WHEN IT'S ALL IN YOUR HEAD: MENTAL DISABILITIES UNDER TITLE I OF THE AMERICANS WITH DISABILITIES ACT

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I. INTRODUCTION

The Americans with Disabilities Act of 1990 (ADA),[1] signed into law by former President Bush on July 26, 1990, prohibits employment discrimination[2] against both physically and mentally disabled persons.[3] Since the ADA is a relatively new statute, there is not yet a substantial body of case law interpreting its provisions. It is, however, becoming evident that compliance with the mental impairment provisions of the ADA will be more difficult for employers than compliance with the ADA's physical impairment provisions. This situation is further complicated by the failure of both Congress and the Equal Employment Opportunity Commission (EEOC), the federal

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[1] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (Supp. Ill 1991)).

[2] Title I of the ADA, 42 U.S.C. §§ 12111-12117 (Supp. Ill 1991). The ADA also prohibits discrimination against disabled persons in public services, including public transportation (Title II), 42 U.S.C. §§ 12131-12165 (Supp. Ill 1991) and in public accommodations and other services operated by private entities (Title III), 42 U.S.C. §§ 12181-12189 (Supp. Ill 1991).

[3] At the date of passage of the ADA, there were an estimated forty-three million disabled Americans. 42 U.S.C. § 12101(a)(1). Senator Harkin characterized the ADA as an "emancipation proclamation" for these individuals. 136 CONG. REC. S9689 (Supp. Ill 1991) (daily ed. July 13,1989) (statement of Senator Harkin).

agency charged with promulgating many of the regulations under the ADA,[4] to provide guidance to employers attempting to grapple with the special needs of psychologically challenged individuals. As a result, such employers will have to devise creative methods of identifying and accommodating employees with these disabilities.

This article examines the application of the ADA to individuals with mental disabilities. Part II delineates the employment-related provisions of the ADA, as well as those contained in its predecessor statute, the Federal Rehabilitation Act of 1973 (Rehabilitation Act).[5] Part III discusses the employer's obligation to reasonably accommodate the known limitations of its mentally disabled employees, and the practical difficulties that this requirement creates. Finally, Part IV provides employers, employees and their attorneys with guidelines to help them cope with the ambiguities inherent in the ADA.

II. Employment-related Provisions of the ADA

A. Elements of a Title I Claim

The ADA prohibits covered entities[6] from discriminating against otherwise-qualified disabled individuals in hiring, promotion, termination, or any term or condition of employment. To state a successful case under the ADA, the qualified disabled plaintiff[7] must initially prove discrimination.[8] This can be accomplished by proving that his

4.42 U.S.C. §§ 12116-12117,12206(cX2XA) (Supp. Ill 1991).

[5] 29 U.S.C. §§ 706-794 (1988). The employment provisions contained in Title I of the ADA are similar to those provided in Section 504 of the Rehabilitation Act, with the important distinction that the Rehabilitation Act only applies to federal agencies and recipients of federal grants and contracts.

[6] A covered entity is defined in the ADA as "an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2) (Supp. Ill 1991). An employer is "a person engaged in an industry affecting commerce who has
15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person..." *Id.* at § 1211K5XA).

[7] For the definition of an individual with a disability, see *infra* notes 10-20 and 64- 69 and accompanying text. For the definition of a qualified individual with a disability, see *infra* notes 32-36 and 73-111 and accompanying text.

8. 42 U.S.C. § 12112(a) (Supp. Ill 1991). The ADA defines discrimination as including the following:

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

or her job opportunities or status were adversely affected due to his or her disability, or that the employer failed to make reasonable accommodations[9] to his or her known physical or mental impairments.

1. Requirement that the Plaintiff Have an Impairment

The ADA plaintiff must prove that he or she (a) has a current physical or mental impairment that substantially limits one or more of the

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration —
(A) that have the effect of discrimination on the basis of disability; or
(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or men
tal limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most
effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Id. at § 12112(b).

[9] For a discussion of the reasonable accommodation requirement, see *infra* notes 43-
48 and 112-133 and accompanying text.

individual's "major life activities,"[10] (b) has a record of having such impairment,[11] or (c) is regarded as having such an impairment.[12] Congress specifically excluded the following conditions from the ADA

[10] An individual's major life activities are those basic functions that the average person in the general population can perform with little or no difficulty, including "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1994). For a discussion of the concept of substantial limitation, see *infra* notes 21-31 and 70-72 and accompanying text.

[11] A person has a record of impairment if he or she "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k) (1994). Congress included this definition of disability to prohibit discrimination against people with a past history of a disability. 29 C.F.R. pt. 1630.2(k) app. at 397 (1994).

[12] There are three ways that an individual can satisfy this prong of the ADA definition of "disability." First, an individual can have a physical or mental impairment that is not substantially limiting, but is treated as such by a covered entity. 29 C.F.R. § 1630.2(1) (1994). The regulations provide the following example of this situation:

> [S]uppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

Id. pt. § 1630 app. at 398.

Second, an individual can have a physical or mental disorder that is substantially limiting to major life activities only because of others' attitudes toward such impairment. *Id.* at § 1630.2(1X2). For example:

> [A]n individual may have a permanent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual s major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of the perceived disability.

Id. pt. § 1630 app. at 398.

Third, an individual with no disorder may be treated by a covered entity as having a substantially limiting impairment. *Id.* The following example is illustrative of this situation:

> ...if an employer discharged an employee in response to a rumor that the employee [was] infected with the Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled.

Id. pt. § 1630 app. at 398.

definition of *disability:* homosexuality and bisexuality,[13] various sexual behavior and gender identity disorders,[14] kleptomania, compulsive gambling, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.[15]

The term *physical impairment* is defined in the EEOC regulations as:

> [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine.[16]

The EEOC's definition of *mental impairment* includes "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[17] The existence of an impairment is determined without regard

[13] 42 U.S.C. § 12211(a) (Supp. Ill 1991).

[14] The relevant ADA provision states that the term *disability* shall not include "...(1) transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders..." *Id.* at § 12211(b) (Supp. Ill 1991).

[15] *Id.* at § 12211(b)(2)-(3). The legislative history of the ADA reveals that Congress did not intend for the ADA to undermine the government's anti-drug campaign, and that the term "current illegal use of drugs" is intended to encompass even an employee's off-duty use of drugs. The statements of Representative Bartlett reflect this sentiment.

> The provisions excluding an individual who engages in the illegal use of drugs from protection is intended to insure that employers may discharge or deny employment to persons who illegally use drugs on that basis without fear of being held for discrimination. The provision is not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current.

136 CONG. REC. H4614 (daily ed. July 12, 1990) (statement of Representative Bartlett). For a discussion of the treatment of psychoactive substance use disorders under the ADA, see William F. Banta & Forest Tennant, Jr., COMPLETE HANDBOOK FOR COMBATING SUBSTANCE ABUSE IN THE WORKPLACE: MEDICAL FACTS, LEGAL ISSUES, AND PRACTICAL SOLUTIONS (1989); Loretta K. Haggard, Note, ***Reasonable Accommodation of Individuals with Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans with Disabilities Act,*** 43 J. URB. & CONTEMP. L. 343, 374-389 (1993).

[16] 29 C.F.R. § 1630.2(h)(1) (1994).

17. Id. at § 1630.2(h)(2) (1994).

to any mitigating factors, such as medicine or therapy.[18] The EEOC's regulations do, however, exclude from the definition of mental impairment certain physical characteristics (left-handedness), characteristic predisposition to illness or disease,[19] common personality traits, such as poor judgment or quick temper (where these are not manifestations of a mental or psychological disorder), and environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record.[20]

2. Requirement that the Impairment Substantially Limit A Major Life Activity

Not all physically or mentally impaired individuals will be protected under the ADA. To prevail in an ADA case, the plaintiff must prove that his or her disability *substantially limits* one or more of his or her major life activities.[21] Although the ADA does not contain a definition of *substantially limits,*[22] under the EEOC definition a person is substantially limited if he or she is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner, or duration under which... [he or she] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[23]

The EEOC, therefore, considers a disabled person's limitations in a relative context in which his or her abilities are measured against

18. Id.

[19] One commentator expressed concern that this exclusion may become significant in certain mental disability cases. "Although rare in the population, schizophrenia is considered to be inherited. Some argue that there is an inherited predisposition to alcoholism. Individuals may have a predisposition to stress and mental illness based on events in their childhood or adolescence, or trauma." Margaret Hart Edwards, *The ADA and the Employment of Individuals with Mental Disabilities,* 18 EMPLOYEE REL. L. J. 347, 348 (1992).

[20] 29 C.F.R. pt. 1630 app. § 1630.2(k) at 395 (1994).

[21] For the definition of *major life activities,* see *supra* note 10.

[22] *See* 42 U.S.C. § 12102 (Supp. Ill 1991).

[23] 29 C.F.R. § 1630.2(j)(l) (1994).

those of the *average* person.[24] In evaluating whether or not a person is substantially limited in a major life activity, the EEOC instructs employers to consider the nature and severity of the impairment, the duration or expected duration of the impairment, and the actual or expected permanent or long-term impact of the impairment.[25]

Although most Title I cases involve allegations that the plaintiff's ability to work is substantially limited, the EEOC's interpretive guidelines on the ADA require an employer to consider an employee's ability to work only if the employee is not substantially limited with regard to other major life activities.[26] The EEOC also provides the following specific definition of *substantially limited* as applied to the major life activity of working:

> ... the term... means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[27]

Finally, the EEOC states that

> an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent....
>
> On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is signifi-

[24] In this regard, one commentator notes that "if someone with an extraordinary IQ suffered a head injury that diminished that person's IQ to only the normal range, the EEOC's Interpretive Guidance, arguably, would find that there was no substantial limitation." Edwards, *supra* note 19, at 350.

[25] 29 C.F.R. § 1630.2(j)(2) (1994).

[26] *Id.* at § 1630.2(j)(3).

[27] *Id.* Other factors that are considered when evaluating whether an individual is substantially limited from working are "(1) the geographical area to which the individual has reasonable access; (2) the job and class of jobs from which the person was disqualified; and (3) the job from which the person has been disqualified and the broad range of jobs in various classes from which the person is also disqualified because of the impairment." *Id.* at § 1630.2(j)(3)(ii).

> cantly restricted in the ability to perforin a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs.[28]

Some courts have restrictively interpreted this requirement under the Rehabilitation Act. In *Forrisi v. Bowen,*[29] the Fourth Circuit held that a utility systems repairer and operator with acrophobia[30] was not substantially limited in his ability to work, even though he was unable to perform the specific functions reflected in the job description for his position, which was climbing stairways and ladders for emergencies and routine maintenance, because his impairment had not previously interfered with his work, nor did it preclude him from obtaining employment that did not require climbing.[31]

3. Requirement that the Plaintiff Be a Qualified Individual with a Disability

A disability alone will not bring an individual within the protection of the ADA. In addition, the person must be a *qualified* individual with a disability.[32] To satisfy this requirement, the disabled individual must be able to perform the "essential functions"[33] of his or her job, with or without reasonable accommodation[34] of the disability. The EEOC regulations require an individualized determination of whether or not a function is essential, and provide the following stan

[28] ***Id.,* pt. 1630 app. § 1630.2j at 397 (1994).**

[29] **794 F.2d 931, 934-35 (4th Cir. 1986).**

[30] Acrophobia is the fear of heights. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 243 (3d ed. rev. 1987) [hereinafter DSM-III- R], The DSM-III-R is one of the most widely used classification systems to catalog mental impairments. David A. Larson, ***Mental Impairments and the Rehabilitation Act of 1973,*** 48 LA. L. REV. 841,849 (1988).

[31] ***Forrisi,* 794 F.2d at 935. *See also* Daley v. Koch, 892 F.2d 212, 215 (2d Cir 1989) (although the plaintiff's impulsive personality traits precluded him from working in a police department, they did not substantially limit him from finding other work)**

[32] **42** U.S.C. **§ 12111(8)** (Supp. **III. 1991);** Equal Employment Opportunity Comm'n A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT **1-2 (1992) [hereinafter** TECHNICAL ASSISTANCE MANUAL]

33. 42 U.S.C. § 12112(b)(3),(5XAMB) (Supp. Ill 1991). Section 12111(8) of the ADA provides the following guidance for determining which job functions are essential- "[consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." *Id.*

***34.* For a discussion of the reasonable accommodation requirement see *infra* not,*« 43-48 and 112-133 and accompanying text.**

dards for determining whether a job duty constitutes an *essential job function.* A function is considered essential if: (1) the reason the position exists is to perform the function; (2) there is a limited number of available employees among whom that function could be distributed; or (3) the function is so highly specialized that the individual was actually selected to fill the position because of his or her special expertise or ability in performing that particular function.[35] Other relevant considerations for determining whether a job function is essential are the experience and ability levels of past and present employees in the same or similar positions, and the relative amount of time that the individual spends performing the particular function. Finally, the EEOC regulations allow evidence of the consequences of failing to require the employee to perform or be able to perform the job function.[36]

B. Employers' ADA Obligations and Defenses

An employer must *reasonably accommodate* the known[37] limitations of a qualified applicant or employee with a disability, unless the employer can prove that the challenged selection criteria are essential to its business, the accommodation would impose an undue hardship on its business,[38] or the disabled individual posed a direct threat to the health or safety of himself or herself or others.[39]

1. Job-Related Selection Criteria Consistent with Business Necessity

The employer may raise the affirmative defense that a challenged standard, test, or job criterion is *job-related and consistent with busi-*

35 29 C.F.R. § 1630.2(n)(2) (1994).

36.The example in the regulations states that although a firefighter may not regularly have to carry an unconscious person from a burning building, the consequences of failing to require a firefighter to have this capability would be quite serious. *Id.* at pt. 1630 app. § 1630.2(n) at 400 (1994).

[37] **It is the employee's duty to notify his or her employer of any disability that requires accommodation.** TECHNICAL ASSISTANCE MANUAL, ***supra* note 32, at III-7. The employer has no duty to investigate whether or not an employee, or prospective employee, requires an accommodation to perform his or her job. 20 C.F.R. pt. 1630 app. at 407 (1994).**

[38] **42 U.S.C. § 12112(b)(5)(A) (Supp. Ill 1991);** TECHNICAL ASSISTANCE MANUAL, ***supra* note 32, at 1-5.**

[39] **42 U.S.C. § 12113(b) (Supp. Ill 1991); 29 C.F.R. § 1630.2(r) (1994). For a discussion of the direct threat defense, see *infra* notes 54-57 and 134-142 and accompanying text.**

ness necessity, and that reasonable accommodation is not possible.[40] The EEOC regulatory guidelines stress that an employer may use selection criteria that have a disparate impact on disabled individuals, as long as the test or selection criterion is job-related and consistent with business necessity.[41] Furthermore, the ADA does not require that a qualification standard or selection criterion apply only to the essential functions of a job.[42]

2. Reasonable Accommodation

The ADA defines *reasonable accommodation* as including:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[43]

EEOC regulations enumerate three types of reasonable accommodation: (1) adjustments in the job application process to ensure equal opportunity for qualified disabled individuals, (2) adjustments to the work environment or method of job performance to enable employees with disabilities to perform the essential functions of their jobs, and
(3) adjustments to the work situation to provide employees with dis-

40. 42 U.S.C. § 12113(a) (Supp. Ill 1991). The purpose of this affirmative defense is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. 29 C.F.R. pt. 1630 app. § 1630.15(b) at 413-414 (1994).

41 The example provided in the regulations is the case of an employer who interviews two candidates, one of whom is blind. Although both are equally qualified for the job, the employer determines that it would be convenient to hire a person who is capable of driving so that he or she could run errands. Thus, the employer hires the sighted applicant because he has a driver's license. Although the driver's license requirement was uniformly applied to both applicants, it is impossible for a blind person to obtain a driver's license. In this scenario, the employer's actions are valid if it can be demonstrated that the requirement of having a driver's license is job-related and consistent with business necessity. 29 C.F.R. § 1630.15(bXc), (citing the example from H.R. Rep. No. 485,101st Cong., 2d Sess., pt. 2, at 55 (1990)).

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42. Id.

43. 42 U.S.C. § 12111(9) (Supp. Ill 1991).

abilities with employment benefits and privileges equal to those enjoyed by similarly situated nondisabled employees.[44]

The EEOC has provided guidelines that an employer and employee can use to determine the appropriate accommodation in a given situation. First, the employer should perform a job analysis to determine the purpose and essential functions of the job.[45] Second, the employer must identify which aspects of the job or work environment will adversely affect the disabled individual's job performance, and how these limitations can be surmounted.[46] Third, the employer must identify potential accommodations and assess the effectiveness of each.[47] Finally, the employer must select and implement the accommodation which best meets the needs of both the employee and the employer.[48]

3. Undue Hardship

The ADA does not require an employer to provide an accommodation which would cause the business to suffer an *undue hardship,*™ which is defined in the ADA as "an action requiring significant difficulty or expense,"[50] after consideration of the following factors:

> (i) the nature and cost of the accommodation needed...;
>
> (ii) the overall financial resources of the facility...; the number of persons employed at such facility; the effect

44 29 C.F.R. § 1630.2(o)(l)(iii) (1994). The regulations offer a *nonexhaustive* list of possible accommodations, including job restructuring; making existing employee facilities readily accessible to disabled individuals, part-time or modified work schedules, talking calculators, telecommunication devices for the deaf, mechanical page turners, and reassignment to a vacant position, *id.* at § 1630.2(o)(2), and envision an "informal, interactive process" between the employer and the disabled employee to arrive at agreement on the needed and feasible accommodations. 29 C.F.R. pt. 1630 app. § 1630.9 at 406-407 (1994).

45 *Id. See supra* notes 33-36 and accompanying text for a discussion of essential job functions.

46 29 C.F.R. pt. 1630 app. § 1630.9 at 406-409 (1994).

47.Id.

48 *Id.* Although the employer should give primary consideration to the disabled individual's preference, it "... has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation, or the accommodation that is easier for it to provide." *Id.* For a discussion of this issue, see *infra* notes 112-133 and accompanying text.

49 42 U.S.C. § 12112(b)(5)(A) (Supp. Ill 1991).

50. *Id.* at § 1211K10XA).

on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce...; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[51]

The statute does not provide specific numerical guidelines for determining what would constitute a reasonable accommodation. In fact, Congress rejected proposals that would do just that.[52] However, the EEOC interpretive guidelines do make it clear that undue hardship is not to be defined solely by reference to financial circumstances. Rather, it may include any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.[53]

51.Id. at § 1211K10XB).

[52] Indeed, Congress embraced a fact-specific, case-by-case, *flexible* approach to defining the terms *reasonable accommodation* and *undue hardship*. S. Rep. No. 116, 101st Cong., 1st Sess. 31 (1989) [hereinafter S. Rep. No. 116]; H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 62 (1990) [hereinafter H.R.Rep., pt. 2], Representative Olin proposed an amendment that would define as *per se* undue hardship any accommodation costing more than ten percent of the disabled employee's salary. The amendment was defeated on the grounds that it would disproportionately disadvantage lower-paid employees.
136 CONG. Rec. H2471-75 (daily ed. May 17, 1990) (debate of Rep. Olin's amendment); Technical Assistance Manual, *supra* note 32, at 111-15. Congress also rejected a proposal that would have required employers to accommodate disabled employees only if the costs of accommodation were negligible. S. Rep. No. 116, *supra,* at 36; H.R. Rep., pt.

2, *supra,* at 40. The Senate Report contains the following insight into the reciprocal concepts of reasonable accommodation and undue hardship:

> Thus a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

S. Rep. No. 116, *supra,* at 36.
[53] 29 C.F.R. pt. 1630 app. § 1630.2(p) at 402 (1994).

4. Direct Threat to Health or Safety

Finally, the employer may exclude a qualified disabled individual from a position if he or she poses a direct threat, or significant risk of substantial harm, to the health or safety of the individual or others, provided that the risk cannot be eliminated by reasonable accommodation.[54] The requisite level of threat is to be determined on a case- by-case basis, and will be governed by precedent established by the Rehabilitation Act case law.[55] The EEOC regulations state that any determination of a direct threat must be based upon an "individualized assessment of the individual's present ability to safely perform the essential functions of the job."[56] In addition, this assessment must be based upon a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and not on subjective perceptions, irrational fears, or stereotypes. In determining whether or not an individual would pose a direct threat, the following factors should be considered: "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and
(4) [t]he imminence of the potential harm."[57]

C. ADA Procedural Requirements

Individuals who bring lawsuits under Title I of the ADA must adhere to the procedural requirements specified in Title VII of the Civil Rights Act of 1964 (CRA).[58] The ADA also specifically incorporates the remedies available under the CRA.[59] Although the CRA initially provided for equitable relief only, the Civil Rights Act of 1991 expanded the remedies available for violations of Title VII, and, consequently, the relief recoverable under the ADA. The Civil Rights Act of 1991

[54] 42 U.S.C. § 12113(b) (Supp. Ill 1991); 29 C.F.R. § 1630.2(r) (1994).

[55] H.R. Rep. pt. 2, *supra* note 52, at 56-57.

[56] 29 C.F.R. § 1630.2(r) (1994).

57.Id. Significantly, even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of a direct threat by making a reasonable accommodation. For a discussion of the rea sonable accommodation requirement, see *supra* notes 43-48 and *infra* notes 112-133 and accompanying text. For a discussion of the direct threat defense as it applies to mentally impaired individuals, see *infra* notes 134-142 and accompanying text.

58. 42 U.S.C. § 12117(a) (Supp. Ill 1991) (providing that the ADA adopts the procedures of certain Title VII provisions). The CRA prohibits employment discrimination based on race, color, religion, sex, or national origin, but does not mention handicapped or disabled individuals. 42 U.S.C. § 2000e-2 (Supp. Ill 1991).

59. 42 U.S.C. § 12117 (Supp. Ill 1991).

provides not only for the recovery of compensatory damages, but also for the recovery of punitive damages when the plaintiff has demonstrated that an employer engaged in a discriminatory practice with malice or reckless indifference to the plaintiff's federally protected rights.[60] Finally, the complex burdens of proof necessary in ADA cases are modeled after those in the Rehabilitation Act and the regulations and case law interpreting that Act.[61]

III. THE ADA TREATMENT OF MENTAL IMPAIRMENTS

Although individuals with mental disabilities comprise a significant portion of the ADA beneficiaries,[62] there is "little legislative history discussing them, and negligible guidance in the Act itself, or in the EEOC's regulations, Interpretive Guidance, or Technical Assistance Manual,"[63] explaining an employer's obligations towards them. This situation has made it difficult for employers to fulfill their responsibilities under the ADA with respect to their mentally disabled employees and applicants for employment. It has also made it difficult for mentally disabled individuals to obtain the ADA benefits to which they are entitled.

The first hurdle confronting an individual with a claimed mental impairment is proving that his or her condition falls within the ADA definition of disability.[64] Although this may not be difficult for individuals with apparent mental impairments such as mental retardation, many mental impairments are manifested as performance problems that may not constitute notice to employers that the affected employee has a mental disability.[65] Individuals suffering from depression, borderline personality disorders,[66] and anxiety disorders[67] are particularly plagued by these difficulties. While some courts have held that these disorders qualify for protection under the Rehabilitation Act,[6*] others have ruled otherwise.[69]

60 42 U.S.C. § 1981a, 1981a(b)(l) (Supp. Ill 1991).

61 S. Rep. No. 116, *supra* note 52, at 38; H.R. Rep., pt. 2, *supra* note 52, at 28 A discussion of the three theories under which plaintiffs may sue, that is, intentional discrimination, surmountable barrier, and disparate impact discrimination, is beyond the scope of this article. For a discussion of this topic, *see* Haggard, *supra* note 15 at 350 352; Reese J. Henderson, Jr., Note, *Addiction as Disability: The Protection of Alcoholics and Drug Addicts under the Americans with Disabilities Act of 1990* 44 Vand I Rpv 713, 721-26 (1991); Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Art* RA Cal. L. Rev. 1607,1637 (1991).

62. It is estimated that approximately 2.8 millon Americans suffer from severe chiatric illnesses, National Institute of Mental Health, DEINSTITUTIONALIZATION Pourv AND HOMELESSNESS 2 (1990), and that almost one-third of Americans experience mental illness during their lives. Lee N. Robins, et al,, *Lifetime Prevalence of Svecific Psychiatric Disorders at Three Sites,* 41 ARCHIVES GEN. PSYCHIATRY 949 952 (1984) Studies also suggest that only twenty to thirty percent of psychiatrically disabled individuals are gainfully employed E. Sally Rogers et al,, *Psychiatric Rehabilitation as the Preferred Response to the Needs of Individuals with Severe Psychiatric D,«nhn;u* qq REHAB. PSYCHOL. 5, 8 (1988). *ycniatnc Disability,* 33

63 Some members of Congress expressed concern that the universe of conditions known to psychiatry was trmoh the disabilities intended to be covered by the ADA. 135 Cong to s Sept. 7,1989).

64. For a discussion of the requisite elements of the definition of an individual with a disability, see *supra* notes 10-20 and accompanying text. Many courts rely on the Diagnostic and Statistical Manual of Mental Disorders to classify mental impairments. See *supra* note 30 and accompanying text. *See also, e.g.,* Doe v. New York University, 666 F.2d 761 (2d Cir. 1981). The subclasses of mental impairments listed in the DSM- III-R include organic mental disorders, psychoactive substance use disorders, schizophrenia, mood disorders, anxiety disorders, somatoform disorders, dissociative disorders, sexual disorders, sleep disorders, factitious disorders, adjustment disorders, and psychological factors affecting physical condition. DSM-III-R, *supra* note 30, at 5-10.

65 Examples of such problems are errors in judgment, aggressive behavior, insubordinate behavior, inability to get along with co-workers, absenteeism, or quick temper. Edwards, *supra* note 19, at 354. *See also* Stuart, *Tracing Workplace Problems to Hidden Disorders,* 71 PERSONNEL J. 83 (June 1992).

66 Persons with borderline personality disorder display a "pattern of unstable and intense interpersonal relationships," impulsiveness, affective instability, inappropriate anger, recurrent suicidal threats or self-mutilating behavior, identity disturbance, chronic feelings of emptiness, and/or fears of abandonment. DSM-III-R, *supra* note 30, at 347.

67 Anxiety disorders comprise the most prevalent subclass of mental disorders listed in the DSM-III-R. *See* DSM-III-R, *supra* note 30, at 235. The seven types of anxiety disorders are: (1) simple phobia, (2) social phobia, (3) agoraphobia, (4) panic disorder, (5) obsessive-compulsive disorder, (6) post-traumatic stress disorder, and (7) generalized anxiety disorder. *Id.* at 7. Post-traumatic stress disorder, one of the most commonly experienced anxiety disorders, results from a psychologically distressing event and is characterized by recurrent recollections, dreams, flashbacks, or psychological distress, avoidance of the traumatizing stimuli, and persistent symptoms of arousal. DSM-III-R, *supra* note 30, at 250. For a thorough discussion of these anxiety disorders, *see* John M. Casey, Comment, *From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the Americans with Disabilities Act,* 17 U. PUGET SOUND L. REV. 381,392-397 (1994).

68 It was the intention of Congress that case law developed under the Rehabilitation Act be used to decide ADA questions. 42 U.S.C. § 12201(a) (Supp. Ill 1991). *See, e.g.,* Schmidt v. Bell, 33 Fair Emp. Prac. Cas. (BNA) 839 (E.D. Pa. Sept 9, 1983) (post-trau- matic stress disorder); Doe v. New York Univ., 666 F.2d 761, 766 (2d Cir. 1981) (borderline personality); Fields v. Lyng, 705 F. Supp. 1134,1135-36 (D. Md. 1988), *afj\l, 888* F.2d 1385 (4th Cir. 1989) (borderline personality). For a definition of post-traumatic stress disorder, *see supra* note 67. For a definition of borderline personality, *see supra* note 66.

69 *See, e.g.,* Daley v. Koch, 892 F.2d 212, 214-215 (2d Cir. 1989) (poor judgment and impulse control and irresponsible behavior alone were not Rehabilitation Act impairments); Adams v. Alderson, 723 F. Supp. 1531, 1531 (D.D.C. 1989) (plaintiff's adjustment disorder was merely a transitory reaction to an antagonizing supervisor and therefore not covered under the Rehabilitation Act).

Even if the plaintiff is able to establish a mental impairment, he or she must demonstrate that the mental impairment substantially limits him or her in one or more of his or her major life activities.[70] This requirement is a difficult one for many individuals with behavioral disorders, since a particular phobia[71] may not disqualify a person from an entire class of occupations for which he or she is trained.[72]

Perhaps the most troublesome aspect of the ADA for mentally disabled plaintiffs is the requirement that they demonstrate their qualification for the position, with or without reasonable accommodation.[73] The Supreme Court in *Southeastern Community College v. Davis*[74] narrowly defined the term *otherwise qualified* in the Rehabilitation Act to encompass only those who are "able to meet all of a program's requirements in spite of [their] handicap."[75] Due to this restrictive

[70] For a discussion of the substantial limitation requirement, *see supra* notes 21-31 and accompanying text.

[71] A simple phobia, the most common form of anxiety disorder, is a persistent fear of a certain object or situation, exposure to which almost "invariably provokes an immediate anxiety response... such as feeling panicky, sweating, and tachycardia [excessively rapid heartbeat]." DSM-III-R, *supra* note 30, at 6,243. The most common simple phobias involve "animals, particularly dogs, snakes, insects, and mice." *Id.* at 243. Other simple phobias involve "witnessing blood or tissue injury (blood-injury phobia), closed spaces (claustrophobia), heights (acrophobia), and air travel." *Id.*

[72] For example, although an individual may suffer from a fear of flying, he or she would not be substantially limited in the major life activity of working if he or she were qualified for a position that did not require air travel. *See supra* notes 29-31 and accompanying text (discussing Forrisi v. Bowen, 794 F. 2d 931 (4th Cir. 1986))- Fields v Lyng, 705 F. Supp. 1134,1136 (D. Md. 1988), *aff'd,* 888 F.2d 1385 (4th Cir. 1989) (plaintiff with anxiety disorder related to his work-related travels who jeopardized his career
by repeatedly shoplifting was not substantially limited since most of his problems took place while he was off-duty).

[73] For a discussion of this requirement, see *supra* notes 32-36 and accompanying text

[74] 442 U.S. 397 (1979).

75.Id. at 412. In *Davis,* the Court reviewed the obligations of a federally-funded nursing school toward a deaf applicant, ruling that she was not "otherwise qualified" because she would have required extensive modifications in the curriculum and could have endangered patients during clinical rounds. *Id.* at 407. The Court explained its decision as follows:

> [T]he purpose of [t]he program was to train persons who could serve the nursing profession in all customary ways. This type of purpose, far from reflecting anv animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service It is undisputed that respondent could not participate] in Southeastern's nursing program unless the standards were substantially lowered. Section 504 [of the Rehabilitation Act] imposes no requirement... to lower or effect substantial modifications of standards to accommodate a handicapped person

Id. at 413 (citations and footnote omitted).

definition, many Rehabilitation Act plaintiffs were never afforded the opportunity to demonstrate that they would be able to perform the essential functions of their jobs, if their employers *reasonably accommodated* their needs.[76] In *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*[77], the Fifth Circuit ruled that a suicidal therapist was not qualified for her job because of the effect that her suicidal behavior could have on her patients, and the possibility that she could pass on her acceptance of suicide as an alternative to her patients. The Court noted, however, that "[t]he Catch-22 implicit in virtually all [Rehabilitation Act] actions [was] particularly evident in this case, that is: Ms. Doe was required to prove her handicap for jurisdictional purposes, but simultaneously required to prove that she was not so handicapped as to be unqualified to perform her job."[78] Significantly, the plaintiff's employer did not offer her any accommodation other than a long-term leave for hospitalization without a guaranteed job upon her return.[79]

The Supreme Court, in *School Board of Nassau County v. Arline,*[m] revised its *Southeastern Community College* interpretation of the Rehabilitation Act's otherwise qualified requirement to include a reasonable accommodation analysis.[81] This is the standard incorporated into the ADA.[82] Nevertheless, many mentally disabled individuals will still be unable to fit the definition of a *qualified individual with a disability.* For example, in *Pesterfield v. Tennessee Valley Authority*;[83] a Rehabilitation Act case decided after *Arline,* the plaintiff successfully proved that he had a disabling mental condition, but was unable to demonstrate that he could perform the essential functions of his job.[84] Pesterfield was an employee of the Tennessee Valley

[76] *See, e.g.,* Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1408-12 (5th Cir. 1983); *Fields,* 705 F. Supp. at 1136-37 (federal employee with anxiety disorder was not otherwise qualified to perform his labor negotiator job responsibilities).

[77] *Region 13,* 704 F.2d at 1408-12.

[78] *Id.* at 1408 n.6.

[79] *Id.* at 1405-07. The employer refused to consider more *reasonable* accommodations, such as accommodations in hours, patient load, or extended leave of absence with a guaranteed job upon her return. *Id.* at 1408-12. One commentator has suggested that negotiations between the parties may have resulted in a more palatable accommodation." Haggard, *supra* note 15, at 361 n.101.

[80] 480 U.S. 273, 287-89 (1987).

[81] The Court held that "[w]hen a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any reasonable accommodation' by the employer would enable the handicapped person to perform those functions." *Id.* at 288 n.17.

[82] 29 C.F.R. § 1630.2(m) (1994).

[83] 941 F.2d 437 (6th Cir. 1991).

[84] *Id.* at 443-44.

Authority (TVA) who was transferred from his construction work job to a position as a tool room attendant after a work-related injury made it impossible for him to do manual labor.[85] When reprimanded by his supervisors for tardiness, falling asleep on the job, failing to follow established procedures, and being uncooperative and discourteous to co-workers, Pesterfield complained of nervousness and anxiety which he felt were caused by his supervisors' harassment.[86] After a five-week hospitalization for psychiatric treatment, TVA's physician refused to clear Pesterfield for return to work, concluding that he was unable to work safely.[87] TVA terminated Pesterfield for medical reasons about a month later, after he confronted the TVA doctor and threatened to kill himself because of the doctor's decision.[88] Although the trial court concluded that Pesterfield had a covered mental impairment, they did not grant him relief under the Rehabilitation Act because he was unable to perform the essential functions of his job.[89] The Sixth Circuit affirmed, reasoning that it "would be unreasonable to require that TVA place [Mr. Pesterfield] at a virtually stress-free environment and immunize him from any criticism in order to accommodate his disability."[90]

In *Johnston v. Morrison, Incorporated*[91] a recent case decided under the ADA, the court held that a food server who was fired from a restaurant after she suffered a *meltdown* caused by her inability to handle the pressure of a busy evening, was not a qualified individual and was precluded from recovery under the ADA.[92] Plaintiff, Geneva Johnston, was hired by defendant Morrison to work as a food server in its seafood restaurant in Birmingham, Alabama.[93] After hiring Johnston, Morrison learned that she suffered from several disabili-

[85] *Id.* at 438.

[86] *Id.*

[87] *Id.* at 439. The physician's decision was based upon the report of Pesterfield's psychiatrist that "[Mr. Pesterfield] feels very inadequate secondary to diminished physical capacities surrounding his [on-the-job injury.] He continues to hold the belief of being victimized by company policy and fears that he will be retired without just compensation. ... If there is the slightest hint of rejection or criticism, he becomes extremely anxious and depressed..." *Id.*

[88] *Id.*

[89] *Id.* at 441-42.

[90] *Id.* at 442-44. The Sixth Circuit agreed with the trial court's conclusion that Pesterfield's tool-room job was one of the least stressful jobs at the plant. *Id.* at 441- 42. For a discussion of an employer's duty to reasonably accommodate mentally disabled employees, see *infra* notes 112-133 and accompanying text.

[91] 849 F. Supp. 777 (N.D. Ala. 1994).

[92] *Id.* at 780.

[93] Id. at 777.

ties, including panic attack disorder.[94] Because of her condition, Johnston was prone to "migraine headaches, racing heartbeat, and panic attacks during which she was completely unable to function...."[95] During a particularly busy evening, Johnston suffered a meltdown and was unable to perform her duties.[96] For this reason, her employment was terminated.

The issue confronting the court was whether or not Johnston was a qualified individual under the ADA.[97] First, the court analyzed the functions of Johnston's position. Morrison required that its food servers know and be able to communicate information regarding its menu. This information changed constantly The court noted that "[t]he term 'essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires."[98] The Court concluded that Morrison had a right to require this function of its food servers.[99] Furthermore, the court agreed that Morrison also had the right to change this information in order to remain competitive.[100] Since, by her own admission, Johnston was incapable of performing these essential functions of her position,[101] she was not a member of the ADA's protected class.[102]

The *Johnston* court also addressed the employer's reasonable accommodation obligation, "which may include job restructuring, part-time work or modified work schedules," but does not require an

[94] *Id.* at 778. Panic attacks are discrete periods of intense fear or discomfort, with at least four of the following symptoms: shortness of breath, dizziness, unsteady feelings or faintness, choking, palpitations or accelerated heart rate, trembling or shaking, sweating, nausea, numbness or tingling sensations, hot flashes or chills, chest pain or discomfort, and fear of dying. DSM-III-R, *supra* note 30, at 235-36.

[95] *Johnston,* 849 F. Supp. at 778 n.5.

[96] Johnston used the term *meltdown* to describe a condition in which she was unable to handle the pressure of the work. *Id.* at 778.

[97] *Id.*

[98] *Id.* (citing 29 C.F.R. § 1630.2(n)(l) (1994)).

[99] *Id.* (citing 42 U.S.C. § 12111(8) (1994), "consideration shall be given to the employer's judgment as to what functions of a job are essential"); 29 C.F.R. § 1630.2(n)(3)(i) (1994) (an employer can determine which functions are essential.)

[100] *Id.* (citing 29 C.F.R. § 1630.2(n)(3)(i) (1994) and 29 C.F.R. § 1630.2(n)(3)(iv) (1994) , the consequences of not requiring the incumbent to perform the function can be used to determine whether a function is essential).

[101] Ms. Johnston testified that her disability made it impossible for her to handle changes in matters such as food ingredients, portion sizes, and pricing, stating that "[t]he constant changes just screwed up [her] whole body." *Id.* at 778-79.

[102] *Id.* at 779. The court reasoned that "[i]f Ms. Johnston were not required to perform the essential function of learning and communicating information concerning ingredients, portion sizes, and prices, then she would be something other than a food server as defined by the day-to-day operation at Morrison's L & N Seafood Restaurant." *Id.*

employer to reallocate essential functions.[103] Because of her condition, Morrison had moved Johnston to the least busy station.[104] The court determined that Morrison was not required to either add an additional employee to handle Johnston's food server duties or remove her from her station when the restaurant became busy.[105]

Since the cornerstone of a determination concerning an employee's qualifications for a job is his or her ability to perform the essential functions of that job, the courts generally scrutinize the employee's past performance in the position. Consequently, employers who have given an employee satisfactory performance reviews are generally unsuccessful in their attempts to have that employee declared unqualified. This is precisely what happened in *Gillespie v. Derwinski,*[m] a Rehabilitation Act case brought by Dianne Kent, a developmentally disabled woman, against the Veterans Administration. Even though Ms. Kent was a productive employee in a Veterans Administration hospital laundry for fifteen months,[107] she was hospitalized for a breakdown after her initial supervisor was replaced by an inexperienced person who failed to reprimand other workers when they taunted Ms. Kent.[108] Although she returned to work after her first hospitalization, she was hospitalized again following a subsequent confrontation with her coworkers.[109] She then resigned and filed a Rehabilitation Act lawsuit.

The court required the hospital to reinstate Ms. Kent, concluding that her favorable performance ratings and productivity indicated that she was qualified for her position.[110] In addition, the court admonished the employer for failing to reasonably accommodate Ms.

[103] *Id.* at 779 (quoting 42 U.S.C. § 12111(a)(B) (Supp. Ill 1994) and 29 C.F.R. pt. 1630 app. § 1630.2(0) at 400-402 (1994)).

104.Id. at 778.

105. Id. (citing 29 C.F.R. pt. 1630 app. § 1630.2(o) at 400-402 (1994) and Guice-Mills v Derwinski, 967 F.2d 794 (2d Cir. 1992)). For a discussion of the reasonable accommo' dation requirement, see *supra* notes 43–48 and *infra* notes 112-133 and accompanying

[106] 790 F. Supp. 1032 (E.D. Wash. 1991).

107. The record indicated that Ms. Kent had performed over one hundred thirty two percent of the work standard for her position. *Id.* at 1037. In addition performance evaluations showed that Ms. Kent exceeded the work standards for her position. *Id* at 1039.

108.Id. at 1037 The new supervisor also criticized Ms. Kent's general appearance and her productivity levels. Nevertheless, the supervisor rated the plaintiff fully satis factoryand fully successful in the two years that she was her supervisor. *Id.* at 1038

*109.*Id.

110 *Id.* at 1039. The Parties stipulated that she was a handicapped person under the Rehabilitation Act. *Id.* The court also noted that she posed no risk of injury to herself or others. *Id.*

Kent by instructing the second supervisor to continue the *soft approach to discipline* that her first supervisor had used.[111]

The ADA imposes upon employers the obligation to reasonably accommodate the known physical or mental limitations of a qualified individual who is an applicant or employee,[112] unless the accommodation would impose an undue burden on the business,[113] or the individual poses a direct threat or risk of substantial harm to the health or safety of the individual or others, which risk cannot be eliminated by reasonable accommodation.[114] Satisfying this requirement with respect to mentally disabled individuals often involves helping them overcome certain problems that are particularly acute for this segment of the disabled population. One commentator has identified the following three barriers that confront those with mental impairments: "[flirst, the symptoms of the disorder may impede work performance;[115] ... [s]econd, aside from these symptoms, formerly-institu- tionalized individuals may display defects in social functioning and basic work skills;[116]... and [t]hird, mentally disabled individuals must

[111] *Id.* at 1040 It should be noted that the accommodation required by Ms. Kent was much more *reasonable* than those requested by Mr. Pesterfield or Ms. Johnston. *See supra* notes 83-105 and accompanying text.

[112]For a discussion of this requirement, see *supra* notes 43-48 and accompanying text.

[113] For a discussion of the concept of undue hardship, see *supra* notes 49-53 and *infra* notes 131-133 and accompanying text.

[114] For a discussion of the direct threat defense, see *supra* notes 54-57 and *infra* notes 134-142 and accompanying text.

[115] Haggard, *supra* note 15, at 362 (footnotes omitted). Haggard lists the following representative symptoms:

> Employees with mental retardation or learning disabilities may display difficulties in learning, comprehension, communication, social interactions, behavior, or movement. Individuals with psychiatric illnesses may experience one or more of the following symptoms: delusions or hallucinations, high levels of distractibili- ty, social isolation or withdrawal, strange behaviors, decreased personal hygiene, agitation, confusion, anxiety, depression, suicidal ideation, poor insight and judgment, and impaired interpersonal relationships. Mental illnesses may manifest themselves in more subtle ways as well, such as extended and perhaps unauthorized absences, poor work performance, violations of work rules, hostile and sometimes violent behavior toward others, or off-duty misconduct.

Id. at 362-64 (footnotes omitted).

[116] *Id.* at 364 (citing Michael McCue & Lynda Katz-Garris, *The Severely Disabled Psychiatric Patient and the Adjustment to Work,* J. REHAB., Oct.-Dec. 1983, at 52, 54-55). According to McCue and Katz-Garris: "The reality in which [patients] previously functioned adequately (the psychiatric hospital) is no longer available, replaced by the new reality of the community and its accompanying pressure and stress. Coping methods learned in the hospital do not apply to the new environment and thus result in adjustment difficulties." McCue & Katz-Garris, *id.* at 55.

contend with the stigma of their illnesses."[117] Due to the extensive needs of individuals with mental impairments, and the often uncertain prognosis for their treatment, the courts in many cases dealing with psychological disabilities have found that reasonable accommodation was not possible.[118] Furthermore, if more than one reasonable accommodation is possible, the question becomes one of fashioning the most appropriate one.[119]

In *Kerno v. Sandoz Pharmaceuticals Corporation*[120] the court evaluated whether or not the employer, Sandoz Pharmaceuticals Corporation (Sandoz), violated the ADA when it offered the plaintiff, Steven Kerno, a reassignment as an accommodation for his disability and rejected Kerno's "own suggested accommodation without attempting either to evaluate it or to come to a mutually agreeable accommodation..."[121] The court held that Sandoz's accommodation was reasonable.[122]

Kerno worked as a Sandoz sales representative for nineteen years. During this period, he was diagnosed as suffering from several mental conditions, including "an obsessive compulsive personality disorder, post-traumatic stress disorder with a secondary reactive depression, and dysthymia (a chronic depressed mood)."[123] A psychiatrist prescribed several medications for Kerno and he was generally able

[117] **Haggard, *supra* note 15, at 364-65 (footnote omitted). Since many people do not have a complete understanding of the causes and symptoms of mental illness, they often harbor misconceptions about mentally ill people. A particularly prevalent fear is that mentally ill employees will become violent. *Id.* at 364 n.126.**

[118] ***See, e.g., Pesterfield,* 941 F.2d 437 (6th Cir.1991) (discussed *supra* notes 83-90 and accompanying text); *Johnston,* 849 F. Supp. 777 (N.D. Ala. 1994) (discussed *supra* notes 91-105 and accompanying text); Schmidt v. Bell, 33 Fair Empl. Prac. Cas. (BNA) 839 846-47 (E.D. Pa. Sept. 9, 1993) (student loan collector with post-traumatic stress disorder manifested by refusal to follow instructions and explosive reaction to criticism was not otherwise qualified and would not become qualified if transferred to a different team leader); Boyd v. United States Postal Serv., 32 Fair Empl. Prac. Cas. (BNA) 1217 1222-23 (W.D. Wash. Aug. 1, 1983), *affd on other grounds,* 752 F.2d 410 (9th Cir 1985) (postal service worker with post-traumatic stress disorder manifested by an extended history of absenteeism was not entitled to an "accommodation" that abandoned a satisfactory prior work history requirement); Gardner v. Morris, 752 F.2d 1271 1283-84 (8th Cir. 1985) (Army Corps of Engineers not required to accommodate an overseas assign ment for an individual with manic-depression by hiring a full-time physician and pro viding on-site laboratory facilities in a remote Saudi Arabian location, the conditions necessary to ensure his appropriate treatment and safety of the employee and co-workers).**

[119] ***See supra* note 48.**

[120] **1994 U.S. Dist. LEXIS 13265 (N.D. 111. Sept. 13,1994).**

[121] ***Id.* at 19.**

[122] ***Id.* at 24.**

[123] ***Id.* at 3.**

to function at work. However, he experienced trouble with his medications on at least two occasions, which led him to inform his supervisor of his condition and that he was on medication.[124] Subsequent to this revelation, Kerno and the supervisor began to experience problems in their relationship. Eventually it was determined that Kerno should no longer work for that supervisor.[126]

Sandoz grouped sales territories such as Kerno's into regions, each of which was headed by a supervisor.[126] Kerno requested that as an accommodation, his sales territory be assigned to a different region so that he could report to a different supervisor, but still retain his territory.[127] After consideration, Sandoz rejected this proposal, concluding that it "... would have imbalanced sales regions, been unfair to other employees, and not have been in Kerno's own financial interest."[128] Instead, Sandoz offered Kerno a transfer to his choice of open
sales territories.[129] Kerno refused this offer.[130]

In its analysis of whether or not Sandoz violated the ADA when it rejected Kerno's suggested accommodation, the court concluded that the ADA does not require an employer to accept an employee's suggested accommodation or to prove that alternative accommodations would impose any undue hardship upon the employer.[131] The court determined that Kerno's suggested accommodation was irrelevant, and that the only issue was whether or not Sandoz's offer of reassignment was a reasonable accommodation.[132] Finally, the court ruled that Sandoz's offer to reassign Kerno to an open sales territory, which would essentially preserve his title and income level, was a reasonable accommodation under the ADA.[1! I

A final problem for mentally impaired employees who seek reasonable accommodations from their employers is the ability of employers to exclude such individuals from the workplace if they pose a direct threat to the health or safety of themselves or others which cannot be eliminated by reasonable accommodation."[1 This exception is partic-

[124] ***Id.* at** 4-5.

[125] ***Id.*** at 11.

[126] ***Id.* at** 2.

[127] ***Id.*** at 13.

[128] ***Id.***

[129] ***Id.***

[130] ***Id.* at** 17.

[131] ***Id.* at** 20. **Indeed, the court regarded the ADA's "bottom line" as simply requiring that the employer offer the employee a reasonable accommodation. *Id.***

[132] ***Id.* at** 21.

[133] ***Id.*** at 24.

[134] **For a discussion of the direct threat defense, see *supra* notes** 54-57 **and accompanying text.**

ularly problematic for mentally ill people, due to a fear that many individuals harbor concerning the potentially violent behavior of those with psychiatric or mental impairments.[135] In *Doe v. New York University,*[136] the plaintiff was accepted to NYU Medical School after falsely reporting that she did not have any chronic or recurrent illnesses from emotional problems or bodily defects.[137] In fact, she had attempted suicide several times and had engaged in forms of other self-destructive behavior, including drinking potassium cyanide, carving a hole in her stomach, deliberately severing her arteries, and threatening to inject herself with cyanide solution.[138] A post-matriculation medical examination revealed her medical history, and NYU requested her resignation on the grounds that she had a mental disorder known as borderline personality.[139]

After undergoing therapy for almost two years, plaintiff applied for readmission to NYU.[140] NYU declined to admit her after considering medical evidence that her condition was likely to continue for most of her adult life and that she would not be able to handle the inevitable stresses of medical school without posing a danger to herself and others.[141] The Second Circuit affirmed NYU's decision, and adopted the following test for determining whether or not an individual poses a risk of harm to others under the ADA.

> In our view she would not be qualified for readmission if there is a significant risk of such recurrence. It would be unreasonable to infer that Congress intended to force institutions to accept or readmit persons who pose a significant risk of harm to themselves or others even if the chance of harm is less than 50%. Indeed, even if she presents any appreciable risk of such harm, this factor could properly be taken into account in deciding whether, among qualified applicants, it rendered her less qualified than others for the limited number of places available.[142]

The ambiguity inherent in the *direct threat* standard makes its application difficult for both employers and employees, and it is likely that

[135] *See supra* note 117 and accompanying text.

[136] 666 F.2d 761 (2d Cir. 1981).

[137] *Id.* at 765-66.

[138] *Id.* at 766.

139.Id at 767-68. For the definition of borderline personality disorder, see *supra* note

140.Doe v. New York University, 666 F. 2d at 761, 768 (2d Cir. 1981).

141.I*d.*

[142] *Id* at 777 As one commentator aptly noted, a "...'significant risk' of harm is something considerably less than a 50-percent possibility." Edwards, *supra* note 19, at 363.

the courts will be called upon to decide whether or not particular employees or applicants do in fact raise workplace safety concerns.

IV. Compliance Guidelines for Mental Impairment Cases

Since employers are prohibited under the ADA from inquiring whether a job applicant is disabled or has a history of a disability,[143] many employers find themselves in the position of having to fashion reasonable accommodations for individuals who experience job performance problems subsequent to their hiring. The employer's concerns are particularly acute with respect to psychologically disabled employees, since mental impairments are often less obvious than physical disabilities.[144] In fact, even the disability of mental retardation is often more easily accommodated than psychological impairments such as anxiety disorders or phobias.[145] To comply with their obligations under the ADA, employers must make individualized determinations concerning an employee's *fitness-for-duty,* as well as accommodations that may be required to render an employee capable of performing his or her job.[146] Examples of the types of accommodations that might be reasonable for persons with mental disabilities include (1) reduction of noise levels by placing an employee in a smaller, more isolated area, (2) assignation of repetitive operations or a variety of tasks, depending on the employee's condition, (3) limitation of the number of people the employee must deal with, (4) provision of supervision that is close, moderate, or minimal, depending on

[143] 42 U.S.C. § 12112(d)(2)(A)(B) (Supp. Ill 1991). The employer may, however, inquire whether the applicant can perform job-related functions. *Id.*

[144] One commentator opines that employers may be more willing to accommodate those with physical disabilities than those with mental disabilities:

> Employers are likely to have come in contact with physical disabilities, such as persons in wheelchairs, persons with heart monitors, or persons with disfiguring conditions. A well-intentioned boss may be more likely to sympathize with an applicant who seeks accommodation in the form of an adjustable-height computer keyboard or a window shade designed to reduce sun glare than she would with an employee who complains of a behavioral disorder or phobia.

Casey, *supra* note 67, at 410.

[145] Henry R. Perritt, Jr., Americans with Disabilities Act Handbook 8 (1990). Mr. Perritt states that "when the disability is mental retardation, actual or perceived, the evaluation of reasonable accommodation possibilities and undue hardship allegations involves the same quantifiable factors that controversy over a physical disability involves." *Id.*

[146] *See* 29 C.F.R. pt. 1630 app. § 1630.2(o) at 400-402 (1994).

the employee, (5) insurance that lines of authority are well defined to reduce ambiguity, and (6) provision of supervision that includes warm guidance or firm direction, depending on the employee.[147] However, employers should not rely upon *laundry lists* of possible accommodations, but should instead seek to find the best solutions for each disabled employee. When fashioning such reasonable accommodations, employers should also be mindful that one universal aspect of making the work environment more welcoming to individuals with mental disabilities is the education of nondisabled employees about the requirements of the ADA. Specifically, employers should "... train all personnel regarding the... appropriate language to use, the avoidance of epithets related to disability, including mental disabilities,[148] how reasonable accommodation works, and how to overcome fears and stereotypes."[149]

Employers should engage the services of qualified psychiatrists or psychologists to assist them in determining an applicant's or employee's fitness-for-duty, and to suggest accommodations that would allow the individual with a disability to perform the essential functions of his or her job without endangering the health or safety of himself or herself or others.[160] Since the employee's fitness will depend upon the job requirements of the position in question, it is essential that employers ensure that their written job descriptions clearly delineate the essential functions of each job, as well as the physical and psychological attributes of employees who have successfully fulfilled the requirements of each position.

Employers who take the aforesaid precautions should find their ADA obligations to be manageable. Nevertheless, a valid concern that employers should have about their ADA compliance requirements is the cost that will be associated with such compliance. Although initial studies have shown that this concern is "unfounded

147. VIGDOR GROSSMAN, EMPLOYING HANDICAPPED PERSONS: MEETING THE **EEOC** OBLIGATIONS **56-57 (1980).**

148. MS E**dwards provides the following list of common epithets often used to describe those with mental impairments: "lunatic", "imbecile", "idiot", "insane", "degenerate" "retarded", "mentally defective", "feeble-minded", "deviant", "brain dead", "demented", and "dimwit". Edwards, *supra* note 19, at 382.**

149. ***Id*** **at 383.**

150. ***Id See also*** **Patricia A. Maffeo, *Making Non-Discnminatory Fitness-for-Duty* n • ' *About Persons with Disabilities Under the Rehabilitation Act and the Americans with Disabilities Act,* 16 Am. J.L. &** MED. **279, 309 (1990). Dr. Maffeo states that federal agencies and the military routinely require fitness-for-duty evaluations, as do many businesses whose work is hazardous.** ***Id.*** **at 279-80.**

for most employers,"[161] even when hidden costs such as litigation expenses and rates for workers' compensation insurance are factored in,[152] these studies have not always assessed the costs associated with accommodating individuals with psychological disorders.[153] Until Congress and the EEOC provide specific guidance to employers regarding when a requested accommodation is no longer *reasonable,* but is instead an *undue hardship,* employers will be well advised to

151 Tracy L. Hart, Legislative Note, *The Americans with Disabilities Act Title I: Equal Employment Rights for Disabled Americans,* 18 U. DAYTON **L.** REV. **921, 941 (1993) (footnote omitted):**

> **According to the Job Accommodations Network (JAN), a service of the President's Committee on Employment of People with Disabilities, thirty-one percent of accommodations reported to JAN cost nothing, nineteen percent cost between $0.00 and $50.00, nineteen percent cost between $50.00 and $500.00, and nineteen percent cost between $500.00 and $1,000.00. Thus, eighty-eight percent of all necessary accommodations cost less than $1,000.00.**

Id. **(citing Michelle Laque Johnson, *What's Reasonable Accommodation for Disabled*?,** INVENTOR'S DAILY, **Oct. 11,1990, at 8.)**

A Department of Labor-sponsored study reached a similar conclusion regarding the cost of accommodating mentally disabled employees. Frederick C. Collignon, ***The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry,*** DISABILITY AND THE LABOR MARKET **196, 197** (Monroe Berkowitz and M. Anne Hill eds., **1986)** (citing Berkely Planning Associates, A STUDY OF ACCOMMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS: FINAL REPORT (U.S. Dep't of Labor, Employment Standards Administration **1982)).** The study found that seventy percent of the accommodations provided to mentally retarded individuals and fifty percent of those provided to mentally ill individuals cost nothing, while only sixteen percent of accommodations provided to mentally retarded employees and twenty-two percent of those provided to mentally ill employees cost over five hundred dollars. ***Id.*** at **224-25.**

152 One commentator reports that businesses that already employ disabled individuals have experienced "savings in workers' compensation, decreases in lost-time claims, and increases in productivity, morale, and net income. Hart, *supra* note 151, at 942 (citing Andrea Maier, *Enabling Disabled: A Civil Rights Act for Fourteen Million Workers,* L.A. TIMES, **July 24,1992, at Dl).**

153 The Department of Labor study discussed *supra* note 150, for example, did not consider "the potentially high cost of extended leaves of absence due to mental disorders." Haggard, *supra* note 15, at 369. An employer will not lose anything if a disabled employee takes a leave without pay and the employer is able to hire a temporary replacement to assume the employee's responsibilities. However, "[i]f the employer cannot hire a temporary substitute, ... it may lose a great deal in terms of lost productivity." *Id.* at 369 n. 155.

work collaboratively with their disabled employees so that they can avoid the uncertainties of case-by-case judicial resolutions of ADA disputes.[154]

V. CONCLUSION

In passing the ADA, Congress sought to achieve the worthy goal of integrating disabled Americans into the labor market. While the needs of physically disabled Americans have generally been addressed in the statute, the unique concerns of individuals with psychological disabilities have not. To further complicate matters, the EEOC has provided scant guidance to employers attempting to fulfill their obligations towards their psychologically impaired applicants and employees. It is essential, therefore, that all employers take steps on their own to reasonably accommodate the needs of these potential plaintiffs in order to avoid the unpredictable and costly resolution of these issues by the courts.

154. Representative Hammerschmidt, although in favor of the ADA expressed con cem that the statute would lead to a great deal of litigation •p01.u' „ , , concern in this bill is that this legislation will end up in the courts and vritti*L* written hy the judicial branch of Government... [given] the vagueness of the language in this bill, you have created a relief act for the legal community. This is an unfortu nate outcome for such a significant piece of legislation." 136 Cone Rec. H2446 (daily ed. May 17,1990) (statement of Rep. Hammerschmidt). y