New Protections for Persons with Mental Illness in the Workplace under the Americans with Disabilities Act of 1990

Janet Lowder Hamilton
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I. INTRODUCTION

The Americans with Disabilities Act of 1990\(^1\) (ADA) was signed by President Bush on July 26, 1990, a day heralded as “Liberation Day for the Disabled.”\(^2\) The legislation was designed to provide a clear and com-
prehensive national directive to end discrimination against individuals with disabilities and to provide enforceable standards addressing discrimination on the basis of disability in private employment, public accommodations, public services, transportation and telecommunications. Although the ADA arguably transforms the class of people with disabilities from one of the least protected groups to the most protected minority in our society, much of the legislation and the regulations are directed towards discrimination based on physical handicaps and removal of physical barriers. The most significant obstacles which persons with either physical or mental disabilities must face are not physical barriers, however, but are rather the attitudes and "stereotypic assumptions" held by society at large.

This is particularly true of individuals with mental illness, which constitutes probably the largest single group of disabled individuals, and one of the least vocal. Because of negative social attitudes, individuals with mild disorders hesitate to call attention to their condition, and "[t]he personal disorganization and defective social skills of the [more seriously mentally ill] themselves preclude their forming an effective pressure group in their own behalf . . . while their social marginality and dependency are likely to detract from whatever efforts they do make."

4 Titles II and III of the ADA deal with the provision of public transportation by public entities and private entities, respectively. ADA §§ 221-310, 42 U.S.C. §§ 12141-190. Title III additionally prohibits discrimination and mandates the removal or modification of physical and communication barriers in all places of public accommodation and, in fact, contains certain affirmative action requirements in retro-fitting existing buildings. ADA §§ 301-310, 42 U.S.C. §§ 12181-90. Title IV provides that all common carriers of interstate or intrastate telephone services must furnish telecommunication services which allow speech and hearing-impaired individuals to communicate with hearing people. ADA § 401, 47 U.S.C. § 225.
7 One study indicates that in 1983 there were approximately 1.07 million Americans living outside of institutions who considered themselves disabled by mental impairment. Howard H. Goldman & Ronald W. Manderscheid, Epidemiology of Psychiatric Disability, in PSYCHIATRIC DISABILITY 17 (Arthur Meyerson & Theodora Fine eds., 1987), citing RESEARCH IN COMMUNITY AND MENTAL HEALTH (James R. Greenley ed., 1983). According to 1984 figures, 827,000 chronically mentally ill adults were receiving SSI or SSDI payments. Presumably these figures represent the most disabled of the mentally ill. Id.
8 SOCIAL ORDER/MENTAL DISORDER 327 (Andrew Scull ed., 1989). This lack of advocacy on behalf of the mentally ill has turned around in recent years, however, with the almost geometric growth of the National Alliance for the Mentally Ill (NAMI), a group comprised of family members of individuals with mental illness which began in 1979. BERTRAM BLACK, WORK AND MENTAL ILLNESS 227-26 (1988).
In addition to limitations in speaking out for themselves, limitations in participation in society often occur because of the stigma attached to mental disorders. People qualified for jobs are not hired because of a history of psychiatric hospitalizations. Former mental patients are excluded from group living, in certain neighborhoods, by zoning ordinances enacted to keep them out. Individuals with mental illness systematically are placed at a disadvantage by their inability to participate in society, whether in the work setting, the neighborhood, or other settings.

The issue of employment of the mentally ill has become increasingly critical over the last decade as the general trend of deinstitutionalization has resulted in greater numbers of individuals with mental illness being maintained in the community, while at the same time government benefits have failed to keep pace with inflation. As one critic argues, the market system of resource allocation in our society fails to meet the most basic needs of housing, occupation and community for the mentally disabled. "The crisis is simply the crisis of the normal social order in relation to any of its members who lack the wage based ticket of entry into its palace of commodities." The purpose of this Note is to analyze the potential impact the ADA will have on this problem of employment discrimination against individuals disabled by mental illness.

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9 Cille Kennedy & Ernest M. Gruenberg, A Lexicology for the Consequences of Mental Disorders, in Psychiatric Disability (Arthur Meyerson & Theodora Fine eds., 1987).

10 See generally Ann Braden Johnson, Out of Bedlam (1990); Rael Isaac & Virginia Armat, Madness in the Streets 1-16 (1990). The population labeled "young chronics" has also increased. "Young chronics" are patients ranging in age from 18 to 35 who tend to be educated (over 90% are high school graduates and an estimated 36-68% have attended college). The employment needs of this population will be an important issue. Black, supra note 8 at 16.


12 Peter Sedgwick, Psycho Politics 239 (1982).

13 Id.

14 Although Title I and its prohibitions against discrimination by employers in the private sector will have the most dramatic impact on individuals with mental disability, the mentally impaired are equally protected by all provisions of the Act. For example, § 204(c) specifically states that any public transit entity must provide paratransit service for an individual with a disability who is unable, as a result of a physical or mental impairment, to board, ride or disembark without assistance. The phrase "mental impairment" was purposely included to ensure eligibility of the mentally retarded and the mentally ill for such services. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 1, at 28-29 (1990), reprinted in 1990 U.S.C.C.A.N. 267 [hereinafter H.R. Rep. (I)].
II. OVERVIEW OF EMPLOYMENT DISCRIMINATION UNDER TITLE I

The ADA is designed to complement and expand the protections provided by existing state and federal laws such as the Rehabilitation Act of 1973 and the Fair Housing Act Amendments of 1988, and incorporates the sanctions embodied in the Civil Rights Act of 1964. For example, the ADA extends employment rights to all employers with fifteen or more employees. The employment rights provided by Section 504 of the Rehabilitation Act of 1973 are limited to employers or public entities which receive federal funds. The rights provided by the ADA are also a broad expansion of the rights available to the disabled under the statutes of many states. The ADA provides that it shall not be construed as affording a lesser level of protection than that provided by the Rehabilitation Act nor does it preempt the "remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act."

The general rule set forth in Title I of the ADA states that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application...

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15 Pub. L. No. 93-112, 87 Stat. 355, 29 U.S.C. §§ 791 et seq. (1982 & Supp. V 1987). Title V of the Rehabilitation Act of 1973 was the first federal legislation to recognize employment rights of the disabled. Section 501 requires the federal government as an employer to take affirmative action in the hiring and promotion of handicapped individuals. Id. at § 791(b). Section 503 places a similar duty on employers who are involved in contracts with the federal government over $2500. Id. at § 793(a). Section 504, the most wide-reaching and heavily litigated provision of the act, prohibits among other things discrimination against disabled individuals solely on the basis of their handicaps in employment by or participation in any programs receiving federal funds. Id. at § 794.


19 See generally Ronald A. Lindsay, Discrimination Against the Disabled: The Impact of the New Federal Legislation, 15 EMPLOYEE RELATIONS L. J. 333, 335 (1989-90); Tucker, supra note 18, at 923 n.6; and Note, From Wanderers to Workers: A Survey of Federal and State Employment Rights of the Mentally Ill, 45 LAW AND CONTEMP. PROBS. 41, 44-46 (1983) for a survey of state employment rights.

20 ADA § 501(a), 42 U.S.C. § 12201(a).

21 ADA § 501(b), 42 U.S.C. § 12201(b); 29 C.F.R. app. § 1630.1 (b) and (c) (1991).
procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.\textsuperscript{22} Title I of the ADA extends the protections against employment discrimination currently provided by the Rehabilitation Act to all private employers with 25 or more employees two years following the date of enactment, and to employers with 15 or more employees four years after enactment.\textsuperscript{23} The Act is intended to ensure that individuals with disabilities are not excluded from jobs unless they are unable in fact to do the job.\textsuperscript{24} The House Labor Committee characterized the three major provisions of Title I which ensure that an individual is considered according to their actual ability to perform as:

Prohibiting disqualification of disabled applicants or employees because of their inability to perform marginal or non-essential functions of the job;

Requiring employers who utilize requirements or selection criteria which tend to exclude disabled individuals to demonstrate that such criteria are job-related or a business necessity; and

Requiring that employers make reasonable accommodation to aid disabled individuals in meeting legitimate criteria.\textsuperscript{25}

\textbf{A. Prohibited Conduct in General}

The ADA prohibits discrimination in virtually all aspects of employment, including "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."\textsuperscript{26} "Other terms, conditions and privileges of employment" include:

(a) Recruitment, advertising, and job application procedures;
(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
(c) Rates of pay or any other form of compensation and changes in compensation;
(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
(e) Leaves of absence, sick leave, or any other leave;
(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

\textsuperscript{22} ADA § 102(a), 42 U.S.C. § 12112(a).
\textsuperscript{26} ADA § 102(a), 42 U.S.C. § 12112(a).
(g) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;
(h) Activities sponsored by a covered entity including social and recreational programs;27

Disabled employees cannot be limited to certain occupational tracks28 nor can they be segregated in separate work or relaxation areas.29

The scope of prohibited conduct becomes apparent when the definition of "discrimination" as used in Title I is considered. Discrimination encompasses:

Limiting, segregating, or classifying job applicants or employees in ways that adversely affect their opportunities because of their disabilities;30
Participating in contracts or other arrangements or relationships that have the effect of subjecting qualified applicants or employees with disabilities to prohibited discrimination;31
Using standards, criteria, or administration methods that have the effect of discriminating on the basis of disability or that perpetuate the discrimination of others subject to common administrative control.32

Employers are further prohibited from excluding or otherwise denying equal jobs or benefits to qualified individuals because they are known to have a relationship or association with a disabled person.33 For example, an employer may not refuse to hire a person who has a disabled spouse or child because of fears that the individual may miss work because of the disabled relative. The employer is not required to make any accommodation for such an employee, however the non-disabled employee may be disciplined or dismissed if they violate neutral tardiness or attendance policies.34

The Act additionally prohibits an employer from discriminating on the basis of employee benefit plans.35 An employer may not deny a qualified individual employment because the employer's current insurance plan does not cover the individual's disability or the disability of a family member, or because of a desire to keep such an individual out of an experience-rated health insurance plan.36

28 29 C.F.R. § 1630.5 (1991)
29 Id.
31 ADA § 102(b)(2), 42 U.S.C. § 12112(b)(2). This provision includes relationships with employment or referral agencies, labor unions, fringe benefit provider organizations, and groups that provide training or apprenticeship programs; all services provided by these entities to employees of the covered entity must be accessible to disabled employees. H.R. REP. (III) at 37.
35 ADA § 102(a), 42 U.S.C. § 12112(a).
B. Pre-Employment Inquiry and Testing

The ADA allows employers to make pre-employment inquiries concerning an applicant's ability to perform essential functions of the job, but the employer may not specifically ask if an individual has a disability or what the nature or severity of any such disability might be. This is consistent with the regulations implementing section 504 and is an important protection for individuals with mental illness, since employers have routinely requested such information from applicants, and often use it to exclude individuals with disabilities before their capability of performing the job is even considered.

In *Doe v. Syracuse School District* the plaintiff was excluded from a job as a teacher's aide on the basis of a prior nervous breakdown when he was serving in the Air Force, despite the fact that the school district's doctors found him physically and mentally qualified for the position. The employer claimed that by asking the plaintiff about prior mental illness or prior treatment for mental illness, it was determining the plaintiff's present ability to perform the tasks of the position. The court stated that the employer could have permissibly inquired whether the applicant was capable of dealing with emotionally demanding situations; as the inquiry was phrased, however, it violated the purpose of the regulation.

An employer may also use physical and other job criteria or tests, but such criteria or tests must be job-related and consistent with business necessity if they screen out, or tend to screen out individuals with a disability. In addition to accurately reflecting job requirements, such tests or criteria must accurately measure the applicant or employee's job skills and aptitudes. The test cannot reflect the impaired sensory, man-

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37 For discussion of "essential functions," see infra notes 121-28 and accompanying text.

38 ADA §§ 102(d)(2)(A) and (B), 42 U.S.C. §§ 12112(d)(2)(A) and (B). Nor may an employer provide a checklist of disabilities and ask the applicant to check off any impairments he or she may have. 29 C.F.R. § 1630.14(a) (1991). An employer may, however, make direct inquiries into the existence or nature of disabilities if the employer is seeking to comply with an affirmative action requirement under the Rehabilitation Act, provided that the employer makes clear that the information is being used for such a purpose, that provision of the requested information is totally voluntary, and that the information will be kept confidential. S. Rep. at 40.


41 508 F. Supp. 333 (N.D.N.Y. 1981). The plaintiff was specifically asked if he had ever been treated for "migraine, neuralgia, nervous breakdown or psychiatric treatment." Id. at 335.

42 Id. at 335-37.

43 Id. at 337.

44 ADA § 102(b)(6), 42 U.S.C. § 12112(b)(6); 29 C.F.R. §§ 1630.7, 1630.10 (1991). "Business necessity" has the same meaning as under § 504 of the Rehabilitation Act: selection criteria which tend to discriminate but do not relate to an essential function of the job are not consistent with business necessity. 29 C.F.R. app. § 1630.10 (1991).

ual or speaking skills of the disabled person, unless that skill is the factor which the test purports to measure.\textsuperscript{46}

The ADA prohibits use of pre-employment medical exams or inquiries.\textsuperscript{47} The evaluation process allowed under the ADA parallels the process explained in the regulations implementing section 504 and assures that misconceptions and prejudices do not bias the selection process before the applicant's ability to do the job is assessed.\textsuperscript{48} As with tests and job criteria, the only legitimate pre-employment inquiry is that relating to the applicant's ability to perform specific job-related functions.\textsuperscript{49}

An employer is allowed to require a medical examination after an offer of employment has been made if the following conditions are met: all entering employees, regardless of disability, must be required to submit to such an exam, the information obtained from the exam must be treated confidentially as required by the Act, and the results of the exam must be used in accordance with Title I.\textsuperscript{50} The offer of employment may be conditioned upon the results of the post-offer examination if the position has certain physical or psychological requirements which can only be determined in such an exam.\textsuperscript{51} The limitations on the use of medical examinations are not intended to prevail over any legitimate medical requirements established by federal, state or local statutes.\textsuperscript{52}

\textbf{C. The Prima Facie Case and Burdens of Proof}

In order to establish a prima facie case of employment discrimination under the ADA, the plaintiff must prove that he suffers from a "disability" that is protected by the Act;\textsuperscript{53} that he is a "qualified individual" for the position in question;\textsuperscript{54} and that he has been discriminated against because

\textsuperscript{46} ADA § 102(b)(7), 42 U.S.C. § 12112(b)(7).
\textsuperscript{47} ADA § 102(d)(1), 42 U.S.C. § 12112(d)(1).
\textsuperscript{48} 29 C.F.R. § 1630.13(a), app. § 1630.13(a) (1991).
\textsuperscript{50} ADA § 102(d)(3), 42 U.S.C. § 12112(d)(3). The Act requires that information obtained regarding the medical condition or history of the applicant be maintained in separate files and treated confidentially, except that specific information may be revealed to supervisors and managers, first aid and safety personnel, and government officials investigating compliance with this Act. \textit{Id.} See also infra notes 228-30 and accompanying text. An employer may also conduct voluntary medical examinations as part of an employee health program provided at the worksite. ADA § 102(c)(4)(B), 42 U.S.C. § 12112(c)(4)(B).
\textsuperscript{51} 29 C.F.R. app. § 1630.14(b) (1991). If the exclusionary medical or psychological criteria screen out or tend to screen out disabled applicants, the criteria must be job related and consistent with business necessity, and there must be no reasonable accommodation which would allow the disabled individual to satisfactorily perform the job. \textit{Id.}
\textsuperscript{53} See infra section III.A.
\textsuperscript{54} See infra section III.B.
of his disability.\textsuperscript{55} Although the concept of discrimination includes the failure to "reasonably accommodate" the disabled individual, the duty to reasonably accommodate terminates at the point that "undue hardship" begins.\textsuperscript{56}

If a plaintiff establishes the existence of a covered disability and establishes that he is able to perform the essential functions of the position despite the disability and without accommodation, the burden will then shift to the employer to prove that the individual was not denied employment on the basis of the disability. If the plaintiff is not able to perform the essential functions of the position without accommodation, then the plaintiff must prove that a request for accommodation was made and that with such accommodation he would be able to perform the essential functions of the position. The employer must then prove either that reasonable accommodation would not enable the plaintiff to satisfactorily perform, or that provision of the reasonable accommodation would create an undue hardship on the employer.\textsuperscript{57}

The employer clearly has the burden of proof on the issue of undue hardship, but it is not clear who bears the burden on the issue of reasonable accommodation.\textsuperscript{58} The legislative history states that reasonable accommodation is generally triggered by a request from the disabled individual,\textsuperscript{59} and the regulations confirm that it is generally the responsibility of the disabled individual to inform the employer of the need for an accommodation.\textsuperscript{60} The employer has an affirmative obligation to provide a requested accommodation if it will enable the applicant or employee to perform the essential functions of the position and will not create undue hardship for the employer.\textsuperscript{61}

\textsuperscript{55} Compare the requirements to establish a prima facie case under the Rehabilitation Act: The "plaintiff must prove (1) that he is a 'handicapped individual' under the Act, (2) that he is 'otherwise qualified' for the position sought, (3) that he was excluded from the position sought solely by reason of his handicap, and (4) that the program or activity in question receives federal financial assistance." \textsuperscript{56}See discussion of reasonable accommodation and undue hardship \textit{infra} sections III.C and D.


\textsuperscript{58} The Second Circuit Court of Appeals discussed the allocation and order of burden of proof in § 504 cases in \textit{Doe v. N.Y. Univ.}, 666 F.2d 761, 776-77 (2d Cir. 1981). "[A] § 504 action frequently does not lend itself easily to the analysis used for allocation of burdens and order of presentation of proof used in suits alleging discrimination based on . . . race . . . [or] sex." \textit{Id.} at 776. In the typical suit under § 504, the employer admits reliance on the plaintiff's handicap in making its determination. The pivotal issue is therefore not whether the handicap was considered, but whether the consideration of the handicap in determining the individual's qualification was discriminatory. \textit{Id.}

\textsuperscript{59} \textit{H.R. Rep.} (II) at 65.

\textsuperscript{60} 29 C.F.R. app. § 1630.9 (1991).

\textsuperscript{61} \textit{ADA} § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A).
D. Disparate Impact and Intent

The ADA "incorporates a disparate impact standard to ensure that the legislative mandate to end discrimination does not ring hollow."62 "Disparate impact" is defined, for purposes of Title I, as uniformly applied criteria with "an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities."63 The legislature adopted the standard set forth in Alexander v. Choate64 in which the Supreme Court held that the Rehabilitation Act could not be construed to prohibit only intentionally discriminatory conduct.65 The Alexander court refused, however, to interpret § 504 to reach all action that had a disparate effect on the handicapped, holding that this would create an "unwieldy administrative and adjudicative burden."66

Although intent is not a necessary element under the ADA, it is unlikely that an employer will be liable for actions not specifically prohibited by the Act but which have a discriminatory impact of which the employer is unaware. An employer will, however, rarely be unaware of the discriminatory impact of his actions if the matter is properly raised under the ADA, since, in order to show discrimination under the ADA, an employee must prove that a request for reasonable accommodation was made and that the request was denied by the employer.67

III. Analysis of Specific Elements of Title I and Mental Disability

Federal officials estimate that at least 15 million adults will experience one or more of three types of severe mental illness - schizophrenia, manic-depressive disorders or major depression - in their lifetime, while one in four adults will suffer from one of a broader range of disorders, including anxiety disorders and personality problems.68 To understand the breadth of the class of individuals with mental illness who will be protected by Title I of the ADA, it is necessary to study judicial interpretation of similar concepts from section 504, particularly the terms "disability", "qualified individual", "essential functions" (of the position) and "reasonable accom-
The scope of the protections under the ADA becomes more clear in light of prior court decisions concerning these terms, because of the similarity of the requirements under section 504. Under the ADA, as under section 504, the "qualified individual" must be able to perform the "essential functions" of the position "with or without reasonable accommodation." Provision of reasonable accommodations is an affirmative duty under the ADA as well as under section 504. Likewise, under the ADA, if reasonable accommodation is requested, and such accommodation will permit an employee to perform the essential functions of the job, the employer is obligated to provide such accommodation or prove that to do so would be an "undue hardship." The language of section 504 is thus an essential starting point for interpretation of the impact of the ADA.

A. Psychiatric Illness as a Disability Under Title I

1. Definition of Disability Under the Act

"Disability," one of only three terms defined in the ADA for purposes of the entire Act, is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; ... a record of such an impairment; or ... being regarded as having such an impairment." The Senate Labor Committee Report states that this definition is to be interpreted consistently with the analysis of the definition of "individual with handicap" in the implementing regulations issued under the Rehabilitation Act of 1973, and by the regulations implementing the Fair Housing Act Amendments of 1988. Under the

69 Congress intended that the ADA regulations be comprehensive and clearly stated. The EEOC utilized case law interpretation of § 504 to develop regulations under the ADA which define terms not previously defined in the § 504 regulations, including "substantially limits," "essential functions" and "reasonable accommodation." Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 35,727 (1991).

70 ADA § 101(8), 42 U.S.C. § 12112(8).


72 ADA § 3, 42 U.S.C. § 12102. Other terms defined in this section include "auxiliary aids and services" and "state." Id.

73 ADA § 3(2), 42 U.S.C. § 12102(2).

74 S. REP. at 21.

75 "The use of the term 'disability' instead of 'handicap' ... represents an effort by the Committee to make use of up to date, currently accepted terminology ... Congress has been apprised of the fact that to many individuals with disabilities the terminology applied to them is a very significant and sensitive issue." S. REP. at 21. See also H.R. REP. (II) at 50-51.


77 24 C.F.R. § 100.301 (1989).
regulation issued by the EEOC, "mental impairment" includes "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 78 "Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 79 The substantial limitation of a major life activity is made by comparing the individual's performance with that achievable by the "average person in the general population." 80

Inclusion of "working" as a major life activity is an important provision of the ADA for individuals suffering from a mental disability. The types of problems which may be exhibited by the mentally ill and interfere with their ability to work, including attendance problems, behavior anomalies, inability to get along with others, and difficulties in dealing with stress, can be considered basic qualifications for the majority of employment situations, 81 thereby substantially limiting the individual in the major life activity of "working." In such cases it is important that the employee's conduct not be viewed separately from his disabling condition, if the behavior is in reality a symptom of the condition. 82

2. Psychiatric Illness as a Disability Generally

Mental illness, unlike physical disabilities which generally produce well-defined symptoms and effects, often manifests itself in vague and ill-defined ways, which make the determination of a disability troublesome. 83 Courts have acknowledged the difficulties in assessing psychiatric

81 In one study of a group of de-institutionalized psychiatric patients, the work performance of those who were employed was plagued by absenteeism, tardiness, low productivity and lack of motivation. Sue E. Estroff, Making it Crazy 2147 (1981). But see Black, supra note 8, at 15 (citing a study comparing two off-track betting parlors, one of which employed patients at a state psychiatric center. The study found "no difference in work performance, absence, tardiness, human relations, objectivity (relationship to supervisor), appearance, personality, or overall employee's rating" between the psychiatric patients and the employees at the identical center).
82 A study of employed persons with mental illness receiving treatment at a VA hospital found that employees who suffered from schizophrenia or anxiety disorders often had disturbed interpersonal relationships and functioned better when they were able to work with little direct personal interaction with other employees. Teresita Bacani-Oropilla, et al., Patients With Mental Disorders Who Work, 84 S. MED. J. 323, 325-26 (1991).
84 See generally Walter Neff, Vocational Rehabilitation in Perspective, in Vocational Rehabilitation of Persons with Prolonged Psychiatric Disorders 5, 6-7 (Jean A. Giardiello and Morris D. Bell eds., 1988).
evidence and testimony,84 which is largely based on subjective, non-physical data. The court's opinion in Doe v. Region 13 Mental Health-Mental Retardation Commission85 illustrates this difficulty:

This is not a case involving whether an employee is able to screw nuts and bolts onto a widget with sufficient speed. No such cut-and-dried factual proof is available when dealing with the "soft science" surrounding the health or affliction of an individual's psyche.86

Another problem encountered by courts in these cases is the challenge of distinguishing between conduct which is a result of the mental disability and generally unacceptable behavior.87 The regulations point out the importance of distinguishing between "common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or physical disorder."88

Although neither the ADA nor the regulations implementing Title I contain a list of impairments which qualify as disabilities,89 numerous mental impairments have been found by courts to qualify as handicaps under section 504, most of which will qualify under the ADA as well.90 These include manic-depressive disorder,91 schizophrenia,92 personality disorder,93 anxiety disorder,94 alcoholism,95 post traumatic stress disor-

84 See also JAY ZISKIN & DAVID FAUST, 1 COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 171 (4th ed., 1988) ("in light of current scientific evidence, there is no reason to consider [psychiatric and psychological expert] testimony as other than highly speculative").
85 704 F.2d 1402, reh'g denied, 709 F.2d 712 (5th Cir. 1983).
86 Id. at 1410. The court further notes that absolute deference to the psychiatric expert is not required, nor are they suggesting rubber stamp approval. "A sound, thorough record substantiating the expert's decision must be developed." Id. at 1410 n.8.
87 See supra notes 216-20 and accompanying text.
88 29 C.F.R. app. § 1630.2(h) (1991). See, e.g., Daley v. Koch, 892 F.2d 212 (2nd Cir. 1989) (significant personality traits which made plaintiff unsuitable for police work did not amount to an impairment under the Rehabilitation Act).
89 H.R. REP. (II) at 51 (it would be impossible to develop a comprehensive list of conditions that qualify as disabilities, especially since new disorders may develop in the future).
90 See section III.A.2 infra for psychiatric conditions specifically excluded from coverage under the ADA.
94 Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989).
For many clinicians, once a psychiatric diagnosis is established for a patient, the patient's disability is proven. In several cases brought under § 504, the courts have apparently accepted the existence of a psychiatric diagnosis alone as adequate to establish a handicap.\textsuperscript{99} It appears from the definition of mental impairment and from the appendix to the regulations that a psychiatric diagnosis is a prerequisite to a finding of a disability of mental illness;\textsuperscript{100} however, psychiatric diagnosis alone should not be considered conclusive evidence of disability. Such an approach would be, in the first instance, over-inclusive since it is estimated that more than 20% of the population suffers from some diagnosable psychiatric disorder.\textsuperscript{101} The system of assessment and diagnosis of mental illness, moreover, is far from exact. Clinicians utilize the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R),\textsuperscript{102} a system that one critic warns "is indeed hazardous to predicate judgments in legal matters upon diagnoses that arise out of what continues to be an inadequately researched and validated diagnostic system that is still in its early, developmental stages."\textsuperscript{103} Furthermore, the purpose of a finding of disability under the ADA and the purpose of a DSM diagnosis are not always consistent.

Courts have not always equated a psychiatric diagnosis with disability. In \textit{Forrisi v. Bowen},\textsuperscript{104} for example, the plaintiff was diagnosed with acrophobia (fear of heights) which, although it had never before interfered with any major life activities, prevented him from performing his duties as a utility systems repairer. The \textit{Forrisi} court, finding that his acrophobia was not a handicap for purposes of the Rehabilitation Act because it only prevented him from a small category of occupations, held that the task of determining who is handicapped under the Act must be an individualized inquiry of whether the impairment creates a significant barrier to

\begin{itemize}
  \item Guice-Mills v. Derwinski, 772 F. Supp. 188 (S.D.N.Y. 1991) (employee's major depressive episode was a handicap under the Rehabilitation Act).
  \item Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, reh'g denied, 709 F.2d 712 (5th Cir. 1983) (phobia of air travel, repeated suicidal episodes); Sites v. McKenzie, 423 F. Supp. 1190 (N.D.W.V. 1976).
  \item See, e.g., Blackwell v. United States Dep't of Treasury, 639 F. Supp. 289, 290 (D.D.C. 1986) (transvestitism is recognized by APA as a mental disorder, plaintiff is a handicapped person under the Rehabilitation Act); Guerriero, 557 F. Supp. at 513 ("The evidence . . . establishes \textit{prima facie} that plaintiff has a schizoid personality disorder and is an alcoholic; . . . either or both conditions can be regarded as handicapping conditions under the Act").
  \item 29 C.F.R. app. § 1630.2(h) (1991). [T]he definition [of mental impairment] does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or physical disorder." \textit{Id.}
  \item See, Larson, supra note 82, at 855-59; Black, supra note 8, at 9. In addition, the ADA specifically excludes some psychiatric diagnoses as disabilities. See infra section IV.B.
  \item \textit{Diagnostic and Statistical Manual of Mental Disorders} (3d ed. revised American Psychiatric Ass'n 1987).
  \item Ziskin & Faust, supra note 84.
  \item 794 F.2d 931 (4th Cir. 1986).
\end{itemize}
If the impairment excludes the individual from only the particular job in question, but not from employment in general, the impairment is not significant enough to be a substantial limitation of a major life activity. The court must consider not only the number and type of jobs which the individual is excluded from, but also the geographical area which is reasonably accessible to the individual, and the individual’s background, education and job expectations.

3. Psychiatric Impairments Excluded Under Title I

Several mental impairments, some of which were protected under the Rehabilitation Act of 1973, are specifically excluded from coverage under the ADA. These include all sexual behavior disorders, including transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, and gender identity disorders not resulting from physical impairments. Compulsive gambling, kleptomania, pyromania and psychoactive substance use disorders resulting from current use of illegal drugs are also excluded from coverage. Illegal drug users who are currently en-
gaged in the use of such substances are also specifically excluded from coverage under the ADA.\textsuperscript{114}

### B. Who is a Qualified Individual Under Title I

After the determination is made that a plaintiff has a disability covered by the ADA, the plaintiff must prove that he is qualified for the position in question. The definition of "qualified individual with a disability," which is specific to Title I of the ADA, is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires."\textsuperscript{115} This definition is expanded in the regulations to an individual "who satisfies the requisite skill, experience, education and other job-related requirements of the . . . position"\textsuperscript{116} and should be interpreted in the same manner as "otherwise qualified"\textsuperscript{117} has been construed for the purposes of § 504.\textsuperscript{118} The individual must meet the qualification standards established by the employer for the position.\textsuperscript{119} The definition is intended to prevent an employer from excluding an applicant or employee because of the inability to perform marginal job functions, rather than concentrating on the essential duties involved in the job.\textsuperscript{120}

#### 1. Essential Functions of Position

A qualified individual with a disability must be able to perform the "essential functions" of a position. "Essential functions" is defined by the EEOC in the regulations as "the fundamental job duties of the employment position."\textsuperscript{121} Title I states that 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.\textsuperscript{122} The criteria or tests which


\textsuperscript{115} ADA § 101(8), 42 U.S.C. § 12111(8).

\textsuperscript{116} 29 C.F.R. § 1630.2(m) (1991).

\textsuperscript{117} For a discussion of the meaning of "otherwise qualified" under the Rehabilitation Act, see Annotation, Who is "Qualified" Handicapped Person Protected from Employment Discrimination Under the Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.) and Regulations Promulgated Thereunder, 80 A.L.R. Fed. 830.

\textsuperscript{118} S. REP. at 26.

\textsuperscript{119} "Qualification standards" include personal and professional requirements of the position, such as educational requirements, experience, possession of requisite skills, and physical, medical and safety requirements which the employer requires for eligibility for the position. 29 C.F.R. § 1630.2(q) (1991).

\textsuperscript{120} H.R. REP. (II) at 55, H.R. REP. (III) at 33.

\textsuperscript{121} 29 C.F.R. § 1630.2(m) (1991).

\textsuperscript{122} ADA § 101(8), 42 U.S.C. § 12111(8). An amendment which would have created a legal presumption from such a written job description and thereby shifted the burden of proof to the plaintiff was rejected by the House. H.R. REP. (III) at 33-34.
an employer uses to determine qualification for essential functions are
valid only if they are "job-related and consistent with business neces-
sity." Furthermore, the term "essential function" encompasses only
the function, not the manner in which it is performed.

Although the essential functions of some jobs are self evident (for ex-
ample, the ability to drive is an essential function for a position as a
chauffeur), in many positions the determination is not clear. Aside
from the discussion in the ADA legislative history noted above, there is little
available interpretation of the definition of essential functions. The reg-
ulations under section 504 do not define the phrase, and it has infre-
quently been directly addressed by the courts. The regulations under
the ADA state that a function may be considered essential if the position
exists specifically to perform the function or the employee was hired
specifically for his or her expertise in performing the function, or if there
are a limited number of employees able to perform the function.

In Wimbley v. Bolger, the employee, disabled due to diabetes and
mental illness, was terminated because he failed to come to work. The
Wimbley court made the obvious determination that "one who does not
come to work cannot perform any of his job functions, essential or oth-
erwise." Wimbley illustrates the problem of deciding whether conduct
which is a symptom of the disability prevents the individual from per-
forming the essential functions.

\[123\] H.R. REP. (II) at 56. See Bentivegna v. Dep't of Labor, 694 F.2d 619 (9th Cir.
1982) (business necessity must not be confused with mere expediency).
\[124\] H.R. REP. (III) at 33 (the essential function involved in use of a computer
is entry and retrieval of information, not ability to use a traditional keyboard or
screen).
\[125\] See Tucker, supra note 18, at 902-04.
\[126\] See supra notes 122-24 and accompanying text.
\[127\] See, e.g., Hall v. United States Postal Serv., 857 F.2d 1073 (6th Cir. 1988)
(70 pound lifting requirement for a clerk's job was questionable as an essential
function when the plaintiff testified that she had never seen any clerk do any
heavy lifting); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983) (amount of
time devoted to a particular function is one factor, but not the only consideration
in determining whether the function is essential: it must also be determined
whether other employees are able to perform the functions that the disabled
employee is unable to perform).
\[128\] 29 C.F.R. § 1630.2(n) (1991). Whether a function is essential is a factual
determination, and evidence which should be considered includes the employer's
judgment as to what is essential, a written job description, the amount of time
spent performing the particular function, consequences to the employer of not
requiring the employee to perform the function, the terms of a collective bar-
gaining agreement, and the work experience of past or present employees in
similar jobs. Id.
\[130\] Id. at 485. See also Santiago v. Temple Univ., 739 F. Supp. 974 (E.D. Pa.
1990) (employee's inability to present himself at work in any predictable, constant
and scheduled manner due to intermittent eye inflammation not a handicap under
§ 501 the court would be forced to find every illness which prevented regular
work attendance to be a handicap); Lemere v. Burnley, 683 F. Supp. 275 (D.D.C.
1988) (employee's pattern of unscheduled absences over a two year period caused
her to lose her status as a "qualified handicapped employee").
\[131\] See supra notes 81-82 and accompanying text.
2. Need for Individualized Determination

Although the employers' judgment concerning the essential functions of a job will be given some deference, the determination of whether a mentally ill individual is qualified to carry out the essential functions of the position requires a detailed analysis of both the job tasks and the nature and extent of the individual's impairment.\(^{132}\) In School Bd. of Nassau County v. Arline,\(^{133}\) the Supreme Court concluded that in most cases, a determination of whether an individual is otherwise qualified will require an individualized inquiry and issuance of appropriate findings of fact on the part of the court.\(^{134}\) The purpose of this detailed investigation is to ensure that the employee is not rejected on the basis of prejudice or unfounded fears and at the same time ensure that the legitimate concerns of the employer are not ignored.\(^{135}\) Furthermore, "[i]n reality, attitudes toward impaired persons vary with the type and severity of impairments, and any one impairment affects productivity differently in different jobs."\(^{136}\) The diversity among impairments suggests that generalizations are not possible and that an individualized determination which looks at both the employee's current condition and past history, and the general requirements and hazards of the job is necessary.\(^{137}\)

3. Determination Must be Based on Present Qualifications

The determination of an individual's qualification for a position must be based on the individual's abilities at the time of the employment

\(^{132}\) S. REP. at 27. The EEOC reiterates this position in the appendix to the regulations. 29 C.F.R. app. § 1620.2(m) and (n).


\(^{134}\) Id. at 287. It is important to note that, although critics contend that the subjectivity of the definitions in the ADA and the need for individualized determinations will lead to extensive litigation, see, e.g., Lindsay, supra note 20, at 333-34; Letter to the editor by John Sloan, Jr., What's Wrong with the New Civil Rights Bill, WASH. POST, Sept. 2, 1989, at A23; Glen Elsasser, Senate OK's Rights Bill for Disabled, CHI. TRIB., Sept. 8, 1989, § 1, at 1, the characteristic of being disabled is not a static characteristic as is race or sex, and therefore mandates such an individualized determination.

\(^{135}\) Arline, 480 U.S. at 287. Although Arline dealt with an individual who suffered from a contagious disease, the case is a good analogy to mental illness since ignorance, incorrect assumptions and unfounded fears are common in both situations.


\(^{137}\) One author sets forth detailed guidelines for psychologists making determinations of "fitness-for-duty" of individuals with mental illness under the Rehabilitation Act and the ADA, which include "degree of disability; current condition; past medical and work histories; nature of the position in question; and nature, duration, immediacy, probability and severity of risk involved." Patricia Maffeo, Making Non-Discriminatory Fitness-for-Duty Decisions About Persons with Disabilities Under the Rehabilitation Act and the Americans with Disabilities Act, 16 AM. J.L. & MED. 279, 309 (1990).
action, and cannot rest on the employer's projections that the individual will become unable to perform and thus unqualified in the future, nor on the employer's concern about what is "best" for the disabled person. The risk of danger to the health or safety of others or to property is an exception to the "presently qualified" requirement, however, and is a legitimate basis for determining that an individual is not qualified.

C. Reasonable Accommodation

Although the ADA sets forth a non-exhaustive list of reasonable accommodations, the term "reasonable accommodation" is not defined in the Act. This list of reasonable accommodations includes altering existing facilities to make them accessible to disabled employees, job restructuring, job reassignment, modification of work schedules, acquisition of equipment, modification of existing equipment or devices, providing readers or interpreters, and altering examinations, training materials or policies. The regulations define reasonable accommodation as:

Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

The duty to make reasonable accommodation applies to all employment decisions, and the determination of whether a reasonable accommodation is appropriate is an individualized fact-specific determination.
The regulations state that in order to determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.\textsuperscript{146}

The House Labor Committee report explains in detail employer obligations in regard to reasonable accommodation.\textsuperscript{147} The employer must notify all applicants and employees of its obligation under the ADA to make such reasonable accommodations.\textsuperscript{148} The duty to accommodate is generally triggered by a request from the disabled individual; if an applicant has an obvious disability which he has not identified it is not clear if the employer can raise the subject of reasonable accommodation.\textsuperscript{149} In the absence of a request for accommodation, it would be inappropriate to provide any accommodation, especially where it would impact adversely on the individual.\textsuperscript{150} An accommodation need not be provided if the individual is not otherwise qualified or if the accommodation will not enable the individual to perform the essential functions of the job.\textsuperscript{151}

Although many of the accommodations listed in the Act are directed towards individuals with physical disabilities, courts have identified job restructuring and reassignment as reasonable methods of accommodating employees with mental illness.\textsuperscript{152} Job restructuring may include elimination of non-essential functions of the job, modification of procedures,
delegation of particular assignments or duties to another employee, or exchange of assignments with another employee. Courts have held that, under the Rehabilitation Act of 1973, an employer need not accommodate an employee by eliminating one of the essential functions of the job. However modification of job requirements such as eliminating contact with the public, providing a low stress work environment, eliminating distractions, or modifying schedules to allow time off for therapy are all examples of job restructuring which could be utilized as appropriate accommodations for an employee with a mental disability. Costs for these types of accommodations may be difficult to assess, but are likely to be minimal.

An employee may also be accommodated by reassignment to a vacant position if the employee can no longer perform the essential functions of his current job, although the employer should first try to accommodate the employee in the position he was hired to fill. Reassignment is not available as an accommodation for applicants, and reassignment may not be made to a lower graded position unless there are no accommodations available to enable the employee to remain in the current position and

- Oriented co-workers, supervisors - 47.4%
- Reassigned tasks - 22.8%
- Transferred to another job - 21.1%
- Modified work hours - 15.8%
- Other modification of work procedure - 15.8%
- Additional training - 14.0%


Accommodations for the mentally disabled “might be as minor and inexpensive as providing more frequent breaks or quieter work areas.” Milt Freudenheim, New Law to Bring Wider Job Rights for Mentally Ill, N.Y. TIMES, Sept. 23, 1991, at A1. See also Laura L. Mancuso, Reasonable Accommodation for Workers With Psychiatric Disabilities, 14 PSYCHOSOCIAL REHAB. J., October 1990, at 3 (thorough analysis of reasonable accommodations for persons with mental illness).

Collignon, supra note 152, at 226-27. Fifty percent of accommodations made for individuals with mental or emotional disability were at no cost, another twenty-nine percent were made at a cost of $499 or less.

there are no equivalent positions available. Use of reassignment as an accommodation may be significantly limited, however, by the existence of a collective bargaining agreement. If the ADA is to be interpreted consistently with the manner in which Rehabilitation Act regulations have already been interpreted, reassignment in violation of an existing collective bargaining agreement will be prohibited unless the agreement itself has the effect or intent of discrimination.

D. Employer Defenses

1. Undue Hardship

Proof of "undue hardship" relieves an employer from the obligation to provide accommodation under the ADA. The ADA does not precisely define undue hardship; rather it states generally that undue hardship "means an action requiring significant difficulty or expense, when considered in the light of the factors set forth in subparagraph (B)." The factors to be considered in determining if an accommodation amounts to undue hardship are:

a. the size and overall financial resources of both the individual facility and the covered entity,

b. the type of operation of the business, and

c. the nature and cost of the accommodation needed.

The House Judiciary Committee rejected an amendment which would have set a cap on the cost of reasonable accommodation at ten per cent (10%) of the employee's salary as a per se undue hardship and adopted

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159 An employer cannot use a collective bargaining agreement to accomplish what it could not otherwise do under the ADA. H.R. REP. (II) at 63. See also S. REP at 32. The Senate states that the collective bargaining agreement could be relevant in determining whether a given accommodation is reasonable. It also recommends that collective bargaining agreements contain a clause allowing an employer to take whatever actions are necessary to comply with the ADA. Id. The House Labor report states that the collective bargaining agreement "would not be determinative on the issue." H.R. REP. (II) at 63.
160 Case law under § 504 has almost always upheld violation of a collective bargaining agreement as a defense against reasonable accommodation. See, e.g., Shea v. Tisch, 870 F.2d 786, 790 (1st Cir. 1989) (employee suffering from an anxiety disorder need not be accommodated by employer under § 504 by reassignment to a position in violation of an existing collective bargaining agreement); Carter v. Tisch, 822 F.2d 465, 469 (4th Cir. 1987) (duty to accommodate "would not defeat the provisions of a collective bargaining agreement unless it could be shown that the agreement had the effect or the intent of discrimination").
the "flexible approach" utilized in the regulations implementing §§ 501 and 504 of the Rehabilitation Act.\textsuperscript{165}

The Judiciary Committee cites favorably\textsuperscript{166} the approach of the district court in \textit{Nelson v. Thornburgh}\textsuperscript{167} which held that, despite the substantial costs of providing materials for blind employees, the costs represented only a small fraction of the employer agency's budget and therefore did not constitute an undue hardship. The court, however, noted that the same accommodations may constitute an undue hardship for a smaller employer. The concept of undue hardship is further explained in the legislative history as requiring more than the \textit{de minimis} approach used by the Court in \textit{TWA v. Hardison}\textsuperscript{168} and as a much higher standard than the "readily achievable" standard applied to the duty to remove physical barriers in existing buildings in Title III of the ADA.\textsuperscript{169}

Availability of other resources to pay for an accommodation must also be considered. An employer may not use the defense of undue hardship if an employee is willing to pay for the necessary accommodation or if an agency such as a state vocational rehabilitation agency is willing to fund all or part of the accommodation.\textsuperscript{170} The employer must pay for the portion

\textsuperscript{165} See H.R. REP. (III) at 40. See also S. REP. at 36. But see Comment, \textit{supra} note 164, at 1011. The author argues that this flexible approach is unworkable since the definition of undue hardship and the factors to be considered in the § 504 regulations fail to specify how such factors are to be weighted and assessed, or how much hardship is "undue." "Rather than provide a clear criterion for decision by designating some limit on the burden that may be imposed on employers, 'undue hardship' seems in practice to have served simply as a label for accommodations that courts have refused to require in particular cases." Id.

\textsuperscript{166} H.R. REP. (III) at 41.


\textsuperscript{168} 432 U.S. 63 (1977) (requiring employer to bear more than \textit{de minimis} cost to accommodate the employee's religion would be an undue hardship).

\textsuperscript{169} ADA § 301(9), 42 U.S.C. § 12181(9). "Readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense." H.R. REP. (III) at 40.

\textsuperscript{170} 29 C.F.R. app. § 1630.2(p) (1991). The employer should also take into consideration tax credits available. \textit{Id.} For example, § 190 of the Internal Revenue Code currently allows tax deductions of up to $15,000 (reduced from $35,000 for tax years after 1990) for the costs of removing architectural barriers. I.R.C. § 190 (CCH 1990). The Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990) creates a disabled "access" tax credit of up to $5,125 for small businesses for removal of architectural barriers and for provision of readers, interpreters and equipment for hearing or sight impaired employees. \textit{Id.} at § 11611. This Act also extends for one year, until December 31, 1991, the targeted jobs credit for disabled workers, which gives a tax credit of up to $6,000 for forty percent of the employee's wages. \textit{Id.} at § 11405.
of the accommodation which would not otherwise amount to undue hardship. The regulations make it clear that an employer has an affirmative obligation to seek outside funding for an accommodation, and that only the portion of the cost of the accommodation which cannot be recovered can be considered when making a determination of undue hardship. It is not clear, however, what would happen if a disabled employee is hired with such supplemental funding for an accommodation, and the funding source terminated payment.

Aside from cost of accommodation, an employer can claim undue hardship if the accommodation would be "unduly disruptive to its other employees or to the functioning of its business" but not if the disruption is caused by the apprehensions or prejudices of the other employees to the individual's disability.

2. "Job-related" or "Business Necessity" Defense

The general defense provided to employers by the ADA reads:

It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

It is evident from the legislative history and the regulations that an employer may use neutral qualification standards, tests or selection criteria, despite any disparate impact on the disabled, if such criteria measure the ability to perform essential functions of the job. However, even if the criteria are legitimate, the employer must still determine if reasonable accommodation would allow the disabled individual to perform adequately. Some policies, such as leave policies or conditions excluded from employer provided health benefits, which may have a disparate impact on the disabled, cannot be challenged under the disparate impact theory as long as the policies are not strategies to evade the purposes of Title I.

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172 Id.
174 Id.
175 ADA § 103(a), 42 U.S.C. § 12113(a).
177 29 C.F.R. app. § 1630.15(b) and (c) (1991).
178 29 C.F.R. app. § 1630.5, 1630.15(b) and (c) (1991). The regulations use an example of a policy of no leave for the first six months of employment as a type of policy which cannot be challenged because of adverse impact on the disabled. 29 C.F.R. app. § 1630.15(b) and (c) (1991). The employer may have to consider allowing leave during that time period as reasonable accommodation, however. Id.
3. Safety Defense

A defense which may have a significant impact on persons with mental illness is the safety defense. The ADA allows exclusion of a disabled employee who currently poses a direct threat to the health or safety of other individuals in the workplace.\(^{179}\) Originally drafted to include only employees with contagious disease, the provision containing the safety defense was amended to encompass all employees who may constitute a risk. One of the reasons given for this amendment was concern about "dangerous or unbalanced workers threatening co-workers."\(^{180}\) The legislative history and the regulations clearly show that the defense will not be allowed on the basis of abstract, unsubstantiated fears of potential dangerous behavior,\(^{181}\) nor may the employer deny employment when there is only a slightly increased risk of harm.\(^{182}\)

The term "direct threat" is defined in the ADA as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation"\(^{183}\) and is intended to embrace the full standard set forth in the Supreme Court’s decision in *School Bd. of Nassau County v. Arline.*\(^{184}\) The Arline Court held that in making the determination of whether an individual with a contagious disease posed a direct threat the employer must consider the nature of the risk, the severity of the

\(^{179}\) ADA § 103(b), 42 U.S.C. § 12113(b). The statute specifically states that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." Id.

\(^{180}\) H.R. REP. (III) at 92 (dissenting view of Hon. Chuck Douglas).

\(^{181}\) S. REP. at 27; H.R. REP. (II) at 76.


\(^{183}\) 480 U.S. 273, reh'g denied, 481 U.S. 1024 (1987); H.R. REP. (II) at 76.

\(^{184}\) 480 U.S. 273, reh'g denied, 481 U.S. 1024 (1987); H.R. REP. (II) at 76.
risk and the likelihood of harm to others.\textsuperscript{186} The risk of harm cannot be speculative or remote.\textsuperscript{186} In \textit{Mantolete v. Bolger},\textsuperscript{187} a case involving an individual disabled by epilepsy, the court used the standard of "a reasonable probability of substantial harm."\textsuperscript{188} The determination "must rely on objective, factual evidence" — not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes — about the nature or effect of a particular disability.\textsuperscript{189}

The employer carries the burden of proof on the issue of safety, and must identify the specific risk presented by the individual.\textsuperscript{190} For individuals with mental illness, the employer must identify the specific behavior that poses the threat.\textsuperscript{191} The employer must also prove that reasonable accommodation would not eliminate the threat, or that such accommodation would impose an undue hardship on the employer.\textsuperscript{192}

\section*{E. Insurance Issues}

Health insurance has been developing into an increasingly important issue for individuals suffering from mental illness because of escalating cutbacks in mental health benefits and the variance between benefits provided for physical and mental illnesses.\textsuperscript{193} Cases brought under the Rehabilitation Act challenging these discrepancies have consistently held that employers need not provide coverage for mental illness equivalent to that provided for physical illness as long as all employees or insureds are treated equally.\textsuperscript{194} The ADA is to be interpreted consistently with

\begin{itemize}
  \item \textsuperscript{186} \textit{Arline}, 480 U.S. at 288. Compare the Supreme Court's standards with those proposed in Alexander D. Brooks, \textit{Defining the Dangerousness of the Mentally Ill: Involuntary Civil Commitment}, in \textit{MENTALLY ILL OFFENDERS} 230 (Michael Craft & Ann Craft eds., 1984) (nature, magnitude, imminence, frequency of harm, likelihood of harm, surrounding circumstances, and balancing the nature of the alleged harm with the proposed intervention).
  \item \textsuperscript{187} \textit{Arline}, 480 U.S. at 288.
  \item \textsuperscript{188} 767 F.2d 1416 (9th Cir. 1985).
  \item \textsuperscript{189} \textit{Id} at 1422.
  \item \textsuperscript{190} 29 C.F.R. app. § 1630.2(r) (1991).
  \item \textsuperscript{191} \textit{Id}.
  \item \textsuperscript{192} \textit{Id}.
  \item \textsuperscript{193} Stephan Haimowitz, \textit{Americans With Disabilities Act of 1990: Its Significance for People With Mental Illness}, 42 Hosp. & Comm. Psy. 23 (1991). While health care costs overall have increased 12% to 20% per year in recent years, a recent survey of employers with more than 5000 employees by A. Foster Higgins & Co., Inc. showed an increase in the cost of mental health benefits of 47% in 1989. Linda Williams, \textit{Getting Therapy for the High Cost of Mental Health Benefits}, L.A. TIMES, Aug. 5, 1990, at D1.
  \item \textsuperscript{194} Alexander v. Choate, 469 U.S. 287 (1985) (holding that the state is not required under the Rehabilitation Act to assure the handicapped adequate health care by providing them with more coverage than the nonhandicapped); Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979) (finding that the mentally ill were not a suspect class and that plaintiff was therefore unlikely to succeed on the merits of his claim that limitations on state benefits for private psychiatric hospitalization violated the Rehabilitation Act and equal protection); Doe v. Devine, 545 F. Supp. 576 (D.D.C. 1982) (federal agency's legitimate interest in reducing program costs was sufficient basis for reduction of mental health benefits to its employees and did not violate the Rehabilitation Act).
\end{itemize}
these cases. Employers may limit coverage for or exclude certain conditions, but the limitation or exclusion must apply to all employees with or without disabilities.\textsuperscript{195}

Notwithstanding the fact that Title I prohibits discrimination on the basis of employee benefit plans,\textsuperscript{196} section 501(c) of the ADA allows employers to continue to provide benefits consistent with their current practices if: any exclusions or limitations from coverage are based on the terms of a bona fide benefit plan; the terms are based on underwriting risks, classifying risks or administering such risks and; the benefit plan provisions are not used as a subterfuge to evade the provisions of Title I of the ADA.\textsuperscript{197} The purpose of section 501(c) ensure that the ADA will not disrupt current underwriting practices or the current regulatory structure for self-insured employers.\textsuperscript{198} Employers and insurers are prohibited from denying insurance or providing insurance with different terms or conditions to an individual with a disability if the disability does not pose increased risks.\textsuperscript{199} An employer may not deny a qualified individual employment because the employer's current insurance plan does not include the individual's disability or because of the increased cost of insurance because of the disability.\textsuperscript{200}

\section*{F. Enforcement and Remedies}

The ADA incorporates by reference the powers, procedures and remedial provisions of Title VII of the Civil Rights Act of 1964.\textsuperscript{201} The intent of the legislators was that the enforcement procedures and remedies available to individuals subjected to disability-based discrimination be the same as those available to persons discriminated against on the basis of sex, race, religion or national origin.\textsuperscript{202} By incorporating the provisions of the Civil Rights Act by reference, the ADA will reflect any future

\begin{footnotesize}
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\item 195 \textsuperscript{20} 29 C.F.R. app. § 1630.5 (1991).
\item 196 ADA § 102(a), 42 U.S.C. § 12112(a).
\item 197 ADA § 501(c), 42 U.S.C. § 12201(c).
\item 198 S. Rep. at 84-85.
\item 200 S. Rep. at 85. The Rehabilitation Act fails to specify rules for risk classification equivalent to § 501(c) of the ADA. Employers who are also governed by the Rehabilitation Act apparently will not be able to take advantage of these special benefit rules. Cheryl D. Fells, \textit{Employee Benefit Plan Implications of the Americans with Disabilities Act, in Employer Compliance with the Americans with Disabilities Act} (Practising Law Institute 1990).
\end{itemize}
\end{footnotesize}
amendments to Title VII.\textsuperscript{203} Under the ADA, a successful plaintiff will be entitled to injunctive relief, reinstatement, and/or back pay, and, in cases of intentional discrimination, punitive and compensatory damages up to certain limits. Attorney’s fees and costs may be awarded at the court’s discretion.\textsuperscript{204}

Current Title VII procedures are in two stages. Individuals who claim that they have been discriminated against must first file a charge with the state agency having jurisdiction over the claim, and thereafter may file a claim with the EEOC. The time limitation for filing with the EEOC is 300 days from the date of the discriminatory action or discharge or within 30 days of the termination of the state or local proceeding, whichever is earlier.\textsuperscript{205} If no state agency exists which has jurisdiction over the claim, the charge must be filed directly with the EEOC within 180 days of the incident.\textsuperscript{206} The EEOC then has 180 days to investigate and either

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which was signed by President Bush on November 21, 1991, amended Title VII and thereby also applies to discrimination under the ADA. The Civil Rights Act of 1991 authorizes jury trials and, in addition to the back pay and other relief authorized by § 706(g) of the Civil Rights Act of 1964, provides for recovery of compensatory damages for punitive damages and future pecuniary losses, emotional pain and suffering and other nonpecuniary losses in case of intentional discrimination, except when the employer demonstrates that good faith efforts were made in consultation with the individual with a disability to identify and make reasonable accommodation. \textit{Id.} at § 102(a)(3). The Act also extends that statute of limitations for filing charges of discrimination with the EEOC. \textit{Id.} at § 114.

\textsuperscript{203} H.R. REP. (III) at 48. An attempt to incorporate the actual wording from Title VII to freeze the remedies available under the ADA was rejected as “antithetical to the purpose of the ADA - to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women.” \textit{Id.}

\textsuperscript{204} ADA § 505, 42 U.S.C. § 12205. Litigation expense is mentioned apart from costs and is specifically intended to include the costs of experts and the preparation of exhibits. “Prevailing party” shall be interpreted consistently with other civil rights laws. Plaintiffs are not to be assessed the attorney’s fees of the opponents unless the court finds that the plaintiff’s claim was frivolous. H.R. REP. (II) at 140.


\textsuperscript{206} 42 U.S.C. § 2000e-5(e) (1982). The Supreme Court, in \textit{Independ. Fed’n of Flight Attendants v. Zipes}, 491 U.S. 754 (1989) held that the time limitation on filing with the EEOC in cases involving private employers is “not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations is subject to waiver, estoppel and equitable tolling.” Several cases have addressed whether the existence of a mental disability tolls the 30 day filing limitation. \textit{See, e.g.}, \textit{Kien v. U.S.}, 749 F. Supp. 286 (D.D.C. 1990) (plaintiff’s borderline personality disorder did not prevent him from comprehending his legal rights and did not equitably toll the time period for appealing EEOC’s decision); \textit{McElrath v. Kemp}, 714 F. Supp. 23 (D.D.C. 1989) (court deemed administrative complaint constructively filed by chronic alcoholic who was too confused to comply with the administrative requirements of the Rehabilitation Act).
seek a conciliation agreement from the employer, to file suit on behalf of
the charging party,\textsuperscript{207} or to issue a determination and/or a right to sue
letter which allows the party to file suit individually in federal court
within 90 days from the receipt of the letter.\textsuperscript{208} EEOC procedures must
be exhausted as a prerequisite to filing suit, as required under Title VII.\textsuperscript{209}

IV. SPECIAL PROBLEMS UNDER TITLE I FOR
PERSONS WITH MENTAL ILLNESS

The general concepts under Title I which have been analyzed create
some special difficulties when applied to employees with mental disabili-
ties. The most significant of such problems are discussed in the following
sections.

A. Knowledge of the Disability

The duty to accommodate arises only in situations where the employer
knows of the existence of the disability, and such accommodation is gen-
erally at the request of the disabled individual.\textsuperscript{210} Persons with mental
illness are hesitant to make their disability known because of the stigma
attached\textsuperscript{211} and are often reluctant to seek help.\textsuperscript{212} Since mental illness
is a “hidden handicap” which in most cases is not readily detectable by
an employer as are many physical disabilities, and because the act pro-
hibits pre-employment inquiry regarding such disabilities, making a
mental disability known if accommodation is needed becomes an impor-
tant issue for an individual with such a disability. This was demonstrated
in \textit{Schmidt v. Bell},\textsuperscript{213} in which the plaintiff, who suffered from both phys-
ical and mental disabilities as a result of his service in Vietnam, was
terminated from his position as a student loan collector in part because
of his difficulty in accepting supervision and his conflicts in dealing with
several clients.\textsuperscript{214} The employer successfully argued that, although aware
of plaintiff’s physical handicap, it was unaware of and thus had no duty
to accommodate plaintiff’s mental disability of post-traumatic stress dis-

\textsuperscript{207} 42 U.S.C. \textsection 2000e-5(b).
\textsuperscript{208} \textit{Id.} \textsection 2000e-5(f)(1).
\textsuperscript{209} \textit{H.R. Rep. (II) at 49.}
\textsuperscript{210} 29 C.F.R. app. \textsection 1630.9 (1991). In the absence of such a request, an accom-
modation should not be offered.
\textsuperscript{211} \textit{See generally} Freudenheim, \textit{supra} note 155.
\textsuperscript{212} \textit{Id.}; Jan Larson, \textit{Treating the Whole Worker at Westinghouse, AMERICAN
DEMOGRAPHICS,} June, 1991, at 32 (1988 study of almost 2,000 employees showed
that few people recognized their own mental health problems and even fewer
would seek help).
\textsuperscript{214} \textit{Id.} at 841.
order. A person with mental illness, particularly in its milder forms, is thus faced with a difficult choice of making their psychiatric condition public or foregoing the protections of the ADA.

B. Conduct vs. Disability

One of the most difficult aspects of determining the disability of an individual with mental illness is separating the person's conduct from their impairment. Unlike an individual with a physical disability which creates obvious, circumscribed limitations on his abilities, psychiatric impairments generally manifest themselves in inappropriate behaviors. It is often difficult to determine with certainty which behaviors are in fact a manifestation of the mental illness. Only those inappropriate or abnormal behaviors which result from the mental illness need be reasonably accommodated—therefore it is important to distinguish these from unrelated behaviors which prohibit satisfactory job performance. This may be an impossible task, and the courts have reflected this difficulty in cases brought under § 504 finding that dismissal on the basis of the employee's conduct, even if such conduct resulted from the mental illness, was justified.

Id. at 845-46. The court did not decide the case on this issue, however, since the plaintiff was not "otherwise qualified," even if reasonable accommodation were provided.

ZISKIN & FAUST, supra note 103 states:

"Some of the commonest problems in rehabilitation [of individuals with mental illness] are concerned with lethargy, and unacceptable behavior, lack of awareness of handicaps and disturbance in social relationships." BLACK, supra note 8, at 12 (quoting Royal College of Psychiatrists, Psychiatric Rehabilitation in the 1980s (1980)).

See cases cited infra note 219. See generally Larson, supra note 82.

See Wimbly v. Bolger, 642 F. Supp. 481 (W.D. Tenn. 1986) (Plaintiff was discharged due to absenteeism which he claimed was a result of his service-connected mental disability. The court found that the attendance policy was neutral and that plaintiff failed to prove disparate impact.); Swann v. Walters, 620 F. Supp. 741 (D.D.C. 1984) (The plaintiff was discharged from his employment because of criminal misconduct - sexual child abuse - despite evidence that this conduct was a result of his mental disability of paranoid schizophrenia); Guerrero v. Schultz, 557 F. Supp. 511, 513-14 (D.D.C. 1983) (Foreign service officer suffering from alcoholism and schizoid personality disorder was dismissed because of sexual conduct with several prostitutes in a public bar, and evidence indicated that the court was attributable, at least in part, to his mental illness. The court did not decide that issue and instead found the plaintiff to be otherwise unqualified because he needed treatment available only in the United States and his position required overseas travel); Russell v. Frank, No. 89-2777-Z, 1991 U.S. Dist. LEXIS 7549, at *10-11 (D. Mass., May 23, 1991) (An employee suffering from paranoid
If an individual is found to be disabled due to mental illness under the statute and the problematic conduct of the individual is determined to be a result of the person's disability, the conduct must again be considered when making the determination of whether the individual is "qualified," and whether reasonable accommodation can be made or undue hardship exists. At each of these levels, the decision must be made as to what job behaviors truly impair job performance. One method of making the determination may be to analogize the behavior to physical appearance. The legislative history indicates that an employer may not exclude an individual because of adverse reactions of other employees to that person's physical appearance — likewise, adverse reactions to an individual's bizarre behavior resulting from a mental disability cannot justify exclusion of that person. Such behaviors should be the basis for exclusion only when the behaviors actually prevent performance of essential functions of the job, and reasonable accommodation is not possible.

Another potential issue in distinguishing conduct from a disability, an issue which will have a particular impact on persons with mental illness, is the concept of voluntariness, since the aberrant behavior which arises from the mental illness may be controlled if the person chose to take medication. In Tudyman v. United Airlines, the plaintiff alleged that his rejection from employment because he did not meet the airline's weight guidelines was discrimination on the basis of handicap. One of the reasons the district court found that the applicant's weight was not a handicap was the fact that it was a voluntarily created condition resulting from his avid body building program. The court in Franklin v. United States Postal Service distinguished between the plaintiff's "handicap" of paranoid schizophrenia controllable with medication, and her "condition" of unmanageable behavior resulting from her voluntary refusal to take the medication. Stating that her condition "may place Plaintiff in the handicapped category" the court found more important the fact that her intentional decision not to take her medication caused her problems on her job.

schizophrenia argued that falsification of his medical history during post-offer medical examination was caused by his handicap. The court held that employers are not required to suspend requirements of employee honesty to reasonably accommodate the plaintiff - honesty is an essential part of every job.

220 S. REP. at 7, H.R. REP. (II) at 30. Disruption of the workplace because of employees' negative reactions to an individual's disability is not an undue hardship under the ADA. 29 C.F.R. app. § 1630.15(d) (1991).

221 See generally Estroff, supra note 81, at 220-32 (discussing several theories of the intentional use by mentally ill individuals of "crazy" behaviors in order to control others or avoid responsibility).


223 Id.


225 Id. at 1217.

226 Id.

227 Id.
C. Confidentiality

The ADA prohibits employers from asking applicants whether they suffer from a disability or the nature or severity of such disability, and likewise prohibits the same query of persons already employed “unless such examination or inquiry is shown to be job-related and consistent with business necessity.” Under the ADA the applicant or employee suffering from a mental illness which is not apparent must provide such information voluntarily if accommodation is desired. The employer may not discriminate on the basis of such voluntarily provided information, and must keep it confidential under the terms of the Act, except that:

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;
(iii) government officials investigating compliance with this Act shall be provided relevant information on request.

Providing accommodation in the case of a hidden handicap such as mental illness while respecting the requirement for confidentiality may lead to the problem of resentment on the part of other employees who see what they consider to be preferential treatment of the disabled employee. “If co-workers feel a disabled individual is not ‘pulling his/her load’ or is receiving unfair privileges it may negatively affect morale and lead to social exclusion of the client.” A decline in employee morale or destruction of employees’ faith in the fairness of their employer are foreseeable problems in this situation. A negative impact on employee morale is not, however, a legitimate claim of undue hardship under the ADA. Orienting co-workers and supervisors about the employee’s disability is a no-cost accommodation which would greatly aid in the prevention of ero-

232 Id. But see S. REP. 28-29 (study done of the E.I. du Pont de Nemours and Company’s experiences with 1,452 physically handicapped employees found that other employees did not resent necessary accommodations made for the disabled employees). One author proposes a hypothetical situation in which minority workers bring claims of discriminatory practices when a non-minority worker, whom they do not know is disabled, is given preferential treatment as part of reasonable accommodation under the Act. Michael A. Faillace & Howard G. Ziff, Reasonable Accommodation and Undue Hardship Under the ADA, in Employer Compliance with the Americans with Disabilities Act 76-77 (Practising Law Institute 1990).
sion of morale, but it conflicts with the confidentiality requirements of
the Act.\footnote{Collignon, \textit{supra} note 152, at 223 (orienting co-workers and supervisors about the employee's mental illness was used as an accommodation for 47.4\% of the employees with mental disability).}

\section*{D. Safety and Prediction of Dangerousness}

Unfortunately, in our society, abstract unsubstantiated fears of violence on the part of the mentally ill are widely shared.\footnote{See Trute et al. \textit{supra} note 6, at 69; Melton & Garrison, \textit{supra} note 6 at 1007.} Mental illness and dangerous behavior have historically been associated, and the exaggeration of the crime rates of the mentally ill in the media perpetuates that belief today.\footnote{This type of attitude is exemplified by the letter sent by Rep. Chuck Douglas to all members of the House of Representatives in March, 1990. The letter contained a drawing of a man with a rifle captioned "Berserkers: Time Bombs in the Workplace. How can we protect ourselves from a growing menace?" The letter, which also included a copy of a newspaper article about a mentally ill Kentucky man who killed seven employees at his previous place of employment, went on to warn that the ADA, if passed, would force employers to hire such dangerous individuals. Laura A. Kiernan, \textit{Alliance Irked at Jacobs Letter}, \textit{Boston Globe}, April 8, 1990, at 2.} The growing body of empirical research on the relationship between violence and mental illness disproves this mythology, however.\footnote{JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 77 (1981).}

As the President's Commission on Mental Health\footnote{Id. at 77-82 (mental illnesses such as psychosis, schizophrenia, primary affective disorders, and neurotic disorders carry only a \textit{slightly} increased risk of criminality and several studies indicate that there is not an increased rate of mental illness among prisoners). \textit{See also} STEVEN R. SMITH & ROBERT G. MEYER, \textit{Law, Behavior and Mental Health Policy and Practice} 602 n.54 (1987).} found:

The sporadic violence of so-called "mentally ill killers" as depicted in stories and dramas is more a device of fiction than a fact of life. Patients with serious psychological disorders are more likely to be withdrawn, apathetic, and fearful. We do not deny that some mentally ill people are violent, but the image of the mentally ill person as essentially a violent person is erroneous.\footnote{\textit{Presidents Comm'n on Mental Health: Report to the President of the Presidents Comm'n on Mental Health} 56 (1978).}

In addition to the problem of stereotypical fears and prejudices concerning the dangerousness of the mentally ill, mental health professionals encounter great difficulty in accurately predicting dangerous behavior.\footnote{Id.} Studies have also found that the psychiatric disorders of sociopathy, alcoholism and drug dependence are the impairments characteristically associated with serious crime; it is significant that the ADA limits the

\footnote{See MONAHAN, \textit{supra} note 236; Jeffrey W. Swanson et al., \textit{Violence and Psychiatric Disorder in the Community: Evidence From the Epidemiologic Cach-ment Area Surveys}, 41 \textit{Hosp. & Community Psychiatry} 761 (1990).}
extent to which employers must accommodate individuals with drug dependence or alcoholism. 241

Several cases brought under the Rehabilitation Act address the safety defense in situations where the employee was mentally ill. In Doe v. Region 13 Mental Health-Mental Retardation Commission 242 the plaintiff, a psychiatric social worker, was dismissed because of psychiatric problems. The plaintiff, although a superior employee, was suicidal at times and all of the physicians who testified about her condition felt that her bias towards suicide might be passed along to her patients. 243 The court found the totality of the evidence in support of the employer to be overwhelming and stated:

We believe in cases of this sort where, as here, there has been no showing of discriminatory animus, and where there is uncontroverted evidence of a chronic, deteriorating situation which is reasonably interpreted to pose a threat to the patients with whom the employee must work, no violation of section 504 could reasonably be found. 244

The court in Doe v. New York University 245 held that the medical school could consider the plaintiff's handicap of mental illness in determining if she was less qualified than another applicant if she presented "any appreciable risk" of harm to herself or others. 246 The plaintiff had previously exhibited self destructive and anti-social behavior and had been diagnosed as suffering from borderline personality disorder which was likely to continue throughout her adult life. 247 The "any appreciable risk" standard established by the Doe court is a fairly minimal burden on the employer and is unlikely to stand up under the ADA. 248

Potential harm to the mentally disabled employee himself takes on greater significance to employers as worker's compensation claims for mental injuries such as anxiety disorder and stress-related illness caused by employment increase. 249 An employer may not base its determination

241 Testing for illegal drug use is allowed under the ADA, and current drug users are not considered disabled under the Act by virtue of such drug use. ADA § 510, 42 U.S.C. § 12210.
242 704 F.2d 1402, reh'g denied, 709 F.2d 712 (5th Cir. 1983).
243 Id. at 1409.
244 Id. at 1412.
245 666 F.2d 761 (2d Cir. 1981).
246 Id. at 777.
247 Id. at 766-68.
248 See also Maffeo, supra note 137, at 311-12 (although published norms and clinical experience can be used to predict recurrence of conditions, use of base rates alone is not a sufficiently individualized evaluation of risk).
of likelihood of emotional or psychological injury to the applicant on the applicant's prior worker's compensation claims. Though numerous employers have argued that investigation into an applicant's worker's compensation history is job related and consistent with business necessity, such investigation is not a permissible pre-employment inquiry under the regulations.

V. CONCLUSION

The growth of civil rights for the disabled in recent years has focused on the problems of physical disabilities and removal of architectural barriers. Notable gains have been made in society's recognition of the rights and needs of such individuals, but acknowledgement of the less obvious condition of psychiatric disability has lagged far behind. The expansion of employment rights to the mentally ill afforded by the ADA is a logical extension of the recent movement towards community-focused mental health services. The psychiatrically disabled individuals being maintained in the community deserve full participation in the life of the community, including employment. Moreover, employment has been found by numerous researchers to have therapeutic value for the mentally ill.

"[T]he ex-mental patient who, based on unfounded bias and stigma, is prevented from returning to employment commensurate with his skills, interests, and abilities is in effect being deprived of the opportunity to fully restore his mental health." A study of recently hospitalized persons with mental illness found that the feature of community living which emerged as the major problem for these individuals was that of finding employment. Of the group, sixty-nine percent felt they were capable of being competitively employed and forty-five percent of the group re-

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250 See supra notes 179 and 183.
253 Community mental health centers placed vocational rehabilitation services low on the list of those they believed their patients had to have. It is a measure of how low rehabilitation of the mentally ill had fallen that in 1983 the U.S. Department of Education omitted rehabilitation of the mentally ill from its priority list for its National Institute of Handicapped Research. It took strong protests to have it reinstated the following year. BLACK, supra note 8, at 11. Sheltered workshops for the disabled have long resisted serving the mentally ill along with their other clients. Id. at 18.
254 For a comprehensive survey of literature on the value of work to the mentally ill, see BLACK, supra note 8, at 1-19.
255 Id. at 15 (quoting George Howard, The Ex-Mental Patient as an Employee: An on-the-Job Evaluation, 45 AM. J. ORTHPSYCH. 479-83 (1975)).
257 Id. at 144.
258 Although the interviewees' self-assessments were generally more positive than social worker assessments, there were indications that their appraisals on employability were accurate. Id. at 146.
ported difficulties obtaining employment. The study further found that inability to find work was the single largest obstacle to making a successful transition into the community - only ten percent of the group were employed one year after discharge.259

The prohibition against discrimination on the basis of current mental illness and psychiatric history may well be the most important provision of the ADA for individuals with psychiatric problems. Such individuals have historically had greater difficulties obtaining employment in the first place than retaining a job once employed.260 By preventing employers from asking about prior psychiatric treatment or mental illness, Title I should effectively preclude negative societal attitudes and prejudices from playing a part in employment decisions, and thereby should enhance the ability of such individuals to obtain employment.

When individuals with mental disabilities are successfully placed in employment, continuing care is essential for maintaining the stability of most such employees.261 Researchers have found that, when properly placed and provided access to appropriate follow-up treatment, many mentally disabled employees perform better than average employees.262 Unfortunately, the development of community-based mental health services has lagged far behind the deinstitutionalization movement, often making needed mental health services difficult to obtain.263 Coincidental with the rapid growth in demand for community services has been the repeated cutbacks in mental health insurance benefits by many employers.264 ADA will have little effect on the psychiatrically disabled who are unable to access the services which they need in order to function at a level which allows them to work.

Many commentators feel that the major effort in maintaining the rehabilitation of the mentally ill in the future lies in the workplace.265 The rapid growth of employee assistance programs (EAPs) over the past decade, although developed primarily to attend to the problems of substance abuse, demonstrates the benefits to both employers and their employees when the employer assumes some responsibility for maintaining the men-

259 Id.
261 Bacani-Oropilla et al., supra note 81, at 326.
263 See BLACK, supra note 8, at 10-11; JOHNSON, supra note 10, at 215-34; ISAAC & ARMAT, supra note 10, at 86-106.
265 BLACK, supra note 8, at 219.
tal health of employees. These programs maintain and improve the health, safety and productivity of the workforce, and at the same time cut costs to employers by recognizing and providing early attention to emotional and psychological problems. While the duty to accommodate mentally disabled employees imposed by the ADA will not require that every employer provide psychological counseling, employers who offer the benefits of an employee assistance program will likely be found to have met the requirement of reasonable accommodation.

Another provision of the ADA which will have significant impact on the psychiatrically disabled is its requirement for individualized determination. The controversy regarding reliability and validity of psychiatric diagnoses, and the frequent lack of correlation between an individual's diagnosis and capacity to work reinforces the need for such a determination. The presence or absence of physical, intellectual and emotional skills, and the specific demands of the work setting, not psychiatric diagnosis, predict the ability of an individual's success at work. All of these elements must be analyzed to determine if the individual is a qualified person with a disability and whether the disability can be accommodated. Likewise, judgments about risk of danger posed by an individual with mental illness must also be made only after careful consideration of individual factors such as current condition, history, length of time elapsed since the last occurrence, prior precipitating factors, likelihood of encountering similar precipitating factors in current employment, and success of treatment, rather than on general statements about the prognosis of persons with a particular diagnosis.

Expanded employment opportunities for the mentally ill under the ADA will force employers and other employees to become more aware of the needs of people with mental or emotional illness in the workplace and to develop constructive methods of dealing with such employees. Clearly, the ADA, in its attempt to balance the rights of disabled with the fiscal needs of employers, provides a framework to eliminate much

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266 Growth of EAPs has skyrocketed during the 1980's. In 1987, 80% of the Fortune 500 companies had EAPs. These firms are trying to help troubled employees regain their health and productivity rather than fire or discipline such employees, as the EAPs broaden their scope to include emotional and mental problems in addition to alcoholism and drug abuse. EMPLOYEE ASSISTANCE PROGRAMS: BENEFITS, PROBLEMS AND PROSPECTS 1-5 (BNA 1987).

267 Id. at 150-51. See also John Nordheimer, Ideas & Trends: Psychological Counseling from the Company Store, N.Y. TIMES, Aug. 19, 1990, § 4, at 5 (companies who sponsor EAPs can expect a five to one return on their investment when a worker responds to counseling and job performance improves).

268 See supra notes 132-37 and accompanying text.

269 See supra notes 102-03 and accompanying text.

270 Rubin & Roessler, supra note 260, at 133 (citing Hyman J. Weiner et al., MENTAL HEALTH CARE IN THE WORLD OF WORK 123 (1973)).

271 See Maffeo, supra note 137, at 312-15.
of the invidious discrimination against the psychiatrically disabled in the employment arena. The courts, the legislature, the mental health system and private employers must work together to ensure effective compliance with and enforcement of the Act.

JANET LOWDER HAMILTON