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## I'm So Lonesome I Could Cry ... But Could I Sue?: Whether 'Interacting With Others' Is a Major Life Activity Under the ADA

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# I'm So Lonesome I Could Cry<sup>1</sup> . . . But Could I Sue?: Whether 'Interacting With Others' Is a Major Life Activity Under the ADA

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## I. INTRODUCTION

An employer described his company’s efforts to deal with a particular employee:

We had to tiptoe around for fear of somehow setting her off and causing her to blow up on us. Her behavior was sometimes *extremely emotional*, bordering on the irrational, and we took great pains to work with her in a way that she would remain calm. In this respect—treating her with kid gloves—she received extra-special treatment that we extended to no other employees. We had to deal with her as if she was emotionally disturbed.<sup>2</sup>

The employee being described sued her employer for employment discrimination, after being terminated because of her “confrontational and irrational behavior with her supervisor,” and her “incessant conflict with her fellow employees.”<sup>3</sup> Specifically, she claimed that she was disabled because she was regarded as having a mental disorder “that substantially limited her ability” to get along with other people.<sup>4</sup> When she brought this action, she was likely unaware that her suit would become a part of a novel debate in a progressive and polemical odyssey of law within the Americans with Disabilities Act of 1990 (“ADA”).<sup>5</sup>

“When President [George] Bush signed the ADA” into law, it was “the world’s first comprehensive civil rights law for people with disabilities.”<sup>6</sup>

2. *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 160 (E.D.N.Y. 2002) (alterations omitted).

3. *Id.* at 154 (quoting plaintiff’s affidavit).

4. *Id.* at 159. This Comment uses “interacting with others” interchangeably with “getting along with others.”

5. 42 U.S.C. §§ 12101-12213 (2000). Generally, the ADA was implemented to combat discrimination against disabled individuals because of their disabilities. *See id.* In this Comment, only the ADA’s application in the employment context will be examined, where covered employers are prohibited from discriminating against employees and potential employees because of their disabilities. *See id.* § 12112. Basically, an employer is prohibited from firing, or failing to hire or promote an individual because of the individual’s disability, whether the disability is real or perceived. *See id.*; *see also Williams v. Motorola, Inc.*, 303 F.3d 1284, 1290 (11th Cir. 2002) (concluding that a claim may be maintained on perceived disability). Further, an employer is required to make reasonable accommodations proportional to the needs warranted by the employee’s disability. *See* § 12112.

6. 148 CONG. REC. E1398-02 (2002) (statement of Rep. Costello). The ADA is applicable in many contexts, including “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.” 42 U.S.C. §§ 12101 (2000).

The signing, "in front of 3,000 people on the White House lawn on July 26, 1990," laid an important foundation in America's commitment to full and equal opportunity for all of its citizens.<sup>7</sup> But less than two months after the signing, House Representative William E. Dannemeyer noted that legal seminars educating employers, employees, and potential employees on the application of the ADA had "already begun to proliferate."<sup>8</sup> Representative Dannemeyer added, "I guarantee that the number of perverse and unintended results will proliferate [from the ADA] as well."<sup>9</sup>

This Comment will address the controversial, evolved, and continually growing issue of what exactly the scope of employment protection under the ADA is, as set forth by Congress, regulated by the Equal Employment Opportunity Commission ("EEOC"), and interpreted by the federal courts.

Specifically, this Comment will consider whether "interacting with others" is properly regarded as a major life activity under the ADA, such that an impairment, which prevents an employee from being able to interact or get along with others, is properly included in the definition of "disability." Or does the classification of such an individual as disabled belong in the category of "perverse and unintended results," as forecasted by Representative Dannemeyer? And if the inability to interact with others *is* deserving of ADA protection, to what extent and in what circumstances should it be protected?

This Comment recognizes and appreciates the varying interpretations and applications of the ADA resulting from language ambiguities and gaps, and the subsequent struggle that federal courts and administrative agencies face in adjudicating ADA employment issues.

Throughout the discussion, particular attention will be paid to: 1) the history and background of the ADA and the EEOC; 2) the EEOC's legal authority to set parameters for application of the ADA; 3) the current split within the federal court system and recent Supreme Court guidance; and 4) the impact, particularly on employers, of accepting "interacting with others" as a major life activity.

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7. *Id.* Near the time of the signing, there were numerous statements made, lauding the inception of the ADA and its future possibilities: "[T]oday is a day to rejoice both for the millions of disabled Americans who, because of ADA, will enter a new era and for the Congress of the United States and the President whose collaborative efforts led to the passage of this milestone law." 136 CONG. REC. H5631-04 (1990) (statement of Rep. Mazzoli). Senator Tom Harkin said that when the ADA was approved by the Senate, "[i]t was the proudest day of [his] life." Mary McGrory, *For the Disabled, a Capital Day*, WASH. POST, May 27, 1990, at B01, available at 1990 WL 2129397. "The matter [was] personal to him. He [had] a deaf brother who was sent to the Iowa School for the Deaf and Dumb where students were taught one of three trades: baker, printer or cobbler." *Id.*

8. 136 CONG. REC. E2939-01 (1990) (statement of Rep. Dannemeyer).

9. *Id.*

## II. HISTORY

### A. *The Rehabilitation Act of 1973 and the Americans with Disabilities Act (“ADA”)*

Recognizing the need for protection of an often disregarded class of individuals, Congress passed the Rehabilitation Act of 1973 (“Rehabilitation Act”).<sup>10</sup> In an effort to prevent discriminatory treatment of disabled individuals, section 504 of the Rehabilitation Act provides that no individual “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.”<sup>11</sup> Although the Rehabilitation Act was lauded by disabled rights activists, it did not reach the private sector.<sup>12</sup> However, eighteen years later Congress enacted the ADA so that private employers would be subject to similar rules and standards as set forth by the Rehabilitation Act.<sup>13</sup>

The first two purposes of the ADA are 1) “to provide a *clear* and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;” and 2) “to provide *clear*, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”<sup>14</sup>

These two purposes clash with recent sentiments expressed by Supreme Court Justice Sandra Day O’Connor. Justices do not usually articulate their views on particular legislation outside of their judicial context; however, Justice O’Connor recently delivered a speech at the Georgetown University Law Center addressing the ADA.<sup>15</sup> In her March 14, 2002 speech she suggested that Congress passed the ADA in haste, which resulted in sloppily constructed statutory language.<sup>16</sup>

The fact that “clear” is a characteristic requirement of the purposes of the ADA is significant, in light of Justice O’Connor’s recent criticism of the ADA for its lack of clarity. Has the congressional directive that ADA standards and provisions be “clear” been fulfilled since its inception to its

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10. 29 U.S.C §§ 701-794e (2000).

11. 29 U.S.C. § 794(a) (2000).

12. *See id.*

13. *Id.* § 794(d). In fact, Congress and the Supreme Court dictate that the ADA shall “grant at least as much protection” to qualified individuals as the Rehabilitation Act. 42 U.S.C. § 12201(a) (2000); *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (noting that the Court is directed to construe the ADA “to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act”).

14. 42 U.S.C. §§ 12101(b)(1)-(2) (2000) (emphasis added).

15. William C. Smith, *DRAWING BOUNDARIES: The Supreme Court is Siding with Employers and Narrowing the Reach of the Americans With Disabilities Act. Is That What its Drafters Had in Mind?*, 88 A.B.A. J. 49 (2002).

16. *Id.* Justice O’Connor stated that the ADA is “an example of what happens when the sponsors are so eager to get something passed that what passes hasn’t been as carefully written as a group of law professors might put together. So it leaves lots of ambiguities and gaps and things for courts to figure out.” *Id.* The author added that the speech appeared to not only recognize the ambiguity and lack of clarity in the language of the ADA, but also that the Court’s intention to remedy such ambiguities is growing. *See id.*

current state of force? How has the ADA changed and expanded its reach in the last decade?

First, it is important to understand the seeds of purpose that were planted in drafting the ADA. Before the ADA was passed, there were numerous debates and inexhaustible lobbying in favor of the act.<sup>17</sup> Many of those who were lobbying were not professional lobbyists, politicians, or even public interest groups; rather they were the very individuals the ADA designed to protect—the disabled.<sup>18</sup>

It is interesting to note that these individuals with disabilities who were visiting congressional offices on Capitol Hill were naturally en route with their wheelchairs, canes, walkers, and crutches.<sup>19</sup> However, among the disabled lobbyists, there was no mention of disgruntled employees with social interaction problems; nor were there individuals with less than amiable personalities or attitudes, complaining about not finding work because they were limited in their ability to get along with others.<sup>20</sup>

But while it is true that the public perception of the ADA was initially centered on those individuals with obvious, physical disabilities, those individuals with mental disabilities were also part of the 43 million Americans with disabilities whom Congress acknowledged in the first words of the ADA.<sup>21</sup> The inclusion of mental disabilities within the ADA's scope of protection gave rise to the issue that is the subject of this Comment.

Congress, in drafting the ADA, set forth simple and short parameters. In particular, the ADA defines the term "disability," with respect to an individual, as (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (2) "a record of such an impairment"; or (3) "being regarded as having such an impairment."<sup>22</sup> Congress chose not to elaborate further on the definition of

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17. McGrory, *supra* note 7, at B01.

18. *See id.*

19. *See id.* The disabled individuals were hoping to make impressions with members of Congress by "displaying dignity and charm, trying to convince members that even people who can only drool are capable of astonishing expression, and making one point over and over: We don't want pity, we want work." *Id.*

20. *See id.* Interestingly, an employment law scholar and practicing attorney went to great lengths to make this point clear. In an article in the Lex Mentis column of the Employee Relations Law Journal entitled "The Americans With Difficult Personalities Act," James J. McDonald, Jr. satirized a particular ADA claim. 25 EMPLOYEE REL. L. REV. 93 (2000). The article noted that by the year 2000, emotional or psychological difficulties accounted for the greatest number of ADA claims, and discussed a particular ADA plaintiff, who unsuccessfully sued her employer after being placed on permanent disability for having numerous emotional outbursts with her supervisor and coworkers. *Id.* Ironically, the unsuccessful ADA plaintiff was once again unsuccessful, in a suit against Professor McDonald for defamation. *See* *Misek-Falkoff v. McDonald*, 177 F. Supp. 2d 224 (S.D.N.Y. 2001).

21. 42 U.S.C. § 12101(a)(1) (2000). Specifically, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older[.]" *Id.*

22. 42 U.S.C. § 12102(2) (2000). The same definition is promulgated at 29 C.F.R. §

disability and chose not to explain the meanings of “impairment,” “substantially limits,” or “major life activities.”<sup>23</sup> Causes of action are viable only for a qualified individual with a disability, which means an “individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.”<sup>24</sup>

With the ADA enacted, was that all Congress was required to do? Did Congress leave the courts and administrative enforcement agencies in the lurch by not being more lucid with its intent? Justice O’Connor’s explanation of why there is lack of clarity in the language and application of the ADA may be accurate,<sup>25</sup> but regardless of Congress’ reasoning (or lack thereof) for not further clarifying key terms, these gaps and ambiguities soon began to be interpreted in a variety of ways.<sup>26</sup>

Mental disability issues have a tendency to be more difficult to adjudicate because of the rapidly evolving fields of psychiatry and psychology, as well as the lack of understanding of these fields by individuals generally.<sup>27</sup> Thus, it is indeed a dubious task for courts, agencies, and employers to understand mental impairments without clarity of intent offered by Congress. This concept is rather new, and has been teething for the last seven years.<sup>28</sup>

What gave rise to the initial claim that the inability to get along with others may give rise to a disability under the ADA? This idea did not come from Congress, the courts, or even an opportunistic plaintiff’s attorney; rather, it was officially promulgated by the EEOC.

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1630.2(g)(1)-(3) (2002), as recognized by the EEOC. There are two possible sources of guidance for applying and understanding this definition—the regulations interpreting the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988), and the EEOC regulations interpreting the ADA. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193 (2002). Congress defined disability “almost verbatim from the definition of “handicapped individual” in the Rehabilitation Act, § 706(8)(B), and Congress’ repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.” *Toyota Motor Mfg.*, 534 U.S. at 193-94. “No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA . . . which fall outside Titles I-V.” *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999). The Court also noted that no agency has “authority to interpret the term disability.” *Id.*

23. *See* 42 U.S.C. § 12102(2) (2000).

24. 29 C.F.R. § 1630.2(m) (2002). *See* § 1630.3 for exceptions to this definition, including drug addiction, gambling, sexual deviancies, and other problems. “Essential functions” is defined as “the fundamental job duties of the employment position the individual with a disability holds or desires. The term ‘essential functions’ does not include the marginal functions of the position.” 29 C.F.R. § 1630.2(n)(1) (2002).

25. *See supra* note 16 and accompanying text.

26. *See infra* Part IV.A, discussing the split within the circuit courts.

27. *See* Tami A. Earnhart, Note, *Medicated Mental Impairments Under the ADA: Diagnosing the Problem, Prescribing the Solution*, 74 *IND. L.J.* 251, 267-68 (1998) (suggesting that the subjectivity of mental impairments, and the lack of understanding of such impairments by the layperson, such as an employer or a judge, complicates the analysis).

28. *See EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (1997), <http://www.eeoc.gov/policy/docs/psych.html>.

### B. Equal Employment Opportunity Commission ("EEOC")

The EEOC was established by Title VII of the Civil Rights Act of 1964<sup>29</sup> to procedurally regulate its provisions combating employment discrimination based on race, color, religion, sex, or national origin.<sup>30</sup>

The EEOC was later charged by Congress in 1990 to promulgate regulations applying the provisions of Title I of the ADA.<sup>31</sup> Congress directed the EEOC to have its regulations in place one year before the ADA's effective date.<sup>32</sup> Among the regulations set forth by the EEOC is the definition of "major life activities."<sup>33</sup> The regulation states that "major life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>34</sup> Further, Congress provided for causes of action against violations of EEOC regulations.<sup>35</sup>

29. 42 U.S.C. §§ 2000e-2000e-17 (2000).

30. 42 U.S.C. § 2000e-12 (2000); 42 U.S.C. § 2000e-2 (2000).

31. 42 U.S.C. § 12116 (2000). The EEOC proceeded to define key terms found in the preamble to the ADA, 42 U.S.C. § 12102(2) (2000). *See* 29 C.F.R. § 1630.2 (2002). It is crucial to note that the EEOC's interpretation of these particular terms deals with a part of the ADA that technically is not delegated to the EEOC to interpret (i.e., it is not within Title I). *See* discussion *infra* Section III (discussing the EEOC's interpretive authority). Specifically, the EEOC defined "physical or mental impairment" as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2) (2002). For purposes here, attention will be given primarily to mental impairment, but it is noteworthy that further definitions of physical or mental impairment include: "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." § 1630.2(h)(1). Further, The EEOC states that an individual is "substantially limited" if he or she is:

[u]nable to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

§ 1630.2(j)(1)(i)-(ii).

32. *See id.* The directive that the EEOC have its regulations set forth before the ADA's enactment date perhaps suggests that the regulations would be relied upon by employees and employers for clear guidance with respect to their rights and responsibilities. *See* Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 551-53 (2000) (arguing in favor of granting deference to EEOC regulations); *see also* discussion *infra* Section III (discussing deference due to EEOC regulations).

33. 29 C.F.R. § 12102(i) (2002).

34. 42 U.S.C. § 12116 (2000). The EEOC laid out examples, but neither Congress nor the EEOC specifically defined major life activities, providing little guidance in determining how inclusive or exclusive the "list" of acceptable major life activities should be. *See* discussion *infra* Section III (relating to the deference to be given to EEOC regulations and subsequent interpretive guidelines).

35. *See* 42 U.S.C. § 1630.2(a) (2000). Specifically, an ADA claimant *must* exhaust administrative remedies within the EEOC before filing suit in federal district court, and then must file suit within a specified time period after a right to sue letter has been issued by the EEOC. *See*



After several years of extensively interpreting the employment provisions of the ADA and enforcing claims, the EEOC further interpreted the language and intent of the ADA, issuing an Enforcement Guidance (“Guidance”) to help clarify employee rights and employer obligations, specifically with respect to emotional or psychological impairments.<sup>36</sup> In the manual, the EEOC classifies “interacting with others” as a major life activity.<sup>37</sup>

In light of the EEOC’s evolving interpretations of the language and intent of the ADA, and the subsequent deference that courts have tended to grant the EEOC,<sup>38</sup> it is important to look at whether or not the EEOC may properly interpret the ADA in a manner that is binding, or at least persuasive, on the courts.

### III. DOES THE EEOC HAVE AUTHORITY TO INTERPRET THE MEANING OF MAJOR LIFE ACTIVITIES?

Notwithstanding Congress’s directive that the EEOC issue regulations implementing and enforcing the ADA, the actual authority of the EEOC to interpret the provisions of the ADA is less than clear.

The Supreme Court stated, in *Sutton v. United Air Lines, Inc.*,<sup>39</sup> that although the EEOC has attempted to clarify the terms of the ADA, Congress has given no agency authority to issue regulations interpreting the term ‘disability’ in the ADA.<sup>40</sup> In *Sutton*, although the Court expressed doubt as to the authoritative weight of EEOC regulations, it nevertheless found no

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*id.* See also White, *supra* note 32, for the proposition that, in granting causes of action for EEOC violations, Congress effectively conferred lawmaking authority on the EEOC; see discussion *infra* Section III (discussing deference due to EEOC regulations).

36. *EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities* (1997), <http://www.eeoc.gov/policy/docs/psych.html>.

37. *Id.* at n.15. The Guidance notes that interacting with others is not substantially limiting “just because an individual is irritable or has some trouble getting along with a supervisor or coworker,” but would require severe problems relating to others on a regular basis, such as “consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.” *Id.* at n.15; *id.* at Question 9.

38. The Second Circuit stated that it will continue to give weight to EEOC regulations “until a more definite pronouncement [from the Supreme Court] is forthcoming.” *Muller v. Costello*, 187 F.3d 298, 312 n.5 (2d Cir. 1999); see also *Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2001) (deferring to legislative purpose and subsequent EEOC interpretive regulations to find a clear intent to include working to be a major life activity within the contemplation of the ADA); *Colwell v. Suffolk County Police Dep’t.*, 158 F.3d 635, 642 (2d Cir. 1998) (holding that the major life activities promulgated by EEOC regulations are “major life activities *per se*,” and that major life activities are assessed within the contemplation of the purposes of the ADA, rather than whether the activity is important to a particular ADA plaintiff); see also *infra* Part IV.A (discussing circuit court split). *But see infra* Part III (questioning EEOC authority).

39. 527 U.S. 471 (1999).

40. *Id.* at 479. The Court noted that the EEOC only has authority to regulate Title I of the ADA, codified at 42 U.S.C. §§ 12111-12117 (2000), concluding that because the statutory definition of disability is found in the preamble to the ADA, 42 U.S.C. § 12102, the EEOC does not have such broad interpretive authority. *Id.* Although the Court recognized this lack of interpretive authority, it nevertheless applied EEOC regulations that interpret and elaborate on the meaning of disability. *Id.*

occasion to assess the validity or weight of EEOC authority to promulgate regulations interpreting the ADA.<sup>41</sup>

The Court held, the same day, in *Albertson's, Inc. v. Kirkingburg*,<sup>42</sup> that because the parties stipulated to the interpretive guidance offered by the EEOC regulations, it was not necessary to determine whether the regulations were binding.<sup>43</sup>

The Court was faced with a similar situation in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.<sup>44</sup> The Court once again punted on the direct question of what deference, if any, is due to EEOC regulations interpreting the provisions of the ADA.<sup>45</sup> The Court explained that if the EEOC does not have license to define or magnify ADA terms, then the terms must "retain only their plain meaning in the language of the statute."<sup>46</sup>

Although the EEOC was implored by Congress to regulate and interpret Title I of the ADA, no express delegation of power to interpret any other part of the ADA was granted.<sup>47</sup> However, it is important to consider questions of deference to the EEOC in light of the Supreme Court's jurisprudence in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>48</sup> There, the Court held that conferring rulemaking authority to a regulatory agency, such as the EEOC, where Congress has enacted an ambiguous statute, constitutes a delegation of interpretive authority to that agency.<sup>49</sup>

The *Chevron* Court set forth a two-step analysis for courts to apply. First, courts should look to whether Congress has clearly "spoken to the

41. *Id.* at 480. The Court did not address the issue of the EEOC's authority interpreting the regulations because it was not dispositive to the case. *See id.*

42. 527 U.S. 555 (1999).

43. *Id.* at 563 n.10.

44. 534 U.S. 184 (2002).

45. *Id.* at 194 (holding that because the litigants accepted "the EEOC regulations as reasonable," the Court would "assume without deciding that they are [reasonable]").

46. *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (stating that when statutory language is clear, the court must look no further than that language to determine the statute's meaning); *see also* Mary Nebgen, Note, *Narrowing the Class of Individuals with Disabilities: Sutton v. United Air Lines, Inc.*, 31 MCGEORGE L. REV. 1129 (2000). Disregarding clarifications made by the EEOC of ADA terms will likely have an insignificant effect on future ADA decisions. *Id.* at 1160. Specifically, the "EEOC's amplification and explanation of the term 'physical or mental impairment' simply provides examples of conditions which could be disabilities if they were substantially limiting in a major life activity. The definition of 'substantially limits' provides a parameter against which to evaluate whether the condition is truly substantially limiting." *Id.* at 1160-61. Because neither Congress nor the EEOC has defined "major life activities," the non-exhaustive list of examples of major life activities, 29 C.F.R. § 1630.2 (2002), seems to give rise to interpretation by way of analogy.

47. *See* 42 U.S.C. §§ 12111-12117 (2000) (granting the EEOC regulatory powers limited to the parameters of Title I only).

48. 467 U.S. 837 (1984). In *Chevron*, the Court assessed whether the Environmental Protection Agency had authority to interpret ambiguous language in the Clean Air Act. *See generally id.*

49. *Id.* at 842-43.

precise question at issue.”<sup>50</sup> The inquiry ends “[i]f the intent of Congress is clear. . . .” The court and the agency must defer to the clear intent of Congress.<sup>51</sup> But if Congress has not directly addressed the precise question at issue, the court may not impose its own construction on the statute.<sup>52</sup> The second step of the *Chevron* analysis requires the court to ask “whether the agency’s answer is based on a permissible construction of the statute.”<sup>53</sup> If the agency’s construction is not “arbitrary, capricious, or manifestly contrary to the statute,” then it is likely permissible.<sup>54</sup> Regulations passing the *Chevron* test are afforded controlling weight.<sup>55</sup>

Congress likely recognized that drafting the ADA with less-than explicit terms, and subsequently granting regulatory powers to the EEOC, would judicially require *Chevron*-style deference to be given to EEOC regulations where the language of the ADA is ambiguous.<sup>56</sup> Thus, applying *Chevron* reasoning to the EEOC’s interpretation of “major life activities,” the relevant inquiry is whether the language that Congress chose is ambiguous in its construction or intent.

Specifically, the statutory language of the ADA speaks of an “impairment that substantially limits . . . major life activities,” without defining, explaining, or clarifying the meaning of “major life activities.”<sup>57</sup> Is there ambiguity in the statutory meaning of “major life activities?” If the language is indeed ambiguous, then because Congress conferred regulatory power upon the EEOC to enforce Title I of the ADA, the EEOC regulation defining major life activities must be afforded *Chevron*-style deference, but only if it is a permissible construction of the ADA statutory language.<sup>58</sup>

However, for purposes of this Comment, the more applicable inquiry lies beyond what deference is owed to EEOC regulations. Assuming *arguendo* that *Chevron*-style deference is due to the regulation, the EEOC did not promulgate “interacting with others” as a major life activity in the regulation; rather it offered this interpretation in its Compliance Manual.<sup>59</sup> Accordingly, the question is whether *Chevron*-style deference is due to the Manual.

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50. *Id.*

51. *Id.*

52. *Id.* at 843. “If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.” *Id.*

53. *Id.*

54. *Id.* at 844.

55. *See id.* As long as the agency’s construction is permissible, that there may be other reasonable interpretations imagined by the Court is irrelevant. *Id.*

56. *See Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 338-39 (2002) (finding that because Congress could not anticipate the directions of a particular statute regulated by the Federal Communications Commission, Congress knew that the FCC would have authority to fill in the intentionally left gaps in the statutory language).

57. 42 U.S.C. § 12102(2)(A) (2000).

58. *See Chevron*, 467 U.S. at 842-43.

59. *EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities* (1997), <http://www.eeoc.gov/policy/docs/psych.html>.

The Supreme Court, in a later decision, addressed this issue. The Court in *Christensen v. Harris County*<sup>60</sup> considered what deference, if any, is due to the acts and language of an administrative agency when not dealing with its official regulations that are promulgated under instruction by Congress.<sup>61</sup> Specifically, the Court considered an administrative interpretation by the Department of Labor under the Fair Standards Labor Act of 1938 ("FSLA")<sup>62</sup> "contained in an opinion letter, not one arrived at after . . . a formal [administrative] adjudication or notice-and-comment rulemaking."<sup>63</sup>

The Court found that such interpretations—"like interpretations contained in policy statements, agency manuals, and enforcement guidelines,<sup>64</sup> all of which lack the force of law—do not warrant *Chevron*-style deference."<sup>65</sup> The Court added that "[i]nstead, interpretations contained in formats such as opinion letters [and administrative guidelines and compliance manuals] are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*"<sup>66</sup> *Skidmore*-style deference is warranted "only to the extent that those interpretations have the 'power to persuade[.]'"<sup>67</sup>

60. 529 U.S. 576 (2000).

61. *Id.*

62. 29 U.S.C. §§ 201-219 (2000).

63. *Christensen*, 529 U.S. at 587. An opinion letter is an informal letter stating a particular position of an agency, but it is not part of the agency's regulations. Notice-and-comment rulemaking is "the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

64. An example is the Manual at issue here, *EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities* (1997), <http://www.eeoc.gov/policy/docs/psych.html>.

65. *Christensen*, 529 U.S. at 587 (quoting *Reno v. Koray*, 515 U.S. 50, 61 (1995), for the proposition that an internal agency guideline, which is not "subject to the rigors of the Administrative Procedure Act, including public notice and comment," is entitled only to "some deference" (alterations omitted)). See also *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-58 (1991) (reasoning that interpretative guidelines do not warrant *Chevron*-style deference); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991) (holding that "some weight" is due to informal interpretations though not "the same deference as norms that derive from the exercise of . . . delegated lawmaking powers").

66. 323 U.S. 134, 140 (1944). But see *Jones v. Am. Postal Workers Union, Nat'l*, 192 F.3d 417 (4th Cir. 1999). There, the court afforded *Chevron*-style deference to an amicus brief filed by the EEOC on behalf of an ADA plaintiff. *Id.* at 427. The court reasoned that in light of the particular circumstances, the "EEOC's position is in no sense a *post hoc* rationalization advanced to defend its past action against attack, and there is simply no reason to suspect that the proffered interpretation does not reflect the EEOC's fair and considered judgment on the statutory interpretation questions at hand." *Id.* An amicus brief given *Chevron*-style deference is a large step from granting *Chevron*-style deference to regulations implemented by regulatory agencies. This suggests that agency interpretations, other than official regulations, may be afforded deference under *Chevron*, but this idea, and *Jones* itself, seem to be in severe conflict with the Supreme Court's holding in *Christensen*.

67. *Christensen*, 529 U.S. at 587. The Court cited *Skidmore*, 323 U.S. at 140, where it stated:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency

However, a further distinction is necessary to recognize. In *Christensen*, the Department of Labor's administrative opinion letter was offering guidance regarding the FSLA, which was not even remotely suggested by the actual regulations promulgated by the Department of Labor.<sup>68</sup> Thus, the Department of Labor was not interpreting statutory language of the FSLA; rather, it had interpreted its *own* regulations (which were promulgated under authority granted by Congress) in the form of an opinion letter.<sup>69</sup>

There is a significant difference in application of deference where an administrative agency is interpreting its own regulation as opposed to when an agency is interpreting the statutory language of an act of Congress. The Court noted that when an agency is interpreting its own regulation, it may be entitled to deference under *Auer v. Robbins*.<sup>70</sup> However, this deference is due the interpretation *only when* the regulation it is interpreting is itself ambiguous.<sup>71</sup> To otherwise defer to an agency's interpretation of its own regulation would be to "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."<sup>72</sup>

Now, the relevant inquiry for purposes of this Comment is what deference is owed to the EEOC Compliance Manual. *Chevron*-style deference is clearly not warranted for the EEOC Manual because the Court specifically excludes interpretive guidance, opinion letters, and compliance manuals from the application of *Chevron*-style deference.<sup>73</sup> If the EEOC's Manual is interpreting the ADA's statutory language, then *Skidmore*-style deference is due to the EEOC interpretation, to the extent that it has the power to persuade.<sup>74</sup> If it is interpreting its own regulation defining major

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with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Skidmore*, 323 U.S. at 140.

68. See *Christensen*, 529 U.S. at 587-88.

69. See *id.*

70. *Id.* at 588 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). In *Auer*, the Court held that the Secretary of Labor reasonably interpreted its own regulation as denying exempt status to employees who were covered by policy permitting disciplinary or pay deductions from their salaries as a practical matter. See *Auer*, 519 U.S. at 461.

71. *Christensen*, 529 U.S. at 588.

72. *Id.*

73. See *supra* notes 48-59 and accompanying text (discussing *Chevron*-style deference). Although the EEOC Manual is not under the protection of *Chevron*, EEOC regulations themselves may be deserving of *Chevron*-style deference, but only where the statutory language that the EEOC is interpreting is ambiguous. See *supra* notes 38-46 and accompanying text. The Supreme Court declined to rule on whether EEOC regulations are deserving of *Chevron*-style deference in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). The Court stated: "[I]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Id.* at 598 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)). But see *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 143 n.4 (3d Cir. 1998) (en banc) (holding that EEOC regulations defining ADA terms, 29 C.F.R. § 1630.2, are entitled to *Chevron*-style deference because of the ambiguity in certain ADA statutory language and the EEOC's authority to enforce the ADA). The Third Circuit later added in *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 515 n.8 (3d Cir. 1999), that its grant of *Chevron*-style deference to EEOC regulations was limited to the interpretation of ambiguous language in Title I of the ADA and did not necessarily apply to interpretation of the preambles of the ADA, 42 U.S.C. §§ 12101-12102 (2000), which is the location of the ADA's first mention of major life activities.

74. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

life activities, then the interpretation is due *Auer*-style deference, such that it is controlling unless it is "plainly erroneous or inconsistent with the regulation," but only if its regulation is itself ambiguous.<sup>75</sup>

*Chevron*-style deference and *Auer*-style deference are very similar in application. *Chevron* requires that the regulation be given deference unless it is "arbitrary, capricious, or manifestly contrary to the statute[.]"<sup>76</sup> while *Auer* requires that the guidance interpreting the ambiguous regulation is controlling unless it is "plainly erroneous or inconsistent with the regulation."<sup>77</sup>

There have been numerous theories regarding the deference owed to EEOC regulations and subsequent interpretive guidance. In fact, the question of what deference is owed to EEOC interpretations has not been conclusively determined by the Supreme Court or delineated by Congress. Although the circuit courts have attempted to reconcile the different standards of deference and cleanly apply them to the EEOC (and other regulatory agencies), it is not a clean process or a clear issue.

It is conceivable that EEOC Guidance should be afforded *Auer*-style deference where it is interpreting ambiguous EEOC regulations.<sup>78</sup> However, if this is the correct analysis, the question still remains of whether EEOC regulations generally, ambiguous or clear, deserve judicial deference of any kind. Until the Supreme Court rules on this issue, the lower courts will likely continue applying their individual theories and deference tests, which despite their differences, are all couched in the same idea in which everything in the law is couched: reasonableness.<sup>79</sup>

In any event, *Skidmore*'s common-sense reasoning should prevail, even in the vast, intricate, and often sloppy quagmire of interaction between administrative agencies and the judiciary:

Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies

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75. *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1945)).

76. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

77. *Auer*, 519 U.S. at 461 (quoting *Robertson*, 490 U.S. at 359).

78. See *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000). Specifically, the question at hand must be whether the regulation laying out the illustrative list of major life activities is itself ambiguous such that the Manual's interpretation of it is appropriate under *Auer*.

79. The pure thought and theory of the deference doctrines is somewhat distorted by different courts' uses and tests. See discussion *infra* Section IV.A analyzing various circuit court decisions. See White, *supra* note 32, for a thorough and clear analysis of deference owed to the EEOC in regulating and interpreting employment claims under the ADA.

and standards are not reached by trial in adversary form does not mean that they are not entitled to respect.<sup>80</sup>

Additionally, although the EEOC's compliance manual initially spawned ADA plaintiffs' realization that they might have claims based on an inability to interact with others, courts have added their own classifications of "major life activities," even in the absence of EEOC language specifically suggesting the propriety of a particular major life activity.

For example, the Supreme Court added a major life activity to the list in *Bragdon v. Abbott*.<sup>81</sup> The Court held that reproduction is a major life activity under the ADA, adding to the illustrative, non-exhaustive list of major life activities provided by the EEOC.<sup>82</sup> The Court found it unnecessary to analyze in-depth the characteristics of what constitutes a major life activity because "[p]etitioner advance[d] no credible basis" for the Court to reach a contrary decision.<sup>83</sup>

The Court deferred to the regulations of the Rehabilitation Act, which supply a non-exhaustive list of major life activities (which is identical to the list found in the EEOC provisions interpreting the ADA).<sup>84</sup> The Court reasoned that "since reproduction could not be regarded as any less important than working," which is recognized by EEOC regulations as a major life activity, the former must be included as a major life activity.<sup>85</sup> The Court further explained that reproduction is "central to the life process itself."<sup>86</sup>

Additionally, the Sixth Circuit in *Workman v. Frito-Lay, Inc.*,<sup>87</sup> concluded that a reasonable jury could find that an employee, who had a spastic colon and subsequent problems controlling her bowels, was substantially limited in the major life activity of controlling one's bowels.<sup>88</sup>

Conversely, courts have concluded, without EEOC guidance, that certain activities do not constitute major life activities. For example, courts have held that attending day care,<sup>89</sup> gardening, golfing, and shopping are not major life activities.<sup>90</sup> Examples of more employment-related activities that have been held not to be major life activities are tardiness and laziness.<sup>91</sup>

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80. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

81. 524 U.S. 624 (1998).

82. *See id.* at 638-39 (referring to 45 C.F.R. § 84.3(j)(2)(ii) (1997) and 28 C.F.R. § 41.31 (b)(2) (1997)).

83. *Id.* at 639.

84. *Id.*

85. *Id.*

86. *Id.* at 638.

87. 165 F.3d 460 (6th Cir. 1999).

88. *Id.* at 467. The court did not defer to the EEOC to make this finding because the EEOC regulations do not include "controlling one's bowels" in the non-exhaustive list of major life activities; rather, in light of reason and experience it is an activity that is of extreme and obvious significance to an individual. *See id.*

89. *See Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999) ("[m]ajor life activities do not include those activities like day care attendance that, although important to a particular plaintiff, are not significant within the contemplation of the ADA" (citing *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 642-43 (2d Cir. 1998))).

90. *See Colwell*, 158 F.3d at 643; *see also Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir.

An example of a lower court interpreting the ADA, even in terms that are non-specific to the EEOC, is the Tenth Circuit decision holding that a major life activity must be "a basic activity that the average person in the general population can perform with little or no difficulty."<sup>92</sup> Clearly, courts are not impotent without the aid of EEOC regulations or interpretive guidance. Accordingly, although EEOC regulations may be persuasive, helpful, or completely confusing and non-authoritative, the courts assert their own interpretive powers, thereby adding to the already murky waters in which the EEOC and the ADA attempt to swim.

#### IV. CURRENT STATE OF LAW REGARDING WHETHER INTERACTING WITH OTHERS IS A MAJOR LIFE ACTIVITY

##### A. Circuit Courts are Split on the Issue

###### 1. The First Circuit Determines that Interacting with Others Is Not a Major Life Activity

The First Circuit was the first to directly consider whether interacting with others is a valid major life activity under the ADA, in *Soileau v. Guilford of Maine, Inc.*<sup>93</sup> The plaintiff employee, Soileau, claimed that his depressive disorder substantially limited him in his ability to get along with others.<sup>94</sup> Soileau worked as a time study analyst in the industrial engineering department of the defendant employer.<sup>95</sup> He was responsible for conducting group meetings within his department, the organization of which was not to the liking of Soileau's new supervisor.<sup>96</sup> The supervisor approached Soileau, and advised him that his "negative attitude" was hurting his department, as well as his credibility among his coworkers and those who worked under him.<sup>97</sup>

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1999). If legal reasoning in this sense is predicated on activities that are important to any particular individual, the definition of major life activities could include every kind of activity, from running marathons to shopping, which would be an absurd and unmanageable interpretation of the ADA.

91. See *Thomas v. General Motors Corp.*, No. 96-2283, 1996 WL 583386, at \*1 (7th Cir. 1996) (unpublished disposition); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995).

92. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999).

93. 105 F.3d 12 (1st Cir. 1997). It is important to note that this case occurred after the EEOC suggested that interacting with others is a major life activity in its 1995 Compliance Manual. The court acknowledged that the compliance manual is "hardly binding." *Id.* at 15 n.2 (citing *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 1001 (D. Or. 1994)).

94. *Soileau*, 105 F.3d at 13.

95. *Id.*

96. *Id.*

97. *Id.*



In fact, the supervisor instructed Soileau to elicit evaluations from his coworkers regarding his performance, attitude, and what could be done to make the department better.<sup>98</sup> When the evaluations came back showing specific problem areas in Soileau's performance and attitude, his supervisor then instructed Soileau to develop a "plan to address the weaknesses identified" in the evaluations.<sup>99</sup> When Soileau refused to come up with a plan to combat his apparent work-related problems, and further refused to perform another, unrelated task, he was placed under suspension.<sup>100</sup> During this time he was required to develop a plan to address four specific work deficiencies.<sup>101</sup>

This suspension, which would result in termination if he failed to comply with company requests, proved to be stressful for Soileau, who advised his employer that he had been suicidal in the past, and feared he was facing another bout of depression.<sup>102</sup> Soileau's supervisor subsequently allowed him to conduct mainly clerical duties and relieved him of his duties to conduct the department meetings, which were the root of his initial work problems.<sup>103</sup> However, this was not enough: Soileau, through his psychologist, requested that his "work duties be 'restricted so as to avoid responsibilities which require significant interaction with other employees,' and advised that Soileau 'should not be ridiculed, provoked or startled by or in front of supervisors or other employees.'"<sup>104</sup>

The supervisor, feeling that his initial accommodation of relieving Soileau of conducting department meetings was sufficient, terminated Soileau because "there had been no improvement in the four problem areas [identified] and because Soileau had not submitted an improvement plan."<sup>105</sup>

The court, in holding that interacting with others is not a major life activity, noted that "[t]he concept of [the] 'ability to get along with others' is *remarkably elastic*, perhaps so much so as to make it unworkable as a definition."<sup>106</sup> The court reasoned that Soileau's alleged inability to get along with others came and went, and was triggered by common problems of life that would stress ordinary, non-disabled people.<sup>107</sup> Further, that Soileau's last depressive episode was four years earlier, and that he had no

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 13-14.

102. *Id.* at 14. Soileau had previously been diagnosed with a depressive disorder. *Id.* Soileau visited his long-time psychologist, who recommended, and Soileau agreed, that he should take a leave of absence to deal with his stress. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* The court added:

While such an ability is a skill to be prized, it is different in kind from breathing or walking, two exemplars which are used in the regulations. Further, whether a person has such an ability may be a matter of *subjective judgment*; and the ability may or may not exist, depending on context.

*Id.* (emphasis added).

107. *Id.* The court gave examples of such life-problems: "losing a girlfriend or being criticized by a supervisor." *Id.*

problems in the interim, tended to show how the elastic concept of the inability to get along with others may be affected by time, circumstance, and context.<sup>108</sup> The court, in summation, found that “[t]o impose legally enforceable duties on an employer based on such an amorphous concept would be problematic.”<sup>109</sup>

*a. Courts Tending to Follow Soileau*

In *Amir v. St. Louis University*,<sup>110</sup> the Eighth Circuit noted that the plaintiff employee had suffered from an obsessive compulsive disorder that affected “his ability to eat and drink without vomiting, [and] his ability to concentrate and learn . . . .”<sup>111</sup> While the court found eating, drinking, and learning to be major life activities, the court regarded interacting with others as “questionable” as a major life activity, without further analyzing its qualities.<sup>112</sup>

Likewise, in *Davis v. University of North Carolina*,<sup>113</sup> the court assessed a claimant’s contention that she was removed from a teacher certification program because she suffered from disassociative identity disorder.<sup>114</sup> At oral argument, counsel for the claimant suggested she was perceived by the defendant “as being so unable to get along with others that she was substantially limited in her ability to work.”<sup>115</sup> The court regarded the argument as approaching “a claim that the ability to get along with others is a major life activity, a claim about which we have some doubt.”<sup>116</sup>

Some district courts have essentially followed the reasoning of *Soileau*. For example, in *Breiland v. Advance Circuits, Inc.*,<sup>117</sup> an individual who was diagnosed with depression sought protection under the ADA, claiming a

108. *Id.* However, the court suggested 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,” but acknowledged that such a possibility was beyond the scope of the issue before the court. *Id.*

109. *Id.* The ability to interact with others as a major life activity is, according the court, “an amorphous concept.” *Id.* Is the court’s holding that it is not a major life activity based simply on the proposition that it is an elastic, amorphous concept? Perhaps if congressional intent were clearer, its reasoning would be different. Or perhaps it is unreasonable for any court, administrative agency, or even Congress, to consider the parameters of a legally applicable standard of a disability based on an “amorphous concept,” such as the inability to get along with others. Nevertheless, the court continued to analyze *Soileau*’s claim, assuming, *dubitante*, that if getting along with others was a major life activity, then his allegations would nonetheless fail because he was not substantially limited in getting along with others. *Id.* at 15-17.

110. 184 F.3d 1017 (8th Cir. 1999).

111. *Id.* at 1027.

112. *Id.*

113. 263 F.3d 95 (4th Cir. 2001).

114. *Id.* at 100-01.

115. *Id.* at 101 n.4.

116. *Id.* (citing *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997)).

117. 976 F. Supp. 858 (D. Minn. 1997).

substantial limitation in the “normal social interaction with others, or the ability to get along with others.”<sup>118</sup> His claim rested on manifestations of his impairment that took the form of hostile acts and incidents while at work, including: (1) “blowing-up” at a co-worker; (2) talking about harming himself on the job; and (3) and threatening and swearing at his group leader.<sup>119</sup> The court concluded that these activities “[are] not the sort of activit[ies] within the ADA’s purview of . . . major life activit[ies].”<sup>120</sup> Although noting the EEOC’s position in its Compliance Manual accepting interacting with others as a major life activity, the court reasoned that such interpretive guidance was “not binding” on the court.<sup>121</sup>

## 2. The Ninth Circuit Holds that Interacting with Others Is a Major Life Activity

With the First Circuit setting the initial tone for assessing the validity of interacting with others as a major life activity, the next circuit court to directly address the issue was the Ninth Circuit in *McAlindin v. County of San Diego*.<sup>122</sup> There the court, clearly disregarding *Soileau*, broke new ground by being the first circuit court to explicitly declare that interacting with others is a major life activity.<sup>123</sup>

Plaintiff McAlindin was a systems analyst for the County of San Diego (“County”), who had been diagnosed with anxiety and panic disorders, and was on several medications to regulate his anxiety.<sup>124</sup> After receiving a

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118. *Id.* at 863.

119. *Id.* at 860-61.

120. *Id.* at 863 (citing *Soileau*, 105 F.3d at 15).

121. *Id.* For other district court holdings, see, e.g., *Salamo Martinez v. Celulares Telefonica, Inc.*, 272 F. Supp. 2d 144, 150 (D.P.R. 2003) (citing *Soileau*, the court found “unavailing [plaintiff’s] allegation that his ability to interact with others is substantially limited”); *Hawkins v. Trs. of Indiana Univ.*, 83 F. Supp. 2d 987, 995-96 (S.D. Ind. 1999) (citing the lack of authority as reason for concluding that “interacting with people outside of work” was unlikely to be a major life activity in and of itself); *Stauffer v. Bayer Corp.*, No. 3:96-CV-661RP, 1997 WL 588890, at \*6 (N.D. Ind. July 21, 1997) (noting that “interacting with others” is not listed in EEOC regulations as a major life activity, and that the plaintiff, an individual with stress-induced adjustment disorder, provided no authority to support her contention that it should be).

122. 192 F.3d 1226 (9th Cir. 1999). To date, the First Circuit in *Soileau*, and the Ninth Circuit in *McAlindin*, are the only circuits to directly assess the validity of interacting with others as a major life activity. *Id.*; *Soileau*, 105 F.3d at 15. Other circuits have suggested reasoning one way or another, and have made assumptions, *arguendo*, but have not adjudicated the precise issue on the merits. See, e.g., *Doebele v. Sprint*, 342 F.3d 1117, 1131 (10th Cir. 2003); *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 65 (2d Cir. 2003); *Heisler v. Metro. Council*, 339 F.3d 622, 628-29 (8th Cir. 2003).

123. *McAlindin*, 192 F.3d at 1233.

124. *Id.* at 1230. McAlindin described his condition as follows:

Despite the medications [I take], I continue to experience symptoms so severe that at least once a month, I am completely incapacitated, and forced to lie down. Symptoms include dizziness, lightheadedness, narrowed vision, and strange sensations in my head, and my arms and legs. As a result of the medications, I experience impotence. In addition . . . I have frequently been unable to sleep and have had severe insomnia . . . Without the medication, my symptoms return. If I do not take my medication, I am unable to function. The frequency and severity of the symptoms increases to the point where I cannot take care of myself. My condition interferes with my ability to see and

promotion, McAlindin began to experience higher levels of work-related stress.<sup>125</sup> The stress proved to be too much for McAlindin, who subsequently took a leave of absence.<sup>126</sup> Three years later, he took another stress-related leave of absence.<sup>127</sup> McAlindin wanted the county either to extend his leave for more than a year, or to reasonably accommodate him by providing him with another job.<sup>128</sup> When neither request was immediately honored, he returned to his original job after psychological and performance evaluations.<sup>129</sup> McAlindin alleged that when he returned to his job, he was mistreated by his supervisors and was not treated the same as other employees.<sup>130</sup>

McAlindin then brought suit alleging, *inter alia*, that the County failed to make reasonable accommodations for him because of his mental disorders that limited him in the major life activity of interacting with others.<sup>131</sup>

In analyzing McAlindin's claims, the court gave vast deference to EEOC guidelines,<sup>132</sup> holding that he was substantially limited in his ability to interact with others, and thus the question of whether he was substantially

hear and speak. The sense of anxiety, without medication, is so overwhelming, that I am unable to do anything. I am essentially "paralyzed."

*Id.* at 1230-31 (alteration in original).

125. *Id.* at 1231. McAlindin alleged that he had logged complaints with his supervisors, who in turn disregarded them. *Id.* Soon after, McAlindin became extremely agitated and began screaming at his coworkers during a meeting. *Id.*

126. *Id.*

127. *Id.*

128. *McAlindin*, 192 F.3d at 1231. The County would not allow McAlindin to be on leave for more than one year because it was against policy to do so. *Id.* Further, the County offered to put him on a transfer list to a different department, but made it clear that no special treatment would be afforded to him. *Id.*

129. *Id.*

130. *Id.* McAlindin asserted that one of his supervisors wrote him a warning based on his sleeping at work, which McAlindin tried to explain as being an effect of his medication that made him drowsy. *Id.* McAlindin further alleged that he received less training than his coworkers, a point that was factually disputed. *Id.* at 1231-32.

131. *Id.* at 1233. McAlindin further asserted substantial limitations in the major life activities of sleeping and sexual relations, based on his insomnia and impotence. *Id.*

132. *Id.* at 1233 n.6. The court recognized the arguments advocating that EEOC regulations and the Manual are not proper authority for interpreting ADA provisions. *Id.*; see *supra* section III (discussing authority suggesting that EEOC regulations are not binding). But the court followed EEOC regulations, pointing out that the parties stipulated to the validity of the regulations, and that the Supreme Court has not yet ruled on the issue of EEOC authority. See *McAlindin*, 192 F.3d at 1233 n.6; see also discussion *infra* Part IV.B (discussing the Supreme Court's acceptance of the parties' stipulation that EEOC regulations are proper authority for ADA claims, and the Court's application of EEOC regulations, but its failure to hold that EEOC regulations are persuasive or binding authority). The court in *McAlindin* made an unprecedented holding, which included three specific activities within the definition of major life activities, in large part because the parties accepted the validity of those regulations. See *McAlindin*, 192 F.3d at 1233 n.6, 1234.

limited in his ability to work (a fairly common and accepted claim) was then moot.<sup>133</sup>

The court relied on two primary pieces of authority for its holding: 1) the EEOC regulations and Manual and 2) *Criado v. IBM Corp.*<sup>134</sup> The court acknowledged the reluctance of the First Circuit in *Soileau* to accept interacting with others as a major life activity because of the term's amorphous or vague characteristics.<sup>135</sup> However, the court stated that "interacting with others is no more vague than 'caring for oneself,' which has been widely recognized as a major life activity."<sup>136</sup>

The court clarified its holding in that recognizing the ability to interact with others "does not mean that any cantankerous person will be deemed substantially limited in a major life activity."<sup>137</sup> The court added that "[m]ere trouble getting along with coworkers is not sufficient to show a substantial limitation."<sup>138</sup> The court found evidence that, because of

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133. *Id.* at 1233-34. The court cited the *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (1997), <http://www.eeoc.gov/policy/docs/psych.html>, as authority for inclusion of the "ability to interact with others" as a major life activity. *Id.* at 1233. The court, deferring to the EEOC Guidance, noted that if a major life activity other than working is applicable, then working shall not be considered in its disability analysis. *Id.*

134. 145 F.3d 437 (1st Cir. 1998); *see also McAlindin*, 192 F.3d at 1234 (relying on the holding in *Criado*). Ironically, the court is supporting its argument with a decision from the First Circuit, where it was strongly doubted that interacting with others is a major life activity in *Soileau*. The court relied on *Criado*, to the extent that it found a claimant to be disabled because she was "substantially limited in her ability to work, sleep, and relate to others." *McAlindin*, 192 F.3d at 1234 (citing *Criado*, 145 F.3d at 442). The court in *McAlindin* sifted out the last small claim in *Criado* of the claimant's limitation in "relating to others" to swiftly conclude 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.'" *McAlindin*, 192 F.3d at 1234. Nothing in *Criado* suggests this conclusion, or supports the particular language used in *McAlindin*, comparing "relating to others" to walking and breathing, which are widely accepted major life activities. *See generally Criado*, 145 F.3d 437. The *McAlindin* court, however, primarily relied on the EEOC guidelines for its holding. *McAlindin*, 192 F.3d at 1233 n.6.

135. *See McAlindin*, 192 F.3d at 1234.

136. *See id.* at 1235. *See, e.g.,* *Bragdon v. Abbott*, 524 U.S. 624, 656 (Ginsburg, J., concurring) (finding that caring for oneself is a major life activity) (citing 45 C.F.R. § 84.3(j)(2)(ii) (2002)); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998) (same); *see also Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (defining "caring for oneself" as including everything from driving and grooming to feeding oneself and cleaning one's home).

137. *McAlindin*, 192 F.3d at 1235. *See also EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* at n.15 (1997), <http://www.eeoc.gov/policy/docs/psych.html> ("Interacting with others, as a major life activity, is not substantially limited just because an individual is irritable or has some trouble getting along with a supervisor or coworker.").

138. *McAlindin*, 192 F.3d at 1235. Thus, the court had no hesitation in defining this major life activity, but clarifies that to be substantially limited requires more specific evidence of impediment in getting along with others. *See id.* at 1235-36 (*McAlindin*'s difficulties in interacting with others were "sufficiently severe" to overcome a summary judgment motion); *see also Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 804 (9th Cir. 2001). In *Thornton*, the Ninth Circuit further explained its reasoning in *McAlindin*:

[W]e defined 'major life activities' as activities 'significant in the life of the average person,' and explained that to determine whether a life activity is 'major,' courts should examine 'the number of people who engage in' it, a standard that incorporates the physical and social realities of peoples' lives. In particular, we concluded that 'interacting with others,' a quintessentially public, social function, constitutes a 'major life activity.' . . . Thus, while major life activities are not *confined* 'to those with a public, economic, or daily aspect,' . . . skills with those aspects *are* quintessential parts of the activities that are covered by the ADA.

McAlindin's impairment, he displayed a "pattern of withdrawal from public places and family members," sufficient to raise a question of fact for a jury on whether this substantially limited him in his ability to interact with others.<sup>139</sup>

Additionally, the impairment must be substantial when compared to the ability of "the average person in the general population."<sup>140</sup> The court ultimately held that a plaintiff must show that his or her "relations with others were characterized on a regular basis by severe problems; for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary."<sup>141</sup> Thus the court, in upholding McAlindin's ADA claims for purposes of defeating summary judgment, effectively created a new major life activity, which had not been officially recognized by any court.

#### a. Courts Tending to Follow McAlindin

The only circuit court to expressly acknowledge *McAlindin*, and somewhat suggest that it may be persuasive, was the Sixth Circuit in *MX Group, Inc. v. City of Covington*.<sup>142</sup> But even in acknowledging *McAlindin*, the court failed to actually apply *McAlindin* reasoning, much less hold that interacting with others is a major life activity.<sup>143</sup>

Several district courts have followed reasoning similar to that in *McAlindin*, identifying interacting with others as a major life activity under certain circumstances.<sup>144</sup> For example, in *Lemire v. Silva*,<sup>145</sup> the court concluded that "if defined broadly to include the most basic types of human interactions," then interacting with others is certainly a major life activity, thereby satisfying the requirement that major life activities are assessed by their significance.<sup>146</sup> The court stated that "[t]he ability to interact with

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*Id.* (citing *Bragdon*, 524 U.S. at 639; *McAlindin*, 192 F.3d at 1233-34).

139. *See id.* Thus, accepting "interacting with others" as a major life activity does not mean that one is substantially limited in interacting with others simply because of problems at work; rather, the individual must also be limited in getting along with others outside of work, in his or her personal, everyday life.

140. *Id.* (citing the definitions in 29 C.F.R. § 1630.2(j)(1)(i) and § 1630.2(j)(2)(i)) ("courts must consider the 'severity' of the impairment.").

141. *McAlindin*, 192 F.3d at 1235 (citing *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (1997), <http://www.eeoc.gov/policy/docs/psych.html>) (internal quotes omitted).

142. 293 F.3d 326 (6th Cir. 2002).

143. *Id.* at 337 (acknowledging that "it has been held that 'interacting with others,' is a major life activity" (citing *McAlindin*, 192 F.3d at 1233)).

144. *See, e.g.*, *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 160 (E.D.N.Y. 2002) ("The ability to interact with others, like other recognized major life activities, is a basic function, necessary for daily human existence"); *Peter v. Lincoln Technical Inst.*, 255 F. Supp. 2d 417, 432 (E.D. Pa. 2002).

145. 104 F. Supp. 2d 80 (D. Mass. 2000).

146. *Id.* at 86-87 (citing *Bragdon v. Abbott*, 524 U.S. 624, 637-42 (1998), for the proposition that

others is an inherent part of what it means to be human.”<sup>147</sup> Reasoning that “[t]he ability to interact is thus both fundamental in itself and also essential to contemporary life,” the court concluded that interacting with others “is at least as basic and as significant as the ability to learn or to work”—activities more readily accepted by courts as major life activities.<sup>148</sup>

### 3. Courts Viewing Interacting with Others as a Component of the Major Life Activities of Learning and Working

Thus, since *Soileau* and *McAlindin*, there have been various courts that have followed the reasoning of either the First or Ninth Circuits to some degree. Some have been more inclined or more reluctant to do so than others. But there is another set of courts, which have not followed either *Soileau* or *McAlindin*, but have applied individuals’ limitations in their ability to interact with others as a subset of the more recognized major life activity of working.<sup>149</sup> While working is not as commonly accepted as the major life activities of, for example, walking or breathing, several courts have nonetheless construed it as subsuming the narrower category of interacting with others.<sup>150</sup>

In *Emerson v. Northern States Power Co.*,<sup>151</sup> the plaintiff alleged that she was substantially limited in “memory, concentration, and interacting with others,” as a result of brain injuries stemming from an accident.<sup>152</sup> The Seventh Circuit refused to specifically decide the issue because the plaintiff

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“the touchstone for determining the activity’s inclusion under the statutory rubric is its significance”).

147. *Id.* at 87.

148. *Id.* Inexplicably, the court did not even cite to *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997), which presumably would be binding upon the court as decided by the First Circuit.

149. Working is regarded by the EEOC as a major life activity. 29 C.F.R. § 1630.2(i) (2002). Although the Supreme Court has declined to assess whether working is a major life activity in the ADA context, *Toyota Motor Mfg., Ky. Inc. v. Williams*, 534 U.S. 184, 193 (2002), it has recognized that working is a major life activity with respect to the Rehabilitation Act. *Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 283 n.10 (1987). In *Arline*, an employer challenged the validity of “working” as a major life activity under the Rehabilitation Act. *Id.* The employer argued that to say that a condition impairing *only* the ability to work was a handicapping condition was to make “a totally circular argument which lifts itself by its bootstraps.” *Id.* However, the Court asserted that such an argument is not circular, but direct. *Id.* The Court continued: “Congress plainly intended the [Rehabilitation] Act to cover persons with a physical or mental impairment . . . that substantially limited *one’s ability to work.*” *Id.* (emphasis added).

150. The Fifth Circuit aptly explained why it adopted working as a major life activity:

For many, working is necessary for self-sustenance or to support an entire family. The choice of an occupation often provides the opportunity for self-expression and for contribution to productive society. Importantly, most jobs involve some degree of social interaction . . . providing opportunities for collegial collaboration and friendship. For those of us who are able to work and choose to work, our jobs are an important element of how we define ourselves and how we are perceived by others. The inability to access the many opportunities afforded by working constitutes exclusion from many of the significant experiences of life.

*EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654-55 (5th Cir. 1999).

151. 256 F.3d 506 (7th Cir. 2001).

152. *Id.* at 511.

did not "sufficiently develop[] her contentions on appeal."<sup>153</sup> However, it considered all three activities collectively as ones that "feed into the major life activities of learning and working," which it considered to be more tangible activities.<sup>154</sup> The court, however, did not provide elaborate reasoning to reach its conclusion; nor did it evaluate how each activity independently fit into the activities of learning and working.<sup>155</sup>

Further, in *Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C.*,<sup>156</sup> the plaintiff had experienced short-term dementia induced by chemotherapy.<sup>157</sup> The First Circuit concluded that her purported limitations in "thinking, concentrating, organizing data, processing information, interacting with others, and performing other everyday tasks such as sleeping and driving at night," were part and parcel of working and learning.<sup>158</sup>

The court noted without explanation that "[e]ven if each of these is a distinct major life activity, we agree with the district court that all may be reasonably subsumed within the broader context of working and learning."<sup>159</sup> The court did not distinguish or even acknowledge its previous decision in *Soileau*.<sup>160</sup>

In *Moyasis v. DTG Datanet*,<sup>161</sup> the Eighth Circuit found that the plaintiff employee had "presented sufficient evidence of an actual disability" at the time of termination.<sup>162</sup> Plaintiff had sustained a brain injury, resulting in problems with concentration and short-term memory.<sup>163</sup> Although the court found that the plaintiff could have continued to work for defendant employer, jobs that mandated meeting new people could pose problems.<sup>164</sup>

The court, without directly addressing the ability to get along with others, noted that the Seventh Circuit had held that, "'the need for routine,' as well as 'memory, concentration, and interacting with others [are] activities that feed into the major life activities of learning and working.'"<sup>165</sup> The court added that this was not a situation where the plaintiff's condition impaired a "'single aspect of a single job position.'"<sup>166</sup> Rather, his limitation in being able to meet and interact with new people was applicable to a broad

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153. *Id.*

154. *Id.*

155. *See id.*

156. 258 F.3d 30 (1st Cir. 2001).

157. *Id.* at 31.

158. *Id.* at 33 n.4.

159. *Id.*

160. *See id.*

161. 278 F.3d 819 (8th Cir. 2002).

162. *Id.* at 825.

163. *Id.*

164. *Id.*

165. *Id.* (quoting *Emerson v. N. States Power Co.*, 256 F.3d 506, 511-12 (7th Cir. 2001)).

166. *Id.* (quoting *Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 680 (8th Cir. 2001)).



spectrum of jobs.<sup>167</sup> The fact that his limitation was so broadly striking was crucial in determining that he was substantially limited in his “real work opportunities.”<sup>168</sup>

#### 4. Courts Assuming *Dubitante*, for the Purpose of Applying the Substantial Limitation Test in Accordance with Stipulation of the Parties, that Interacting with Others Is a Major Life Activity

Several courts have not taken a definitive stance on the issue; rather they have simply assumed that interacting with others is a major life activity and applied the appropriate substantial limitation analysis.<sup>169</sup>

#### B. What the Supreme Court Has Done

For several years after the ADA’s enactment, the Supreme Court seemed content to let the lower courts interpret the meaning of “disability,” with its first disability interpretation occurring in 1998, holding that individuals with HIV are covered by the ADA because it limits the major life activity of reproduction.<sup>170</sup>

Although the Supreme Court has not addressed the validity of “interacting with others” as a major life activity, it has nonetheless supplied helpful guidance in determining what a major life activity is generally, and what constitutes a substantial limitation of a major life activity in the ADA context.

With regard to regulations interpreting the meaning of “disability,” the Court has noted that there are two sources of regulatory guidance: the EEOC regulations interpreting the ADA and the regulations interpreting the Rehabilitation Act of 1973.<sup>171</sup>

The Court has further noted that because ‘disability’ is contemplated by the ADA “with respect to an individual,”<sup>172</sup> that Congress intended the existence of a disability to be determined in a case-by-case manner.<sup>173</sup> In proving a substantial limitation, ADA claimants may not “merely submit

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167. *Id.*

168. *Id.* (citing *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 488 (8th Cir. 1996), for the proposition that the ADA is “concerned with preventing substantial personal hardship in the form of significant reduction in a person’s real work opportunities . . . [such that a] court must ask ‘whether the particular impairment constitutes for the particular person a significant barrier to employment’”).

169. *See, e.g., Doyal v. Okla. Heart, Inc.*, 213 F.3d 492, 496 (10th Cir. 2000) (“The *EEOC Guidance* is not, however, controlling authority. We will nevertheless assume for the sake of argument that, along with learning and sleeping, thinking and interacting with others constitute major life activities.” (citations omitted)); *Horwitz v. L & J.G. Stickley, Inc.*, 122 F. Supp. 2d 350, 354 n.3 (N.D.N.Y. 2000) (expressing doubts that “socializing qualifies as a major life activity”); *Presta v. S.E.P.T.A.*, No. CIV.A. 97CIV.2338, 1998 WL 310735 (E.D. Pa. June 11, 1998).

170. *See Smith, supra* note 15, at 50 (citing *Bragdon v. Abbott*, 524 U.S. 624 (1998)).

171. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193 (2002). *See also* *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999) (assuming that EEOC regulations are valid and applying them); *supra* Section III (discussing deference to be given to the EEOC).

172. 42 U.S.C. § 12102(2) (2000).

173. *Toyota Motor Mfg.*, 534 U.S. at 198.

evidence of a medical diagnosis of an impairment."<sup>174</sup> Rather, they must "prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of *their own experience* . . . is substantial."<sup>175</sup>

Further, "[t]he plain meaning of the word major denotes comparative importance and suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance."<sup>176</sup> The *Bragdon* Court noted that the term "major life activity" is very broad and includes activities that are private in character.<sup>177</sup>

More recently, the Supreme Court decided four major ADA cases in 2002.<sup>178</sup> The rulings tended to favor employers.<sup>179</sup> Is this recent trend an awakening for ADA and EEOC advocates that the envelope is not going to be pushed much further?<sup>180</sup>

In January 2002, the Court limited ADA protection of employees with carpal tunnel syndrome and other work-related impairments, holding that an individual's impairment, in order to substantially limit a major life activity, must pervade into the life of the individual generally, and may not only limit the activity while the individual is working.<sup>181</sup>

Three months later, the Court seemed to favor employee seniority rights over ADA protections of disabled workers.<sup>182</sup> In June the Court upheld an EEOC regulation permitting employers to reject job applicants who have medical conditions that might be inflamed by workplace conditions.<sup>183</sup> Lastly, the Court ruled that municipalities are not liable for punitive damages in private ADA suits.<sup>184</sup>

The Supreme Court has yet to address the issue of whether the ability to get along with others is a major life activity. The Petition for Writ of Certiorari in response to the Ninth Circuit's decision in *McAlindin* was

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174. *Id.*

175. *Id.* (quoting *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999)) (emphasis added).

176. *See Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (internal quotation marks omitted).

177. *Id.* The *Bragdon* Court rejected an attempt to confine major life activities to "those with a public, economic, or daily aspect." *Id.* at 639.

178. *See Barnes v. Gorman*, 536 U.S. 181 (2002); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

179. *See cases supra* note 178.

180. *See Smith, supra* notes 15-16 (discussing Justice O'Connor's recent speech regarding the ADA).

181. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002) ("[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.").

182. *See US Airways v. Barnett*, 535 U.S. 391 (2002).

183. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002).

184. *See Barnes v. Gorman*, 536 U.S. 181 (2002).

denied,<sup>185</sup> and remains to be the only Petition for Writ of Certiorari submitted to the Court on this issue.

### C. *What the Supreme Court Will Likely Do*

The Court will likely not hear many more cases where the primary issue is whether a particular activity is a major life activity. The Court likely feels that it has set forth enough language for lower courts to apply in assessing disability in the context of the ADA. In addition to the existing language and instructions on determining if an activity is to be regarded as “major,” there exists an additional restraint on the ADA plaintiff: passing the substantial limitation test.<sup>186</sup> Between convincing a court that interacting with others is a major life activity, and further convincing the trier of fact that the individual is substantially limited in interacting with others, due to an actual impairment, there are significant barriers ADA claimants must overcome.

The intent of the Supreme Court is that disability *is* to be construed narrowly, such that frivolous, fraudulent, and unjust claims are not recognized.<sup>187</sup> Because of this and the Court’s recent tightening of the reins over possible future claimants, the Court is likely to patiently see where its recent holdings will take the ADA.

However, with respect to “interacting with others” specifically, because the varying interpretations are still in disarray within the lower courts, the Court may be interested in deciding if it is a major life activity, thereby clearing the air for better and more efficient application of the law.

## V. PRACTICAL PROBLEMS WITH ACCEPTING INTERACTING WITH OTHERS AS A MAJOR LIFE ACTIVITY

### A. *The “Essential Functions” Obstacle*

Is interacting with others not simply an “essential function” of almost every job, thus precluding it as a major life activity because the individual

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185. *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999), *cert. denied*, 530 U.S. 1243 (2000).

186. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002). Specifically, the determination of disability is “not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.” *Id.*

187. *See id.* at 197. Further, the Court noted that “[i]f Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans [reflecting 43 million] would surely have been much higher.” *Id.* (citing 42 U.S.C. 12101(a)(1)). *But see* Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of The Americans With Disabilities Act*, 18 LAB. LAW 417, 442 (2003) (describing the Court as the “Supreme Legislature,” which has ignored both legislative findings and purpose in severely limiting the types of plaintiffs who qualify as disabled under the ADA).

would thus not be otherwise qualified to work if he or she cannot perform the essential function of interacting with others?<sup>188</sup>

Courts have determined, both pre- and post-ADA, that certain functions are generally essential to jobs, such that if the employee cannot fulfill them, then the Rehabilitation Act or the ADA does not protect him or her.<sup>189</sup> More recently, it has been reasoned that getting along with others is unquestionably an essential function of basically every job.<sup>190</sup> Thus, if interacting with others is an essential function, then a limitation of such is not covered by the ADA. But, if interacting with others is not an essential function of a particular type of job (i.e. professional graffiti remover inside a cave), then what conceivable situation would arise where that employee

188. See 42 U.S.C. § 12111(8) (2000). The ADA protects only those "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* Further, "consideration shall be given to the employer's judgment as to what functions of a job are essential." *Id.* "[E]ssential functions" means the "fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1) (2003).

189. See *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 674-75 (1st Cir. 1995) (noting that "[t]echnical skills and experience are not the only essential requirements of a job"). Here the court cited cases that had reasoned similarly:

See *Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 441-42 (6th Cir. 1991) ("at least the ability to get along with supervisors and co-workers" was essential function of job as tool room attendant); *Mancini v. General Electric Co.*, 820 F.Supp. 141, 147 (D. Vt.1993) ("ability to follow the orders of superiors is an essential function of any position"); *Pickard v. Widnall*, 1994 WL 851282, \*9 (S.D. Ohio, Dec. 15, 1994) (No. C-3-94-40) ("mental and emotional stability" was essential job function for military position); *Johnston v. Morrison*, 849 F.Supp. 777, 778 (N.D.Ala.1994) (waitress who was unable to handle pressures of working on crowded nights or memorizing frequent menu changes was unable to perform essential functions of job); cf. *Bento v. I.T.O. Corp. of Rhode Island*, 599 F. Supp. 731, 742-43 (D.R.I.1984) (although there is "no question that plaintiff . . . is qualified to do the job, at least in the sense of knowing how to perform it," he is not necessarily "otherwise qualified" within the meaning of the Rehabilitation Act). More specifically, an employer may reasonably believe that an employee known to have a paranoia about the plant manager is not able to perform his job. Cf. *Voytek v. University of California*, 1994 WL 478805, \*15, 6 A.D.D. 1137, 1161 (N.D. Cal., Aug. 25, 1994) (No. C-9203465 EFL) (holding that employee was legally denied re-employment after period of disability where he "could not continue to perform all of the tasks assigned to him," due in part to "the ongoing conflict with his supervisor").

*Grenier*, 70 F.3d at 674-75.

190. The court explained:

Since getting along with others and accepting supervision are *crucial to every job* except, perhaps, to a lighthouse keeper, they are *certainly essential functions*. If, therefore, a person's disability prevents her from being cooperative and amenable to supervision, and a employer cannot reasonably accommodate that disability, then the disabled person cannot perform an essential function of her position and her discharge is appropriate despite her disability. But, if the disability claimed has nothing to do with being cooperative, then the ADA is completely irrelevant to her discharge.

*Smith v. Dist. of Columbia*, 271 F. Supp. 2d 165, 172 (D.D.C. 2003) (emphasis added) (citations omitted). In summation, the court recognized the very basic but oft forgotten fact that "[d]isabled persons and their employers are not covered in every aspect of their relationship by the ADA." *Id.*

would be fired, or otherwise discriminated against, *because* of his or her inability to interact with others, as required for an ADA claim?

*B. Congressional Intent Trumps Judicial Proactivism (and, of Course, the EEOC)*<sup>191</sup>

A primary catalyst for enacting the ADA was rooted in the idea that a deplorable stigma exists towards the disabled.<sup>192</sup> In this sense, the deplorable stigma irrationally judges another individual based on a set of physical or mental features of that person that are not part of the proverbial “inner person.” This stigma could be characterized as an impediment to getting along with others, particularly if those who attach the stigma are excluding them or choosing not to interact with them because of their personal bias against them. Thus, it could be argued that the inability to interact with others is the basis for the stigma, which is the foundation of such discriminatory attitudes and practices.<sup>193</sup>

Accordingly, not being able to interact with others in this context is the root of the purpose of the ADA, and is not an outward manifestation of an individual’s impairment. With this in mind, the fact that irrational feelings towards an individual, such as having a prejudice against an individual in a wheelchair because of ignorant notions or generalizations about individuals in wheelchairs, are based on ignorance in perceiving or accepting the outward manifestations of physical or mental impairments, is why “interacting with others” is a problematic legal issue.<sup>194</sup> A stigma towards an individual with whom it is hard to get along is based on *rational* human

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191. However, congressional intent prevails only when it is unambiguous. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Obviously, the fact that there is a severe circuit split on the issue of this Comment proves that Congress used less than clear language in drafting the ADA. *See supra* note 16 (discussing Justice O’Connor’s belief that the ADA was sloppily constructed); Part III (discussing deference levels of administrative agencies when congressional intent is less than clear because of ambiguous statutory language). But, despite less than clear statutory language, congressional intent may be inferred where appropriate.

192. *See* 42 U.S.C. § 12101(a)(2), (7) (2000), explaining that:

historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; [i]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society[.]

*Id.*

193. The primary purpose of the ADA is “to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation’s life, including the workplace.” *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002) (citing 42 U.S.C. §§ 12101(a)-(b)).

194. *But see* Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans With Disabilities Act?*, 2002 WIS. L. REV. 1139, 1168-75 (2002) (arguing for recognition of interacting with others as a major life activity, and suggesting that claims based on mental illness are rejected by courts more often than claims based on physical impairments because of “the significant discomfort that many in society experience in the presence [of] mental illness”).

tendencies to not want to be around someone who is unstable, abrasive, argumentative, or generally "unlikable" because of the way that individual acts or treats those around him or her.

Thus, interacting with others naturally includes *behavior* towards others, a factor that none of the other commonly accepted major life activities considers. It is reasonable to infer that courts' reluctance to apply "interacting with others" in the ADA employment context is because it is difficult to say that the congressional purpose behind the ADA prohibits stigmas that are based on natural human tendencies, rather than the traditional "bad reasons."

## VI. CONCLUSION

Because there is no clear answer to what deference is owed to EEOC regulations, nor its compliance manuals and other interpretive guidance, whether the EEOC is authoritative when it declares that "interacting with others" is a major life activity is less than obvious. The federal courts have reached differing conclusions, doing their best to balance the EEOC, congressional intent, and the often vague language of the Supreme Court.

Whether or not the Supreme Court will choose to address the issue remains to be seen. In any event, the First Circuit in *Soileau* has offered the most persuasive and logical reasoning of the lower courts. The "ability to interact with others" is an elastic phrase, and it is difficult to imagine courts being able to interpret what exactly it means, in light of the fact that courts are accustomed to adjudicating issues where the major life activities in question are seeing, walking, breathing, or some other activity that is concrete, outwardly and quantitatively manifested.

Further, arguing that being substantially limited in one's ability to interact with others begs the question of the purpose of the ADA itself, creating an illogical interpretation of congressional intent. Rep. Dannemeyer forecasted that "perverse and unintended results will proliferate" from interpreting the ADA.<sup>195</sup> Is that what is happening?

Bryan P. Stephenson<sup>196</sup>

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195. See *supra* note 9.

196. J.D. Candidate, Pepperdine University School of Law, 2004. This Comment is dedicated to my mother, Ellen, to my hero and father, the late M.J. Stephenson, Ph.D., and to Elijah Stephenson and Layla Hoffen, who represent a new and better future. In addition, I would like to thank Eugene Pickel and Dr. Gary Fulks, who likely do not realize the significant impact that they have had on my life and education.

