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John E. Rumel
University of Idaho College of Law, jrumel@uidaho.edu

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FEDERAL DISABILITY DISCRIMINATION LAW AND THE TOXIC WORKPLACE: A CRITIQUE OF ADA AND SECTION 504 CASE LAW ADDRESSING IMPAIRMENTS CAUSED OR EXACERBATED BY THE WORK ENVIRONMENT

John E. Rumel*

INTRODUCTION

Work and the workplace itself have long been recognized as conferring important benefits on workers and society at large.[1] For workers, work provides a source of income and may provide a sense of self-worth and fulfillment, and the workplace itself may be a source of community.[2] For society, full or maximized employment provides a source of social stability and control, and also fuels the economy.[3] Congress

* Adjunct Professor of Law, University of Idaho College of Law, and General Counsel, Idaho Education Association; formerly Visiting Assistant and Visiting Associate Professor of Law, Santa Clara University School of Law; J.D., 1981, University of California, Hastings College of the Law; B.A., 1977, University of California, Santa Cruz. The author would like to thank Professor Monique Lillard of the University of Idaho College of Law for making insightful comments on an earlier draft of this article.

1. Tristin K. Greene, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 627 (2005); Thomas E. Geu & Martha S. Davis, *Work: A Legal Analysis in the Context of the Changing Transnational Political Economy*, 63 U. CIN. L. REV. 1679, 1681–97 (1995); *see also* Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 834 (2002) (employment, when balanced with family and civic commitments, benefits individuals and society).

2. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886–92 (2000); *but cf.* Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 530 (1997) ("For countless millions, work is a chore, a burden to be borne, a source of anxiety and conflict.").

3. Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L. J. 759, 781–85 (2005) (citing FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 7–22 (1971) (hereinafter PIVEN & CLOWARD)); *see also* Brigid Kennedy-Pfister, *Continuity and Contradiction in the Theory and Discourse of Dependence*, 28 FORDHAM URB. L. J. 667, 682–83 (2001) (citing PIVEN & CLOWARD, *supra*, at 7–8 (2d ed. 1993)).

enacted the Americans with Disabilities Act ("ADA"),[4] which was preceded by Section 504 of the Rehabilitation Act,[5] to further several of these goals, including allowing qualified individuals to gain, maintain, and enjoy the benefits of employment notwithstanding their disabled status and the prejudices against them. Employment of these individuals, in turn, causes society to reap the fruits of a more fully employed work force.[6]

However, work and the workplace may sometimes cause harm, and may sometimes even become toxic. The workplace may cause or exacerbate physical illnesses such as asthma, lung cancer, and other pulmonary diseases.[7] The workplace or work environment may also cause or exacerbate mental illnesses such as depression, anxiety, and post-traumatic stress syndrome,[8] although courts have been far more

4. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as 42 U.S.C. §§ 12101–12213 (2006)). Within the past two years, Congress has amended the ADA, enacting the ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553 (2008). For a discussion of those amendments and their relevance (or lack thereof) to the issues addressed in this Article, *see infra* notes 34, 35, 40, 85, 86, and 99 and accompanying text.

5. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).

6. In the Findings and Purpose provision of the ADA, Congress found, among other things, that "many people with physical or mental disabilities have been precluded from . . . [participating in all aspects of society] because of discrimination," that "discrimination against individuals with disabilities persists in such critical areas as employment," and that "the continu[ed] existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C.A. § 12101 (West 2010); *see also* Laura F. Rothstein, *Reflections on Disability Discrimination Policy—25 Years*, 22 U. ARK. LITTLE ROCK L. REV. 147, 158 (2000).

7. *See, e.g.*, *Occupational Cancer*, CENTERS FOR DISEASE CONTROL AND PREVENTION, www.cdc.gov/niosh/topics/cancer (last visited Sept. 22, 2010) ("Based on well-documented associations between occupational exposures and cancer, it is estimated that approximately 20,000 cancer deaths and 40,000 new cases of cancer each year in the U.S. are attributable to occupation.").

8. *See, e.g.*, *Work Organization and Stress-Related Disorders*, CENTERS FOR DISEASE CONTROL AND PREVENTION, www.cdc.gov/niosh/programs/workorg (last visited Sept. 22, 2010).

> Work organization and job stress are topics of growing concern in the occupational safety and health field. Job stress results when there is a poor match between job demands and the capabilities, resources, or needs of workers. Stress-related disorders encompass a broad array of conditions, including frank psychological disorders (depression, anxiety, post-traumatic stress disorder) and other emotional disturbances (dissatisfaction, fatigue, tension, etc.), maladaptive behaviors (aggression, substance abuse), and cognitive impairment.

skeptical of and less receptive to such claims.[9] And, while the above-described impairments may themselves impede or prevent a worker from working, those same impairments may have a substantially adverse—indeed, sometimes debilitating—impact on other, more fundamental, basic life functions, including breathing, eating, and sleeping, among others.[10] Thus, a day seldom goes by without a report of toxic mold in a workplace causing life-threatening respiratory or neurological problems for employees,[11] or excessively stressful circumstances or relationships at work causing equally life-impacting mental illness.[12]

This Article will address judicial treatment of one aspect of the toxic workplace under the ADA and Section 504.[13] Specifically, it will address a line of cases under the ADA holding that, where an impairment is caused solely by the work environment and substantially limits major life activities other than working, the question of whether a worker is disabled within the meaning of the ADA must be evaluated under so-called foreclosure or class-based analysis. Foreclosure/class-based analysis requires that a worker's

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Id.

9. *See infra* note 92.

10. *See supra* note 8.

11. *See, e.g., Other Sick Building Stories*, SICK BUILDINGS AND TOXIC MOLD, www.presenting.net/sbs/otherstories.html (last visited Sept. 22, 2010).

12. *See, e.g., Facts about Workplace Stress*, MEDI-SMART: NURSING EDUCATION RESOURCES, www.medi-smart.com/stress1.htm (last visited Sept. 22, 2010).

13. Toxic workplaces include work environments that expose workers to dangerous substances, fumes, or the like. *See* Michelle Gorton, Comment. *Intentional Disregard: Remedies for the Toxic Workplace*, 30 ENVTL. L. 811 (2000). Toxic workplaces, however, also include work environments characterized by dysfunctional relationships between employees and management that can lead to stress and thereby cause or exacerbate mental or physical illness. *See* Frances E. Zollers & Elletta Sangrey Callahan, *Workplace Violence and Security: Are There Lessons for Peacemaking?*, 36 VAND. J. TRANSNAT'L L. 449, 480 & nn.222–24 (2003) (citing John K. Slage, *Attack on Violence*, INDUSTRY WEEKLY, Feb., 17, 1997, at 15; GERALD W. LEWIS & NANCY C.. ZARE, WORKPLACE HOSTILITY: MYTH AND REALITY 58–66 (1999)). Although the ADA and Section 504 may apply when working conditions cause impairments to all employees exposed to the work environment, Hendricks-Robinson v. Excel Corp., 164 F.R.D. 667 (C.D. Ill. 1996), *cited with approval in* David T. Wiley, *If You Can't Fight 'Em, Join 'Em: Class Actions Under Title I of the Americans with Disabilities Act*, 13 LAB. LAW. 197, 223–24 (1997), this Article will primarily focus on the idiosyncratically-toxic workplace, i.e. workplaces where individual employees have particular susceptibility to workplace-caused impairments.

impairment prevent him or her from performing a broad range or class of jobs. Traditionally, this doctrine applies only when the single major life activity affected is working. Ultimately, this Article will reject the holding in those cases.

Part I of the Article will discuss existing ADA and Section 504 doctrine, outlining the statutory texts, federal case law, and Congressional intent, thereby providing the framework for traditional disability discrimination analysis.[14] Part II will discuss the line of cases alluded to above, tracking the courts' deviation from traditional analysis.[15] Part III will critique that case law, demonstrating that the courts' focus on causation (a) runs contrary to Congressional intent and that the resultant use of foreclosure/class-based analysis contravenes Supreme Court precedent, (b) is illogical and improperly requires additional issues of proof, and (c) by unwarrantedly making it more difficult for an employee to prove disability, and by thereby potentially eliminating inquiry into the issue of whether the employer might be able to reasonably accommodate an employee's disability, prematurely truncates ADA and Section 504 analysis.[16] Part IV of this Article will place that line of cases in the larger context of ADA and Section 504 jurisprudence. Specifically, Part IV will argue that such cases are symptomatic of the courts' desire to maintain "gate keeper" status on disability discrimination claims by (a) resolving such cases in favor of employers on the threshold issue of whether a claimant is disabled as a matter of law at summary judgment, and (b) thereby improperly failing to give full play to the reasonable accommodation provisions of the ADA and Section 504, which often involve questions of fact not susceptible to summary judgment and questions of management prerogative regarding the internal operation of its business.[17] The Article will conclude by suggesting that, because judicial analysis in this area has been at odds with both previously- and recently-stated congressional intent and existing Supreme Court precedent, the appropriate fix should come from future judicial decisions, not Congress.[18]

14. *See infra* notes 19–55 and accompanying text.
15. *See infra* notes 56–79 and accompanying text.
16. *See infra* notes 80–96 and accompanying text.
17. *See infra* notes 97–104 and accompanying text.
18. *See infra* note 105 and accompanying text.

I. THE ADA AND SECTION 504

A. Text, Purpose, and the Prima Facie Case

Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . . and other terms, conditions, and privileges of employment."[19] Similarly, Section 504 of the Rehabilitation Act provides, in pertinent part, that "[n]o otherwise qualified person with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[20] As discussed above,[21] the "basic purpose" of the ADA and Section 504 "is to ensure that [disabled] individuals are not denied jobs or other benefits because of the prejudic[ial] attitude[] or the ignorance of others."[22] Or, as stated by one district court, "[t]he ADA and Rehabilitation Act are interrelated Congressional mandates designed to remedy discrimination against disabled individuals."[23]

To prove a claim under the ADA, an employee must prove that he or she (1) is disabled under the Act, (2) is a qualified individual with a disability, and (3) has been discriminated against because of the disability.[24] The analysis is essentially the same under Section 504 of the Rehabilitation Act, with an employee also having to prove that the employer receives federal funding.[25]

B. Proving Disability—Impairments, Effect on Major Life Activities, and the Foreclosure / Class-Based Test

Under the ADA, a disability is defined as "a physical or

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19. 42 U.S.C. § 12112(a) (2006).

20. 29 U.S.C. § 794(a) (2006).

21. *See supra* note 6 and accompanying text.

22. Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987).

23. Shepherd v. U.S. Olympic Comm., 464 F. Supp. 2d 1072, 1089 (D. Colo. 2006).

24. Richardson v. Friendly Ice Cream Corp., 594 F.3d 69, 74 (1st Cir. 2010); Hennagir v. Utah Dept. of Corr., 587 F.3d 1255, 1261 (10th Cir. 2009); Bates v. United Parcel Serv., Inc., 511 F.3d 974, 988 (9th Cir. 2007).

25. Kilcullen v. N.Y. State Dept. of Labor, 205 F.3d 77, 79 n.1 (2d Cir. 2000); Zukle v. Regents of Univ. of Cal., 166 F.3d 1041, 1045 & n.11 (9th Cir. 1999).

mental impairment that substantially limits one or more . . . major life activities . . ."[26] that has a permanent or long-term effect.[27] The Equal Employment Opportunity Commission ("EEOC") has defined "physical impairment" as a "physiological disorder, or condition . . . affecting one or more of the following body systems: neurological, musculoskeletal . . . respiratory . . . cardiovascular . . . digestive . . . [and] skin . . . ."[28] Thus, physical illnesses such as asthma, migraine headaches, and cancer have all been deemed physical impairments under the ADA or Section 504.[29] The EEOC has also defined "mental impairment" to mean "[a]ny mental or psychological disorder, such as . . . emotional or mental illness . . . ."[30] Thus, numerous courts have held that depression, anxiety, post-traumatic stress syndrome, and panic attacks are emotional or mental illnesses that constitute mental impairments under the ADA or Section 504.[31]

The Supreme Court has made clear, however, that "[m]erely having an impairment does not make one disabled for purposes of the ADA;" rather, "[c]laimants also need to demonstrate that the impairment limits a major life activity."[32] A major life activity must be of "comparative importance" and "central to the life process itself" and it need not have a "public, economic, or daily character."[33]

Under recent amendments to the ADA, major life

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26. 42 U.S.C. § 12102(2), *cited in* Rohr v. Salt River Project Agric. Imp. & Power Dist., 555 F.3d 850, 858 (9th Cir. 2009).

27. Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 198 (2002).

28. 29 C.F.R. § 1630.2(h)(1) (2009).

29. Rivera-Rodriquez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 23 (1st Cir. 2001) (asthma); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 189 (5th Cir. 1996) (cancer); Lee v. City of Columbus, No. 2:07-cv-1230, 2009 WL 2929439, at *4 (S.D. Ohio Aug. 31, 2009) (migraine headaches).

30. 29 C.F.R. § 1630.2(h)(2) (2009).

31. Battle v. United Parcel Serv., Inc., 438 F.3d 856, 861–62 (8th Cir. 2006) (depression); Rohan v. Network Presentations, LLC, 375 F. 3d 266, 273–74 (4th Cir. 2004) (post-traumatic stress disorder); Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1408 (5th Cir. 1983) (anxiety and depression); Wilson v. Alamosa Sch. Dist., No. 06-cv-00607-WDM-CBS, 2009 WL 2139776, at *4 (D. Colo. July 15, 2009) (anxiety and stress); Clinkscales v. Children's Hosp. of Phila., No. 06-3919, 2009 WL 1259104, at *10 (E.D. Pa. May 7, 2009); Meador v. Metro. Water Reclamation Dist., No. 06 C 2705, 2007 WL 4162809, at *6 (N.D. Ill. Nov. 15, 2007) (panic attacks).

32. *Toyota Motor Mfg.*, 534 U.S. at 195.

33. Bragdon v. Abbott, 524 U.S. 624, 638 (1998).

activities have been broadened to "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working."[34] This statutory amendment codified a number of judicial decisions that had held that several fundamental activities, not specifically listed in the regulations implementing the ADA, constituted major life activities under the ADA.[35] Given the broad range of ADA-cognizable major life activities falling outside the context of working, the Supreme Court has rejected the notion "that the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace."[36] The Court

34. 42 U.S.C.A. § 12102(2)(A) (2010); *see also* 29 C.F.R. § 1630.2(i). The ADAAA also defines major life activities to include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C.A. § 12102(2)(B). The ADAAA makes several other important changes to the ADA. First, the ADAAA requires that, with limited exception, "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures," § 12102(4)(E)(i), thereby statutorily reversing the Supreme Court's decisions in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), and two companion cases, Murphy v. United Parcel Serv., 527 U.S. 516 (1999) and Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999). Second and third, the ADAAA requires that "[t]he definition of disability in [the ADA] shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA]," § 12102(4)(A), and provides that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active," § 12102(4)(D), thereby (again) statutorily reversing the Supreme Court's restrictive reading of the ADA on those issues in Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184 (2002). Only these latter two statutory changes, however, impact the issues addressed in this Article, and only do so indirectly. *See infra* note 86; *see also infra* note 103 and accompanying text.

35. *Bragdon*, 524 U.S. at 638–39 (sexual reproduction); E.E.O.C. v. Chevron Phillips Chem. Co., LP, 570 F.3d 606 (5th Cir. 2009) (sleeping); Adams v. Rice, 531 F.3d 936, 948 (D.C. Cir. 2008) (sexual relations); *Battle*, 438 F.3d at 861 (thinking and concentrating); Fraser v. Goodale, 342 F.3d 1032, 1041 (9th Cir. 2003) (eating). Prior to the ADAAA, courts had split over whether interacting with others constituted a major life activity. *Compare* McAlindin v. County of San Diego, 192 F.3d 1226, 1234–35 (9th Cir. 1999) *with* Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997). Because Congress did not specifically list interacting with others as a major life activity, but utilized "including but not limited to" language in the ADAAA, the question remains open. *See* 42 U.S.C.A. § 12102(2)(A).

36. *Toyota Motor Mfg.*, 534 U.S. at 201; *see also* Rohr v. Salt River Project

buttressed its conclusion by pointing out that the ADA's definition of disability applies to public transportation and privately-provided public accommodation cases, in addition to employment cases, stating that the ADA "is intended to cover individuals with disabling impairments regardless of whether the individuals have any connection to a workplace."[37]

In employment cases, the Supreme Court and numerous other courts have held that, when the major life activity affected by the impairment is working, a "foreclosure" or class-based test must be applied. Thus, when working is the major life activity affected by the impairment, "the statutory phrase 'substantially limits' requires . . . that plaintiffs allege they are unable to work in a broad class of jobs" or in a "'broad range' of jobs, rather than a specific job."[38] Conversely, where an impairment affects a major life activity other than working, the Supreme Court, in *Toyota Motor Mfg.*, made clear that working need not be analyzed in ADA employment cases and specifically held that "[n]othing in the text of the [ADA], our previous opinions, or the regulations suggests that a class-based framework should apply . . . ."[39] Numerous pre- and post-*Toyota Motor Mfg.* lower court

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Agric. Imp. and Power Dist., 555 F.3d 850, 858 n.5 (9th Cir. 2009)

> The Supreme Court has made clear that the substantial limitation inquiry is not limited to the effects of the impairment in the workplace . . . . Rather, the proper inquiry is whether the . . . impairment substantially limits the claimed major life activity in daily life. Put another way, "[w]hether [a plaintiff] faced substantial limitations in his ability to work is irrelevant to whether his limitations in other major life activities qualify him as disabled for ADA purposes."

Id. (quoting *McAlindin*, 192 F.3d at 1233) (citations omitted).

37. *Toyota Motor Mfg.*, 534 U.S. at 201.

38. *Id.* at 200 (citing *Sutton*, 527 U.S. at 491–92) ("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.") (citing 29 C.F.R. § 16302(j)(3) (2001) (emphasis added by court)). As quoted above, the Supreme Court, tracking the language utilized in 29 C.F.R. § 1630.2(j)(3), has referred to the legal standard as "class-based" analysis. *Toyota Motor Mfg.*, 534 U.S. at 200–01. Other courts, however, have referred to the standard as a "foreclosure" test. *See, e.g.*, Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996) (per curiam). The terms will be used interchangeably in this Article.

39. *Toyota Motor Mfg.*, 534 U.S. at 200. The Supreme Court's rejection of the class-based framework in cases involving major life activities other than working was the only employee-favoring aspect of the decision. *See supra* note 34.

decisions and EEOC regulations are in accord.[40]

C. Proof of Causation

Although proof of an impairment's substantial effect on a major life activity is essential under the ADA and Section 504, proof of the cause of the disability is not. Thus, several courts, quoting legislative history underlying the ADA, have stated that "[t]he cause of a disability is always irrelevant to the determination of disability."[41] Likewise, several courts, evaluating disability claims under Section 504, have stated that "[t]he Rehabilitation Act contains no language

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40. *See, e.g.*, Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 152 (3d Cir. 1999) ("A separate [class-based] analysis is applied under the regulations to determine when the major life activity of working is substantially limited, *see* . . . 29 C.F.R. § 1630.2(j)(3), but since we find [claimant's] illness affected major life activities even more fundamental than working, we need not analyze her disorder's impact on her ability to work.") (citation omitted); Burns v. Chi. Park Dist., No. 99 C 3479, 2002 WL 31018363, at *2 (N.D. Ill. Sept. 9, 2002) (class-based analysis inapplicable where major life activity affected is other than working); Watson v. Hughston Sports Med. Hosp., 231 F. Supp. 2d 1344, 1350 n.3 (M.D. Ga. 2002) (same); Jackson v. Lake County, No. 01 C 6528, 2002 WL 808351, at *4 (N.D. Ill. Apr. 30, 2002)

> Although it is questionable whether [plaintiff] could state a claim with respect to the major life activity of 'working' because he does not specifically allege he was regarded as 'unable to work in a broad class of jobs,' the court need not decide this question at this stage, since he has also included allegations that he was regarded as substantially impaired in other major activities such as "learning."

Id. (citation omitted); *see also* 29 C.F.R. pt. 1630, App. § 1630.2(j) ("If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working."). Commentators agree with these court decisions. *See, e.g.*, 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, 1400 (1999) ("[A]n employee should rely on working as a major life activity only as a last resort."); Randal I. Goldstein, *Mental Illness in the Workplace after* Sutton v. United Airlines, 86 CORNELL L. REV. 927, 949 (2001) ("[D]ue to the difficult evidentiary standard in cases involving the major life activity of working, many future plaintiffs will need to bring claims based on other major life activities that have been successful in the wake of *Sutton*."). Congress, albeit indirectly, essentially codified these well-established principles of ADA law in the ADAAA, enacting a rule of construction which states that "[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability." 42 U.S.C. § 12102(4)(C).

41. Henderson v. N.Y. Life, Inc., 991 F. Supp. 527, 531 n.4 (N.D. Tex. 1997) (citing Americans with Disabilities Act of 1990 Committee on the Judiciary Report, H.R. Rep. No. 101-485 (III) (1990), *reprinted in* 1990 U.S.C.C.A.N. Vol. 4., 451–52). *See, e.g.*, Lawrence v. Metro-Dade Police Dept., 872 F. Supp. 950, 956 n.5 (S.D. Fla. 1993).

suggesting that its protection is limited to how an individual became impaired, or whether an individual contributed to his or her impairment."[42] Courts and commentators have reached the same conclusion regarding the etiology of physical and mental impairments, stating that "[t]he ADA and regulations under it are simply devoid of any requirement that a physiological disorder or condition have a scientific name or known etiology,"[43] and that "the key in psychiatric disability cases—as in all other disability cases—is to look at the manifestations of disability rather than the etiology of the disability."[44] Indeed, in at least three federal or state law disability discrimination cases where employees alleged that their employer caused their impairments, the courts refused to evaluate causation for purposes of disability discrimination analysis, stating in the most recent decision that "[p]laintiff's status as a qualified individual with a disability does not depend on the cause of his disability, but on the extent of his disability."[45]

Although Congress, courts, and commentators have not directly addressed the issue, the congressional and judicial refusal to allow or to require inquiry into the cause of an impairment appears to stem from their reluctance to (1) (further) complicate ADA and Section 504 cases with additional issues of proof,[46] (2) bring tort concepts of causation into federal statutes designed, not to compensate plaintiffs for personal injury, but to allow qualified individuals to enter or remain in the workforce,[47] and (3)

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42. Cook v. State of R.I., Dept. of MHRH, 10 F.3d 17, 24 (1st Cir. 1993); *see also* Navarro v. Pfizer Corp., 261 F.3d 90, 97 (1st Cir. 2001) ("[T]he source of an impairment is irrelevant to a determination of whether that impairment constitutes a disability . . . .").

43. Pacourek v. Inland Steel Co., Inc., 916 F. Supp. 797, 801 (N.D. Ill. 1996); *see also* Woodson v. Cook County Sheriff, No. 96 C 3864, 1996 WL 604051, at *2 (N.D. Ill. Oct. 18, 1996) (allegation that plaintiff suffered from chronic fatigue syndrome, a condition of unknown etiology that substantially limited major life activities, sufficient to state claim under ADA).

44. Susan Stefan, *"You'd Have to be Crazy to Work Here": Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 817 (1998).

45. Trotter v. B & S Aircraft Parts & Accessories, Inc., No. 94-1404-FGT, 1996 WL 473837, at *9 (D. Kan. Aug. 13, 1996) (ADA) (internal quotation marks omitted); *see also* August v. Officers Unlimited, Inc., 981 F.2d 576, 583 (1st Cir. 1992) (state handicapped discrimination law); Simo v. Home Health & Hospice Care, 906 F. Supp. 714, 720 (D. N.H. 1995) (Section 504).

46. *See infra* notes 88–89 and accompanying text.

47. *See August*, 981 F.2d at 583 (contrasting state handicap discrimination

based on the ADA and Section 504's statuses as civil rights statutes, to avoid potentially "re-victimizing" individuals previously and traditionally subject to discrimination.[48] As to this latter point, just as Congress and the courts would not countenance employer or judicial inquiry into how an individual became a member of a protected class—indeed, such inquiry would be absurd in cases involving immutable characteristics such as race, ethnicity and age, among others—Congress and the courts have wisely chosen not to open that area of inquiry in disability discrimination cases either.

D. Qualified Individuals, Reasonable Accommodation, and Undue Hardship

Once a court determines that an individual is disabled under the ADA or Section 504, the court looks to whether the person is a qualified individual under the two federal statutes. Under the ADA and Section 504, a qualified individual includes "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[49] Under the ADA's implementing regulations, "[t]he term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires."[50] Under the ADA and Section 504, a reasonable accommodation may include "reassignment to a vacant position,"[51] a transfer,[52] or

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law and tort causation requirements); *Trotter*, 1996 WL 473837, at *10 (same contrast regarding ADA and tort requirements on causation); *see also* Henrietta D. v. Bloomberg, 331 F.3d 261, 279 n.8 (2d Cir. 2003) (relying on tort proximate cause principles for guidance on issue of whether employer discriminated against employee because of her disability in ADA and Section 504 case, but leaving open question whether common law tort causation principles invariably apply to that issue or to other aspects of disability discrimination analysis).

48. *See* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 U.C.L.A. L. REV. 1341, 1398 n.238 (1993); Caroline Palmer & Lynn Mickelson, *Many Rivers to Cross: Evolving and Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV. 455, 483 (2001) (discussing "double victimization" of disability discrimination litigants by employers and courts).

49. 42 U.S.C. § 12111(8) (2006), *cited in* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 396 (2002).

50. 29 C.F.R. § 1630.2(n).

51. 42 U.S.C. § 12111(9)(B), *cited in* Graves v. Finch Pruyn & Co., Inc., 457

an unpaid leave of absence of finite duration that will plausibly, or is reasonably likely to, allow the employee to return to work.[53] Under the ADA, prohibited discrimination includes an employer's "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."[54] Where, however, a court finds and concludes that an employee is not disabled within the meaning of the ADA, it need not reach the issue of whether the employer failed to provide the employee with a reasonable accommodation.[55]

In sum, (1) ADA and Section 504 doctrine protects individuals afflicted with physical or mental impairments that substantially limit major life activities, (2) only the major life activity of working triggers class-based analysis, (3) the cause of an impairment is irrelevant to ADA and Section 504 analysis, and (4) once an individual is recognized as disabled under the ADA and Section 504, all that should matter is whether the individual can perform the essential functions of the position that he or she holds or seeks, with or without a reasonable accommodation from his or her employer.

II. THE CASES

The lead case is *Rhoads v. FDIC*.[56] In *Rhoads*, a former bank employee who suffered from asthma and migraines caused by her working conditions brought, among other

F.3d 181, 186 (2d Cir. 2006).

52. Bellino v. Peters, 530 F.3d 543, 550 (7th Cir. 2008); Burns v. Coca-Cola Enters., Inc., 222 F.3d 247, 257 (6th Cir. 2000).

53. *Graves*, 457 F.3d at 186 n.6; Humphrey v. Mem'l Hosp. Ass'n, 239 F.3d 1128, 1136 (9th Cir. 2001); McNamara v. Tourneau, Inc., 496 F. Supp. 2d 366, 376 (S.D.N.Y. 2007).

54. 42 U.S.C. § 12112(b)(5)(A), *quoted in U.S. Airways, Inc.*, 535 U.S. at 396.

55. Lebron-Torres v. Whitehall Labs., 251 F.3d 236, 242 (1st Cir. 2001); Lampe v. Anderson News Corp., No. 94-16608, 1996 WL 56108, at *2 (D. Az. Feb. 9, 1996); McDonald v. Pa. Dep't of Pub. Welfare, 62 F.3d 92, 96 (3d Cir. 1995); Czapinski v. Iron City Indus. Cleaning Corp., No. 07-717, 2009 WL 614808, at *4 n.6 (W.D. Pa. 2009); Carlson v. Rent-A-Center, Inc., 237 F. Supp. 2d 114, 123–24 (D. Me. 2003).

56. 956 F. Supp. 1239 (D. Md. 1997), *aff'd in part and rev'd in part on other grounds*, 257 F.3d 373 (4th Cir. 2001).

claims, an ADA claim against her former employer, a financial institution that had been placed in receivership.[57] The district court rejected Rhoads's ADA claim on cross-motions for summary judgment, rejecting the claim that she was disabled because her physical impairments substantially limited her major life activities of working and breathing.[58] Thus, as to Rhoads's working claim, the court stated as follows:

> In this case, plaintiff alleges that she was unable to work in a smoke-filled environment due to the effect smoke had on her breathing and headaches. However, there appears to be no reasonable material or relevant factual dispute concerning the plaintiff's ability to perform her job requirements at a very high level, provided that she is given the opportunity to perform her work in a smoke-free atmosphere . . . . Thus, applying the . . . foreclosure test, Rhoads cannot argue that a class of jobs free from exposure to smoke has been foreclosed as a result of her impairments, and hence, Rhoads cannot show her ability to work is substantially limited. Consequently, as Rhoads's strongest claim of substantial impairment to a major life activity, i.e., her ability to work, fails, Rhoads's claim that she has a disability is fatally weakened.[59]

The district court also rejected Rhoads's breathing claim, again applying the foreclosure test and stating as follows:

> The plaintiff, however, strenuously argues application of the foreclosure test to her claim is only a starting point for determining whether or not she is a disabled individual because she alleges additional major life activities, such as breathing, are affected by the asthma and migraines she suffers when exposed to smoke. *See Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (per curiam) ("the general foreclosure test applies only to claims brought under the major life activity of working."). On the surface, plaintiff's argument has merit. Indeed, to find otherwise would allow employers to avoid grappling with their responsibility to accommodate employees with a disability that effects [sic] numerous aspects of their lives, in contravention of the ADA. *However, where the additional major life activities which*

57. *Id.*
58. *Id.* at 1246–47.
59. *Id.* at 1246.

> *the plaintiff claims are substantially limited, such as the ability to "breathe," are all triggered solely by her workplace environment, the traditional approach found in the ADA for determining whether such impairments are sufficiently severe to be classified as a disability appears inadequate.* In these limited circumstances, the proper inquiry should remain focussed on the extent to which an ADA claimant is capable of successfully pursuing a given vocation with or without reasonable accommodation.[60]

The Fourth Circuit affirmed, stating that:

> We accordingly hold that, where an ADA plaintiff asserts that she is disabled based on a substantial limitation of a major life activity other than working, but her condition is aggravated solely by her workplace environment, her claim must be assessed under our foreclosure test for a limitation on working. . . . As already discussed above, Rhoads's claim fails under its requirements.
>
> . . . .
>
> . . . If . . . Rhoads had shown that she was debilitated by exposure to secondhand smoke outside of the work-place, then the proper inquiry would have been whether her ability to breathe, etc., was "significantly restricted" as compared to the breathing ability of the "average person in the general population." However, because Rhoads established that her abilities to breathe and engage in other life activities were limited only by her exposure to tobacco smoke in the workplace, the proper inquiry is whether, pursuant to the foreclosure test, she was substantially limited in her ability to work.[61]

Between the district court's and the Fourth Circuit's opinions in *Rhoads*, the Northern District of California addressed a similar issue in *Benson v. Lawrence Livermore National Laboratory*.[62] In *Benson*, the plaintiff, a human resources specialist, brought claims against her former employer, defendant Lawrence Livermore National Laboratories ("LLNL"), alleging, among other things, that LLNL violated the ADA when she encountered problems breathing in her primary workplace.[63] Although LLNL had transferred her to a trailer where her breathing problems

60. *Id.* at 1246–47 (emphasis added).
61. Rhoads v. F.D.I.C., 257 F.3d at 389–90.
62. No. C95-2746 FMS, 1997 WL 651349 (N.D. Cal. Oct. 14, 1997).
63. *Id.*

subsided, she continued to have problems working and breathing at her prior worksite, where, according to her supervisor, a significant number of "workshops, meetings, and programmatic activities" within her job assignment occurred.[64]

As in *Rhoads*, the district court granted summary judgment in LLNL's favor, finding and concluding that because Benson only had difficulty breathing at one worksite, but was not foreclosed from working (and breathing) at a broad class of job, she was not impaired in the major life activity of working.[65] The district court, quoting the district court's opinion in *Rhoads*, likewise rejected Benson's contention that she was impaired in the major life activity of breathing.[66] Thus, as in *Rhoads*, the court held that where an employee's impairment is triggered solely by her workplace environment, the foreclosure analysis applicable to the major life activity of working must inform the court's conclusion.[67] And, the district court rejected Benson's argument that her breathing impairment was caused, at least in part, by factors outside her workplace, finding and concluding that Benson "ha[d] not offered evidence to show that her symptoms were triggered by anything but her work environment."[68]

The Ninth Circuit affirmed the district court's decision in an unpublished opinion.[69] The Court of Appeals did so without citing or discussing the district court's opinion in *Rhoads*.[70]

In the only relevant Court of Appeals decision post-dating the Fourth Circuit's decision in *Rhoads*, the Ninth Circuit addressed the legal effect of impairments caused by working conditions that limit both working and other major life activities.[71] In *Tyler*, the plaintiff was bitten by an insect nesting near the distribution center of his employer, Target

64. *Id.* at *2.
65. *Id.* at *4.
66. *Id.*
67. *Id.*
68. Benson v. Lawrence Livermore Nat'l Lab., No. C95-2746 FMS, 1997 WL 651349 at *4 n.5.
69. Benson v. Lawrence Livermore Nat'l Lab., 163 F.3d 605 (9th Cir. 1998) (unpublished).
70. *Id.*
71. Tyler v. Dayton Hudson Corp., 42 F. Appx. 934 (9th Cir. 2002).

Stores, and subsequently suffered severe allergic reactions.[72] Due to the insect bites and allergies, Tyler could not work, care for himself, sleep, or eat properly.[73] When Tyler requested an accommodation, Target refused and placed him on unpaid medical leave.[74] Tyler eventually sued under the ADA; however, the district court granted summary judgment against him, finding and concluding that he was not disabled within the meaning of the statute.[75]

In an unpublished opinion, the Ninth Circuit affirmed the decision. The Court of Appeals first rejected Tyler's claim that he was substantially limited in the major life activity of working, concluding, as in *Rhoads* and *Benson*, that the limitations on Tyler's ability to work at one type of job were legally insufficient to prove a disability under the ADA.[76] The Court of Appeals also rejected Tyler's claims that he was substantially limited in other major life activities, holding as follows:

> Tyler additionally contends that he is substantially limited in many other major life activities, that when afflicted with an allergic reaction, he is not only unable to work, but is also unable to care for himself, sleep or perform various essential manual tasks. Assuming, without deciding, that this is true, Tyler is still unable to press a viable claim under the ADA because the limitations on these other activities are products solely of his exposure to VBGs [Valley Black Gnats] at the workplace. In this situation, "the proper inquiry should remain focused on the extent to which an ADA claimant is capable of successfully pursuing a given vocation with or without reasonable accommodation. . . ." Because Tyler's "limitation was . . . created or aggravated solely by [his] work environment," . . . we do not think his other limitations place him under the protection of the ADA.[77]

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72. *Id.*

73. *Id.*

74. *Id.* Although the Ninth Circuit's opinion does not identify the specific accommodation requested, the briefing on appeal indicates that Tyler requested accommodations in the form of a "transfer, time off, or reassignment." Appellant's Opening Brief at 1, Tyler v. Dayton Hudson Corp., 42 F. Appx. 934 (9th Cir. 2002) (No. CIV S-00-756), 2001 WL 34103692 at *1.

75. *Tyler*, 42 F. Appx. at 934.

76. *Id.* at 935.

77. *Id.* (citations omitted) (quoting Rhoads v. F.D.I.C., 956 F. Supp. 1239, 1247 (D. Md. 1997), *aff'd in part and rev'd in part on other grounds*, 257 F.3d

The Court of Appeals concluded by opining that Congress did not intend for the ADA to cover employees in Tyler's circumstances, stating:

> The ADA protects people whose disability precludes them from working in a broad class of jobs. While the allergic reactions Tyler endured were serious, we cannot say he was disabled under the ADA where the impairment is the result of working at one place during one period of time. If this were the kind of disability that Congress really meant to redress, it could do so in future amendments to the statute. The precedents that constrain our consideration do not in the meantime permit an extension of the ADA's protections here. Until this legal landscape shifts, we must affirm the district court's ruling in favor of Target.[78]

Thus, under the legal standard applied in each of the above-discussed decisions, ADA plaintiffs were forced to either suffer physically in the workplace or quit their jobs, rather than receive accommodations from their employers.[79]

373, 389 (4th Cir. 2001)).

78. *Id.* For additional decisions adopting and applying the standard articulated in *Rhoads*, *see* Camacho v. Pemco World Air Servs., Inc., No. 1:05cv503-MHT, 2006 WL 2827243, at *8 (M.D. Ala. Oct. 2, 2006); Crumel v. Hampton Univ., No. Civ.A. 4:05CV31, 2005 WL 3357315, at *6 (E. D. Va. Dec. 8, 2005); Darnell v. Principi, No. 03-987-KI, 2004 WL 1824120, at *3–4 (D. Or. Aug. 4, 2004); Merit v. Se. Pa. Transit Auth., 315 F. Supp. 2d 689, 699 & n.22 (E.D. Pa. 2004); Reagan v. England, 218 F. Supp. 2d 742, 747 & n.5 (D. Md. 2002); Sanders v. FMAS Corp., 180 F. Supp. 2d 698, 704 (D. Md. 2001); Kidwell v. Bd. of County Comm'rs of Shawnee County, 40 F. Supp. 2d 1201, 1220 & n.6 (D. Kan. 1998).

79. The legal standard applied clearly affected the results of these cases. The decisions may also be partly attributable to the unique facts in the cases, a mischaracterization of the facts and the plaintiffs' claim by the courts, or bad tactical decisions by the plaintiffs (or some combination thereof). In each of the cases, the courts found that plaintiffs' impairments were triggered by air quality and other conditions solely in their respective workplaces. However, the courts' findings seem highly suspect, given that the impairments alleged—asthma and allergies—could almost certainly be caused by conditions outside of the workplace as well—such as bars or nightclubs where smoking has not been banned by state law or local ordinance (an increasingly infrequent circumstance in many parts of the United States), or churches burning incense as part of their religious practice. Indeed, in each of the cases, the plaintiffs argued or presented evidence that their impairments were also triggered by non-workplace conditions. In each instance, however, the courts chose to ignore the plaintiffs' factual showing or characterized it as inadequate. Also, as discussed above, given that the plaintiffs' impairments substantially limited their major life activities other than working, and given that "working" cases are analyzed under the employer-favoring class-based test, the plaintiffs in *Rhoads* and *Tyler* would have been better served—and would have been less likely to have led the

III. CRITIQUE

A. Utilizing Foreclosure / Class-Based Analysis when an Impairment is Caused or Exacerbated by the Work Environment and Substantially Affects Major Life Activities other than Working is Contrary to Congressional Intent and Supreme Court Case Law

As discussed above, Congress, in enacting both the ADA and Section 504, expressly stated that the cause or etiology of an impairment is of no legal moment under either of those federal disability discrimination statutes.[80] Notwithstanding Congress's clear statement of legislative intent, *Rhoads* and its progeny hold that the foreclosure test must be applied to disability discrimination plaintiffs' claims when their impairment is caused solely by the work environment.[81] By so holding, those courts, with no indication that they are consciously doing so, have acted directly contrary to congressional intent and have carved out a category of cases where causation improperly matters.[82]

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courts in the direction of class-based analysis—by not characterizing their cases as "working" cases at all. *See* Blair, *supra* note 40; Goldstein, *supra* note 40; *see also* Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before A Jury? A Response to Professor Colker*, 19 Rev. Litig. 505, 510–57, 574 (2000). However, even in *Benson*, where the plaintiff deliberately attempted to plead and prove her case as a "breathing" case only, the district court applied the class-based test and ruled against her. *See* Benson v. Lawrence Livermore Nat'l Lab., 163 F.3d 605 (9th Cir. 1998) (unpublished).

80. *See supra* notes 41–45 and accompanying text.

81. *See supra* notes 56–79 and accompanying text.

82. It might be argued that Congress's determination that causation is irrelevant in disability discrimination cases was an attempt to ensure that impairments caused by voluntary (albeit, in some cases, addiction-based) conduct—*e.g.*, lung cancer caused by cigarette smoking or morbid obesity caused by overeating—do not receive protection under the ADA and Section 504. However, the House Report, discussing impairments and major life activities under the ADA, stated as follows:

> . . . [I]f a person is employed as a painter and is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures, the person would be substantially limited in a major life activity, by virtue of the resulting skin disease or seizure disorder. The cause of a disability is always irrelevant to the determination of disability. In such a case, a reasonable accommodation to the employee may include assignment to other areas where the particular paint is not used.

AMERICANS WITH DISABILITIES ACT OF 1990 COMM. ON THE JUDICIARY, H.R. REP. NO. 101-485 (III), at 451–52 (1990), *reprinted in* 1990 U.S.C.C.A.N. Vol. 4.,

In addition, the *Rhoads* line of cases, by evaluating impairments triggered or exacerbated by the work environment under the foreclosure test when the impairment substantially limits major life activities other than working, ignores well-settled Supreme Court and lower court precedent related to analyzing the effect of impairments on major life activities.[83] As discussed above, the Supreme Court has held that class-based analysis does not apply when an impairment substantially affects a major life activity other than working.[84] Consistent with the Supreme Court's holding, numerous lower courts and the EEOC have made clear that, where an ADA or Section 504 plaintiff has demonstrated that an impairment substantially limits a major life activity other than or more fundamental than working, the effect of the impairment on working—and, in turn, the question of whether the impairment prevents the plaintiff from working in a broad range of jobs—should not be analyzed.[85]

Thus, with essentially no analysis, *Rhoads* and its progeny blithely ignore Congressional intent concerning the causation issue, as well as ignore Supreme Court and lower court authority regarding the circumscribed roles of working as a major life activity and foreclosure/class-based analysis in ADA and Section 504 jurisprudence.[86]

451–52. Thus, the House Report makes clear that Congress, in discussing the irrelevance of causation, was referring to the relationship between the work environment and an ADA- and Section 504-cognizable impairment, and not between voluntary conduct and impairment. For a discussion regarding assessing voluntary conduct under the ADA, *see* Lisa E. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations,"* 48 HASTINGS L. J. 75 (1996).

83. *See supra* notes 39–40 and accompanying text.

84. *See supra* note 39 and accompanying text.

85. *See supra* note 40. The result in *Rhoads*, by giving primacy to the major life activity of working over all other major life activities, is also inconsistent with the Supreme Court's twice-stated reluctance, prior to Congress's enactment of the ADAAA, to recognize working as a major life activity under the ADA. *See* Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 200 (2002) (noting "conceptual difficulties inherent in the argument that working could be a major life activity," assuming so based on parties' agreement, but not deciding the question) and Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999) (noting same conceptual difficulty and, again, not deciding the question). Congress definitively resolved the issue in 2008 by adding working to the list of major life activities codified in the ADAAA. *See supra* notes 34–35 and accompanying text.

86. As discussed above, Congress, in enacting the ADAAA, reversed those portions of the Supreme Court's decision in *Toyota Motor Mfg.* requiring a

B. Rhoads *and its Progeny's Focus on Causation is Improper for Other Reasons*

In addition to running counter to Congressional intent and Supreme Court case law, the *Rhoads* line of cases' focus on causation is illogical and needlessly injects additional issues of proof into toxic workplace cases under the ADA and Section 504.

Although the *Rhoads* district court suggested that "the traditional approach found in the ADA for determining whether . . . impairments [caused solely by the workplace environment] are sufficiently severe to be classified as a disability appears inadequate,"[87] neither that district court decision nor any other post-*Rhoads* decision has described the nature of the perceived inadequacy of traditional ADA analysis under those circumstances. Likewise, neither the *Rhoads* courts, nor any other court relying on *Rhoads*, has given the slightest hint as to why their focus on causation, their refusal to analyze the effect of an impairment on major life activities other than working, and their use of the foreclosure/class-based analysis cures any such unarticulated inadequacy.

For a disability discrimination plaintiff suffering from workplace-induced or -exacerbated asthma or depression, it matters little or not at all whether the impairment was caused inside the workplace, outside the workplace, or both. Whatever the cause of the impairment, the purpose of disability discrimination laws—to allow qualified individuals suffering from impairments to remain in the workplace like their non-disabled co-workers, insofar as their employers have the ability to reasonably accommodate them—applies

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restrictive reading of the definition of disability and refusing to include episodic or intermittent impairments that otherwise satisfied the requirements of the ADA within the definition of disability. *See supra* note 34. The statutory changes wrought by the ADAAA do not directly address the above-discussed flaws in *Rhoads* and its progeny, nor did Congress intend them to do so. However, to the extent that courts, in future decisions, are tempted to rely on *Rhoads*-inspired jurisprudence to justify a narrow definition of disability, based on an evaluation of causation and application of the foreclosure test when the major life activity impaired is other than working, or to hold, as in *Benson* and *Tyler*, that the ADA does not cover employees who are precluded from working at only one worksite—arguably, an episodic impairment—the above-discussed ADAAA provisions will militate against any such reading of the ADA.

87. Rhoads v. F.D.I.C., 956 F. Supp. 1239, 1247 (D. Md. 1997); *see also supra* notes 56–60 and accompanying text.

with equal force. Similarly, looking at the effect of *Rhoads*-inspired case law on employers, it is both illogical and more-than-a-little ironic that an employer who causes an employee's impairment should be subject to a more employer-favoring standard—one that foregoes analysis of the effect of an impairment on an employee's major life activities other than working, and requires that an employee's impairment precludes or restricts the employee from working in a broad range of jobs, rather than a single job—while an employer who has no causal role in an employee's impairment is subject to the traditional, more rigorous, less employer-favoring ADA and Section 504 analysis.

In addition to logical shortcomings, *Rhoads* and its progeny's focus on causation results in problems of proof not faced by any other class of ADA and Section 504 claimants. Disability discrimination plaintiffs whose impairments may be caused or exacerbated by conditions in the workplace, unlike any other class of ADA or Section 504 disability discrimination plaintiffs, are required to demonstrate not just the fact, but also the source, of their impairments. Moreover, commentators have rightly pointed out that the cause of physical impairments like asthma or mental impairments such as depression or anxiety—each of which may be caused or exacerbated both inside or outside the workplace—are often difficult to prove with any degree of medical or legal certainty.[88] Thus, under cases governed by the *Rhoads* line of decisions, but no other class of disability discrimination cases, additional, difficult, and often expensive issues of proof will be added to a disability discrimination plaintiff's burden of proof (and the defendant's rebuttal)—which, even without

88. *See, e.g.*, Michelle Parikh, *Burning the Candle at Both Ends, and There is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 744–45 (2004)

> Though mental illness may be theoretically provable, it likely occurs as a result of some type of brain malfunctioning, and therefore, because we lack the medical technology to verify such malfunctioning during diagnosis, we must often rely solely upon "symptomatology" without "proof" to back it. Further, the source of the illness may be difficult to ascertain, as most mental illnesses are due to varied, and sometimes indirect, causes.

Id. Christopher L. Callahan, *Establishment of Causation in Toxic Tort Litigation*, 23 ARIZ. ST. L. J. 605 (1991) (discussing difficulty in proving causation of physical illnesses such as cancer and birth defects in toxic tort cases).

causation issues, frequently require both plaintiffs and defendants to retain medical, vocational, and economic or financial experts.[89]

In sum, the *Rhoads* line of cases' focus on causation defies logic and unwarrantedly injects into the analysis substantial issues of proof not encountered by other disability discrimination plaintiffs. For these additional reasons, *Rhoads* and its progeny's focus on causation in toxic workplace cases under the ADA and Section 504 is improper.

C. By Improperly Analyzing the Disability Issue, Rhoads *and its Progeny Undercut the ADA and Section 504 by Avoiding the Reasonable Accommodation Issue*

As discussed above, when a court determines that a disability discrimination claimant is not disabled under the ADA or Section 504, the court need not, and invariably does not, reach the issue of whether the employer could reasonably accommodate the employee's impairment.[90]

Thus, under the *Rhoads* line of cases, a disability discrimination claimant whose impairment is caused or triggered solely by his or her work environment is precluded from demonstrating that his or her impairment substantially affects a major life activity other than working, and may not be able to prove that his or her impairment precludes his or her working from a broad range of jobs under foreclosure or class-based analysis. If so, then the claimant will not be allowed to prove that his or her employer could reasonably accommodate the claimant's disability by providing him or her with a reassignment, job swap, transfer, or an unpaid leave of absence.

For example, in the most typical fact pattern under *Rhoads* and its progeny—a disability discrimination claimant with a physical impairment such as asthma caused by adverse air quality in the workplace—the employer need not address or correct the adverse condition causing the employee's impairment and caused by the employer itself (unless required to do so by the state or federal occupational safety or environmental laws) by transferring the employee to

89. John V. Jansonius & Andrew M. Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility*, 50 BAYLOR L. REV. 267 (1998).

90. *See supra* note 55 and accompanying text.

another worksite, if a position at another site is available.[91] Likewise, under the *Rhoads* line of cases, an employer who becomes aware that the work environment—in the form of an employee's relationship with a supervisor or co-worker—has caused a disability discrimination claimant to be afflicted with a mental illness, such as clinical depression or anxiety, is under no legal duty to reasonably accommodate the claimant—by (again) either transferring the employee to another job site and, hence, another supervisor or set of co-workers, or providing the employee with a leave of absence so that he or she could obtain psychological or psychiatric treatment to alleviate or remedy the mental illness.[92]

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91. This outcome works a particularly harsh result in idiosyncratically-toxic workplaces, i.e. where individual employees, but not a larger complement of workers, suffer from a workplace-caused or -exacerbated impairment, since occupational safety or environmental laws will not generally be a source of relief for those individual employees. *See* Nat'l Realty & Const. Co., Inc., v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1266 (D.C. Cir. 1973), *cited in* Tosh Anderson, *Overwork Robs Workers' Health: Interpreting OSHA's General Duty Clause to Prohibit Long Work Hours*, 7 N. Y. CITY L. REV. 85 (2004) and David J. Kolesar, *Cumulative Trauma Disorders: OSHA's General Duty Clause and the Need for an Ergonomics Standard*, 90 MICH. L. REV. 2079, 2096 (1992).

92. Courts, reflecting societal aversion to recognizing that mental illnesses may be caused or exacerbated by the workplace, have been singularly unreceptive to such claims under the ADA, often cursorily dismissing them as involving "personality conflicts." *See, e.g.*, Potter v. Xerox Corp., 88 F. Supp. 2d 109, 112–13 (W.D.N.Y. 2000) (collecting cases). A review of the cases, however, reveals that (a) courts have almost universally focused on whether a plaintiff's mental impairment has substantially limited the major life activity of working and, focusing on working alone, have held that the plaintiff was not disabled under the ADA and foreclosure analysis because the plaintiff was able to work at another job site or with another supervisor, and (b) the plaintiffs did not claim that, and the courts did not analyze whether, the plaintiffs' mental impairment substantially limited a major life activity other than working, which, under *Toyota Motor Mfg.*, would have placed the case outside of class-based analysis. *Id.* The few judicial decisions showing any receptivity to workplace-caused or workplace-exacerbated mental impairment claims under the ADA stem from the court's reasoning in Palmer v. Circuit Court of Cook County, Ill., 117 F.3d 351 (7th Cir. 1997). There, Judge Posner, although writing for a majority that rejected the plaintiff's ADA claim on other grounds, stated as follows:

> . . . [I]f a personality conflict triggers a serious mental illness that is in turn disabling, the fact that the trigger was not itself a disabling illness is no defense. Schizophrenia and other psychoses are frequently triggered by minor accidents or other sources of normal stress. Before then the individual seemed perfectly normal; after that he may be incapable of productive employment for the rest of his life. . . . (Palmer's paranoid delusions concerning her supervisor are typical symptoms of schizophrenia, although her psychiatrist did not use the

Under *Rhoads* and its progeny and, more generally, under the class-based analysis standard applicable to the major life activity of working, a cruel irony exists. Class-based analysis often prevents a disability discrimination plaintiff from even being considered disabled under the ADA and Section 504, since he or she would not be precluded from performing a broad range of jobs. This result ensues, even though the reasonable accommodation often sought—reassignment or a job transfer—would plausibly allow that same plaintiff to be a qualified individual with a disability under the ADA or Section 504, *i.e.*, perform the essential function of a similar job (with a reasonable accommodation). Again, the inconsistency between this result and the purpose of the ADA and Section 504 is palpable.[93]

Moreover, courts, by reversing the trend started in *Rhoads*—specifically, by jettisoning their improper focus on causation, properly considering the effect of impairments on major life activities other than working, and not defaulting to foreclosure/class-based analysis—would not invariably harm employers' legitimate interests.

In this regard, even if transferring a physically- or mentally-impaired individual to a different position, or

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term.) Psychotic episodes are not certain to recur, and if they don't the psychosis would not be disabling. Our only point is to distinguish between the nondisabling trigger of a disabling mental illness and the mental illness itself. On the record compiled in the district court, it is not possible to negate the inference that Palmer has in fact a disabling mental illness.

117 F.3d at 352 (citations omitted); *see also* Bennett v. Unisys Corp., No. 2:99CV0446, 2000 WL 33126583, at *3–5 (E.D. Pa. Dec. 11, 2000); Coniglio v. City of Berwyn, No. 99 C 4475, 2000 WL 967989, at *3–5 (N.D. Ill. June 15, 2000); Martyne v. Parkside Med. Servs., No. 97 C 8295, 2000 WL 748096, at *2 (N.D. Ill. June 8, 2000); Walker v. State of Ill., Dept. of Human Servs., No. 98 C 4555, 1999 WL 262133, at *2–4 (N.D. Ill. Apr. 16, 1999). These cases have not responded directly to *Rhoads* and its progeny, likely because the *Rhoads* line of cases has not yet been discussed or applied in any reported ADA or Section 504 mental impairment decisions. For scholarly treatment regarding the hurdles faced by plaintiffs alleging mental impairment claims under the ADA, *see* Blair, *supra* note 40, and Stefan, *supra* note 44.

93. Class-based analysis will often prematurely truncate the full ADA/Section 504, disability/qualified, individual/reasonable accommodation analysis, not just in *Rhoads* and its progeny, but in all cases where working is the only major life activity substantially limited by an impairment. As such, that broader outcome militates in favor of reassessing the validity of class-based analysis in *all* cases involving the major life activity of working. That reassessment, however, is beyond the scope of this Article.

providing that same individual with unpaid leave, would plausibly or likely remedy the workplace-caused impairment, an employer would not have an absolute duty under the ADA or Section 504 to provide such accommodation. Rather, under the reasonable accommodation standard, an otherwise reasonable accommodation such as a job transfer may become unreasonable if a position is not available,[94] or if the transfer would displace a more senior employee.[95] Likewise, an employer may not be required to provide an otherwise reasonable accommodation such as unpaid leave where the leave occurs during an employer's busy season, or where the employer would be forced to hire or schedule additional workers, since providing the leave would be either unreasonable or would work an undue hardship on the employer.[96]

Thus, courts, by applying traditional disability discrimination/reasonable accommodation analysis—rather than, as occurred in the *Rhoads* line of cases, altering the evaluation of the disability and thereby avoiding reasonable accommodation analysis altogether—would adequately protect the legitimate interests of both the disability discrimination claimant and his or her employer.

IV. *RHOADS* AND ITS PROGENY IN CONTEXT

The judicial decisions in *Rhoads* and its progeny are symptomatic of the Supreme Court's and lower courts' broader disdain for ADA and Section 504 claims. In

94. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1174 (10th Cir. 1999) (en banc) (under the ADA, "[i]t is not reasonable to require an employer to create a new job for the purpose of reassigning an employee to that job.") (collecting cases).

95. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 402–03 (2002) (ordinarily not a reasonable accommodation to grant a transfer or job assignment in violation of seniority system).

96. *See, e.g.*, Deal v. Candid Color Sys., 153 F.3d 726 (Table), No. 97-6298, 1998 WL 381036, at *2 (10th Cir. July 6, 1998) (allowing plaintiff to work whenever she was able would have imposed an undue hardship on employer's business during busy season since employer would have to bring in second employee to perform plaintiff's duties); Stubbs v. Marc Ctr., 950 F. Supp. 889, 895 (D. Ill. 1997) (request for accommodation that would temporarily shift plaintiff's duties to co-workers and subordinates unreasonable as a matter of law); Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983) (assigning other parts technicians to perform plaintiff's duties would impose an undue hardship on employer).

particular, the decisions illustrate a well-documented tendency of the Supreme Court and other courts, acting as judicial gatekeepers,[97] to resolve disability discrimination cases in favor of employers at the summary judgment stage by determining that a plaintiff is not disabled within the meaning of the ADA and Section 504.[98] This tendency was most graphically illustrated by the Supreme Court's decision in *Sutton*, where the Court, rejecting EEOC regulations, held that the determination regarding whether an employee or job applicant was disabled must be determined only after taking into account corrective or mitigating measures available to the individual.[99]

By facilitating dismissal of ADA and Section 504 cases on the threshold question of disabled status at the summary judgment stage, the decisions in *Rhoads* and its progeny also allow courts to avoid resolving the issue of whether or not an employer failed to fulfill its statutory duty to reasonably accommodate qualified individuals with disabilities.

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97. Michael Ashley Stein, *Foreword: Disability and Identity*, 44 WM. & MARY L. REV. 907, 908 (2003) ("[T]he Court zealously has taken on a gatekeeping role, ensuring that only those individuals with disabilities 'worthy' of the appellation be afforded ADA protection.").

98. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101, 103, 110–26 (1999); American Bar Association, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404–05 (1998); *see also* Van Detta & Gallipeau, *supra* note 79 (agreeing in part with Professor Colker regarding judges' role in employer-favoring results in ADA cases, but focusing on bad lawyering as the primary causal factor).

99. Sutton v. United Airlines, 527 U.S. 471, 475, 482–83. As discussed earlier, *Sutton* was legislatively overruled by Congress in the ADAAA. *See supra* note 34. This is not to say that the question of whether a plaintiff is disabled under the ADA and Section 504 is invariably a legal question resolvable on summary judgment. Indeed, the question of whether a plaintiff is disabled under disability discrimination statutes may well be factually disputed such that resolution on summary judgment would be inappropriate. *See, e.g.*, Rohr v. Salt River Project Agric. Imp. & Power Dist., 555 F.3d 850, 859–60 (9th Cir. 2009). However, a review of ADA and Section 504 case law reveals that a substantial number of disability discrimination claims—particularly, disability discrimination cases where foreclosure analysis is utilized—are resolved against employees on motions for summary judgment brought by employers. *See, e.g.*, Breitkreutz v. Cambrex Charles City, Inc., 450 F.3d 780, 784 (8th Cir. 2006); Wong v. Regents of Univ. of Cal., 379 F.3d 1097, 1100, 1110 (9th Cir. 2004); Pegram v. Honeywell, Inc., 361 F.3d 272, 287 (5th Cir. 2004); Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110, 116–17 (1st Cir. 2004); Webb v. Clyde L. Choate Mental Health and Dev. Ctr., 230 F.3d 991, 998–99 (7th Cir. 2000).

Judicial avoidance of the reasonable accommodation inquiry is consistent with the courts' decisions on the disability question. Indeed, if the Supreme Court and other courts have been reluctant to recognize and protect individuals who are indisputably impaired in one or more major life activities as disabled under the ADA and Section 504—and thereby refuse to force employers to modify their hiring and firing practices vis-à-vis such employees—then it is not at all surprising that those same courts would create and follow a judicial doctrine that allows courts to avoid scrutinizing whether an employer modified its operational practices to accommodate such employees. From the perspective of courts and employers, if a contrary result on the former question would improperly expand the class of disability discrimination claimants, and would work a significant incursion on employer hiring and firing practices, then a contrary result on the latter question would require courts and juries to evaluate and resolve the factually-intensive reasonable accommodation issue.[100] This latter result would constitute an exponentially-greater invasion of employer prerogative concerning the day-to-day operation of their business.[101]

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100. Several courts of appeals have held that the question of whether an employer has reasonably accommodated an employee under disability discrimination statutes is ordinarily a question of fact. Lujan v. Pac. Maritime Ass'n, 165 F.3d 738, 743 (9th Cir. 1999); Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 601 (7th Cir. 1998). Consistent with this general rule, numerous courts within the past few years have denied motions for summary judgment on the reasonable accommodation issue. *See, e.g.*, Waters v. Fred Meyers Stores, Inc., No. CV-08-322-HU, 2009 WL 1874271, at *11 (D. Or. June 26, 2009); Walker v. Potter, 629 F. Supp. 2d 1148, 1175–76 (D. Haw. 2009); Geiger v. Pfizer, Inc., No. 2:06-CV-636, 2008 WL 4346781, at *17–18 (S.D. Ohio Sept. 18, 2008); Fitzsimmons v. City of Phx., No. CV-06-3103-PHX-DGC, 2008 WL 2225764, at *5 (D. Ariz. May 28, 2008); Monterroso v. Sullivan & Cromwell, 591 F. Supp. 2d 567, 581 (S.D.N.Y. 2008).

101. Scholars have recognized that the reasonable accommodation provision of the ADA has both an antidiscrimination and redistributive component, although they disagree on whether the redistributive component of the reasonable accommodation provision differs in kind or in degree from other antidiscrimination statutes. *Compare* Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?* 79 N. C. L. REV. 307 (2001) *with* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001). However characterized, and as a matter of perception, if not reality, the redistributive component of the reasonable accommodation requirement has a more intrusive effect on capital expenditures and day-to-day operations of an ADA-covered employer than the antidiscrimination component

Yet, properly recognizing disability status under traditional disability discrimination analysis, and giving full play to the ADA and Section 504's reasonable accommodation provisions, are clearly mandated by the stated purposes and express language of the two congressional enactments.[102] Indeed, Congress, by enacting ADAAA provisions calling for a broad construction of the definition of disability and the inclusion of episodic impairments, or impairments in remission when active, within the definition of that term when the requirements of the ADA have been otherwise satisfied, further cements that mandate—at least as to the disability status issue.[103] And, as to the legitimacy of employer prerogative to manage its own internal operations without judicial intrusion, court and employer concerns are more imagined than real: empirical studies have demonstrated that the cost to employers of affording reasonable accommodations are relatively minimal, often requiring no financial outlay and seldom costing over $150.[104]

Thus, the *Rhoads* line of cases constitutes one of the more striking examples of lower courts formulating disability discrimination doctrine that runs counter to law and logic. The resulting application of that doctrine serves judicial and employer interests in avoiding the full application of the ADA and Section 504, thereby disserving the legitimate interests of employees entitled to coverage under those disability discrimination statutes.

CONCLUSION

When work and the workplace itself become a curse, rather than a blessing—specifically, where work or the workplace itself has caused or exacerbated an impairment that substantially limits an employee's major life activities beyond working—courts faced with ADA and Section 504 claims have gone astray. Those courts, by focusing on causation and applying class-based analysis, have fashioned a

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of the ADA.

102. *See supra* notes 6, 21–23, 49–55, and accompanying text.

103. *See supra* note 34.

104. Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1674 (2000); Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 902 (1997).

legal standard that is at odds with congressional intent and Supreme Court precedent, defies logic and raises issues of proof not present in other disability discrimination cases, and improperly short-circuits full disability/reasonable accommodation analysis envisioned by Congress under the ADA and Section 504.

The most recent court of appeals decision addressing this matter has suggested that courts must follow and apply *Rhoads* and its progeny,[105] unless and until Congress amends disability discrimination law to require application of what the district court in *Rhoads* referred to as "the traditional approach found in the ADA;"[106] however, such amendment should be wholly unnecessary. Specifically, an amendment is not necessary in light of Congress's clear statement of intent regarding the irrelevance of causation in disability discrimination analysis and recent amendments to the ADA concerning the broad definition of disability and coverage of episodic impairments, as well as the Supreme Court's equally clear circumscription of class-based analysis where impairments substantially limit major life activities other than working.

Thus, unlike the Supreme Court's decision in *Sutton*, *Rhoads* and its progeny constitute aberrational, judge-made law under circumstances where both Congress and the Supreme Court have already spoken. Also, in contrast to *Sutton*, *Rhoads*-inspired case law has not yet migrated to more than a few courts of appeals. As such, unlike *Sutton*, the fix to the problems created by *Rhoads* and its progeny should come from other courts of appeals and the Supreme Court, and not from Congress.

105. *See* Tyler v. Dayton Hudson Corp., 42 F. Appx. 934, 935 (9th Cir. 2002) (citing Rhoads v. F.D.I.C., 956 F. Supp. 1239, 1247 (D. Md. 1997)); *see also supra* notes 71–78 and accompanying text.

106. *Rhoads*, 956 F. Supp. at 1247; *see also supra* notes 56–60 and accompanying text.