Genetic and Mental Disorders under the ADA

William M. Tarnow
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INTRODUCTION

Any survey of the coverage of the Americans With Disability Act (ADA) must involve an examination of the extent to which Congress can, or should, legislate about the significance of the personal makeup of the American worker. For purposes of addressing this question, this essay will focus on bringing two particular applications of the ADA under careful scrutiny. The first of these areas, the human gene, requires the Act to achieve a proper balance between that which is within the realm of scientific capability, that which is desirable within the context of human privacy, and that which is appropriate as a subject of legislative intervention.

The immediacy of the challenge of human genetics has been highlighted by the progress of the Human Genome Project, which aims to analyze the crucial role genes play in matters of health and disease as its goal. Here, because of the immense potential for both beneficial use as well as widespread abuse of the knowledge to be gained from unlocking the mysteries of the human genetic composition, serious attention must be given to the degree to which society intends to permit an individual's future to be determined on the basis of the sometimes vague possibilities and uncertain predispositions that may be suggested through the use of genetic testing.

Secondly, the human mind presents an equally important subject as to the extent to which the government should be involved in the business

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of safeguarding those suffering the effects of mental illness and disability. Arguably, it was to combat misconceptions such as these that Congress enacted the ADA legislation in 1990 "to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American Life." However, a certain level of confusion persists in trying to determine the scope of protection Congress actually intended to afford the mentally challenged when it included employees with mental disorders as a protected class under the Act. Looking at the legislative history of the ADA, it seems that Senator Humphrey accurately predicted the present day interpretation problems with the Act when he commented:

> While the committee report gives examples of clear cut accommodations for the [physically] disabled, it studiously avoids the more bizarre accommodation requirements imposed by the bill. What are employers expected to do to accommodate alcoholics, the mentally retarded, or persons with neurotic or psychotic disorders? This Senator has no idea and I doubt that other Senators do either.

While there is no significant distinction in the language of the ADA regarding the protection to be afforded to employees with physical or mental disabilities, in reality, the problems, fears, suspicions and stereotypes visited upon the employee with a history of mental disorders present very unique problems.

In the process of generally examining the protections and intrusions which American workers may reasonably expect under the provisions of the ADA, this article will place emphasis on those provisions of the Act which are of particular concern to employees suffering from disabling mental conditions or diagnosed with genetic predispositions. Finally, this article will comment upon the extent to which the Americans With Disabilities Act is capable of providing equal, adequate and effective protection for the mentally or genetically troubled employee against challenges not contemplated at the time of its enactment.

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LEGISLATIVE HISTORY

With the passage of the Rehabilitation Act of 1973,\(^6\) Congress planted the seeds that would eventually grow into the basis for universal protection of the disabled against workplace discrimination. Originally somewhat limited in scope, and designed as protective legislation only applicable to certain federal employees and those working with federal contractors, the Rehabilitation Act mandated that: "No otherwise qualified [handicapped] individual ... in the United States[,] ... shall, solely by reason of her or his [handicap], be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ... ."\(^7\)

In Section 706(8)(B), the Act defines a handicapped person as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."\(^2\) Major life activities were defined as including "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."\(^9\)

With the enactment of the Rehabilitation Act, the substantive rights of handicapped workers, whether mentally or physically impaired, were given formal recognition and officially safeguarded, provided that the disabled applicant was otherwise qualified for the position in question. In short, Congress intended "to share with handicapped Americans the opportunities for ... jobs that other Americans take for granted."\(^10\)

In implementing the protections Congress extended to handicapped workers under the Rehabilitation Act, the United States Supreme Court determined in the leading case of Southeastern Community College v. Davis that, "in the employment context, an otherwise qualified person is one who can perform the 'essential functions' of the job in question."\(^11\) This case gave the Court the opportunity to define the scope of the class protected by the Rehabilitation Act as including not only currently

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\(^7\)29 U.S.C. § 794.
\(^9\)45 C.F.R. 84.3 (j)(2)(ii).
\(^11\)442 U.S. 397 (1979); see also 45 C.F.R. 84.3(k) (1985).
disabled workers but also those who may have a record of impairment but who, at present, are asymptomatic or "may have no actual incapacity at all." The later part of the Court's statement incorporates a critical concept when dealing with employee genetic or mental conditions under the ADA, as these conditions may frequently be episodic in nature or characterized solely by a potential future impairment. Two later cases provided additional impetus to the Act's evolutionary process by presenting occasion for the courts to further broaden the holding of Southeastern. By finding a protective intent under the Act for individuals suffering from disabilities which did not necessarily involve open and physically obvious signs of handicap, safeguards were unquestionably extended to individuals suffering from a wider range of more subtly manifested conditions.

The first of these cases, School Board of Nassau County, Florida v. Arline, was decided by the United States Supreme Court in 1987 and clearly brought those suffering from contagious diseases within the protective arm of the Rehabilitation Act. In that case, Gene Arline, a teacher who experienced periodic and recurring episodes of tuberculosis, was found to be a handicapped individual within the meaning of Section 504. The second case, Chalk v. U.S. District Court Central District of California, was decided one year later by the Ninth Circuit Court of Appeals. In this case, the Court found Vincent L. Chalk, a teacher diagnosed with AIDS, to be suffering from a condition covered by the Act, and allowed him to return to the classroom absent a showing of direct and immediate risk to his students. The general implication of this decision for the workplace was the Court's holding that speculation of future harm or a theoretical, undefined threat of injury to others could not be used as a pretext for discriminatory employment decisions unless based upon a reasonable degree of supporting medical evidence. Of particular note here, in terms of its application to mentally and genetically disabling conditions, is the Court's approval of the rejection in Ray v. School

12442 U.S. at 405-06; see also Keri K. Gould, And Equal Participation for All ... The Americans With Disabilities Act in the Courtroom, 8 J.L. & HEALTH 123, 131.
15840 F.2d 701 (9th Cir. 1988).
16Id. at 703.
17Id. at 711.
District of DeSoto County of employment decisions based upon "pernicious mythologies" or "irrational fear." Accordingly, with the Court's express finding that coverage under the Rehabilitation Act also applies to individuals impaired by disabilities other than overtly and strictly physically limiting handicaps, the scope of the Act's protection was expanded to encompass the often complex range of hidden disorders suffered by the mentally and genetically impaired employee.

Apparently encouraged by the success of the Rehabilitation Act in dealing with discrimination problems of the handicapped in the relatively small arena of federal contractors, and satisfied with the manner in which the courts were interpreting and applying the protections of the Act in the workplace, Congress next undertook the ambitious task of making legislatively mandated disability protection available to nearly all American workers. The result of this effort was the framing of the Americans With Disabilities Act.

AMERICANS WITH DISABILITIES ACT OF 1990

The logical outgrowth of the Rehabilitation Act of 1973 was the passage of the Americans With Disabilities Act of 1990 (ADA). More ambitious in its scope than the Rehabilitation Act, the ADA went beyond recipients of federal funding and federal contracts as the regulated target group to ultimately encompass all employers with fifteen or more employees. Yet, despite the fact that Congress elected to broadly extend new statutory protections to millions of potential claimants alleging victimization by discriminatory employment practices, the history of the Act clearly indicated little consideration was given to the interplay between the ADA and genetics, genetic characteristics and genetic predictions of susceptibility to disease, disability or early death. Likewise, a sparse legislative record leaves similar uncertainty as to the extent of recourse

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19 Id.
20 See supra note 1.
22 Dee Lord, Something in the Genes, EEOC Takes Steps to Forestall Discrimination for Predisposition to Illness, 82 Apr A.B.A.J. 86.
Congress actually intended the Act to provide for the special problems of the mentally impaired. On its face, the language which Congress chose to employ in enacting the ADA is broadly structured to bring employees suffering from a wide variety of conditions squarely within the intended protections of this Act. However, today, nearly seven years after its enactment, debate continues and the law is still evolving as to those particular circumstances under which the ADA should be applied to situations involving employee mental and genetic disorders. Because the interpretations given to the Act on mental and genetic issues by the Equal Employment Opportunity Commission (EEOC) have frequently been absent, unclear or reflective of significant position shifts, no consensus has yet been reached as to any clearly defined parameters of the Act's coverage in dealing with mentally disabled or genetically impaired employees.

As mentioned above, the starting point for analyzing the ADA and its applicability to genetic problems and mental disabilities begins with the bank of precedent established through judicial interpretation of the Rehabilitation Act of 1973, from which the ADA was cloned. With its use of identical terms and parallel phrases, Congress confirmed the precedents set under the Rehabilitation Act and adopted its judicial history as the applicable law to be used in interpreting the ADA.

The similarities between the Rehabilitation Act of 1973 and the ADA become apparent with even a cursory examination of the two legislative texts. "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." The ADA goes on to define a "qualified individual with a disability" as meaning "an individual with

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23 Id.
24 42 U.S.C.A. § 12116, 12117. The EEOC is the agency charged with policing the ADA.
26 42 U.S.C.A. § 12112 (a); see also Rehabilitation Act of 1973, 29 U.S.C.A. § 701 et seq. at 794.
a disability who, with or without reasonable accommodation, can perform the essential functions of the employee position that such individual holds or desires." Thus, having identified the group of workers targeted for the Act's protection, the next step is to explore the specific provisions of the ADA which attempt to define, more particularly, the protected disabling conditions.

With either careless oversight or brilliant foresight, Congress accomplished the task of defining the protected conditions under both the ADA and the Rehabilitation Act of 1973 in amorphous terms capable of being molded to fit an ever widening set of claimed disabilities, diagnosed disorders and exploding technological advancements. This flexibility is well attuned to dealing with employee mental and genetic problems as it gives the Act the ability to adapt and respond to both the changing and often conflicting theories of mental health professionals and to the rapidly expanding map of the human genome. In this regard, Congress determined that, with respect to an individual, the term "disability" means:

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

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

In its Rules and Regulations implementing the Act, the EEOC has clarified the basic definition of a disability under the ADA as including the essential element that any disability claimed by an employee must also substantially limit a major life activity such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working," in order to be recognized as protected under the Act. To this core concept of a disabled employee entitled to coverage under the ADA, the interpretations and safeguards provided by seminal Rehabilitation Act cases such as Arline and Chall became immediately applicable and have set the tone for determining the scope of the ADA's

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27 42 U.S.C.A. §12111(8).
28 42 U.S.C.A. § 12102(2)(A)(B) and (C).
30 See supra notes 13 and 15.
impact upon employee genetic problems and mental impairments. As such, the extent to which mental and genetic disorders can be found to be protected by the Act will depend upon the ability of the individual claimant to bring his or her particular circumstances within the protective language of the ADA definition of disability, as interpreted by the EEOC and implemented by the courts.

**EEOC RULES AND REGULATIONS**

The EEOC stands as the primary agency responsible for the interpretation of the ADA as it is generally applied in the workplace. Accordingly, it is worthwhile to examine the constraints placed upon courts reviewing ADA based employee discrimination claims as to the degree of deference accorded to the first line interpretations of the agency.

Generally stated, the authority with which an administrative agency acts in carrying out its duties can be summarized as follows:

The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate specific provisions of the statute by regulation. Such legislative regulations are given controlling weight, unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes, the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrative agency.

However, the rule making authority of the administrative agency is neither unfettered nor absolute. In every case, the keystone of the interpretive process is the statute itself. The sole function of the court in such

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31Title I of the Americans With Disabilities Act deals with all aspects of employment, while Titles II and III deal with government and public accommodations. Title IV is involved with telecommunications issues (42 U.S.C. § 12101 et seq.).


instances is to enforce the statute, as written, when the statutory language is clear and unambiguous. 34

For the most part, there appears to be widespread agreement that, when an administrative agency has been charged by Congress with the oversight of a particular statute, the interpretations of the agency are to be given considerable deference. 35 Still, limitations can be placed on the statutory interpretation authority of an administrative agency which impact upon the weight to be given to the agency's published directives, depending upon the type of rule or regulation involved. 36

An administrative agency can issue two types of rules; legislative rules and interpretive rules. Legislative rules are those rules directed towards implementing and interpreting regulations that have been open to public notice and comment procedures prior to adoption and publication. 37 Rules of this sort are given considerable deference by the courts. On the other hand, when issuing interpretive rules, the agency does not seek comments from the public. Instead, distribution of rules occurs unilaterally as a general public advisory of the agency's construction of the statutes and rules it has been charged to administer. 38 For the most part, the EEOC pronouncements relating to the ADA fall into the category of interpretive procedures.

When faced with agency interpretative rules such as those issued by the EEOC in administering the ADA, a court may find the information provided to be persuasive, but it is not compelled to give an interpretive ruling binding effect and "always has the power to substitute its judgment for that of the agency rule." 39 As such, the Court in Shalala v. St. Paul-Ramsey Medical Center found the impact of an interpretive rule upon the court should be viewed "as mere agency statements which provide guidance to parties but which do not have the force of law." 40 In short, although the involvement of the EEOC in the ADA interpretive process was, undoubtedly, designed to clarify Congressional

35Blum v. Bacon, 457 U.S. 132 at 141, (1982); see also Chevron, 467 U.S. at 843-44
purpose and streamline administration, publication of the agency’s views regarding the scope of the Act’s coverage has not always resulted in a harmony of interpretation between the EEOC and the courts.

UNIQUE GENETIC CONSIDERATIONS UNDER THE ADA

The Early EEOC Position Regarding Genetic Disorders
From the beginning, the effort to determine the extent to which Congress meant the ADA to provide protection for genetically influenced conditions has been hampered by the fact that the legislative history of the ADA contains little authoritative guidance and the language of the Act is silent regarding matters of genetics. Despite technological advances which were being made in the field of human genetics during the seventeen years between the enactment of the Rehabilitation Act and passage of the ADA, the original interpretive rules and regulations issued by the EEOC for the ADA were published without providing any in depth reference or direction regarding genetic disorders. With this void in EEOC interpretive guidance, the EEOC effectively delegated responsibility to the courts to decide the extent to which the protective provisions of the ADA could reasonably be extended in matters of genetic discrimination.

Initially, on the few occasions when the EEOC did provide any comment on genetically related issues, the tenor of the remarks was clearly set in the direction of denying ADA coverage to claimed genetic disabilities which were not characterized by presently manifested effects. Early on, the EEOC began to emphasize this exclusion by declaring that physical impairments do no include “characteristic predispositions to illness or disease.” Although this pronouncement appears straightforward and conclusive on its face as excluding genetically based claims from protection under the ADA, implementation of the EEOC position has been much more complex.

Over the years since passage of the ADA, internal policy exceptions and case law decisions have chipped away at the EEOC directive that a predisposition to illness or disease is not an ADA protected condition.

With the inherited case law of the Rehabilitation Act of 1973, a line of cases had already determined that certain consequences likely to impact upon an individual's future health could not be used as the bases for present discriminatory employment decisions. In the first of these cases, *Harris v. Thigpen*, the Eleventh Circuit held that HIV positive inmates were, indeed, handicapped individuals under the Rehabilitation Act, as these inmates were regarded as having a physical impairment. The Court in Thigpen rejected the EEOC position of requiring presently manifested symptoms of the disease as a component for achieving a covered disability classification. By 1993, the acceptance of asymptomatic HIV infected individuals as a protected class under the ADA was conceded by the EEOC in its Rules and Regulations which established that HIV infection is "inherently substantially limiting." A second decision, which also considered the possibility of extending the Rehabilitation Act to more long range considerations than just those of presently exhibited symptoms was returned in *E.E. Black Ltl. v. Marshall*. In this case, the Court determined the Rehabilitation Act prevented an employer from rejecting otherwise qualified applicants on the basis of a medical examination which suggested the individuals might be susceptible to an increased risk of back injury. Clearly, despite the traditional EEOC position that claims of discriminatory employment practices based upon potential future impairments were not actionable as current disabilities, the courts appeared to be moving towards an acknowledgment that there was a place for the protection of future and as yet asymptomatic conditions to be considered under the ADA.

In 1991, the EEOC's view as to where genetic considerations fit into the ADA was evidenced in correspondence from its Deputy Legal Counsel which, in a patently unequivocal summary of the EEOC's position, stated that "the ADA does not protect individuals who are not otherwise impaired, from discrimination based on genotype alone." However, this

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*43* 941 F.2d 1495 (11th Cir. 1991).
*44* Id. at 1521.
*47* Id. at 1104.
same correspondence continued on to hint at the possibility for a qualifying genetic exception with the concession that "[s]ymptomatic individuals, with late onset of a genetic disease may be protected by the ADA. Such individuals are protected when they develop a genetic disease that substantially limits one or more of their major life activities."49 As might be expected, the lack of any clearly defined, dispositive EEOC determination of the role of genetics under the ADA combined with a near total absence of judicial precedent on the issue of genetic disabilities gave rise to a considerable difference of opinion among various commentators on the Act who simultaneously wrote: (i) the major uncertainty is "whether the ADA covers someone who is presymptomatic for a late onset genetic disease,"50 and (ii) that the ADA "will protect workers from genetic discrimination by employers"51 and (iii) the ADA "does not apply to discrimination based upon an applicant's genetic profile."52 Again, as to the direction future interpretive activities might take, there was speculation that "because presymptomatic genetic testing was not considered during the extensive negotiations that preceded the enactment of the ADA; and given the costs associated with further extending the ADA's reach, it is doubtful that the ADA will be judicially construed to protect healthy carriers of disease genes against genetic discrimination."53

Throughout the first years of the ADA, bringing an employee's genetic profile within the purview of the ADA remained an uphill battle in light of the EEOC's persistence in resisting genetically related issues as an area covered by the ADA. Furthermore, the EEOC maintained its position that genetics were not covered by the Act until symptomatically manifested. For example, in responding to the proposition that the genetic susceptibility of an individual should be covered by the ADA, the EEOC contended:

49 Id.
50 See Miller and Huros, supra note 48, at 375.
51 Therese Morelli, Genetic Discrimination By Insurers: Legal Protections Needed From Abuse, 9 No. 8 HealthSpan, Sept. 1992.
Everyone has hereditary genetic characteristics that predispose them to the onset of particular illnesses or diseases that could become disabilities under the ADA. If your grandmother had heart disease, you may have a predisposition to heart disease. And if your father has cancer, you may be predisposed to developing cancer. However, the presence of these genetic characteristics does not indicate that an individual has an impairment or a record of an impairment, or necessarily that the individual may develop an impairment in the future. Consequently, the Commission determined that a characteristic predisposition to illness, like that revealed in a family history, is no impairment covered by the ADA. 54

Although this appeared to be a final and definitive pronouncement by the EEOC regarding its position on matters of genetics, as will be seen, this was, by no means, the Commission’s last word on genetic disabilities.

EEOC Compliance Manual § 902.8
The outlook for the future of genetic disorders being covered by the ADA changed abruptly on March 16, 1995, when the EEOC, without any significant comment on its action, released an amended Section 902.8 Compliance Manual provision discussing the definition of the term “disability” and the manner in which the ADA may be found to apply to genetics and genetically involved diseases. 55 While not providing the force and authority of an officially promulgated Regulation, the purpose of the Compliance Manual is to provide guidance to EEOC investigators and the public for determining when an individual has a disability for ADA purposes. 56 While the story carried in The Wall Street Journal on April 10, 1995, may be somewhat overly broad in stating that workers who have been fired or denied employment as a result of their genetic makeup have been subjected to actionable discrimination under the


55EEOC Compliance Manual (BNA) § 902 at 47.

56Taken from EEOC Opinion Letter to The Honorable Patrick Johnston, Senate of the State of California dated July 7, 1991 as reported in 7 NDLR 362.
there is no doubt that the EEOC had definitely backed away from its prior reluctance to even discuss genetic matters as a proper topic for ADA coverage.

At its basic level, by including Section 902.8 in the Compliance Manual, the EEOC effectively opened the door of the ADA for the first time to those experiencing employment discrimination based upon genetic characteristics. Additionally, the EEOC sidestepped its prior position that a worker must have an exhibited symptom of an illness or disease as a prerequisite for bringing a discrimination claim within the scope of ADA protected conditions.

The Position Of The EEOC And The Courts On Genetic Issues

Upon closer review, the quiet shift in the EEOC's position, away from one of adamant opposition to recognizing genetic conditions as a proper subject of ADA coverage and toward one of mild support for addressing genetic issues in the workplace, does not actually entail a dramatic abandonment of any previous EEOC interpretation of the ADA. Rather, what the Commission did was to acknowledge that the ADA applies "to individuals who are subject to discrimination on the basis of genetic information relating to illness, diseases or other disorders." In publishing this acknowledgment, the EEOC relied upon the limited information available in the legislative history of the Act to discern the intention of Congress. In short, the thrust of the Compliance Manual revision was directed towards emphasizing one aspect of the ADA which the EEOC found to be particularly applicable to matters involving genetic information. This should not, however, suggest that the traditional and fundamental interpretation of the Commission regarding the application of the ADA to an individual's currently asymptomatic genetic profile, even when combined with a veritable certainty of future disabling developments, has undergone any significant alteration. Indeed, over one and one half years after the publication of Section 902.8, the court in

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58 Lord, supra note 22, at 86.
59 Id.
60 EEOC Compliance Manual, § 902.8.
Wenzlaff v. Nationsbank \textsuperscript{62} relied upon the EEOC interpretive rules as authority in quoting, \textit{verbatim}, that "[t]he definition, likewise, does not include characteristic predisposition to illness or disease."\textsuperscript{63}

Perhaps, the reason for the confusion following the release of Section 902.8, acknowledging that unlawful discrimination in the workplace based upon genetic information may be actionable under the ADA, was a misinterpretation of the EEOC’s earlier statements on the subject of genetics. While the widespread perception of the Section 902.8 release was that the EEOC had somehow dramatically reversed itself on the genetic issue, the actual fact was that the Commission remained completely consistent in its approach to genetic matters.

As seen earlier, the EEOC had previously followed a practice of avoiding linkage of the terms “ADA” and “genetics” in anything other than a negative and dismissive context.\textsuperscript{54} While, in fact, no substantive change in the EEOC interpretive rules regarding the treatment of genetic problems occurred on March 16, 1995, what did occur was a change in the Commission’s attitude towards its willingness to discuss and consider the relationship between an individual’s genetic composition and the ADA. This, however, only occurred under certain limited circumstances.

In an action considerably less publicized than the distribution of Section 902.8 of the Compliance Manual, the change in the EEOC’s attitude towards genetically connected matters began somewhat earlier with the Commission’s filing of an \textit{amicus} brief in support of Bonnie Cook’s claim that she was wrongfully denied employment.\textsuperscript{65} Ms. Cook claimed her employer, the State of Rhode Island, Department of Mental Health, Retardation and Hospitals had violated the Rehabilitation Act of 1973 by declining to offer employment based upon the employer’s perception that Ms. Cook was disabled due to morbid obesity.\textsuperscript{65} Although brought under the provisions of the Rehabilitation Act, this leading case on the “perceived” or “regarded as” theory of recovery is equally


\textsuperscript{63}29 C.F.R. 1630.2(h) at 401 (1995).

\textsuperscript{64}\textit{See} EEOC Letter, \textit{supra} note 60.

\textsuperscript{65}Cook v. Rhode Island, Dep’t of Mental Health, Retardation, and Hosp3., 10 F.3d 17 (1st Cir. 1993).

\textsuperscript{65}Id. at 21.
applicable to cases prosecuted under the ADA and, by analogy, reflects those specific allegations necessary to qualify for review on a charge of genetic discrimination.

In *Cook*, the Plaintiff, who had twice previously worked for Defendant institution with a good work record, again applied for a position at a time when her weight had reached 320 pounds. Although found to be morbidly obese in the course of her pre-employment physical, no finding was made that Cook was incapable of doing the job. Nonetheless, Defendant elected not to hire Cook. Defendant’s Motion to Dismiss, based upon a claim that the Rehabilitation Act of 1973 can never cover morbid obesity, was denied and the case submitted to a jury which found in Cook’s favor.

The First Circuit Court of Appeals conducted a thorough analysis of Cook’s claim and concluded that a jury could reasonably find that Plaintiff suffered an impairment resulting from a physiological disorder which resulted in a dysfunction of various body systems thereby causing adverse effects on Cook’s musculoskeletal, respiratory and cardiovascular systems. The Court saw no merit in Defendant’s position that Plaintiff’s physical condition was mutable, and within the Plaintiff’s voluntary control. Instead, the Court found that “mutability is nowhere mentioned in the statute or regulations” and “the Rehabilitation Act contains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment.” However, what the Court did find, which is of prime importance when considering application of the ADA to genetically related disorders, is that “[u]nder the ‘regarded as’ prong of Section 504, a plaintiff can make out a cognizable perceived disability claim by demonstrating that she was treated as if she had an impairment that substantially limits a major life activity.”

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6810 F.3d at 20.
69Id. at 21.
70Cook v. Rhode Island, Dep’t of Mental Health, Retardation, and Hosps., 10 F.3d 17, 22 (1st Cir. 1993).
71Id. at 24.
72Id. at 25.
73Id.
For those courts that have addressed the question as to whether the ADA covers conditions which are genetically influenced, such as morbid obesity, there has been a remarkable consistency in following the holding in *Cook*. To date, for cases along this line, the question as to whether a perceived disorder is actually genetically grounded or has physical manifestations remains essentially irrelevant and inconsequential. Instead, it is the employer's perception regarding the Plaintiff's condition that draws the focus of the Court's inquiry.

With the cases decided since *Cook*, the emerging principal has been that, even with arguably genetically related disorders such as obesity, the condition alone, without more, is not, in and of itself, clearly covered by the protections of the ADA. Quite to the contrary, judicial notice has been taken of the EEOC's rule that "except in rare circumstances, obesity is not considered a disabling impairment." By extension, the logic of these findings transfers directly to situations involving an individual’s entire genetic makeup and his predisposition to illness or disease. Succinctly stated, since even a manifested, genetically linked disorder does not automatically qualify for coverage under the ADA unless other qualifying standards are also met, the mere possibility, or even the probability, that an individual has or may develop a particular genetically based disorder almost certainly, will not qualify for protection under the Act if left to stand alone. Here, what is critical and fatal to the allegation of unlawful discrimination, if left unproven, is the question of the employer’s perception of the plaintiff’s condition as being that of a disabled person.

As discussed above, an individual alleging employer discrimination under the ADA must establish that the claimed disability is either (i) a condition which substantially limits one or more of the major life activities of the individual or (ii) that the condition is perceived by the employer as being disabling.\(^7\)

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\(^7\)Nedder v. Rivier College, 908 F. Supp. 66, 76 (D.N.H. 1995) noting that "obesity alone does not constitute a disabling impairment; see also Torcasio v. Murray, 57 F.3d 1340, 1350 (4th Cir. 1995) citing 29 CFR 1630.2(h).


\(^7\)Smaw v. Virginia, Dep't of State Police, 862 F. Supp. 1469, 1475 (E.D. Va. 1994) (For those claiming a disability based upon an asymptomatic genetic disorder, the third possibility for relief of "having a record of such impairment" [42 U.S.C.A. § 12102(2)] would be inapplicable.
Here, a good starting point for an analysis of the proofs that are required to bring a discrimination claim rooted in genetics within the protective scope of the ADA is to return to the publication which opened the door for extending the applicability of the Act to the human genome. Section 902.8(a) of the EEOC Compliance Manual discussing the investigation of complaints of individuals who allege that their employer regarded them as having a disability states:

This part of the definition of "disability" applies to individuals who are subjected to discrimination on the basis of genetic information relating to illness, disease, or other disorders. Covered entities that discriminate against individuals on the basis of such genetic information are regarding the individuals as having impairments that substantially limit a major life activity. Those individuals, therefore, are covered by the third part of the definition of "disability."\(^{77}\)

The manual goes on to state that "a person who is covered because of being regarded as having an impairment is not required to show that the employer’s perception is inaccurate ... ."\(^{78}\) What then, is the claimant required to show to bring a genetically linked claim within the ADA?

In assembling the building blocks of an ADA genetic discrimination claim, the aggrieved party must first establish (i) he or she is a person with a disability as described in the ADA, (ii) he or she is otherwise qualified for a position, with or without reasonable accommodation, and (iii) [s]he was terminated or subjected to an adverse decision because of the disability.\(^{79}\) In the usual ADA case, this process is begun through a showing the individual has an ADA qualified disability which is: "(a) a physical or mental impairment that substantially limits one or more major life activities; (b) has a record of having such an impairment; or (c) is regarded as [emphasis added] having an impairment."\(^{80}\) The EEOC has gone on to clarify the qualifying factors for ADA coverage of the disabled by defining an impairment as "[a]ny physiological disorder or condition,


\(^{78}\)Id.


\(^{80}\)Id.
cosmetic disfigurement, or anatomical loss affecting ... neurological, musculoskeletal, special sense organs, respiratory ... cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine ... .” systems. The established standard for a substantial limitation of a major life activity has been defined as the inability to perform such functions as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working[,]” that “the average person in the general population can perform.” Once the prima facie case has been proven through evidence establishing that the claimant is a disabled person under the ADA, the inquiry then turns to ascertaining whether the employer engaged in unlawful conduct under the ADA because of the person’s disability or, whether the employer perceived or regarded the employee as being disabled and improperly acted upon that perception, which is of crucial importance when facing genetically linked conditions. Due to the uncertain nature of perceptions, claims of discrimination resulting from perceived disability are fact intensive and must be viewed on a case by case basis. As such, it is entirely possible for an unquestionably healthy individual, with no otherwise qualifying disability under the ADA, to find recourse under the Act, so long as the perception of the employer is that the individual suffers from a covered disability.

In a recent case decided by the Eight Circuit, the court found in cases where the Plaintiff claims to have been regarded as disabled by his employer within the meaning of the ADA, “[t]he limiting adjective ‘substantially’ and ‘major’ indicate the perceived ‘impairment must be a significant one.” Again, more must be proven to make a case of perceived disability under the ADA than a showing that an employer had knowledge of an employee’s physical mental or genetic disorder or

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81 Id.
82 29 C.F.R. 1630.2(j).
83 29 C.F.R. 1630.2(j)(1).
86 Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311, 1319 (8th Cir. 1996); see also Gerdes v. Swift-Eckrich, 94 F. Supp. 1386, 1399 (N.D. Iowa 1996); see also EEOC Compliance Manual, Section 908.8(a).
found the employee unfit for a particular job.\textsuperscript{87} What is required for a complaint to be actionable under the ADA is the critical combination that the employer perceived or regarded the employee as having a substantially limiting, qualifying impairment under the Act but, also, that the employer acted unlawfully upon that perception.\textsuperscript{88}

The \textit{Cook} case has set the standard for analyzing the increasing number of "regarded as" ADA filings which have become relatively popular over the last few years. The decisions in these cases have begun charting the course the courts are likely to take in addressing genetic discrimination claims and will form the cornerstone for the Act’s response to the explosive scientific progress expected from the Human Genome Project.

**UNIQUE PROBLEMS OF THE MENTALLY DISABLED UNDER THE ADA**

**The EEOC Position On Mental Disorders**

As with genetic issues, several similar difficulties exist in attempting to interpret the proper application of the ADA to a covered worker’s mental condition. While, theoretically, mental and physical disabilities are governed by the same standards, issues of mentally disabling conditions generally present far more complex and elusive questions.\textsuperscript{89} For both physically and mentally based discrimination claims, the EEOC interpretive rules have defined a disabled employee as an individual who has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."\textsuperscript{90} In its view, the EEOC has determined a qualifying mental impairment to include "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities."\textsuperscript{91} Also, in a recent interpretation broadening the recognition given to the mentally challenged, the EEOC has supplemented its list of major life

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\textsuperscript{87}Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986); see also 29 C.F.R. 1630.2(j)(3): "The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes .... The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."

\textsuperscript{88}Forrisi, 794 F.2d at 934.

\textsuperscript{89}See supra note 5.

\textsuperscript{90}29 C.F.R. 1630.2(g)(1).

\textsuperscript{91}29 C.F.R. 1630.2(h) (2).
activities to include "mental and emotional processes such as thinking, concentrating and interacting with others." Still, at the same time, the list of limiting exceptions and exclusions from the definition of a "disability" and "qualified individual with a disability" which the EEOC includes in its reading of the Act contains several conditions which the medical profession would generally acknowledge to be mental disorders under the Diagnostic and Statistical Manual of Mental Disorders (DSM). As specified in the Act, or as interpreted by the EEOC, conditions such as illegal drug use, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorder not resulting from physical impairments or other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania, psychoactive substance use disorders resulting from current illegal use of drugs, and homosexuality and bisexuality are not considered qualified disabilities. Interestingly, in dealing with physical handicaps, neither Congress nor the EEOC has elected to identify a comparable list of detailed, medically recognized physical disorders which they find appropriate to exclude from the protection of the ADA. With the exception of "temporary, non-chronic impairments of short duration," the EEOC has essentially left the determination of qualifying physical disabilities to the courts without any excluded categories of illness.

Another area of the EEOC's interpretation of the ADA is also troubling because of the lack of detail regarding its intended application. In this instance, although the EEOC has determined that the ADA is not protective of undesirable personality traits such as poor judgment or a quick temper, where such behavior is not a symptom of a mental or

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94 C.F.R. 1630.3(a)(2).
95 C.F.R. 1630.3(d)(1).
96 C.F.R. 1630.3(d)(2).
97 C.F.R. 1630.3(d)(3).
98 C.F.R. 1630.3(e). This section directly declares "homosexuality and bisexuality are not impairments and so are not disabilities as defined in this part." This statement would seem to be in conflict with the tendency of the EEOC and courts to rely upon DSM defined conditions in identifying mental impairments and disorders.
psychological disorder, and no distinguishing test or standard for exclusion has ever been established. In such cases, the courts have been left to their own devices to determine where the line is to be drawn distinguishing between the unprotected bad employee who simply lacks self control and social graces and the fully protected mentally impaired employee who exhibits the identical, unacceptable workplace behavior which the employee claims to be the manifestation of a DSM recognized disorder. As might be expected, the lack of a concise EEOC directive has led to conflicting judicial decisions and inconsistent outcomes.

Because the courts are not constrained from reviewing the soundness of EEOC interpretations and the compatibility of these interpretations with the language and Congressional intent of the Act, or from acting where the EEOC has chosen not to do so, the judiciary has undertaken to interpret and shape those difficult portions of the ADA involving mental disorders and controversies which the agency has, to date, elected to avoid.

**Fear Of Disclosure**

In many respects, the problems faced by the mentally disabled in asserting their right to protection under the ADA are completely dissimilar to the barriers faced by physically disabled workers. Perhaps the biggest impediment to a mentally disabled worker's exercise of his rights lies in the disabling condition itself. While the ADA was ostensibly passed to remedy the isolation of individuals with disabilities due to discrimination ranging from exclusionary standards to architectural barriers and to provide protection for those with "hidden disabilities such as ... mental illnesses," the mentally disabled employee often finds the hidden nature of the disorder to be his greatest protection against discrimination. In short, employees with mental disorders frequently succumb to the fear of the stigma and discrimination which they anticipate as likely to result from any disclosure of a disabling mental condition to an employer and

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100 C.F.R. Pt. App. 1630.2(h).
102 *Employment: ADA, 20 MENTAL & PHYSICAL DISABILITY L. REP. 817 (1996).*
co-workers and thereby, forego the full enjoyment of their rights under the ADA. The resulting cycle of events then serves to perpetuate the employee's inability to realize the intended benefits of the Act. As the Court concluded in Jackson v. Boise Cascade Corp., the ADA does not require clairvoyance on the part of the employer. The generally accepted rule is that it is the responsibility of the employee claiming the mental disability or impairment to inform the employer of the need for a reasonable accommodation as guaranteed him by the Act. The result, then, is that the employee, fearing the consequences of disclosing his mental problem, and need for accommodation to his employer, can not claim the enabling benefits the ADA was intended to impart and may forfeit the opportunity to achieve the independence the Act was structured to provide to the disabled.

Appropriate Use Of The DSM

Diagnoses of mental impairments and disorders qualifying for protection under the Act present another problematic area. While the legislative history of the ADA contains some indication that coverage of a mentally disabled person under the Act would depend upon the appearance of the underlying condition in the Diagnostic and Statistical Manual of Mental Disorders (DSM), various legislative exclusions were selectively approved denying coverage under the ADA for certain mental disorders with which Congress seems to have been morally or politically uncomfortable. The irony of such exclusionary legislation in dealing with conditions clearly recognized as constituting mental disorders under the DSM is that Congress, in the course of enacting protective legislation for the mentally disabled, openly sanctioned discriminatory employer conduct against employees with DSM recognized disorders that are, for the most part, wholly unrelated to DSM recognized disorders that are, for

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the essential functions of the position. As a result, while some conditions universally recognized as mental disorders in the medical community may go unprotected under the ADA, the inclusion of such conditions as the disorder of written expression now described in DSM-IV would, arguably, qualify the employee for the full protection of the Act.

In support of this argument, it would seem by creating specific, itemized lists of conditions statutorily excluded from coverage under the ADA, Congress intended the terms "mental impairment" and "mental disability" to potentially include all other non-excluded mental and psychological disorders, or at least all such disorders as are included in the DSM. This, then, becomes one of the serious challenges to the ADA as the Act must adapt to changing medical opinions and emerging behavior syndromes which work their way into and out of the repertoire of the DSM. Still, it would be a mistake to reach the simplistic conclusion that the DSM is the definitive arbiter of employee coverage under the ADA. Quite to the contrary, the courts ultimately retain the obligation to examine each individual case and decide whether the claimant qualifies as an individual with a disability under the Act.

Although the DSM is constantly being revised, lawyers and legislatures tend to place enormous faith in such diagnoses and consider them to be scientific and objective. However, the mere existence of an employee's claimed mental disability, whether classified under the DSM or otherwise, does not alone resolve the coverage question of the ADA. Beginning with claims rooted in the same type or classification of mental impairment, the courts have routinely reached wide ranging and divergent conclusions as to the circumstances under which the Act will provide


104 Diagnostic Criterion from DSM-IV, published by the American Psychiatric Association, Washington, D.C. describes Disorder of Written Expression as: "(A) Writing skills, as measured by individually administered standardized test ... are substantially below those expected given the person's chronological age, measured intelligence, and age-appropriate education. (B) The disturbance in Criterion A significantly interferes with academic achievement or activities of daily living that require the composition of written texts (e.g. writing grammatically correct sentences and organized paragraphs.)"


106 Welsh v. City of Tulsa, 977 F.2d 1415, 1417 (10th Cir. 1992).

107 See supra note 91.
workplace protection to the mentally disabled employee. Here, while there is ample evidence in the legislative history of the ADA that Congress intended, or at least allowed for, the DSM to play a part in the implementation of the Act’s protections,\(^{113}\) nothing in the Act compels any court to use the DSM when deciding a charge of illegal employer discrimination grounded upon the employee’s actual or perceived mental condition. If, however, a court chooses to look to the DSM for guidance in mental disability cases, it should do so with caution as has been urged by the American Psychiatric Association.\(^{114}\)

**Disagreement In The Courts**

Unlike the situation that exists with the often visible or easily diagnosed disabilities of physically handicapped workers, the uncertain and elusive nature of mental illness has defied precise definition and uniform treatment by the courts. In this area, several of the more common and controversial problems faced by the mentally troubled worker merit discussion.

Perhaps the most logical place to begin addressing the application of the ADA’s provisions to a mentally disabled employee is through an effort to try and determine at what point along the spectrum of mental health the employee becomes vested with the protections of the Act. However, as the courts dealing with this issue have found, identifying the exact point where ADA coverage begins is elusive and not easily achieved.

Traditionally, the EEOC has held firm in its position that it is the untreated condition of the employee that sets the qualifying standard for the Act. Taking the literal wording of the Act that a disability means “physical or mental impairment that substantially limits one or more of the major life activities,”\(^{115}\) the EEOC maintains the consideration of disability is to be made “without regard to mitigating measures such as

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\(^{114}\) The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.” [Taken from the Cautionary Statement of the American Psychiatric Association, *Quick Reference to the Diagnostic Criteria From DSM-IV*, p. xi (1995).]  

\(^{115}\) 42 U.S.C.A. § 12102 (2)(A)
In the opinion of the agency, the Act fully covers those employees who have mental illnesses which respond well to psychotropic drugs even though the prescribed medication results in the complete normalization of the worker's behavior. However, this interpretive regulation has not gained universal acceptance in the courts.

In the *Coghlan* case, which involved an insulin dependent diabetic who would lapse into coma absent her necessary medication, the EEOC argued that the Plaintiff was *per se* disabled because of a substantial limitation of a major life activity. The agency's determination of ADA coverage was primarily based upon a finding that the Plaintiff was likely to lapse into a coma absent the controlling effects of her medication. The court, however, rejected this argument on the basis that the EEOC's position would have the courts ignore the plain statutory language of the ADA and would require reading the critical element of a limitation of a major life activity completely out of the Act. Essentially, the court rejected the EEOC's argument that the Plaintiff, although not limited in major life activities while taking proper medication, must, nonetheless, be considered disabled because she would be so limited if the beneficial effects of her insulin regimen were ignored as EEOC guidelines require. Finding that "to allow such an interpretation would be to allow one having no limitation to satisfy a condition that clearly requires limitation," the Court went on to hold that "the EEOC's interpretive guidance ... is directly at odds with clear statutory language."

Another case involving a consideration of employee medication is the *Franklin* case, decided under Section 504 of the Rehabilitation Act. This case involved a postal worker suffering from paranoid schizophrenia. Although the Court took a somewhat different route in arriving at a finding that the Plaintiff was not entitled to relief, the effect

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119 Id. at 814.
120 Id.
121 Id.
124 Id. at 1216.
of medical intervention on the plaintiff's behavioral pattern played a substantial role in the Court's decision. Stating "the Court is far more concerned with the situation in this case that the 'handicap' as distinguished from the 'condition' is a created one," the Court held that "[a] person suffering from the condition of paranoid schizophrenia that is controllable by the ingestion of medication who does not take such medication is not an 'otherwise qualified' handicapped person." 125

Taking the difficulty the mentally impaired employee faces in evaluating the extent of protection he can expect to receive under the ADA one step further, consideration must also be given to the possibility that the side effects of psychotropic drugs may, themselves, constitute substantial limitations invoking the protections of the Act and requiring reasonable employer accommodation. This was the inference given in the Guice-Mills, 126 Dees 127 and Overton 128 cases discussed below.

In Dees, the Court found that "Dees has also proved by a preponderance of the evidence that the policy of holding ... meetings at 7:00 A.M. discriminated against Dees and those who like her have early morning sedative side effects from medication by excluding them from participation." 129 Likewise, the Court in Guice, although ultimately denying relief on another basis, concluded that "[w]e agree with the district court that because appellant's illness and medication regime interfered with her ability to arrive at work on time, she was a handicapped individual within the meaning of the Rehabilitation Act." 130 Again, in a decision with a decidedly cavalier overtone, the Court in Overton stated:

Supervisors are prone to view catnaps as inappropriate and unprofessional, but if Overton's sleepiness is a function of his disability (or more properly, of the treatment for his disability) and he can still perform the essential functions of his job, then he may still be viewed as 'qualified' under the Rehabilitation Act. FN5. We do not mean to condone promiscuous napping. Some positions

125 See supra note 122, at 1218-19.
127 Dees v. Austin Travis County Mental Health & Mental Retardation Clinic, 860 F. Supp 1186 (W.D. Tex. 1994).
128 Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992).
129 See supra note 126, at 1190.
130 See supra note 125, at 797.
may actually require full-time vigilance. Every position presumably requires wakefulness for most of the working day and at specified events. In any event, the government may presumably require its employees to stay awake as a matter of decorum. But this is not necessarily to say that an occasional nap would make any federal employee unfit.\textsuperscript{31}

In light of decisions such as these, it appears that the degree to which the ADA requires an employer to accommodate employee behavior driven by prescribed psychotropic medication remains a fertile area for the courts to explore and clarify.

\textbf{Stress and Depression Related Problems}

In contrast to the uncertainty and divergent opinions identified with the complex issues of disorder classification and medication related problems discussed above, the courts have tended towards a consensus when dealing with claims of stress or depression related disability.

In general, the attitude of the judiciary, when confronted with ADA discrimination claims based upon workplace stress, reflects the sentiment that "in reality, a 'stress free' environment is possible only in the grave; simply being alive subjects everyone to stress."\textsuperscript{32} Here, the courts have uniformly refrained from imposing any ADA based employer requirement to provide its workers with a stress free environment\textsuperscript{33} which is a position in which the EEOC concurs. Unquestionably, since all humans are prone to experience occasional periods of anxiety, depression, stress and other mood-related disorders,\textsuperscript{34} the challenge then becomes one of discerning which episodes of distress will warrant the Act's protection. In this area, while some modest concession has been made by the EEOC\textsuperscript{35} and the

\textsuperscript{31}See supra note 127, at 1195.
\textsuperscript{32}See supra note 98.
\textsuperscript{33}Magee v. United States Postal Serv., 903 F. Supp. 1022 (W.D. La. 1995); see also, Dealing With Mental Disabilities Under the ADA, 9 LABOR L.A.W. 531, 539 (1993).
\textsuperscript{34}Susan Gaylord Willis, Stress Related Disability Claims Under the ADA, 43 No. 1 PRAC. LAW. 73.
\textsuperscript{35}Americans With Disabilities Act Technical Assistance Manual, 29 C.F.R. 1630.2.2(a)(i) discusses stress, and depression as conditions; see also Pritchard v. Southern Co. Servs., 92 F.3d 1130 (11th Cir. 1996); Doe v. Regional 13 Mental Health-Mental Retardation Comm’n, 704 F.2d 1402 (5th Cir. 1983).
courts\textsuperscript{136} that stress and depression may be impairments under the ADA, recovery has frequently been denied due to the Plaintiff’s failure to meet the required standard of proof in showing that the claimed mental or emotional condition rose to the level of limiting a major life activity.\textsuperscript{137} For these cases, the prevailing sentiment has been that the inability of an employee to work in a particular position or with a particular person does not trigger a covered disability or an employer obligation of accommodation.\textsuperscript{138}

As noted by the Court in \textit{Weiler v. Household Finance Corporation}: “[T]he ADA does not protect people from the general stresses of the workplace. Everyone has encountered difficult situations in the working environment. Being unwilling or even unable to work with a particular individual simply is not the equivalent of being ‘substantially limited’ in the life activity of working.”\textsuperscript{139}

Other courts have reflected a similar qualification that puts the burden on the employee alleging illegal employer discrimination under the ADA to establish that the claimed disability restricts the employee’s ability to perform a broad range of jobs and not just the particular job in question.\textsuperscript{140} Possibly, the position of the courts in addressing job related stress claims is best summarized by the court in \textit{Dewitt v. Carsten} which, in denying Plaintiff’s disability claim arising from the stress associated with being a jail sergeant, stated that “were such a complaint held to be actionable, it would expand the scope of the ADA well beyond the scope of illnesses that Congress has indicated it was intended to cover.”\textsuperscript{141}

\textsuperscript{136}See supra note 127 in which the \textit{Overton} court states at footnote 1: “‘Depression’ is a misleadingly mild term for an extraordinarily debilitating illness.”; \textit{See William Styron, DARKNESS VISIBLE: A MEMOIR OF MADNESS} (Random House 1990); \textit{see also} Pritchard \textit{v. The Southern Co. Servs.}, 92 F.3d 1130 (11th Cit. 1996); \textit{Doe v. Regional 13 Mental Health-Mental Retardation Comm’n}, 704 F.2d 1402 (5th Cir. 1983).

\textsuperscript{137}See, e.g., \textit{Overton}, 977 F.2d at 1190; \textit{Pritchard}, 92 F.3d at 1130; \textit{Doe}, 704 F.2d at 1402.

\textsuperscript{138}See, e.g., \textit{Overton}, 977 F.2d at 1190; \textit{Pritchard}, 92 F.3d at 1130.

\textsuperscript{139}\textit{Weiler v. Household Finance Corp.}, No. 93C6454, 1995 WL 452977, at *5 (July 27, 1995). The Court also went on the clarify that: “A disability is a part of someone and goes with her to her next job. A personality conflict, on the other hand, is specific to an individual ... ”

\textsuperscript{140}\textit{Holihan v. Lucky Stores}, 87 F.3d 362 (9th Cir. 1996); \textit{Partlow v. Runyon}, 526 F. Supp. 40 (D.N.H. 1994); \textit{see also} 29 C.F.R. 1630.2(j)(3).

For those advocating ADA coverage for matters involving an employee’s genetic profile or mental situation, the key to the question is embedded within the categories of a defined “disability” as outlined by the Act. As consistently required by the cases reviewed above, the crucial element is to bring the employee’s condition within the parameters of the ADA’s definition of a disability that includes individuals having (i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual or (ii) who have a record of such an impairment or (iii) who are regarded as having such an impairment.  

What steps then need to be taken to advance a grievance based upon genetics, genetically related disorders or mental impairment which an employee claims to be protected by the ADA?  

An examination of the first possibility, an impairment substantially limiting one or more major life activities, requires that a two part test be satisfied. First, an impairment must currently be present and, secondly, the impairment must cause a substantial limitation of a major life activity.  

Obviously, an individual with an asymptomatic, potential health disorder currently disclosed only through discovery of a particular genetic marker would fail to satisfy one or both requirements of this qualifying condition. Similarly, unless there is an attendant interference with a major life activity, the mere existence of a recognized mental disability is not, by itself, sufficient to establish an actionable disability.  

Even an individual presently suffering from a DSM-IV recognized mental disorder will fail to satisfy an essential requirement and be found not to have a disability protected by the ADA if the underlying condition fails to interfere with a qualifying life activity.  

The second avenue that can be traveled in an effort to establish an ADA protected mental or genetic disability applies to the employee having an historical record of an impairment that satisfies the standard of limiting one or more major life activities. In cases of mental disturbance,

142 See supra note 29.  
143 Id.  
144 Charles B. Gurd, supra note 53.  
this second alternative is a simple fact based test, and does not require the mental impairment be ongoing or that the employee is currently suffering the effects of the disorder. In short, this is the situation averred to by the Court in Southeastern, finding that the protection exists for an employee who currently "may have no actual incapacity at all." However, while the employee having a history of mental impairment may find relief under this second test, the ADA again affords no relief to the worker exhibiting only a genetic susceptibility to future illness or disease. The critical missing element in this later instance is the genetically effected employee would not yet have established a record of impairment regarding an unmanifested condition which may, in fact, never actually develop.

The final possibility for an employee to secure ADA coverage requires that the individual be regarded as having the impairment in question. This qualifying test clearly offers the most promise for including latent genetic traits as accepted, covered disabilities under the ADA. In meeting this test, the EEOC has determined what is intended by the phrase "being regarded as having an impairment" is that an individual:

(1) has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as having a substantially limiting impairment;

(2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment, or:

(3) has none of the impairments ... but is treated by a covered entity as having a substantially limiting impairment.

Accordingly, an employee regarded by his employer as being mentally disabled, whether or not the employee is actually mentally impaired, would have recourse as an individual protected under the Act. Thus, while the mentally impaired worker may have access to the ADA's

146 See. e.g., Southeastern Community College v. Davis, 442 U.S. 397 (1979).
147 Id.
protection under any of the three tests for coverage, the road to ADA coverage for the genetically impacted employee is much narrower in offering opportunities for relief and is almost exclusively dependent upon the employee's ability to establish the perceptions upon which the employer acted in regarding the employee as disabled.

CONCLUSION

When confronted with mental disability or genetic issues under the ADA, the EEOC, and the judiciary seem to be inclined toward extending the Act's coverage to these conditions provided the employee is able to meet the threshold qualifying requirements of the Act.

For the worker claiming unlawful discrimination based upon either currently manifested genetic disorders or the potential for the future occurrence of a genetically related diseases or illness, attaining coverage under the Act is a fairly well defined, straightforward process. In order to succeed on such claims, the complaining individual must establish, despite the employee's actual condition of health, that the employer regarded the employee as being substantially limited in the performance of a major life activity and improperly acted upon this perception.

In dealing with genetic issues, the direction and limitation the EEOC and courts have set in essentially restricting relief in perceived disability cases to the standards required in cases of discrimination for manifested physical disabilities is correct. To afford an individual asserting an asymptomatic, genetic predisposition for disease or illness relief on any lesser standard than required of individuals currently suffering from expressed, physical impairments would severely undermine the purpose of the Act. Here, the requirements placed upon the employee asserting genetic discrimination are neither unreasonable nor biased towards excluding the genetically impacted worker from the protections afforded employees who are physically disabled. Again, despite the expected explosion of twenty-first century scientific progress in unlocking many more of the mysteries of the human genetic makeup, the current provisions of the Act for recognizing actionable, genetically based claims under the ADA seem capable of adapting an increased ability to predict potential employee health problems.

On the other hand, because of the unique, fragile and elusive nature of the human mind, coupled with the many subtle, bizarre or dangerous
disorders with which it can be afflicted, the mentally disabled employee faces special challenges in the workplace which are generally not experienced by his physically handicapped or genetically impaired counterpart. These problems are exacerbated by the lack of consistency and agreement shown by the courts and EEOC in dealing with mental disability claims.

Few physical disabilities carry the stigma or evoke the suspicions, fears and misconceptions in the workplace as does the image of an employee suffering the effects of a troubled mind. Nonetheless, for the employee considering exercising his rights under the ADA, the Act requires the mentally disabled worker to make a reasoned judgment balancing the risks and benefits of advancing a claim against the possible adverse effects of disclosing a disabling mental condition to an employer. In brief, the employee must evaluate the difficult and complex questions as to: whether his claim of disability will be denied because his condition is medically controlled; whether he will be found to have an ADA qualified disability without regard to the effect of medical intervention; or whether the side effects of his drug therapy will carry the day in establishing a substantial limitation of a major life activity. Since the EEOC and the courts have, themselves, been unable to agree on the answers to these key questions, this seems to be an unreasonable burden to place upon the truly mentally disabled worker as the prerequisite for realizing his protections under the ADA. If the EEOC truly believes its own statement that "mental and emotional processes such as thinking [and] concentrating" are major life activities, then it would seem to be incumbent upon the agency to structure a better process for the employee suffering from a mental disability to protect his rights under the ADA than to expect and require a sophisticated exercise of an impaired major mental life activity, the same as if no disability existed at all.

\footnote{See supra note 92.}