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## A DISABILITY BY ANY OTHER NAME IS STILL A DISABILITY: *LOG CABIN*, THE DISABILITY SPECTRUM, AND THE ADA(AA)

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### I. INTRODUCTION

While the Americans with Disabilities Act (“ADA”)<sup>1</sup> was expected to open doors for people with disabilities that had long been closed, the ADA is widely regarded as a disappointment, especially in the employment context, where absurd results are not uncommon.<sup>2</sup> To bring a claim of employment discrimination under the ADA, a plaintiff must show “(1) he is disabled, (2) he is qualified to perform the essential function of the job either with or without reasonable accommodation, and (3) he suffered an adverse employment action

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<sup>1</sup> 42 U.S.C. § 12101 et seq.

<sup>2</sup> See, e.g., Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 994-95 (citing a case in which a plaintiff suffering from schizophrenia was denied a job because the employer said she was “physically and mentally incapable of having a job,” yet lost her case for not being able to prove she was regarded as having a mental impairment); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217-18 (2008) (relating a case in which a plaintiff with cancer brought suit against his employer and died before the resolution of the case, which posthumously found that the plaintiff’s cancer was not limiting enough to be considered a disability under the Act).

because of his disability.”<sup>3</sup> Intuitively, one might suspect it would be the third prong of the definition—proving that he suffered an adverse employment action because of his disability—that that would be a challenge for a plaintiff. However, contrary to expectations, and contrary to past practice, it is the first prong, whether a plaintiff has a disability under the law, which has proved challenging.<sup>4</sup> Time and time again, individuals with a wide range of serious impairments—from epilepsy to diabetes to cancer—have not met the statutory definition of “disability.”<sup>5</sup> And in case after case, the courts have narrowed their interpretation of the ADA, applying stringent requirements in order for plaintiffs to be considered disabled. Indeed, legal commentators have concluded that what was once celebrated as “the most comprehensive civil rights legislation passed by Congress since the 1964 Civil Rights Act” has become increasingly narrowed to the point of being in danger of becoming ineffective.<sup>6</sup> How did the interpretation of the ADA move so far from its original intent? And what can be done about it?

On July 26, 2007, the 17<sup>th</sup> anniversary of the ADA’s passage, legislation to amend the ADA was introduced in the House<sup>7</sup> and Senate,<sup>8</sup> resulting in the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”),<sup>9</sup> a compromise bill negotiated between business<sup>10</sup> and disability groups.<sup>11</sup> The broad purpose of the ADAAA

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<sup>3</sup> 42 U.S.C. § 12112(a); *Furnish v. SVI Sys., Inc.*, 270 F.3d 445, 448 (7th Cir. 2001).

<sup>4</sup> Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 139 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> ADA Amendments Act of 2008, H.R. 3195, 110th Cong. (2007-2008).

<sup>8</sup> Americans with Disabilities Act Restoration Act of 2007, S. 1881, 110th Cong. (2007-2008).

<sup>9</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 [hereinafter ADAAA of 2008].

<sup>10</sup> Business groups included U.S. Chamber of Commerce, Society for Human Resource Management, and National Association of Manufacturers.

was “[t]o restore the intent and protections of the Americans with Disabilities Act of 1990.”<sup>12</sup> Rejecting the reasoning and standards enunciated by the Supreme Court in a number of cases over the last ten years<sup>13</sup> and calling for the Equal Employment Opportunity Commission (“EEOC”)<sup>14</sup> to revise its regulations,<sup>15</sup> Congress intended the ADAAA to reinstate a broad scope of protection for people with disabilities.<sup>16</sup> The ADAAA starts off with the same definition of “disability” found in the original ADA, requiring (a) a physical or mental impairment that substantially limits one or more major life activities of an individual, (b) a record of such an impairment, or (c) being regarded as having such an impairment.<sup>17</sup>

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<sup>11</sup> Disability groups included Epilepsy Foundation, American Diabetes Association, American Association of People with Disabilities, and National Disability Rights Network.

<sup>12</sup> ADAAA of 2008.

<sup>13</sup> *See, e.g.,* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), *superseded by statute*, ADAAA of 2008 (holding that whether an impairment substantially limits a major life activity is to be determined by taking into account the ameliorative effects of mitigating measures); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (declaring that the mitigating measures rule applied not just to artificial measures, but also to “measure undertaken, whether consciously or not, with the body’s own systems”); *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184 (2002), *superseded by statute*, ADAAA of 2008 (creating demanding standards for the terms “substantially” and “major” in the definition of disability and holding 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”).

<sup>14</sup> Congress has charged the EEOC with enforcing the ADA.

<sup>15</sup> Congress expects that the EEOC will revise the term “substantially limits,” as defined in its current regulations to mean “significantly restricted,” to be consistent with the ADAAA. ADAAA of 2008 § (2)(b)(6).

<sup>16</sup> ADAAA of 2008 § (2)(a)(1).

<sup>17</sup> (1) DISABILITY.—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;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment. . .

ADAAA of 2008 § 3.

However, the amendments then make important revisions, including instructions to the courts regarding how the terms of the Act should be interpreted, clarifications to the “substantially limits” language, expansion of the “major life activities” concept, and substantial changes to the “regarded as” prong.<sup>18</sup> According to the EEOC, “[t]he effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.”<sup>19</sup>

Just three months before the ADAAA went into effect,<sup>20</sup> the United States Court of Appeals for the Seventh Circuit affirmed summary judgment in a controversial case involving an alleged ADA violation for refusing to hire an applicant because she was human immunodeficiency virus (“HIV”) positive.<sup>21</sup> The Seventh Circuit’s majority decision in *EEOC v. Lee’s Log Cabin, Inc.* calls into question the court’s approach to ADA cases involving complex disabilities, such as HIV/AIDS. It also points to the disjuncture between ADA language and ADA litigation, “between the type of people that advocates of the ADA presumed would be covered under the law, and the practical reality of the protection currently afforded by the law.”<sup>22</sup>

Because very few cases have been decided yet under the ADAAA,<sup>23</sup> it is uncertain if the new amendments will close the gap between Congress’ vision of protecting people with disabilities and the

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<sup>18</sup> Long, *supra* note 2, at 218.

<sup>19</sup> THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NOTICE CONCERNING THE AMERICANS WITH DISABILITIES ACT (ADA) AMENDMENTS ACT OF 2008, [http://www.eeoc.gov/ada/amendments\\_notice.html](http://www.eeoc.gov/ada/amendments_notice.html) (page last modified March 10, 2009).

<sup>20</sup> The ADAAA was effective as of January 1, 2009.

<sup>21</sup> *EEOC v. Lee’s Log Cabin, Inc.*, 546 F.3d 438 (7th Cir. 2008).

<sup>22</sup> Feldblum, *supra* note 4, at 156.

<sup>23</sup> *See, e.g.*, *Jenkins v. Nat’l Bd. of Med. Examiners*, 2009 WL 331638 (6th Cir. 2009) (holding that because the suit for injunctive relief was pending on appeal when the amendments became effective, the amendments apply to the case); *but see, e.g.*, *Rohr v. Salt River Project Agric. Improvement and Power Dist.*, 555 F.3d 850 (9th Cir. 2009) (declining to decide whether the ADAAA applies retroactively and holding that even under pre-ADAAA case law, the plaintiff provided sufficient evidence to survive summary judgment).

interpretation of that vision promulgated by the courts and administrative agencies. Nonetheless, this note suggests that rather than attempting to distinguish those with disabilities from those without under the ADA or its amendments, a better policy approach would be to adopt an overly inclusive conceptualization of disability, one that captures all individuals in a broad spectrum of disability. While this concept of disability would technically include a number of individuals who might never need the ADA's anti-discrimination protection, the concept would mirror Title VII, which similarly provides protection for many people who might never need its protection. Such an approach would allow the courts to expend less energy on parsing the definition of disability and deciding who is covered and more energy on remedying real cases of discrimination and dismissing others on the basis of their lack of merit.<sup>24</sup>

## II. *LEE'S LOG CABIN*

### A. *Korrin's Story*

Korrin Krause Stewart was diagnosed with HIV when she was 14 years old.<sup>25</sup> One week after Korrin's initial diagnosis, she found out her HIV condition had already developed into acquired immunodeficiency syndrome ("AIDS").<sup>26</sup> In fact, Korrin had had HIV since birth because her mother, who died when Korrin was nine years old, was infected with the virus when Korrin was born.<sup>27</sup>

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<sup>24</sup> This concept of a spectrum of disabilities is not new. Similar language and concepts were proposed in a report from the U.S. Commission on Civil Rights in 1983 and, more recently, in the work of legal commentator Chai R. Feldblum. *See* Feldblum, *supra* note 4.

<sup>25</sup> Brief of Petitioner-Appellant at \*2, *EEOC v. Lee's Log Cabin*, No. 06-3278 (7th Cir. Dec. 15, 2006).

<sup>26</sup> *Id.*

<sup>27</sup> Marilyn Marchione, *Fears Over HIV Cost Girl Her Job; EEOC Urges Settlement, Finds 'Reasonable Cause,'* MILWAUKEE J. SENT., Sep. 2, 2001, at 19, 21; Brief of Petitioner-Appellant, *supra* note 25, at \*2.

When Korrin was 15 years old, she worked as a part-time bagger and stock person at Quality Foods, a grocery store.<sup>28</sup> She told a store manager that she had HIV when she was hired, and the manager told Korrin that the store would be able to accommodate her if she needed time off for appointments with her physicians.<sup>29</sup> About a month later, Quality Foods' upper management found out that Korrin was infected with HIV.<sup>30</sup> The grocery store fired Korrin because she was HIV positive, and the EEOC settled a lawsuit against Quality Foods for unlawful employment practices, violative of the ADA.<sup>31</sup>

Just a couple of years later, when Korrin was 18 years old, she responded to an advertisement in the *Wausaw Daily Herald* for a waitress position at Lee's Log Cabin Restaurant ("Log Cabin").<sup>32</sup> Although Korrin had never been a waitress before, she had lots of other restaurant experience, as a bartender, cashier, dishwasher and server, which she put down on her application.<sup>33</sup> Also, since one of the job requirements was that a waitress be able to lift 25-30 pounds during a shift, she stated on her application that she had a lifting restriction of 10 pounds that could not be accommodated.<sup>34</sup> Just two weeks before applying for this job, Korrin's doctor had put Korrin on a lifting restriction until her platelet count increased.<sup>35</sup> The assistant manager she spoke with said her lifting restriction would disqualify her from employment, but Korrin told him the restriction was only temporary.<sup>36</sup>

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<sup>28</sup> Complaint at ¶8(a), EEOC v. Schofield Foods, Inc., d/b/a/ Quality Foods IGA, 2001 WL 34134856 (W.D.Wis. Sep. 26, 2001).

<sup>29</sup> *Id.* at ¶8(b).

<sup>30</sup> *Id.* at ¶8(c).

<sup>31</sup> *Id.* at ¶8; Brief of Petitioner-Appellant, *supra* note 25, at \*3-4.

<sup>32</sup> Brief of Petitioner-Appellant, *supra* note 25, at \*2.

<sup>33</sup> *Id.* at \*2-3.

<sup>34</sup> *Id.* at \*3.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* There was a dispute in the testimony over who told what to whom. Korrin insisted that she told the assistant manager that her lifting restriction was temporary; however, the assistant manager denied that Korrin said anything to him about the restriction being temporary.

After not hearing from Log Cabin for about a month, Korrin went back to the restaurant to check on her application.<sup>37</sup> Korrin talked to the same assistant manager, who told her that the owner, who made all the hiring decisions, was out of town.<sup>38</sup> Then, the assistant manager asked Korrin if she was the girl from Quality Foods, and Korrin confirmed that she had worked at Quality Foods.<sup>39</sup> Korrin asked to see her application so she could add some additional experience, and when the assistant manager got it for her, the application had “HIV+” written across the front in big letters.<sup>40</sup> Dean Lee, the owner of Log Cabin, never called or interviewed Korrin, and she never got the waitressing job.<sup>41</sup>

*B. EEOC v. Lee’s Log Cabin, Inc.*

The owner of Log Cabin did go over Korrin’s application with the assistant manager, including the HIV notation.<sup>42</sup> Lee said he decided not to hire Korrin because she lacked prior waitressing experience and because of her lifting restriction.<sup>43</sup> However, at the time of Korrin’s application, Lee already had in his employ two waitresses with no prior waitressing experience and a waitress who could not do any heavy lifting.<sup>44</sup> The EEOC filed suit, alleging that Log Cabin violated the ADA for not hiring Korrin “because it learned that she was HIV positive,” and Log Cabin subsequently filed a motion for summary judgment, arguing that Korrin was not disabled nor qualified for the job.<sup>45</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at \*3-4.

<sup>40</sup> *Id.* at \*4.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at \*5.

## 1. District Court Decision

The district court granted Log Cabin's summary judgment motion, deciding that the EEOC had not proved Korrin had a disability.<sup>46</sup> Although Korrin actually had AIDS, the complaint only spoke of having HIV, and it was not until the EEOC responded to Log Cabin's motion for summary judgment that the EEOC's affidavits discussed how AIDS or HIV/AIDS affected Korrin's life activities.<sup>47</sup> The court concluded that calling Korrin's condition AIDS was a "gross departure" from the original complaint that identified her as HIV positive, and that the EEOC could not be permitted to amend its pleadings "to allege an entirely new cause of action" when the trial "is only a month away."<sup>48</sup> Thus, because the court determined that "[h]aving AIDS and being HIV positive are not synonymous," the only question before it was whether Log Cabin discriminated against Korrin because she had HIV, and the EEOC had not presented any evidence showing how HIV alone impacted Korrin's life activities.<sup>49</sup>

Additionally, the district court ruled that even if an AIDS claim had been brought properly, there was no evidence that Log Cabin knew Korrin suffered from AIDS.<sup>50</sup> Finally, the district court noted that it was "questionable" whether the EEOC could prove that Korrin was a qualified individual with a disability since she was unable to lift more than 10 pounds.<sup>51</sup> The EEOC appealed to the Seventh Circuit.

## 2. Seventh Circuit Majority Opinion

The Seventh Circuit affirmed the district court's ruling on slightly different grounds.<sup>52</sup> The court reasoned that summary

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<sup>46</sup> EEOC v. Lee's Log Cabin, Inc., 436 F.Supp.2d 992, 993 (W.D. Wis. 2006).

<sup>47</sup> *Id.* at 995.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 996.

<sup>52</sup> EEOC v. Lee's Log Cabin, Inc., 546 F.3d 438, 440 (7th Cir. 2008).

judgment was appropriate because the “EEOC’s failed attempt to substitute factual premises left an empty record on whether [Korrin]’s HIV infection limited one or more of her major life activities.”<sup>53</sup> Stating that it need not address whether HIV and AIDS are synonymous for purposes under the ADA in this case, the Seventh Circuit found the district court’s judgment to be “manifestly reasonable” in refusing to “entertain the EEOC’s belated alteration of the factual basis of its claim.”<sup>54</sup>

Citing *Sutton v. United Air Lines, Inc.*,<sup>55</sup> Judge Sykes, writing for the majority, stated that for a disability determination the ADA requires an individualized inquiry into whether a particular physical or mental impairment substantially limits the major life activities of a particular individual.<sup>56</sup> According to Judge Sykes, the EEOC complicated this individualized inquiry by attempting to refashion its claim from one based on HIV to one based on AIDS.<sup>57</sup>

Judge Sykes elaborated on the alleged distinction between AIDS and HIV by discussing the Supreme Court’s reasoning in *Bragdon v. Abbott*,<sup>58</sup> in which a pre-symptomatic HIV-infected woman brought an ADA claim when her dentist refused to fill her cavity unless she agreed to the work being performed at a hospital and agreed to pay for the cost of the hospital’s facilities.<sup>59</sup> In determining whether the claimant was disabled, the Court held that her HIV satisfied the statutory definition of impairment and concluded that her infection substantially limited her major life activity of reproduction.<sup>60</sup>

The Supreme Court, in *Bragdon*, described the typical progression of HIV, from its initial stage until it develops into full-

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 443.

<sup>55</sup> 527 U.S. 471, 483.

<sup>56</sup> *Log Cabin*, 546 F.3d at 442.

<sup>57</sup> *Id.*

<sup>58</sup> 524 U.S. 624 (1998).

<sup>59</sup> *Id.* at 628-29.

<sup>60</sup> *Id.*

blown AIDS.<sup>61</sup> These different stages are important, said Judge Sykes, because the ADA's applicability depends upon whether the asserted impairment is a disability within the meaning of the statute, which in turn depends on whether the impairment substantially limits one or more of the major life activities of the claimant.<sup>62</sup> Accordingly, "whether an ADA claimant was HIV-positive or had full-blown AIDS at the time of the alleged discrimination is highly relevant to this foundational aspect of the claim."<sup>63</sup>

Judge Sykes noted that "being HIV-positive is *not* the same as having AIDS, as the Supreme Court discusses at length in *Bragdon*. And that's the material point as to notice here."<sup>64</sup> Thus, because the district court and Log Cabin (allegedly) did not know until a month before trial that the EEOC was basing its disability discrimination claim on the fact that Korrin had AIDS, not just that she was HIV positive, this was a major alteration of the claim and the grounds upon which it rested.<sup>65</sup> When Korrin and the EEOC submitted affidavits from her doctor describing the effect of AIDS, not HIV, on her life activities, the court had no choice but to conclude that the EEOC had not made a threshold evidentiary showing that HIV infection imposed substantial limitations on a major life activity.<sup>66</sup> Based on *Bragdon* and *Sutton*, holding that the question of disability under the ADA is an individualized inquiry, the Seventh Circuit declined to adopt a rule that HIV infection is a per se disability.<sup>67</sup>

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<sup>61</sup> *Id.* at 635.

<sup>62</sup> *Log Cabin*, 546 F.3d at 443.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 444.

<sup>65</sup> *Id.* at 443-44. It is worth noting that the EEOC's response to Log Cabin's summary judgment motion, including her doctor's affidavits, was submitted only a month before trial because of a mistake by Log Cabin, who failed to properly serve the EEOC with its motion for summary judgment until well past the court's deadline for filing dispositive motions. Due to that mistake, the district court was forced to revise its entire briefing schedule. *Id.* at 448, n. 1 (Williams, J. dissenting).

<sup>66</sup> *Id.* at 444-45.

<sup>67</sup> *Id.* at 445.

As an additional or alternative basis to affirm Log Cabin's motion for summary judgment, the Seventh Circuit ruled that Korrin was not a qualified individual under the ADA.<sup>68</sup> The waitress position at Lee's Log Cabin Restaurant required individuals "to lift, transport, and carry objects weighing from 25 to 30 pounds up to 20 or more times per shift."<sup>69</sup> Because Korrin indicated on her employment application that she had a lifting restriction of 10 pounds that could not be accommodated,<sup>70</sup> she could not be considered "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."<sup>71</sup>

Finally, after considering the EEOC's petition for panel rehearing and for rehearing en banc, a majority of the Seventh Circuit judges voted to deny rehearing.<sup>72</sup>

### 3. The Dissents

Judge Williams wrote not one, but two, dissents in *EEOC v. Lee's Log Cabin, Inc.* She dissented from the majority view in the Seventh Circuit decision, and she wrote another opinion, in which Judges Rovner, Wood, and Evans joined, dissenting from the denial of the petition for rehearing. Judge Williams claimed that distinguishing between HIV or AIDS or HIV/AIDS "misses the point of the ADA."<sup>73</sup> She argued that the EEOC did not change its claim because a person diagnosed with AIDS is also HIV positive. "To the extent there is a difference between HIV and AIDS . . . , the majority's focus on

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> 42 U.S.C. § 12111(8).

<sup>72</sup> *EEOC v. Lee's Log Cabin*, 546 F.3d 438 (2008), *rehearing denied*, No. 06-3278 (7th Cir. Feb. 2, 2009).

<sup>73</sup> *Id.* at 447 (Williams, J. dissenting).

nomenclature overlooks whether that difference is consequential in this case.”<sup>74</sup>

Citing to *Bragdon*, *Sutton* and *Kirkingburg*, Judge Williams concluded that the determination of whether an individual has a disability is not necessarily based on the name of the impairment, but rather on the impact of that impairment on the life of the individual.<sup>75</sup> Like the majority, Judge Williams pointed to the detailed description the Supreme Court in *Bragdon* makes of the illness’ progression for a person who is HIV-positive.<sup>76</sup> However, she emphasized that *Bragdon* does not characterize AIDS as distinct from being HIV-positive.<sup>77</sup> Instead, the Supreme Court’s analysis, she said, breaks down the course of illness into three stages—the final stage being AIDS—but HIV is a disease that can render a person disabled at all stages.<sup>78</sup>

In Judge Williams’ dissent from the denial of rehearing en banc, she argued that the majority imposed a higher pleading requirement for claims with multi-stage disabilities.<sup>79</sup> The EEOC met its threshold burden pursuant to the federal notice pleading standard by providing a short and plain statement of the grievance: Log Cabin refused to hire Korrin because it found out she was HIV positive.<sup>80</sup> “The exact stage of HIV is a detail—and an irrelevant one at that.”<sup>81</sup> As required by this standard, any facts consistent with the allegations could be proved later without needing an amended complaint.<sup>82</sup>

However, the majority speculated that the reason the EEOC did not plead AIDS in its complaint is because there was no evidence Log

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<sup>74</sup> *Id.* at 448.

<sup>75</sup> *Id.* at 447; see *Bragdon*, *supra* note 58 at 637; *Sutton*, *supra* note 13 at 483; *Kirkingburg*, *supra* note 13 at 566.

<sup>76</sup> EEOC v. Lee’s Log Cabin, 546 F.3d 438, 448 (2008), *rehearing denied*, No. 06-3278 (7th Cir. Feb. 2, 2009).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> EEOC v. Lee’s Log Cabin, 546 F.3d 438 (2008), *rehearing denied*, No. 06-3278 at \*4 (7th Cir. Feb. 2, 2009).

<sup>80</sup> *Id.* at \*8.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at \*5.

Cabin knew Korrin had AIDS.<sup>83</sup> Whether this is true, Judge Williams said in dissent, is not the issue. Log Cabin knew Korrin was HIV-positive, and requiring employers to have specific knowledge of the actual extent of a disability goes beyond the pleading requirements.<sup>84</sup> The majority's holding, Judge Williams concludes, "creates an insurmountable hurdle for ADA plaintiffs with complex disabilities" and raises serious questions about the conceptualization of disability in this country.<sup>85</sup>

### III. CONCEPTS OF DISABILITY IN FEDERAL LAW

#### A. *A Short History of the Concept of Disability in America*

Disabled people have been out of the mainstream of American life for two hundred years. And these years have seen the construction of modern American society—its values, its heritage, its cities, its transportation and communications networks. So that now, when they are coming back into our society, the barriers they face are enormous.<sup>86</sup>

The concept of disability in America has gone through a slow, painful change over the last 200 years. In colonial America, people with disabilities were viewed with both revulsion and pity.<sup>87</sup> Gradually, as medical technology advanced, disabled people were seen as objects of rehabilitation and cure.<sup>88</sup> The government's relationship to people with disabilities reflected public perception and attitudes of

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at \*7.

<sup>85</sup> *Id.* at \*3, \*6.

<sup>86</sup> FRANK BOWE, *HANDICAPPING AMERICA* (Harper & Row, 1978).

<sup>87</sup> Examples of ridicule, torture, imprisonment, and execution of disabled people throughout history are not uncommon, while societal practices of isolation and segregation have been the rule. BOWE, *supra* note 86, at 3-8.

<sup>88</sup> Feldblum, *supra* note 4, at 94.

the time: disabled people were viewed first in terms of their dependency and later in terms of their capacity for rehabilitation.<sup>89</sup>

In the 18<sup>th</sup> century, the disabled were lumped together with widows and orphans, the poor, the elderly, the mentally ill, and others who could not provide for themselves and relied on community support.<sup>90</sup> For those who had no family support, the government provided subsistence by establishing “poor laws” and paying private individuals to take in the disabled and provide room, board, and care.<sup>91</sup> By the 1820s, the familial and community construct of society was changing and people with disabilities found much less local support.<sup>92</sup> The government responded by constructing large almshouses that took in the disabled, along with juvenile delinquents, prostitutes, the elderly, and the poor.<sup>93</sup>

The almshouses continued to grow throughout the 1800s, despite their reputation for deplorable conditions, and people with disabilities continued to share them with abandoned children, drifters, petty criminals and poor immigrants.<sup>94</sup> The assumption with regard to people with disabilities was an inability to function effectively in society. Hence, the disabled were excluded and kept outside the mainstream of society, first to protect the disabled from society<sup>95</sup> and later to protect society from the disabled.<sup>96</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 4 (Aldine Transaction 2002) (1971).

<sup>91</sup> U.S. COMMISSION ON CIVIL RIGHTS, *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES* 18 (1983) [hereinafter *ACCOMMODATING THE SPECTRUM*].

<sup>92</sup> ROTHMAN, *supra* note 48, at 4-5.

<sup>93</sup> *ACCOMMODATING THE SPECTRUM*, *supra* note 91.

<sup>94</sup> Feldblum, *supra* note 4, at 95.

<sup>95</sup> *ACCOMMODATING THE SPECTRUM*, *supra* note 91, at 19. “This philosophy emphasized ‘benevolent shelter’ and resulted in large institutions housing greater numbers of disabled people far from population centers.” *Id.*

<sup>96</sup> For example, a 1934 article in a Kentucky law journal calling for a sterilization statute in Kentucky issued the following warning:

Since time immemorial, the criminal and defective have been the “cancer of society.” Strong, intelligent, useful families are becoming smaller and smaller; while irresponsible, diseased, defective families are becoming larger. The result can only be race degeneration. To prevent this race

The early 20<sup>th</sup> century saw a shift in society's perception of people with disabilities. The basic principle was that a disability is an infirmity that could be fixed or cured.<sup>97</sup> Disabled people must be rehabilitated and returned to gainful employment to increase national production and decrease welfare spending.<sup>98</sup> At the end of World War I, a mass of injured returning war veterans prompted Congress to establish laws governing the rehabilitation of individuals with disabilities.<sup>99</sup> The Smith-Sears Veterans' Rehabilitation Act was enacted in 1918 "to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces."<sup>100</sup> Two years later, the Smith-Fess Act was signed into law as the first federal civil vocational rehabilitation act for individuals with disabilities who were not war veterans.<sup>101</sup>

This conception of disability was termed the medical model of disability, as opposed to the exclusionary model of earlier years.<sup>102</sup> The medical model presumed that the problem of disability was within the individual, who must change to fit the surrounding society, rather than any aspect of the environment changing to make life easier for the disabled individual.<sup>103</sup> The definition of disability at this time focused on the impact an individual's disability had on his or her capacity to work, and on the extent to which such an individual would benefit from vocational rehabilitation programs.<sup>104</sup> For those individuals who

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suicide we must prevent the socially inadequate persons from propagating their kind, i.e., the feeble-minded, epileptic, insane, criminal, diseased, and other.

Note, "A Sterilization Statute for Kentucky," KY. L.J., vol. 23 (1934), at 168, cited in ACCOMMODATING THE SPECTRUM, *supra* note 91, at 20 n. 23.

<sup>97</sup> U.S. COMMISSION ON CIVIL RIGHTS, SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? 6 (2000) (hereinafter SHARING THE DREAM).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Vocational Rehabilitation Act, ch. 107, 40 Stat. 617 (1918) (amended 1919).

<sup>101</sup> Smith-Fess Act, ch. 219, 41 Stat. 735 (1920) (repealed 1973, and re-enacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355).

<sup>102</sup> Feldblum, *supra* note 4, at 96.

<sup>103</sup> *Id.*

<sup>104</sup> The Vocational Rehabilitation Amendments of 1954 defined "physically handicapped individual" to mean "any individual who is under a physical or mental

could not work, Congress established Social Security Disability Insurance (“SSDI”)<sup>105</sup> and the Supplemental Security Income program (“SSI”) to provide support for disabled individuals.<sup>106</sup> To qualify as disabled and receive cash benefits under both of these programs, an individual must be unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment.”<sup>107</sup>

As the modern civil rights movement in America gained momentum, protections against disability discrimination also became part of the discussion.<sup>108</sup> The courts became involved in mostly unsuccessful attempts to remedy disability discrimination.<sup>109</sup> For example, in 1965 a New York City schoolteacher sued the state public school system when he was excluded from a teaching position because of his blindness.<sup>110</sup> The court held that the school board was authorized to disqualify teaching applicants based on vision requirements.<sup>111</sup> However, in 1969, a court in Utah applied the principles of equal educational opportunity established in *Brown v. Board of Education*<sup>112</sup> to people with disabilities, holding that the exclusion of two mentally retarded children from the state’s public schools was unconstitutional.<sup>113</sup> This decision started a landslide of lawsuits alleging disability discrimination in transportation, housing,

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disability which constitutes a substantial handicap to employment, but which is of such a nature that vocational rehabilitation services may reasonably be expected to render him fit to engage in remunerative occupation.” Pub. L. No. 565, § 11(b), 68 Stat. 652, 660 (1954).

<sup>105</sup> Social Security Amendments of 1956, Pub. L. No. 84-880 § 103(a), 70 Stat. 807, 815-24 (1956).

<sup>106</sup> Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972).

<sup>107</sup> 42 U.S.C. § 423(d)(1)(A) (1994) (SSDI); 42 U.S.C. § 1382c(a)(3)(A) (1994) (SSI).

<sup>108</sup> Feldblum, *supra* note 4, at 97.

<sup>109</sup> SHARING THE DREAM, *supra* note 97, at 6.

<sup>110</sup> Chavich v. Bd. Of Exam’rs, 23 A.D.2d 57 (N.Y. App. Div. 1965).

<sup>111</sup> *Id.* at 60-61.

<sup>112</sup> 349 U.S. 294 (1954).

<sup>113</sup> Wolf v. State Legislature, Civ. No. 182646 (3d Judicial Dist., Salt Lake County, Utah, Jan. 8, 1969).

medical services, contracts, voting, and confinement in residential treatment facilities.<sup>114</sup> A new attitude towards the disabled began to develop that continued the rehabilitation model of disability but also sought to protect the civil rights of disabled people.<sup>115</sup>

*B. Section 504 of the Rehabilitation Act*

Too many handicapped Americans are not served at all, too many lack jobs, and too many are underemployed—utilized in capacities well below the levels of their training, education, and ability . . . [I]f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward elimination of the most disgraceful barrier of all—discrimination.<sup>116</sup>

Although the Civil Rights Act of 1964 did not address disability discrimination, the Rehabilitation Act of 1973<sup>117</sup> was eventually signed into law and took a significant step toward implementing a national policy to integrate people with disabilities into society.<sup>118</sup> Section 504 of the Rehabilitation Act<sup>119</sup> provides that

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<sup>114</sup> SHARING THE DREAM, *supra* note 97, at 6 (citing ROBERT L. BURGENDORF JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 25 (Washington, D.C.: Bureau of National Affairs, 1995)).

<sup>115</sup> Feldblum, *supra* note 4, at 97.

<sup>116</sup> 119 Cong. Rec. 24, 587 (1973). Senator Taft (R-Ohio), a sponsor of the Rehabilitation Act of 1973, speaking in support of the Act (cited in ACCOMMODATING THE SPECTRUM, *supra* note 91, at 49).

<sup>117</sup> 29 U.S.C. § 790 (repealed 1992).

<sup>118</sup> ACCOMMODATING THE SPECTRUM, *supra* note 91, at 47.

<sup>119</sup> The remaining sections of the Rehabilitation Act also sought to further equal rights for disabled individuals: Section 501 requires affirmative action hiring and advancement programs for federal agencies (29 U.S.C. § 791(b) (Supp. IV 1998)), Section 503 has similar requirements for federal governmental contractors with \$10,000 or more in federal contracts (29 U.S.C. § 793(a)), and Section 502 established the Architectural and Transportation Barriers Compliance Board (Access Board), which issued guidelines for accessible designs and a uniform set of

“no otherwise qualified handicapped individual in the United States. . .shall, solely by reason of 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.”<sup>120</sup> Section 504 was patterned on nearly identical provisions in Title VI of the Civil Rights Act of 1964, prohibiting discrimination based on race in any program or activity receiving federal financial assistance, and Title IX of the Education Amendments of 1972, prohibiting discrimination based on sex in any educational program or activity receiving federal financial assistance.<sup>121</sup>

In 1974, Congress expanded the definition of “handicapped individual” for purposes of Section 504 to read as follows: 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.<sup>122</sup> The amended definition reflected Congress’ concern with protecting the disabled against discrimination stemming not only from simple prejudice, but also from “archaic attitudes and laws” that proliferated because the American people were simply unfamiliar with and insensitive to the difficulties confronting individuals with disabilities.<sup>123</sup>

While the act declined to define “substantially limits” or “major life activities,” the act’s regulations gave a non-exhaustive list of examples of impairments, including “orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and. . .drug and alcohol addiction”; and examples of major life activities, including “functions such as caring

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standards for building accessibility pursuant to the act’s requirements (29 U.S.C. § 792(a),(b)(3) (Supp. IV 1998)).

<sup>120</sup> 29 U.S.C. § 794(a) (1998) (cited in Feldblum, *supra* note 4, at 98-99).

<sup>121</sup> Feldblum, *supra* note 4, at 99.

<sup>122</sup> 29 U.S.C. § 706(8)

<sup>123</sup> S. Rep. No. 93-1297, p. 50 (1974) (cited in *Sch. Bd. of Nassau County v. Arline*, 480 U.S. at 279).

for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>124</sup>

In an important 1979 Supreme Court case, a woman was fired from her job as a schoolteacher because she had several lapses of tuberculosis.<sup>125</sup> The issues that the Court decided were whether the definition of a handicapped individual included people with contagious diseases and whether the ability to transmit a contagious disease could ever be considered a handicap under Section 504.<sup>126</sup> The Court found that the schoolteacher was a handicapped individual under Section 504<sup>127</sup> because, as the Court explained:

We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this. [The schoolteacher's] contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.<sup>128</sup>

The Court did not spend much time analyzing whether a particular impairment sufficiently qualifies as a disability, instead focusing primarily on the “regarded as” prong of the definition of disability.<sup>129</sup> By providing a broad interpretation of this prong, the Court acknowledged Congress' finding that society's myths and fears about

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<sup>124</sup> 45 C.F.R. § 84.3(j)(2)(ii) (2007); 28 C.F.R § 41.31 (b)(2) (2007).

<sup>125</sup> Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

<sup>126</sup> The Supreme Court also considered whether the schoolteacher was qualified for the job, but the Court determined further findings of fact were needed before that question could be answered. *Id.* at 288-89.

<sup>127</sup> *Id.* at 284.

<sup>128</sup> *Id.* at 282.

<sup>129</sup> *Id.* at 284.

disability “are as handicapping as are the physical limitations that flow from actual impairment.”<sup>130</sup> In fact, the Supreme Court’s interpretation of the “regarded as” prong seemed sufficiently broad to capture *any* individual who had been discriminated against because of *any* impairment.<sup>131</sup>

When analyzing historical perceptions of disability, the judicial interpretations and the agency implementations of the Rehabilitation Act of 1973 become significant because Congress used the same defining language in both the Rehabilitation Act and the ADA.<sup>132</sup> Indeed, many in Congress viewed the ADA as merely an extension to the private sector of the public sector requirements already found in Section 504 of the Rehabilitation Act.<sup>133</sup> Because Congress felt comfortable with the manner in which the definition of disability had been applied thus far, and because disability rights advocates felt comfortable that the same individuals who had been covered under existing disability anti-discrimination law would be covered under the new law, the definition of disability in the ADA was taken directly from the definition in the Rehabilitation Act.<sup>134</sup> Such repetition demonstrates Congress’ sanctioning of this broad interpretation and implementation, which it endorsed and incorporated into the ADA.

### *C. Overview of the Americans with Disabilities Act*

[The ADA] signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will

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<sup>130</sup> *Id.*

<sup>131</sup> Feldblum, *supra* note 4, at 92 (emphasis added).

<sup>132</sup> *Id.* at 128.

<sup>133</sup> *Id.* at 92.

<sup>134</sup> *Id.*

likewise come to be a model for the choices and opportunities of future generations around the world.<sup>135</sup>

On July 26, 1990, a day that President George H.W. Bush likened to another “independence day,”<sup>136</sup> the Americans with Disabilities Act of 1990<sup>137</sup> was signed into law. This Act, he said, would allow the 43 million Americans with disabilities to “pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>138</sup> The ADA was the world’s first comprehensive civil rights law for people with disabilities,<sup>139</sup> prohibiting discrimination against people with disabilities in employment (Title I),<sup>140</sup> in public services (Title II),<sup>141</sup> in public accommodations (Title III)<sup>142</sup> and in telecommunications (Title IV).<sup>143</sup>

Acknowledging that an ever increasing population of Americans was physically or mentally disabled,<sup>144</sup> Congress addressed the discrimination against individuals with disabilities by establishing a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>145</sup> According to the ADA, “[t]he term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a

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<sup>135</sup> President George Bush, Statement Upon Signing S. 933, 1990 U.S.C.C.A.N. 601, 602 (1990).

<sup>136</sup> President George H.W. Bush, *Remarks on Signing the Americans with Disabilities Act of 1990*, 2 PUB. PAPERS 1067, 1067 (July 26, 1990), available at <http://www.eeoc.gov/ada/bushspeech.html>.

<sup>137</sup> 42 U.S.C. § 12101 et seq.

<sup>138</sup> Bush, *supra* note 136.

<sup>139</sup> The U.S. Equal Employment Opportunity Commission, *The Americans with Disabilities Act (ADA): 1990-2002*, <http://www.eeoc.gov/ada/> (last modified Oct. 15, 2002).

<sup>140</sup> 42 U.S.C. § 12111–12117.

<sup>141</sup> *Id.* § 12131–12165.

<sup>142</sup> *Id.* § 12181–12189.

<sup>143</sup> 47 U.S.C. § 225.

<sup>144</sup> 42 U.S.C. § 12101 (a)(1).

<sup>145</sup> *Id.* § 12101 (5)(1).

record of such an impairment; or (C) being regarded as having such an impairment.”<sup>146</sup>

Therefore, to be considered disabled under section (A) of the ADA, a person must (1) have an impairment (2) that substantially limits (3) a major life activity. However, as with the Rehabilitation Act of 1973, Congress did not define the terms “physical or mental impairment” or “major life activities,” leaving it to the EEOC and Department of Justice (“DOJ”) to issue regulations and the courts to apply them.<sup>147</sup> Further, the ADA regulations adopted the same non-exhaustive list of major life activities<sup>148</sup> as found in Section 504 the Rehabilitation Act, and Congress specifically ordered the courts not to apply a lesser standard than the standards applied under the Rehabilitation Act or its regulations to ensure that the ADA’s regulations and jurisprudence were not eroded by the courts.<sup>149</sup>

The ADA regulations issued by the DOJ were very similar to the comparable Section 504 regulations, including an almost identical definition of disability.<sup>150</sup> Nothing in the DOJ’s regulations suggested that courts would need to engage in an individual assessment with regard to most impairments to determine if a particular individual had a disability.<sup>151</sup> In contrast, the EEOC regulations introduced, for the first time in disability jurisprudence, the idea of an individualized assessment to determine whether a person had a disability under the ADA.<sup>152</sup> Also for the first time, the EEOC defined the term “substantially limits”<sup>153</sup> and set forth factors to be considered when determining whether an individual is substantially limited in a major life activity.<sup>154</sup> Such a determination, the EEOC noted, must be made

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<sup>146</sup> *Id.* at § 12102 (2).

<sup>147</sup> Feldblum, *supra* note 4, at 134.

<sup>148</sup> *See* 29 C.F.R. § 1630.2(h) (2007).

<sup>149</sup> 42 U.S.C. § 12201(a) (2007).

<sup>150</sup> Feldblum, *supra* note 4, at 134.

<sup>151</sup> *Id.* at 135.

<sup>152</sup> *Id.*

<sup>153</sup> *See* 29 C.F.R. § 1630.2(j)(1) (1999).

<sup>154</sup> *Id.* at § 1630.2(j)(2).

on a case by case basis, “without regard to mitigating measures such as medicines, or assistive or prosthetic devices.”<sup>155</sup>

Sections (B) and (C) of the ADA definition of disability also come directly from the language of the Rehabilitation Act and reflect Congress’ desire to prohibit discrimination based not only on an actual disability, but also on a history of disability or the perception of disability.<sup>156</sup>

#### IV. JUDICIAL INTERPRETATION OF THE DEFINITION OF DISABILITY UNDER THE ADA

##### A. *Supreme Court Decisions*

##### 1. *Bragdon v. Abbott* (1998)

The Supreme Court’s only decision on what constitutes a major life activity within the context of HIV/AIDS is *Bragdon v. Abbott*.<sup>157</sup> Abbott, an asymptomatic HIV positive woman, went to see Bragdon for a dental appointment.<sup>158</sup> When the dentist became aware of her HIV status, he refused to fill her cavity in his office and told her he would only perform the procedure at a hospital and if she bore the additional expenses.<sup>159</sup> Abbott brought suit under Section 12182(a) of the ADA,<sup>160</sup> and the Court granted certiorari to review “whether HIV infection is a disability under the ADA when the infection has not yet progressed to the so-called symptomatic phase.”<sup>161</sup> The Court had

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<sup>155</sup> *Id.*

<sup>156</sup> See *Arline*, 48 U.S. at 284 (discussing Congress’ pre-ADA concern about perceived impairments).

<sup>157</sup> 524 U.S. 624 (1998).

<sup>158</sup> *Id.* at 628.

<sup>159</sup> *Id.* at 629.

<sup>160</sup> “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation.” 42 U.S.C. § 12182(a).

<sup>161</sup> *Bragdon*, 524 U.S. at 628.

little trouble concluding that because of its effect on the hemic and lymphatic systems from the moment of infection, HIV satisfies the definition of a physical impairment during every stage of the disease.<sup>162</sup> Considering reproduction to be a major life activity, the Court then found that HIV infection had a personal, individual effect on Abbott's life, deterring her from reproducing.<sup>163</sup> The Court concluded that Abbott's HIV infection qualified as a disability under the ADA because it substantially limited the major life activity of reproduction.<sup>164</sup>

Unfortunately, the Supreme Court declined to address the issue of whether HIV is a *per se* disability under the ADA, limiting the decision's guidance for lower courts and leaving the door open to discrimination against those who are not able to reproduce or have no intention to reproduce.<sup>165</sup>

## 2. The *Sutton* Trilogy (1999)

In *Sutton v. United Air Lines, Inc.* and its companion cases,<sup>166</sup> the Supreme Court addressed the major life activity prong of the disability definition. The Court announced a new standard, which required that the determination of whether an impairment substantially limits a major life activity must be balanced against the "ameliorative effects of mitigation measures," such as medication or medical devices.<sup>167</sup> In *Sutton*, twin sisters with severe myopia were denied the opportunity to become commercial airline pilots because they did not meet the airline's minimum vision requirement, which was uncorrected visual acuity of 20/100 or better.<sup>168</sup> Although the sisters' uncorrected vision

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<sup>162</sup> *Id.* at 637.

<sup>163</sup> *Id.* at 641.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 642.

<sup>166</sup> 527 U.S. at 471 (1999); *Kirkingburg*, 527 U.S. 555; *Murphy v. United Parcel Service*, 527 U.S. 516 (1999).

<sup>167</sup> *Sutton*, 527 U.S. at 482.

<sup>168</sup> *Id.* at 475.

was 20/200 in the right eye and 20/400 in the left eye, with the use of corrective measures, both could function identically to individuals without a similar impairment.<sup>169</sup>

The Court carefully parsed the language of the ADA's definition of disability and held that because the definition uses the "present indicative verb form," a person must be presently, not potentially or hypothetically, substantially limited.<sup>170</sup> Since the sisters' impairment could be mitigated by corrective measures and thus was no longer substantially limiting, the sisters were not disabled under the ADA.<sup>171</sup>

Likewise, in *Murphy v. United Parcel Service*, a case decided the same day, the Court upheld Murphy's termination because his hypertension was controlled by medication.<sup>172</sup> Murphy was hired as a mechanic, which also required him to drive commercial vehicles.<sup>173</sup> However, when a medical supervisor reviewed his blood pressure tests, Murphy was fired on the belief that his blood pressure exceeded the Department of Transportation's ("DOT") requirements for drivers of commercial motor vehicles.<sup>174</sup> Murphy filed suit under Title I of the ADA.<sup>175</sup> Given its holding in *Sutton*, the Supreme Court affirmed that with his medication, Murphy functioned normally in everyday activities, and thus he was not a person with a disability under the ADA.<sup>176</sup>

Finally, in *Albertson's, Inc. v. Kirkingburg*,<sup>177</sup> the last of the *Sutton* trilogy, the Supreme Court declared that the mitigating measures

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 482.

<sup>171</sup> *Id.* at 482-83.

<sup>172</sup> 527 U.S. at 519.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 520.

<sup>175</sup> *Id.* at 518. "No covered entity shall discriminate against a qualified individual on the basis of disability 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." 42 U.S.C. § 12112(a).

<sup>176</sup> *Murphy*, 527 U.S. at 521.

<sup>177</sup> 527 U.S. 555 (1999).

standard applied not just to artificial corrective measures, but also to “measures undertaken, whether consciously or not, with the body’s own system.”<sup>178</sup> Kirkingburg, a monocular individual,<sup>179</sup> was fired from his job as a truck driver because he could not meet the basic DOT vision standard, and Kirkingburg sued under the ADA.<sup>180</sup>

While allowing that most monocular individuals would ordinarily be considered disabled under the ADA, the Supreme Court ruled that Kirkingburg did not qualify.<sup>181</sup> Kirkingburg’s brain had developed subconscious mechanisms for coping with his monocular vision and thus his body compensated for his disability.<sup>182</sup> The Court held that the ADA “requires monocular individuals, like others claiming the Act’s protection, to prove a disability by offering evidence that the extent of the limitation *in terms of their own experience*, as in loss of depth perception and visual field, is substantial.”<sup>183</sup> Thus, because his body had learned a way to make his impairment less limiting, Kirkingburg could not be disabled and was not protected under the ADA.

### 3. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (2002)

The Supreme Court continued its trend of interpreting disability narrowly, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>184</sup> by holding that the term “major life activities” “refers to those activities that are of central importance to most people’s daily life.”<sup>185</sup> The Court went on to say that under the ADA, this term needed to be “interpreted strictly to create a demanding standard for

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<sup>178</sup> *Id.* at 555-56.

<sup>179</sup> Kirkingburg suffers from amblyopia, a general medical term for “poor vision caused by abnormal visual development secondary to abnormal visual stimulation” *Id.* at 559, n 3 (citing K. Wright et al., *Pediatric Ophthalmology and Strabismus* 126 (1995)).

<sup>180</sup> *Id.* at 560.

<sup>181</sup> *Id.* at 567.

<sup>182</sup> *Id.* at 565-66.

<sup>183</sup> *Id.* at 567 (emphasis added).

<sup>184</sup> 534 U.S. at 184.

<sup>185</sup> *Id.* at 198.

qualifying as disabled.”<sup>186</sup> In *Toyota Motor Manufacturing*, Williams worked on an engine fabrication assembly line using pneumatic tools, which eventually caused her to develop painful medical conditions of the muscles and nerves, including carpal tunnel syndrome, myotendinitis, and thoracic outlet compression.<sup>187</sup> After her employment was terminated, Williams filed a charge of disability discrimination, alleging her employer failed to reasonably accommodate her disability.<sup>188</sup>

In substantiating her claim of disability, Williams said that her physical impairments substantially limited her in (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working.<sup>189</sup> To be substantially limited in performing manual tasks, the Supreme Court found, 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, and the impairment’s impact must be permanent or long term.<sup>190</sup> The Court emphasized the need for an individualized assessment of the effect of an impairment, especially when the impairment is one that varies from person to person.<sup>191</sup> Repeating the findings of the *Sutton* trilogy, the Court said that it is not enough to submit evidence of a medical diagnosis of an impairment; instead, for a claimant to prove a disability requires offering evidence that, in terms of the individual’s own experience, the extent of the limitation is substantial.<sup>192</sup>

Finally, with the regard to what may be considered a manual task, the Supreme Court held that “the manual tasks unique to any particular job are not necessarily important parts of most people’s lives. As a result, occupation-specific tasks may have only limited relevance to

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<sup>186</sup> *Id.* at 197.

<sup>187</sup> *Id.* at 187, 196.

<sup>188</sup> *Id.* at 190.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 198.

<sup>191</sup> *Id.* at 199.

<sup>192</sup> *Id.* at 198; see *Sutton*, 527 U.S. at 483; *Kirkingburg*, 527 U.S. at 566.

the manual task inquiry.”<sup>193</sup> Rather, the inquiry should focus the variety of tasks central to most people’s daily lives, *e.g.*, tending to personal hygiene and carrying out personal or household chores.<sup>194</sup> Because there was evidence that Williams was able to perform these types of tasks,<sup>195</sup> her limitations did not establish a manual task disability as a matter of law.<sup>196</sup>

The Supreme Court also emphasized that courts should not engage in hypothetical inquiries as to the severity of impairments but must focus instead on the individual in her present state.<sup>197</sup> In other words, the Supreme Court requires an individualized inquiry and rejects the notion of *per se* disability under the ADA.

## V. THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT

### A. *Has Anything Changed?*

Although the ADAAA starts with essentially the same three-pronged definition of disability that existed under the original ADA,<sup>198</sup> the primary purpose of the ADAAA is to broaden the definition of the term disability and make it easier for individuals to qualify for the law’s protections.<sup>199</sup> Section 2(b)(5) of the ADAAA expressly states that the determination of whether an individual has a disability “should not demand extensive analysis”;<sup>200</sup> while Section 3(4)(A) provides that the definition of disability “shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent

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<sup>193</sup> *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 201 (2002), *superseded by statute*, ADAAA of 2008.

<sup>194</sup> *Id.* at 192.

<sup>195</sup> *Id.* at 201-02.

<sup>196</sup> The Supreme Court did not consider the working, lifting, or other arguments for disability status that had been preserved below but which were not ruled upon by the Court of Appeals. *Id.* at 193.

<sup>197</sup> *Id.* at 198.

<sup>198</sup> *See supra* note 15.

<sup>199</sup> ADAA of 2008, *supra* note 9, § 2(b).

<sup>200</sup> *Id.* at § 2(b)(5).

permitted by the terms of this Act.”<sup>201</sup> These sections are consistent with the broad interpretation of disability found in Section 504 of the Rehabilitation Act of 1973 and the broad view enunciated by the Supreme Court in *School Board of Nassau County v. Arline*.<sup>202</sup>

Section 3 of the ADAAA expands the definition of “major life activities” and provides two non-exhaustive lists as examples. The first list includes previously recognized activities, as well as three new ones: reading, bending, and communicating.<sup>203</sup> The second non-exhaustive list clarifies that major life activities include activities that constitute the operation of a major bodily function, including but not limited to “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>204</sup>

Although proof that an individual has an impairment will not be sufficient by itself to establish that the individual has a disability, Section 2(b)(5) states 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. . .the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”<sup>205</sup> This change expresses a lower standard than the Supreme Court’s strict and demanding

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<sup>201</sup> *Id.* § 3(4)(A).

<sup>202</sup> 29 U.S.C. § 790 (repealed 1992); *Sch. Bd. of Nassau County v. Airline*, 480 U.S. 273 (1987).

<sup>203</sup> The first list in its entirety includes “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” ADAAA of 2008, *supra* note 9, at § 3(2)(A). However, on April 6, 2009, the U.S. Supreme Court declined to accept a petition by a fired oil field safety worker to reverse an appeals court ruling that driving is not a “major life activity” under the Americans with Disabilities Act. *Kellogg v. Energy Safety Servs. Inc., d/b/a Oilind Safety*, U.S., No. 08-1013, *cert. denied* (Apr. 6, 2009).

<sup>204</sup> ADAAA of 2008, *supra* note 9, § 3(2)(B). For example, cancer would affect an individual’s major bodily function of normal cell growth, kidney disease would affect bladder function, and HIV would affect functioning of the immune system.

<sup>205</sup> *Id.* at § 2(b)(5).

standard found in the *Sutton* trilogy and *Toyota Motor Manufacturing*.<sup>206</sup>

The ADAAA further provides that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”<sup>207</sup> In the past, the Supreme Court has emphasized that courts should refrain from hypothetical inquiries as to the severity of impairments and instead must focus on the individual in his or her present state.<sup>208</sup> However, with these changes, courts must consider whether an impairment would substantially limit a major life activity if it were active.

In Section 3(4)(E)(i), the ADAAA states that ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses, shall not be considered when assessing whether an individual is substantially limited in a major life activity.<sup>209</sup> This reversal of the analysis set forth in the *Sutton* trilogy goes on to provide that if an employer uses a qualification standard based on an individual’s uncorrected vision, the employer must show that the standard is related to the job and consistent with a business necessity.<sup>210</sup>

One of the most significant changes to the ADA involves the “regarded as” prong of the original definition. According to the “Findings and Purposes” section of the ADAAA, one of the purposes of the amendments is “to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*. . . which set forth a broad view of the third prong of the definition of [disability] under the Rehabilitation Act of 1973.”<sup>211</sup> The ADAAA sets forth a separate definition of the “regarded as” prong:

An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes

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<sup>206</sup> See *supra* note 13.

<sup>207</sup> ADAAA of 2008, *supra* note 9, at § 4(a).

<sup>208</sup> See e.g., *Sutton*, 527 U.S. at 482; *Toyota Motor Mfg.*, 534 U.S. at 198.

<sup>209</sup> ADA Amendments Act, *supra* note 9, § 3(4)(E)(i).

<sup>210</sup> *Id.* § 5(b).

<sup>211</sup> *Id.* § 2(b)(3).

the he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.<sup>212</sup>

Thus, the “regarded as” prong once again seems sufficiently broad to capture almost *any* individual who had been discriminated against because of almost *any* impairment.<sup>213</sup>

These are the most significant changes made to the definition of disability under the ADAAA. Other changes include a new provision concerning the duty of a covered entity to accommodate an individual that the covered entity regards as having a disability and an express statement concerning the authority of federal agencies to issue regulations concerning the definition of disability.<sup>214</sup>

### *B. Log Cabin Redux*

Had Korin Krause Stewart’s case been decided just a few months later than it was, after the ADAAA had gone into effect, the outcome may have been quite different. The analysis of her claim of disability discrimination would have been looked at through a broader lens, where the focus would be on evaluating the merits of her claim, rather than on determining whether she met the definition of disability.

To bring a disability discrimination claim under the ADA, a plaintiff must show “(1) he is disabled; (2) he is qualified to perform the essential function of the job either with or without reasonable accommodation; and (3) he suffered an adverse employment action because of his disability.”<sup>215</sup> Contrary to the expectations of the ADA drafters, the courts began to interpret the first prong more and more strictly, creating a demanding standard for being considered

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<sup>212</sup> *Id.* at § 4(a).

<sup>213</sup> *See supra* note 131 and accompanying text.

<sup>214</sup> Long, *supra* note 1, at 223.

<sup>215</sup> 42 U.S.C. § 12112(a)

disabled.<sup>216</sup> Thus, claimants found, somewhat perversely, that a wide range of serious impairments did not meet the statutory definition of disability.<sup>217</sup> With the passage of the ADAAA, however, getting past the first prong in bringing a disability discrimination claim will likely be less onerous.

For Korrin, who was not considered disabled because she did not make a sufficient showing of how HIV (rather than AIDS) substantially impaired any of her major life activities, being considered disabled now would arguably be much easier. Section 3 of the ADAAA clarifies that major life activities include activities that constitute the operation of a major bodily function, including functions of the immune system.<sup>218</sup> Thus, Korrin's HIV infection would qualify as substantially impairing a major life activity, and, in turn, she would be considered a disabled individual under the ADA.

However, the inquiry into Korrin's disability discrimination claim does not stop there. She must now show that she is qualified to be a waitress at Log Cabin with or without reasonable accommodation and that she was not hired because she has HIV/AIDS. Will Korrin be successful in her claim? The answer is unclear until there is further investigation into the merits of her claim; but now at least, under the ADAAA, Korrin's claim will reach the merits.

### *C. The Future of the ADAAA*

What does the future hold for the ADAAA? Since the ADAAA went into effect on January 1, 2009, few cases have yet to be decided under the new amendments. A case filed on February 13, 2009, in the Ninth Circuit noted that while the court's decision was pending, the ADAAA was signed into law.<sup>219</sup> The court declined to consider whether the ADAAA applied retroactively in this case because even if

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<sup>216</sup> Feldblum, *supra* note 4, at 139.

<sup>217</sup> *Id.*

<sup>218</sup> ADAAA of 2008, *supra* note 9, at § 3(2)(B).

<sup>219</sup> Rohr v. Salt River Project Agric. Improvement and Power Dist., 555 F.3d 850, 853 (2009).

the ADAAA were applicable, the claimant provided sufficient evidence that he was a qualified individual to survive summary judgment under pre-ADAAA law.<sup>220</sup>

In a disability discrimination case in the Sixth Circuit, the court vacated the judgment and remanded the case “[b]ecause this suit for injunctive relief was pending on appeal when the amendments became effective, [and] the amendments apply to this case.”<sup>221</sup> The plaintiff’s status under the ADA turned on the definition of “substantial limitation,” which changed under the ADAAA.<sup>222</sup> Thus, the district court’s legal conclusions would have to be reconsidered in light of the new law.<sup>223</sup>

An even more recent case in the United States District Court for the Northern District of Illinois held that the court would apply the law in force when the events of the case occurred.<sup>224</sup> Although the plaintiff argued that the ADAAA should apply because it restored Congress’ original intent that disability claims should be broadly construed, the court noted that the ADAAA “does not contain an express provision for retroactive application, and courts will not apply a statute to events preceding the effective date if doing so would cause a retroactive effect.”<sup>225</sup>

Legal commentators are already discussing some of the controversial and potentially contentious issues brought about by the passage of the ADAAA. One article shows that the ADAAA fails to address certain important issues, including the so-called “single-job rule,” short-term impairments, the “record of” prong, whether interacting with others qualifies as a major life activity, and the limited

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<sup>220</sup> *Id.*

<sup>221</sup> *Jenkins v. Nat’l Bd. of Med. Examiners*, No. 08-5371, 2009 WL 331638 (C.A.6 (Ky.)) at \*1.

<sup>222</sup> *Id.* at \*2.

<sup>223</sup> *Id.*

<sup>224</sup> *Pennie v. United Parcel Service, Inc.*, No. 07-C1596, 2009 U.S. Dist. WL 855787, at \*1 (N.D. Ill. Mar. 30, 2009).

<sup>225</sup> *Id.*

guidance provided on reasonable accommodations.<sup>226</sup> Another commentator argues that “courts in employment discrimination cases often show surprising disregard for Congress’ disapproval of precedent.”<sup>227</sup> Calling these repudiated precedents “shadow precedents,” the article suggests that Congress’ check on judicial power is not as robust as typically assumed because courts tend to rely on shadow precedents rather than interpret the new language of a congressional override.<sup>228</sup>

Legal practitioners also are discussing the amendments and the future of the ADAAA. With titles such as “Recent Amendments to Federal Law Increase Protection for the Disabled,” “Disabling the ADAAA,” “The ADA Amendments Act of 2008: Who Isn’t Disabled?” and “The New and Expanded Americans with Disabilities Act,” these articles discuss the changes to disability law and conclude generally that the efficacy of the ADAAA will only become clearer as more and more courts consider disability discrimination issues under the new statutory guidelines.<sup>229</sup>

## VI. A BETTER DEFINITION OF DISABILITY

Everyone who is born holds dual citizenship, in the kingdom of the well and in the kingdom of the sick. Although we prefer to use only the good passport, sooner or later each of

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<sup>226</sup> For a discussion of the unresolved issues under the ADAAA, see Long, *supra* note 1, at 226-29.

<sup>227</sup> Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 582 (2009).

<sup>228</sup> *Id.* at 511.

<sup>229</sup> See generally Lynne M. Hook & Stacey A. Lee, *Recent Amendments to Federal Law Increase Protection for the Disabled*, LOS ANGELES LAW., FEB. 2009, AT 10.; Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, NJ LAW., FEB. 2009, AT 37; Edward G. Phillips, *The ADA Amendments Act of 2008: Who Isn’t Disabled?*, TENN. BAR J., FEB. 2009, AT 33; Sandra B. Reiss & J. Trent Scofield, *The New and Expanded Americans with Disabilities Act*, ALA. LAW., JAN. 2009, AT 38.

us is obliged, at least for a spell, to identify ourselves as citizens of that other place.<sup>230</sup>

The rulings in cases such as the *Sutton* trilogy, *Toyota Motor Manufacturing.*, and *Log Cabin* made it harder for people to prove that their impairments caused a substantial limitation in some life activity but at the same time did not make them unqualified for the jobs they sought.<sup>231</sup> With the revisions made to the definition of disability and other significant changes under the ADA, fewer individuals will find themselves in this catch-22 situation of having to prove both substantial limitation and qualification for employment in order to bring a discrimination claim.

However, even with the ADA's insistence on a broad definition of disability, the law still seems to rest on the premise that anti-discrimination protection is necessary and appropriate for a limited group of individuals who are very different from "normal," non-disabled people. Though much more subtle in ends and means than were historical perceptions of disability, the current perception of disability retains a clear dividing line between the disabled and the nondisabled. This disabled-nondisabled dichotomy "is the wellspring of [disability] discrimination."<sup>232</sup>

The drafters of Section 504 of the Rehabilitation Act and the disability rights activists who pushed for the ADA's passage envisioned a very different picture of disability.<sup>233</sup> In their vision, people with disabilities have a spectrum of impairments, from mild to moderate to severe.<sup>234</sup> There is no dividing line between those with disabilities and those without, because anyone with an impairment, no matter how trivial or mild, could still be covered under this view if he or she was discriminated against.<sup>235</sup> The one unifying aspect is that the

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<sup>230</sup> SUSAN SONTAG, *ILLNESS AS METAPHOR* 3 (Picador, 1978).

<sup>231</sup> Feldblum, *supra* note 4, at 160.

<sup>232</sup> ACCOMMODATING THE SPECTRUM, *supra* note 91, at 93–94.

<sup>233</sup> Feldblum, *supra* note 4, at 161.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 161–62.

individual either has to have, or has to be perceived as having, an impairment, *i.e.*, an aberration in a physical or mental system.<sup>236</sup> Unlike race and gender classes which include specific groups of people who will remain (mostly) in those exclusive groups, disabilities are nonexclusive: everyone is eligible to become disabled.<sup>237</sup> According to one commentator, “Most disabled people are adventitiously impaired. That is, they became disabled rather than being born that way.”<sup>238</sup>

The *Sutton* case raised the question of whether people who wear glasses and contact lenses should be considered disabled under the ADA.<sup>239</sup> While people with disabilities historically had been considered others or different from the rest of us, and to the extent that people with disabilities were traditionally perceived as unable to function in society, the twin sisters in *Sutton* brought disability anti-discrimination law closer to home.<sup>240</sup> If the disability issue before the Supreme Court concerned people with glasses and contact lenses, where was the line to be drawn?

Variouly termed a range, a spectrum, or a continuum, under this view of disability, almost any person would be able to invoke the protection of the law.<sup>241</sup> Imagine that everyone in society is on a continuum of impairments: at one side of the continuum are people with ingrown toenails; further along are people who wear glasses or have high blood pressure; even further along the continuum are people with cancer or diabetes or HIV infection; and at the far end of the continuum are people who are blind or use wheelchairs.<sup>242</sup> For example, take the simplistic categorization of blind versus sighted. Vision is not one-dimensional, but involves a number of component

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<sup>236</sup> *Id.* at 162.

<sup>237</sup> *Id.* at 145.

<sup>238</sup> Bowe, *supra* note 44, at 34.

<sup>239</sup> Feldblum, *supra* note 4, at 153.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 101.

<sup>242</sup> *Id.*

functions, and for each function there is a range of abilities.<sup>243</sup> At one end of the vision spectrum are a few people with unusually good eyesight, and at the other end are people who have no vision whatsoever. However, the vast majority of people fall somewhere between the two extremes of the vision continuum.<sup>244</sup> “A similar continuum occurs for all of our physical and mental abilities. For each human function, there are some who excel, some who perform poorly, if at all, and some who perform at all levels in between.”<sup>245</sup>

It would seem to make perfect sense, then, to consider, not the dichotomous classification of disabled versus non-disabled, but rather a spectrum of disability that includes everyone. While the disability spectrum would result in the inclusion of a number of people who might never need the anti-discrimination protection of the ADA, it would in fact mirror Title VII, which similarly provides protection to people who might never its protection.<sup>246</sup> Thus, a person with an ingrown toenail can prove she has an impairment, and hence is covered under the ADA, just as a man can prove he has a sex, and hence is covered under Title VII.<sup>247</sup> Both individuals would then have to prove they were fired because of the impairment or the sex, respectively.<sup>248</sup>

In reality, men are not usually fired because they are men, and women are not usually fired because they have ingrown toenails. However, as a matter of public policy, men should not be fired simply because they are men, and women should not be fired simply because they have ingrown toenails.<sup>249</sup> Thus, even though neither Title VII nor the ADA were passed to combat the problems of discrimination against men or women with ingrown toenails, “the resultant protection against discrimination based on gender or impairment should be

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<sup>243</sup> ACCOMMODATING THE SPECTRUM, *supra* note 91, at 87.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 88.

<sup>246</sup> Feldblum, *supra* note 4, at 163.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 163-64.

equally available to any individual who has experienced discrimination on the basis of the identified component.”<sup>250</sup>

## VII. CONCLUSION

The Seventh Circuit’s decision in *EEOC v. Lee’s Log Cabin* represents just how far the determination of what constitutes a disabled individual has moved away from the original vision of the ADA’s drafters and supporters. In an attempt to restore the ADA to its original purpose, Congress passed the ADA Amendments Act of 2008. Whether these amendments will produce dramatic changes in the way the administrative agencies and courts apply the ADA remains to be seen. Nonetheless, the real test of the amendments efficacy will be the manner in which they help break down the myths, stereotypes, and fears surrounding the concept of disability that continues today.

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<sup>250</sup> *Id.* at 164.