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Note

Establishing a Substantial Limitation in Interacting with Others: A Call for Clearer Guidance from the EEOC

Lisa M. Benrud-Larson*

Congress enacted the Americans with Disabilities Act of 1990 (ADA)¹ with the laudable goal of ending discrimination against persons with disabilities.² Congress, however, did not intend to protect everyone with a physical or mental impairment—only those with significant impairments. A person is disabled within the meaning of the ADA only if he or she has a physical or mental impairment that “substantially limits” a “major life activit[y].”³ This definition may have seemed clear to the ADA’s drafters, but it has proven far from clear for litigants and the courts.⁴ Many argue that courts’ interpretation of “disability” under the ADA has frustrated Congress’s intent “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”⁵

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1. Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)).

2. 42 U.S.C. § 12101(b)(1).

3. *Id.* § 12102(2).

4. See Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1147; Mark A. Rothstein et al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 244, 251–52 (2002).

5. 42 U.S.C. § 12101(b)(2); see also Rothstein et al., *supra* note 4, at 297 (noting that the underlying purpose of the ADA has been “undermined by the failure to create a reasonably clear definition of the crucial term ‘individual with a disability,’ which delineates the class of individuals protected by the ADA”). See generally Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 139–60 (2000).

Persons with psychiatric disorders face a particularly high hurdle when attempting to establish a disability under the ADA.⁶ For example, although courts generally agree that activities affected by physical limitations (e.g., walking, seeing, lifting) constitute “major life activities” under the ADA, they often disagree over whether activities primarily affected by mental impairments (e.g., interpersonal interaction, concentration) also meet that definition.⁷

The current circuit split on how to treat the activity of “interacting with others” highlights this issue. Courts disagree on two fundamental issues: first, whether interacting with others should constitute a “major life activity” under the ADA; and second, what constitutes a “substantial limitation” in interacting with others if it is recognized as a major life activity.⁸ The disconnect among the courts leaves both employers and employees unsure of how to proceed when facing this difficult issue in the workplace. Employers may forego appropriate disciplinary action for fear of being accused of discrimination. Employees may forego filing a valid discrimination claim for fear that it will be readily dismissed by the court. Confusion among the courts underscores the need for more concrete guidance for interpreting the ADA’s definition of disability. Such guidance would provide needed clarity to an area of the law currently marked by contention and confusion.

Part I of this Note provides a general overview of the ADA’s definition of disability, focusing on three key terms: mental impairment, major life activity, and substantial limitation. Part II outlines the current circuit split regarding first, whether interacting with others is a “major life activity” under

6. See Hensel, *supra* note 4, at 1168, 1175; Mark DeLoach, Note, *Can't We All Just Get Along?: The Treatment of "Interacting with Others" as a Major Life Activity in the Americans with Disabilities Act*, 57 VAND. L. REV. 1313, 1315 (2004).

7. SUSAN STEFAN, HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES 75 (2002).

8. *Compare* Jacques v. DiMarzio, Inc., 386 F.3d 192, 202–03 (2d Cir. 2004) (determining that interacting with others constitutes a major life activity and that a plaintiff is substantially limited when an impairment significantly limits his or her fundamental ability to communicate), *and* McAlindin v. County of San Diego, 192 F.3d 1226, 1234–36 (9th Cir. 1999) (finding that interacting with others is a major life activity and that a plaintiff is substantially limited when his or her interaction is characterized by severe problems such as consistently high levels of hostility), *with* Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15–16 (1st Cir. 1997) (holding that the ability to get along with others does not constitute a major life activity).

the ADA; and second, if so, what constitutes a “substantial limitation” in this activity. Part III focuses on courts’ varying interpretations of “substantial limitation” in claims brought by persons with psychiatric disorders who allege a substantial limitation in interacting with others. Part IV proposes recommended guidelines for determining when a plaintiff’s psychiatric disorder substantially limits his or her ability to interact with others, thus qualifying as a disability under the ADA. This Note ultimately calls for the Equal Employment Opportunity Commission (EEOC) to develop regulations establishing a presumption of disability based on recognized diagnostic criteria and documented medical evidence.

I. THE AMERICANS WITH DISABILITIES ACT OF 1990

Congress enacted the ADA with the stated purpose of “provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁹ Title I of the ADA prohibits employment discrimination in the workplace “against a qualified individual with a disability because of the disability.”¹⁰ A person is disabled for the purposes of the ADA if he or she has “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 [is] regarded as having such an impairment.”¹¹

Under the ADA’s definition of disability, courts must engage in a three-step analysis to determine whether a person with a psychiatric disorder is disabled: (1) the person must have a mental impairment; (2) the mental impairment must limit one or more major life activities; and (3) the limitation resulting from the mental impairment must be substantial.¹² A court determining that a plaintiff is not disabled according to this definition dismisses the discrimination suit, foreclosing the opportunity to decide the case on its merits. Unfortunately, Congress failed to define any of the three key terms in an ADA disability analysis: mental impairment, major life activity, and substantial limitation. It did, however, authorize the EEOC to promulgate regulations to implement Title I of the ADA.¹³ The

9. 42 U.S.C. § 12101(b)(1).

10. *Id.* § 12112(a).

11. *Id.* § 12102(2).

12. *See id.*

13. *Id.* § 12116; *see* 29 C.F.R. §§ 1630.1–.16 (2004).

EEOC also has issued multiple enforcement guidelines to aid in the interpretation of the Act.¹⁴

A. MENTAL IMPAIRMENT

In its regulations, the EEOC defines “mental impairment” as “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”¹⁵ It expands on this list in its enforcement guidelines, noting that “emotional or mental illness” includes such psychiatric disorders as “major depression, bipolar disorder, anxiety disorders . . . schizophrenia, and personality disorders.”¹⁶ The EEOC notes that the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV)¹⁷ is relevant for the purposes of identifying mental disorders.¹⁸ EEOC guidelines also specify that “traits or behaviors” (e.g., irritability, chronic lateness) “are not, in themselves, mental impairments, although they may be linked to mental impairments.”¹⁹

Mental impairment is the least debated of the ADA’s three key terms. In most cases, courts find (or defendants concede) that diagnosed psychiatric disorders, such as bipolar disorder and major depressive disorder, constitute a “mental impairment.”²⁰ In contrast, “major life activity” and “substantial limi-

14. See, e.g., EQUAL EMPLOYMENT OPPORTUNITY COMM’N, COMPLIANCE MANUAL § 902: DEFINITION OF THE TERM DISABILITY (2000), available at <http://www.eeoc.gov/policy/docs/902cm.html> [hereinafter EEOC DEFINITION OF DISABILITY]; EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997), available at <http://www.eeoc.gov/policy/docs/psych.html> [hereinafter EEOC ON PSYCHIATRIC DISABILITIES].

15. 29 C.F.R. § 1630.2(h)(2).

16. EEOC ON PSYCHIATRIC DISABILITIES, *supra* note 14, at 2–3.

17. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

18. See EEOC ON PSYCHIATRIC DISABILITIES, *supra* note 14, at 3. The EEOC expressly noted, however, that not every condition listed in the DSM-IV constitutes a disability or even a mental impairment under the ADA. *Id.*

19. *Id.* at 4. For example, if an individual’s short temper, arrogance, and impatience stem from bipolar disorder, she or he has a mental impairment (i.e., bipolar disorder), but such personality traits in and of themselves do not constitute impairments under the ADA. See *id.*

20. See, e.g., *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 201 (2d Cir. 2004) (holding that a plaintiff’s bipolar disorder is a mental impairment under the ADA); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1232–33 (9th Cir. 1999) (holding that a plaintiff’s anxiety disorder constitutes a mental impairment under the ADA); *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir.

tation” have generated much litigation.

B. MAJOR LIFE ACTIVITY

The EEOC defines major life activities by example, noting that they include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”²¹ In the appendix to its regulations, the EEOC further notes that major life activities generally include “those basic activities that the average person in the general population can perform with little or no difficulty.”²² Recognizing that the examples listed in its regulations focus primarily on physical activities, the EEOC specified in its *Compliance Manual* that “[m]ental and emotional processes such as thinking, concentrating, and interacting with others” constitute additional examples of major life activities.²³ Continued confusion regarding the definition of major life activity in the context of mental illness²⁴ led the EEOC to further clarify its position in its 1997 publication, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*.²⁵ Here, the EEOC reiterates that mental processes, including “interacting with others,” constitute major life activities under the ADA.²⁶

Unfortunately, the EEOC’s guidance on the definition of major life activity has not led to uniform interpretation of the term. This is because courts, including the Supreme Court, have questioned the deference due the EEOC’s regulations and enforcement guidelines.²⁷ The Court’s decision in *Sutton v.*

1997) (concluding that a plaintiff’s dysthymia is a mental impairment within the meaning of the ADA).

21. 29 C.F.R. § 1630.2(i) (2004).

22. *Id.* pt. 1630 app. § 1630.2(i).

23. EEOC DEFINITION OF DISABILITY, *supra* note 14, § 902.3(b).

24. *See* Hensel, *supra* note 4, at 1147.

25. EEOC ON PSYCHIATRIC DISABILITIES, *supra* note 14.

26. *Id.* at 5.

27. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (noting that responsibility for implementing the ADA is not delegated to a single agency but declining to address the issue of deference); *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 n.2 (1st Cir. 1997) (noting that the EEOC *Compliance Manual* is “hardly binding” on courts); *Bell v. Gonzales*, 398 F. Supp. 2d 78, 87 (D.D.C. 2005) (noting that the EEOC *Compliance Manual* recognizes “interacting with others” as a major life activity under the ADA but that “its persuasive value remains undetermined”); *see also* John N. Ohlweiler, *Disability and the Major Life Activity of Work: An Un-“Work”-Able Definition*, 60 BUS. LAW. 577, 592 n.76 (2005).

United Air Lines, Inc. provides a vivid example.²⁸ In *Sutton*, the Court held that a physical or mental impairment corrected by mitigating measures (e.g., medication, corrective lenses) does not substantially limit a major life activity and thus does not constitute a disability under the ADA.²⁹ In so holding, the Court flatly rejected the EEOC's position on the issue of mitigating measures and disability—the EEOC regulations expressly directed courts to determine a person's disability status based on his or her functioning in an unmitigated state.³⁰

The Supreme Court provided its own guidance on the definition of major life activity in *Bragdon v. Abbott*.³¹ The case involved a plaintiff with asymptomatic HIV infection who filed an ADA claim after a dentist refused to treat her in his office.³² She asserted that HIV constituted a disability under the ADA because it substantially limited her ability to engage in the major life activity of reproduction.³³ In analyzing what constitutes a major life activity, the majority concluded that the plain meaning of the word “major” denotes “comparative importance” or “significance.”³⁴ In light of this, the Court held that reproduction constitutes a major life activity because “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself.”³⁵ The majority rejected the dissent's opinion that major life activities should only include activities that occur frequently and continuously.³⁶

28. 527 U.S. 471, 481–82 (1999).

29. *Id.*

30. *See id.*; 29 C.F.R. pt. 1630 app. § 1630.2(j) (2004).

31. 524 U.S. at 638.

32. *Id.* at 628–30.

33. *Id.* at 637.

34. *Id.* at 638 (quoting *Abbott v. Bragdon*, 107 F.3d 934, 939–40 (1st Cir. 1997)).

35. *Id.*

36. *See id.* at 659–60 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist acknowledged that decisions regarding reproduction are of central importance to a person's life but stressed that such importance is not the defining characteristic of the illustrative major life activities in the EEOC regulations and interpretive guidelines. *Id.* Instead, the “common thread” among the EEOC's illustrative examples is that “activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual.” *Id.* at 660. Justice O'Connor offered a similar rationale, stressing that reproduction is not a major life activity because, although important to the lives of many women, it “is not generally the same as the representative major life activities of all persons—‘caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working’—listed in regulations relevant to the [ADA].” *Id.* at 664–65 (O'Connor, J., dissenting)

The notion that a major life activity must have a daily or repetitive component appeared in the Court's later decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.³⁷

In *Toyota*, the Supreme Court reconsidered whether a major life activity must occur on a regular or daily basis.³⁸ The *Toyota* Court endorsed the *Bragdon* Court's interpretation of "major" as denoting importance but added a regularity component to the definition in holding that major life activities are those that "are of central importance to most people's *daily* lives."³⁹ After *Toyota*, major life activities clearly must have a daily character.⁴⁰ The *Toyota* court also emphasized that the ADA must "be interpreted strictly to create a demanding standard for qualifying as disabled."⁴¹ It reasoned that interpreting major life activity liberally would result in significantly more disabled individuals than the forty-three million identified by Congress as having physical or mental disabilities.⁴² This, in fact, is a common theme in the case law arising under the ADA—courts emphasize the need to construe the ADA strictly so as "to cover only 'true' disabilities."⁴³

C. SUBSTANTIAL LIMITATION

The EEOC regulations provide two alternative definitions of "substantial limitation": (1) "[u]nable to perform a major life activity that the average person in the general population can perform;" or (2) "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a

(quoting 45 C.F.R. § 84.3(j)(2)(ii) (1997) and 28 C.F.R. § 41.31(b)(2) (1997)); see also Ohlweiler, *supra* note 27, at 594–96 (discussing the varied definitions of "major life activity" articulated in *Bragdon*'s majority and dissenting opinions).

37. 534 U.S. 184, 197 (2002).

38. *Id.*

39. *Id.* at 198 (emphasis added).

40. See Ohlweiler, *supra* note 27, at 606 (noting that after *Toyota*, it is clear that "a 'major' life activity must be a 'basic' life activity: one that is essential to the day-to-day existence of a normally functioning individual").

41. *Toyota*, 534 U.S. at 197.

42. *Id.* at 197–98.

43. Hensel, *supra* note 4, at 1152; see also, e.g., *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 642 (2d Cir. 1998) (highlighting the importance of ensuring that only individuals with significant disabilities are protected under the ADA); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 152 (2d Cir. 1998) (noting that "[n]arrowing and diluting the definition of major life activity" would undercut the ADA's protection of only those individuals with substantial disabilities).

particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.”⁴⁴ The EEOC directs courts to consider three factors: (1) the “nature and severity of the impairment;” (2) its “duration or expected duration;” and (3) its “permanent or long term impact.”⁴⁵ With respect to duration, the EEOC’s enforcement guidelines specify that an impairment is “substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities.”⁴⁶ The guidelines describe a person with major depressive disorder of one year’s duration that is characterized by symptoms of intense sadness, social withdrawal (other than going to work), insomnia, and severe problems with concentration.⁴⁷ This person has a mental impairment (major depressive disorder) that affects his ability to interact with others, sleep, and concentrate (three major life activities).⁴⁸ The impairment’s effects are sufficiently severe and of long enough duration to qualify as substantially limiting.⁴⁹

With respect to the major life activity of interacting with others, the EEOC guidelines specify that a person is substantially limited “if his/her relations with others [a]re characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.”⁵⁰ For example, a person diagnosed with schizophrenia who stays in his room for several months and usually refuses to talk with family or close friends is substantially limited in interacting with others, and therefore disabled within the meaning of the ADA.⁵¹

In *Bragdon v. Abbott*, the Supreme Court clarified that a plaintiff need not establish a *complete inability* to perform a major life activity in order to prove a substantial limitation.⁵²

44. 29 C.F.R. § 1630.2(j)(1) (2004).

45. § 1630.2(j)(2).

46. EEOC ON PSYCHIATRIC DISABILITIES, *supra* note 14, at 8.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 10. The guidelines also point out that “[i]nteracting with others . . . is not substantially limited just because an individual is irritable or has some trouble getting along with a supervisor or coworker.” *Id.* at 5 n.15.

51. *Id.* at 10.

52. 524 U.S. 624, 641 (1998) (“The Act addresses substantial limitations on major life activities, not utter inabilities.”).

Instead, one satisfies the definition “[w]hen significant limitations result from the impairment . . . even if the difficulties are not insurmountable.”⁵³ The plaintiff still must demonstrate a “substantial” or “considerable” limitation.⁵⁴ Impairments having only a minor effect on a major life activity will not qualify as a disability under the ADA.⁵⁵ In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court further clarified that the substantial impairment analysis must not be limited to the workplace; courts are to consider the effect of the plaintiff’s impairment both within and outside the work environment.⁵⁶ The Court added in *Sutton v. United Air Lines, Inc.* that courts must determine a plaintiff’s disability status in light of all mitigating measures, including medication.⁵⁷

Many argue that courts’ interpretation of key terms under the ADA has failed to provide the “clear, strong, consistent, enforceable standards” that Congress intended.⁵⁸ Employers and employees alike have spent much time and money fighting over what constitutes a disability under the ADA. The problem stems, in part, from the varying deference courts have afforded the EEOC’s regulations and interpretive guidelines.⁵⁹ As noted above, the Supreme Court has questioned the EEOC’s authority to issue regulations interpreting the meaning of “disability” under the ADA but has declined to address the issue directly.⁶⁰ In *Toyota*, the Court assumed, without deciding, that the EEOC regulations were reasonable but failed to address what deference, if any, was due.⁶¹ Currently, the federal circuits dis-

53. *Id.*

54. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196 (2002).

55. *Id.* at 197.

56. *Id.* at 201.

57. 527 U.S. 471, 487–88 (1999).

58. 42 U.S.C. § 12101(b)(2) (2000). *See generally* Feldblum, *supra* note 5, at 139–60 (reviewing judicial interpretations of the ADA’s definition of disability).

59. *See, e.g.*, *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 n.2 (1st Cir. 1997) (noting that the EEOC *Compliance Manual* is “hardly binding”); *Bell v. Gonzales*, 398 F. Supp. 2d 78, 87 (D.D.C. 2005) (noting that the EEOC *Compliance Manual* recognizes “interacting with others” as a major life activity under the ADA, but that “its persuasive value remains undetermined”).

60. *Sutton*, 527 U.S. at 479 (“[N]o agency has been delegated authority to interpret the term ‘disability.’ . . . The EEOC has, nonetheless, issued regulations to provide additional guidance regarding the proper interpretation of this term.”); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (noting that responsibility for implementing the ADA is not delegated to a single agency but declining to address the issue of deference).

61. *Toyota*, 534 U.S. at 194.

agree over several issues on which the EEOC has spoken, including whether interacting with others constitutes a “major life activity” and, if so, how to determine whether a plaintiff is “substantially limited” in this area.⁶²

II. THE CURRENT CIRCUIT SPLIT

To date, three circuits have considered whether a substantial limitation in interacting with others constitutes a disability under the ADA. Each resolved the issue differently. The courts disagree on both of the main issues: (1) whether interacting with others constitutes a major life activity; and (2) if so, what constitutes a substantial limitation in this area.

A. INTERACTING WITH OTHERS AS A MAJOR LIFE ACTIVITY

1. The First Circuit

The First Circuit was the first to address the issue of whether interacting with others constitutes a major life activity under the ADA. In *Soileau v. Guilford of Maine, Inc.*, a plaintiff diagnosed with dysthymia, a chronic depressive disorder, alleged that he was disabled under the ADA because his mental disorder substantially limited his ability to interact with others.⁶³ The First Circuit began its analysis by noting that the EEOC *regulations* promulgated under the ADA do not list the ability to interact with others as an example of a “major life activity.”⁶⁴ The court did acknowledge in a footnote that the EEOC *enforcement guidelines* list interacting with others as a major life activity, but the opinion emphasized that such guidelines are not binding on courts.⁶⁵ It then declined to recognize interacting with others as a major life activity, reasoning that the “ability to get along with others” is a “remarkably elastic” concept, the presence of which may depend on subjective judgment and/or the particular situation.⁶⁶ The court refused to in-

62. See Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 283 (2000) (noting that some circuit courts have refused to apply the EEOC’s recommended definitions of “major life activity” and “substantially limited”).

63. See 105 F.3d at 13.

64. See *id.* at 15.

65. See *id.* at 15 n.2.

66. *Id.* at 15 (“Here, Soileau’s alleged inability to interact with others came and went and was triggered by vicissitudes of life which are normally

flict a legal duty on an employer “based on such an amorphous concept.”⁶⁷ It noted, however, that “a more narrowly defined concept going to essential attributes of human communication could, in a particular setting, be understood to be a major life activity” under the ADA.⁶⁸ As discussed below, the Second Circuit later endorsed such a standard in *Jacques v. DiMarzio, Inc.*⁶⁹

2. The Ninth Circuit

Two years following the First Circuit’s decision in *Soileau*, the Ninth Circuit considered the same question in *McAlindin v. County of San Diego* and reached the opposite conclusion.⁷⁰ The plaintiff in *McAlindin* claimed that his diagnosed anxiety disorder substantially limited his ability to interact with others, thus constituting a disability under the ADA.⁷¹ The Ninth Circuit looked to the EEOC regulations and interpretive guidelines for guidance in defining what constitutes a major life activity under the ADA.⁷² It concluded that “[b]ecause interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of ‘major life activity.’”⁷³ The court expressly rejected the First Circuit’s admonition that “getting along with others” is too amorphous a concept to constitute a major life activity under the ADA.⁷⁴ It pointed out that nothing in the statutory text implicated clarity as a criterion for defining a major life activity.⁷⁵ The court further noted that the well-recognized major life activity of “caring for oneself” is just as vague as “interacting with others.”⁷⁶ Several district courts have followed *McAlindin*, emphasizing that the “substantially limited” prong of the disability analysis can adequately address concerns regarding the breadth of “interacting with others” as a major life activity.⁷⁷

stressful for ordinary people—losing a girlfriend or being criticized by a supervisor.”).

67. *Id.*

68. *Id.*

69. *See* 386 F.3d 192, 203 (2d Cir. 2004).

70. *See* 192 F.3d 1226, 1233 (9th Cir. 1999).

71. *See id.* at 1230.

72. *See id.* at 1233 & n.6.

73. *Id.* at 1234.

74. *Id.* at 1234–35.

75. *See id.* at 1234.

76. *Id.* at 1235.

77. *See* Hensel, *supra* note 4, at 1167 nn.197–98 (citing several cases fol-

3. The Second Circuit

In *Jacques v. DiMarzio, Inc.*, the Second Circuit became the most recent appellate court to address this issue.⁷⁸ It concluded that “interacting with others” constitutes a major life activity under the ADA, although “getting along with others” does not.⁷⁹ The plaintiff suffered from bipolar II disorder and a long-standing history of psychiatric problems.⁸⁰ After being terminated from her job following multiple confrontations with coworkers, the plaintiff filed an ADA claim alleging a substantial limitation in interacting with others.⁸¹ The Second Circuit began its analysis by distinguishing between the life activities of “getting along with others” (considered in *Soileau*) and “interacting with others” (considered in *McAlindin*).⁸² It noted that “‘interacting with others’ . . . more objectively describes a life activity than does ‘getting along with others,’ which connotes proficiency or success” and necessitates a more subjective analysis.⁸³ In making this distinction, the Second Circuit attempted to reconcile the disagreement between its sister circuits. It endorsed the First Circuit’s conclusion that “getting along with others” is too subjective to be considered a major life activity under the ADA⁸⁴ while concurring with the Ninth Circuit’s position that “interacting with others” is “‘an essential, regular function’ that ‘easily falls within’” the ADA’s definition of major life activity.⁸⁵ The Second Circuit then went on to reject the Ninth Circuit’s standard for determining when one is “substantially limited” in interacting with others.⁸⁶

lowing *McAlindin*).

78. 386 F.3d 192, 202 (2d Cir. 2004).

79. *See id.* at 202.

80. *See id.* at 195.

81. *See id.* at 197–98.

82. *See id.* at 202.

83. *Id.*

84. *See id.* (“We agree with the First Circuit’s observation that ‘get[ting] along with others’ is an unworkably subjective definition of a ‘major life activity’ under the ADA—in much the same way that ‘perceiving’ (as distinct from merely ‘seeing’ or ‘hearing’) would be an unworkably subjective ‘major life activity.’” (alteration in original) (quoting *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997)).

85. *Id.* (quoting *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999)).

86. *See id.* at 202–03.

4. Other Courts

Although other circuits have confronted the issue of whether interacting with others constitutes a major life activity under the ADA, they all avoided addressing it directly.⁸⁷ Several have done this by skipping to the “substantially limited” prong of the analysis.⁸⁸ By finding that the plaintiff is not substantially limited in interacting with others, a court can hold that he or she is not protected under the ADA without having to decide if interacting with others constitutes a major life activity. The Supreme Court has yet to weigh in on the issue.

B. STANDARDS FOR ESTABLISHING A SUBSTANTIAL LIMITATION IN INTERACTING WITH OTHERS

Once a court holds that interacting with others is a major life activity, it must determine what constitutes a “substantial limitation” in this activity. The Ninth and Second Circuits addressed this issue in *McAlindin* and *Jacques*, respectively. They disagreed on the answer.

1. The Ninth Circuit

After concluding in *McAlindin* that interacting with others constitutes a major life activity, the Ninth Circuit looked to the EEOC’s interpretive guidelines to determine what constitutes a substantial limitation in this area. It adopted the EEOC’s recommendation that a plaintiff attempting to establish a substantial limitation in interacting with others “must show that his ‘relations with others [a]re characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.’”⁸⁹ The court stressed that the limitation “must be severe” and that mere cantankerousness or “trouble getting along with coworkers” does not constitute a substantial limitation in this area.⁹⁰ The court focused on documented medical evidence pertaining to the plaintiff’s symptoms when concluding that the

87. See *id.* at 202 n.8 for a summary of circuits declining to address whether interacting with others constitutes a major life activity under the ADA.

88. See, e.g., *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 274 (4th Cir. 2004); *Heisler v. Metro. Council*, 339 F.3d 622, 628–29 (8th Cir. 2003); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1254–55 (10th Cir. 2001).

89. *McAlindin*, 192 F.3d at 1235 (alteration in original) (quoting EEOC ON PSYCHIATRIC DISABILITIES, *supra* note 14, ¶ 9, at 10).

90. *Id.*

evidence demonstrated a genuine issue of fact regarding whether the plaintiff's anxiety disorder resulted in a substantial limitation in interacting with others.⁹¹

2. The Second Circuit

To date, the Second Circuit sets the highest bar for a plaintiff attempting to prove a substantial limitation in interacting with others. In *Jacques v. DiMarzio, Inc.*, the court did not mince words when it condemned the Ninth Circuit's test as "unworkable, unbounded, and useless as guidance to employers, employees, judges, and juries."⁹² It proclaimed the Ninth Circuit's demarcation between hostility and mere cantankerousness "illusory"⁹³ and asserted that its test "frustrates the maintenance of a civil workplace environment."⁹⁴ The court opined that a standard requiring "consistently high levels of hostility" would simply result in more protection under the ADA for the most "troublesome and nasty . . . employee."⁹⁵

In rejecting the Ninth Circuit's (and the EEOC's) approach, the Second Circuit announced a new standard for determining whether a person is substantially limited in interacting with others. One meets this standard "when the mental or physical impairment severely limits the fundamental ability to communicate with others."⁹⁶ The court made it clear that only those with the most basic, severe limitations in communication would qualify under this test, but it noted that a number of severe psychiatric disorders may result in such impairment.⁹⁷ The court elaborated:

This standard is satisfied when the impairment severely limits the plaintiff's ability to connect with others, *i.e.*, to initiate contact with other people and respond to them, or to go among other people—at the most basic level of these activities. The standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful. A plaintiff who otherwise can perform the functions of a job with (or without) reasonable accommodation could

91. *See id.* at 1235–36 (noting that several evaluating physicians documented the plaintiff's pattern of withdrawal caused by his anxiety disorder).

92. 386 F.3d at 202.

93. In making its point, the Second Circuit pointed out the similarities in the dictionary definitions of "hostile" and "cantankerous." *Id.* at 203.

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.* at 203–04.

satisfy this standard by demonstrating isolation resulting from any of a number of severe conditions, including acute or profound cases of: autism, agoraphobia, depression or other conditions that we need not try to anticipate today.⁹⁸

By requiring a significant limitation in the *fundamental* ability to communicate, the Second Circuit appears to have set a tougher standard for plaintiffs than either the Ninth Circuit⁹⁹ or the EEOC.¹⁰⁰

3. Other Courts

Several other circuits have considered whether a plaintiff with a psychiatric disorder is substantially impaired in interacting with others, but none has outlined a specific standard for deciding the issue.¹⁰¹ To date, the Supreme Court has declined to address the issue.¹⁰² Consequently, both employers and employees face uncertainty when confronting this unresolved area of the law.

III. COURTS' UNEVEN TREATMENT OF INTERACTING-WITH-OTHERS CLAIMS

Interacting-with-others claims have received decidedly uneven treatment by the courts. Although unpredictability characterizes both the major life activity and substantial limitation prongs of the analysis, the variance in the latter is particularly noteworthy.

A. INTERACTING WITH OTHERS AS A MAJOR LIFE ACTIVITY

In enacting the ADA, Congress consciously chose to protect individuals with both mental and physical impairments.¹⁰³ The Act, however, has fallen short in its attempt to protect persons

98. *Id.*

99. *See* *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999).

100. *See* EEOC ON PSYCHIATRIC DISABILITIES, *supra* note 14, ¶ 9, at 10.

101. *See, e.g.*, *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 274 (4th Cir. 2004); *Heisler v. Metro. Council*, 339 F.3d 622, 628–29 (8th Cir. 2003).

102. *See, e.g.*, *McAlindin v. County of San Diego*, 530 U.S. 1243 (2000), *denying cert. to* 192 F.3d 1226.

103. *See* 42 U.S.C. § 12102(2)(A) (2000) (“The term ‘disability’ means . . . a physical or mental impairment that substantially limits one or more . . . major life activities.” (emphasis added)); *see also* 29 C.F.R. § 1630.2(h)(2) (2004) (listing “emotional or mental illness” as an impairment under the ADA).

with mental impairments.¹⁰⁴ For example, courts more often hold that interacting with others is a major life activity when a person with a physical impairment (e.g., diabetes, AIDS), rather than a mental impairment, brings the claim.¹⁰⁵ This seems somewhat counterintuitive. Diabetes, for example, is not likely to impair one's interaction with others to the extent that a mental illness such as bipolar I disorder would. A person must demonstrate "marked" impairment in social or occupational functioning before even receiving a diagnosis of bipolar I disorder.¹⁰⁷ This tendency may reflect the discomfort that many, including judges, have with mental illness.¹⁰⁸ As Professor Nancy Hensel has noted, "Judges, and indeed employers, are likely concerned that if they recognize interacting with others in the context of mental disability, they will be validating frivolous claims brought by 'otherwise normal' employees who are simply 'difficult' and manipulating the ADA to secure preferable and unwarranted concessions."¹⁰⁹ This is a valid concern: courts must craft a standard narrow enough to block frivolous claims yet broad enough to allow legitimate claims to proceed.

Although courts continue to disagree about whether interacting with others should constitute a major life activity,¹¹⁰ the recent trend is toward recognizing it as such.¹¹¹ Doing so corresponds with both the EEOC's and the Supreme Court's guidance on the ADA's definition of "major life activity." The EEOC expressly lists interacting with others as a major life activity in its interpretive guidelines.¹¹² In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court held that a ma-

104. See Douglas A. Blair, *Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection Under Title I of the Americans with Disabilities Act*, 29 SETON HALL L. REV. 1347, 1358 (1999); Hensel, *supra* note 4, at 1139–42.

105. See Hensel, *supra* note 4, at 1168.

107. See AM. PSYCHIATRIC ASS'N, *supra* note 17, at 355–58.

108. See Hensel, *supra* note 4, at 1168–70.

109. *Id.* at 1169–70.

110. Compare *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (declining to recognize interacting with others as a major life activity under the ADA), with *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 202 (2d Cir. 2004), and *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) (both recognizing interacting with others as a major life activity under the ADA).

111. See, e.g., *DiMarzio*, 386 F.3d at 202; *McAlindin*, 192 F.3d at 1234.

112. See EEOC DEFINITION OF DISABILITY, *supra* note 14, § 902.3(b); EEOC ON PSYCHIATRIC DISABILITIES, *supra* note 14, ¶ 3, at 5.

major life activity is one that is “of central importance to daily life.”¹¹³ Undoubtedly, interacting with others constitutes a significant and regular aspect of most people’s daily lives.¹¹⁴ Similar to walking, breathing, and caring for oneself (other commonly recognized major life activities under the ADA), most people must interact with others multiple times throughout the day. It is thus “essential in the day-to-day existence of a normally functioning individual.”¹¹⁵ Consequently, courts should follow the Ninth and Second Circuits’ lead in recognizing interacting with others as a major life activity under the ADA.

Uniform recognition of interacting with others as a major life activity would lower one roadblock for persons with mental illness attempting to establish a disability in this area. However, the “substantial limitation” prong creates an even larger hurdle for plaintiffs.¹¹⁶

B. ESTABLISHING A SUBSTANTIAL LIMITATION IN INTERACTING WITH OTHERS

Litigants face particular difficulty when trying to predict a court’s analysis of what constitutes a substantial limitation in interacting with others. Courts vary in their treatment of several issues, including the degree of limitation required across different spheres of life (e.g., work versus home), the temporal requirements of the limitation, and the weight accorded to expert medical testimony regarding the limitation.

1. Substantial Limitation Versus Complete Inability

Commentators posit that courts employ “excessively exacting standards” in determining whether a plaintiff is substan-

113. 534 U.S. 184, 197 (2002).

114. See Hensel, *supra* note 4, at 1189–90, for an excellent discussion of why interacting with others should be uniformly recognized as a major life activity under the ADA. Hensel notes that “[i]nteracting with others, by any definition, is a required precursor to an individual’s ability to work, to love, to reproduce and to function on a day-to-day basis in modern society.” *Id.* at 1189.

115. *Bragdon v. Abbott*, 524 U.S. 624, 660 (1998) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

116. See Kathleen D. Zylan, Comment, *Legislation That Drives Us Crazy: An Overview of “Mental Disability” Under the Americans with Disabilities Act*, 31 CUMB. L. REV. 79, 94 (2000) (“[A]lthough the courts are somewhat split on how broadly they should interpret ‘major life activity,’ this term does not seem to be the major stumbling block for employees in proving disability. . . . [T]he test for ‘substantial limitation’ appears to play a major ‘gatekeeping’ role in limiting claims.”).

tially limited in interacting with others.¹¹⁷ Despite the Supreme Court's instruction in *Bragdon* that "substantially limited" does not require a "complete inability" to perform a major life activity,¹¹⁸ courts often have required virtual incapacity in interpersonal relations in order for a plaintiff to prevail in an interacting-with-others claim.¹¹⁹ Evidence of any ability to interact with others in either one's private or work life likely will defeat a plaintiff's disability claim at the summary judgment stage.¹²⁰ For example, in *Heisler v. Metropolitan Council*, the plaintiff suffered from a twenty-year history of severe depression marked by multiple hospitalizations and ongoing outpatient treatment, including electroconvulsive therapy.¹²¹ Despite the plaintiff's testimony that her depression caused great sadness, isolation, and a failure to talk to anyone, the Eighth Circuit concluded that she was not substantially impaired in interacting with others.¹²² The court apparently based its conclusion largely on the fact that the plaintiff's depression did not prohibit her from performing her job, which involved supervising other employees.¹²³

Similarly, in *Steele v. Thiokol Corp.*, the Tenth Circuit held that a plaintiff suffering from obsessive compulsive disorder (OCD) was not substantially limited in interacting with others despite evidence of repeated problems with multiple coworkers and supervisors that ultimately resulted in a "nervous breakdown" and a three-and-a-half week leave of absence.¹²⁴ The court emphasized that, unlike the plaintiff in *McAlindin*, Mr. Steele failed to provide evidence that his OCD caused substantial impairment in getting along with people *in general*.¹²⁵ Instead, he only provided evidence of difficulties getting along

117. Hensel, *supra* note 4, at 1178 ("[C]ourts have interpreted the 'substantially limited' requirement to be so exacting in connection with interacting with others that few plaintiffs have been able to survive summary judgment."); *see also* DeLoach, *supra* note 6, at 1338 ("Essentially, the . . . court equated substantial limitation with total inability to interact with others.").

118. *Bragdon*, 524 U.S. at 641.

119. *See* Hensel, *supra* note 4, at 1181; *see also* *Heisler v. Metro. Council*, 339 F.3d 622, 625, 628–29 (8th Cir. 2003); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1250–52, 1255 (10th Cir. 2001) (both holding that the plaintiff did not produce sufficient evidence to prevail on an interacting with others claim).

120. *See* Hensel, *supra* note 4, at 1194.

121. *See* 339 F.3d at 625.

122. *See id.* at 628–29.

123. *See id.* at 629.

124. 241 F.3d at 1250–52.

125. *See id.* at 1255.

with people at work, which was not enough to survive summary judgment.¹²⁶

While some courts require plaintiffs to demonstrate a nearly complete inability to interact with others across all spheres of life, others allow a case to proceed on much weaker evidence of a substantial limitation. In *Bennett v. Unisys Corp.*, a plaintiff with major depressive disorder survived summary judgment based on her and her coworkers' testimony that she was "belligerent," had "difficulty controlling her emotions," and possessed deficient interpersonal skills *at work*.¹²⁷ The court purportedly applied the *McAlindin*/EEOC standard and noted that one does not have to show a complete inability to interact with others or daily problems to establish a substantial limitation in interacting with others.¹²⁸ In *Lemire v. Silva*, the plaintiff had a longstanding history of panic disorder with agoraphobia.¹²⁹ The plaintiff's treating psychiatrist testified that although her ability to relate to her family continued to have a good prognosis, she was impaired in her ability to interact with others in crowded places.¹³⁰ Based on this evidence, the court, applying the *McAlindin* standard, concluded that a genuine issue of material fact existed as to whether the plaintiff's inability to interact with others *in crowded places* constituted a substantial limitation in interacting with others.¹³¹ Clearly, courts ostensibly applying the same standard come up with very different results.

The Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* suggests that courts are correct to require evidence of impairment in interacting with others across multiple spheres of life.¹³² The Court's decision in *Bragdon v. Abbott*, however, established that a disability under the ADA does not require proof of a *complete inability* to perform a major life activity.¹³⁴ An impairment may substantially

126. See *id.*; see also *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1131 (10th Cir. 2003) (citing *Steele* in holding that the plaintiff's severe interpersonal problems with multiple coworkers did not establish a *general* inability to get along with others).

127. No. 2:99 CV0446, 2000 WL 33126583, at *6 (E.D. Pa. Dec. 11, 2000).

128. See *id.* at *5.

129. See 104 F. Supp. 2d 80, 83 (D. Mass. 2000).

130. See *id.* at 88.

131. See *id.*

132. See 534 U.S. 184, 200-01 (2002).

134. See 524 U.S. 624, 641 (1998).

limit a major life activity even if the resulting difficulties are not “insurmountable” in all areas of a person’s life.¹³⁵ The fact that an individual attempts to participate in a major life activity despite an impairment should not automatically signal that he or she is not substantially limited in that activity.¹³⁶

2. Substantial Limitation and Chronic Intermittent Disorders

Commentators also criticize courts’ analyses of duration of psychiatric disabilities when evaluating whether a plaintiff is substantially limited in interacting with others.¹³⁷ Courts often minimize the disabling impact of chronic conditions by rejecting claims of psychiatric disability that are not supported by medical evidence of recurrent and ongoing problems.¹³⁸ Thus, a person with a severe but intermittent chronic disorder likely faces an uphill battle in establishing a disability based on substantial impairment in interacting with others.

Courts must not automatically discount psychiatric disorders with an episodic course. One with a severe mental illness may experience a disease course marked by periods of relative adjustment interspersed with periods of substantially impaired functioning. For example, the DSM-IV describes bipolar I disorder as a “recurrent disorder” in which the majority of those affected “return to a fully functional level between [manic] episodes.”¹³⁹ The lack of constant impaired functioning should not, in itself, defeat a disability claim. Courts should not downplay the severity of a psychiatric disorder just because the plaintiff does not experience florid symptoms on a daily basis. Instead, a court must distinguish between acute manifestations of a serious, underlying psychiatric disorder (e.g., bipolar I disorder) versus a temporary, nonchronic condition (e.g., adjustment dis-

135. *See id.*

136. *See Hensel, supra* note 4, at 1194 (quoting *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 22 (1st Cir. 2002)). Hensel elaborates:

Just as an individual in a wheelchair “may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run,” an individual capable of interacting with others some of the time who nevertheless experiences significant difficulty in doing so likewise is substantially limited in the ability to interact with others.

Id. (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999)).

137. *See, e.g., id.* at 1187.

138. *See id.* at 1187–88.

139. AM. PSYCHIATRIC ASS’N, *supra* note 17, at 353.

order, bereavement).¹⁴⁰ The EEOC recognized this when it noted in its enforcement guidelines that “[c]hronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms.”¹⁴¹

The Third Circuit heeded the EEOC’s guidance regarding chronic conditions in *Taylor v. Phoenixville School District*.¹⁴² The fact that the plaintiff did not experience problems on a daily basis due to bipolar disorder did not foreclose the possibility that she was substantially limited in the major life activity of thinking.¹⁴³ The court noted that “[c]hronic, episodic conditions can easily limit how well a person performs an activity as compared to the rest of the population.”¹⁴⁴ The substantial limitation inquiry must focus on the nature (e.g., typical course) and severity of the impairment rather than the mere number of days one experiences limitations.¹⁴⁵ A plaintiff suffering from a “severe and potentially long-term” condition should survive summary judgment and proceed to a presentation of his or her case on the merits.¹⁴⁶

Of course, simply counting the number of days a plaintiff claims substantial impairment is much easier than analyzing whether the severity, duration, and course of a mental impairment cause a substantial limitation in interacting with others.

140. See Hensel, *supra* note 4, at 1195 (“[I]t is simply inequitable to view each episode of disability in isolation, equating flare-ups of serious underlying and ongoing impairments with mere temporary and ‘intermittent’ conditions . . .”); see also AM. PSYCHIATRIC ASS’N, *supra* note 17, at 626, 684 (describing adjustment disorder and bereavement).

141. EEOC ON PSYCHIATRIC DISABILITIES, *supra* note 14, at 9.

142. 184 F.3d 296, 309 (3d Cir. 1999).

143. See *id.*

144. *Id.* The court also noted:

When we consider the nature and severity of the impairment, its duration, and its expected long-term impact, see 29 C.F.R. § 1630.2(j)(2), we find evidence that [the plaintiff] has had to contend with a serious, very much ongoing condition. . . . That she may not have experienced problems every day does not defeat her claim. . . . [R]epeated flare-ups of poor health can have a cumulative weight that wears down a person’s resolve and continually breaks apart longer-term projects.

Id.

145. See Hensel, *supra* note 4, at 1195.

146. *Id.* at 1196; see also Zylan, *supra* note 116, at 95 (asserting that consideration of duration is unnecessary in determining whether a mental impairment substantially limits a major life activity because it might bar valid claims of those who suffer “an episodic or seemingly transient emotional disorder”).

The more comprehensive analysis of the substantial limitation requires knowledge of psychiatric disorders, which necessitates reliance on psychiatric experts. As such, documented medical evidence plays a critical role in substantiating a claim of substantial impairment in interacting with others.

3. Reliance on Documented Medical Evidence

Not surprisingly, courts vary in the extent to which they rely on (or perhaps believe) documented medical evidence and expert testimony regarding the effect of a plaintiff's mental disorder on his or her ability to interact with others. The *McAlindin* court relied heavily on documented clinical findings from multiple physicians indicating that the plaintiff's mental illness resulted in a pattern of withdrawal from public places and family members.¹⁴⁷ The court concluded that the documented medical evidence "suggest[ed] that McAlindin suffer[ed] from a total inability to communicate at times, in addition to a more subtle impairment in engaging in meaningful discussion" and that his "alleged 'fear reaction' and 'communicative paralysis' [we]re sufficiently severe to raise a genuine issue of material fact about his ability to interact with others."¹⁴⁸

In contrast, the court did not place considerable weight on documented medical evidence of the plaintiff's impairment in *Zale v. Sikorsky Aircraft Corp.*¹⁴⁹ The court determined that the plaintiff's "chronic and moderately severe"¹⁵⁰ post traumatic stress disorder—characterized by distressing dreams, feelings of detachment from others, irritability, avoidance, hyperalertness, poor anger control, and psychological distress¹⁵¹—did not cause a substantial impairment in interacting with others.¹⁵² It concluded that the plaintiff's problems with coworkers reflected "a situational response, exacerbated by work harassment but lacking facts showing a manifestation of any regular or consistent nature."¹⁵³ The court noted that there was little in the re-

147. See *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999).

148. *Id.* at 1235–36.

149. See No. 3:97CV00125(JBA), 2000 WL 306943, at *6 (D. Conn. Feb. 7, 2000).

150. *Id.* at *5.

151. See *id.* at *1, *5.

152. See *id.* at *1, *6 (finding that Zale's evidence "is insufficient . . . to meet the standard set out in *McAlindin*").

153. *Id.* at *6.

cord to distinguish the plaintiff from the average “cantankerous employee” referenced in *McAlindin*.¹⁵⁴

As illustrated by the above discussion, the evidence required to establish a disability by demonstrating a substantial impairment in interacting with others depends primarily on the court hearing the case.¹⁵⁵ In light of this, several commentators emphasize the need for more detailed guidance on the issue.¹⁵⁶ Some posit that the Ninth and Second Circuits provided the necessary guidance in *McAlindin* and *DiMarzio*, respectively.¹⁵⁷ Others are not so sure.¹⁵⁸

C. THE *MCALINDIN* AND *DIMARZIO* SUBSTANTIAL LIMITATION STANDARDS

Both the Ninth and Second Circuits attempted to clarify the definition of “substantially limited” in the context of an “interacting with others claim,” with questionable success. The

154. *Id.*

155. *Cf.* Feldblum, *supra* note 5, at 150 (“[T]he varied results in cases under the ADA as to whether an impairment *substantially* limits a major life activity often seem to depend more on the court’s belief in the *merits* of the plaintiff’s underlying claim than on the specific effects of the plaintiff’s impairment on his or her life.”).

156. *See, e.g.,* DeLoach, *supra* note 6, at 1341–42 (noting that the lower courts need more detailed guidance regarding the meaning of “substantially limits” and calling for the EEOC to promulgate regulations providing “a more comprehensive statement of what a plaintiff must show to establish a substantial limitation in her ability to interact with others”); *see also* Rothstein et al., *supra* note 4, at 296–97 (noting that the underlying purpose of the ADA has been “undermined by the failure to create a reasonably clear definition of the crucial term ‘individual with a disability’”).

157. *See, e.g.,* Hensel, *supra* note 4, at 1194 (“The *McAlindin* standard, whereby those demonstrating severe problems on a regular basis, such as ‘consistently high levels of hostility, social withdrawal or failure to communicate when necessary,’ strikes a good balance between frivolous and significant interacting with others claims.” (citation omitted)); *see also, e.g.,* Lyda Phillips, *Accommodating the Problem Employee: No Easy Answers, Experts and Courts Agree*, 73 U.S. L. WK. 2275, 2276 (2004) (“[T]he Second Circuit’s standard for determining whether a mental disability is substantially limiting offers ‘far more practical guidance.’” (quoting Sharon Rennert, Senior Attorney Advisor, ADA Division of EEOC)).

158. *See, e.g.,* DeLoach, *supra* note 6, at 1342 (“While [the *McAlindin*] standard appears to strike a better balance than courts that require almost complete inability to interact with others, its language . . . may also be too vague, thus allowing lower courts to continue setting too high a burden for the substantial limitation requirement.”); *see also* Stephanie Francis Ward, *A Split on Personality*, A.B.A. J. E-REP., Oct. 15, 2004, available at 3 No. 41 ABAJEREP 4 (Westlaw) (noting that the Second Circuit’s *DiMarzio* opinion did little to clarify the definition of disability under the ADA).

Ninth Circuit's standard announced in *McAlindin*—interpersonal interactions characterized by recurrent and severe problems, such as “consistently high levels of hostility, social withdrawal, or failure to communicate when necessary”¹⁵⁹—appears to provide concrete guidance. However, courts have varied widely in their application of the standard.¹⁶⁰ Many have made the standard essentially insurmountable by requiring “comprehensive evidence of virtual incapacity prior to a finding of substantial limitation.”¹⁶¹

Courts' application of the Second Circuit's standard announced in *DiMarzio* (one is substantially limited in interacting with others when a “mental or physical impairment severely limits the *fundamental* ability to communicate with others”¹⁶²) remains untested. However, given that the *DiMarzio* standard sets the bar higher for plaintiffs than the *McAlindin* standard, courts already requiring a nearly complete inability to interact with others likely will interpret the *DiMarzio* standard as requiring the same. After all, it does not require a stretch of the imagination to argue that a limitation in the “fundamental ability” to communicate essentially equals a virtual incapacity to interact with others. On the other hand, one also could argue that a person is limited in the fundamental ability to communicate with others if he or she has recurrent and severe problems interacting with others, in other words, the *McAlindin* standard.¹⁶⁴

Ultimately, the Second Circuit's standard for defining a

159. *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999) (quoting EEOC ON PSYCHIATRIC DISABILITIES, *supra* note 14, at 10).

160. *Compare Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir. 2001) (noting that if it applied the *McAlindin* standard the plaintiff would not be substantially limited in interacting with others because he did not present evidence of impairment outside of work), *with Lemire v. Silva*, 104 F. Supp. 2d 80, 88 (D. Mass. 2000) (applying the *McAlindin* standard and holding that the plaintiff had presented a genuine issue of material fact regarding whether she was substantially limited in interacting with others due to difficulty interacting with others in crowded places).

161. *Hensel*, *supra* note 4, at 1194; *see, e.g., Heisler v. Metro. Council*, 339 F.3d 622, 628–29 (8th Cir. 2003) (finding that the plaintiff did not meet the *McAlindin* standard because, despite significant depressive symptoms affecting her ability to interact with others, she continued to perform her job, which involved supervising other employees).

162. *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2d Cir. 2004) (emphasis added).

164. *McAlindin*, 192 F.3d at 1235.

substantial limitation in interacting with others does little to clarify the definition of the term. Employers and employees still face a nonuniform and unpredictable standard. Undoubtedly, courts will continue to struggle with, and disagree on, just how severe a plaintiff's limitation in interacting with others must be before it qualifies as "substantial." Congress could address this confusion and unpredictability by unambiguously directing the EEOC to promulgate, through notice and comment rule-making,¹⁶⁵ concrete guidelines for determining the existence of a substantial limitation in interacting with others. The EEOC should ground the criteria in established psychiatric diagnoses and expert testimony regarding the effect of a plaintiff's psychiatric disorder on his or her ability to interact with others. Given the complexity of psychiatric diagnoses and the variability of their effects on functioning, it makes sense to leave the determination of whether a person's mental impairment substantially limits his or her ability to interact with others to the experts—i.e., the mental health professionals responsible for the diagnosis and treatment of mental illness.

IV. RECOMMENDATIONS

The uncertainty surrounding the definition of disability under the ADA leaves all parties guessing and frustrates the ADA's goal of providing "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."¹⁶⁶ Further, the "virtual incapacity" standard applied by many courts in interacting-with-others claims does not effectuate the intended purpose behind the ADA and often prevents deserving plaintiffs from presenting their case on the merits.¹⁶⁷ The challenge lies in fashioning a standard that

165. Notice and comment rulemaking is one method through which executive agencies promulgate regulations that have the force of law. *See Christensen v. Harris Co.*, 529 U.S. 576, 587 (2000).

166. 42 U.S.C. § 12101(b)(2) (2000).

167. *See, e.g., Feldblum, supra* note 5, at 150–51 (citing several cases meritorious on their face but ultimately dismissed because the disability was not found to "substantially limit" the plaintiff and noting that courts "are perceiving a spirit of the ADA that was never envisioned by any of us who worked to enact the law"); *see also Hensel, supra* note 4, at 1194 ("[D]eserving plaintiffs should be permitted to present their claims before a jury without the need to first present evidence of near-total incapacitation."); Rothstein et al., *supra* note 4, at 249 ("[T]he courts have been so restrictive in interpreting the statutory definition of an individual with a disability that the limited coverage approach has been extended beyond that intended by Congress.").

strikes an appropriate balance between the concerns of employers and employees while providing clear guidance to the courts.

This Note recommends that Congress authorize the EEOC to establish, after notice and comment rulemaking, criteria for determining when a mental impairment results in a substantial limitation in interacting with others. At a minimum, the criteria should require documented medical evidence of a preexisting mental impairment in the form of a DSM-IV diagnosis made by a licensed psychiatrist or psychologist.¹⁶⁸ A substantial limitation in interacting with others (and hence disability) would be presumed for certain DSM-IV diagnoses, such as those for which “marked impairment” in interpersonal functioning is a required characteristic of the disorder. For other psychiatric diagnoses, plaintiffs must present documented medical evidence regarding the impact of the diagnosed mental impairment on his or her ability to interact with others.¹⁶⁹

A. PRESUMPTION OF A SUBSTANTIAL LIMITATION IN INTERACTING WITH OTHERS BASED ON DSM-IV DIAGNOSES

To receive a psychiatric diagnosis, a person typically must display some degree of impairment in occupational or social functioning.¹⁷⁰ For example, a diagnosis of severe major depressive disorder requires that symptoms “markedly interfere with occupational functioning or with usual social activities or relationships with others.”¹⁷¹ The criteria for a manic episode require that symptoms “cause marked impairment in occupational functioning or in usual social activities or relationships

168. Both psychiatrists and clinical psychologists receive specialized training in the diagnosis of mental disorders.

169. See Zylan, *supra* note 116, at 114 (“Forcing employees to provide documented evidence or expert opinion regarding the nexus between the conduct and the disorder should be required.”). Rothstein and his colleagues proposed a similar scheme calling for Congress to authorize the EEOC, after notice and comment rulemaking, to publish medical criteria for determining when the most common physical and mental impairments are severe enough to constitute a disability under the ADA. Rothstein et al., *supra* note 4, at 244, 270–72. Disability (and thus ADA coverage) would be presumed for those meeting the established criteria; no disability would be presumed for those not meeting the criteria. *Id.* A party could rebut the presumption by demonstrating, via clear and convincing evidence, that the plaintiff’s impairment either did or did not substantially limit a major life activity. *Id.*

170. See generally AM. PSYCHIATRIC ASS’N, *supra* note 17 (describing features of a wide range of mental disorders).

171. *Id.* at 377–78.

with others.”¹⁷² A diagnosis of OCD requires that symptoms “cause marked distress, are time consuming . . . or significantly interfere with the person’s normal routine, occupational (or academic) functioning, or usual social activities or relationships.”¹⁷³

As illustrated above, many psychiatric diagnoses inherently contain evidence directly relevant to one’s ability to interact with others. A documented DSM-IV diagnosis characterized by “marked” or “significant” impairment in social functioning (e.g., severe major depressive disorder),¹⁷⁴ should establish a presumption of substantial impairment in interacting with others and, hence, disability under the ADA. In contrast, a plaintiff diagnosed with a psychiatric disorder that does not necessarily involve “marked” or “significant” impairment in interpersonal functioning (e.g., mild major depressive disorder¹⁷⁵) would have to provide documented medical evidence regarding the effect of the disorder on his or her ability to interact with others.

B. DOCUMENTED MEDICAL EVIDENCE OF A PSYCHIATRIC DISORDER’S EFFECT ON FUNCTIONING

If significant impairment in interpersonal functioning is not an essential criterion of a plaintiff’s psychiatric diagnosis, she or he must establish a substantial limitation in interacting with others through documented medical evidence of the disorder’s effect on such functioning. The EEOC’s existing enforcement guidelines do not require expert testimony regarding a substantial limitation.¹⁷⁶ However, doing so would help legitimize these claims in the eyes of both courts and laypersons. It certainly should help eliminate some of the error involved in allowing judges untrained in the diagnosis of psychiatric disorders to determine the existence and effect of a mental illness.¹⁷⁷

172. *Id.* at 332.

173. *Id.* at 423.

174. *Id.* at 377–78.

175. *Id.* at 377 (describing a patient having “only minor impairment in occupational functions or in unusual social activities or relationships with others”).

176. See EEOC ON PSYCHIATRIC DISABILITIES, *supra* note 14, at 6.

177. Of course, trained mental health professionals can, and do, disagree regarding the correct psychiatric diagnosis. See Zylan, *supra* note 116, at 121–22 (noting that psychiatric expert testimony can complicate litigation by creating a “battle of the experts”). However, such experts are arguably better at determining the existence and effect of a psychiatric disorder than is the judi-

A person justifiably limited by a mental impairment likely will have preexisting, documented medical evidence to that effect in the form of a psychiatric or psychological consultation and ongoing treatment notes. Therefore, requiring such evidence should not provide an unreasonable hurdle for those with legitimate claims. Further, it should help eliminate frivolous claims conceived in a post hoc fashion following an adverse employment decision.¹⁷⁸ On the other hand, reliance on expert testimony necessarily opens the door to “expert shopping” and potentially leaves the judge with the difficult task of refereeing a “battle of the experts.”¹⁷⁹ The Family and Medical Leave Act (FMLA)¹⁸⁰ provides one model for dealing with this problem.

Under the FMLA, an employee may take up to twelve weeks leave for a “serious health condition.”¹⁸¹ Before authorizing leave, the employer may require the employee to provide medical certification documenting the existence of the health condition.¹⁸² If the employer questions the adequacy of the medical certification provided by the employee, it may require a second opinion from a health care professional of its choosing.¹⁸³ The employer pays for the second evaluation, which may not be performed by a health care provider used on a regular basis by the employer.¹⁸⁴ If the two experts disagree, the employer may require a third medical opinion.¹⁸⁵ Both the employer and employee must approve the third evaluator,¹⁸⁶ whose conclusions are dispositive.¹⁸⁷

The EEOC could employ similar requirements for psychiatric disorders that do not meet the presumption of disability. If mental health professionals testifying for the employee and the employer disagree as to whether the employee’s mental im-

ary.

178. See Blair, *supra* note 104, at 1397–98 (noting that requiring a documented psychiatric diagnosis would allow courts to dismiss claims where a plaintiff “asserts an undiagnosed ailment while employed and then attempts medical validation after termination”).

179. See Zylan, *supra* note 116, at 122.

180. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (2000)).

181. 29 U.S.C. § 2612(1)(D).

182. See *id.* § 2613(a).

183. See *id.* § 2613(c)(1).

184. See *id.* § 2613(c)(2).

185. See *id.* § 2613(d)(1).

186. See *id.*

187. See *id.* § 2613(d)(2).

pairment causes a substantial limitation in interacting with others, the court could require a third opinion. The parties together would designate the “tiebreaker” expert whose opinion would be final and binding.

C. ADOPTING THE REGULATIONS

Drafting regulations establishing criteria for a substantial impairment in interacting with others is not a simple task. It is, however, an achievable one. Mental health professionals already diagnose psychiatric disorders based on established DSM-IV criteria.¹⁸⁸ Psychiatric diagnoses typically require some degree of impairment in occupational or social functioning. Most also include an indication of the severity and course of the disorder. Consequently, psychiatrists and clinical psychologists are well equipped to help specify diagnostic criteria suitable for establishing a presumption of substantial limitation in interacting with others. Because agencies have access to such experts, EEOC rulemaking provides the best approach for establishing such standards.¹⁸⁹ The inconsistency in courts’ deference to existing EEOC regulations and guidelines suggests that Congress may need to amend the ADA to ensure compliance with the proposed regulations. A clear congressional statement granting the EEOC authority to implement regulations regarding what constitutes a substantial limitation in interacting with others likely would result in deference from the courts.¹⁹⁰

The current state of the law generates considerable uncertainty regarding what constitutes a disability under the ADA. This unpredictability permeates the Act—it is not limited to

188. See Rothstein et al., *supra* note 4, at 271 (“Medical practice guidelines and standard diagnostic and treatment protocols routinely designate the medical criteria for determining when a condition is mild, moderate, or severe. These determinations are crucial in the clinical setting to indicate the appropriate course of treatment.”).

189. See *id.* (proposing that the EEOC consult with professional medical associations and organizations when promulgating rules establishing medical standards).

190. See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (holding that the mandatory deference of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is reserved for agency interpretations adopted pursuant to a congressional delegation of rulemaking authority); see also DeLoach, *supra* note 6, at 1342–43 (recommending that the EEOC promulgate regulations regarding what constitutes a substantial limitation in interacting with others because courts afford greater deference to agency regulations promulgated through formal rulemaking procedures).

persons with mental impairments attempting to establish a substantial limitation in interacting with others.¹⁹¹ The confusion in the realm of interacting with others, however, is particularly salient. This likely stems from a number of factors, including the invisibility of mental impairments, widespread misconceptions and stereotypes regarding their impact on functioning,¹⁹² and the lack of “objective” evidence demonstrating a causal link between a mental impairment and functional limitations.¹⁹³ As such, there is a heightened need for detailed regulatory guidance establishing what constitutes a substantial limitation in the major life activity of interacting with others.

CONCLUSION

Congress enacted the ADA with the goal of providing clear and consistent standards for eliminating discrimination against persons with disabilities. This goal has not been realized. Persons with mental impairments seeking to establish a disability based on a substantial limitation in interacting with others face a particularly difficult battle. The unpredictability surrounding this issue disadvantages employers and employees alike. EEOC regulations establishing diagnostic criteria necessary to demonstrate a substantial limitation in interacting with others would provide needed clarity to this contentious and confusing area of the law.

191. See generally Rothstein et al., *supra* note 4. Rothstein and colleagues call for a broad regulatory scheme in which Congress authorizes the EEOC to publish medical criteria for determining when common physical and mental impairments are severe enough to constitute a disability under the ADA. See *id.* at 244. For example, the authors propose that persons with bipolar I disorder should qualify as disabled if they (1) are receiving ongoing treatment for a confirmed diagnosis of bipolar I disorder; or (2) have a history of hospitalization for bipolar I disorder. See *id.* at 285. Persons with epilepsy should qualify as disabled if they (1) have had “one generalized tonic-clonic seizure”; or (2) have “been on [antiseizure medication] for at least one year.” *Id.* at 290.

192. For example, the notion that a person suffering from major depressive disorder should just “snap out of it” implies that the person, not the mental impairment, is causing any limitations in functioning.

193. Unlike with hearing and vision, there are no “objective” tests that indicate the degree to which a person’s mental impairment affects his or her ability to interact with others.