[6] a grocery store shelf stocker's Tourette's syndrome causes him to blurt out offensive epithets;[7] a counselor with a traumatic brain injury loses the one-

[1] Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (Justice Kennedy, writing for the majority).

[2] *See* 42 U.S.C. § 12111(5)(A) (2012) (providing the definition of covered employer); *id.* § 12112(a) (2012) (providing the general rule against discrimination in employment).

[3] *See, e.g.*, Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994) (arguing that "differences" are often morally irrelevant and that such irrelevancy is the key reason for prohibiting discrimination on the basis of particular characteristics, including disabilities).

[4] 42 U.S.C. § 12102(1) (2012) ("The term 'disability' means, with respect to an individual — (A) a physical *or mental* impairment that substantially limits one or more major life activities of such individual . . . ." (emphasis added)).

[5] *See, e.g.*, Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271 (2000) (summarizing evidence that the ADA fails to protect employees with psychiatric disabilities); Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94 (2006) (concluding on the basis of extensive empirical research that persons with psychiatric disabilities are treated less favorably under the ADA).

[6] Heisler v. Metro. Council, 339 F.3d 622, 628-29 (8th Cir. 2003).

[7] Ray v. Kroeger Co., 264 F. Supp. 2d 1221, 1224 (S.D. Ga. 2003).

hour-per-week job coach her employer previously provided, who helps her avoid on-the-job volatility;[8] and a medical resident with Asperger's syndrome has difficulty communicating with his patients.[9] Although a large literature addresses mental or "psychosocial" disability under the ADA generally,[10] almost none of it specifically focuses on the *social functioning* aspects of the broad range of potential social impairments the case law reflects.

A more recent literature rejects the term disability and introduces instead the term "neurodiversity," defined as "an approach to learning and disability which suggests that diverse neurological conditions appear as a result of normal variations in the human genome."[11] The neurodiversity movement eschews the tendency of experts to pathologize brain-based differences in human functioning.[12] Courts applying the ADA, however, require such expert diagnoses, so I will use them as required, all the while appreciating the problem of characterizing difference as "disorder." The *Diagnostic and Statistical Manual of Psychiatric Disorders* ("DSM") is a chief offender in this regard but is viewed as a definitive reference.[13] It describes impairments in social functioning as a potential feature of a great many "disorders" it identifies. Social impairments also feature in many cognitive, intellectual, learning and even so-called physical

[8] Menchaca v. Maricopa Cmty. Coll. Dist., 595 F. Supp. 2d 1063, 1071 (D. Ariz. 2009).

[9] Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 198 (6th Cir. 2010).

[10] *See, e.g.*, Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15 (1993/1994); Stefan, *supra* note 5; Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351 (2008).

[11] *See Definitions for Neurodiversity*, DEFINITIONS.NET, http://www.definitions.net/definition/Neurodiversity (last visited Sept. 16, 2016) ("This term was coined in the late 1990s as a challenge to prevailing views of neurological diversity as inherently pathological, and it asserts that neurological differences should be recognized and respected as a social category on a par with gender, ethnicity, sexual orientation, or disability status. Examples of these differences can include attention deficit hyperactivity disorder, autism spectrum disorder, dyscalculia, dyslexia, dyspraxia, Tourette's syndrome, and others."). The term neurodiversity is sometimes used in discussing the autism spectrum but can also be used to discuss brain-based differences more generally. *See id.* I use neurodiversity throughout this Article in the second, broader sense. *See* THOMAS ARMSTRONG, THE POWER OF NEURODIVERSITY 8 (2011); DANA LEE BAKER, THE POLITICS OF NEURODIVERSITY: WHY PUBLIC POLICY MATTERS 17 (2011) (using a very similar definition).

[12] *See supra* note 11.

[13] *See, e.g.*, AM. PSYCHIATRIC ASS'N., THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013) [hereinafter DSM-V].

disabilities.[14] It is thus important to confront the issues social impairments raise under Title I of the ADA.

Social impairments can pose complex issues under the ADA because social ability very often *is* relevant to successful job performance. This fact can make ADA cases involving plaintiffs with social impairments harder to analyze than cases involving disabilities that have no real relevance to performance on a job, such as engineer who uses a wheelchair for locomotion. This in part explains courts' awkward grappling with how social impairments should be handled under the ADA. The ADA specifically states that it covers both "physical" and "mental" impairments, however, so it is no answer to say that social impairments simply do not qualify for ADA protection, though courts have sometimes done so, as discussed further below.[15] Many persons with social impairments *can* function successfully in many jobs, and the ADA mandates that employers permit them to do so.

The relevance of some degree of ability to function socially is not the only reason courts find social impairment cases difficult. Other problems arise because of the stigma associated with social impairment. Courts often do not understand social impairments or do not see them as significant limitations on a person's life activities. One circuit even held that plaintiffs with social impairments are not entitled to the ADA's protections at all.[16]

Other problems in courts' handling of social impairments cases arise at the reasonable accommodations stage. Courts are often loath to grant accommodations for social functioning challenges. Logically, persons with social impairments may need accommodations addressing the *interpersonal* landscape of work, just as persons with physical challenges may need accommodations in the workplace's physical landscape. But courts often regard intervention into a workplace's managerial or interpersonal features as going beyond the scope of the relief they should offer.

Even when plaintiffs in social impairments cases ask for the same accommodations as courts routinely grant in other disability cases, courts often look askance at them. Temporary leave or shortened work hours to recover from a heart attack, for example, may appear eminently reasonable to a court, but the same temporary leave or shortened hours to recover from depression may not. Social

[14] *See infra* Part I.

[15] *See infra* section II.A.2 (discussing Soileau v. Guilford of Maine, Inc., 105 F.3d 12 (1st Cir. 1997)). As further explained in section II.A.2, *Soileau* is no longer good law after passage of the ADAAA.

[16] *See Soileau*, 105 F.3d at 15.

impairment cases thus suffer from the parity problem that has been documented in "mental" disability cases more generally, but even more so, as this Article will show in depth below.[17]

This Article examines the fundamental questions that the analysis of social impairments poses under Title I of the ADA. Part I discusses the general issue of social impairments, and Part II takes on the threshold issues of establishing ADA coverage.[18] Part II first asks under what circumstances employees with social impairments should be eligible for the ADA protections. Important statutory changes abrogate much of the case law on social impairments decided before Congress's enactment in 2008 of the Americans with Disabilities Act Amendments ("ADAAA"). Although some courts and commentators have yet to fully appreciate this, these changes render obsolete the pre-2008 case law on social impairments that was highly problematic for plaintiffs, as Part II explains.[19]

Part III then looks at the reasonable accommodations questions that arise in social impairment cases that survive threshold issues of ADA coverage.[20] Relying on extensive canvassing of reported social impairments cases, Part III analyzes what accommodations courts are most and least likely to require. Part III also offers suggestions for how lawyers and other advocates might best cast accommodations requests to increase the likelihood that an employer and/or court will accept them. Case analysis shows that litigation often is a non-preferred

[17] There is a large and growing literature on mental disability and the ADA, but very little on the specific issue of social impairment. On the literature of mental disability and employment generally, see Lizabeth A. Barclay & Karen S. Markel, *Ethical Fairness and Human Rights: The Treatment of Employees with Psychiatric Disabilities*, 85 J. BUS. ETHICS 333, 333 (2009) (synthesizing "previous research on individuals with psychiatric disabilities drawn from rehabilitation, psychological, managerial, legal, as well as related business ethics writings" and illustrating the "dynamics of (un)ethical behavior in relation to the employment of such individuals"); Judith A. Cook, *Employment Barriers for Persons with Psychiatric Disabilities: Update of a Report for the President's Commission*, 57 PSYCHIATRIC SERVS. 1391, 1395 (2006) (reporting that employers in surveys express more negative attitudes about hiring workers with psychiatric disabilities than any other group); Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931, 957 (1997) (discussing the balance among the interests of other employees, plaintiffs, and employers that must be struck in mental disabilities cases). An excellent overview, which is now unfortunately out of date due to the many changes in the law, is SUSAN STEFAN, HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES (2002).

[18] *See infra* Parts I & II.

[19] *See infra* Part II.

[20] *See infra* Part III.

option for achieving reasonable accommodations; far better in many cases is negotiating "in the shadow"[21] of the ADA's protections, by using the interactive process the Equal Employment Opportunity Commission's ("EEOC's") ADA regulations require.[22]

Finally, Part IV explores the potential usefulness of the too often overlooked "regarded as" prong of Title I of the ADA.[23] As clarified in the ADAAA, an employee relying on this prong of the ADA has no entitlement to reasonable accommodations but also need not establish that a perceived impairment substantially limits or is perceived as substantially limiting a major life activity. Although few post-ADAAA cases have used the "regarded as" prong of the ADA, Part IV argues that this prong has the potential to expose the wrong of discrimination based on employers acting adversely against employees with a social impairment simply because they perceive them as odd or different.

I. WHAT ARE SOCIAL IMPAIRMENTS?

The ADA states that it potentially covers all recognized disabilities, both "physical" and "mental" (or brain-based) in their origins.[24] Social impairments can arise from either physical or mental conditions, as discussed further below, but most often arise from what many disability advocates refer to as "psychosocial" disabilities. By this term, experts explain, they intend to capture the concept that persons may face barriers to full participation in life due to mental, emotional, and social challenges.[25] It is important to emphasize, however, that psychosocial disability and social impairment are *not* coterminous concepts: a person may have a psychosocial disability without having significant social impairments, instead primarily facing challenges in cognitive and/or emotional realms, for example, and persons may have social impairments as a result of physical conditions, such as

---

[21] *Cf.* Robert N. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (examining how legal rules affect parties' negotiations conduct).

[22] The EEOC states that "[t]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3) (2016).

[23] *See* 42 U.S.C. § 12102(1)(C) (2012); *infra* Part IV.

[24] *See* 42 U.S.C. § 12102(1).

[25] *See Taking a Human Rights Approach to Psychosocial Disability*, UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS (Jan. 13, 2015), http://www.ohchr.org/EN/NewsEvents/Pages/Takingahumanrightsapproachtopsychosocialdisability.aspx.

blindness, rather than psychosocial ones.[26] There is, to be sure, considerable overlap between persons with social impairments and persons with psychosocial disabilities, because many psychosocial disabilities do involve social impairments, and many persons with social impairments do have diagnosed psychosocial disabilities. But overlap is not equivalence, and this point bears clarifying at the outset of the analysis.

A perusal of the DSM, currently in its fifth edition ("DSM-V"), demonstrates the pressing need for attention to the analysis of social impairments under the ADA. Social impairments are features of a broad variety of DSM diagnoses. These include mental illnesses such as clinical depression, bi-polar disorder, social anxiety or phobia, posttraumatic stress disorder, schizophrenia, and borderline personality disorder. The DSM-V describes clinical depression as involving "symptoms [that] cause clinically significant distress or impairment in *social*, occupational, or other important areas of functioning."[27] It highlights the same symptoms for bipolar disorder.[28] The DSM-V further states that "[i]n social anxiety disorder (social phobia), the individual is *fearful or anxious about or avoidant of social interactions* . . . ."[29] The diagnostic criteria for posttraumatic stress disorder similarly include "[f]eelings of detachment or estrangement *from others*."[30] Disorders on the schizophrenia spectrum show "a pervasive pattern of *social and interpersonal deficits, including reduced capacity for close relationships*; cognitive or perceptual distortions; and eccentricities of behavior . . . ."[31] Moreover, the DSM-V states, borderline personality disorder is marked by "[a] pervasive pattern of instability of *interpersonal relationships* . . . ."[32]

Likewise, social impairments are salient features of many conditions referred to as "cognitive" impairments. Autism spectrum diagnoses, for example, involve "[p]ersistent *deficits in social communication and*

[26] *See infra* text accompanying note 33 (explaining that the common definition of psychosocial impairments refers to impairments related to the mental, emotional, and social aspects of life); *see also infra* note 39 (discussing social impairments that can arise from lack of sight).

[27] *See* DSM-V, *supra* note 13, at 168 (emphasis added).

[28] *See id.* at 132-33 ("The symptoms of depression or the unpredictability caused by frequent alternation between periods of depression and hypomania causes clinically significant distress or impairment in *social*, occupational, or other important areas of functioning." (emphasis added)).

[29] *Id.* at 190 (emphasis added).

[30] *Id.* at 272 (emphasis added).

[31] *Id.* at 89 (emphasis added).

[32] *Id.* at 663 (emphasis added).

social interaction across multiple contexts"; these syndromes include Asperger's syndrome and PDD-NOS.[33] Tourette's syndrome is yet another neurological diagnosis characterized by compulsive and involuntary tics and/or utterances and may include involuntary "uttering [of] *socially inappropriate* words."[34]

Intellectual disability, too, usually involves social skills impairment, including limitations in "everyday *social*" skills and "*social* problem solving."[35] Persons with intellectual disability display limitations in adaptive behavior that include "*[s]ocial* skills," such as "interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), *social* problem solving, and the ability to follow rules/obey laws and to avoid being victimized."[36] And some brain-based conditions that are typically classified as learning disabilities can have important effects on social functioning, such as ADHD and some speech impediments.[37]

---

[33] *Id.* at 50, 53. The DSM-V notes that these social impairments can include:

> 1. *Deficits in social-emotional reciprocity*, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
>
> 2. *Deficits in nonverbal communicative behaviors used for social interaction*, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
>
> 3. *Deficits in developing, maintaining, and understanding relationships*, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

Id. (emphasis added).

[34] *See Tourette Syndrome Fact Sheet*, NAT'L INST. NEUROLOGICAL DISORDERS & STROKE (emphasis added), http://www.ninds.nih.gov/disorders/tourette/detail_tourette.htm (last visited Sept. 17, 2016).

[35] *See Definition of Intellectual Disability*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES ("AAIDD") (emphasis added), http://aaidd.org/intellectual-disability/definition#.VnMktJ0o7vo (last visited Sept. 17, 2016). The AAIDD defines an intellectual disability as "a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers *many everyday social and practical skills*. This disability originates before the age of 18." *Id.* (emphasis added).

[36] *Id.* (emphasis added).

[37] *See, e.g.*, Andresen v. Fuddruckers, Inc., No. Civ.03-3294 DWF/SRN, 2004 WL 2931346, at *3, *5-6 (D. Minn. Dec. 14, 2004) (denying summary judgment to an employer who argued that a plaintiff's severe speech impairment did not substantially limit her ability to interact with others).

Moreover, as already noted, not all social impairments fall in the category of so-called mental or psychosocial disabilities. Impediments classified as physical disabilities can give rise to social functioning challenges as well. Traumatic brain injury is one example.[38] Others include visual or hearing impairments, which may make it more difficult to respond to social and language cues others use.[39] Some medical conditions, such as brain infection, cancer, liver and kidney disease and diabetes, can cause social irritability or other significant personality changes, as can certain medicines.[40] In short, a wide range of mental, cognitive, and physical conditions can give rise to social impairments. In order to address precisely the topic that is the focus of this Article, I use the specific, if somewhat awkward, term "social impairment" to refer to disabilities of any kind that involve significant impacts on social functioning.

Finally, of course, it bears emphasizing that not all persons who have difficulties getting along with others have a potentially ADA-qualified disability based on social impairment. Individuals may have any number of personality traits that make social relations difficult: they may be blunt, irascible, or cantankerous, lack good judgment, or be either highly extraverted or extremely shy or reserved, all without having recognized disabilities. As courts are fond of noting, the mere fact of personality characteristics that make social relations difficult does not make a disability; instead, a recognized impairing condition must be involved.[41] Thus, the fear that applying the ADA to persons with social impairments will lead to a cascade of cases seeking

[38] *See generally* Portia L. Cole & Dale Margolin Cecka, *Traumatic Brain Injury and the Americans with Disabilities Act: Implications for the Social Work Profession*, 59 SOC. WORK 261 (2014) (discussing traumatic brain injury ("TBI") from a social worker's perspective under the ADA). As Cole and Cecka note, between 2000 and 2012, an estimated 266,810 U.S. military service members sustained TBIs. *Id.* at 262. Many veterans seeking to return to work in civilian jobs may require ADA accommodations, and the authors argue that social workers and others need to better understand the law surrounding ADA accommodations and TBI as a result. *See id.* at 262-63, 267-68.

[39] *See, e.g.*, *Developing Social Skills in Students Who Are Blind*, PERKINS SCH. FOR THE BLIND (Apr. 3, 2012), http://www.perkins.org/stories/blog/developing-social-skills-in-students-who-are-blind (describing the many challenges students face in social interactions when they cannot rely on visual cues).

[40] *See generally* PROFESSIONAL GUIDE TO DISEASES (9th ed. 2009).

[41] *See, e.g.*, McAlindin v. Cty. of San Diego, 192 F.3d 1226, 1235 (9th Cir. 1999) ("Recognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited in a major life activity."); Bennett v. Unisys Corp., No. 2:99CV0446, 2000 WL 33126583, at *6 (E.D. Pa. Dec. 11, 2000) ("The fact that a person is blunt in his or her interpersonal dealings and has poor judgment does not give them a cause of action under the ADA.").

accommodations at work is largely unwarranted; except in "regarded as cases," the ADA's difficult threshold requirements should sift out claims lacking a diagnosed condition that causes a significant impairment, as will be discussed further in Part II below.[42]

II. APPLYING THE ADA IN SOCIAL IMPAIRMENT CASES

In the ADA's relatively short existence, many issues about how its provisions apply to social impairments remain unresolved. In the ADAAA, Congress abrogated some key restrictive interpretations of the ADA that the U.S. Supreme Court had offered prior to that time.[43] Some of these changes crucially affect the analysis of social impairments under the ADA, as analyzed in detail below. Courts sometimes fail to appreciate the extent to which the ADAAA abrogates pre-2008 precedents, and this continuing confusion adds more complexity to the analysis of social impairments under the ADA today. The statute's structure and basic requirements provide a starting point.

A. The Structure of the ADA

Title I of the ADA protects individuals with disabilities from discrimination in employment in three ways, each defined in its § 12102(1) "Definitions" section. Section 12102(1)(A) provides ADA coverage to persons with an "impairment" that "substantially limits one or more major life activities[.]"[44] Employers must grant reasonable accommodations to such persons, provided that they can perform the essential functions of the job at issue, either with or without reasonable accommodations.[45] Section 12102(1)(B) covers employees with "a record of such an impairment" in much the same way.[46] Section 12102(1)(C) provides that an employer may not discriminate in employment against an individual who is "regarded as" having an impairment;[47] under this "third prong" of the ADA,

[42] *See infra* Part II.

[43] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-54 (stating that Congress's purpose was to reject several narrow Court interpretations of the Act).

[44] 42 U.S.C. § 12102(1)(A) (2012).

[45] *See id.* § 12111(8) (2012).

[46] *Id.* § 12102(1)(B).

[47] *Id.* § 12102(1)(C). The EEOC's regulations define impairments as follows:

> (h) Physical or mental impairment means—
>
> (1) Any physiological disorder or condition, cosmetic disfigurement, or

however, an employer is not required to make reasonable accommodations and the individual is not required to prove that the perceived impairment limits, or is regarded as limiting a major life activity.[48]

Persons with social impairments may need to use any of these three prongs of the ADA's protections depending on their needs and particular situation. This Article will start with the threshold requirements for making an ADA claim under prongs one and two, then look at the reasonable accommodations provisions that apply to these prongs, and finally explore the potential of the third "regarded as" provision for those who experience discrimination but do not need accommodations.

1. Ability to Perform the Essential Functions of the Job

The ADA aims to start its analysis with a person rather than a disability, and to ask a series of questions to determine whether that person can raise a claim under Title I.[49] In order to raise an employment discrimination claim, a person must demonstrate that she is "qualified" to perform the "essential functions" of the job in question, with or without reasonable accommodations.[50] Thus, reasonable accommodations analysis can come up at the beginning of any § 12102(1)(A) or (B) case, and also arises later in the analysis for individuals who surmount these provisions' threshold requirements and contest an employer's rejection of their request for accommodations.[51] Analysis at this later stage will be discussed in Part III below.

> anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (2016).

[48] 42 U.S.C. § 12102(3)(A).

[49] *See, e.g.*, *id.* § 12101 (2012) (referring throughout to "individuals" with disabilities).

[50] *Id.* § 12111(8) (2012) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").

[51] *See* 29 C.F.R. § 1630.9(a) (2016) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an

A major issue for persons with significant social functioning challenges can be whether they can perform the "essential functions" of the job. This is a prerequisite under all three prongs of ADA analysis.[52] An "essential function" is one that is "fundamental" to a position rather than "marginal," and involves "fact-sensitive considerations and must be determined on a case-by-case basis."[53]

The essential functions issue can become salient in social impairment cases because most jobs require at least some ability to work with others. Thus, courts have sometimes held that ADA plaintiffs with social impairments were not qualified for their jobs because they lacked the particular social skills necessary to carry out tasks the courts viewed as essential functions of the positions at issue. In *Cameron v. Community Aid for Retarded Children, Inc.*, for example, the plaintiff began working for her employer as a part-time manager and after a series of promotions became associate director.[54] She had an anxiety disorder and got into a shouting match with an employee, who resigned as a result.[55] When Cameron returned from a two-week leave, her employer fired her.[56] Cameron sued under the ADA but the district court entered summary judgment against her.[57] The Second

otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").

[52] *See* 42 U.S.C. § 12111(8).

[53] Richardson v. Friendly Ice Cream Corp., 594 F.3d 69, 75 (1st Cir. 2010) (quoting Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 25 (1st Cir. 2002)). The types of evidence used to determine essential functions of the job include:

> (i) The employer's judgment as to which functions are essential;
>
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
>
> (iii) The amount of time spent on the job performing the function;
>
> (iv) The consequences of not requiring the incumbent to perform the function;
>
> (v) The terms of a collective bargaining agreement;
>
> (vi) The work experience of past incumbents in the job; and/or
>
> (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3) (2016).

[54] Cameron v. Cmty. Aid for Retarded Children, Inc., 335 F.3d 60, 62 (2d Cir. 2003).

[55] *Id.*

[56] *Id.*

[57] *Id.* at 61.

Circuit affirmed, stating that "[s]ince Cameron's conceded inability to get along with [others] drove away an employee whom she was supposed to be supervising," she clearly "was unqualified to be a supervisor."[58]

Another example is the Eleventh Circuit case, *Taylor v. Food World, Inc.*, where the plaintiff worked as a grocery clerk.[59] He had Asperger's syndrome, which caused him to speak loudly and ask personal questions of customers.[60] After three customers complained to the management, Taylor was terminated.[61] He sued under the ADA but the district court entered summary judgment for the employer, finding that interacting appropriately with customers was an "essential job function."[62]

Courts have even rejected claims on this basis of individuals with very little need to interact with others, such as another grocery store clerk who filed suit in *Ray v. Kroeger Co.*[63] Ray had Tourette's syndrome, which caused him to utter involuntary racial epithets that were highly offensive to others.[64] Ray's employer initially granted Ray accommodations by allowing him to work at night when few others were present.[65] A cleaning contractor who was in the store during the night shift overheard Ray's verbal tics, however, and complained to Ray's employer, who fired Ray as a result.[66] The court held — perhaps incorrectly, I will suggest below — that non-offensive interaction with others was an essential function of even Ray's low-contact job and dismissed his case on summary judgment.[67]

Of course, far from all plaintiffs with social impairments lose under this "essential functions" threshold requirement of the ADA. Often plaintiffs' social impairments do not prevent them from doing a job's essential functions, even if some accommodations may be needed to allow them job success. But these plaintiffs, too, may face difficulties

[58] *Id.* at 64.

[59] Taylor v. Food World, Inc., 133 F.3d 1419, 1421 (11th Cir. 1998).

[60] *Id.*

[61] *Id.*

[62] *Id.* at 1423-24; *see also* Rosenquist v. Ottoway Newspapers, Inc., 90 F. App'x 564, 565 (2d Cir. 2004) (involving a newspaper reporter who had an aneurysm that led to difficulty communicating and could not do an essential job function because of his communications difficulties).

[63] 264 F. Supp. 2d 1221 (S.D. Ga. 2003).

[64] *Id.* at 1224.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 1228-29.

surviving the ADA threshold analysis for a number of other reasons, as I will discuss below.

2. Demonstrating "Substantial Impairment" in "Major Life Activities"

Establishing one's ability to do the "essential functions" of a job is only part of the challenge persons with social impairments may face under the first two prongs of the ADA's Title I. Section 12102(1)(A) of the ADA further requires a plaintiff seeking reasonable accommodations to demonstrate a "physical or mental impairment that *substantially limits* one or more *major life activities*[.]"[68] Alternatively, the person may show a "record of such impairment[.]"[69] Thus, after the person's qualifications to perform the essential functions of the job are established — after the question of whether the disability is *too* impairing has been resolved — the question of whether the person's disability is *sufficiently* impairing — whether it "substantially impairs a major life activity" — arises. This is a major area in which Congress abrogated the Court's earlier rulings when it passed the 2008 amendments. In order to fully understand how the ADAAA affects the analysis in social impairments cases, it is necessary to understand how the courts handled claims that social impairments substantially limited major life activities prior to the ADAAA.

a. Interacting with Others as a Major Life Activity Prior to the ADAAA

No line of cases better demonstrates the courts' lack of understanding of social impairments under the ADA than those that considered plaintiffs' pre-ADAAA claims that they were substantially limited in the major life activity of "interacting with others." In 1997, the First Circuit ruled in *Soileau v. Guilford of Maine, Inc.*, that interacting with others is not a major life activity.[70] That case involved an engineer with average to above average job performance ratings but a history of occasional difficulty in getting along with his coworkers and boss.[71] His employer fired him from his job after a series of escalating conflicts with his supervisors.[72] Soileau filed suit claiming

[68] 42 U.S.C. § 12102(1)(A) (2012) (emphasis added).

[69] *Id.* § 12102(1)(B).

[70] Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997).

[71] *Id.* at 13.

[72] *Id.* at 13-14.

that he had been discriminated against on grounds of disability based on diagnosed depression that interfered with his "ability to interact with others."[73]

Soileau argued that the ability to interact with others was a major life activity, but the First Circuit disagreed, raising a number of concerns. First, the court asserted that "the concept of 'ability to get along with others' is remarkably elastic, perhaps so much so as to make it unworkable as a definition."[74] It acknowledged that "such an ability is a skill to be prized," but viewed it as "different in kind from breathing or walking, two exemplars which are used in the regulations."[75] The court further worried that "whether a person has such an ability may be a matter of subjective judgment; and the ability may or may not exist depending on context."[76] The court then noted that in the case before it, "Soileau's alleged inability to interact with others came and went and was triggered by vicissitudes of life which are normally stressful for ordinary people — losing a girlfriend or being criticized by a supervisor" and that "Soileau's last depressive episode was four years earlier, and he had no apparent difficulties in the interim."[77] The court concluded that "[t]o impose legally enforceable duties on an employer based on such an amorphous concept would be problematic."[78]

The *Soileau* court's reasoning is a classic illustration of the problems persons with social impairments face in explaining the legitimacy of their claims under the ADA in light of stigma, ignorance, and misunderstanding. Different impairments do differ in their manifestations, but this is no reason to deny coverage to some impairments but not others. Many impairments may go into remission and then flare up again, which is part of the reason § 12102(1)(B) covers "a record of" a qualifying impairment. Most importantly, a substantial limitation in the ability to interact with others most definitely goes to a major life activity, indeed, one of the most important abilities to life success, as research has shown.[79]

---

[73] *Id.* at 13.

[74] *Id.* at 15.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] Studies show that persons with impairments in social functioning face great challenges in all major spheres of life, including successful employment. *See, e.g.*, Patricia Howlin et al., *Adult Outcome for Children with Autism*, 45 J. CHILD PSYCHOL. & PSYCHIATRY 212, 224 (2004) (documenting through empirical study the major effects

Soileau was the first court of appeals case to consider whether interacting with others is a major life activity. The court's hesitation to embrace the idea that ability to interact with others could be a major life activity luckily did not catch on with other courts. Instead, all subsequent courts have concluded that interacting with others is or can be assumed to be a major life activity. Indeed, the EEOC's current regulations expressly state that this is so.[80]

The more significant problem that emerged in many pre-ADAAA cases was that courts began resolving claims of impairment in the ability to interact with others unfavorably for plaintiffs by holding that plaintiffs had failed to show that they were "substantially impaired" in this ability. In a series of cases, courts rejected plaintiffs' claims that they were substantially limited in the major life activity of interacting with others, despite diagnoses of significant conditions such as major depression, bipolar disorder, autism spectrum disorder and others, now on the grounds that plaintiffs' impairments were not sufficiently *severe* to qualify for ADA protection.

Ironically, the lead, highly restrictive, pre-ADAAA opinion on how much social impairment qualifies as "substantial" became *McAlindin v. County of San Diego*, a case in which the Ninth Circuit did allow a claim of impairment in the ability to interact with others to proceed beyond summary judgment.[81] In doing so, however, the court held that "a plaintiff must show that his 'relations with others were characterized on a regular basis by *severe* problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.'"[82] The court in *McAlindin* held that the record before it established a genuine issue of material fact as to whether McAlindin had met this standard.[83] His medical evaluations showed that his anxiety and panic disorders caused him to become increasingly withdrawn and "his ability to deal with people and stress was seriously diminished," so much so that he had *no* social activities outside his family, was not involved in political or religious groups, and even had a "total inability to communicate at times[.]"[84] Thus, the court concluded, the plaintiff's "alleged 'fear reaction' and

to adult life functioning of children diagnosed with autism spectrum disorders).

[80] *See* 29 C.F.R. § 1630.2(i)(1)(i) (2016) (including "interacting with others" as a major life activity).

[81] McAlindin v. Cty. of San Diego, 192 F.3d 1226, 1230 (9th Cir. 1999).

[82] *Id.* at 1235 (emphasis added).

[83] *See id.*

[84] *Id.*

'communicative paralysis' are sufficiently severe to raise a genuine issue of material fact about his ability to interact with others."[85]

Although McAlindin himself survived summary judgment, the high degree of impairment the Ninth Circuit defined as necessary to show "substantial limitation" led many other courts to deny plaintiffs' claims in social impairment cases.[86] Even on strong facts, many pre-2008 courts denied plaintiffs' claims of impairments in interacting with others, quoting *McAlindin*'s language requiring virtually complete inability to interact with others as necessary to establish a substantial limitation. In other words, these courts held that the plaintiffs' impairments in interacting with others had to be so "severe" as to prevent them from interacting with others in virtually any context.[87]

The use of this high *McAlindin* threshold for finding substantial impairment in interacting with others presented a virtual bar for plaintiffs with social impairments who could still do the essential functions of the job. Employees who suffer from social problems so severe that they manifest "consistently high levels of hostility," complete "social withdrawal" or "failure to communicate when

---

[85] *Id.* at 1235-36.

[86] *See, e.g.*, Jacques v. DiMarzio, Inc., 386 F.3d 192, 203-04 (2d Cir. 2004) (holding that a plaintiff is substantially limited in interacting with others only when the impairment "severely limits the fundamental ability to communicate with others," but not when communication is "inappropriate, ineffective, or unsuccessful"); Steele v. Thiokol Corp., 241 F.3d 1248, 1255 (10th Cir. 2001) (holding that a plaintiff with obsessive compulsive disorder whose behaviors made him the frequent butt of nasty workplace jokes did not meet *McAlindin* standard); Olson v. Dubuque Cmty. Sch. Dist., 137 F.3d 609, 612 (8th Cir. 1998) (finding that a plaintiff with depression and severe social withdrawal did not meet the *McAlindin*/EEOC standard); *see also* Bell v. Gonzales, 398 F. Supp. 2d 78, 88 (D.D.C. 2005) (concluding that a plaintiff with Tourette's syndrome who worked for the FBI as a photographer failed to meet the "high" standard for impairment in interacting with others under *Toyota*). There was a debate in law reviews on this issue, which the ADAAA now likewise supersedes. *See, e.g.*, Patrick A. Hartman, *"Interacting with Others" as a Major Life Activity Under the Americans with Disabilities Act*, 2 SETON HALL CIR. REV. 139, 140 (2005) (arguing in favor of ADA coverage for person with impairments in their ability to interact with others); Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1142-43 (arguing that interacting with others must be seen as a major life activity under the ADA); Matthew M. Cannon, Comment, *Mending a Monumental Mountain: Resolving Two Critical Circuit Splits Under the Americans with Disabilities Act for the Sake of Logic, Unity, and the Mentally Disabled*, 2006 BYU L. REV. 529, 543-47, 557-59 (arguing in favor of interacting with others as a major life activity). *But see* Bryan P. Stephenson, Comment, *I'm So Lonesome I Could Cry . . . But Could I Sue?: Whether "Interacting with Others" Is a Major Life Activity Under the ADA*, 31 PEPP. L. REV. 773, 799-801 (2004) (arguing that interacting with others is not a major life activity).

[87] *See supra* note 86.

necessary,"[88] probably cannot meet the threshold requirement of being able to "perform the essential functions" of virtually any job. *McAlindin*, in short, threatened to write protection for persons with social impairments out of the ADA.

A case example demonstrates this point. In *Heisler v. Metropolitan Council,* an employee experiencing severe depression returned to work after a hospitalization for suicidal thoughts.[89] She asked for the accommodation of being assigned to a day rather than a night shift, which tended to exacerbate her symptoms.[90] Her employer fired her instead.[91] The Eighth Circuit held that Heisler was not substantially impaired in her ability to relate to others despite her testimony that she was isolating herself and not talking to or calling anyone.[92] In support of this conclusion, the court pointed out that Heisler had testified that she was still able to perform her job duties, which required her to supervise other employees.[93] She had also stated that she had a "support network" outside of work in a couple of good friends, her brother, and a friend's mother.[94] On the basis of this testimony, the court concluded on summary judgment that "Heisler has failed to meet her burden of establishing that her depression significantly restricted her ability to interact with others as compared to the general population."[95]

Note how *Heisler* illustrates a "Catch-22": employees with social impairments may be either too significantly or not significantly enough impaired to qualify for ADA coverage; they may find themselves "damned if they do and damned if they don't." Prior to the ADAAA, the likelihood that an employee with a social impairment would be found both qualified to perform a job's essential functions, yet also severely enough impaired to meet the substantial impairment requirement was slim indeed.

---

[88] *McAlindin*, 192 F.3d at 1235; *id.* at 1241 (Trott, J., concurring in part and dissenting in part).

[89] Heisler v. Metro. Council, 339 F.3d 622, 625 (8th Cir. 2003).

[90] *Id.*

[91] *Id.* at 625-26.

[92] *Id.* at 629-30.

[93] *See id.* at 629.

[94] *Id.*

[95] *Id.* (citing Doyal v. Okla. Heart, Inc., 213 F.3d 492, 496 (10th Cir. 2000) (rejecting an ADA claim of substantial impairment in interacting with others where the employee testified that she stopped visiting with friends but the employer introduced evidence that she continued to interact normally at work)).

Luckily, passage of the ADAAA changed this analysis, though not all courts realize the extent of the changes the ADAAA made to the law.[96] After the ADAAA, no ADA plaintiff may be required to establish that an impairment *severely* impairs the ability to carry out a major life activity.[97] The ADAAA also greatly expands the activities considered "major life activities" for purposes of meeting the ADA's threshold requirements. Both topics will be discussed below.

b. Appreciating the ADAAA's Significance to Analysis of Substantial Limitations in Major Life Activities

A key reform brought about by the ADAAA involves Congress's rejection of the opinion ADA critic Justice O'Connor wrote for a Court majority in *Toyota Motor Manufacturing v. Williams*.[98] *Williams* held that a disability must *severely* impair the most basic life activities of an individual in order for that individual to qualify for ADA coverage.[99] The plaintiff was a machinist who had developed carpal tunnel syndrome as a result of using hand-held vibrating power tools in her automobile assembly job.[100] Justice O'Connor held that Williams did not have a qualifying disability under the ADA because her ability to use her hands, while greatly reduced, was not so severely impaired that she could not, albeit with difficulty, carry out basic life activities such as dressing, grooming, and tending house.[101] Williams testified that her carpal tunnel syndrome prevented her from playing with her grandchildren, gardening, or performing most types of work.[102] But because she could brush her teeth and shop and cook with difficulty,

[96] One important empirical study documents a shockingly high incidence of courts and litigants failing to even cite in case pleadings and judgments the very significant modifications the ADAAA made in the statutory text and congressionally stated purposes of the ADA. *See* Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1, 3 (2013). Standard research guides also fail to make note of these significant alterations in the law. *See, e.g.*, Kristine Cordier Karnezis, Annotation, *What Constitutes Substantial Limitation on Major Life Activity of Interacting with Others for Purposes of Americans with Disabilities Act*, 2 A.L.R. Fed. 2d 347 (2005) (failing entirely to acknowledge and revise discussion in light of the important changes in ADA analysis the ADAAA makes in social impairment cases).

[97] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3554.

[98] 534 U.S. 184 (2002).

[99] *Id.* at 198.

[100] *Id.* at 187.

[101] *Id.* at 201-02.

[102] *Id.* at 202.

the Court held she was not so disabled as to meet the ADA's requirement of substantial impairment in a major life activity.[103]

In the face of this holding, Congress expressly states in the ADAAA that the *Williams* standard of "severe" impairment is an incorrect interpretation of the Act.[104] Instead, all that is needed is a showing of a substantial impairment, and this should be construed "in favor of expansive coverage."[105] In other words, in forcefully rejecting *Williams* in the text of the ADAAA, Congress disapproved the high threshold for coverage defined in *Williams*, the EEOC's regulations at that time, and cases like *McAlindin*.[106] Congress instead wanted to ensure that the focus in ADA cases would be on the employer's ability to accommodate disabilities rather than on the extent of a plaintiff's impairment.[107] The ADAAA significantly improves the playing field for

---

[103] *See id.*

[104] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3554.

[105] 29 C.F.R. § 1630.1(c)(4) (2016).

[106] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3554.

[107] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3553-54. This Act states the following:

> (a) FINDINGS — Congress finds that —
>
> . . .
>
> (5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;
>
> (6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;
>
> (7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and
>
> (8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.
>
> (b) PURPOSES — The purposes of this Act are —
>
> . . .
>
> (4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002),

all ADA Title I plaintiffs. Plaintiffs do not have to show that their condition severely impairs their ability to interact with others as the *McAlindin* court opined. Without question, *McAlindin* is no longer good law.

Congress further stated in the ADAAA that, along with lowering the standard for what degree of limitation is sufficient to show impairment, it intended to expand what activities qualify as major life activities under the ADA.[108] Thus, as the EEOC's regulations promulgated under the ADAAA state, it "should easily be concluded"

> that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
>
> (5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and
>
> (6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

Id.

[108] *See* 42 U.S.C. § 12102(4) (2016). It states the following:

> (4) Rules of construction regarding the definition of disability
>
> The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
>
> (A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.
>
> (B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

Id.

that impairments including intellectual disability, autism, and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia may "substantially limit . . . major life activities."[109]

In short, the ADAAA is of crucial importance in analyzing social impairments. The ADAAA abrogates all prior cases that narrowly interpreted when difficulties with social relations constitute a qualifying impairment, broadening the definitions of both "substantial limitations" and "major life activities."

Some post-ADAAA opinions correctly appreciate these changes in the law but others do not. One case that gets the analysis right is *Jacobs v. N.C. Administrative Office of the Courts*.[110] This case, well litigated by disability rights specialists from the Bazelon Center for Mental Health, involved a plaintiff with a longstanding diagnosis of social anxiety disorder.[111] Jacobs started a job as an office assistant in a court clerk's office and one month later received promotion to a deputy clerk position.[112] Four or five of the thirty employees in this position interacted with customers at the front counter, while others did a variety of other tasks including microfilming and filing.[113] After being assigned front-desk duty and finding that it caused her extreme stress and panic attacks, Jacobs asked for an accommodation that would allow her to work at the front desk less often.[114] Her employer instead fired her.[115] After Jacobs filed suit, her employer argued that she could not be substantially limited in interacting with others because she did interact with others on a daily basis, socialized with coworkers outside of work, and took part in Facebook.[116]

The Fourth Circuit roundly rejected this argument, however, reasoning that "[a] person need not live as a hermit in order to be

---

[109] 29 C.F.R. § 1630.2(j)(3)(iii) (2016). The ADAAA also clearly abrogates a line of cases that disqualified plaintiffs from coverage where their conditions substantially improved with medication. *See, e.g.*, Nave v. Woolridge Constr., No. CIV.A. 96-2891, 1997 WL 379174, at *4 (E.D. Pa. June 30, 1997) (rejecting as only temporary in nature a plaintiff's disability claim where he had benefited from psychotherapy and antidepressant medication and had remarkably improved). The ADAAA specifically states that the extent of a plaintiff's impairment must be evaluated "without regard to the ameliorative effects of mitigating measures[.]" 42 U.S.C. § 12102(4)(E)(i).

[110] 780 F.3d 562 (4th Cir. 2015).

[111] *Id.* at 566.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 566-67.

[115] *Id.* at 567.

[116] *Id.* at 573.

'substantially limited' in interacting with others."[117] The court cited the *DSM-IV* to note that persons with social anxiety disorders may either avoid social situations or endure them with intense anxiety.[118] Pointing to Jacobs's testimony that working at the front counter caused her extreme stress and panic attacks, the court concluded that her claim survived summary judgment.[119] The facts that Jacobs spoke to coworkers, performed her job at the front counter, and attended several outings with coworkers were "hardly dispositive," according to the court.[120] The *Jacobs* court thus correctly rejected the high bar of virtually complete impairment in the major life activity of interacting with others set by earlier, pre-ADAAA courts quoting *McAlindin*. Other post-ADAAA federal district courts have reached similar conclusions.[121]

Some post-ADAAA courts, however, such as the Ninth Circuit, have rejected plaintiffs' claims for lack of substantial impairment in interacting with others, though these cases have distinguishable facts and do not (at least yet) indicate a circuit split.[122] *Jacobs* should stand as an important step forward in correctly applying the "substantial limitation" standard to social impairments under the post-ADAAA framework. Total or severe incapacity is not required.

In sum, Congress's clarifications in the ADAAA establish that interacting with others is a major life activity[123] and that substantial

---

[117] *Id.*

[118] *Id.* at 573-74.

[119] *Id.* at 566-67, 582.

[120] *Id.* at 574.

[121] *See, e.g.*, Glaser v. Gap Inc., 994 F. Supp. 2d 569, 574-75 (S.D.N.Y. 2014) (noting, in a case allowing an employee with autism to proceed to trial on a claim of substantial impairment in the ability to interact with others, that "[t]he ADAAA, which was enacted after *Jacques*[,] . . . drastically altered the manner in which the phrases 'substantially limit' and 'major life activity' should be construed" with respect to interacting with others).

[122] *See, e.g.*, Weaving v. City of Hillsboro, 763 F.3d 1106, 1107 (9th Cir. 2014). In *Weaving*, the plaintiff, a police officer, had ADHD and had "recurring interpersonal problems with his colleagues[.]" He won his jury trial under the ADA but the court of appeals reversed, concluding that the jury could not, as a matter of law, have found that ADHD substantially limited his ability to interact with others within the meaning of the ADA. *Id.* The court noted that Weaving was for the most part able to engage in social interactions, including with his supervisors, but had problems only with his peers and subordinates. *Id.* at 1113. The court cited *McAlindin*, which the ADAAA in fact abrogates. *See id.* Insofar as Weaving's social disability was factually different from Jacobs's, the two cases may be distinguished on their facts.

[123] The definition of major life activities is as follows:

> (1) In general. Major life activities include, but are not limited to:

impairment in this area meets the ADA's threshold requirements. In future cases in which these issues arise, plaintiffs' lawyers should carefully brief and empirically support these points, drawing on experts to document the substantial impairment in social functioning caused by a diagnosed condition. If plaintiffs' advocates proceed in this way, courts should have every reason to apply the ADAAA.

The ADAAA should also abrogate all pre-2008 court rulings that *any* ability to maintain social relations disqualifies employees with social impairments from ADA protection. A person who has *no* ability to engage in social relations most likely lacks the ability to perform the essential functions of almost any job, since almost all work involves some interaction with others, if only to receive and respond to work instructions. A person may have substantial difficulties with social interactions because of a diagnosed condition, as did the plaintiff in *Heisler*, who was experiencing major depression, yet still be capable of maintaining some social ties and interactions at work.[124] Ironically, it is the person potentially trapped in the ADA "Catch-22" — who is somewhat impaired in social functioning but not so impaired as to be unable to do the essential functions of the job — that the ADA aims to identify and protect. To deny such individuals ADA coverage defeats the ADA's very objective of opening the workplace to persons with disabilities who can work if granted reasonable accommodations.

Yet despite the ADAAA, there is still a danger that persons with social impairments will find themselves sandwiched between the requirements of being both able to perform essential functions of a job, and sufficiently impaired in one or more major life activities. They may, in other words, still be trapped in a "Catch-22" of being either too impaired or not impaired enough. To demonstrate this problem in the context of social functioning at a job, consider *Ray v. Kroger Co.*, the case involving the grocery store shelf stocker with Tourette's syndrome, which caused him to involuntarily utter racial epithets.[125] The employer allowed Ray to work the night shift and to show people a card to explain the involuntary nature of his offensive verbal tics, but a cleaning contractor in the store in the middle of the night heard the tics and

> Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, *interacting with others*, and working.

29 C.F.R. § 1630.2(i)(1) (2016) (emphasis added).

[124] *See* Heisler v. Metro. Council, 339 F.3d 622, 628-29 (8th Cir. 2003).

[125] Ray v. Kroger Co., 264 F. Supp. 2d 1221, 1224 (S.D. Ga. 2003).

expressed offense, leading the employer to fire Ray.[126] In finding that Ray's impairment prevented him from doing the "essential functions" of his job, the court in essence found that Ray was *too impaired* in social functioning to perform even a low-interaction job such as stocking grocery store shelves at night.[127] In *Heisler*, on the other hand, the court found that a plaintiff experiencing severe depression and difficulty interacting with others at work, though able to continue in her job and maintain a limited social support network through family and friends, was *not sufficiently impaired* to receive ADA protection.[128] Lawyers representing employees in social impairment cases must take careful steps to avoid this "Catch-22" of being either too impaired or not impaired enough, as discussed further below.

B. Surviving the ADA Threshold Analysis in Social Impairment Cases Today

After the ADAAA's enactment, the EEOC retracted its earlier regulations that offered restrictive definitions of what constitutes a "substantial" impairment.[129] In their place the EEOC's new regulations emphasize the importance of interpreting the ADA broadly. This mandate will be helpful in social impairment cases, but lawyers must still present a strong factual record concerning the specifics of their client's situation.

---

[126] *See id.*

[127] *See id.* at 1228.

[128] *See Heisler*, 339 F.3d at 628-29.

[129] These old regulations called on plaintiffs to show:

> (i) the nature and severity of the impairment;
>
> (ii) the duration or expected duration of the impairment; and
>
> (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2) (1991), *amended by* Regulations to Implement the Equal Employment Provisions of the American with Disabilities Act, as Amended, 76 Fed. Reg. 16978-01 (Mar. 25, 2011). Prior to 2008, courts used these factors to reject plaintiffs' claims. *See, e.g.*, Johnson v. Spencer Press of Me., Inc., No. Civ. 02-73-PH, 2003 WL 169751, at *7-9 (D. Me. Jan. 24, 2003) (rejecting claim despite mental health care providers' testimony that plaintiff's depression and anxiety substantially limited his ability to interact with others because there was no evidence that his disorder, although it had resulted in the plaintiff being taken from work in an ambulance, was expected to have a long term impact). They should no longer do so, but it behooves plaintiffs' lawyers to make their strongest case on all these factors nevertheless, given courts' tendency toward discounting psychosocial disability claims.

For example, pre-ADAAA courts frequently concluded that a showing that a plaintiff had conflicts with her supervisors or co-workers failed to establish substantial impairment in ability to interact with others because this showing did not establish that the plaintiff had a substantial impairment in social functioning more generally.[130] These precedents arguably do not survive the ADAAA, as the *Jacobs* court in essence concluded.[131] Other circuits may reach different results, however, so plaintiffs' lawyers should strive to build a record in their client's cases that demonstrates impairment in social functioning beyond a particular workplace situation.

Similarly, many a social impairment case has failed because a court found the expert evidence too cursory, vague, conclusory, abstract, or lacking in concrete detail.[132] In this context as in all cases, plaintiffs' lawyers should work with experts to ensure that expert reports extensively explain the basis for the experts' conclusions in a manner

[130] *See, e.g.*, Steele v. Thiokol Corp., 241 F.3d 1248, 1250, 1255 (10th Cir. 2001) (finding, in a case where coworkers of a plaintiff with OCD called him "dunce," "psycho" and worse, that plaintiff failed to show that he was impaired in interacting with others because he had only shown difficulty getting along with coworkers); Williams v. N.Y. State Dept. of Labor, 18 Nat'l Disability L. Rep. ¶ 198, at 1047 (S.D.N.Y 2000) (holding that plaintiff's depression caused by difficulty in getting along with her boss and crude and vulgar behavior in the workplace was not so severe or long lasting as to substantially limit major life activities); Stauffer v. Bayer Corp., No. 3:96–CV–661RP, 1997 WL 588890, at *6, *10 (N.D. Ind. July 21, 1997) (holding that plaintiff failed to show that her ability to interact with others was substantially limited because the evidence did not show that she had difficulty interacting with coworkers other than one coworker and her supervisor).

[131] *See supra* notes 119–121.

[132] *See, e.g.*, Baerga v. Hosp. for Special Surgery, No. 97 Civ.0230(DAB), 2003 WL 22251294, at *5, *7 (S.D.N.Y. Sept. 30, 2003) (finding that a doctor's clinical assessment of his patient's depression was "vague" and did not indicate how the effects of the plaintiff's impairment caused a pattern of severe phobic reactions, and that the plaintiff's testimony on how his impairment affected his ability to interact with others was "self-serving" and "uncorroborated"); Huizenga v. Elkay Mfg., No. 99 C 50287, 2001 WL 640973, at *3 (N.D. Ill. June 5, 2001) (finding that the affidavit of a treating psychotherapist was "too conclusive and uninformative to be given any weight" even where the plaintiff had been receiving treatment at a Veterans Administration ("VA") Medical Center for more than 15 years for an anxiety disorder with panic attacks and his psychotherapist submitted an affidavit based on her observations of the plaintiff during two recent years and a review of his medical records from the VA for the preceding years, but did not offer reasons for her conclusions, and did not compare the plaintiff's abilities to those of the general population); *see also* Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendments Act*, 40 U. BALT. L. REV. 419, 470 (2011) (observing that Congress failed to use the ADAAA to correct some appellate courts' unduly high standards for expert evidence).

courts will accept. This is one of many areas of "culture clash" between the law and other professions: experts from other disciplines can fail to realize that courts may not credit their conclusions based on the authority of their expertise alone.

Courts too often discredit experts' reports on the grounds that they offer information that is not phrased in the correct legal language.[133] All elements necessary to make out the plaintiff's case of social impairment giving rise to an ADA claim usually should be covered in the expert's evaluation. Similarly, courts may insist that expert reports recite very specific details and give extensive reasons or factual support for each of their conclusions. These requirements can put treating or diagnosing professionals in a bind, because they quite understandably may seek to protect patient confidentiality to the extent possible by not revealing too many details about a plaintiff's situation to an employer or court. A review of cases shows that this understandable impulse to guard patient confidentiality can lead courts to disregard professionals' reports and conclusions, however.[134] Plaintiffs' lawyers should thus consider ways to work with clients, judges, and employers to protect client information while still developing a robust record on the features of a client's social impairment. Such client privacy protections can include offering submissions under seal and putting in place protective orders designed to safeguard patient confidential information. These methods should promote experts' ability to support lawyers in presenting the strongest, most complete, and detailed factual case possible.[135]

---

[133] *See* Comber v. Prologue, Inc., No. CIV.JFM–99–2637, 2000 WL 1481300, at *3-4, *6 (D. Md. Sept. 28, 2000) (rejecting the case of a plaintiff with autism who submitted her psychiatrist's testimony that her life had been "marked by 'virtually complete social isolation'" and that she lacked and would always lack the skills to enjoy relationships with others, because this doctor did not testify to knowledge of the plaintiff's relationships with anyone but himself and a coworker testified that she had a good working relationship with the plaintiff); *see also* Koshko v. Gen. Elec. Co., No. 01 C 5069, 2003 WL 1582285, at *3 (N.D. Ill. Mar. 26, 2003) (rejecting a doctor's affidavit that stated that the plaintiff had serious emotional problems that impacted major life activities including interacting with others, where the doctor stated that these activities were "impacted" but not "substantially limited").

[134] *See, e.g.*, cases cited *supra* notes 132–133.

[135] *See, e.g.*, EEOC v. Sheffield Fin. LLC, No. 1:06CV00889, 2007 WL 1726560, at *17 (M.D.N.C. June 13, 2007) (noting that a plaintiff's medical records in a Title VII national origin discrimination case were protected by a consent protective order and that "[f]ederal courts have held that 'the privacy of any individual and the confidentiality of the files may be protected by an appropriate protective order'" (quoting Willis v Golden Rule Ins. Co., No. CIV-3-89-0189, 1991 WL 350038, at *3 (E.D. Tenn. Aug. 5, 1991))); Doe v. Judicial Nominating Comm'n, 906 F. Supp. 1534,

Yet another problem experts can face arises from the "Catch-22" of ADA analysis already discussed. A medical expert's report that is too positive about a patient's ability to function in the workplace may fail to demonstrate substantial impairment in major life activities.[136] On the other hand, a report that emphasizes the extent of an employee's impairments may end up being quoted as evidence that an employee cannot perform a job's essential functions, even with reasonable accommodations. Expert reports thus must walk a fine line between clearly explaining the substantial nature of a plaintiff's social impairment *and* making the case that the plaintiff can, with or without reasonable accommodations, perform the essential functions of the job. This is yet another reason why it is important to ensure that experts understand the ADA's legal requirements.

Similar pointers emerge from a study of how courts have dealt with reasonable accommodations claims for plaintiffs with social impairments. The more clearly documented the need for accommodations to address social impairment challenges, the more likely a court is to accept the claim. This, of course, is true in all ADA cases. But in cases requesting accommodations for social impairments, courts sometimes do not fully understand the need for reasonable accommodations because these impairments remain less well understood by judges and the public alike. Strong factual records with powerful supporting evidence in the form of experts' reports and/or testimony thus are particularly important. I discuss the many legal and practical issues that arise in reasonable accommodations requests in social impairments cases in Part III below.

III. REASONABLE ACCOMMODATIONS FOR SOCIAL IMPAIRMENTS

Once a plaintiff meets the threshold requirements for ADA coverage under § 12102(1)(A) & (B), the question arises of what accommodations are reasonable. Here too, social impairment cases

1538 (S.D. Fla. 1995) (noting that the plaintiff had demonstrated disability through an affidavit filed under seal). *See generally* Megan I. Brennan, *Evidence, Social Psychology, and Health Care: Scalpel Please: Cutting to the Heart of Medical Records Disputes in Employment Law Cases*, 41 WM. MITCHELL L. REV. 992 (2015) (suggesting approaches for parties, practitioners, and courts to use in handling medically sensitive information in employment cases generally).

136 *See, e.g.*, Polderman v. Nw. Airlines, Inc., 40 F. Supp. 2d 456, 462-63 (N.D. Ohio 1999) (holding that plaintiff's mental health counselor's testimony that the plaintiff's illness "was not very severe" did not support the claim that the plaintiff flight attendant was sufficiently disabled by her depression to be substantially limited in her ability to interact with passengers).

face special difficulties. This Part analyzes the existing case law addressing reasonable accommodations for social impairments and makes recommendations for both lawyers and courts. Far too often, courts balk at requests for reasonable accommodations in the social impairments context because they sound different than the kinds of requests made in physical impairments cases. This is so even though the latter kinds of requests may often be far more expensive. This lack of open-mindedness is short-sighted and counterproductive, as I hope to convince below.

To begin this discussion, it is helpful to present a more concrete picture of how reasonable accommodations can successfully be deployed in social impairments cases. Here are two illustrative scenarios, created as a composite of some of the reported cases examined for this Article:

Scenario One*: Cecilia Cedarbaum has worked for ten years as a successful senior program manager at a business school. Her position requires her to market her program through national and international travel, speeches, and meetings with college professors and business contacts. Although usually an extroverted person, Cecilia experiences a depression that causes her to find interpersonal interaction extremely draining, especially if it is constant or long in duration. A psychiatrist prescribes a period of medical leave, followed by a reduced workload, permission to work at home, and a ban on travel, which Cecilia finds especially exhausting, for a period of one year. Cecilia hires an employment lawyer to assist her in negotiating these accommodations. Through the interactive process the EEOC mandates in ADA cases, Cecilia and her employer negotiate accommodations that grant Cecilia three months of medical leave, paid for under the disability leave policy her employer provides; a reduced workload; and permission to work at home two days a week. At first her employer is unwilling to grant her request of no travel, but a junior colleague eager for more travel agrees to assume these duties for an interim period. Following a year of medical treatment and these accommodations, Cecelia is able to assume all of her regular duties. Her colleague who volunteered to cover her travel obligations is recognized for her success when she is promoted to become a senior manager of a different program at the university.*

Scenario Two*: Ralph Sachs, diagnosed with Asperger's syndrome, is fascinated by marine biology and graduated from college with a straight A record in the sciences. He is hired at a marine research facility, where he finds the work fascinating but experiences difficulty in interacting with his colleagues, who are all much older than he is and do not share any hobbies or other lifestyle interests with Ralph. After Ralph receives several*

negative work evaluations in the categories of "getting along with others" and "working well as a team member," Ralph meets with an attorney, who advises Ralph to request job accommodations and to visit a vocational specialist. This specialist recommends job coaching for Ralph, and puts Ralph in touch with a service funded by the county that provides government-funded, once-a-week, on-site job coaching for persons on the autism spectrum. Ralph's lawyer helps him successfully negotiate with his employer for this accommodation, overcoming the employer's initial resistance to permit an outsider to regularly come into the workplace. Ralph's job coach works with him to learn the "rules" of appropriate workplace interaction, including tips for making small talk, avoiding sharing too much personal information, and remaining calm when workplace problems arise. This job coach also makes suggestions to Ralph's supervisors about ways to manage his occasional outbursts of frustration and tendencies to be too blunt in offering critical observations to others. After two years of job coaching Ralph is able to interact appropriately with his peers and has even become well-liked by them, who come to appreciate his humor and quirky insights. In year three of his employment Ralph wins a special commendation for a scientific discovery in his field.

These examples illustrate the possibilities for both employee work success *and* benefits for employers who grant reasonable accommodations to allow employees with social impairments to contribute to a workplace mission. The accommodations need not be extensive, certainly no more extensive than accommodations granted routinely in physical disability cases, but are just as crucial to the employees' ability to succeed in their employment. Yet far too often, employers and/or courts are not willing to look to this goal of long-term workplace success. They balk at the idea of accommodating social impairments, for a range of reasons that can include unconscious prejudice against those who are different in the viscerally perceived area of skillful social functioning. This failure to follow the ADA results in unnecessary waste of human talent and a narrowing of appreciation for and exploitation of the broad range of human talents. The missteps evident in the case law on reasonable accommodations in social impairment cases can be overcome, however, through good lawyering and further education of the judiciary. To that end, the Parts below examine and critique the current case law on reasonable accommodations for social impairments.

A. Reasonable Accommodations and the ADA's Interactive Process

Before discussing litigated cases, it is worth noting that the best accommodations usually are achieved without litigation. In other words, the best outcomes arise when an employer agrees to an employee's reasonable accommodations request. This is the result the EEOC intends to encourage by requiring employers and employees to engage in the interactive process to negotiate, with a "problem solving mentality," win-win solutions that keep employees working and meet employers' legitimate business needs.[137] This is where good ADA lawyering should start.

As already noted above, good lawyering requires obtaining appropriate expert reports. In the same way that the phrasing of reports is important at the threshold coverage stage, experts' careful drafting of reports at the reasonable accommodations negotiations stage is equally crucial. Medical and/or vocational experts cannot simply prescribe appropriate accommodations and expect employers — or, later, courts — to accept them. Instead, they must explain the links between the employee's particular impairments and the accommodations requested.[138]

Employees trigger the ADA's interactive process by providing their employers with notice that they believe they have a qualifying disability and wish to request a discussion about receiving reasonable accommodations.[139] After this, employers must engage in a good faith interactive process to understand what accommodations the employee wants and to offer their own accommodations suggestions that are reasonable and meet the relevant objectives.[140] While employers need

---

[137] *See* 29 C.F.R. § 1630.2(o)(3)(2016) (discussing the interactive process the EEOC requires in ADA cases). The ADA is thus an example of what Susan Sturm has helpfully referred to as "second generation" legal approaches to antidiscrimination law, which seek to create legal incentives for private actors to resolve legal disputes among themselves to avoid the need to bring litigation. *See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

[138] In *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir. 2010), for example, a medical resident with Asperger's Syndrome who had difficulty communicating with patients simply asked for "knowledge and understanding" from his colleagues and argued that they would find his communications effective once informed of his condition and its symptoms and triggers. The court was not persuaded, however, noting that he had failed to explain how the accommodation he proposed would improve his patient interactions. *Id.*

[139] *See* 29 C.F.R. app. § 1630 (2016).

[140] *See id.*

not grant employees their requested or preferred accommodations, they must attempt in good faith to offer reasonable ones.[141]

Lawyers should strongly and comprehensively build the case for reasonable accommodations for persons with social impairments, starting as early as possible — ideally, before an individual's initial request for ADA accommodations. It may be much easier to persuade an employer to offer reasonable accommodations at this informal negotiations stage than to litigate after an employer has denied effective accommodations, thus signaling that it has decided to endure the costs and risks of a lawsuit. But many individuals will not have contacted lawyers at this early stage, and may not even know that they may ask for accommodations or request that their employer engage in the interactive process. Thus, an important aspect of improving the ADA's functioning requires educating employees and employers about how Title I of the ADA works.

Even when cases come to lawyers only after an employee has filed or is poised to file a discrimination charge with the EEOC or relevant state agency, lawyers should press for EEOC-sponsored mediation with the employer. Obtaining reasonable accommodations for social impairments most often involves education and sensitization of employers rather than significant costs. It therefore may be possible to achieve good results through mediation, *before* positions become rigid in the litigation process.[142] Litigation tends to produce mixed results, at best, as discussed further below.

B. Reasonable Accommodations Listed in the ADA's Text

In casting accommodations requests in the ADA's framework, lawyers should start with the ADA's statutory language. The text of the ADA authorizes many types of accommodations, including "making existing facilities used by employees readily accessible . . . and usable"; "job restructuring, part-time or modified work schedules"; "reassignment to a vacant position"; "acquisition or modification of equipment or devices, [and] appropriate adjustment or modifications of examinations, training materials or policies"; as well as "the provision of qualified readers or interpreters, and other similar

[141] Gruber v. Entergy Corp., No. CIV.A. 96-1409, 1997 WL 149966, at *4 (E.D. La. Mar. 24, 1997) (noting, in a case involving an employee with depression, that "an employer is not obligated to always provide an employee with the best possible accommodations or to accommodate the employee in the specific manner requested").

[142] The Court has recently noted the importance of the EEOC's mediation or "conciliation" process in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1648 (2015).

accommodations . . . ."[143] Many of these generally stated types of accommodations have physical barriers to workplace access foremost in mind, but there is no reason other barriers to workplace participation of persons with impairments should not also be included. The discussion below will use this statutorily specified list as its preliminary framework, and then go on to discuss other potentially appropriate accommodations as well.[144]

1. "Making Existing Facilities Accessible" and Using "Equipment and Devices"

The idea of "making existing facilities . . . accessible"[145] brings physical disabilities to mind. But facilities are organized for non-impaired workers not only in a physical sense; they are also organized this way in a psychosocial sense.[146] Workplaces make not only physical but also *social* demands on employees, such as by sandwiching them together, exposing them to high noise flow, and/or offering no spaces for retreat to take a break from social demands and the like.[147] Many workplace facility design features may be modified at a relatively low cost. A quiet room can be offered, or a wing of office space can be provided for employees who need a lower stimulation environment. Doors or sound barriers can be installed. As is often true of design choices that accommodate employees with disabilities, design modifications may lead to productivity gains throughout the workplace. Even employees who are not covered by the ADA may

[143] 42 U.S.C. § 12111(9)(A)-(B) (2012).

[144] Statutory provisions, case law, and EEOC regulations establish that some categories of accommodations may be inappropriate. These include those that impose an "undue hardship." *See id.* § 12111(10) (discussing factors to be applied in carrying out this analysis, including specific ones laid out in (10)(B)(i)-(iv)); *id.* § 12182(b)(3) (2012) (stating that a "direct threat" exists when there is a "significant risk to the health or safety of others that cannot be eliminated by a modification of polices, practices, or procedures or by the provision of auxiliary aids or services"); 29 C.F.R. § 1630.2(r) (2016) (defining direct threat). All of these general parameters are well established by statutory text, case law, EEOC regulations, and a large literature and thus will not be a focus here.

[145] 42 U.S.C. § 12111(9)(A) (2012).

[146] *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability*," 86 VA. L. REV. 397, 428-29 (2000) (defining the "social model" as viewing disabilities as the product of interactions between the physical environment — including societal barriers — and the person with the disability).

[147] *See id.* at 429.

benefit from better designed facilities that help re-center thoughts and emotions.[148]

Similarly, employees with social impairments may need alternative communications technologies. They may benefit from handling some communications without face-to-face, real time interactions. In many situations, adapting communications methods to accommodate an employee with a social impairment may be reasonable.[149] Employees may take part in some face-to-face meetings but use online communications for another portion of their interactions. Greater use of email may allow employees to avoid the stimulation and anxiety associated with a constant barrage of in-person interactions. Email may allow employees to think longer about responses and to rethink and reevaluate before sending messages. It may remove nonverbal social cues from the communication, thus leveling the playing field because in email no one benefits from such cues. Of course, in some jobs the ability to communicate immediately and effectively in face-to-face interactions with others may be an essential job function; consider, for example, a fire chief or other emergency workforce supervisor. The ADA teaches, however, that what may be an unreasonable accommodation in one circumstance may be reasonable in another.

In short, alternative communications technologies may accommodate employees with social impairments without burdening legitimate employer interests. Such technology accommodations should not be controversial because they are low-cost modifications that clearly fall under the statutory text calling on employers to make existing facilities accessible and employ and modify equipment or devices to accommodate employees with disabilities.[150]

---

[148] *Cf.* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990) (noting that accommodations for persons with disabilities often benefit a wide range of others as well). These insights are incorporated into concepts of universal design. *See What is Universal Design,* AMERHART (Sept. 29, 2014), http://www.amerhart.com/what-is-universal-design/ (describing universal design movement as "designing products and spaces so that they can be used by the widest range of people possible").

[149] *See, e.g.*, Bennett v. Unisys Corp., No. 2:99CV0446, 2000 WL 33126583 (E.D. Pa. Dec. 11, 2000) (citing EEOC 1998 guidelines stating that adjusting the structure of supervision can be a reasonable accommodation); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, 1997 WL 34622315, *12-13 (1997) (noting as an example of a reasonable accommodation a supervisor "communicating assignments, instructions, or training by the medium that is most effective for a particular individual").

[150] *See* 42 U.S.C. § 12111(9) (2012).

2. Providing "Interpreters": Job Coaches, Counselors, and Trainers

The reference to "interpreters" in the ADA provision that spells out examples of "reasonable accommodations" refers most obviously to sign language interpreters, but employees can need "interpretive" assistance in other ways as well. Employees with social impairments may need help interpreting the social world just as employees with hearing impairments may need help in interpreting speech. Interpreters for the social world can be job coaches, counselors, job mentors or, in some circumstances, informal "work buddies" who agree to look out for a fellow worker. Most often and most effectively, such accommodations involve approving, appointing, or recruiting experts such as job coaches, retention specialists, counselors, trainers, and the like.

One of the most effective potential interpreters for employees with social impairments is a job coach. A growing vocational experts' literature documents the benefits of job coaches,[151] and a handful of ADA cases approve this accommodation as well. The Job Accommodations Network ("JAN"), an U.S. Department of Labor-sponsored online resource on possible accommodations for disabilities, explains: "While job coaches can be helpful in assisting individuals with a wide variety of disabilities, job coaches most commonly work with individuals who have conditions such as autism, learning disabilities, attention deficit disorder (ADD), and cognitive impairments."[152] Moreover, it adds, "[j]ob coaching is also one of the most frequently used accommodations by people with psychiatric disabilities."[153] JAN further notes that these resources may often be provided externally and without cost to the employer, through state vocational rehabilitation agencies or similar resources.[154] Granting an accommodation involving a part-time and/or temporary job coach, vocational counselor, or similar trainer need not be expensive or obtrusive.[155] The employee gets assistance in navigating the interpersonal aspects of succeeding at her job and the employer gets a better performing employee.

---

151 *See, e.g.*, Daniel Tucker, *Accommodations and Compliance Series: Job Coaching in the Workplace*, JOB ACCOMMODATION NETWORK (June 12, 2013), http://askjan.org/topics/jobcoaching.htm (describing what job coaches are and how they may be helpful to navigate ADA requirements).

152 *Id.*

153 *Id.*

154 *Id.*

155 *See id.*

JAN provides two specific examples of accommodations that address social interaction impairments through job coaches.[156] These are worth quoting in full in order to illustrate concretely the difference a job coach can make:

Situation [1]: *A food service worker with an anxiety disorder works in the kitchen of a restaurant, helping with food preparation and cleaning. She is able to perform all of her essential functions, but she tends to talk to her co-workers incessantly about her personal issues to the point that other employees complain to management. A manager talks with the food service worker about her conduct and explains that it is interfering with work and making coworkers uncomfortable.*

Solution: *The employee is a client of a mental health agency and offers to talk with her service coordinator about getting a job coach. The job coach teaches the employee how to talk with coworkers about impersonal topics (like the weather) and how to focus conversations on work tasks she and coworkers are performing. The job coach then helps the employee apply the new skills directly on the job and is able to fade out direct involvement after a couple of months.*

Situation [2]: *A veteran who recently returned to the workforce after spending several years overseas has Post Traumatic Stress Disorder (PTSD) and a Traumatic Brain Injury (TBI), which causes difficulty with memory and mood regulation. He was recently hired as a customer service representative. After disclosing his disability and requesting reasonable accommodations, his employer provided him with a cubicle close to an exit, with his back facing a wall. This helped to alleviate some of his stress, but he still had difficulty with memory and emotional outbursts.*

Solution: *The employer obtained a job coach through the Department of Veterans Affairs to assist the employee with adjusting to his new position. The job coach worked with the employer and employee to develop a customized form for taking notes from customers and a system for organizing the employee's workspace. The job coach also suggested the employee e-mail his supervisor when he has questions so he will have responses in written form that he can refer to later if he forgets something. Finally, the job coach helped the employee incorporate breaks into his day to walk and do breathing exercises to help reduce the likelihood of emotional outbursts. After the job coach comes in twice a week for three weeks, the employee is able to incorporate the job coach's suggestions into his regular routine and perform his job duties without assistance.*

[156] *Id.*

In short, job coaches are a well-studied accommodation found to produce effective results.[157] Preliminary indications as to whether courts will accept job coaches as a reasonable accommodation are positive as well. One example of a case approving this accommodation is *Menchaca v. Maricopa Community College District*.[158] There, a car accident caused traumatic brain injury and PTSD to the plaintiff, a counselor for college students.[159] As a result, she experienced some difficulty with volatility in interpersonal relations.[160] After the college that employed her discontinued the job coach it had been providing for her and then failed to renew her employment contract, she sued under the ADA.[161]

The court denied the college's motion for summary judgment against Menchaca's claim that a job coach was a reasonable accommodation, noting that she had been successful at her job while the college was providing her with a job coach for one hour per week.[162] This coach had assisted her with goal setting, decision making, and communications skills and had discussed her work activities to help her identify and resolve problems.[163] The court further noted that the suggested accommodation of a one-hour-per-week job coach involved a relatively minimal burden that could allow this employee to successfully perform her job.[164]

Another case approving a job coach as an ADA accommodation for an employee with a social impairment is *Glaser v. Gap Inc*.[165] The Gap employed Glaser, who had autism, as a merchandise handler, but fired him after he had an altercation with his supervisor.[166] Glaser filed suit under the ADA.[167] The court rejected Gap's argument that Glaser was not sufficiently impaired to be eligible for ADA protection and further denied Gap's motion for summary judgment on whether it had a responsibility to provide him with accommodations.[168] When Gap first hired Glaser, he had requested a job coach, or "retention specialist,"

157 *See, e.g.*, *id.* (citing additional sources).
158 595 F. Supp. 2d 1063, 1072 (D. Ariz. 2009).
159 *Id.* at 1065.
160 *See id.*
161 *Id.* at 1066-67.
162 *Id.* at 1071-72.
163 *See id.* at 1072.
164 *See id.* at 1072-73.
165 994 F. Supp. 2d 569 (S.D.N.Y. 2014).
166 *Id.* at 570-72.
167 *Id.* at 572.
168 *Id.* at 575, 580.

but Gap denied this request even though a state service agency would have provided this resource for free.[169] The court rejected Gap's argument that this accommodation was "unreasonable as a matter of law," pointing out that it had not identified any "undue hardship" that would have arisen from granting Glaser's accommodations request.[170]

Other cases approve extended training periods or additional training as reasonable accommodations for plaintiffs with social impairments.[171] In still other cases, courts have rejected plaintiffs' ADA claims after noting that the employer had provided accommodations such as job coaching in prior situations. *Jakubowski v. Christ Hosp., Inc.*, for example, involved a medical resident with Asperger's syndrome who was terminated because of his difficulties interacting with patients as well as mistakes in diagnosing and treating them.[172] The employer had provided remediation coaching for other residents with similar problems.[173] In Jakubowki's situation, the employer met with Jakubowski and offered to help him obtain a different placement in a pathology residency that did not require as much interpersonal interaction.[174] The court pointed to the employer's prior good faith in discussing and providing accommodations in upholding the employer's decision that Jakubowski could not perform the essential functions of a family practice residency.[175]

In sum, courts may see accommodation requests for a part-time job coach, trainer, or counselor as reasonable and minimally burdensome. Court may see employers who provide such accommodations as acting in good faith. Whether this accommodation is reasonable in the circumstances will of course depend on the particular situation, including the nature of the position and the amount and type of coaching required. Courts are more likely to endorse job coaching or extra training as accommodations when employees ask for these

169 *Id.* at 577-78.

170 *Id.* at 580.

171 *See, e.g.*, Rocafort v. IBM Corp., 334 F.3d 115, 120 (1st Cir. 2003) (holding that an employer's provision of a temporary extended training period was a reasonable accommodation for an employee with anxiety and panic disorders); Kleiber v. Honda of Am. Mfg., Inc., 420 F. Supp. 2d 809, 822 (S.D. Ohio 2006), *aff'd*, 485 F.3d 862 (6th Cir. 2007) (stating that the use of a temporary job coach to assist in training an employee who had experienced a traumatic brain injury could be a reasonable accommodation, but a full-time job coach providing more than training would not be a reasonable accommodation).

172 Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 198-99 (6th Cir. 2010).

173 *Id.* at 199.

174 *Id.* at 198-99.

175 *Id.* at 203.

services on a part-time and/or temporary basis rather than constantly or permanently.[176] Courts have held, for example, that it is not reasonable to request that an employer hire a new employee to assist an ADA-protected employee in actually performing the essential functions of a job; instead, courts have viewed such a request as an admission that the employee cannot perform those essential functions. In *Stebbins v. Reliable Heat & Air, LLC*, for example, an employee with Asperger's syndrome worked as a customer service representative.[177] He asked that his employer provide another employee to explain his situation to customers who became upset with him over the phone.[178] The court rejected this proposal, finding that it would require the second employee to continuously monitor the plaintiff's phone calls and thus showed that the plaintiff was not qualified to perform the essential functions of his job.[179] Thus, requests for full-time help — help that involves doing essential functions of a job—will backfire.[180] More limited requests for part-time or temporary coaching and/or training to assist an employee in adapting to the social demands of a particular workplace should, in many situations, be reasonable.

Using co-workers as informal "job buddies" for persons with social impairments may be less reasonable. On the one hand, this possible accommodation demonstrates that workplaces are not necessarily isolating and individualistic; the very fact that most workplaces are social and collaborative supports the idea that workers can and do help each other in myriad ways. Indeed, social coaching is not far removed from the wise counsel of workplace friends from which many employees benefit during their careers. On the other hand, assigning the responsibility to support a fellow employee's job success to a co-worker arguably puts it in the wrong place, since it is the employer's burden to provide accommodations, not that of fellow employees. Co-worker or peer social coaching thus may not be an appropriate accommodation in many situations. This accommodation may provide too little help, lack the efficacy of using a trained professional, and potentially cause co-worker resentment. But it is one that can at least

176 *See supra* note 171.

177 Stebbins v. Reliable Heat & Air, LLC, No. 10-3305-CV-S-RED, 2011 WL 4729816, at *1 (W.D. Mo. Oct. 7, 2011), *aff'd*, 473 F. App'x 518 (8th Cir. 2012).

178 *Id.* at *3.

179 *Id.*

180 *See* E.E.O.C. v. Amego, Inc., 110 F.3d 135, 148 (1st Cir. 1997) (citing Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995)) (holding that it was not a reasonable accommodation to require a small nonprofit to hire additional staff to accommodate an employee).

be considered in circumstances in which it would not be onerous and has a realistic probability of producing a positive outcome.

3. Leaves of Absences

A temporary leave of absence should also be a reasonable accommodation under EEOC regulations and the statutory text.[181] Courts sometimes, but not always, get this issue right.[182] Courts often reject requests for indefinite or long leaves.[183] The case law is mixed on courts' willingness to grant limited temporary leave in social impairment cases; critical in these situations is evidence that the plaintiff will be able to return within a definite time frame and then be able to do the essential functions of the job. Employers and courts that

[181] *See* 29 C.F.R. pt. 1630, app. § 1630.2(o) (2016); 29 C.F.R. pt. 32, app. A(b) (stating that regulations promulgated by the Department of Labor indicate that a reasonable accommodation may require an employer to grant liberal time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that it is likely to respond to treatment of hospitalization).

[182] *See, e.g.*, Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1139 (9th Cir. 2001) (holding that a leave of absence for medical treatment for obsessive-compulsive disorder may be a reasonable accommodation); Criado v. IBM Corp., 145 F.3d 437, 443-44 (1st Cir. 1998) (allowing a temporary leave of absence to an employee with depression as a reasonable accommodation); Ralph v. Lucent Tech. Inc., 135 F.3d 166, 172 (1st Cir. 1998) (approving a four-week provisional part-time period of employment as a reasonable accommodation for an employee with depression and post-traumatic stress disorder); Jensen v. Wells Fargo Bank, 102 Cal. Rptr. 2d 55, 67-68 (2000) (noting that, although an employer is not required under the ADA to create a temporary position for an employee with posttraumatic stress disorder, holding her job open while she healed was a reasonable accommodation that "may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future"); *see also* Stacy A. Hickox & Joseph M. Guzman, *Leave as an Accommodation: When Is Enough, Enough?*, 62 CLEV. ST. L. REV. 437, 483 (2014) (concluding on the basis of extensive empirical analysis that employees with mental illness are less likely to succeed in challenging denial of leave as an accommodation and also that short, definitive leave requests are more likely to succeed).

[183] *See, e.g.*, Allen v. BellSouth Telecomm., Inc., 483 F. App'x 197, 201 (6th Cir. 2012) (stating that it was not a reasonable accommodation to request indefinite leave under an employer's disability plan); Moore v. Comput. Assocs. Int'l, Inc., 653 F. Supp. 2d 955, 965-66 (D. Ariz. 2009) (finding that the request of a plaintiff with schizophrenia and depression for an extended leave, which would have required his employer to hire an expensive independent contractor, was not a reasonable accommodation); Roberts v. Cty. of Fairfax, Va., 937 F. Supp. 541, 549 (E.D. Va. 1996) (finding that it was not a reasonable accommodation for an employer to grant an employee with depression additional leave to fully recover); *see also* Hickox & Guzman, *supra* note 182, at 483, 486 (empirical evidence shows that short, definite-term leave requests are most likely to be granted).

balk at reasonable requests for necessary extensions of leave may be exhibiting a bias against psychosocial disabilities, however; there is no reason that recovery from a psychosocial condition should be handled any differently than any other medically necessary leave.

4. Modified Work Schedules

Another statutorily specified reasonable accommodation involves part-time and modified work schedules. As several scholars have pointed out, courts have been reluctant to grant such accommodations in ADA cases generally.[184] Professor Nicole Buonocore Porter calls these modifications in workplace "structural norms" — in other words, "'when' and 'where' work is completed."[185] She identifies a number of reasons why courts have antipathy to modifying structural norms, including avoiding "special treatment" for ADA-protected employees, concerns about worker resentment and effects on other employees, and fear of the "slippery slope" bugaboo, under which granting some modifications might invite a cascade of outlandish proposals.[186] Indeed, she points out, drawing on a convincing array of case support, courts are much less likely to approve modifications in structural norms than even far more expensive physical modifications of the workplace.[187]

Porter and other scholars' observations about courts' general hesitancy in ADA cases to approve modifications in workplace "structural norms," such as job schedules and shifts, is even more pronounced in social impairment cases. Courts sometimes deny requests for modified or reduced work schedules in social impairment cases on the ground that the plaintiff has requested such a schedule due to "stress" arising from interpersonal relations.[188] These courts

[184] Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 70 (2014). Porter notes that earlier scholars have also made this observation. *See id.* at 70 n.527 (citing Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6 (2005) [hereinafter *Transformative Potential*]); *see also* CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY & MEDICAL LEAVE ACT: RIGHTS ON LEAVE 671 (2010).

[185] Porter, *supra* note 184, at 70.

[186] *See id.* at 79-82.

[187] *Id.* at 78-80.

[188] *See, e.g.*, Cannice v. Nw. Bank Iowa N.A., 189 F.3d 723, 727-28 (8th Cir. 1999) (stating that it is not a reasonable accommodation to provide an employee with depression with "an aggravation-free environment"); Gaul v. Lucent Techs. Inc., 134 F.3d 576, 581 (3d Cir. 1998) (holding that it would not be a reasonable accommodation to ensure that an employee with depression and anxiety did not have

point out that all jobs inherently require enduring stress, and assert that employers should not be required to provide a non-stressful work environment. In adopting this reasoning, courts fail to understand that the plaintiff is not complaining about the general phenomenon of stress, which all employees endure to some extent, but rather specific conditions related to a particular impairment. Consider an analogy to physical disability: a court could point out that virtually all jobs involve some walking. This is generally true, but it often is possible to modify a job so that a person in a wheelchair can do it. Likewise, all jobs require significant commitment from employees, which often creates stress. But surely some jobs (and, to be sure, not all jobs) can be modified through adjusted work schedules to make them possible for employees with impairments that cause heightened sensitivity to long periods of stress at work.

In one Seventh Circuit case, for example, the court denied an accommodation request for part-time work from an employee with depression who worked as a directory assistance operator and could no longer get through a full day without crying on the phone to customers.[189] The court simply stated that "part time work is not a reasonable accommodation for a full-time job."[190] Although, to be sure, the essential functions of some jobs do require full-time work, the job of phone directory operator would appear capable of being divided into two part-time positions or being performed with some breaks in which another employee filled in. When courts deny requests to reduce hours or go part-time to plaintiffs with social impairments, skepticism about such claims sometimes seems to underlie their reasoning, a phenomenon disability rights advocates and others should monitor and oppose.[191]

any prolonged or inordinate stress). *But see* Rocafort v. IBM Corp., 334 F.3d 115, 120 (1st Cir. 2003) (ruling that it was a reasonable accommodation to put an employee on full salary rather than commission sales to reduce pressure on him and to adjust the employee's work schedule so he could avoid commuter traffic); Bultemeyer v. Fort Wayne Cmty. Schs., 100 F.3d 1281, 1287 (7th Cir. 1996) (holding that it would be a reasonable accommodation to put an employee with bipolar and anxiety disorder in a "less stressful" work environment).

189 Lileikis v. SBC Ameritech, Inc., 84 F. App'x 645, 649 (7th Cir. 2003) (rejecting the request of a plaintiff with depression who worked full time as a directory assistance operator for the accommodation of part-time work).

190 *Id.*

191 To give an example, in *Boutin v. Home Depot U.S.A., Inc.*, 490 F. Supp. 2d 98, 105 (D. Mass. 2007), a plaintiff experiencing depression and an anxiety disorder asked for a one-hour work schedule adjustment. The court denied this on the ground that the request was not related to the plaintiff's "purported disability" but rather to his "preference for a work day that matched his child's schedule more comfortably." *Id.*

Thus, notwithstanding some contrary precedent, there is no reason not to request part-time or modified work schedules as an accommodation for a social impairment where this would be an effective accommodation. A person with an anxiety disorder or depression, for example, may find it much more possible to work a shortened work schedule or to do some work at home in order to lessen the social demands of work.[192] Despite the failure of some plaintiffs to make headway with such requests, plaintiffs' lawyers should continue to push employers and courts to develop more understanding. Through careful preparation before and during litigation, lawyers can lay the factual and legal groundwork. They should encourage employers and courts to abandon unhelpful prior case law in order to bring the ADA into a better fit with the needs of persons with social as well as physical impairments.

Social impairment cases in which courts have rejected modified work schedules sometimes involve situations in which employees have asked for day-to-day leeway in their work schedules, such as

What remained unrecognized in this court's unsympathetic characterization is that the requested work schedule adjustment to match child care duties could help with stressors contributing to the depression and anxiety. *But see Rocafort*, 334 F.3d at 120 (holding that it was a reasonable accommodation for an employer to adjust the work schedule of an employee with an anxiety disorder to allow him to avoid commuter traffic and also to restructure the employee's compensation methods in order to reduce the work pressure he was experiencing).

[192] *See, e.g.*, Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1124 (10th Cir. 2004) (holding that a request to work at home would be unreasonable if it eliminates an essential function of the job, but that summary adjudication was improper when an employee with PTSD presented evidence that she could perform the essential functions of her position at home, thereby making the at-home work accommodation request at least facially reasonable); Burchett v. Target Corp., 340 F.3d 510, 517 (8th Cir. 2003) (finding that it was a reasonable accommodation to restructure the workload of an employee with depression by allowing her to work diminished hours and providing flexibility in her schedule for medical appointments and other scheduled meetings); Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1139 (9th Cir. 2001) (stating that allowing an employee to work from home could be a reasonable accommodation for OCD); Bixby v. JP Morgan Chase Bank, N.A., No. 10 C 405, 2012 WL 832889, at *15 (N.D. III. Mar. 8, 2012) (finding that it was a reasonable accommodation to allow an employee with anxiety and panic disorder to work from home); Thompson v. AT&T Corp., 371 F. Supp. 2d 661, 680 (W.D. Pa. 2005) (finding that it would be a reasonable accommodation for an employee with depression to be allowed to work at home six to eight hours a week); *see also* Beth Loy & Melanie Whetzel, *Accommodation and Compliance Series: Employees with Mental Health Impairments*, JOB ACCOMMODATION NETWORK (Oct. 22, 2015), http://askjan.org/media/Psychiatric.html (suggesting many accommodations related to modified work schedules for employees with ASD, bipolar disorder, and general "mental health impairments").

permission to arrive late for work at the employee's option to deal with the effects of depression or similar condition. Here courts are especially likely to balk, privileging employers' interests in insisting on punctuality and defined work schedules for all employees over the individual needs of the ADA-covered employee.[193] Concern about co-employee resentment may be a factor as well.[194] Courts have approved requests for a modified work schedule under which an employee starts *regularly* on a specified later schedule.[195] Here as in other situations to be discussed below, accommodations that appear to maintain employers' management prerogatives, such as the right to set employee work schedules across the board rather than letting one particular employee do so at her own discretion, tend to meet with more success than do proposals that single out an affected employee for what may appear to other employees as favored treatment.

5. Job Reassignment to a Vacant Position

Another possible accommodation the ADA's text mentions is job reassignment to a vacant position.[196] The courts are divided on the

[193] *See, e.g.*, Rask v. Fresenius Med. Care N. Am., 509 F.3d 466, 469 (8th Cir. 2007) (holding, in a case involving a plaintiff with depression, that "[w]e have 'consistently held that regular and reliable attendance is a necessary element of most jobs,' and we see no reason to hold otherwise in the circumstances of this case"); Earl v. Mervyns, Inc., 207 F.3d 1361, 1367 (11th Cir. 2000) (holding that it was not a reasonable accommodation to allow an employee with OCD to clock in at whatever time she arrived, without reprimand, and to permit her to make up the missed time at the end of her shift); *see also* Porter, *supra* note 184, at 80-81 (noting that employers resist introducing more laxness in attendance rules for ADA-protected employees generally). *But see* McMillan v. City of N.Y., 711 F.3d 120, 127-28 (2d Cir. 2013) (allowing, as a reasonable accommodation under the ADA, an employee with schizophrenia to work on an adjusted work schedule where he could bank time for being late by working through lunch and leaving later).

[194] *See* Heather Peters & Travor C. Brown, *Mental Illness at Work: An Assessment of Co-worker Reactions*, 26 CANADIAN J. ADMIN. SCI. 38, 45 (2009) (finding that co-workers were less likely to view longer/more frequent work breaks as appropriate accommodations for employees with mental illness than flexible hours, banking of overtime hours, and counseling). Research shows that employees who have had workplace contact with persons with mental illness are more likely to support hiring people with mental illness than those who have not had such exposure. *Id.* at 49.

[195] *See Rocafort*, 334 F.3d at 120 (holding that it was a reasonable accommodation for an employer to adjust the work schedule of an employee with an anxiety disorder to allow him to avoid commuter traffic); *see also* Breen v. Dep't of Transp., 282 F.3d 839, 840-43 (D.C. Cir. 2002) (holding that it could be a reasonable accommodation to allow an employee with OCD to work an alternative work schedule of nine hours a day and then an extra day off every other week).

[196] In other cases, of course, the employee wants to remain in her old position and

general standards for job reassignments under the ADA,[197] so this issue is not without controversy in any disability case, but the problems are compounded in social impairment cases.

Employees with psychosocial disabilities should be entitled to transfer to vacant job positions if they are qualified to do these jobs and require a transfer due to disability, just as an employee with a physical disability would be.[198] Recognizing this, some courts have granted transfers in social impairment cases,[199] but others have refused transfer requests.[200] The Seventh Circuit, for example, has approved the potential reasonableness of an employee's accommodation request to be transferred to a less stressful work environment.[201] In other cases employees have not fared as well.[202]

---

it is the employer seeking to transfer her to a different position that she regards as less desirable. In this scenario the plaintiff may be fighting reassignment and the lawyer may be called upon to argue that the client can still do the essential functions of her original position and that transfer is *not* appropriate.

197 *See generally* Porter, *supra* note 184, at 58-59.

198 *See* Coulson v. Goodyear Tire & Rubber Co., 31 F. App'x 851, 857 (6th Cir. 2002) (stating that in general transfer or reassignment of an employee with depression was within the realm of possible reasonable — and therefore required — accommodations, but such a transfer must be to a currently existing vacant position for which the person is qualified, and the plaintiff in this case had not shown this); Kleiber v. Honda of Am. Mfg., Inc., 420 F. Supp. 2d 809, 821 (S.D. Ohio 2006), *aff'd*, 485 F.3d 862 (6th Cir. 2007) (noting, in a case involving an employee with a traumatic brain injury, that an employer need only reassign an employee to a vacant position and need not create a new position or "bump" another employee from a position to meet an accommodation request).

199 *See, e.g.*, Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775-76 (3d Cir. 2004) (allowing a police officer with depression who was not able to carry firearms to transfer to a radio room position).

200 *See, e.g.*, *Coulson*, 31 F. App'x at 857-58 (holding that it was not a reasonable accommodation to transfer an employee to another department so he did not have to work with certain individuals); Schwarzkopf v. Brunswick Corp., 833 F. Supp. 2d 1106, 1123 (D. Minn. 2011) (disapproving a transfer request based on the plaintiff's need to avoid certain coworkers and the stress of the prior job position).

201 Bultemeyer v. Fort Wayne Cmty. Schs., 100 F.3d 1281 (7th Cir. 1996). In this case a school custodian developed bipolar disorder. The school district failed to engage in a good faith interaction with him about possible accommodations, including his request for a change in his building assignment, and the Seventh Circuit for this reason reversed the district court's grant of summary judgment for the employer. *Id.* at 1281-82, 1285.

202 *See, e.g.*, Cannice v. Nw. Bank Iowa, N.A., 189 F.3d 723, 728 (8th Cir. 1999) (holding that obligation to provide reasonable accommodations does not extend to "an aggravation-free environment"); Gaul v. Lucent Techs., Inc., 134 F.3d 576, 579-81 (3d Cir. 1998) (holding that a plaintiff's request for a transfer to reduce stress in his work position was unreasonable as a matter of law on various grounds); *Schwarzkopf*, 833 F. Supp. 2d at 1123 (holding that cessation of harassment and stress was not a

Again, the concept of workplace stress plays heavily in courts' reasoning. Courts that have rejected requests for job transfers based on social impairments or other psychosocial disabilities generally state that employees may not seek to "avoid stress" at work by transferring positions. This perspective again evidences a bias against psychosocial disabilities: just as an employee with a physical disability may need to avoid lifting too much weight, yet still be able to do a job involving lifting less weight, an employee with a psychosocial disability might need to avoid experiencing too much stress, but still be able to do a job involving less (but not zero) stress. Likewise, an employee with a social impairment may not perform effectively at a job involving too much or a certain type of interpersonal interaction, such as Jakubowski, the medical intern who had difficulty interacting well with patients in a family practice residency. But this same employee might be effective if able to transfer to a job vacancy involving less or a different kind of interpersonal interaction, as Jakubowski's employer understood in suggesting he consider transferring to a residency in pathology.[203] To avoid the potential snares raised by focusing on workplace stress generally, plaintiffs' lawyers should emphasize the individual's particular impairment in diagnostic terms, for example, "social anxiety" rather than general work stress.[204]

Note that there are two possible scenarios in which an employee with a social impairment might need a job reassignment. One involves situations, such as in *Jacobs*, in which an employee's job duties change so that they begin to require social interaction that is problematic for her,[205] or in which the employee's medical condition changes, as in *Heisler*, where the plaintiff was experiencing severe depression, so that she could no longer perform all of the functions required in a job that she previously was able to perform.[206] These situations are analogous to ones in which an employee's job duties change so that she is asked to lift more weight than is possible for her, or she develops a disability that makes the weight lifting that always accompanied her job now impossible. These employees can no longer work for the employer if they do not receive a job transfer. Courts may see the equities in this type of case as strong, even though it still may be hard to win a transfer, because the employer has available the argument that the

reasonable accommodations request).

[203] Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 198-99 (6th Cir. 2010).

[204] *See, e.g.*, Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 574 (4th Cir. 2015).

[205] *See supra* notes 112–114 and accompanying text.

[206] *See supra* notes 6 & 89–91 and accompanying text (discussing *Heisler*).

employee is no longer qualified to perform the essential functions of the job for which she was hired.

A different scenario arises when an employee argues that she cannot do a job because of the actions or attitudes of particular supervisors or coworkers. Here, she is not saying she can no longer do her existing job because of changed circumstances but instead that persons in her environment are interfering with her ability to work because of her social impairment. As already noted, courts are especially loath to approve accommodations where the social aspects of a work environment become problematic. In these cases, it may be best to emphasize changes in job duties or in the plaintiff's condition in explaining the reasons for the job transfer request.

When employees seek a job transfer as an accommodation and state that they wish to avoid specific individuals, their best chances of success are when they can show that their employer has previously granted transfer requests based on interpersonal conflict. As the court in *Felix v. City & County of Denver* pointed out (although disapproving the transfer request in that case), winning evidence should include the fact that a vacant position exists, if this is the case, and that the employer has granted transfer requests based on "personality conflicts," without regard to disability, in the past.[207] Similar considerations apply for transfer requests based on an inability to interact with coworkers. At least one court has found, in *Roberts v. County of Fairfax*, that there was an issue of material fact as to whether such a transfer request was a reasonable accommodation because the employer had allowed such transfers in the past.[208] These are thus issues of fact ADA plaintiffs' lawyers should explore for their clients.[209]

The reason the *Felix* and *Roberts* courts noted that evidence of prior successful transfer requests by employees without disabilities should be relevant in ADA cases is that comparator evidence establishes disparate treatment under employment discrimination law generally. Comparator evidence shows that an employer treated persons with*out* disabilities better, such as by allowing transfers based on interpersonal conflict, than persons who requested such transfers for the same reasons but who had a disability. This, at least, is a bottom line to which plaintiffs can resort under appropriate facts: employers and

---

[207] *See* Felix v. City & Cty. of Denver, 729 F. Supp. 2d 1243, 1265 (D. Colo. 2010).

[208] *See* Roberts v. Cty. of Fairfax, 937 F. Supp. 541, 549-50 (E.D. Va. 1996) (denying employer's summary judgment motion on these grounds). *But see* Coulson v. Goodyear Tire & Rubber Co., 31 F. App'x 851, 858 (6th Cir. 2002) (stating that it is not a reasonable accommodation to request transfer to avoid certain individuals).

[209] *See Felix*, 729 F. Supp. 2d at 1265; *Roberts*, 937 F. Supp. at 549-50.

courts should not deny accommodations requests in social impairment cases when they would approve them in other scenarios. In other words, obtaining workplace accommodations should not be any more problematic for persons with social impairments than for persons with other types of disabilities or no disability at all.

C. Other Accommodations in Social Impairments Cases

Other types of appropriate accommodations for individuals with social impairments are not specifically mentioned in the ADA's text but may be equally appropriate. These can include requests for changes in a workplace interpersonal environment, modification of management methods, or reduction in social interaction demands. Although the ADA makes clear that reasonable accommodations are not limited to those listed in the statutory text,[210] courts are often reluctant to grant such accommodations that address the interpersonal aspects of work, even though these accommodations quite obviously are the ones appropriate to address impairments in interpersonal relations.

The problems plaintiffs with social impairments often face in getting appropriate accommodations is yet another illustration of the general problem of parity between so-called "mental" as opposed to "physical" disabilities. This parity problem is a very real and continuing one, as the research underlying this Article shows and as many disability scholars have pointed out in addressing a variety of topics related to psychosocial conditions.[211] Indeed, problems of parity between law's treatment of so-called "mental" and "physical" conditions manifest themselves throughout law. Consider, for example, doctrines that do not allow recovery under workers' compensation laws for employees whose injuries are related to workplace "stress."[212] Another example involves the still existing lack of parity in insurance coverage for "mental" versus "physical" conditions.[213] Still others concern the

[210] *See* 42 U.S.C. § 12111(9) (2012) ("The term 'reasonable accommodation' may include [list] and other similar accommodations . . . .").

[211] *See* literature cited *supra* note 17.

[212] *See generally* MARION G. CRAIN ET AL., WORKPLACE LAW: CASES AND MATERIALS 945-49 (3d ed. 2015) (discussing and presenting case examples of courts' unwillingness to allow workers' compensation recovery for injuries resulting from general workplace stress).

[213] *See, e.g.*, Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, H.R. 6983, 110th Cong. (2008), https://www.govtrack.us/congress/bills/110/hr6983 (explaining that the goal of this defeated legislation was to introduce health insurance parity for mental illness).

differences in treatment under tort law of plaintiffs with mental versus physical injuries.[214] And, as already discussed in sections III.B.4 & 5 above, even ADA case law eschews accommodations for workplace "stress" that would be granted to individuals facing conditions classified as "physical" impairments.[215] Nonetheless, the fact remains that the ADA mandates that accommodations address the particular impairments involved; logically enough, in *social impairment* cases the accommodations plaintiffs need may involve modifications in a workplace's *interpersonal* environment.

Such modifications do not address the workplace's physical hardscape, such as installing a braille machine or a wheelchair-accessible bathroom, or even "structural norms," such as work schedules and shifts. Instead, even worse from the perspective of many courts, they address the amorphous realm of social environment. Without further education, judges may regard accommodations addressed to the interpersonal aspects of work as going beyond the tangibles courts can or should address under the ADA.

One reason judges are reluctant to approve accommodations that address interpersonal matters in the workplace relates to the general background norms of U.S. employment law that disapprove of too much legal intrusion into employers' "managerial prerogatives."[216] The principle of management prerogatives holds that workplace regulation should avoid interfering with employers' rights to manage their workplaces as they see fit.[217] The management prerogative doctrine can easily bump up against ADA mandates, especially when plaintiffs ask courts to order alterations in management styles or methods. But in social impairments cases it is precisely these aspects of the workplace that may need to be adjusted in order to allow an employee to successfully perform her job.[218] The adjustments may often be quite

---

[214] *See generally* RICHARD A. EPSTEIN, TORTS § 10.14-.17 (1999) (discussing special tort rules for nonphysical injuries).

[215] *See* discussion *supra* sections III.B.4 & 5.

[216] *See generally* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 115-17 (1983) (discussing doctrine of management prerogatives).

[217] *See id.*

[218] *See* Sharon L. Harlan & Pamela M. Robert, *The Social Construction of Disability in Organizations: Why Employers Resist Reasonable Accommodation*, 25 WORK & OCCUPATIONS 397, 397 (1998) ("[E]mployers are reluctant to modify the social structure of work because of their perceived need to contain the costs of reform and maintain control of the work process."). For an example of a case in which a court explicitly states this rationale for denying accommodations request, see *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 581 (3rd Cir. 1998), in which the court rejected the plaintiff's request to be transferred away from individuals who were causing him

small for the employer but produce large payoffs in the effectiveness of an employee, in much the same way that small adjustments in teaching methods may make a big difference to the learning of a student covered by the Individuals with Disabilities Education Act[219] or Section 504 of the Rehabilitation Act.[220]

Of course, some accommodations may be reasonable in a particular workplace situation and others may not. It may not always be possible to accommodate social impairments, just as it may not be possible to accommodate physical ones. The point is simply that there is, or should be, nothing "off limits" about granting accommodations that go to the aspects of a workplace that involve *social* interactions, any more than granting physical hardscape modifications that go to ameliorating barriers posed by physical impairments. Courts have quite a long way to go, however, in readily accepting accommodations requests for adjustments in an employee's social environment. This Part addresses that set of particularly difficult accommodations proposals.

1. Specific Personnel Changes

Not surprisingly, for the reasons already discussed, accommodations requests for specific personnel changes, such as changes away from a particular supervisor, are difficult to win.[221] A few courts have been willing to entertain such requests but in the end rejected them.[222] Even

inordinate stress on the grounds that this was "essentially asking this court to establish the conditions of his employment" and that "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy."

[219] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2012).

[220] 29 U.S.C. § 794 (2012).

[221] *See, e.g.*, Weiler v. Household Fin. Corp., 101 F.3d 519, 524-25 (7th Cir. 1996) (holding that it is not a reasonable accommodation to require an employer to switch an employees' supervisor); Schwarzkopf v. Brunswick Corp., 833 F. Supp. 2d 1106, 1122-23 (D. Minn. 2011) (holding that it was not a reasonable accommodation request to be transferred to avoid certain co-workers); Felix v. City & Cty. of Denver, 729 F. Supp. 2d 1243, 1265 (D. Colo. 2010) (holding that employees must come forward with evidence to overcome the presumption that a supervisory transfer would be unreasonable).

[222] *See, e.g.*, Kennedy v. Dresser Rand Co., 193 F.3d 120, 122-23 (2d Cir. 1999) (stating that a per se rule that replacement of a supervisor can never be a reasonable accommodation is "inconsistent with our ADA case law," but holding on the facts of the case that it was not a reasonable accommodation to switch the employee to a new supervisor since it could not be accomplished without excessive organizational costs and since the employee's request was not simply for reassignment to a different supervisor but also for protection from any interaction with the previous supervisor

when a plaintiff convincingly demonstrated that a particularly abusive supervisor's tendency to shout at employees aggravated his depression and anxiety, for example, the court in *Schwarzkopf v. Brunswick Corp.* held that it was not a reasonable accommodation for the employee to ask that the supervisor and others cease such harassment or, alternatively, for a transfer to another supervisor.[223] There appears to be no particularly good rationale for such a holding other than courts' fear that plaintiffs may seek to abuse the protections of the ADA by attempting to resolve mere interpersonal workplace conflicts through its protections. Since the ADA's high threshold requirements for establishing a covered disability protect against the dangers of such abuse, as already discussed,[224] courts' reasoning in this regard appears unduly crabbed. Some disabilities may make working with an abusive supervisor not simply unpleasant but impossible. Why should a person with such an impairment not receive the effective accommodation of changing supervisors when not unduly burdensome, just as an employee with a physical disability might need the accommodation of changing office equipment in order to effectively perform her job? To hold that changes in physical environment are reasonable but changes in the interpersonal environment are not is to privilege the physical world over the social or interpersonal one in a manner that also privileges the accommodation of physical impairments over social ones.

The most favorable cases involving accommodations requests for transfer away from particular supervisors emphasize the ADA's explicit statutory language providing that transfers to vacant positions may be a reasonable accommodation, as already discussed in section III.B.5

and this would be virtually impossible given the specifics of the employee's job).

[223] *Schwarzkopf*, 833 F. Supp. 2d at 1123 (stating that there exists "no authority for the proposition that cessation of harassment is a required reasonable accommodation" (citations omitted)). *But see* Ann Hubbard, *The ADA, the Workplace, and the Myth of the 'Dangerous Mentally Ill*,' 34 UC DAVIS L. REV. 849, 910 (2001) ("Because aggressive, badgering and assaultive conduct does not advance any legitimate interest of the employer, and risks running afoul of federal anti-discrimination statutes and state tort laws, employers should prohibit and discourage such conduct. . . . This type of accommodation would advance the employer's interest in avoiding workplace violence without incurring an undue hardship.").

[224] *See supra* Part I. A plaintiff with a social impairment who argues that she could do her job if she were only transferred to another supervisor may run into problems in establishing that she has a covered disability. The court in *Weiler*, 101 F.3d at 525, for example, held that the plaintiff, a senior account clerk who developed depression and anxiety because of criticism from her supervisor, showed that she was not "significantly limited" for purposes of the ADA because she argued that she could do the same job under a different supervisor.

above.[225] In other words, the best way to cast an accommodations request to move *out* of a particular work environment may be to ask for transfer *to* an open position for which the plaintiff is qualified.

2. Modifying Supervision Methods

Another accommodation that is hard to win in social impairments cases involves requests that supervisors modify supervision methods. Some such requests might be for supervisors to be more explicit about work expectations, break tasks into smaller chunks, or give more frequent or specific feedback to an employee. Others might involve requests that supervisors avoid harsh supervision techniques — shouting, undue criticism, unreasonable demands, and the like.[226] These are all requests that courts appear loath to approve because they go to altering the interpersonal environment of the workplace.

Some courts have approved minor modifications in management methods, such as accommodations that called for a supervisor to give an employee with a social impairment daily performance updates or feedback on interpersonal weaknesses.[227] The challenge has been convincing those employers and courts that are skeptical about legal intrusion on employers' management discretion. Winning arguments must point to the payoffs of improved job effectiveness on the part of an ADA-protected employee, as weighed against minor management adjustments. It appears best to cast the accommodation request as narrowly as possible, painting a picture that avoids sounding like the accommodation will involve a major intrusion into managers'

[225] *See supra* section III.B.5.

[226] *See generally* STEFAN, *supra* note 17, at 138-40 (noting problematic nature of such supervisor behavior for persons with psychiatric disabilities).

[227] *See* Connolly v. Entex Info. Servs., Inc., 27 F. App'x 876, 878 (9th Cir. 2001) (finding in a case involving an employee with autism spectrum disorder, it was a reasonable accommodation for the employer to reduce the number of assignments given to the employee, and to instruct his supervisor to show him with more specificity how to do his tasks and give him a checklist and binder in which he could take notes and track pertinent data in order to aid him with record-keeping difficulties); Bennett v. Unisys Corp., No. 2:99CV0446, 2000 WL 33126583, at *10 (E.D. Pa. Dec. 11, 2000) (approving supervisory method modifications as potential reasonable accommodations for an employee with inappropriate interpersonal skills due to major depression); *see also* Tucker, *supra* note 151 (discussing case examples). *But see Schwarzkopf*, 833 F. Supp. 2d at 1122-23 (rejecting reasonable accommodation request for written instructions to complete work made by a plaintiff experiencing depression). The court's reasoning in *Schwartzkopf* was that the plaintiff could not be entitled to the accommodation he requested because he had claimed that he was capable of performing his job's essential functions. *Id.*

prerogatives. For example, instead of asking for a change in "management methods" to provide more intensive, positive, and/or frequent feedback to support the employee's interpersonal interactions, it might be preferable to frame the accommodation as a restructuring of the employee's job duties (without eliminating essential functions, of course) so that the job becomes one that requires less independence from supervision. This makes the accommodation appear to be about the particular employee rather than about general management methods.

A survey of cases helps delineate the still fuzzy lines between what courts are and are not likely to endorse. As scholars examining ADA cases generally have noted, requests that sound like alterations in physical environment work best.[228] Thus, where possible, changes should be cast as being about the employee's *natural* rather than *social* environment. For example, the Seventh Circuit endorsed an accommodation request that involved a switch in workroom assignments so that an employee with depression would experience natural light.[229] Similarly, courts have occasionally approved shift changes from night to day on the ground that daylight would be better for employees with depression.[230]

3. Providing for Less Social Interaction

Yet another complex accommodation issue from courts' perspectives involves employee requests for less social interaction in the workplace. Courts tend to be unsympathetic; this response again points towards a lack of parity in courts' handling of social impairment cases. The

[228] *See, e.g.*, STEFAN, *supra* note 17, at 58-59, 103-42 (presenting excellent early discussion of courts' bias on these issues in cases involving plaintiffs with psychiatric disabilities); Porter, *supra* note 184, at 5-6; *cf.* Travis, *Transformative Potential*, *supra* note 184, at 6.

[229] *See* Ekstrand v. Sch. Dist. of Somerset, 583 F.3d 972, 977 (7th Cir. 2009); *see also* Mustafa v. Clark Cty. Sch. Dist., 157 F.3d 1169, 1175 (9th Cir. 1998) (holding that it would be a reasonable accommodation to place an employee with depression in a non-classroom setting).

[230] *See, e.g.*, Gile v. United Airlines, Inc., 213 F.3d 365, 374 (7th Cir. 2000) (holding that it was a reasonable accommodation to transfer an employee with depression and anxiety from the night to the daytime shift); Norman v. Univ. of Pittsburgh, No. CIV.A. 00-1655, 2002 WL 32194730, at *18-19 (W.D. Pa. Sept. 17, 2002) (finding that it was a reasonable accommodation to allow an employee with anxiety, depression and panic disorder to switch shifts). *But see* Heisler v. Metro. Council, 339 F.3d 622, 625-30 (8th Cir. 2003) (rejecting the plaintiff's request for shift change from day to night to help with depression because she oversaw an activity done only at night).

landscape is still murky on this score, however. Sometimes these requests prevail, at least at the stage of avoiding an adverse ruling on summary judgment, as in *Jacobs*, the case involving the request of an employee with social anxiety for fewer (though not zero) hours working at the customer service counter.[231] And sometimes the essential functions of the position do require a great deal of interpersonal interaction, so that an employee whose social impairment interferes with effectiveness in this realm will in fact be unable to perform the essential functions of the position.[232] This Article's arguments do not deny that this *can* be true — just that it is less often true than courts are yet willing to see. An example is again *Jakubowski*, involving the medical resident in family practice whose Asperger's syndrome interfered with his ability to effectively interact with his patients.[233] There the employer may well have been right to suggest a field of medicine for this employee that did not require so much patient interaction.

Whether courts will approve accommodations requests for less interpersonal interaction can depend on the nature of the plaintiff's job. In *Moore v. Computer Associates International*, for example, the plaintiff's job was as an instructional consultant for computer users at businesses.[234] The court held that his request to teach solely by Internet was not reasonable because face-to-face interaction with clients was an essential function of his position.[235] In *St. Hilaire v. Minco Products, Inc.*, a court stated that a supervisor with Tourette's syndrome could not be entitled to complete isolation on the job because interacting with others was an essential function of his job.[236]

These conclusions make sense given the jobs at issue. But less defensible is another case involving a plaintiff with Tourette's syndrome, *Ray v. Kroger Co.*, already discussed in sections II.A.1 & 2 above, where the employee's job was as a night-shift grocery shelf stocker.[237] If interacting with others was an essential job function even

[231] *See supra* text accompanying notes 110–20.

[232] *See, e.g.*, Franklin v. City of Slidell, 969 F. Supp. 2d 644, 655 (E.D. La. 2013) (finding that it was not reasonable to request that a city remove from the duties of a senior corrections officer with PTSD all but "administrative duties," and in effect create a new "light duty" job to accommodate him).

[233] Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 199 (6th Cir. 2010).

[234] Moore v. Comput. Assocs. Int'l, 653 F. Supp. 2d 955, 957 (D. Ariz. 2009).

[235] *Id.* at 964.

[236] St. Hilaire v. Minco Prods., Inc., 288 F. Supp. 2d 999, 1005-06 (D. Minn. 2003) (noting that it is not a reasonable accommodation for an employee to be completely isolated in the workplace).

[237] Ray v. Kroger Co., 264 F. Supp. 2d 1221, 1224 (S.D. Ga. 2003).

on that case's facts, then the need to be able to interact successfully with others must be an essential function of almost *all* work situations. Whether this is so remains to be seen; courts' views may change over time as their understanding of the nature of social impairments and tolerance for human difference improves. More enlightened views may allow more employees to work without the need to engage in a level of face-to-face interactions that may be problematic for them. Such developments would advance the ADA's goals of allowing more persons with disabilities to enter the workplace and live economically and societally productive lives. For the time being, however, given the enormous progress that still needs to be made in general understandings of differences related to social impairments, lawyers for plaintiffs may do best casting accommodations requests in language that emphasizes physical rather than interpersonal adjustments.[238]

A final category of accommodations involves those courts are least likely to approve. These are ones that have met with most skepticism in the ADA commentators' literature as well, though this Article is in part a plea for ADA scholars to think somewhat differently about these matters. I discuss some of these scenarios below.

4. Accommodations Courts Are Least Likely to Approve

a. Requests for Reinstatement After Quitting a Job

Unfortunately for persons with social impairments, and for the state of ADA law and inclusion of a broader range of human variation as well, the kinds of accommodations courts are least likely to endorse disproportionally impact plaintiffs with social impairments. One frequently disapproved accommodation involves requests to rehire employees who may have, perhaps impetuously, quit their jobs — very possibly because of workplace conflict they lacked the tools to handle due to a social impairment. In *Brundage v. Hahn*, for example, an employee with bipolar disorder precipitously quit her position and then filed suit under the ADA seeking reinstatement as a reasonable accommodation.[239] The court had no sympathy for her, pronouncing that the ADA is not a statute about granting "second chances."[240]

[238] An employee might, for example, consider asking for equipment to support frequent teleconferencing rather than asking to be exempt from attending in-person office meetings.

[239] Brundage v. Hahn, 66 Cal. Rptr. 2d 830, 838 (Cal. Ct. App. 1997).

[240] *Id.* (stating that reasonable accommodation under the ADA does not include

Cases like *Brundage* and others testify to the importance of lawyers or other skilled advocates and advisors intervening early to stop a problematic situation from becoming worse while reasonable accommodations are negotiated.[241] A salient goal for ADA lawyers should be to find creative ways to "run interference," so to speak, to prevent workplace conflicts involving an employee with a social impairment from escalating. Precisely because ability to interact with others can be such an important skill, an employer that has lost patience with an employee after a series of contentious situations may be less likely to respond to the employee's requests for accommodations with enthusiasm or even good faith. Contentious background facts may also make it less likely that a plaintiff will meet with a court's sympathy in challenging an employer's refusal to grant requested accommodations. In these situations, early, creative, and skillful lawyering interventions can make a major difference.

b. Setting Aside Disciplinary Actions

Another set of accommodations courts tend to disapprove seek to set aside or forgive disciplinary actions against an employee for conduct related to a social impairment. Especially where an employee's perceived misconduct has been disruptive, courts show little willingness to take into account the connection between the employee's unresolved, untreated, or under-treated disorder and the misconduct that took place.[242] Here, too, more enlightenment about

excusing a failure to control a disability or giving an employee a "second chance" to control the disability in the future); *see also* Wooten v. Acme Steel Co., 986 F. Supp. 524, 528-29 (N.D. Ill. 1997) (finding that it was not a reasonable accommodation to re-hire an individual who resigned his position while in a manic depressive state he called "uncontrollable").

241 The fact that this is often not the case poses an important problem that effective disability rights training and advocacy must address.

242 *See, e.g.*, Rocafort v. IBM Corp., 334 F.3d 115, 120 (1st Cir. 2003) (holding that it was not a reasonable accommodation to require an employer to refrain from investigating and potentially disciplining an employee with anxiety and panic disorders who had allegedly written a letter disclosing company secrets); Cohen v. Ameritech Corp., No. 02 C 7378, 2003 WL 23312801, at *6 (N.D. Ill. Dec. 23, 2003) (finding that it would be unreasonable for an employer to exempt an employee with anxiety and panic disorder from remote monitoring or other disciplinary measures, and stating that expecting an employer to withhold discipline from an employee who is not performing up to expectations is not a reasonable accommodation). *See generally* Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187 (2005) (analyzing how courts have treated ADA cases involving disability-related misconduct and arguing that misconduct should not be a per se bar to accommodation).

the nature of social impairment may lead to more enlightened results, but for the time being it is much more effective to intervene before a disciplinary incident than attempt to remedy it post hoc.

These cases again point to the importance of obtaining employers' initial willingness to consider accommodations for employees with social impairments. Such employees may come across to others, including those in authority positions, as somewhat "difficult," obstinate, resistant to supervision, and the like.[243] Social impairments may contribute to social gaffes that may undermine an employer's good will toward the employee. In other situations, an employee may not be well liked by peers, and this may lead to escalating conflicts that result in the employee being terminated. Or, co-worker mistreatment may be entirely the fault of the co-workers, as in countless examples of workplace bullying where employees single out the most vulnerable or defenseless for cruel mistreatment.[244]

As I have argued in another article addressing race and sex discrimination law, in many situations where there has been no significant harm or threat of harm to others, such when an employee has engaged in a short verbal outburst or brief refusal to carry out an order, courts should not necessarily assume that an employer's discipline, such as for "insubordination," should stand.[245] Instead, in considering discipline cases, courts should give more thought to the level or type of misconduct involved. This is precisely what the National Labor Relations Board ("NLRB") and reviewing courts do in the labor law context, where employees are protected from precipitous dismissal under a "just cause" standard.[246] Courts look behind the discipline to understand its background. Was the employee provoked, for example? Were there other reasons for the misconduct when probed?

---

[243] *See* Barclay & Markel, *supra* note 17, at 333 ("Individuals with psychiatric disabilities often evoke negative reactions from those in their environment."); *cf.* Susan D. Carle, General Essay, *Angry Employees: Revisiting Insubordination in Title VII Cases*, 10 HARV. L. & POL'Y REV. 185, 188 (2016) (noting reasons employees may appear difficult to employers when they seek to protest humiliating discriminatory actions against them).

[244] See David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 480-82 (2000) (discussing the problem of workplace bullying).

[245] See Carle, supra note 243, at 185-89 (analyzing Title VII of the Civil Rights Act of 1964).

[246] For a general discussion of the just cause standard, see Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 611-12.

This is all the more important when an employee's short outburst or other mild form of so-called "insubordination," a frequent cause of employee discipline, results from a social impairment. The employee may lack the abilities to skillfully handle conflict in particular situations, but this impairment may be effectively addressed with minor accommodations such as a job coach, restructuring of duties, lessening of face-to-face interaction demands, provision of a rest or quiet area or opportunity for a "time out," use of online communications technology, or any combination of these and other similar accommodations, as discussed throughout Part III of this Article.

In short, the *Brundage* court was arguably wrong when it stated that the ADA should not grant "second chances."[247] There is nothing inevitable about that rule. The most evolved context in U.S. employment law — that which applies in the union context — requires graduated, "for cause" discipline, and in fact *does* provide for second chances where appropriate.[248] Why should the ADA not develop a measured "some second chances" doctrine as well?[249]

To suggest this is by no means to argue that persons with social impairments should be impervious to workplace discipline. Many kinds of misconduct are obviously grounds for termination. Employers should not be required to put up with employees who are unfit simply because those employees have diagnosed disabilities. Instead, this Article proposes that courts take a more nuanced approach to evaluating employer disciplinary actions. Some employee wrongdoings, such as acts of dishonestly or physical assault, are off limits under any circumstances. But some other kinds of brief, isolated misconduct, such as talking too much, engaging in a short verbal outburst out of frustration, or simply failing to sufficiently curry favor with a boss, may go to social impairments that the employee is unable to control without help and that do not interfere with workplace functioning in any significant way. Granting a bit of leeway on minor behavioral matters may create a more inviting workplace for all, one in which demonstrating a modicum of forgiveness to employees goes a

[247] Brundage v. Hahn, 66 Cal. Rptr. 2d 830, 838 (Ct. App. 1997).

[248] *See generally* Abrams & Nolan, *supra* note 246, at 612 (explaining that industrial due process in the union context requires "the imposition of discipline in gradually increasing degrees").

[249] *See* Timmons, *supra* note 242, at 288-94 (presenting a compelling argument for some second chances under the ADA in "low severity" misconduct cases); *cf.* Carle, *supra* note 243, at 212-15 (arguing for some second chances for employees under Title VII in "mild to moderate" insubordination cases).

long way towards nurturing employees' reciprocal loyalty and good faith towards their employer. A world that understood disability better and sought to gain the benefits of neurodiversity would be a more understanding world, not only for persons with disabilities but for others as well.

c. "Harm to Others" Cases

Courts are least likely to order accommodations for employees whose prior conduct has involved any type of harm or threat of harm to others (or self).[250] "Harm to others" is a defense in ADA cases built into the language of the statute,[251] so these cases may be correctly decided — unless, of course, they are based on stereotypes about persons with social impairments, which all too often may be present.[252] Again, the best solutions to reasonable accommodations in social impairments cases are ones in which lawyers or other skilled advocates are able to intervene early enough to head off escalating conflict. Early intervention can not only deescalate conflict, but also lead to the development of better facts, and, most beneficially where possible, avoid unnecessary adverse actions against employees and costly, unproductive litigation.

IV. USING THE ADA'S "REGARDED AS" PRONG IN SOCIAL IMPAIRMENTS CASES

Another potential strategy in social impairments cases makes use of the third, "regarded as" prong of the definition of covered disability under Title I of the ADA. As already noted, this prong protects individuals from employment discrimination based on being "regarded as" having a physical or mental impairment.[253] The ADAAA added that an "individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of

[250] *See, e.g.*, McElwee v. Cty. of Orange, 700 F.3d 635, 645-46 (2d Cir. 2012) (refusing to grant a second chance to a plaintiff with PDD-NOS who sexually harassed a fellow worker); Palmer v. Circuit Court, Soc. Serv. Dep't, 905 F. Supp. 499, 511 (N.D. Ill. 1995) (finding that an employee who made abusive and profane statements to other employees could not be accommodated for her depression and paranoia because her conduct put others in danger).

[251] *See* 42 U.S.C. § 12113(b) (2012).

[252] *See* Hubbard, *supra* note 223, at 852 ("A hasty or reflexive resort to the direct threat provision to exclude persons with mental disorders, however, is neither warranted by the facts nor permitted by the ADA.").

[253] 42 U.S.C. § 12102(1)(C) (2012).

an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[254] Thus the ADAAA clarified that an individual does not have to prove a limitation or perceived limitation on a major life activity in order to use the regarded as prong. The ADAAA further provides that the regarded as prong cannot be used for reasonable accommodations,[255] and that the regarded as prong "shall not apply to impairments that are transitory and minor," which it defines as lasting six months or less.[256] Thus, the regarded as prong protects employees from discrimination for being perceived as having an impairment that is not transitory or minor, even as it, at the same time, does not provide a basis for requesting accommodations. This provision has the potential to greatly improve the ADA's protection for employees who may not be able to prove a limitation on a major life activity despite suffering from employment discrimination because they are regarded as having an impairment.

In the social impairments context, the regarded as prong of the ADA could be exactly what a plaintiff needs to gain relief where she can perform the essential functions of the job without accommodations. The fact that an employer or coworkers *perceive* an employee as having a social impairment can support an ADA claim when an adverse employment action occurs as a result. In other words, individuals may face discrimination in the workplace solely because they are perceived to be different or impaired. What they may need is for employers to instruct their agents to refrain from discriminatory conduct on the basis of these perceptions. If the employer's agents simply accepted the employee's perceived difference, there would be no problem, for either the employee or the employer. ADA plaintiffs' lawyers should thus keep the regarded as prong in mind in negotiations with employers when their client does not require accommodations. Indeed, lawyers should use and highlight the regarded as prong of Title I's definition of disability whenever appropriate in representing persons with social impairments, at all stages of the representation. The ADA seeks to protect the rights of persons with social impairments, equally with those having "physical" impairments, to live lives free from stigma, including discrimination in

---

[254] *Id.* § 12102(3)(A); *see also* Mercado v. Puerto Rico, 814 F.3d 581, 589-90 (1st Cir. 2016) (applying this new ADAAA standard for regarded as claims in an ADA Title II case and noting the significance of this change).

[255] 42 U.S.C. § 12201(h) (2012).

[256] *Id.* § 12102(3)(B) ("A transitory impairment is an impairment with an actual or expected duration of 6 months or less.").

employment. The mandates of Title I of the ADA apply to all recognized impairments, including those involving social functioning, even though these impairments may "rub people the wrong way." Studies by evolutionary biologists suggest that humans may be predisposed to react negatively to those perceived as different, and that these tendencies may have been adaptive at some point in human evolution.[257] Today, however, social policy reflects a strong consensus that racial and ethnic discrimination causes great harm; discriminatory acts based on such perceptions of difference are, accordingly, illegal.[258] Discrimination on the basis of perceived social "otherness" due to perceptions of mildly odd behavior — in other words, discrimination on the basis of perceived neurodiversity — likewise is and should be illegal, in recognition of the similar harm such discrimination causes to victims and society alike.[259]

That someone seems a bit different socially — even unlikeable or strange — is not a reason to discriminate in employment any more than is discrimination on the basis of a physical difference that someone considers unattractive (provided, of course, in both categories of cases, that the individual can perform the essential functions of the job).[260] As with any other perceived impairment, and sometimes even more so, persons with social impairments face the problem of stigma.[261] For this reason, the ADA's regarded as prong can

[257] *See, e.g.*, Ross A. Hammond & Robert Axelrod, *The Evolution of Ethnocentrism*, 50 J. CONFLICT RESOL. 926, 927 (2006) (finding on the basis of mathematical modeling and empirical study that an innate predisposition to favor ones "in-group" can support very high levels of cooperation). *But see* BERNARD E. WHITLEY JR. & MARY E. KITE, THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION 22-23 (2006) (summarizing critiques of sociobiological explanations of prejudice). *See generally* THE SOCIOBIOLOGY OF ETHNOCENTRISM: EVOLUTIONARY DIMENSIONS OF XENOPHOBIA, DISCRIMINATION, RACISM AND NATIONALISM (Vernon Reynolds et al. eds., 1987) (presenting theories linking discrimination to evolutionary biology).

[258] *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012) (defining as "unlawful" employment discrimination on the basis of race, national origin, and several other protected characteristics).

[259] *Cf.* Hammond & Axelrod, *supra* note 257, at 933 (discussing evolutionary biology findings as to the possible causes of ethnocentric biases of many types).

[260] Sometimes a particular job may require high social skills, and a certain degree of social impairment may be disqualifying, as already discussed. But in many other situations, the same impairment may not be disqualifying, as, for example, in the potential difference between being a family practice doctor versus a pathologist discussed in relation to the medical resident with Asperger's syndrome in *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 203 (6th Cir. 2010).

[261] *See, e.g.*, Patrick W. Corrigan & Amy C. Watson, *Understanding the Impact of Stigma on People with Mental Illness*, 1 WORLD PSYCHIATRY 16, 16 (2002) (noting that a large majority of the United States and Western Europe have a stigmatizing attitude

be of special help to persons with social impairments. As the Supreme Court stated in *School Board of Nassau County, Florida v. Arline*,[262] the only case in which it has interpreted the regarded as prong (in that case, under a predecessor statute that served as the basis for the ADA's regarded as provision[263]), disability can arise "as a result of the negative reactions of others," so that "society's accumulated myths and fears . . . are as handicapping as are the . . . limitations that flow from actual impairment."[264] In other words, the reactions of others to a person with a social impairment can be the entire problem. Social impairments are thus a prime illustration of the "social model" of disability, which sees disability not as a medical condition but as the result of "the interaction between persons with impairments and attitudinal and environmental barriers[.]"[265]In other words, the social environment *constructs* the disability. If a person who does not interact easily with others were not stigmatized, there would be no impairment. It is the very perception of an impairment, and the negative reaction the perception produces, that *creates* disability—"but for" the negative response from others no disability would exist. Enforcing the regarded as prong in these cases could have great potential to reduce the problem of social impairment discrimination.

A helpful analogy comes from Mari Matsuda's discrimination theory work on accent discrimination.[266] In a now-classic article, Matsuda shows that the real problem in discrimination against persons with non-dominant accents may arise, not from the person with the accent, but from the listener who does not have the cultural competence or patience to comprehend the person's accent.[267] As Matsuda notes, in a globalized world that mixes together speakers of many languages, the best policy choice in the situation of a speaker with heavily accented but intelligible English would be to put the burden of understanding

towards about mental illness); Graham C.L. Davey, *Mental Health & Stigma*, PSYCHOL. TODAY (Aug. 20, 2013), https://www.psychologytoday.com/blog/why-we-worry/201308/mental-health-stigma (noting that many face stigma for their mental illness).

262 480 U.S. 273 (1987).

263 This statute was the federal Rehabilitation Act of 1973, 29 U.S.C. §§ 701-718, which, in sections 503 and 504, imposes disability nondiscrimination mandates on federal contractors and programs receiving federal funds respectively. *See id.*

264 *Id.* at 283-84.

265 *See* G.A. Res. 61/106, annex, Convention on the Rights of Persons with Disabilities, Preamble (e) (Dec. 13, 2006). *See generally* Bagenstos, *supra* note 146 (discussing the systematic social impairment caused by society's institutions).

266 My thanks to Noah Zatz for suggesting this comparison.

267 Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1375 (1991).

on listeners, who should be encouraged to develop the listening skills to function in a richly diverse, multi-lingual world.[268]

In much the same way, the better policy choice for social impairments would put the burden of appreciating neurodiversity[269] on the audience rather than on the person performing social conventions in a non-typical manner. From this perspective, it is not the person with depression who avoids extraneous social contact that is the problem, but the people who form negative judgments based on that person's lack of interest in extra social interaction. Encouraging tolerance in the workplace for a wider range of social performances not only opens more opportunities for employment success for persons with social impairments, but also produces better workplaces along many axes of diversity, as human difference in general becomes a workplace feature to be valued rather than denigrated. Social difference itself may be accompanied by positive attributes, such as an ability to think "outside the box" or to perceive or be sensitive to matters others do not notice. And workplace cultures that accept and embrace differences in social functioning open themselves up to accepting difference in other positive ways as well, promoting the benefits workplace diversity brings on many fronts simultaneously. Just as empirical research has found that diversity in life experiences and backgrounds leads to better decision-making within groups, the acceptance of the neurodiversity also may benefit a work group's product or mission.[270]

Despite these potential benefits of enforcing the regarded as prong following the ADAAA's amendments, few reported cases turn on this provision.[271] Even fewer involve individuals with social

---

[268] *Id.* at 1396.

[269] *See* discussion *supra* note 11.

[270] *See, e.g.*, STEVE SILBERMAN, NEUROTRIBES: THE LEGACY OF AUTISM AND THE FUTURE OF NEURODIVERSITY 429-32 (2015) (quoting autistic author Temple Grandin and Oliver Sacks' dialogues on the contributions of Grandin's perspective to her profession). As other examples, high creativity has been correlated with bipolar disorder. *See generally* KAY REDFIELD JAMISON, TOUCHED WITH FIRE: MANIC-DEPRESSIVE ILLNESS AND THE ARTISTIC TEMPERAMENT (1994). Persons on the autism spectrum sometimes have special talents such as extreme musicality, artistic capacities, or mathematical facility. *See* SILBERMAN, *supra*, at 34-36 (noting that a number of persons historically considered great scientists appear to have had Asperger's syndrome, such as British chemist and physicist Henry Cavendish).

[271] *See* Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2051-52, 2052 tbl. 3 (2013) (reporting surprise at finding, on the basis of comprehensive empirical analysis, fewer prong three cases, for a total of only eight cases, after the ADAAA than before its passage); Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from*

impairments.[272] Pre-ADAAA, an employer's admission that it took an adverse employment action against an employee because it perceived the employee as odd or different did not establish that the employer perceived the employee as having a covered "impairment." For example, in *Merrill v. Burke E. Porter Machinery Co.*, the employer's agent stated that he fired an employee because his lack of eye contact made him appear untrustworthy.[273] The employee had Asperger's syndrome and disclosed this to his employer, but the actual decision-maker involved in the termination testified that he did not know this nor what Asperger's syndrome was;[274] he simply viewed the employee negatively based on his eye contact deficits.[275] The court held that under these facts the employer was not liable for discrimination under the ADA because its decision-maker had fired the employee for lack of eye contact, not for having Asperger's syndrome.[276]

Post-ADAAA, it remains unresolved whether the regarded as prong protects persons from discrimination on the basis of perceived traits of an impairment rather than solely on the basis of perceptions of a known diagnosis. In other words, should the court in *Merrill* have held that the decision maker's negative reaction to a lack of eye contact, a common feature of Asperger's syndrome, violated the regarded as prong? The legislative history of the ADAAA leaves this important issue up in the air. Professor Michelle Travis has carefully examined the legislative history of the ADAAA and the EEOC's subsequent work in promulgating interpretative regulations. She concludes that Congress did intend the ADAAA to protect plaintiffs from trait-based discrimination under the regarded as prong of § 12102(1)(C).[277] Professor Travis points out that the EEOC's initial interpretative regulations explicitly covered trait or symptom-based discrimination.[278]

the Convention on the Rights of People with Disabilities, 63 DRAKE L. REV. 819, 837 (2015) (noting the lack of "regarded as" cases under the ADA).

[272] *But see* Mercado v. Puerto Rico, 814 F.3d 581, 584 (1st Cir. 2016) (sustaining against a statute of limitations challenge a Title II regarded as claim in which the plaintiff alleged that the defendants regarded her as having an unspecified mental impairment).

[273] Merrill v. Burke E. Porter Mach. Co., 159 F. App'x 676, 678-79 (6th Cir. 2005).

[274] *Id.* at 679.

[275] *Id.*

[276] *Id.*

[277] Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 EMP. RTS. & EMP. POL'Y J. 35, 52-54 (2013) [hereinafter *Part and Parcel*].

[278] *Id.* at 49-54; *see also* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, BERKELEY J. EMP. & LAB. LAW 203, 219 (2010) (arguing for this position on the basis of the EEOC's proposed

These draft regulations stated that discrimination based on an actual or perceived impairment "includes, but is not limited to, an action based on a symptom of such an impairment" regardless of whether the employer is aware of an individual's underlying condition.[279] As Professor Travis documents in detail, these proposed regulations turned out to be controversial, with representatives of various constituencies testifying both in favor and against the EEOC's proposal. The business community, as might be expected, opposed including trait-based discrimination under the ADA on the grounds that such an interpretation would limit employers' ability to discipline or terminate employees for conduct-related workplace problems.[280] Travis argues that these fears were overblown, pointing to the voluminous case law reflecting courts' lack of patience for plaintiffs with conduct-related impairments.[281] In any event, in its final regulations the EEOC removed the proposed language that would have stated that trait-based discrimination constitutes impairment discrimination under the regarded as prong of the ADA.[282] The EEOC emphasized, however, that its failure to retain this language in its final regulations should *not* be read as the EEOC's decision on the question.[283] Presumably, the EEOC intended to leave the issue to the courts.

interpretative regulations).

279 Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48443 (proposed Sept. 23, 2009) (codified at 29 C.F.R. pt. 1630).

280 *See* Travis, *Part and Parcel, supra* note 277, at 42-44.

281 *See id.* at 50-60. This Article has invoked that same general body of case law, but to make a different point. Travis is correct in her descriptive claim that courts very often reject conduct-related impairment claims. This Article, on the other hand, opposes continuation of judicial attitudes that deny ADA protection to plaintiffs whose impairments may include non-typical behavior or conduct that does not go to the essential functions of a job or present danger to self or others. I thus disagree with Travis in the following respect: opponents of the EEOC's proposed regulation to include trait-based discrimination under § 12102(1)(C) were correct when they argued that protecting trait-based discrimination would increase protections for some employees with conduct-related impairments. But this would have been a beneficial development, because impairment discrimination should be unlawful regardless of the type of impairment at issue — provided, of course, that the defenses that apply in any discrimination case are defeated, including defenses that the employee's conduct interfered with performing the essential functions of the job. Absent applicable defenses, conduct-related traits should be covered under the ADA's regarded as prong on the same basis as the traits of other impairments.

282 *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630).

283 *Id.* at 16985 ("No negative inference concerning the merits of this issue should

ADA lawyers using the regarded as prong thus should be aware that courts may conclude that the ADA does not protect employees with social impairments from adverse actions based on employers' regarding them as having negatively perceived, impairment-related traits such as social withdrawal, awkward or inappropriate social conduct, or failure to follow typical social conventions such as eye contact, conversational style, gregariousness and the like. To be protected, an employee may need to show that an employer regarded her as having a recognized diagnosis rather than simply the attributes of an impairment. But there are equally strong arguments available to support protection against trait-based discrimination under the regarded as prong. One of these arguments, especially pertinent in the social impairments context, is that it often is the very ignorance of employers and others as to the neurological basis of traits such as lack of eye contact that leads to discrimination against otherwise qualified employees, as in *Merrill*.[284] If trait-based discrimination does not receive protection under the ADA's regarded as prong, then ignorant employers are immune from liability, because they do not understand that the social characteristics of an employee who appears odd may be symptoms of a covered impairment. Yet this employee should be entitled to protection from discrimination just as an employee of a more enlightened employer would be. Protecting trait-based discrimination under the regarded as prong thus creates proper incentives for employers to educate themselves about impairments that affect social functioning, whereas failing to cover trait-based discrimination has the opposite effect, contrary to the purposes of the ADA.

Failing to protect trait-based discrimination under the regarded as prong also makes regarded as cases very difficult for plaintiffs with social impairments to prove. To do so, they would have to prove not only that their employer discriminated against them on the basis of a negatively perceived impairment, but also that the employer realized that the traits to which it reacted negatively stemmed from a recognized disability. This may often be impossible absent an employer making "smoking gun" discriminatory comments that

be drawn from this deletion . . . . [The EEOC's] existing position, as expressed in its policy guidance, court filings, and other regulatory and sub-regulatory documents, remains unchanged.").

284 Merrill v. Burke E. Porter Mach. Co., 159 F. App'x 676, 678-79 (6th Cir. 2005); *see Case Law Developments*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 170, 291 (2006); *see also* Smith v. Chrysler Corp., 155. F.3d 799, 809 (6th Cir. 1998) (holding that firing an employee who feels fatigue and lacks eye contact because of narcolepsy that was not disclosed to the employer is not discriminatory).

associate the impairment to which the employer reacted negatively to a recognized disability. For example, it would not be enough for the employer to say, "I am firing you because I'm annoyed by your tendency towards significant mood changes"; the employer would instead have to admit that, "I'm firing you because I think you have bipolar disorder." But how often can employers be expected to make such statements about suspected diagnoses? Even if they suspect an underlying disorder, how often can employers be expected to admit such suspicions when taking an adverse action against an employee they disfavor because of an impairment-related trait?

If the regarded as prong is viewed as not covering trait-based discrimination, the legal situation for persons with social impairments under § 12102(1)(C) of Title I would be far more difficult than that for persons with physical ones. In the latter category of cases, the very physical symptom perceived — for example, a limp — is very often the impairment itself. In the psychosocial context, in contrast, it may be unclear whether a perceived symptom is related to an impairment or is simply a personality attribute. Logically, however, it can be convincingly argued that firing someone because he does not make eye contact is equivalent to firing an employee because he has a limp. In the first case, the employer is firing the employee for a perceived social impairment, even if it does not know its cause, in the same way that the employer violates the regarded as prong if it fires an employee for a limp even if it does not know its cause. At bottom, it should be enough that the employer perceived as a deficiency a trait unrelated to a job's essential functions and took an adverse action on the basis of this trait.[285] Otherwise, persons with social impairments, as opposed to obvious physical ones, risk losing the protection against discrimination that may be the most appropriate for their situation — namely, protection against being regarded as different and treated negatively as a result when they are perfectly capable of performing their jobs.

Not permitting a cause of action under the regarded as prong based on trait-based discrimination may have perverse incentive effects under the ADA in yet another way as well. If an employee can only gain protection under the regarded as prong by notifying her employer that she has a non-apparent disability, she will be required to reveal

[285] *Cf.* Mercado v. Puerto Rico, 814 F.3d 581, 588 (1st Cir. 2016) (noting that under the new ADAAA standards for regarded as claims, the plaintiff "need plead and prove only that the defendants regarded her as having a physical or mental impairment, no matter the defendants' view of the magnitude of the effect of the perceived impairment").

her diagnosis in order to gain protection. This will be necessary even though revealing a non-obvious impairment may increase the chances of discrimination against her.[286] As commentators have noted, one of the most promising aspects of the underutilized regarded as prong of the ADA is that it should protect employees from discrimination when they have no need to request accommodations.[287] Requiring disclosure of non-obvious impairments that need no accommodations in order to be protected against discrimination defeats this important goal of the regarded as prong, namely, to protect persons from disability discrimination when they are not asking for accommodations. A narrow interpretation of the regarded as prong, which requires employees to disclose a specific diagnosis in order to be protected from discrimination, thus perversely creates the conditions for more rather than less disability discrimination, a goal Title I certainly does not embrace.

In short, there are many reasons why the law under the ADA's regarded as prong should be interpreted as not requiring an employee to prove that an employer regarded her as having a specific disability. Precisely because social impairment is not well understood, the employee may have great difficulty proving that an employer regarded her as having a particular condition unless she has previously informed her employer that she has such a diagnosis. But it is a risky step to inform an employer that one has a diagnosed condition to which stigma attaches, especially when one needs no accommodations other than refraining from discrimination. Volunteering such information about a hidden disability increases the likelihood of stigma and discrimination, which then may be difficult to prove. The employee would thus confront yet another ADA Catch-22, either disclosing and risking a higher probability of discrimination, or not disclosing and risking no protection against discrimination on the basis of attributes associated with a stigmatizing impairment. Here, as in many other issues that arise in the social impairments context, early and good legal counseling is crucially important, though far too often not received.

---

[286] *See, e.g.*, Alina Tugend, *Deciding Whether to Disclose Mental Disorders to the Boss*, N.Y. TIMES (Nov. 14, 2014), http://www.nytimes.com/2014/11/15/your-money/disclosing-mental-disorders-at-work.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=1#story-continues-1 (discussing the widespread difficulties that employees with mental, behavioral, and emotional disorders face in deciding whether, when, and to what extent to reveal their conditions to their employers).

[287] *See, e.g.*, Barry, *supra* note 278, at 238-42; Travis, *Part and Parcel*, *supra* note 277, at 61.

In sum, for all the reasons just discussed, the better answer to the question whether § 12101(1)(C) protects persons with impairments from trait-based discrimination should be affirmative. The main problem with the argument that attribute-based discrimination is prohibited under the regarded as prong of Title I of the ADA is that it does not offer a ready limiting principle. Professor Kevin Barry has even argued that the regarded as prong offers "universal coverage" to all persons, in much the same way that antidiscrimination statutes cover all persons from race discrimination regardless of what race they are perceived to be.[288] This argument is all to the good if courts would accept it, but the lack of a limiting principle may cause them to balk. Congress initially stated in the ADA that the statute covered approximately 43 million people with disabilities, but then removed this language in the ADAAA;[289] it is not clear, however, that in doing so Congress intended to cover *all* persons within the reach of U.S. law. Grappling with such a limiting principle would take this Article too far afield from its central focus, but one can hope that creative scholars will follow in the footsteps of Professors Travis and Barry's important work to further analyze this and other issues the regarded as prong presents.

CONCLUSION

The ADA states that it covers all types of disabilities, but the law still has a long way to go in handling social impairments. Like all disabilities, those that include elements of social impairment require proper ADA analysis. Some degree of ability to interact with others is relevant to most jobs, but many persons with some degree of impairment in social functioning can do the essential functions of many jobs, and may, indeed, be brilliant at those jobs. The ADA teaches that respecting and accommodating differences in abilities leads to a better world in a broad range of ways. It defines no limit excluding social impairments from its coverage, and courts developing ADA law should not do so either. Lawyers in the trenches, counseling in and handling social impairment cases, must push the law forward in the right directions, and this Article aims to help in that important endeavor.

---

[288] *See* Barry, *supra* note 278, at 217-18, 266.

[289] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3553 (codified as amended at 42 U.S.C. § 12101 (2012)).