From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the Americans with Disabilities Act

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I. INTRODUCTION

You are the owner of a small business. A few years ago, you asked a white female employee to make a delivery to another part of town. While making her delivery, your employee was accosted by a large African American man. She was thrown to the ground and left with a broken vertebrae, in a state of shock.

Your employee regained her physical health. Mentally, however, she did not fare so well; she has been plagued by emotional troubles ever since. She has nightmares in which she relives the attack, and being near black males causes her to experience panic attacks. The attacks bring on sweating, panic, and a rapid heartbeat. She is undergoing psychiatric treatment and has been diagnosed as having post-traumatic stress disorder and simple phobia. She does not experience similar nightmares or panic concerning men who are white or members of other racial groups.

Now the employee asks to speak with you in private. She demands that you accommodate her condition by segregating her from all African American males in her work section. What can you do? What must you do? If you consult an attorney for help, he or she will look to the Americans with Disabilities Act of 1990 (ADA) for guidance. The ADA, however, will not provide much assistance.

The ADA and the Civil Rights Act of 1964 have profoundly impacted how employers treat persons with physical or mental

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2. Your employee's request to be accommodated raises other interesting legal issues, such as equal protection rights and associational rights. Those issues, however, are beyond the scope of this Comment and will not be discussed here.

disabilities. The ADA's individualized approach, coupled with the broad-reaching remedial provisions of the Civil Rights Act of 1991, force employers to accommodate persons with disabilities to an unprecedented degree.

But the degree of required accommodation is unclear. So too are the standards used to determine whether one is a person with a disability. In essence, the ADA prevents discrimination against persons with mental impairments, as long as the impairments substantially limit those persons' "major life activities." A "mental impairment" is broadly defined as any mental or psychological disorder, except for certain disorders that Congress chose not to include.

Conditions such as behavioral disorders, a type of mental disability, are often less apparent to employers than are most obvious forms of mental disability. Yet such hidden behavioral disorders are a potentially greater source of stigma, employer indifference, and, ultimately, job termination. The ADA fails to address behavior disorders in general and phobias in particular. Does that mean that all behavioral disorders and phobias are disabilities under the ADA? Which of the available diagnostic systems will be used to help the courts decide?

Neither Congress nor the Equal Employment Opportunity Commission (EEOC), the agency responsible for promulgating many of the regulations under the ADA, has answered these questions. Courts cannot simply rely on the broad provisions of preexisting federal statutes. Without extensive guidance on what is a mental disability under the ADA, employers and employees will be left to the haphazard, costly, and time-con-
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assuming alternative of resorting to the courts to determine the precise nature of their responsibilities and rights in the workplace. It is time that the EEOC provide that guidance.

This Comment proposes that the EEOC take two actions. First, the EEOC should pass administrative rules that settle the question of which standards to use in determining whether an individual is mentally impaired. Second, and more importantly, the EEOC should issue interpretive guidance that acknowledges the burdens facing persons with hidden behavioral anomalies and phobias, and gives these persons additional help under the Act.

Part II of this Comment describes the ADA generally. It explains the Act's purpose and summarizes the Act's legal requirements. Part III describes the legal requirements for bringing a mental impairment case under the ADA. Cases decided under the Rehabilitation Act of 1973\textsuperscript{11} are used to illustrate the legal hurdles that face an ADA plaintiff and to provide guidance as to how similar cases would be decided under the ADA. Finally, Part IV of this Comment examines some of the pragmatic concerns of employers and employees regarding persons with hidden disorders and proposes that the EEOC take steps to ameliorate the treatment of such persons under the ADA.

II. THE ADA GENERALLY AND MENTAL IMPAIRMENTS

Former President George Bush signed the ADA into law on July 26, 1990.\textsuperscript{12} The Act is a comprehensive plan that seeks to prohibit discrimination against persons with disabilities. Certain aspects of the ADA, such as which employers are covered, what burdens of proof are used, and what damages are available, are roughly patterned after Title VII of the Civil Rights Act. The ADA has five titles, the first of which governs the hiring and employment of disabled Americans.\textsuperscript{13} While the Act does not guarantee jobs for persons with disabilities,\textsuperscript{14} it does specify that employers may not discriminate against disabled

\begin{itemize}
  \item 13. Id. §§ 12111-12117. The other four titles include Public Services, Public Accommodation and Services Operated by Private Entities, Telecommunications, and Miscellaneous Provisions. Id. § 12007.
  \item 14. See 29 C.F.R. pt. 1630 app. at 400 (1993) (indicating that the purpose of Title I is to ensure that qualified persons with disabilities are protected from discrimination on the basis of their disability).  
\end{itemize}
persons who meet the job-related requirements for a particular position and who can perform the essential functions of the job, with or without reasonable accommodation. Section A below examines the purpose of the ADA. Section B addresses the substantive law of the ADA.

A. Purpose of the ADA

The ADA's main purpose is to ensure that individuals with disabilities are not excluded from job opportunities unless such individuals are actually unable to do the job. Secondarily, the ADA attempts to prevent "common attitudinal barriers" that often result in employers excluding individuals with disabilities by requiring that employers ensure that job criteria in fact measure skills required on the job. The ADA presumes that, once we as a society grow accustomed to measuring job requirements by the essential skills of the job, we will more readily accept persons with disabilities into the work force.

The ADA requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. But a major policy question is how far the ADA ought to go to affect the workplace. Should the ADA attempt to revolutionize the way employers treat their employees in general? Does the ADA require employers to give the same level of accommodation to an employee with a behavioral anomaly as the employer would give to a worker with a physical disability? The law is unclear. It seems that courts will have to decide unless the EEOC clarifies the issue. A brief discussion of the substantive law of the ADA will put the issue into perspective.

B. The Substantive Law of the ADA

Briefly stated, the ADA prohibits a covered entity\(^{19}\) from discriminating against a qualified individual with a disability

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16. See 136 Cong. Rec. H2438 (daily ed. May 17, 1990) (statement of Rep. Don Edwards (D-Cal.)) ("Like other civil rights laws, the ADA does not require employers to hire unqualified persons, nor does it require employers to give preference to a person with disabilities. The ADA simply states that a person's disability should not be an adverse factor in the employment process.").
because of the disability.\textsuperscript{20} For simplicity, this Comment refers to all covered entities as "employers."

1. Stating a Case Under the ADA

To successfully state a case under the ADA, one must first prove discrimination.\textsuperscript{21} To "discriminate" under the ADA is to directly limit or segregate individuals because of their disabilities, to use standards or criteria that have the effect of discriminating, or to fail to make reasonable accommodations to the known physical or mental limitations of applicants or employees.\textsuperscript{22}

\begin{itemize}
  \item \textit{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 year" with certain exceptions. Id. § 12111(5)(A). Exempt are the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or a bona fide private membership club that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986. Id. § 12111(5)(B).
  \item 20. Id. § 12112(a).
  \item 21. Id.
  \item 22. Id. § 12112(b). The Act provides in full that the term "discriminate" includes the following:
    \begin{itemize}
      \item (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;
      \item (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);
      \item (3) utilizing standards, criteria, or methods of administration—
        \begin{itemize}
          \item (A) that have the effect of discrimination on the basis of disability; or
          \item (B) that perpetuate the discrimination of others who are subject to common administrative control;
        \end{itemize}
      \item (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;
      \item (5)(A) not making reasonable accommodations to the known physical or mental 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
      \item (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;
      \item (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
A discrimination claim, thus, involves an individual with a disability. An "individual with a disability" is one who (1) has a current physical or mental impairment that substantially limits one or more of the individual's major life activities, (2) has a record of having such impairment, or (3) is regarded as having such an impairment. Congress chose to exclude several disorders from the definition of "disability"; these excluded disorders include gender identity disorders not resulting from physical impairments, voyeurism, kleptomania, compulsive gambling, and pyromania.

An individual with a disability is "qualified" if he or she meets the skill, experience, education, and other job-related requirements of a position held or desired, and can perform the essential functions of the job, with or without reasonable accommodation.

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.

23. Id. § 12102(2). The "record of" definition of disability is intended to ensure that people who have a history of a disability are not discriminated against because of that history. 29 C.F.R. pt. 1630 app. at 405 (1993). The "regarded as" definition of disability covers those individuals who have impairments that are not substantially limiting, but their employer perceives the impairment as substantially limiting. Id. The definition also covers those who have no impairment at all but are regarded by their employers as being impaired. Id. § 1630.2(l)(3). The rationale for the "regarded as" definition comes from Congress' belief that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." School Board v. Arline, 480 U.S. 273, 284 (1987).

24. 42 U.S.C. § 12211(b) (Supp. III 1991) provides that the term "disability" shall not include the following:

(1) transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

Because they are obviously not impairments, homosexuality and bisexuality are not disabilities within the meaning of Title I of the ADA. Id. § 12211(a).

25. See id. § 12111(8); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT I-2 (1992) [hereinafter TECHNICAL ASSISTANCE MANUAL].
Determining whether the individual has a disability is only the first step of proving discrimination under the ADA. The second step requires a showing that the disability substantially limits the individual in one or more major life activities. A major life activity is a basic activity that the average person in the general population can perform with little or no difficulty. Sitting, standing, lifting, reaching, caring for oneself, walking, seeing, hearing, speaking, breathing, learning, and working are major life activities. In determining whether a person is substantially limited in a major life activity, one should consider the nature and severity of impairment, the duration or expected duration of the impairment, and the actual or expected long-term impact of the impairment. One should consider whether a plaintiff is substantially limited in the major life activity of working only if the plaintiff is not severely impacted in any other major life activity.

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   (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 an individual 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.


27. Id. pt. 1630 app. at 403.

28. Id. § 1630.2(i). This list is not exclusive. Id. pt. 1630 app. at 403.

29. Id. § 1630.2(j)(2).

30. Id. § 1630.2(j)(3). Section 1630.2(j)(3) provides the following:
   With respect to the major life activity of working . . . the term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes 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.

Id.

Three additional factors are to be considered in deciding whether a person's limitation in the major life activity of working is substantial: (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. § 1630.2(j)(3)(ii). The EEOC indicates 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 signif-
In addition to the definitional criteria that a person with mental impairments must meet, she must demonstrate that she is qualified for the position, with or without reasonable accommodation.\textsuperscript{31} Such proof must be specific to the circumstances and must include an examination of the job requirements, as well as any adjustments that could be made to accommodate the plaintiff.\textsuperscript{32}

If the plaintiff proves that she is qualified for the position with or without accommodation, the employer has an affirmative defense that the standards at issue are "job-related and consistent with business necessity," such that no reasonable accommodation could accomplish the job.\textsuperscript{33} The employer may also require that individuals not pose a direct threat to the health or safety of themselves or others in the workplace.\textsuperscript{34} Furthermore, the employer is not required to provide an accommodation if doing so would impose an undue hardship on the operation of its business.\textsuperscript{35}

Substantive requirements aside, the procedural requirements of the ADA mirror many of those required for Title VII of the Civil Rights Act.\textsuperscript{36} The Title VII burden of proof scheme, for instance, requires the plaintiff to prove that he or she (1) is a person with a disability under the Act, (2) was otherwise qualified for the position sought, (3) was excluded from the position because of the disability, and (4) was excluded from a position that was part of a program or activity of the defendant's covered entity.\textsuperscript{37} Establishing this prima facie case is the first step in

\textsuperscript{31} Significantly restricted in the ability to perform 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.

\textsuperscript{32} Id. pt. 1630 app. at 404.


\textsuperscript{34} See id.; see also 29 C.F.R. pt. 1630 app. at 406 (1993).


\textsuperscript{36} Id. § 12113(b); 29 C.F.R. § 1630.2(r) (1993).

\textsuperscript{37} 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1991). "Undue hardship" is an accommodation that is excessively costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business. 29 C.F.R. pt. 1630 app. at 409 (1993).


\textsuperscript{39} 2 Arthur Larson & Lex K. Larson, Employment Discrimination § 50.00 (1993). This is a very basic description of the plaintiff's prima facie case. There are other burden of proof models, including "pattern and practice" and "mixed motive." Id.
the plaintiff's lawsuit. The second step differs according to the burden of proof model chosen.\textsuperscript{38}

In sum, the ADA prohibits an employer from discriminating against a qualified person with a disability because of the person's disability. Under Title I of the ADA, a phobia or anxiety disorder (except those disorders specifically excluded by the Act) is a disability only if it is a mental impairment that substantially limits one's major life activities.

2. Mental Impairments Under the ADA

A "mental impairment" within the meaning of the ADA is a "mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, [or] specific learning disabilities."\textsuperscript{39} Some conditions are not impairments: physical characteristics (left-handedness); characteristic predisposition to illness or disease; common personality traits (poor judgment or quick temper); or environmental, cultural, or economic disadvantages (poverty, lack of education, or a prison record).\textsuperscript{40}

Congressional debates on the Act reveal that some lawmakers feared the Act went too far in its coverage of disabilities. Senator William Armstrong of Colorado, for instance, noted that the courts use psychological classification systems to determine whether persons were impaired under the Rehabilitation Act and wondered if the universe of conditions known to psychiatry was much broader than the disabilities intended to be covered by the ADA.\textsuperscript{41} Congress ultimately settled on a list of excepted conditions without defining the universe of covered conditions.\textsuperscript{42}

Some basic conclusions may be drawn from the structure of the ADA with respect to persons with temporary behavioral dis-

\textsuperscript{38} The burden of proof in ADA lawsuits is a complex and somewhat unsettled subject that is beyond the scope of this Comment. For a basic description of the subject, see 2 Larson & Larson, supra note 37, § 50.00, and Henry R. Perritt, Jr., Americans with Disabilities Act Handbook 82, 82-85 (1990). For a more thorough critique, see Kingsley R. Browne, The Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?, 43 Case W. Res. L. Rev. 287 (1993).

\textsuperscript{39} 29 C.F.R. § 1630.2(h)(2) (1993).

\textsuperscript{40} Id. pt. 1630 app. at 402-03.

\textsuperscript{41} 135 Cong. Rec. S10,765 (daily ed. Sept. 7, 1989). Senator Armstrong (R-Col.) noted that "[v]oyeurism is in unless we take it out." Id.

\textsuperscript{42} See 42 U.S.C. § 12211(b) (Supp. III 1991); see supra note 24 and accompanying text.
orders. First, persons with less serious or temporary behavioral disorders will have great difficulty showing that they are substantially limited by their disorder. Although they suffer disorders cataloged in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-III-R), and may be undergoing treatment, they are likely to be unable to prove that they are substantially limited in a major life activity, even that of working. Thus, they will be unable to claim under the ADA.

Second, although persons with more serious or critical disorders would be disabled within the meaning of the Act, they would have difficulty demonstrating that they are otherwise qualified for the position sought. Thus, they too would be unable to claim under the Act.

Third, some persons with behavioral disorders will present troublesome questions in the workplace regardless of whether or not they are accommodated. A race phobia (fear of persons of a certain race or national origin), for example, presents problems even if the employee is accommodated. If the employer attempts to accommodate the disability, perhaps by isolating the employee from other employees of that specific race and gender, the employer sends an adverse message to other workers regarding race and gender. The employer also arguably tramples the civil rights of the other employees. Alternatively, if the employee is not found to be disabled under the ADA, the court risks being perceived as arbitrarily selecting the disabilities it will protect.

In sum, the ADA imposes several hurdles that a person with mental impairments must clear to obtain an ADA judgment against her employer. These hurdles certainly do not make for an easy road for such a plaintiff. While the policy behind the ADA is to eliminate discrimination based on disability, persons with nonexcluded behavioral disorders still face a battle if they choose to sue.

### III. PHOBIAS AND ANXIETY DISORDERS UNDER THE ADA

Mental impairments are not new to American jurisprudence. Many laws recognize mental impairments and treat

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44. Congress has already done this in excluding certain disorders from the definition of "disability." See *supra* note 24 and accompanying text.
them in various ways. In particular, the Rehabilitation Act establishes a framework and case law that Congress intends the ADA to follow in its handling of persons with mental impairments. Section A orients the reader to mental impairments generally and to behavioral disorders specifically. Section B uses Rehabilitation Act case law to predict how the ADA will treat plaintiffs with behavioral disorders.

A. Phobias and Anxiety Disorders Generally

As one might expect, the diagnosis and treatment of mental impairments is a vast field of medicine. Researchers in the field have developed useful classification systems to catalog mental impairments. Two of the most widely-recognized systems are the DSM-III-R and the World Health Organization's International Classification of Diseases, Injuries, and Causes of Death (ICD). The DSM-III-R is one of the most widely used systems in the United States today. It is intended for clinicians, but many courts rely on it to classify mental impairments. The DSM-III-R lists approximately thirteen subclasses of mental impairments. Anxiety disorders comprise one of these subclasses. This section provides a broad overview of the field of mental impairments generally and then explores the anxiety disorders subclass in more detail.

45. See infra note 188.
48. Id. at 849.
49. Id. The DSM-III-R is not without criticism, however, because of the difficulty of applying diagnostic criteria consistently. Id. at 850. Professor Larson suggests that a less obvious problem is the distribution of information regarding new developments because knowledge is advancing too rapidly for anyone to have personal experience with all the findings of the latest experiments. Id. at 851.
50. DSM-III-R, supra note 43, at XXVI. The DSM-III-R catalogs mental impairments and provides a "five-axis" classification system for use in the diagnosis of mental illnesses. Id. at I-5. The first three axes constitute the diagnostic assessment; the last two axes supplement the official diagnosis with information useful in planning treatment and predicting the outcome of treatment. Id. Under the DSM-III-R system, a person may receive more than one diagnosis. Id.
51. See infra part III.B.
52. The 13 subclasses 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 43, at 5-10.
1. Mental Impairments

By some estimates, twenty percent of the population of the United States suffers from diagnosable psychiatric disorders.\textsuperscript{53} Fifteen percent will suffer an episode of severe depression in their lifetime.\textsuperscript{54} Five percent suffer generalized anxiety; five to ten percent suffer from affective disorders; five to ten percent suffer severe personality disorders.\textsuperscript{55} One percent develop schizophrenia.\textsuperscript{56}

Perhaps those who suffer from severe depression or anxiety disorders present the most complicated questions for employers. Unlike mental impairments that are more readily noticeable, such as retardation or Alzheimer's disease, anxiety disorders are less apparent to outsiders. Thus, even though anxiety disorders are relatively common, the fact that they are also hidden means many employers will overlook them. Anxiety disorders are examined more closely below.

2. Anxiety Disorders

Studies indicate that of the thirteen subclasses of mental disorders mentioned above, anxiety disorders is the subclass that is most frequently found in the general population.\textsuperscript{57} Generally, anxiety disorders fall within seven types: (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.\textsuperscript{58} These seven anxiety disorders are described briefly below. Because so many Americans suffer or will suffer one of these disorders, the possible impact of these disorders on the workplace is significant. It is for this reason that the ADA's unclear treatment of these disorders is problematic.

a. Simple Phobia

Simple phobia is the most common of the anxiety disorders.\textsuperscript{59} The essential feature of simple phobia is a persistent fear of a certain object or situation, as compared to a fear of

\textsuperscript{53} Larson, supra note 47, at 846.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} See DSM-III-R, supra note 43, at 235.
\textsuperscript{58} Id. at 7.
\textsuperscript{59} Id.
having a panic attack (panic disorder) or of humiliation in certain social situations (social phobia). 60 According to the *DSM-III-R*, exposure to the simple phobic stimulus almost invariably provokes an immediate anxiety response... such as feeling panicky, sweating, and having tachycardia [excessively rapid heartbeat] and difficulty breathing. Anxiety increases or decreases in a fairly predictable way with changes in the location or nature of the phobic stimulus. 61

Commonly known phobias include fear of flying, fear of spiders and snakes, fear of heights, fear of public speaking, and fear of AIDS. Less well known are phobias like “blood-injury” phobia, a severe uneasiness about blood, injury, or deformity. 62 More controversial phobias include AIDS phobia 63 and race phobia. 64 Because of the highly charged atmosphere surrounding race phobias, and because the distinction between such phobias and simple racism is blurred, resolution and accommodation of individuals with such phobias have the potential to be highly controversial under the ADA. 65

Simple phobias rarely result in marked impairment, and persons suffering from them seldom seek treatment. 66 The ADA, as interpreted by the EEOC, requires that an impairment be more than a temporary, nonchronic condition. 67 Thus, per-

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60. *Id.* at 243.
61. *Id.*
63. Many Americans continue to believe erroneously that AIDS is transmitted through public toilets, shaking hands, and kissing. In reality, the Human Immunodeficiency Virus (HIV) is transmitted by injection of infected blood, by unprotected sex with an infected person, and by “vertical” transmission from an infected mother to her fetus or newborn. AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE II-2 to II-3 (Paul Albert et al. eds., 1988).
65. Indeed, many discriminatory attitudes could be said to be phobic, at least if carried to an extreme. One example would be the extreme attitude demonstrated by those who espoused and carried out the extermination of millions of Jews in Nazi Germany.
66. DSM-III-R, *supra* note 43, at 244. “Impairment may be minimal if the phobic object is rare and easily avoided, such as fear of snakes in someone living in the city. Impairment may be considerable if the phobic object is common and cannot be avoided, such as fear of elevators in someone living in a large city who must use elevators at work.” *Id.*
sons with simple phobias may, from a clinical standpoint, be unable to state a claim under the ADA.

b. Social Phobia

Social phobias, however, can be more debilitating. They are marked by the persistent fear of situations in which the person is exposed to possible scrutiny by others and is fearful that she may humiliate or embarrass herself. Some social phobics have specific fears, such as the fear of public speaking, choking on food in front of others, being unable to urinate in a public restroom, or having a hand tremble when writing in the presence of others. Others have more general fears of most social situations. According to some practitioners, social phobia is among the most neglected of major anxiety disorders classified in the DSM-III-R.

Unless the social phobia is severe, it is rarely incapacitating in itself, but persons with the disorder are prone to abuse alcohol and barbiturates.

c. Agoraphobia

Agoraphobia is the fear of being in places or situations from which escape might be difficult (or embarrassing), or the fear of being someplace where help might not be immediately available. The fear typically results in the person restricting travel or needing a companion when away from home. Common agoraphobic situations include being alone outside one’s home, being in a crowd or standing in a line, being on a bridge, and being in a bus, train, or automobile. Sufferers may fear attacks of dizziness, loss of bladder or bowel control, vomiting, or cardiac distress. Some agoraphobics have actually experienced the symptoms in the past; others are agoraphobic because they fear that the symptoms may develop.

69. Id.
72. Id. at 240.
73. Id.
74. Id.
75. Id.
76. Id.
d. Panic Disorder

Persons who suffer from panic disorder experience discrete periods of intense fear or discomfort that occur unexpectedly. Common symptoms include shortness of breath; dizziness, unsteady feelings, or faintness; choking; trembling or shaking; sweating; chest pain; fear of dying; and fear of going crazy or of doing something uncontrolled. Panic disorder may last several minutes, weeks, months, or it may last for years. It is often accompanied by some symptoms of agoraphobia. Without agoraphobia, panic disorder may result in little or no impaired social or occupational functioning; with agoraphobia, it is much more likely to constrict the lifestyle.

e. Obsessive Compulsive Disorder

Obsessive compulsive disorder is marked by recurrent obsessions or compulsions. These obsessions and compulsions are severe enough to cause marked distress or significantly interfere with normal work routines, social activities, or relationships with others. Obsessions are persistent thoughts or images, mostly intrusive and senseless. The most common obsessions are repetitive thoughts of violence (killing one's child), contamination (getting infected by shaking hands), and doubt (repeatedly wondering whether one has done something, such as having injured another person in a traffic accident).

Compulsions are repetitive and intentional behaviors performed in response to an obsession or to other stimuli. According to the DSM-III-R, [compulsive behaviors are] designed to neutralize or to prevent discomfort or some dreaded event or situation. The person recognizes that his or her behavior is excessive or unreasonable and does not derive pleasure from carrying out the activity, although it provides a release of tension. The

77. Id. at 235.
78. Id. at 236.
79. Id. at 235-36.
80. Id. at 236.
81. Id.
82. Id. at 245.
83. Id.
84. Id.
85. Id.
most common compulsions involve hand-washing, counting, checking, and touching.\textsuperscript{86}

Impairment under an obsessive compulsive disorder is often moderate to severe, and complications include major depression and abuse of alcohol and drugs.\textsuperscript{87}

\textbf{f. Post-Traumatic Stress Disorder (PTSD)}

PTSD results from a psychologically distressing event that is outside the scope of common human experiences.\textsuperscript{88} The most common causes of PTSD include a serious threat to one's life, a serious threat or harm to one's spouse or children, sudden destruction of one's home or community, and seeing another person seriously injured or killed.\textsuperscript{89} Such stressors can occur in combat, accidental disasters (car accidents, airplane crashes, fires, floods), or in deliberately caused disasters (bombing, torture, death camps). The traumatic event is often periodically reexperienced by the individual, conditioning the individual to avoid all of the stimuli associated with the event.\textsuperscript{90} Impairment can be mild or severe, and interpersonal relationships may be affected.\textsuperscript{91} Depression and guilt may result in suicidal behavior or in substance abuse.\textsuperscript{92}

\textbf{g. Generalized Anxiety Disorder}

Generalized anxiety disorder is characterized by excessive worry about two or more life circumstances.\textsuperscript{93} For example, worry about possible misfortune to one's child and worry about finances are common anxiety-producing circumstances.\textsuperscript{94}

Implications in the workplace can be seen from all of these anxiety disorders. In clinicians' terms, some of the disorders are severely impairing, but professionals usually find that anxiety disorder induced impairment in occupational functioning is "rarely more than mild."\textsuperscript{95} Nevertheless, some anxiety disorders could cause a few hours of lost time. Others could create a

\begin{flushleft}
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 246.
\textsuperscript{88} Id. at 247.
\textsuperscript{89} Id. at 247-48.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 248-49.
\textsuperscript{92} Id. at 250.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\end{flushleft}
danger of injury to other employees. Some, such as race phobia and AIDS phobia, are sure to create controversy if the ADA is used to accommodate them. Others will probably not arise in litigation because they will not, for the most part, seriously impair their victims. How should courts decide which are disabilities under the ADA? Clear guidance from the EEOC is the answer. By promulgating guidance on which classification system to use and how to determine which impairments are disabilities, the EEOC could eliminate much of the confusion. Absent further guidance, courts will have to look to Rehabilitation Act case law for help.

B. Possible Treatment of Phobias and Anxiety Disorders Under the ADA

Congress intended that the case law developed under the Rehabilitation Act be used to decide ADA questions. The Rehabilitation Act also prohibits discrimination against persons with disabilities, but it covers only those employed by federal departments and agencies, recipients of federal financial assistance, and federal contractors.

By applying Rehabilitation Act case law to the requirements of the ADA, one can speculate as to how the courts will decide which phobias and anxiety disorders will be covered by the ADA. The cases that follow are organized according to the steps that an ADA plaintiff must take in proving her lawsuit. First, the plaintiff must prove that she has a mental impairment. Second, the plaintiff must prove that the mental impairment substantially limits her in a major life activity. Third, the plaintiff must demonstrate that she is qualified with or without reasonable accommodation. Fourth, she must have sought reasonable accommodation. Finally, the employer may raise defenses to defeat the plaintiff's case.

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96. The ADA retains standards applied under the Rehabilitation Act. The ADA provides that

[except as otherwise provided . . . nothing in (the ADA) shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C. § 12201(a) (Supp. III 1991). One can assume that this passage demonstrates Congress' intent not to allow the law under the ADA to diverge from the law under the Rehabilitation Act. Perritt, supra note 38, at 108.

1. **Requirement That Plaintiff Have a Mental Impairment, Have A Record of Impairment, or Be Regarded as Having an Impairment**

Rehabilitation Act case law demonstrates two methods by which the courts have determined whether a claimant has an impairment. Under one method, the parties stipulate to the plaintiff's impairment, or the court assumes without deciding that the plaintiff is impaired and proceeds to a decision as to whether the plaintiff meets the other requirements of the law. 98 Under the second method, the court relies on expert testimony to decide whether the plaintiff has a legally recognized disability. 99 Both methods are discussed below.

**a. Stipulation by Parties That the Plaintiff Is Impaired**

Many Rehabilitation Act cases avoid the question of whether a particular plaintiff is impaired because the parties stipulate that the plaintiff is impaired. Doe v. Region 13 Mental Health-Mental Retardation Commission 100 is such a case. In Region 13, the plaintiff Doe applied for employment as a mental health associate in defendant's Mental Health Center, representing that she was in excellent health. 101 In fact, she had suffered spells of anxiety, insomnia, and depression, and had taken a potentially lethal overdose of sleeping pills one year prior. 102

Ms. Doe was hired and went on to become a superior employee, but she continued to suffer from the same psychological symptomatology as in the previous year. 103 Three months after starting her job, Ms. Doe began psychotherapy. 104 Doctors diagnosed her as having a depressive neurosis with phobias, and her psychologist was concerned about the possibility of suicide. 105 She voluntarily entered the hospital for medication to relieve her depression. 106 After two more hospitalizations, psychologists recommended long-term hospitalization, preferably for one year. 107 Ms. Doe refused the treatment. Nonetheless,

98. See infra part III.B.1.a.
99. See infra part III.B.1.b.
100. 704 F.2d 1402 (5th Cir. 1983).
101. Id. at 1404.
102. Id.
103. Id.
104. Id.
105. Id. at 1405.
106. Id.
107. Id.
she continued her good work, was rated outstanding, and was given a pay raise.\textsuperscript{108}

Finally, several days before her thirtieth birthday, Ms. Doe told her coworkers and a psychologist that she would not see her birthday.\textsuperscript{109} She said that she would electrocute herself by dropping her hair dryer into the bathtub.\textsuperscript{110} Commitment proceedings were instituted against her, but were later dismissed.\textsuperscript{111} The Mental Health Center, "concerned about funds and public image," gave her the option of resigning or taking a long-term leave for hospitalization.\textsuperscript{112} She refused to comply with either of the Center's requests, and her employment was terminated.\textsuperscript{113}

Ms. Doe brought suit under the Rehabilitation Act, seeking lost wages, damages for pain and suffering, and reinstatement.\textsuperscript{114} The Mental Health Center did not contest that she was handicapped within the meaning of the Rehabilitation Act.\textsuperscript{115} The jury found for Ms. Doe.\textsuperscript{116} On appeal, the Fifth Circuit noted that "[t]he Catch-22 implicit in virtually all [Rehabilitation Act cases] is 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."\textsuperscript{117} The court concluded that Ms. Doe was handicapped under the Rehabilitation Act because the parties had so stipulated.\textsuperscript{118} The court went on to determine whether she was otherwise qualified within the meaning of the Rehabilitation Act.\textsuperscript{119}

Thus, one method by which the courts analyze mental impairments is to avoid deciding the question altogether; the parties simply stipulate to the condition. The inquiry then focuses on whether the plaintiff is qualified for the position.

\begin{thebibliography}{99}
\bibitem{108}Id.
\bibitem{109}Id. at 1406.
\bibitem{110}Id.
\bibitem{111}Id.
\bibitem{112}Id. at 1406-07.
\bibitem{113}Id. at 1407.
\bibitem{114}Id.
\bibitem{115}Id. at 1408.
\bibitem{116}Id. at 1407.
\bibitem{117}Id. at 1408 n.6.
\bibitem{118}Id. at 1408.
\bibitem{119}Id. at 1409.
\end{thebibliography}
b. Reliance on Expert Testimony to Determine Whether the Plaintiff Is Impaired

If the parties refuse to stipulate to the plaintiff's condition, the court must decide whether the plaintiff is mentally impaired. In Rehabilitation Act cases, this has been accomplished through the use of expert testimony. The expert testimony has often relied on the DSM-III-R.

One case that used expert testimony to establish the plaintiff's condition is Doe v. New York University.120 In that case, the plaintiff Jane Doe was accepted to NYU Medical School after falsely representing that she had no chronic illnesses or emotional problems.121 In fact, she was suffering from serious psychiatric and mental disorders, which resulted in numerous self-destructive acts and attacks on others.122 Tragically, her self-destructive acts included overdosing on sleeping pills, attempting suicide by drinking potassium cyanide, cutting her stomach with a knife, and repeatedly severing veins in her arms.123 A routine medical screening at NYU led to the discovery of her medical history. NYU requested her resignation, and she was placed on a leave of absence with no guarantees of reinstatement.124

The plaintiff Doe then underwent therapy and applied for readmission to NYU almost two years later.125 After a professor of clinical psychiatry at NYU concluded that the plaintiff's prognosis was guarded in stressful situations, NYU declined to readmit her.126 She sued for readmission under the Rehabilitation Act.127

The plaintiff was diagnosed with a borderline personality disorder.128 Doctors predicted that the disorder would continue through most of her adult life, modifiable only by therapy and

120. 666 F.2d 761 (2d Cir. 1981). Although this case is not an employment discrimination case (plaintiff brought suit under § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1988), because NYU is a recipient of federal funds), it is decided under the Rehabilitation Act and the same definitions of mental impairment are used. Id. at 770.
121. Id. at 765-66.
122. Id. at 766.
123. Id.
124. Id. at 767-68.
125. Id. at 768.
126. Id. at 770 n.2.
127. Id. at 770.
128. Id. at 771. The court noted that a borderline personality disorder is "a serious psychiatric problem that is extremely difficult to cure and . . . can lead to the type of self-destructive behavior that Doe had engaged in in the past." Id.
by avoiding the situations with which she could not cope.\textsuperscript{129} The trial court found that she was a handicapped person within the meaning of the Rehabilitation Act and that she was otherwise qualified because she would more than likely "be able to complete her course of medical studies and serve creditably as a physician."\textsuperscript{130} The trial court directed NYU to reinstate her.\textsuperscript{131} NYU appealed.\textsuperscript{132}

On appeal, the Second Circuit agreed that the plaintiff was a handicapped person.\textsuperscript{133} The court reached its decision by relying on independent evidence of her extensive history of mental impairments requiring hospitalizations and her departure from NYU . . . because of her psychiatric problems, all of which indicate that she has suffered from a substantial limitation on a major life activity, the ability to handle stressful situations of the type faced in a medical training milieu.\textsuperscript{134}

The court found that NYU "regarded [the plaintiff] as having such an impairment" because the school considered her to be an unacceptable risk.\textsuperscript{135} Thus, the court used expert evidence to find the plaintiff to be a handicapped person.

\textit{Region 13} and \textit{New York University} demonstrate two methods by which plaintiffs can prove that they are impaired. First, where the plaintiff is seriously impaired, as in \textit{Region 13}, the parties can stipulate to the impairment. The question then becomes whether the plaintiff is otherwise qualified. Second, the court can rely on expert testimony, which often uses the \textit{DSM-III-R}, to decide whether the plaintiff is impaired.

2. Requirement of a Substantial Limitation on a Major Life Activity

As noted in Part II of this Comment, determining whether a mental impairment exists is only the first step of a discrimination charge under the ADA. The second step requires the

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 768.
\item \textsuperscript{130} \textit{Id.} at 772.
\item \textsuperscript{131} \textit{Id.} at 765.
\item \textsuperscript{132} \textit{Id.} at 773.
\item \textsuperscript{133} \textit{Id.} at 775.
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.} The court reinforced its conclusion by noting the wide scope of the definition of "mental impairment" and by legislative history, which indicated that the "definition is not to be construed in a niggardly fashion." \textit{Id.} (citing S. Rep. No. 1297, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6388-91).\
\end{itemize}
plaintiff to demonstrate that the mental impairment substantially limits her in one or more of her major life activities.\textsuperscript{136}

One Rehabilitation Act case helped develop the concept of a major life activity. \textit{Forrisi v. Bowen}\textsuperscript{137} examined a phobia’s effect on the major life activity of working.\textsuperscript{138} Mr. Forrisi was hired by the U.S. Department of Health and Human Services (DHHS) as a utility systems repairer.\textsuperscript{139} When Mr. Forrisi told his supervisor that he could not climb to certain heights because of acrophobia,\textsuperscript{140} he was told that he could not meet the job requirements.\textsuperscript{141} Mr. Forrisi insisted that he could do the work if DHHS would make some “adjustments to accommodate his fears.”\textsuperscript{142} Two months later, he was terminated by DHHS for being “medically unable to perform the full range of the duties of [his] position.”\textsuperscript{143}

Mr. Forrisi brought suit under section 505 of the Rehabilitation Act,\textsuperscript{144} alleging that he was regarded as a handicapped individual by DHHS even though he was not handicapped.\textsuperscript{145} The Fourth Circuit ruled that Mr. Forrisi failed to allege a prima facie case.\textsuperscript{146} Although his condition left him “incapable of satisfying the singular demands of a particular job,” the court found that he had not shown that his mental condition limited him in the major life activity of working.\textsuperscript{147} The court noted that “[t]he statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee’s impairment to foreclose generally the type of employment involved.”\textsuperscript{148} The court found for DHHS.\textsuperscript{149}

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\textsuperscript{137} 794 F.2d 931 (4th Cir. 1986).
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 933.
\textsuperscript{140} “Acrophobia” is defined as an abnormally intense fear of being in high places. WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 19 (2d ed. 1975).
\textsuperscript{141} Forrisi, 794 F.2d at 933.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} 29 U.S.C. \textsection 794(a) (1988).
\textsuperscript{145} Forrisi, 794 F.2d at 934.
\textsuperscript{146} The court of appeals affirmed a summary judgment for the employer. Id. at 932.
\textsuperscript{147} Id. at 935.
\textsuperscript{148} Id. (emphasis added).
\textsuperscript{149} Id. One commentator suggests that the ADA may be interpreted more broadly than the Fourth Circuit did in \textit{Forrisi}. He believes that “major life activity” under the ADA is meant to be more broadly defined than solely by reference to the workplace. PERRITT, supra note 38, at 26 n.14.
\end{flushright}
Just as Mr. Forrisi's Rehabilitation Act case foundered because he could not show that his fear of heights limited him in the major life activity of working, so too might many persons with behavioral disorders have difficulty in making such a showing under the ADA. A person with a phobic fear of flying, for instance, may have difficulty showing that his phobia substantially limits him in his particular job and in the entire class of jobs he is trained to do. Perhaps a flight attendant, for example, could make this showing. But would that person be able to meet the minimum requirements of the job? Because the ability to work while airborne is an essential function of the flight attendant's job description, such a person would probably not meet the minimum requirements. In essence, as long as the employer's requirements are job related, nondiscriminatory, and necessary for the business, the ADA does not require the employer to change them.150

3. Requirement That the Plaintiff Be Qualified for the Job

Under the ADA, a plaintiff must demonstrate that she is qualified for the position, with or without reasonable accommodation.151 Early versions of the ADA required a plaintiff to demonstrate that she is "otherwise qualified."152 The House Committee on the ADA wrote that "otherwise qualified" describes a person with a disability who meets all of an employer's job-related selection criteria except those that she cannot meet because of her disability, but which could be met with a reasonable accommodation.153 The Committee noted that the otherwise qualified person must then be offered the reasonable accommodation that would make the individual a "qualified individual with a disability."154 But Congress found the Rehabilitation Act's otherwise qualified requirement to be too controversial and deleted the word "otherwise" from the ADA.155 Thus, a plaintiff must be disabled, but not too disabled, to state a claim under the ADA.

If the plaintiff suffers from a social phobia or from an extreme reaction to stress and criticism, he or she may not qual-

151. Id. § 12112(b)(3), (5)(A)-(B).
153. Id.
154. Id.
155. See generally 3A LARSON & LARSON, supra note 37, § 108A.31(a).
ify for a job or for a particular class of jobs. In one Rehabilitation Act case, *Pesterfield v. Tennessee Valley Authority*, 156 the plaintiff demonstrated a disabling mental condition, but the court found him to be too disabled for the job. 157

In that case, Mr. Pesterfield was employed by the Tennessee Valley Authority (TVA) as an hourly construction worker. 158 An on-the-job injury left him unable to continue as a construction worker. 159 TVA's Rehabilitation Section found him temporary work as a tool room attendant, a largely sedentary position. 160 In the years following, TVA supervisors admonished him for tardiness, falling asleep on the job, failing to use tool checkout procedures, and being uncooperative and discourteous to coworkers. 161 Mr. Pesterfield complained of "nervousness and anxiety" related to what he perceived as harassment by his superiors. 162 He was hospitalized for five weeks of psychiatric treatment. 163 His psychiatrist reported 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. . . . 164

Based on the psychiatrist's report, TVA's doctor concluded that Mr. Pesterfield was unable to work safely and refused to clear him to return to work. 165 The doctor refused, however, to certify that the psychiatric condition was job related. 166 One month later, Mr. Pesterfield burst into the TVA doctor's office, swore at the doctor, and threatened to kill himself because of the doctor's decision. 167 Soon thereafter, TVA terminated him for medical reasons. 168

156. 941 F.2d 437 (6th Cir. 1991).
157. Id. at 443-44.
158. Id. at 438.
159. Id.
160. Id.
161. Id.
162. Id.
163. Id.
164. Id. at 439.
165. Id.
166. Id.
167. Id.
168. Id.
Although the trial court concluded that Mr. Pesterfield had a mental impairment that substantially limited his ability to work, it did not find him to be a "qualified handicapped person" because he was unable to perform the essential functions of his work.\textsuperscript{169}

The Sixth Circuit affirmed, noting that Mr. Pesterfield "was already working in the least stressful job at the plant," and 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."\textsuperscript{170} The court also found that Mr. Pesterfield failed to prove TVA's decision was based on discriminatory intent rather than on reasoned medical judgment that he could not be returned to work safely under any accommodation that TVA could make.\textsuperscript{171}

\textit{Pesterfield} teaches several lessons. First, conditions such as the one Mr. Pesterfield suffered are recognized as mental impairments under the Rehabilitation Act. Given that the ADA is to be built on Rehabilitation Act case law, Mr. Pesterfield's condition should be a mental impairment under the ADA. Second, given similar facts, a court might find no duty to accommodate if the employer has already placed the plaintiff in the least stressful job in the facility. Third, if the employer demonstrates any discriminatory intent in his treatment of the plaintiff, the employer is likely to be liable under the ADA.

Furthermore, if the plaintiff passes employer-established performance standards and performance reviews, the employer will have difficulty contending that the plaintiff is not qualified for the position. In \textit{Gillespie v. Derwinski},\textsuperscript{172} for example, Dianne Kent was a forty year old developmentally disabled woman employed by a Veterans Administration hospital laundry.\textsuperscript{173} Her experienced supervisor calmly corrected her when

\begin{footnotesize} \begin{itemize} \item \textsuperscript{169} \textit{Id.} at 441-42. The trial court noted that the "[p]laintiff's job of tool room attendant required at least the ability to get along with supervisors and coworkers. Given plaintiff's inability to tolerate even the slightest hint of rejection or criticism, it would be impossible for him to perform the essential functions of his work." \textit{Id.} \item \textsuperscript{170} \textit{Id.} at 442-44. \item \textsuperscript{171} \textit{Id.} at 443-44. \item \textsuperscript{172} 790 F. Supp. 1032 (E.D. Wash. 1991). \item \textsuperscript{173} \textit{Id.} at 1035. Plaintiff found employment through a special program for hiring persons with disabilities. She was mentally retarded and had an emotional disability. \textit{Id.}. \end{itemize} \end{footnotesize}
she did something wrong.\textsuperscript{174} Her supervisor reprimanded coworkers when they taunted Ms. Kent for being "retarded."\textsuperscript{175}

But after fifteen months, Ms. Kent's supervisor was replaced by an inexperienced person who failed to stop other workers from taunting Ms. Kent.\textsuperscript{176} The new supervisor also complained about Ms. Kent's general appearance and about her productivity levels, despite the fact that Ms. Kent had performed over 132\% of the work standard for her position.\textsuperscript{177} Further, performance evaluations indicated that Ms. Kent worked above the standards required for her position.\textsuperscript{178} Soon after the change of supervisors, Ms. Kent was hospitalized for a breakdown.\textsuperscript{179} She returned to work, but was later hospitalized after a confrontation with coworkers.\textsuperscript{180} She resigned and brought suit under the Rehabilitation Act.\textsuperscript{181}

The parties stipulated that Ms. Kent was a handicapped person; the question was whether she was otherwise qualified.\textsuperscript{182} The district court concluded that her strong performance ratings, her ability to perform at 132\% of the standard, and the fact that she posed no risk of injury to herself or her coworkers, led to no other conclusion but that she was otherwise qualified.\textsuperscript{183} The court reasoned that even if she was not otherwise qualified, had her second supervisor continued the soft approach to discipline that her first supervisor had used, Ms. Kent probably would have continued to be a productive employee.\textsuperscript{184} The court found that Ms. Kent had been constructively discharged and it ordered the hospital to reinstate her.\textsuperscript{185}

\textit{Pesterfield} and \textit{Gillespie} indicate that employer-established performance standards are given weight in evaluating whether a person with disabilities is qualified for a position. If a person

\textsuperscript{174} \textit{Id.} at 1035-36.
\textsuperscript{175} \textit{Id.} at 1036.
\textsuperscript{176} Plaintiff was subjected to comments such as "can't you work any faster than that?" The new supervisor also lectured the plaintiff on getting along with coworkers. \textit{Id.} at 1037.
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.} at 1039. She was given a fully successful rating for 1986-87 and 1987-88. \textit{Id.}
\textsuperscript{179} \textit{Id.} at 1038.
\textsuperscript{180} \textit{Id.} Despite her criticism of plaintiff, the new supervisor rated the plaintiff as fully satisfactory and fully successful in the following two years, respectively. \textit{Id.}
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.} at 1039.
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.} at 1040.
\textsuperscript{185} \textit{Id.} at 1041.
meets the standard and performs satisfactory work, the employer will have difficulty arguing that the person is not qualified for the position. On the other hand, there is a limit to the lengths an employer must go to demonstrate that a person is not qualified for a position. As Pesterfield shows, if the person cannot handle the least stressful position in the employer's business, courts are not likely to require further accommodation attempts.

4. Requirement That the Employer Provide a Reasonable Accommodation

An employer must make a reasonable accommodation to the known limitation of a qualified person with a disability unless the accommodation would cause an undue hardship on the operation of its business. But this requirement raises an interesting question. Would a social phobic, for example, be qualified for a sales position or a customer service job? The answer is likely dependent on the reasonable accommodation provided by the employer. Perhaps a person who fears criticism could be accommodated in a manner similar to the Gillespie accommodation—a soft approach to discipline and a conversational, instructive tone. Gillespie typifies the approach that employers should take in providing reasonable accommodations.

The plaintiff must satisfy the requirements listed above to state a prima facie case under the ADA. Once he has proved that he has an impairment, that the impairment substantially limits him in a major life activity, that he is qualified for the position sought with or without reasonable accommodation, and that he asked for a reasonable accommodation, the burden shifts to the defendant to challenge elements of the plaintiff's case or to assert any available defenses.

Although the Rehabilitation Act and its case law are the most analogous laws to the ADA, other federal and state statutes provide examples of accommodation of behavioral disorders. These statutes either provide disability coverage for persons with such disorders or prohibit discrimination against
such persons. 188 Although these cases provide little guidance on how the ADA should address behavioral disorders, they demonstrate some of the diverse situations in which such disorders arise in the workplace. More importantly, they suggest the possible impact that the ADA will have on the workplace. If fear of flying, agoraphobia, race phobia, and spider phobia have been presented as disabilities to courts under various state and federal statutes, they will surely be presented under the ADA. When they are, there will surely be two sides to the question of whether they should be disabilities under the ADA.

188. For instance, other federal laws provide examples of phobia cases that were pursued as disabilities. See, e.g., Turner v. Office of Personnel Management, 707 F.2d 1499, 1500 (D.C. Cir. 1983) (holding that the claimant who developed a psychophysiological gastrointestinal reaction and phobic fear of air travel, a mental illness as defined by the DSM-III-R, had been wrongly denied disability retirement because the U.S. government ignored the physical manifestation of his disease and ignored the fact that his phobia is classified as a mental illness by the DSM-III-R).


One very controversial workers' compensation case is the basis of the opening hypothetical in this Comment. In it, a 63-year old white female employee had been mugged by a young African American male while she performed a work-related errand. See Comp Lawyer Nets $450K, supra note 64. She developed a post-traumatic phobia of black males that required psychiatric care. Id. Allegedly, her phobia prevented her from working without a guarantee that she would not come in contact with black males. Id. Florida awarded her workers' compensation benefits for a work-related disability, and the award was affirmed per curiam by the Florida Court of Appeals. Id. This case also presents an interesting question for the ADA: Where is the line to be drawn between reasonable accommodation of impairment and violation of fellow employees' associational and civil rights? In other words, does the case simply elevate extreme forms of racism to favored legal status?

Finally, many states have antidiscrimination statutes, which may allow phobias as handicaps. See, e.g., OR. REV. STAT. § 659.425 (1991); WASH. REV. CODE § 49.60 (1992). In Leggett v. First Interstate Bank, 739 P.2d 1083 (Or. Ct. App. 1987), for example, the Oregon Court of Appeals assumed without deciding that spider phobia is a handicap under Oregon law. Id. at 1087. The court held that the plaintiff had not been terminated because of discrimination based on her spider phobia; rather, the plaintiff had been let go for nondiscriminatory reasons. Id. at 1087-88.
IV. CONSIDERATIONS OF PERSONS WITH BEHAVIORAL DISORDERS AND A PROPOSAL FOR ACTION

In some ways, the ADA's treatment of persons with physical disabilities is easier to predict than is its treatment of persons with mental disabilities. Generally speaking, we as a society are more cognizant of persons with physical impairments. Therefore, it is reasonable to expect that employers and courts react in a similar fashion. Section A discusses pragmatic considerations regarding persons with behavioral disorders. Section B suggests a plan for EEOC action.

A. Pragmatic Considerations

No discussion of mental impairments under the ADA should omit the real-world concerns of those who will work with and under the Act. By definition, two groups will be principally affected by Title I of the ADA—employees and employers.

From the employee's (or prospective employee's) standpoint, there may be an understandable reluctance to file a complaint with the EEOC or bring a lawsuit against the employer. The employee may feel that taking the employer to court will impair future employability, especially with the employer being sued. And, as one commentator observed about the Rehabilitation Act, many plaintiffs' disabilities bring on a social stigma that tends to isolate the plaintiffs from society.189 Plaintiffs may feel less inclined to endure the public scrutiny that a lawsuit might entail because of such isolation.190

Employers, on the other hand, may be concerned with whether the Act requires them to take affirmative action to hire persons with disabilities, and, if so, how they should comply. Employers must also consider the potentially significant costs of not complying with the ADA.191 Because the Act is relatively

190. Id.

new, plaintiffs may be waiting to file actions to test its scope.\textsuperscript{192} These concerns dictate that managers quickly grasp the ADA's requirements. 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 or employee 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.

Employers may want to avoid persons with anxiety disorders altogether. Employers might be informed about persons who are mentally retarded, but totally uninformed about persons with anxiety disorders and phobias. For example, most would agree that allowing an employee to take prescribed medications at specified intervals throughout the day is a reasonable accommodation, but what about the employee who refuses to take the medication? Can the employer be held liable? Must the employer supervise the taking of medication? What about the employee who poses no threat to others' safety while medicated, but is a direct threat when he fails to take his medication? Is accommodation required then? These are valid questions, and the answers are somewhat elusive.

Even a mental disability such as mental retardation is arguably easier to quantify and comprehend by a lay person than an anxiety disorder or disabling phobia. As one commentator suggests, "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."\textsuperscript{193} Reasonable accommodation alternatives for a mentally retarded employee are likely to be more readily available than for an employee with an anxiety disorder. For example, several organizations have literature and information telephone lines designed to assist employers in accommodating employees with classic mental impairments.\textsuperscript{194}

\textsuperscript{193} Perritt, supra note 38, at 8.
\textsuperscript{194} In the states of Washington, Idaho, Oregon, and Alaska, for example, information is available through the Northwest Disability Business Technical Assistance Center, P.O. Box 9046 Mailstop 6000, Olympia, WA 98507-9046.
But mental disabilities that involve anxiety disorders involve a more difficult assessment. Evaluating reasonable accommodation and undue hardship for these impairments puts parties and tribunals in the difficult position of deciding what kinds of job behaviors are acceptable in the workplace and when traditional standards of behavior must change.\(^{195}\)

Additionally, persons with anxiety disorders arguably suffer more severe and stigmatizing treatment by our society than those who suffer physical disabilities. We feel sorry for the amputee or the blind person, yet we often refer to the person suffering from a depressive neurosis as sick or crazy. Moreover, we may feel downright outraged at the caucasian woman who has a phobia so crippling that she is unable to work with African American men.

Beyond these outward feelings toward persons with disabilities, we may feel less inclined to help or to want to accommodate someone who looks fine from the outside, but who really suffers a debilitating mental illness. In other words, a person who is mentally retarded may exhibit characteristics that others recognize. In contrast, a person who suffers a depressive neurosis is likely to seem fine from outward appearances. Maybe we expect more from a person who appears normal and healthy than from one who is profoundly retarded. The discriminatory impact of such stereotypes is apparent.

Clearly, irrational fears and prejudices that result in discrimination are prohibited by the ADA. As one House Committee noted,

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One commentator offers the following examples of reasonable accommodations for persons with mental disabilities:

1. reduce noise levels by placing an employee in a smaller, more isolated area;
2. assign repetitive operations or a variety of tasks, depending on the employee's condition;
3. limit the number of people the employee must deal with;
4. provide supervision that is close, moderate, or minimal, depending on the employee;
5. ensure that lines of authority are well defined to reduce ambiguity; and
6. provide supervision that includes warm guidance or firm direction, depending on the employee.


a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under [the regarded as disabled] test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.196

Similarly, employers may not rely on such fears and prejudices in making reasonable accommodation and undue hardship decisions.

Moreover, an employer cannot base a refusal to accommodate on adverse coworker or customer reactions to the physical appearance of a person. Legislative history indicates a concern that acceptance by coworkers and customers is one barrier identified by sociologists that frequently results in employers excluding disabled persons.197 If employers cannot discriminate on this basis, it is reasonable to infer that the ADA will prohibit them from basing a refusal to accommodate on it.

Following similar reasoning, an employer should not be able to base a refusal to accommodate a mentally impaired person on the expected adverse reactions of his coworkers or customers. Nor should the employer be able to rely on such reactions when determining whether an undue hardship exists.198

Clearly, the ADA requires employers to examine the way they treat individuals with disabilities. Employers must take positive steps to ensure equality of opportunity and full participation for such individuals.199 Thus, traditional behavior norms cannot be relied on to segregate, classify, or exclude someone with a mental impairment. Traditional behavior norms can, however, make employers more aware of behavior disorders such as fear of flying, fear of AIDS, and fear of heights. After all, most of us have experienced these and simi-

197. Id.
198. For instance, the Equal Employment Advisory Council, a group representing business concerns, was concerned that "a person might exhibit bizarre behavior that is not the result of any mental impairment but is merely a personality trait. While customers might react negatively to that person or presume that he is mentally impaired, that reaction, and the employer's action in response, would not confer ADA coverage." See Business Groups Ask EEOC for More Flexibility, Guidance in Disability Rules, Daily Lab. Rep. (BNA) No. 98, at A-1 (May 21, 1991).
lar fears to varying degrees. We probably know people who refuse to fly or are leery about high places, and perhaps we suffer the same fears.

But how many of us have experienced race phobia, social phobia, or spider phobia? Behaviors such as these, which differ dramatically from those traditionally acceptable, could conceivably create a substantial impediment to the normal functioning of the workplace. The situation in Colorcraft Corp., Fuqua Industries, Inc. v. Jandrucko, from which this Comment's introductory hypothetical was taken, raises an additional problem, namely that accommodations of these disorders implicate policies and law beyond the ADA. Thus, perhaps race phobia should, for policy reasons, simply not be classified as a disability. After all, the ADA expressly excludes other conditions that would meet the technical definition of disability. Alternatively, even if race phobias qualify as disabilities, perhaps they should be treated as conditions that are not accommodated under the ADA on the grounds that not every trait causing others to react negatively will constitute a disability under the ADA. For instance, an employee may exhibit bizarre behavior in the form of a personality trait rather than a mental impairment; this employee will be unable to claim coverage under the ADA.

Thus, an employer and the fact-finder are presented with the problem of where to draw the line between behaviors that must be protected by the ADA and those that need not be. One commentator suggests that the EEOC should be the first to draw the line, then the courts will step in.

B. A Call for EEOC Action

Because employer scrutiny of those with hidden behavioral anomalies is likely to be worse than of persons with more obvious mental disorders or with physical disabilities, more protections are needed to put persons with hidden behavioral anomalies on par with the rest of the community of persons with disabilities. Those who suffer panic disorders or social phobia, for example, are likely to be treated more harshly if

200. PERRITT, supra note 38, at 8.
201. See Comp Lawyer Nets $450K, supra note 64; see also supra note 188.
202. See supra note 24 and accompanying text.
203. 29 C.F.R. pt. 1630 app. at 402-03 (1993); see supra note 40 and accompanying text.
204. PERRITT, supra note 38, at 8.
they seek an accommodation from their employers than are persons who are blind or in wheelchairs. The extra protections needed would recognize these and other perils of persons with hidden disorders.

On the other hand, too much protection could be counterproductive. For example, any accommodation granted to persons such as race phobics would have to be balanced against the burden on the civil rights of the race phobics' coworkers.

The ADA requires individualized examinations of disabilities and individualized treatment. A logical extension of such treatment is a system whereby those that have disorders more likely to be stereotyped and stigmatized get additional help from the Act.

Of course, one alternative is to do nothing and allow persons with behavioral disorders to bring their cases to court, one by one, relying on the statutory safeguards already contained in the ADA. This alternative would require plaintiffs to clear each of the hurdles discussed earlier in Part III. This solution, however, runs the risk of causing haphazard case results that may not protect the persons that the ADA intends to protect. This solution also has the potential, as some employers would suggest, to protect plaintiffs too well, thereby further eroding any right of the employers to be free of government interference in the workplace.

For example, haphazard case law development could result from courts attempting to legislate the question raised in this Comment's introductory hypothetical—that is, the proper boundary between an employee's right to nondiscrimination on the basis of her race phobia and her coworkers' civil rights of freedom of association and equal protection of the laws. The courts will have to deal with the inevitable clash between the ADA's requirement of individual treatment and the requirements of other federal laws, such as the Civil Rights Act or federal labor laws.

Haphazard results could also arise because Congress has excluded some recognized mental impairments from coverage under the Act. The crucial question remains open—whether

205. See 29 C.F.R. pt. 1630 app. at 403 (1993) (noting that whether an individual has a disability is not necessarily based on the impairment, but rather on the effect of that impairment on the individual).

206. See supra note 188. Although the case arose under Florida workers' compensation statutes, its facts are applicable to the ADA.
the ADA will be interpreted to include and protect all other conditions listed in the *DSM-III-R*. Haphazard results are likely to arise unless the courts recognize that persons with hidden behavioral disorders need as least as many of the protections of the ADA as persons with more apparent disabilities.

To prevent such haphazard results, the EEOC should take action. Two simple solutions present themselves: First, the EEOC should approve one or more of the commonly used classification systems for use by the courts in handling mental impairment cases. Second, the EEOC should formally recognize that persons with hidden disorders need more protection under the ADA.

EEOC could implement these solutions in a variety of ways. First, the EEOC could pass administrative rules to settle the question of which standards to use in determining whether an individual is mentally impaired. Rather than the courts relying on the *DSM-III-R* in some cases and not in others, the EEOC should study the problem and then decide whether conditions listed in the *DSM-III-R* will be accepted wholesale, or whether the agency will specify the particular conditions protected by the ADA. Even if the EEOC were to do nothing more than mandate that all disorders specified in the *DSM-III-R* (except those already excluded by the ADA) fit the definition of mental impairment under the Act, it would greatly improve the present state of the law.

Second, the EEOC could issue interpretive guidance that recognizes the issues surrounding persons with hidden anxiety disorders and phobias. Such guidance should provide clear instruction as to whether persons with hidden disorders will get additional help from the Act.

An alternative suggestion would be to have the EEOC issue interpretive guidance in the form of a framework for use by the courts in determining what behaviors are acceptable in the workplace. Such persuasive guidelines would provide assistance in the handling of claims under the ADA and would ameliorate public intolerance and stereotyping of those with latent or hidden disabilities. Moreover, both of these proposals for EEOC action would assist courts in establishing important ADA case law.
V. Conclusion

Because employer scrutiny of those with hidden behavioral anomalies is likely to be worse than employer scrutiny of persons with more obvious mental disorders or with physical disabilities, more accommodation is needed to put persons with hidden behavioral anomalies on a level playing field with the rest of the disabled community. Given that the ADA requires individualized examination of each disability and individualized treatment, a logical application is to give additional help to those who have disorders more likely to be stereotyped, misunderstood, and stigmatized, and less likely to be forgiven.

The EEOC could provide the solution by taking two measures. First, it should issue a rule on whether the *DSM-III-R* is to be used as the source to determine whether a particular condition is a mental impairment. Second, the EEOC should determine whether any additional disorders are to be excluded from the Act and whether persons with hidden disorders should receive any different treatment under the Act. Such interpretive guidance could go a long way toward helping the victims of public intolerance and stereotyping—and toward ensuring that employers know the rules.