NCD

National Council on Disability

Policy Brief Series: Righting the ADA

No. 14
The Supreme Court's ADA Decisions Regarding the Not-Just-One-Job Standard

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May 20, 2003

Under the definition of disability in the Americans with Disabilities Act (ADA), a condition constitutes a disability if it "substantially limits one or more of the major life activities of such individual" (42 U.S.C. § 12102(2)(A)). A prior policy brief in the National Council on Disability's *Righting the ADA* series discusses the confusion the Supreme Court has provoked regarding whether working should be recognized as a major life activity (see **http://www.ncd.gov/newsroom/publications/limitation.html**). Because, however, regulations implementing the ADA and Section 504 of the Rehabilitation Act, and the Senate and House ADA committee reports all explicitly include "working" as a major life activity;[1] and all nine Justices of the Supreme Court had previously discussed working as a major life activity in separate opinions in *Bragdon v. Abbott*,[2] the lower courts have generally continued to accept that working is a major life activity, either holding outright[3] or assuming, with reservations,[4] that it is.

For some years, the Equal Employment Opportunity Commission (EEOC) has advanced a restrictive interpretation of the standard that must be met to prove that one is substantially limited in working. The EEOC has taken the position that, to establish a substantial limitation regarding the activity of working, a complainant must demonstrate more than an actual or perceived inability to perform a specific job; it has required ADA plaintiffs to show that they are "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes...[5]" The Supreme Court has not explicitly endorsed the EEOC's position on this issue, but the Court has referred to and quoted the EEOC standard in the circumstances of several ADA cases. This policy brief examines the origin and consequences of the constricted standard imposed by the EEOC, the Court's statements about the EEOC's approach, and the implications of the Court's indecisive but suggestive position on efforts by ADA complainants to demonstrate that they have a substantial limitation on the major life activity of working.

THE ORIGINS OF THE NOT-JUST-ONE-JOB STANDARD

The idea that proof that one cannot perform the essential functions of a particular job (or is perceived by an employer as being unable to do so) is insufficient to establish a substantial limitation in working has its roots in a 1980 decision of a federal district court judge in Hawaii in the case of *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D.Haw. 1980). The case was decided under the Rehabilitation Act of 1973, and interpreted the three-prong definition of "individual with handicaps" that is the direct predecessor and substantially identical to the definition of disability in the ADA. Faced with conflicting contentions that a plaintiff with a "congenital back abnormality" should, on the one hand, be required to prove that his condition "impeded activities relevant to many or most jobs,"[6] or, to the contrary, that the definition of disability includes "every individual with an impairment which is a current bar to employment which the individual is currently capable of performing,"[7] the district court forged its own unique stance. The court rejected the argument that the statutory definition includes anyone who is refused a particular job because of a real or perceived impairment, but it nonetheless ruled that the plaintiff had been "regarded as having" an impairment by virtue of his having been refused

an apprentice position because of back abnormalities[8]. It reasoned that "the focus cannot be on simply the job criteria or qualifications used by the individual employer; those criteria or qualifications must be assumed to be in use generally. . . . In evaluating whether there is a substantial handicap to employment, *it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process.*[9]" Otherwise, according to the court, in situations involving "some aberrational type of job qualification," an employer "discriminating against a qualified handicapped individual would be rewarded if his reason for rejecting the applicant were ridiculous enough.[10]"

The *E.E. Black* analysis had two principle elements: first, that rejection from a single particular job because of an impairment does not automatically establish a substantial limitation of working; and, second, that the same exclusionary requirement or screening process must be attributed to all employers with the same or similar positions. In combination, these two elements would only make it difficult for a plaintiff to demonstrate a substantial limitation of working in circumstances where the job in question was a unique or very rare one not available from other employers. Surprisingly, subsequent court decisions and the EEOC which have relied upon the *E.E. Black* decision have ignored the second element of the ruling, which in fact determined the favorable outcome for the plaintiff in the *E.E. Black* case itself. They have inaccurately treated the *E.E. Black* ruling as if it had endorsed the position that a plaintiff must demonstrate that his or her impairment "impeded activities relevant to many or most jobs," when the court expressly rejected that contention.[11]

Relying upon such a mischaracterization of the *E.E. Black* decision, in 1986 the Court of Appeals for the Fourth Circuit issued its decision in *Forrisi v. Bowen*, 794 F.2d 931, 932 (4th Cir. 1986), in which it ruled that a utility systems repairman dismissed from his job because of his acrophobia had not proven that he was "regarded as" having a disability. The court held that the evidence in the case had shown that "[f]ar from being regarded as having a `substantial limitation' in employability, Forrisi was seen as unsuited for one position in one plant — and nothing more.[12]" The court said that the Rehabilitation Act was not intended to address such an "isolated mismatch of employer and employee.[13]" Apart from disregarding the second element of the *E.E. Black* ruling, which might have produced an opposite result in the *Forrisi* case, the Fourth Circuit noted that Mr. Forrisi was able to be hired in similar positions both before and after the incident challenged in his lawsuit, and that he had testified that his condition had never affected his life or his ability to get a job other than this single incident[14]. Such evidence would suggest that Mr. Forrisi did not have an actual substantial limitation on his ability to work, but it is completely irrelevant to his contention that his employer regarded him as having a substantially limiting condition.

The *Forrisi* ruling influenced some other courts to take the position that an employer's exclusion of a worker from a particular job because of an actual or perceived impairment is not sufficient to demonstrate that the employer regarded the worker as substantially limited in ability to work[15]. Some courts, however, took a considerably more expansive approach to the definition

than that of the *Forrisi* court[16]. In direct contrast to the *Forrisi* decision is *Thornhill v. Marsh,*[17] in which the Ninth Circuit held that a man discharged from a job because the Army Corps of Engineers erroneously interpreted the consequences of his congenital spine abnormality satisfied the statutory definition of "individual with handicaps.[18]" The plaintiff met the "regarded as" criteria because of "the congenital deformity of his spine which the Corps perceived as imposing a disqualifying limitation on his ability to lift weight.[19]" The court made no suggestion of a need to show that his perceived impairment would have an impact on his employability beyond the immediate position from which he had been discharged. In *Doe v. New York University,*[20] the Second Circuit observed, regarding the definition of "individual with handicaps," that "its legislative history . . . indicates that the definition is not to be construed in a [stingy] fashion.[21]" The court ruled that a medical student denied readmission because of psychiatric problems was "regarded as having" a disability, and it applied the definitional phraseology liberally by characterizing her as having a "substantial limitation on a major life activity, the ability to handle stressful situations of the type faced in a medical training milieu."[22]

In 1987, the Supreme Court provided some perspective on this issue in its decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). It recognized that "Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work.[23]" The Court noted the Senate Report's example of a person "regarded as" having a disability — "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning.[24]" The Court declared that "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.[25]" It also quoted from the legislative history of Section 504 Senator Mondale's description of a situation to be addressed by the legislation — that of a woman disabled by arthritis who was denied "a job" not because she could not do the work but because "college trustees [thought] `normal students shouldn't see her.'[26]" Neither Senator Mondale nor the Court suggested that such a plaintiff would have to show that she would also be excluded from other positions.

ADA LEGISLATIVE HISTORY

With the judicial decisions discussed in the prior section as a backdrop, Congress began its consideration of the legislation that became the ADA. The legislative history of the Americans with Disabilities Act offers a bit of support for the notion that exclusion because of a physical or mental impairment that prevents the individual from performing a single specific job with unique qualifications is not enough to establish a disability under the first prong of the definition (actual disability). The report of the House Committee on the Judiciary declared:

> A person with an impairment who is discriminated against in employment is . . . limited in the major life activity of working. However, a person who is limited in his or her

> ability to perform only a particular job, because of circumstances unique to that job site or the materials used, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in the major life activity of working if he has a mild allergy to a specialized paint used by one employer which is not generally used in the field in which the painter works.[27]

Under the "regarded as" prong of the definition of "disability," however, the legislative history of the ADA indicates considerable congressional intent to reject the *Forrisi* "not just one job" approach. The Senate Committee Report pointedly cited as examples of individuals included within the "regarded as" concept "people who are rejected *for a particular job* for which they apply because of findings of a back abnormality in an x-ray, notwithstanding the absence of any symptoms, or people who are rejected *for a particular job* solely because they wear hearing aids . . . .[28]" The report added:

> A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.[29]

Not only is there no suggestion of a need to show that the individual is limited in connection with other jobs or participation in other programs, but in support of the quoted language the report cited *Thornhill* and *Doe v. Centinela Hospital*[30] — both of which differ from the *Forrisi* approach.[31] Similar sentiments and the same case citations were repeated in the report of the House Committee on Education and Labor.[32]

The House Committee on the Judiciary used language that differed somewhat from that in the other reports but to similar effect. It noted that

> a person who is rejected from *a job* because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test, *whether or not the employer's perception was shared by others in the field* and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.[33]

To manifest its intent even further, the Judiciary Committee declared:

> In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test.[34]

Under the Judiciary Committee's approach, excluding a person from a job or activity because of an actual or perceived physical or mental impairment would create an inference that the excluded individual has been "regarded as" having a disability, and the employer would be forced to defend the merits of its exclusion of the individual. Under the language of the other committees, exclusion from a single job because of a physical or mental impairment would establish coverage of the excluded individual as having been "regarded as" having a disability.

THE EEOC STANDARD

In 1991, when the EEOC issued its regulations implementing the employment provisions of the ADA, the Commission largely disregarded the statements in the legislative history regarding the standard for proving substantial limitation on the activity of working, and the court decisions supporting such a standard. Instead, the regulations declared that, with respect to the major life activity of working,

> [t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
> 29 C.F.R. § 1630.2(j)(3)(i).

As authority for this standard, the EEOC regulatory guidance[35] cited the *E.E. Black, Ltd. v. Marshall* and *Forrisi v. Bowen* decisions, and the ruling in a third case — *Jasany v. United States Postal Serv*[36]. In the *Jasany* case, the court ruled that a mild case of strabismus ("crossed eyes") was not a disability because it did not substantially limit a major life activity; the court noted that "the parties stipulated that [the plaintiff's] condition never had any effect whatsoever on any of his activities.[37]" Significantly, however, the court considered only the first prong of the statutory definition and never discussed or even mentioned the "regarded as" prong[38]. In its report PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT (2000), NCD has termed the cases cited by the EEOC as "dubious judicial precedents" and described the EEOC as "ignoring other judicial precedents, explicitly mentioned in ADA committee reports, to the contrary" (*id.* at 214). NCD concluded that "the precedents did not compel the result EEOC arrived at" and that "the EEOC's analysis was derived from a selective and partial marshaling of the case law." *Id.*

The EEOC's citation of the three cases illustrates a critical difficulty with its position. Two of the cited cases — *E.E. Black* and *Forrisi* – involved claims that the plaintiffs were covered under the third prong of the ADA definition of disability because they had been "regarded as" having a disability. The *Jasany* decision, on the other hand, addressed only the question of whether the plaintiff actually had a disabling condition under the first prong of the definition. The EEOC did not make it clear whether it intended its class-of-jobs-or-broad-range-of-jobs and the single-job-is-not-sufficient criteria to apply only under the first prong of the definition, or to the third prong as well.

Arguably, the EEOC limitation as to what is substantially limiting in regard to working makes some sense in the context of the first prong (actual disability) of the definition of disability. Such an approach would be consistent with the example in the ADA report of the House Committee on the Judiciary, quoted above, regarding a painter allergic to a specialized paint used only by one employer[39]. Such a singular, idiosyncratic allergy would not, in itself, substantially limit the major life activity of working and thus would not constitute an actual disability under the first prong of the definition.

In fact, some language in the interpretive guidance EEOC issued to accompany its ADA regulations suggests that the agency did not intend its restrictive standard for demonstrating substantial limitation on working to apply to determinations, under the third prong, whether employers regarded workers as having substantially limiting impairments. In discussing the "regarded as" prong of the definition of disability, the regulatory guidance cited an example of a person with "controlled high blood pressure that is not substantially limiting," and declared "[i]f an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled" (29 C.F.R. pt. 1630, app. (commentary on §1630.2(l)). The guidance also discussed the situations of persons with "a prominent facial scar or disfigurement," or with "a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities," and stated that "[i]f an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability" (*id.*, citing the ADA reports of the Senate, and the House Committees of Education and Labor and of the Judiciary).

Most explicitly, the interpretive guidance declared that "[a]n individual rejected from a job because of the `myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability, *whether or not the employer's or other covered entity's perception were shared by others in the field* . . . ." (29 C.F.R. pt. 1630, app. (commentary on §1630.2(l)) (emphasis added)). Thus, the EEOC's regulatory guidance indicates that exclusion from a single position may be sufficient to satisfy the third prong of the definition.

The EEOC considers exclusions based on "common attitudinal barriers" toward individuals with disabilities — including "concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers" —to constitute discrimination based on perceptions of disability (*id.*). Thus, if an individual with a physical or mental impairment can show that he or she was terminated from or not hired for a particular job because of that impairment, and the employer took the exclusionary action because of one of the listed concerns, such a showing may be sufficient to establish that the individual was "regarded as having" a substantially limiting impairment. According to the EEOC, unless the employer can articulate a nondiscriminatory reason for the employment action in such a situation, "an inference that the employer is acting on the basis of `myth, fear or stereotype' can be drawn" (*id.*). The EEOC has stressed such a "myths, fears, and stereotypes" route for proving that an employer regarded an individual as having a substantially limiting impairment, and has provided concrete examples of the application of the "regarded as" prong of the definition of disability in its compliance guidance[40]. Such an approach, establishing coverage under the third prong for exclusion from a single job, would, in some circumstances, alleviate the impact of the EEOC's contrary analysis under the first prong.

Despite such statements, however, and the EEOC's declarations that its interpretation of what is substantially limiting to working is not intended to place onerous burdens of evidence and proof on potential plaintiffs,[41] the EEOC's position on this issue has had some serious deficiencies. Most critically, the Commission has never stated in the text of its regulations that its class-of-jobs-or-broad-range-of-jobs and the single-job-is-not-sufficient standards apply only under the first prong of the definition, and not to the third prong. If the EEOC intended this to be the case, it should have said so, explicitly and clearly, in its regulations. While neither the EEOC Title I regulation nor the regulatory guidance declare that being denied or terminated from a single job because of a physical or mental impairment is insufficient to constitute being "regarded as" having a disability under the third prong of the definition, the EEOC's failure to discount this possibility has engendered ambiguity. The absence of such a statement has invited the courts to follow EEOC's restrictive standard for demonstrating substantial limitation on working, spelled out in the regulation, under the third prong, as well as the first, of the definition of disability; and many courts have accepted that invitation.

The benefits of EEOC's "myths, fears, and stereotypes" approach to proving that an employer regarded a person as having a disability are largely illusory. It shifts the issue to be proven away from what the employer did and toward what the employer's motivation was. Evidence of what was in the mind of a person in taking a certain action is notoriously hard to produce. An employer that is silent about its motivation will ordinarily be invulnerable to allegations that it was acting based on myths, fears, or stereotypes. Since the initial regulations implementing the three-prong definition of disability were issued in 1977, it has been accepted that a person is "regarded as" having a disability if he or she is "treated as having" a substantially limiting impairment,[42] and the EEOC's ADA regulations reiterate that position[43]. Under the EEOC's standard for demonstrating substantial limitation of working, however, the question of how one

was treated becomes subordinate to the issue of what the employer was thinking. Because of these and other problems, various legal commentators have been strongly critical of the position of the EEOC on the standards for proving substantial limitation of working.[44]

In its PROMISES TO KEEP report, NCD criticized the EEOC's formulation of restrictive standards for demonstrating substantial limitation of the activity of working, creating constraints not based on any statutory language. NCD argued that "[t]he illogic of permitting employers to terminate a person from a job because of a physical or mental condition and then to argue that the condition is not serious enough to constitute a disability is starkly apparent.[45]" NCD formally recommended that the EEOC should "reorient its policy positions on the interpretation of the definition of disability," "take clear and explicit actions to mitigate the impact of its previous restrictive positions," and "promote, to the maximum extent possible, an inclusive interpretation of the scope of ADA protection to extend to all persons whom an employer disadvantages because they have a physical or mental impairment.[46]" More specifically, NCD called upon the EEOC to clarify "that the third prong of the definition of individual with a disability includes any American who suffers discrimination on the basis of physical or mental impairment, even if that discrimination occurs on only one occasion in connection with one particular job with a particular employer ....[47]" Unfortunately, the EEOC did not see fit to follow such recommendations.

THE SUPREME COURT'S STATEMENTS REGARDING THE STANDARD

Technically, the Supreme Court has not yet made a binding substantive ruling on whether proof that one cannot perform the essential functions of a particular job (or is perceived by an employer as being unable to do so) is sufficient to establish a substantial limitation in working. Yet, the Court's treatment of the EEOC's regulatory position on this issue has, arguably at least, been nearly tantamount to ruling that such evidence is insufficient.

In *Sutton v. United Airlines*, 527 U.S. 471, 491 (1999), the Court quoted the EEOC's standard for what "substantially limits" means when applied to the major life activity of working:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
> 29 C.F.R. § 1630.2(j)(3)(i) (1998).

In the context of the *Sutton* case in which neither party contested the validity of the EEOC regulations, the Court assumed without deciding that the EEOC regulations interpreting the term "substantially limits" were reasonable, and applied the EEOC's not-just-a-single-particular-job criterion. The parties in the *Sutton* case, and consequently the Court, assumed that the not-just-

one-job standard applies under the third prong and that plaintiffs must demonstrate that an employer regarded them as unable to perform either a class of jobs or a broad range of jobs in various classes. Based upon the EEOC regulations, the Court concluded that "[w]hen the major life activity under consideration is that of working, the statutory phrase `substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. . . .[48]" The Court elaborated as follows:

> To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.[49]

The plaintiff sisters in *Sutton* contended that United Airlines mistakenly believed their physical impairments substantially limited them in the major life activity of working, and had applied a vision requirement that precluded them from obtaining the job of global airline pilot, which they argued was a class of employment[50]. The Court ruled that the position of global airline pilot is a single job, so the plaintiffs' allegations did not support the claim that United regarded them as having a substantially limiting impairment[51]. Thus, the Court assumed without deciding that the EEOC's standards were valid and then, apparently under the impression that this was the EEOC's position, applied the not-just-one-job standard under the third prong of the definition. Compounding this view, by construing global airline pilot to be a single job, the Court made an expansive interpretation of the term "a job," far broader than the EEOC's conception of the unique circumstances of a particular employment position of a particular employer, and extending well beyond the situation implicated under the *E.E. Black* decision. The Court disregarded the common meaning of a job as a paid position with a specific employer (*e.g.*, "I got a job at X restaurant"), and instead interpreted it to mean a type of position (*e.g.*, waiter, dishwasher, bookkeeper), without regard to any particular employer who offers it — a far more extensive reading.

Similarly, in *Murphy v. United Parcel Service*, 527 U.S. 516, 523-24 (1999), the Court again assumed without deciding that the EEOC regulations were valid and required a showing of inability to perform either a class of jobs or a broad range of jobs in various classes. The Court ruled that Murphy showing that he was "regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle — a specific type of vehicle used on a highway in interstate commerce" — was insufficient to establish a genuine issue of material fact that he was regarded as disabled (*id.* at 524). The Court simply took it for granted, without discussion, that the EEOC's "class of jobs or a broad range of jobs" standard applied under the third prong of the definition.

Although the Court in *Sutton* and *Murphy* only assumed *arguendo* (for the purpose of argument in the particular case) that the EEOC standards are valid and expressly stated that it was not so

deciding, the Court's application of the "class of jobs or a broad range of jobs" standard, without expressing any misgivings or hesitation, its facile analytic leap to the conclusion that this standard applies under the third prong of the definition, and its broad interpretation of what constitutes a single job could have significant negative consequences. Unless they are examined with a precise and cautious eye, these decisions can easily be read as having endorsed the EEOC standard on demonstrating substantial limitation on working and its applicability under the "regarded as" prong of the definition, weakening the chances of contrary rulings in the future. This is particularly true because in these decisions the Court directly rejected another of the EEOC's positions — on mitigating measures — while seeming to follow the single-job-is-not-sufficient standard.

The Court did nothing to rectify this situation in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), where the Court recited the EEOC not-just-one-job standard (without deciding that the regulation was valid), but held that the criterion of inability to perform a class or broad range of activities should not be applied to major life activities other than working. Indeed, the Court's ruling that the class-or-broad-range-of-activities does not apply in nonemployment contexts can be viewed as reinforcing the implication that it does apply in regard to the major life activity of working.

IMPLICATIONS OF THE SUPREME COURT'S DECISIONS

In the absence of any effort by the EEOC to stem the tide, the Supreme Court's rulings in the *Sutton*, *Murphy*, and *Williams* cases have accelerated the trend in the lower courts to require ADA plaintiffs seeking to show they are substantially limited in the activity of working to demonstrate that they are unable to perform either a class of jobs or a broad range of jobs, or that the employer regarded them as unable to perform either a class of jobs or a broad range of jobs. This has proven to be a very onerous hurdle, or, as the Court of Appeals for the First Circuit has described it, such a plaintiff "must make a weighty showing."[52]

In *Duncan v. WMATA*,[53] for example, the Court of Appeals for the District of Columbia ruled that a transit employee who had been terminated because of his back condition was not substantially limited in working. The worker had introduced medical testimony substantiating his condition and lifting restrictions, and presented evidence regarding his age, limited skills, education, experience, and inability to find comparable employment after discharge (the only job the plaintiff ultimately found was at 1/3 his former salary). The court concluded, however, that the plaintiff had failed to produce sufficient evidence of the number and types of jobs in the local employment market to show that he was disqualified from a class or broad range of jobs[54]. As a result, the Court of Appeals overturned a jury verdict awarding the plaintiff $125,000 on his wrongful termination claim and $125,000 on his reasonable accommodation claim, as well as the lower court's order awarding back pay and reinstatement.[55]

Likewise, in *Broussard v. University of California*,[56] the Court of Appeals for the Ninth Circuit, relying on the Supreme Court's ruling in *Sutton*, held that an animal technician's "inability to perform the specialized job of animal technician for the transgenic mice does not constitute a substantial limitation" in working. The Ninth Circuit found that a vocational expert's determination that Broussard was precluded from 40 percent of available jobs in the San Francisco Bay area was insufficient to establish substantial limitation of working. It viewed such evidence as inadequate because it did not adequately take the plaintiff's vocational abilities into account and because it did not include a more precise comparison of the jobs she was able to do before and after the onset of her condition.[57]

In *Rhoads v. FDIC*,[58] the Court of Appeals for the Fourth Circuit held that an individual with asthma and related migraine headaches, who experienced recurring bouts of bronchitis, pneumonia, severe lung infections and cluster-migraine syndrome when exposed to second-hand smoke at her office, was not substantially limited in working because she "established only that she was unable to function in one particular smoke-infested office." The Fourth Circuit found that the plaintiff had failed to "show, as required, that she is generally foreclosed from jobs utilizing her skills because she suffers from smoke-induced asthma and migraines.[59]" The plaintiff had argued that an employer who is unwilling to provide reasonable accommodations to its employees (such as enforcing a smoking ban) should not be allowed to point to other employers who are willing to provide such accommodations as proof that an employee with a disability is not precluded from employment generally. While finding that failure to enforce a smoking ban "is hardly commendable," the Fourth Circuit rejected plaintiff's argument and ruled that she had failed to establish that she was precluded from a broad range of jobs.[60]

In other cases, a pipefitter rigger with a seizure disorder — not controlled by medication — was held not substantially limited in the major life activity of working, even though he was fired (two days after disclosing his seizure disorder) for refusing to work at elevation because there was no place for him to tie his safety belt into a life line and he considered the risk of having a seizure and falling to be too great[61]. An employee with a back injury was ruled not substantially limited in working even though his condition eliminated him from 47 percent of jobs in his job market[62]. A customer service representative whose HIV status was construed as precluding him from customer service positions was held not to be substantially limited in working because he had not shown that he was precluded from a class of jobs or a broad range of jobs.[63]

These cases serve to illustrate that the lower courts are requiring plaintiffs to shoulder quite a heavy burden of proof to demonstrate that their physical or mental impairments substantially limit their ability to work. In most cases, medical and vocational expert testimony is necessary to demonstrate "a significant[] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." Even with such experts, necessary data about job opportunities for people whose training, skills, and abilities are comparable to those of the plaintiff may or may not be available. And to the extent that ability to perform comparable jobs may depend upon the extent

to which other employers have similar conditions, practices, and restrictions as the defendant employer, and upon other employers' willingness or unwillingness to make necessary accommodations and adjustments to the plaintiff's condition, such evidence may become very difficult or impossible to obtain, or may become largely conjectural evidence that courts are often inclined to discount. Moreover, a plaintiff's successful array of the requisite evidence of difficulty performing a class or a broad range of jobs may be undercut by evidence that the plaintiff was able to find other employment.[64]

If plaintiffs can marshal sufficient demographic data and other evidence establishing that they are unable to work in a "class of jobs" or "broad range of jobs," they must simultaneously be careful to maintain that, at least with reasonable accommodations, they are still "qualified" to perform the job in question[65]. The tension between having to show that one is substantially limited in ability to work but yet is still qualified to do the job has been described by courts and other authorities as a "Catch 22.[66]" One federal court described the necessity of the plaintiff proving that she was substantially limited in working and simultaneously was qualified as "two conflicting elements" of establishing that one is included in "the ADA's protected class.[67]" Another went so far as to suggest that it is impossible to be substantially limited in working and simultaneously qualified for the particular job.[68]

In addition to cases in which plaintiffs have had difficulty establishing an actual substantial limitation on the major life activity of working, numerous other plaintiffs have attempted to show that their employers regarded them as having such a substantial limitation. In the wake of the Supreme Court's decisions regarding the standard for proving substantial limitation to one's ability to work, plaintiffs have found the going quite difficult. Employers can maintain that they had no opinion as to whether the plaintiff could perform a range or class of jobs, but had concerns only regarding the individual's ability to perform the particular job in question. In the absence of incriminating statements by the employer, establishing coverage under the "regarded as" prong becomes virtually an impossible task. As a result, individuals who clearly were discriminated against because of "myths, fears, and stereotypes" and other negative attitudes toward disability have nonetheless frequently been found not to be protected under the ADA.

In the case of *EEOC v. Rockwell Int'l Corp.*,[69] for example, an employer refused to hire over 70 entry-level job applicants who failed nerve conduction tests. Though the applicants did not have any medical impairments, they were not hired on the grounds that failing the nerve conduction test was an indication that the applicants *might* suffer from neuropathy and therefore *might* be susceptible to injuries from frequent repetitive motions or the use of vibratory power tools. The EEOC argued that these individuals were denied jobs and thus discriminated against because they had been regarded as persons with substantially limiting impairments. The Court of Appeals for the Seventh Circuit ruled, however, that the EEOC had failed to submit sufficient evidence to show that the applicants were regarded as substantially limited in working. Because the EEOC had failed to introduce demographic or other data regarding the surrounding labor market, the court ruled, the EEOC had only established that the employer perceived the applicants as unable

to perform the specific entry level jobs at Rockwell International Corp., rather than unable to perform a class of jobs or a broad range of jobs.[70]

In *Sorenson v. University of Utah*,[71] a flight nurse with multiple sclerosis (MS) was involuntarily reassigned because of her employer's concerns regarding the impact her MS would have on her ability to do her job. Despite assurances from the nurse's neurologist that she could perform the essential functions of a flight nurse, and despite the fact that after her diagnosis the nurse successfully worked as a regular nurse in the burn unit, the surgical intensive care unit, and the emergency room, the nurse's supervisors remained concerned that she "would suffer from an episode or problem associated with her MS while on duty," and they refused to reinstate her[72]. The Court of Appeals for the Tenth Circuit ruled that the nurse was not protected by the ADA, because the hospital had not regarded her as substantially limited in working. Rather, the hospital merely perceived the nurse as unable to perform the job of flight nurse; in the court's view, the fact that the hospital continued to employ the nurse as a burn unit, surgical ICU, and emergency room nurse showed that the hospital did not regard her as unable to perform a class of jobs or broad range of jobs.[73]

In *Giordano v. City of New York*,[74] a police patrol officer who took anti-coagulant medication following aortic valve replacement surgery was terminated because of the fear that he could sustain catastrophic bleeding if he was injured on the job. The Court of Appeals for the Second Circuit ruled that the New York Police Department did not regard the officer as substantially limited in working. At most, the court found, the officer's evidence showed that the Department regarded the officer as "disabled from police or other investigative or security jobs that involve a substantial risk of physical confrontation.[75]“ This, the court held, was not sufficient to establish that the Department regarded the officer as substantially limited in working a "broad class of jobs," and thus was insufficient to establish protection under the ADA.[76]

The decisions discussed here are only a small sampling of a large number of cases in which plaintiffs who have been fired, refused employment, or otherwise disadvantaged in the workplace because of real or perceived physical or mental impairments, have nonetheless been found not to be substantially limited in working[77]. Plaintiffs who seek to prove that their employers regarded them as substantially limited in working face all the problems, discussed above, involved in trying to present adequate evidence regarding "ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” In addition, such evidence will often have an even more conjectural character because the nature or degree of the limitation at issue may be more in the perception of the employer than real. For example, a plaintiff may need to show that "if I had X condition which my employer believed I did, then it would limit me in the following ways, and that would limit me in the ability to do the following jobs.” Moreover, as noted above, such cases often will involve the difficult challenge of proving what exactly was in the mind of the employer.

Of course, despite the demanding and at times oppositional evidentiary burdens involved, some plaintiffs manage to surmount them and to convince courts that they are both substantially limited in regard to working and also are qualified for the particular position at issue[78]. But for most potential ADA claimants, the extremely onerous standards applied by the courts for establishing substantial limitation of the activity of working constitute a daunting and at times insurmountable obstacle.

CONCLUSION

The notion that proof that a worker is not able to perform the essential functions of a particular job (or is perceived by an employer as being unable to do so) is insufficient to establish a substantial limitation of working grew out of a few court decisions under the Rehabilitation Act of 1973. Based upon such dubious, inadequate, and misinterpreted precedents, and ignoring a body of contrary decisions and statements in the ADA legislative history calling for a less demanding standard, the EEOC devised in its ADA regulations a requirement that proving substantial limitation of the major life activity of working requires an ADA claimant to demonstrate significant restriction "in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." The EEOC never definitively clarified whether this standard should be applied under the third prong ("regarded as") of the definition of disability or only under the first prong (actual disability).

In a technical sense, the Supreme Court has yet to rule on whether proof that one cannot perform the essential functions of a particular job (or is perceived by an employer as being unable to do so) is sufficient to establish a substantial limitation in working. In its decisions in the *Sutton*, *Murphy*, and *Williams* cases, the Supreme Court raised some questions about the overall authority of the EEOC to issue regulations construing the definition of disability, but the Court then assumed without deciding that the EEOC regulations interpreting the term "substantially limits" were reasonable and valid. In that context, the Court applied the EEOC's "class of jobs or a broad range of jobs" standard under both the first and third prongs of the ADA's definition of disability.

The combination of the EEOC's requirement of proof that a person is restricted in a class or broad range of jobs, the EEOC's ambiguous stance as to whether that requirement also applies when plaintiffs seek to establish that their employers regarded them as substantially limited in working, and the Court's application of the EEOC standard to claims under both the first and third prongs has precipitated a torrent of lower court rulings that make it very difficult for plaintiffs to prove that they are or are regarded as being substantially limited in the activity of working. Whether they seek to establish that they are actually substantially limited in working or that their employer so regards them, ADA plaintiffs face demanding and at times antagonistic evidentiary burdens. For most potential ADA claimants, the extremely onerous standards applied

by the courts for establishing substantial limitation of the activity of working constitute a formidable and sometimes insurmountable obstacle.

This policy brief was written for the National Council on Disability by Professor Robert L. Burgdorf Jr. of the University of the District of Columbia, David A. Clarke School of Law. Some of the material about lower court decisions was derived in part from an earlier paper in the National Council on Disability's *Righting the ADA Series*. That paper, written by Sharon Perley Masling, Director of Legal Services, National Association of Protection and Advocacy Systems, is found on the NCD Web site at **http://www.ncd.gov/newsroom/publications/decisionsimpact.html**.

ENDNOTES

1. 29 C.F.R. § 1630.2(i); 45 C.F.R. § 84.3(j)(2)(ii); S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28 (1990) (Committee on the Judiciary).

2. 524 U.S. 624, 638-39 (1998) (Justice Kennedy for the Court, joined by Justices Stevens, Souter, Ginsburg, and Breyer); *id.* at 664-65 (Ginsburg, J., concurring); *id.* at 659 (Rehnquist, C.J, concurring in the judgment in part and dissenting in part, joined by Justices Scalia and Thomas).

3. *See*, *e.g.*, *E.E.O.C. v. J.B. Hunt Transport, Inc.*, 321 F.3d 69, 75-77 (2d Cir. 2003); *Felix v. New York City Transit Authority*, 324 F.3d 102, 105-06 (2d Cir., 2003); *Huge v. General Motors Corp.*, 2003 WL 1795691, *2 (6th Cir. 2003); *Peters v. City of Mauston*, 311 F.3d 835, 843 (7th Cir. 2002); *Blanks v. Southwestern Bell Communications, Inc.*, 310 F.3d 398, 401 (5th Cir. 2002); *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1161 (10th Cir. 2002); *Brunko v. Mercy Hosp.*, 260 F.3d 939, 941-42 (8th Cir. 2001). *See also Henderson v. Ardco, Inc.*, 247 F.3d 645, 652 (6th Cir. 2001) (holding that plaintiff had shown evidence sufficient to withstand summary judgment that her employer regarded her as disabled in working); *Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2001) ("the drafters of the ADA and its subsequent interpretive regulations clearly intended that plaintiffs who are mistakenly regarded as unable to work have a cause of action under the [ADA]").

4. *See*, *e.g.*, *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1168 n. 5 (1st Cir. 2002); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 725 n. 3 (8th Cir. 2000); *Mahon v. Crowell*, 295 F.3d 585,

590 (6th Cir. 2002).

5. 29 C.F.R. § 1630.2(j)(3)(i).

6. 497 F.Supp. at 1094.

7. *Id.* (quoting opinion of Donald Ellsburg, Ass't Sec'y of Labor, Employment Stds. Admin.).

8. *Id.* at 1102.

9. *Id*. at 1100 (emphasis added).

10. *Id.*

11. 497 F.Supp. at 1094.

12. 794 F.2d at 935.

13. *Id.*

14. *Id.* at 934-35.

15. *See*, *e.g.*, *Chandler v. City of Dallas*, 2 F.3d 1385, 1392 (5th Cir. 1993); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1417 (10th Cir. 1992); *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) (*Forrisi* ruling followed in *dicta*); *Maulding v. Sullivan*, 961 F.2d 694, 698 (8th Cir. 1992), *cert. denied sub nom. Maulding v. Shalala*, 113 S.Ct. 1255 (1993) (*Forrisi* ruling followed in *dicta*).

16. *See*, *e.g.*, *Taylor v. U.S. Postal Service*, 946 F.2d 1214, 1218 (6th Cir. 1991) (permitted "applicant to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so-called job requirement due to physical impairment"); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1125-26 (11th Cir. 1993) ("impairment [pseudofolliculitis barbae], and the [plaintiff] firefighters' inability to shave that results from it, `substantially limit' the firefighters' ability to engage in the `major life activity' of work on account of the [defendants'] no-beard rule"); *Cook v. State of Rhode Island*, 10 F.3d 17, 26 (1st Cir. 1993) (jury could rationally conclude that defendant's perception of plaintiff applicant's impairment, as exhibited in its refusal to hire her for a particular position, foreclosed a sufficiently wide range of jobs to serve as proof of a substantial limitation).

17. 866 F.2d 1182 (9th Cir. 1989).

18. *Id.* at 1183.

19. *Id.* at 1183-84.

20. 666 F.2d 761 (2d Cir. 1981).

21. *Id.* at 775.

22. *Id.*

23. 480 U.S. at 283 n. 10.

24. *Id.* at 282, quoting S. Rep. No. 93-1297, at 64.

25. *Id.* at 283.

26. *Id.* at 283 n.9, quoting 117 Cong. Rec. 36761 (1972) (remarks of Senator Mondale).

27. H.R. Rep. No. 101-485, pt. III at 29 (1990).

28. S. Rep. No. 101-116, at 24 (1989) (emphasis added).

29. *Id.*

30. No. CV87-2514 PAR, 1988 WL 81776 (C.D. Cal. June 30, 1988). In *Doe*, a federal district court ruled that an individual who had been excluded from an alcohol and drug treatment program because of HIV infection had thereby been regarded as having an impairment affecting the major life activity of "learning."

31. S. Rep. No. 101-116, at 24.

32. H.R. Rep. No. 101-485, pt. II at 53-54 (1990).

33. H.R. Rep. No. 101-485, pt. III, at 30 (emphasis added).

34. *Id.* at 30-31.

35. 29 C.F.R. pt. 1630, app. (commentary on §1630.2(j)).

36. 755 F.2d 1244 (6th Cir. 1985).

37. *Id.* at 1250.

38. *Id.* at 1248-50.

39. H.R. Rep. No. 101-485, pt. III at 29 (1990).

40. EEOC, *Compliance Manual* § 902.5 (March 1995 guidance memorandum on the definition of disability).

41. *See* 29 C.F.R. pt. 1630, app. (commentary on §1630.2(j)); 56 Fed. Reg. 35,728 (1991) (commentary on §1630.2(j)).

42. *See* 45 C.F.R. § 84.3(j)(2)(iv).

43. 29 C.F.R. § 1630.2(l)(3).

44. *See*, *e.g.*, Richard A. Bales, *Once Is Enough: Evaluating When a Person Is Substantially Limited in Her Ability to Work*, 11 HOFSTRA LAB. L. J. 203, 210-11 (1993); Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILLANOVA L. REV. 409 (1997); Arlene B. Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997); Bonnie Poitras Tucker, *The Supreme Court's Definition Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 356-61 (2000).

45. *Id.* at 215.

46. National Council on Disability, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* 236, Recommendation 36 (2000).

47. *Id.*

48. 527 U.S. at 491-92 (citations omitted).

49. *Id.*

50. *Id.* at 490.

51. *Id.* at 493.

52. *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1168 (1st Cir. 2002). In the factual situation before it, in which the plaintiff claimed that his alcoholism substantially limited his ability to work, the First Circuit ruled that "Bailey's summary judgment evidence is not up to this ambitious a task." *Id.*

53. 240 F.3d 1110 (D.C.Cir. 2001) (en banc).

54. *Id.* at 1115-1117.

55. *Id.* at 1117.

56. 192 F.3d 1252, 1259 (9th Cir. 1999).

57. *Id*. at 1257-59.

58. 257 F.3d 373, 388 (4th Cir. 2001).

59. *Id.*

60. *Id.*

61. *Whitson v. Union Boiler Co.,* 2002 WL 31205208 (6th Cir. 2002)

62. *Mahon v. Crowell*, 295 F.3d 585, 590, 591-92 (6th Cir. 2002).

63. *Blanks v. Southwestern Bell Communications, Inc.*, 310 F.3d 398, 401 (5th Cir. 2002).

64. *See*, *e.g.*, *Pollard v. High's of Balt., Inc.*, 281 F.3d 462, 471 (4th Cir. 2002) (employee with back injury was not substantially limited in working when she immediately obtained a new job).

65. *See* 42 U.S.C. § 12112.

66. *See*, *e.g.*, *Doe v. Region 13 Mental Hlth.-Mental Retard. Comm'n*, 704 F.2d 1402, 1408 (5th Cir. 1983); *Tudyman v. United Airlines*, 608 F. Supp. 739, 744 (C.D. Cal. 1984); National Council on the Handicapped, *Toward Independence, Appendix* A-25 (1986); Richard A. Bales, *Once Is Enough: Evaluating When a Person Is Substantially Limited in Her Ability to Work*, 11 HOFSTRA LAB. L. J. 203, 239 (1993); Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARVARD CIVIL RIGHTS — CIVIL LIBERTIES LAW REVIEW 413, 448 (1991); Jonathan Brown, *Defining Disability in 2001: A Lower Court Odyssey*, 23 WHITTIER L. REV. 355, 381-84 (2001); Arlene B. Mayerson and Kristan S. Mayer, *Defining Disability After Sutton: Where Do We Go From Here?*, 27 HUMAN RIGHTS 13, 16 (2000).

67. *Williams v. Avnet, Inc.*, 910 F.Supp. 1124, 1131 (E.D.N.C. 1995). *See also Doe v. New York University*, 666 F.2d 761, 775 (2d Cir. 1981).

68. *Everette v. Runyon*, 911 F.Supp. 180, 183-84 (E.D.N.C. 1995). Ironically, applying the *Forrisi* one-job-is-not-enough rationale to a situation in which the plaintiff claimed to have been discharged because of his impaired vision, the court in *Everette* ultimately concluded that Everette's condition was too insubstantial to amount to a disability and so substantial that it rendered him not qualified. *Id.* at 184-85.

69. 243 F.3d 1012 (7th Cir. 2001).

70. *Id.* at 1018. *See also EEOC v. Woodbridge*, 263 F.3d 812 (8th Cir. 2001).

71. 194 F. 3d 1084 (10th Cir. 1999).

72. *Id.* at 1085-86.

73. *Id.* at 1089.

74. 274 F.3d 740 (2nd Cir. 2001).

75. *Id.* at 749.

76. *Id.* at 749-50.

77. *See*, *e.g.*, *Cooper v. Olin Corp.*, 246 F.3d 1083 (8th Cir. 2001) (locomotive engineer with chronic depression, prohibited from operating locomotive engine after return from depressive episode despite clearance to return to work by treating physician, not regarded as substantially limited in working); *Steele v. Thiokol Corp.,* 241 F.3d 1248 (10th Cir. 2001) (rocket test technician with obsessive compulsive disorder (OCD) not regarded as disabled, despite employer's awareness of technician's OCD, the medicines he was taking, and supervisor's concerns regarding technician's mood swings); *Krocka v. City of Chicago*, 203 F.3d 504 (7th Cir. 2000) (police officer with depression, which was treated successfully with Prozac, not regarded as disabled, despite the fact that, because he was taking Prozac, police officer was required to participate in Police Department's "Personnel Concerns Program," which required frequent monitoring by Department officials and routine medical evaluations, including blood draws); *Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492 (10th Cir. 2000) (individual with severe depression and anxiety, whom her managers described as "incapacitated" and who was fired due to her inability to make decisions and her lapses in memory and judgment, not regarded as substantially limited in any major life activity); *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000) (typesetter with seizure disorder controlled by medication, type 2 diabetes, depression, mitral valve prolapse, high blood pressure, and who had had a brain tumor removed, neither substantially limited nor regarded as substantially limited in working, despite the fact supervisor contacted company's disability management personnel regarding typesetters' excessive medically-related absences, and despite the fact that typesetter was reassigned to a lower level position); *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083 (8th Cir. 2000) (railroad manager with major depression and anxiety, whose employer refused to allow him to return to work under maximum 40 hour work week restriction, not regarded as substantially limited in working); *Stumbo v. Dyncorp Technology Services, Inc.*, 130 F. Supp. 2d 771 (W.D.Va. 2001); *aff'd sub nom.*, *Stumbo v. Dyncorp Procurement Systems, Inc.,* 17 Fed. Appx. 202 (4th Cir. 2001); *cert. denied*, 122 S. Ct. 1302 (2002) (security officer with fully corrected hypertension, denied job because reviewing physician noted in application file, "overweight smoker on hypertensive meds, wouldn't recommend for strenuous work," not regarded as substantially limited in working); *Fultz v. City of Salem*, 2002 WL 31051577 at *2 (9th Cir. 2002) (police officer who suffered a work-related injury to his left ring finger and who was fired as a result only regarded as having impaired left finger, not regarded as disabled); *EEOC v. J.B. Hunt Transp*., 128 F. Supp. 2d 117 (N.D.N.Y. 2001) (truckload motor carrier did not discriminate against class of applicants that it did not hire because it learned (after it had made them a conditional offer of employment) that they were

taking medications that appeared on a list that the company used to screen out applicants; plaintiffs had merely presented evidence that they were taking these medications, not that the employer regarded them as substantially limited in any major life activity or that they were actually substantially limited in a major life activity)*; Arnold v. City of Appleton,* 97 F. Supp. 2d 937 (E.D.Wis. 2000) (applicant for firefighter position, whose conditional offer of employment was revoked because he had epilepsy, not protected by the ADA; "the perceived inability to perform one job is not sufficient to establish that the plaintiff is substantially limited in the major life activity of working"); *Piascyk v. City of New Haven*, 64 F. Supp.2d 19 (D.Conn. 1999) (patrol officer with multiple injuries from car accident, who was denied promotion to superintendent position, not regarded as substantially limited, despite employer's receipt of employee's doctor reports, employer's express reference to officer as being injured, and officer's assignment to "light duty").

78. In *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002) (decided under Arkansas Civil Rights Act applying ADA standards), for example, the Eighth Circuit found that the plaintiff had successfully met his burden of proof as to the various elements of his claim. He had provided satisfactory evidence of his impairment: "Duty presented evidence at trial to illustrate the nature, severity, duration and impact of his impairment, including (1) symptoms of chilling occurring several times a week and lasting approximately forty-five minutes, (2) chronic neck pain present approximately ninety percent of the time, (3) weakness, (4) numbness in his groin and hands, (5) upper arm pain, and (6) headaches." *Id.* at 491. He met his burden of showing that his employer regarded him as unable to perform a class or a broad range of jobs: "At trial, Duty presented evidence to demonstrate that NAP regarded him as significantly restricted in the major life activity of working, including (1) evidence of his lifting restriction which disqualified him from the type of work in which he is trained, (2) evidence of his lack of education, (3) evidence of his relatively advanced age, and (4) the vocational consultant's affidavit, which found him to be disqualified from the available jobs in his working area based on his disability." *Id.* at 492. He was also able to demonstrate that he was qualified for the position he had been terminated from: "At trial, Duty submitted evidence to demonstrate that he was able to perform the essential functions of the maintenance mechanic job, including (1) his own testimony that he was capable of lifting 100 to 150 pounds occasionally, fifty to seventy-five pounds regularly and fifty pounds comfortably; (2) his testimony that heavier lifting was not an essential function of the job, because he had done such lifting only four or five times in his eighteen years on the job; (3) evidence that a variety of lifting devices were available to do any necessary heavier lifting; (4) evidence regarding NAP's available positions of rebuilder, sizing operator, ball mill operator, STS operator, and material handler, all of which he could have performed with his restrictions; (5) evidence of other employees hired to perform jobs he was capable of doing; (6) evidence that the "no-rehire" *493 policy was not the reason he was not given another position; and (7) evidence that other employees had returned to work when they were less than 100 percent capable of performing their essential job functions. *Id.* at 492-93. Accordingly, the Eighth Circuit affirmed a jury verdict in the amount of $305,000 in the plaintiff's favor, and the district court's award to the plaintiff of attorney's fees and costs totaling $54,673.05.