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“Bartender, I’ll Have a Beer and a Disability”; Alcoholism and the Americans with Disabilities Act: Affirming the Importance of the Individualized Inquiry in Determining the Definition of Disability

Beth Hensley Orwick

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"BARTENDER, I'LL HAVE A BEER AND A DISABILITY"; ALCOHOLISM AND THE AMERICANS WITH DISABILITIES ACT: AFFIRMING THE IMPORTANCE OF THE INDIVIDUALIZED INQUIRY IN DETERMINING THE DEFINITION OF DISABILITY

I. INTRODUCTION

In 1990, Congress, recognizing the need for legislation to protect individuals with disabilities, enacted the Americans with Disabilities Act (hereinafter ADA), with the stated purpose of eliminating discrimination against them.[1] In the ten years since the passage of the ADA,[2] administrative and judicial interpretations have resulted in differing views on several of the statute's substantive points. Conflicting views are evident in the numerous disagreements among the circuits over which plaintiffs in particular qualify as an "individual with a disability"[3] for the purposes of an ADA discrimination claim.[4] Disputes frequently arise when the plaintiff's alleged disability does not fall into the realm of a commonly held notion of disability.[5] This comment will examine one such inconsistency, namely the current circuit split concerning the status of a person who suffers from alcoholism as a "qualified

1. The Americans With Disabilities Act, 42 U.S.C. § 12101(b)(1) (1994). For information concerning the ADA as a whole, *see generally Development in the Law: III. The Americans With Disabilities Act: Great Progress, Greater Potential,* 109 HARV. L. REV. 1602 (1996).

2. The ADA was enacted in 1990, however, it did not become effective until July 26, 1992. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.).

3. In order to establish a prima facie case of discrimination, a plaintiff has the burden of demonstrating that: (1) the defendant is a covered entity, (2) she has a disability, (3) she is otherwise qualified, and (4) she was discriminated against "because of" her disability. 42 U.S.C § 12112(a) (1994).

4. "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (1994).

5. Examples of such alleged disabilities include: plaintiffs with asthma, *see* Webb v. Clyde L. Choate Mental Health and Dev. Ctr., 230 F.3d 991 (7th Cir. 2000) (asserting that asthmatic plaintiff was not a qualified individual under the ADA); carpal tunnel syndrome, *see* McKay v. Toyota Motor Manu., 110 F.3d 369 (6th Cir. 1997) (asserting that plaintiff's carpal tunnel syndrome does not qualify as a disability under ADA); and colorblindness, *see* Ferguson v. Whirlpool Corp., 2000 U.S. Dist. LEXIS 12905 (W.D. AK Apr. 5, 2000) (denying colorblind plaintiff relief under ADA by asserting the ability to distinguish colors in not a major life activity).

individual with a disability."[6] The Fourth Circuit, in *Little v. Federal Bureau of Investigation*,[7] and the Seventh Circuit, in *Duda v. Board of Education of Franklin Park Public School District No. 84*,[8] both assert that alcoholism is a per se disability.[9] In contrast, the Fifth Circuit, in *Burch v. Coca-Cola, Co.*,[10] and the Tenth Circuit, in *Nelson v. Williams Field Services*,[11] argue that in order to determine if a plaintiff's alcoholism qualifies as a disability, an individualized inquiry must be made into whether alcoholism substantially limits a major life activity of the individual.[12] This comment will begin a discussion of the history and background of the ADA, alcoholism in general, and the general provisions of the ADA that discuss alcoholism. Next, this comment will discuss the circuit split in light of the purposes and statutory construction of Title I, which governs disability discrimination actions in an employment setting.[13] This comment will also discuss the differences between

6. This comment will focus on only the Fourth, Seventh, Fifth and Tenth Circuit cases because of their relative importance in defining the two sides of the circuit split and the individual cases' impact on other circuits. It must be noted, however, that other circuits have taken a position on the issue of the necessity of an individualized inquiry for individuals asserting alcoholism as a disability. The First, Second, Fourth, Sixth, Seventh, Ninth, Eleventh, and the Federal Circuits use a per se approach. *See, e.g.,* Martin v. Barnesville Exempted Village School Dist. Bd. of Ed., 209 F.3d 931, 934 (6th Cir. 2000); Farley v. Nationwide Mutual Ins. Co., 197 F.3d 1322, 1330 n.2 (11th Cir. 1999); Singer v. Office of the Senate Sergeant at Arms, 173 F.3d 837, 839 (Fed. Cir. 1999); Evans v. Federal Express Corp., 133 F.3d 137, 139 (1st Cir. 1998); Brennan v. New York City Police Dept., 1998 U.S. App. LEXIS 1923, 8 (2nd Cir. 1998); Newland v. Dalton, 81 F.3d 904, 906 (9th Cir. 1996). The Fifth, Tenth and the D.C. Circuits advocate the individualized inquiry approach to determine if a claimant is an individual with a disability. *See, e.g.,* Director, Office of Workers' Compensation Programs v. Jaffee New York Decorating, 25 F.3d 1080, 1083-4 (D.C. Cir. 1994). The Eighth Circuit is split on this issue. *See, e.g.,* Wallin v. Minnesota Dept. of Corrections, 153 F.3d 681, 687 n.4 (8th Cir. 1998) (using the individualized inquiry and asserting that the plaintiff did not demonstrate that his alcoholism impaired a major life activity); Miners v. Cargill Communications, Inc., 113 F.3d 820, 824 n.5 (8th Cir. 1997) (recognizing alcoholism is a disability under the ADA).

7. Little v. Fed. Bureau of Investigation, 1 F.3d 255 (4th Cir. 1993).

8. Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054 (7th Cir. 1998).

9. 133 F.3d 1054 (7th Cir. 1998); 1 F.3d 255 (4th Cir. 1993).

10. Burch v. Coca-Cola, Co., 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998).

11. Nelson v. Williams Field Services, 216 F.3d 1088 (10th Cir. 2000).

12. *Id.* at 1088; *Burch* 119 F.3d at 305.

13. The ADA is divided into several titles. Titles I through IV each cover a different segment of society. For purposes of Title I a "covered entity" is an employer, employment agency, labor organization, or joint labor-management committee. 42 U.S.C. § 12111 (1994). Title II is applicable to public entities. "Public entities" include any state or local government, any department, agency, special purpose district, or other instrumentality of a State or States or local government, the National Railroad Passenger Corporation, and any commuter authority. 42 U.S.C. § 12131 (1994). Title III covers public accommodations and services operated by private entities. 42 U.S.C. § 12181 (1994). Title IV sets standards for telecommunications services for

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

alcoholism and the traditionally conceived notions of disability[14] as well as its overall status as a disability for the purposes of the ADA. This author will then analyze the circuit splits to conclude that alcoholism should not be considered a per se disability, but that the disability status of an individual with alcoholism should be determined by a full individualized inquiry into whether their alcoholism "substantially limits one or more of the major life activities."[15]

II. HISTORY AND BACKGROUND

A. The Americans with Disabilities Act

President George Bush signed the bipartisan and popularly supported Americans with Disabilities Act into law on July 26, 1990.[16] The ADA is rooted in the Rehabilitation Act of 1973, however, the ADA is more detailed and far-reaching.[17] Notably, the ADA expanded the Rehabilitation Act by increasing the number of private entities that are prevented from discriminating against people with disabilities.[18] When President Bush signed the law he remarked that the ADA "promises to open up all aspects of American life to individuals with disabilities" and "signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."[19] The potential impact of the ADA was demonstrated by Congressional findings that showed forty-three million Americans have some type of mental

hearing and speech-impaired individuals. 47 U.S.C. § 225 (1994). This comment will not discuss the status of alcoholism as a disability in relation to the entities covered in titles II thorough IV because my focus is on the employment setting as defined in Title I.

14. For the purposes of the ADA, a disability differs from an impairment. A person's impairment may rise to the level of a disability if, when compared to the general population, she is "unable to perform a major life activity" or is "significantly restricted as to the condition, manner or duration under which" he can perform the major life activity. *Duda*, 113 F.3d at 1058 n. 5 (citing 29 C.F.R. § 1630.2(j) (2001)).

15. 42 U.S.C. § 12102(2)(a) (1994).

16. Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 328 (1997).

17. 29 U.S.C. §§ 701-796 (Supp. V 1999).

18. The coverage of the Rehabilitation Act was severely limited and only prohibited discrimination by federal executive agencies, federal grantees, and federal contractors. 29 U.S.C. § 794 (1974). However, the ADA is more comprehensive and affects a greater number of individuals. *See supra* note 13. For a more complete explanation of the federal law starting with the Rehabilitation Act and leading up to the enactment of the ADA, see generally Mary Nebgen, Note, *Narrowing the Class of Individuals With Disabilities: Sutton v. United Air Lines, Inc.*, 31 MCGEORGE L. REV. 1129, 1132 (2000). For a discussion of the Rehabilitation Act, specifically the definition of the term "handicapped," see generally Maureen O'Connor, '*Defining Handicap' for Purposes of Employment Discrimination*, 30 ARIZ. L. REV. 633, 639-649 (1988).

19. Statement on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1165 (July 26, 1990).

or physical disability.[20] Congress also found 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."[21] As a result of their findings, Congress stated its purpose was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"[22] and " to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[23]

Although Congress asserted that they provided clear "standards addressing discrimination,"[24] critics of the ADA maintained that the law would result in an onslaught of litigation by individuals claiming they were entitled to protections under the Act.[25] Critics contended that the ADA's definition of "disability" was too vague,[26] and as a result, people would seek to expand it in

20. 42 U.S.C. § 12101(a)(1) (1994).

21. *Id.* (a)(2).

22. *Id.* (b)(1).

23. *Id.* (b)(2).

24. *Id. See also Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 190 (1989) [hereinafter *Hearings*] (statement of Chairman Jack Brooks) (asserting that in order to protect the rights of the disabled the legislation must be "as clear and precise as possible, so that those who are affected by its provisions understand what their duties are and can comply with them").

25. Gary S. Becker, *Are We Hurting or Helping the Disabled?*, BUSINESS WEEK, August 2, 1999, at 21. *See also* Nancy R. Mudrick, *The Americans with Disabilities Act: Social Contract or Special Privilege?: Employment Discrimination Laws for Disability: Utilization and Outcome*, 549 ANNALS 53, 54 (1997).

26. In order to remove some of the vagueness of the ADA, Congress authorized the Equal Employment Opportunity Commission (EEOC) to issue regulations to aid the implementation of Title I provisions. 42 U.S.C. § 12116 (1994). There has been a considerable amount of debate, however, as to the amount of deference courts should give the EEOC regulations that explain provisions not contained within Title I. The Supreme Court discussed the deference to be given to the regulations in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The *Chevron* Court developed a two-part test to determine when to defer to agency regulations. *Id.* First, if the intent of Congress is clear on the face of the statute, then the court must give deference to the statute itself. *Id.* However, if the statute is silent or ambiguous on an issue, the court must determine if the agency's determination is based on a possible construction of the statute. *Id.* The judiciary is the final authority on issues of statutory construction. *Id.* The Supreme Court further discussed this concern in Sutton v. United Air Lines, Inc., 527 U.S. 471, 478-80, (1999). The Court noted that no administrative agency was given authorization to administer regulations for the generally applicable provisions of the code, specifically §§ 12101-12102, that fall outside of Titles I-IV. *Id.* Importantly, no administrative agency was given authority to define "disability," which is at issue in this comment. The EEOC, however, issued regulations for the definition of "disability" and further defined "physical or mental impairment," "substantially limits," and "major life activities." *Id.* The Supreme Court, however, did not have the opportunity to comment on the proper amount of deference to be given

order to obtain protection under the Act.[27] In the employment arena, persons critical of the ADA remarked that even though the ADA had a worthwhile purpose, it was likely to "result in a plethora of litigation and a wholesale revision of many companies' personnel policies and programs."[28] President Bush, however, countered that fears of increased litigation were "misplaced."[29] The President asserted that the existing case law and standards from the Rehabilitation Act,[30] would guide employers on how to properly meet their obligations under the ADA.[31] Criticism by media and news sources who charged vagueness proved to be telling, however, as the principally litigated "disabilities" under the ADA involve people alleging discrimination over afflictions that are hard to verify, such as, stress, drug addiction and alcoholism.[32] In this context, the split among the circuits has developed.

to the EEOC regulations because the parties in *Sutton* agreed to accept the regulations as valid. *Id.* Furthermore, the ADA EEOC regulations are basically identical to the Rehabilitation Act regulations, with the exception that the ADA EEOC regulations address the issue of mitigation as defined in *Sutton*. The Supreme Court in *Bragdon v. Abbott* asserted that administrative agency guidelines that implement a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (quoting Skidmore v. Swift & Co., 323 U.S. 134. 139-40 (1994)). With this statement, the Court approved the use of Rehabilitation Act regulations to interpret the term "disability." Therefore, because Congress intended Rehabilitation Act regulations to be applicable to the ADA, the EEOC regulations defining "disability" can be viewed as legitimate. *See infra* note 31.

27. Becker, *supra* note 25, at 21.

28. MARK A. DEBERNARDO, DRUG AND ALCOHOL ABUSE PREVENTION AND THE ADA: AN EMPLOYER'S GUIDE, 20 (1992). *See also Development in the Law: III. The Americans With Disabilities Act: Great Progress, Greater Potential*, 109 HARV. L. REV. 1602, 1615-8 (1996) (asserting that the ADA's major problem is the use of general standards instead of clearly-defined rules which has had the unfortunate effect of strained relations between employer and employees and increased litigation, although noting that in his opinion, this later concern has not yet materialized).

29. Statement on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1165 (July 26, 1990).

30. *See supra* note 26.

31. The Rehabilitation Act, signed seventeen years before, is the precursor to the ADA, therefore, Congress statutorily asserted that the case law, regulations, and standards developed under the Rehabilitation Act would apply to the ADA:

> Except as provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C. § 12201(a) (1994). *See also* Bragdon v. Abbott, 524 U.S. 624, 631-32 (1998) (asserting the statutory intent of using the Rehabilitation Act regulations in order to construe the definition of disability under the ADA).

32. Becker, *supra* note 25, at 21. Becker points out in this article that seven years previously he predicted that the "vagueness of the ADA and the litigious nature of the judicial system would encourage lawyers and workers to widen the concept of disability to absurd extremes." *Id.*

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B. Alcoholism

The National Council on Alcoholism and Drug Dependence and the American Society of Addiction Medicine jointly define alcoholism as:

> a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. Alcoholism is characterized by a continuous or periodic impaired control over drinking; preoccupation with alcohol; and use of alcohol despite adverse consequences and distortions in thinking, most notably denial.[33]

Furthermore, the *Diagnostic and Statistical Manual of Mental Disorders* defines alcoholism as a substance dependence involving a "cluster of cognitive, behavioral, and psychological symptoms indicating that the individual continues use of the substance despite significant substance-related problems."[34] In fact, the physical effects of alcohol exhibit themselves differently from person to person, including differences in resulting health and social problems.[35] A key element of alcoholism, however, is addiction.[36] Both legal and medical journals have not been able to agree on an "exact, universally-accepted definition" of the term addiction.[37] For example, alcoholism, like other addictive behaviors, is often characterized as a disease, and, therefore, is considered irreversible and uncontrollable without total avoidance.[38] What is known about addiction is that it develops progressively and is characterized by a loss of self-control and competence in decision-

33. Job Accommodation Network, *Ideas for Accommodating Persons With Alcoholism*, *at* http://janweb.icdi.wvu.edu/media/alcohol.html (last visited Jan. 31, 2001) [hereinafter Job Accommodation Network].

34. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 176 (4th ed. 1994). This definition was relied on by the dissent in Tomlin v. Anderson, 1997 U.S. App. LEXIS 1752, 16-17 (1997) (6th Cir. 1997). *Tomlin* dealt with a violation of an Ohio Law that prohibited possessing a firearm while disabled. *Id.*

35. Depending on the individual, the short-term effects of alcohol consumption may include "distorted vision, hearing and coordination, altered perceptions and emotions, impaired judgment, and bad breath and hangovers." Job Accommodation Network, *supra* note 33. The long-term effects of alcohol use may include "loss of appetite, vitamin deficiencies, stomach ailments, skin problems, sexual impotence, liver damage, heart and central nervous system damage, and memory loss." *Id.*

36. Rex Greene, M.D., *Towards a Policy of Mercy: Addiction in the 1990s*, 3 STAN. L. & POL'Y REV. 227, 229 (1991).

37. Marvin F. Hill, Jr. & Tammy Westhoff, *"No Song Unsung, No Wine Untasted" – Employee Addictions, Depedencies, and Post-Discharge Rehabilitation: Another Look at the Victim Defense in Labor Arbitration*, 47 DRAKE L. REV. 399, 405 (1999).

38. *Addiction a Whole New View*, PSYCHOLOGY TODAY, at 32 (1994). Alcoholics Anonymous has popularized the disease theory. *Id.* Proponents of this theory point to the assertion that children of alcoholics have a higher risk of alcohol abuse than children of non-alcoholics to bolster their argument that in alcoholism genetics plays an important role in determining whether a person will be affected, such as in cancer and other inherited diseases. *Id.*

making.[39] From a physical standpoint, "addiction generally requires substance dependence with tolerance and withdrawal effects."[40]

Left untreated, an individual's alcoholism has the potential for strong impact in their employment setting. In the middle and late stages of alcoholism, for example, the following might occur: poor productivity, erratic performance, erratic behavior, excessive or patterned absenteeism and/or tardiness, difficulty cooperating, carelessness, negligence, and disinterest.[41] In addition to this potential behavior, alcoholism has a strong impact on society demonstrated by the number of people it affects. Alcohol is widely used by the American population. More than seven percent of people ages eighteen years and older have problems with drinking (13.8 million people), which includes 8.1 million alcoholic individuals.[42] Demonstrating the relevance of the this figure to the employment setting, 6.6 percent of Americans who work in full-time jobs, 4.9 percent of part-time workers, and 10.4 percent of unemployed workers report heavy drinking.[43] These figures coupled with the known effects of alcoholism in an employment setting demonstrate the importance of protecting an individual whose major life activities are affected by alcoholism from employment discrimination. Furthermore, the potential impact of workers who suffer from alcoholism on the workplace illustrates the importance of developing a clear standard for evaluating the status of alcoholic employees under the ADA.

C. Alcoholism and the ADA generally

Alcoholism is categorized as a mental disability for the purposes of the ADA.[44] As a mental disability, alcoholism is categorized with other disabilities such as behavior disorders, schizophrenia, bipolar disorder, stress, and anxiety.[45] According to the EEOC, a mental impairment refers to "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities."[46]

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39. Greene, *supra* note 36, at 229. Greene also points out that repetitive use of an addictive substance stems from several factors including, genetics, personality, and the presence of a dysfunctional family. *Id.*

40. Hill & Westhoff, *supra* note 37, at 405.

41. Jonathan A. Segel, *Alcoholic Employees and the Law*, 38 H.R. MAGAZINE 87 (1993).

42. Job Accommodation Network, *supra* note 33.

43. *Id.* Heavy drinking is defined as "drinking five or more drinks per occasion on five or more days in the past thirty days." *Id.*

44. JOHN W. PARRY, MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 9 (1997).

45. *Id.* at 10.

46. 29 C.F.R. § 1630.2(h)(2) (2001). The EEOC defines physical impairment or mental impairment as "(1) [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,

The ADA expressly excludes certain conditions from the definition of disability even if they substantially limit a major life activity.[47] Current users of illegal drugs, for example, are excluded from ADA protection, even though drug abuse typically "substantially limits" an individual's life activities.[48] While not specifically excluded, alcoholism is treated differently than other disabilities.[49]

Congress has stated that alcoholics may qualify for disability status;[50] however, several limitations remove certain types of alcohol-related activity from protected status.[51] For example, an employer may prohibit the consumption of alcohol at the workplace[52] and require that employees not be under the influence of alcohol at the workplace.[53] The ADA also requires employees to act in conformance with the Drug Free Workplace Act of 1988.[54] Importantly, an alcoholic employee can be held to the "same qualification standards for employment or job performance and behavior" as other employees are held, "even if any unsatisfactory performance or behavior is related to the . . . alcoholism of such employee."[55] Also, relying on the statutory provisions regarding alcohol at the workplace, courts have drawn a

reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) [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)(1) (2001). Note that the Rehabilitation Act's EEOC regulations definition of "physical or mental impairment" is identical to the definition in the EEOC's ADA regualtions. *See* 29 C.F.R. § 1613.702(b) (2001).

47. 42 U.S.C. §12211 (1994) (excluding from the definition of disability: homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance abuse disorders resulting from current illegal use of drugs). Section 504 of the Rehabilitation Act provides the same exclusions. *See* 29 U.S.C. § 706(8)(D) (1994).

48. The prohibition against protection for illegal drug users does not apply to people who have successfully completed or are participating in a drug rehabilitation program and no longer use drugs, or are regarded as using drugs. 42 U.S.C. § 12114(b) (1994). To ensure an employee is no longer using drugs, an employer may administer drug testing. *Id.*

49. PARRY, *supra* note 44, at 42.

50. 29 U.S.C. § 706(8)(C)(v) (1994). *See also* Wendy K. Voss, *Employing the Alcoholic Under the Americans With Disabilities Act of 1990*, 33 WM. & MARY L. REV. 895, 898 (1992).

51. 29 U.S.C. § 706(8)(C)(v) (1994).

52. 42 U.S.C. § 12114 (c)(1) (1994).

53. *Id.* (c)(2).

54. *Id.* (c)(3). The Drug-Free Workplace Act, 41 U.S.C. § 701 et seq. (Supp. V 1999).

55. 42 U.S.C. § 12114(c)(4) (1994). *See* Maddox v. Univ. of Tennessee, 62 F.3d 843, 847 (6th Cir. 1995) (asserting that an alcoholic assistant football coach, who was fired after driving while intoxicated and claimed that his conduct resulted from his disability, could be held to the same performance and behavior standards as other employees even if the conduct was related to his alcoholism).

distinction between alcoholism and alcohol-related misconduct.[56] Following this distinction, alcohol-related misconduct is not protected under the ADA, and employers may take steps to terminate employment for this reason.[57] These provisions demonstrate how alcoholism is regarded differently from other mental health disabilities in the ADA.[58]

III. THE CIRCUIT SPLIT

A circuit split currently exists concerning the disposition of an alcoholic individual as a qualified individual with as disability. The number of working Americans who consider themselves alcoholics demonstrates the importance of this split.[59] Furthermore, for the purposes of Title I (as well as Titles II through IV) a plaintiff must meet the prima facie elements of an ADA case,[60] which includes qualifying as an "individual with a disability."[61] If a plaintiff fails to meet this burden the case is subject to dismissal. The ADA takes its definition of an "individual with a disability"[62] verbatim from the Rehabilitation Act's definition of "handicapped."[63] The relevant part of the

56. *See* James H. Coil, III & Lori J. Shapiro, *The ADA at Three Years: A Statute in Flux; Americans With Disabilities Act*, EMPLOYEE REL. L.J. 5, 13 (1996). Coil and Shapiro cite as examples: an employer may discharge an alcoholic employee who reports for work intoxicated, see Flynn v. Raytheon Co., 868 F. Supp. 383 (D. Mass. 1994); an employer may fire an employee for absenteeism resulting from incarceration for drinking while intoxicated, see Leary v. Dalton, 58 F.3d 748 (1st Cir. 1995); an alcoholic football coach, fired after arrested for drunk driving, was found not to be fired as a result of his alcoholism, but for the negative publicity surrounding his criminal conduct, see Maddox v. Univ. of Tennessee, 62 F.3d 843 (6th Cir. 1995).

57. Coil & Shapiro, *supra* note 56, at 13.

58. For more general information on alcoholism and the ADA, see generally James P. Sadler, *The Alcoholic and the Americans With Disabilities Act of 1990: The "Booze Made Me Do It" Argument Finds Little Recognition in Employment Discrimination Actions*, 28 TEX. TECH L. REV. 861 (1997). For information concerning psychiatric disabilities and the ADA, see generally Stephanie Proctor Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701 (1997).

59. *See supra* note 42.

60. 42 U.S.C. § 12101 (1994).

61. *Id.* § 12102(2) (1994).

62. The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having an impairment.

42 U.S.C. § 12102(2) (1994). The ADA uses the same language as the Rehabilitation Act. *See* 29 U.S.C. § 704(8)(A)-(B) (1994).

63. 20 U.S.C. § 706(8)(B) (1994). The ADA definition of a qualified individual with a disability is the same as the Rehabilitation Act's definition of handicapped, which demonstrates Congress' intent that the case law and regulations of the Rehabilitation Act were to be imported to the ADA. Congress explicitly stated: "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V

definition of disability is the interpretation of: "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[64] The key to this definition is an understanding of what constitutes a "substantial limitation"[65] and what qualifies as a "major life activity."[66] This comment will first look at the status of an alcoholic plaintiff from the per se point of view (Fourth and Seventh Circuits)[67] and, secondly, by the circuits that advocate an individualized inquiry (Fifth and Tenth Circuits).[68]

A. *Alcoholism as a per se disability*

Since the passage of the ADA the Fourth and Seventh Circuits have consistently held that alcoholism is a per se disability,[69] often making this determination based on the belief that alcoholism is a disease.[70] As a result, in circuits which accept this per se assertion, complainants who can demonstrate that they are alcoholics do not need to undergo the individualized inquiry into how alcoholism "substantially limits" a major life activity. By relying on alcoholism as a per se disability, the court is not required to perform the individualized inquiry analysis. As a result, an individual who can demonstrate she is an alcoholic is able to claim she is disabled for the purposes of the ADA, but is also subject to the statutory provisions applying specifically to and limiting the coverage of alcoholics.[71]

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of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a) (1994). *See* Bragdon v. Abbott, 524 U.S. 624, 632 (1998) (advocating that "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations").

64. 42 U.S.C. § 12102(2)(A) (1994).

65. "Substantially limits" means "[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 the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j) (2001). Factors to be considered in determining if an individual is substantially limited in a major life activity include: "the nature and severity of the impairment . . . the duration or expected duration of the impairment," and "the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.*

66. "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(i) (2001).

67. Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054 (7th Cir. 1998); Little v. Fed. Bureau of Investigation, 1 F.3d 255 (4th Cir. 1993).

68. Nelson v. Williams Field Services, 216 F.3d 1088 (10th Cir. 2000); Burch v. Coca-Cola, Co., 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998).

69. In addition, the First, Second, Fourth, Sixth, Seventh, Ninth, Eleventh, and the Federal Circuits assert that alcoholism is a per se disability. S*ee supra* note 6.

70. For discussion of alcoholism as a disease, *see supra* note 38.

71. 42 U.S.C. § 12114 (1994).

In *Little v. Federal Bureau of Investigations*,[72] the United States Court of Appeals for the Fourth Circuit expressly held that alcoholism is a per se disability.[73] Plaintiff Charles Little, Jr., a known alcoholic, worked for the FBI for more than seven years before he was fired.[74] Although Little's supervisors were aware of his alcohol problems, they nevertheless consistently rated his performance as at least "fully satisfactory."[75] In December of 1989, Little, while off-duty, was charged with driving while intoxicated.[76] This incident prompted Little to ask for assistance from his supervisor so he could get professional treatment for his alcoholism.[77] Little completed an outpatient alcohol program in March 1990, and was subsequently reinstated to full duty on May 4, 1990.[78] On May 16, 1990, Little became intoxicated while on duty and had to be escorted home by his co-workers.[79] Following this incident Little completed an inpatient treatment program.[80] As a result of this incident, the FBI asked Little to resign, which he refused.[81] Shortly thereafter Little was terminated because of his "inability to conform to the FBI's established standards that special agents must remain mentally and physically fit for duty at all times."[82] Little then filed a lawsuit under sections 501 and 504 of the Rehabilitation Act.[83]

The district court dismissed Little's claims,[84] and upon appeal Little asserted he was fired because of his alcoholism.[85] The FBI asserted that Little

72. 1 F.3d 255 (4th Cir. 1993).

73. *Id.* at 257.

74. *Id.* at 256.

75. *Id.*

76. *Id.*

77. *Little*, 1 F.3d at 256.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Little*, 1 F.3d at 257 (quoting the FBI's Notification of Personnel Action dated January 17, 1991). *Id.*

83. *Id*. Section 501 imposes an affirmative duty on handicapped agencies to accommodate handicapped individuals. 29 U.S.C. § 791(b) (Supp. V. 1999). Section 504 states that "no otherwise handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by an executive agency." 29 U.S.C. § 794 (1974). Recall that Congress intended Rehabilitation Act case law to apply to ADA cases. For a discussion on the deference to the Rehabilitation Act case law, see *supra* note 31. Therefore, reliance on a Rehabilitation Act case is proper when discussing the provisions of the ADA.

84. *Little*, 1 F.3d at 257. The district court dismissed Little's claim because it found that he was not within the protection of the Rehabilitation Act because he was not "otherwise qualified." *Id.*

85. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

was not fired because of his alcoholism, but because of his misconduct.[86] In discussing whether Little met the prima facie elements of his case, the court stated; "It is settled that alcoholism is a handicapping condition within the meaning of the Act."[87] The Fourth Circuit decided that Little was an individual with a disability without performing an individualized inquiry to see if alcoholism placed a substantial limitation on his major life activities.[88] The court relied on a statement by the Attorney General, who concluded that alcoholics are handicapped individuals for purposes of the Rehabilitation Act.[89] The court noted that the Secretary of Health, Education and Welfare and the Civil Service Commission relied on the Attorney General's opinion in writing the Section 504 regulations.[90] Although the court recognized that such agency statements are non-binding authority, the court gave the regulations "considerable deference,"[91] interpreting them to label alcoholism as a per se handicapping condition.[92]

In *Duda v. Board of Education of Franklin Park Public School District No. 84,*[93] a case tried under the ADA, the United States Court of Appeals for the Seventh Circuit also asserted that alcoholism is a per se disability.[94] John Duda, a recovering alcoholic and diagnosed manic depressive with bipolar disorder, worked as a night custodian at a junior high school for eight years.[95] The defendant employer knew of his conditions.[96] During his work breaks, to help relieve anxiety or depression, Duda would write his private thoughts in a personal diary.[97] One of Duda's co-workers stole the diary and distributed

86. *Id.* This case primarily stands for the principle that an alcoholic employee can be held to the same standards of misconduct as a non-alcoholic employee. Therefore, the FBI was not required to reasonably accommodate Little by letting him drink on the job. *Id.* For more information, see generally Eric Harbrook Cottrell, *There's Too Much Confusion Here, and I Can't Get No Relief: Alcoholic Employees and the Federal Rehabilitation Act in Little v. FBI*, 72 N.C. L. REV. 1753 (1994).

87. *Little*, 1 F.3d at 257.

88. *Id.*

89. *Id.* at 258.

90. *Id.* The Secretary of Health, Education and Welfare is now the Secretary of Health and Human Services. *Id.*

91. *Little*, 1 F.3d at 258.

92. *Id.* Ultimately the Fourth Circuit concluded that Little failed to state a claim under the Rehabilitation Act because he could not show that he was terminated "solely by reason of his handicap." *Id.*

93. Duda v. Bd. of Educ. of Franklin Park Sch. Dist. No. 84, 133 F.3d 1054 (7th Cir. 1998).

94. *Id.* at 1059.

95. *Id.* at 1055.

96. *Id.*

97. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

copies of incriminating pages to co-workers and the school administration.[98] After reading the diary, the school administration told Duda he could not return to work until he received a "clean bill of health" from his doctor.[99] Duda then obtained a note from his psychiatrist who informed the administration that Duda was stable enough to work.[100] The defendant then required that Duda comply with other conditions before he could return to work, including continued attendance at Alcoholic's Anonymous meetings, counseling to continue taking his medication, notifying the school when his medication was changed, and agreeing to a transfer to a different school.[101] Also, when Duda inquired about a better position, he was told not to apply because of the diary incident.[102] Duda brought an ADA claim[103] alleging he was segregated from others at school and discouraged from applying for the new job.[104]

The district court granted the defendant's motion to dismiss Duda's complaint. The Seventh Circuit, however, reversed and remanded on Duda's ADA claim asserting that Duda qualified as an individual with a disability.[105] The court found that medically diagnosed mental conditions, like alcoholism and manic depression, which Duda was diagnosed as having, are recognized disabilities under the ADA.[106] The court stated: "Our cases have distinguished between claims of personal conflicts with others, or mere temperament and irritability, which do not amount to 'disabilities' under the ADA, and medically diagnosed medical conditions, like the ones from which Mr. Duda suffers, which are recognized disabilities under the ADA."[107] Relying on other Seventh Circuit cases,[108] the court, in a footnote[109] stated that alcoholism and

98. *Duda*, 133 F.3d at 1055. Allegedly, Duda's diary contained a death threat against Duda's supervisor, but this information was presented at a status hearing and not in the complaint. *Id.* at 1056 n.1.

99. *Id.* at 1056.

100. *Id.*

101. *Id.* Duda moved to an elementary school where no other custodians were employed and was asked not to have conversations with others at the school. *Id.*

102. *Id.* at 1056.

103. Duda also brought a claim under 42 U.S.C. § 1983, alleging unreasonable search and seizure of his diary and invasion of privacy by the reading of his diary. *Duda*, 133 F.3d at 1056.

104. *Id.* at 1056.

105. *Id.* at 1059.

106. *Id.*

107. *Id.*

108. The court relied on Despears v. Milwaukee County, 63 F.3d 635, 635 (7th Cir. 1995) (recognizing parties' agreement that alcoholism is a disability under the ADA); Bryant v. Madigan, 84 F.3d 246 (7th Cir. 1996) (accepting alcoholism and other addictions as disabilities); and Huels v. Exxon Coal USA, Inc., 121 F.3d 1047 (7th Cir. 1997) (accepting without discussion the status of alcoholism is a disability). The court did reference Burch v. Coca-Cola, Co., 119 F.3d 305 (5th Cir. 1997), but did not give it deference to the decision by asserting that alcoholism is not a per se disability. *Duda*, 133 F.3d at 1059 n.10.

109. *Id.*

other forms of addiction are disabilities per se within the meaning of the ADA.[110] Finding that alcoholism is a per se disability, the court did not undergo an individualized inquiry into whether alcohol substantially limits Duda's major life activities.[111]

The EEOC, in its regulations and guidelines, does not provide a "laundry list" of disabilities.[112] Instead it lists various factors that must be weighed in determining if a particular impairment is substantially limiting.[113] This seems to suggest that every plaintiff's condition must be individually analyzed. However, the Interpretative Guidance qualifies the requirement for a case-by-case analysis by asserting a list of impairments that are per se disabling.[114] Therefore, an impairment that is inherently substantially limiting satisfies the ADA disability requirement, as a per se disability.[115] Moreover, the EEOC Enforcement Guidance notes: "in very rare instances, impairments are so severe that there is no doubt that they substantially limit major life activities. In those cases it is undisputed that the complainant is an individual with a disability."[116] The EEOC Interpretative Guidance notes that as a result, many courts have accepted without discussion alcoholism as a disability.[117]

The *Little* and *Duda* cases demonstrate that in both the Fourth and the Seventh circuits, an alcoholic plaintiff does not need to demonstrate how alcoholism substantially limits a major life activity. Instead, a plaintiff in front of one of these courts must only claim that they suffer from alcoholism. This is based on the belief that alcoholism, as an addictive disease, is inherently

110. *Id.* at 1059.

111. *Id.* at 1062. The court ultimately found that the plaintiff's amended complaint set forth a claim for relief under the ADA and the case was remanded. *Id.*

112. EEOC Interpretative Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app., § 1630.2(j) [hereinafter EEOC Interpretative Guidance]. The EEOC Regulations and accompanying Interpretative Guidance define the statutory terms of the ADA. *See supra* n. 26. The ADA gives little guidance to what constitutes a disability. Congress did not list specific disabilities which it intended to include because new disorders will develop in the future. H.R. Rep. No. 101-485, at 51 (1990). The development of such a list in the statute did have some support. *See* Lanctot, *supra* note 16, at 333.

113. EEOC Interpretative Guidance, *supra* note 112, at § 1630.2(j). "Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact of, or resulting from, the impairment." *Id.*

114. The Interpretative Guidance lists HIV, paralysis, and insulin dependent diabetes as a substantially limiting condition. EEOC Interpretative Guidance, *supra* note 112, at § 1630.2.

115. *Id.*

116. EEOC Interim Enforcement Guidance: Definition of the Term Disability, § 902.4 (c).

117. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

limiting.[118] Proponents of the per se rule assert that this is seen through the EEOC view of disability in general.[119]

Advocates of the existence of per se disabilities assert that a case-by-case analysis of plaintiff's medical condition has resulted in narrowing the ADA's protected class.[120] As a result, ADA plaintiffs are "considered in a vacuum . . . without reliance on other reported cases addressing the same disease."[121] Proponents of the per se approach assert that similar cases should be relied upon in determining if a condition amounts to a disability. The individualized inquiry is the wrong approach because it "virtually forecloses the development of judicial consensus as to whether certain diseases are 'inherently substantially limiting.'"[122] The result has been confusion among employers and lower courts as to whether a certain disease, particularly alcoholism, always amounts to a disability.[123]

B. The necessity of an individualized inquiry

The Fifth and Tenth Circuits reject the notion that alcoholism is a disability per se and instead advocate an individualized inquiry to determine the plaintiff's disability status.[124] The proponents of this method assert that an individualized inquiry into whether alcoholism substantially limits a major life activity is necessary in order to properly assess whether a person is actually disabled under the terms of the ADA. Importantly, an inquiry does not presuppose that alcoholism can never be a disability.[125] Rather alcoholism may be a disability if it meets the statutory test, which ensures that properly disabled individuals receive coverage under the ADA.[126]

Proponents of the notion that alcoholism is not a per se disability point to the statutory provisions concerning "disability" for support. The first question

118. For discussion of alcoholism as a disease, see *supra* note 38.

119. For an explanation of how this statutory structure works to assert certain conditions as per se disabling, see Michael D. Carlis & Scott A. McCabe, *Are There No Per Se Disabilities Under the Americans With Disabilities Act? The Fate of Asymptomatic HIV Disease*, 57 MD. L. REV. 558, 564-7 (1998) (asserting that under the administrative regulations asymptomatic HIV is a per se disability).

120. Lanctot, *supra* note 16, at 332.

121. *Id.*

122. *Id.* at 333.

123. *Id.*

124. In addition to the Fifth and Tenth Circuits, the D.C. Circuit also asserts the need for an individualized inquiry. *See supra* note 6.

125. Burch v. Coca-Cola, Co., 119 F.3d 305, 318 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998).

126. *Id. See also* Nielsen v. Moroni Feed Co., 162 F.3d 604, 609 (10th Cir. 1998) (stating that the "mere status" of being an alcoholic may receive protection under the ADA); McKey v. Occidental Chemical Corp., 956 F. Supp 1313, 1317 (S.D. Tex. 1997) (noting that if alcoholism is left untreated it can rise to the level of an impairment or a disability).

addressed in the ADA is who should be protected, and in response the statute sets out a three-prong test[127] to determine if a person is disabled.[128] Under the first prong of the test, "a physical or mental impairment"[129] must substantially limit[130] a major life activity.[131] Generally major life activities are basic functions,[132] that the average person can perform. The EEOC Technical Assistance Manual lists major life activities that the "average person can perform with little or no difficulty."[133] The list includes walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, and working.[134] The EEOC notes that the list is not exclusive and activities such as sitting, standing, lifting or reading are also major life activities.[135] In order to qualify for coverage under the ADA, the plaintiff must be substantially limited in at least one of these activities, or substantially limited in the ability to perform an activity compared to an average person in the general population.[136] Factors to be considered include the impairment's nature and severity, how long it will last, and its permanent or long-term impact.[137] The EEOC notes that "these factors *must be considered* because, generally, it is not the name of an impairment or a condition that determines whether a person is protected by the ADA, but rather the effect of an impairment or condition on the life of a particular person" (emphasis added).[138]

Burch v. Coca-Cola,[139] a case decided by the U.S. Court of Appeals for the Fifth Circuit, is an opinion heavily relied upon by circuits that advocate a case-by-case analysis of alcoholic plaintiffs.[140] Plaintiff Robert Burch was a

127. 42 U.S.C. § 12102(2) (1994). *See also* 29 C.F.R. § 1630.2(g) (2001).

128. Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 110 (1996).

129. 29 C.F.R. § 1630.2(h) (2001).

130. *Id.* at § 1630.2(j).

131. 42 U.S.C. § 12102(2) (1994). *See also* 29 C.F.R. § 1630.2(i) (2001).

132. Locke, *supra* note 128, at 111.

133. Equal Employment Opportunity Commission, A TECHNICAL ASSISTANCE MANUAL OF THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, II-3 (1992).

134. *Id.*

135. *Id.*

136. *Id.* at II-4.

137. *Id.*

138. *See supra* note 133, at II-4.

139. Burch v. Coca-Cola, Co., 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998).

140. Burch has been cited by several other circuits in their determination of whether alcoholism is a per se disability. In the Fifth Circuit, Burch is heavily relied upon as the seminal case necessitating the individualized inquiry, and it has influenced several interesting opinions which follow its guidelines. *See* Werner v. Philadelphia Gas Works, 1997 U.S. Dist. Lexis 14966 (E.D. Pa. 1997). The court asserted that the plaintiff, who was fired for submitting liquor store receipts with her overtime meal reimbursement forms, failed to demonstrate that her alcoholism

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

management-level employee with Coca-Cola as an area service manager for the southwest region Fountain Division.[141] Burch performed well in this position receiving several awards; however, his evaluations stated that "working relationships" were a "developmental area" for him.[142] In May 1992, Burch began confidential counseling with a clinical social worker in Coca-Cola's Employee Assistance Program.[143] In February of 1993, the social worker referred Burch to a psychiatrist.[144] Burch testified that he drank heavily during his off hours, typically eight or ten beers an evening, and while he did not drink during work hours he did experience hangover-like symptoms.[145] Burch also testified that he believed his work at Coca-Cola aggravated his alcohol problems.[146]

Cola-Cola asserted that Burch's termination was a result of his behavior at an area service manager's meeting in Atlanta in September 1993.[147] At a company dinner, the speaker made comments about Burch, to which he took offense, but at which other members of the group laughed.[148] Burch became visibly upset and mouthed obscenities toward a laughing co-worker and demanded that they meet outside the room.[149] Burch, however, remained seated for the remainder of dinner.[150] When Burch learned that Coca-Cola's human resources department opened an investigation into his conduct, he

qualified as a disability. The court granted defendant's motion for summary judgment even though the plaintiff later submitted an affidavit that stated alcoholism "seriously affected" her ability to work and the contradictions and change in her testimony was a result of her alcoholism. *Id.* *See also* Equal Employment Opportunity Commission v. Exxon Corp., 973 F. Supp. 612 (N.D. Texas 1997). The court asserted that a rehabilitated substance abuser is not a qualified individual with a disability automatically, but he had to prove that he suffered a disability under the ADA. The court relied on *Burch* to assert that an individual who falls under a subcategory of 42 U.S.C. § 12114(b) (1994) is not per se disabled but had to undergo the individualized inquiry. *Id.*

141. *Burch*, 119 F.3d at 309.

142. *Id.*

143. *Id.* at 310.

144. *Id.*

145. *Id.*

146. *Burch*, 119 F.3d at 310. Burch testified that alcohol was served at Coca-Cola functions and he drank with supervisors on business trips. According to Burch, the Coca-Cola "culture" "amounted to a fraternity of drinkers and contributed to his alcoholism." *Id.*

147. *Id.* at 311.

148. *Burch*, 119 F.3d at 311. The events are as follows: Max Trowbridge was the outgoing service manager for New York and was being transferred to Integrated Operating Systems [IOS] division. *Id.* Burch did not see this as a promotion, but rather the result of Trowbridge's bad records as a service manager. *Id.* Trowbridge mentioned in his speech that Burch would make a good candidate for IOS, and that his supervisor would "enjoy" his move. *Id.* Burch considered Trowbridge's comments to be an attack on his competence. *Id.*

149. *Burch*, 119 F.3d at 311.

150. *Id.*

admitted himself to Charter Hospital for alcohol treatment.[151] Burch was unable to return to work after treatment because he was on suspension upon completion of the human resource investigation.[152] The investigation resulted in the recommendation that Burch be fired.[153] Burch brought suit claiming that he was fired in violation of the ADA and alleging failure to accommodate and intentional discrimination.[154] The magistrate judge dismissed the intentional discrimination claim but did not dismiss the reasonable accommodation claim.[155] The case was tried before a jury which returned a verdict for Burch and awarded $109,000 in back pay, $700,000 in front pay, $300,000 in compensatory damages, and $6,000,000 in punitive damages.[156] Although these damages were reduced, Coca-Cola appealed.[157]

The Fifth Circuit overturned the trial court's ruling, asserting that Burch failed to prove that he was disabled under the ADA.[158] The court stated that, "the ADA requires employers to reasonably accommodate limitations, not disabilities."[159] The existence of an impairment is material to an ADA claim only if it substantially limits a major life activity.[160] Accordingly, an impairment that does not substantially limit a major life activity does not warrant ADA protection. The court noted that the same impairment could limit one person and not limit another.[161]

The court determined that Coca-Cola correctly contended that Burch failed to demonstrate he was a qualified individual with a disability under the ADA.[162] The court primarily made this finding based on Burch's expert testimony. The expert testified about alcoholics as a class, which the court found was insufficient evidence to label Burch a qualified individual with a

151. *Id.* at 312. Burch said he had several drinks at dinner, but did not consider himself intoxicated. *Id*. at 311.

152. *Id.*

153. *Burch*, 119 F.3d at 311.

154. *Id.* Burch also asserted state law claims of defamation and intentional infliction of emotional distress. *Id.*

155. *Id.* at 313. Burch's case was tried on a reasonable accommodation claim. *Id.* at 314. On appeal the court held that this was inappropriate because Burch did not establish that alcoholism substantially limited a major life activity and he failed to demonstrate that he requested a modification or accommodation to his job. *Burch*, 119 F.3d at 314.

156. *Id.* at 313.

157. *Id.*

158. *Id.* at 315.

159. *Id.* (quoting language from Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996)).

160. *Burch*, 119 F.3d at 315. For Burch's reasonable accommodation claim, Burch needed to show that alcoholism limited his ability to perform his job at the time of the requested accommodation. *Id.* Without this showing, there would be nothing for an employer to accommodate. *Id.*

161. *Id.* at 315.

162. *Id.*

disability.[163] The court pointed out that the EEOC did not create a "laundry list" of impairments, and further, did not specifically classify alcoholism as a per se disability.[164] In light of this the court noted that it "declined to adopt such a questionable position."[165] Burch countered by asserting that his ability to walk, talk, think and sleep and his memory were affected by his alcoholism.[166] However, the court asserted: "that Burch's inebriation was temporarily incapacitating is not determinative," and that Burch produced no evidence that his impairments were "qualitatively different than those achieved by an overindulging social drinker."[167] Burch's drinking affected his life, but the effect was temporary, and "permanency, not frequency, is the touchstone of a substantially limiting impairment of any significant duration."[168] The court, however, did not assert that an alcoholic can never demonstrate a substantially limiting impairment based on his or her alcoholism.[169] In this instance, however, Burch's offered impairments were the result of temporary inebriation, which is insufficient to demonstrate a substantially limiting impairment.[170] With no proof that Burch's inebriation permanently altered his gait, ability to speak, memory when sober, or resulted in long-term insomnia, Burch could not prove a substantially limiting impairment.[171]

In *Nelson v. Williams Field Services*,[172] the U.S. Court of Appeals for the Tenth Circuit relied on *Burch v. Coca-Cola* to assert that a plaintiff failed to state a claim of discrimination under the ADA.[173] Nelson was an employee with Williams Field Services Company ("Williams"), a Utah based natural gas processor.[174] He was employed as a field operator or gathering technician, requiring him to drive a truck about four hours a day and work with potentially explosive materials.[175] Williams' drug and alcohol policy encouraged employees to seek help with their addictions.[176] In September 1994, Nelson informed his supervisor of a recent near-suicide attempt and asked for help

163. *Burch*, 119 F.3d at 315.
164. *Id.*
165. *Id*.
166. *Id.*
167. *Id.*
168. *Burch*, 119 F.3d at 315.
169. *Id.* at 316 n.9.
170. *Id.*
171. *Id.* Working against Burch was that he bicycled 100 to 200 miles a week while undergoing alcohol treatment. *Id.* He also conceded that when he began alcohol treatment his work was unaffected by his alcoholism. *Id.*
172. Nelson v. Williams Health Services Co., 216 F.3d 1088 (10th Cir. 2000).
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

with personal problems and excessive alcohol consumption on weekends.[177] With his employer's help Nelson completed an alcohol treatment program.[178] Upon his release Nelson signed a "Return-to-Work Agreement" that required him as long as he worked at Williams not to consume alcohol or unauthorized drugs and to participate in unannounced periodic alcohol testing for five years.[179]

In January 1997, Nelson violated the Return-to-Work Agreement when he was arrested for driving while intoxicated in his personal vehicle.[180] Nelson pled guilty to drunk driving and told his supervisor.[181] Williams subsequently fired Nelson for violating the agreement.[182] Nelson sued Williams for violation of the ADA, among other claims.[183] Nelson appealed from a summary judgment against all of his claims.

The Tenth Circuit affirmed the district court's decision on the ground that Nelson did not demonstrate that he was a qualified individual with a disability.[184] Nelson's counsel conceded that alcoholism is not a per se disability under the ADA and that a case-by-case determination was necessary.[185] Based on the evidence, the district court concluded that Nelson did not demonstrate how alcoholism substantially limited his major life activities or how it affected his ability to perform his job.[186] Pointing to Nelson's level of competence, he received a satisfactory performance rating before he informed Williams of his alcohol related arrest.[187] Nelson was not fired for his alcoholism, but for violation of his Return-to-Work Agreement.[188]

In both the Fifth and Seventh Circuits, a plaintiff must demonstrate how his or her alcoholism substantially limits a major life activity. In both the *Burch* and *Nelson* cases the court used a case-by-case analysis to determine if

177. *Nelson*, 216 F.3d at 1088.

178. *Id.*

179. *Id.* Return-to-work agreements were held to not be a violation of the ADA. *Id.* Periodic alcohol testing is not a violation of the ADA. *See also* 42 U.S.C. § 12114 (1994).

180. *Nelson*, 216 F.3d at 1088.

181. *Id.*

182. *Id.* Management for Williams stated that the company was not willing to take the chance Nelson would drive the company truck after drinking and then kill someone. The company stated they were not willing to assume liability if Nelson should kill someone. *Id.*

183. *Id*. Nelson also brought claims for breach of covenant of good faith and fair dealing, wrongful termination of an implied contract and intentional infliction of emotional distress. *Nelson*, 216 F.3d at 1088.

184. *Id.*

185. *Id.* The court made reference to *Burch* on this point. *Nelson*, 216 F.3d at 1088.

186. *Id.*

187. *Id.*

188. *Id.* *Nelson* not only clarified the rule governing alcoholism and the ADA in the Tenth Circuit; it also gives support to employers who use return-to-work agreements. As long as the employee enters into the return-to-work agreement voluntarily, the court will uphold it. *Court Says Alcoholism Can be a Disability Under the ADA,* 6 UTAH EMP. L. LETTER (Aug. 2000).

the plaintiff was entitled to protection under the ADA. The EEOC reasons that an individualized approach is necessary because similar impairments sometimes vary in severity and restrict people to differing degrees.[189] Alcoholism is an appropriate example of this because different people react dissimilarly to the disease.[190] While some people continue to function normally with alcoholism, others experience substantial limitations in their daily activities.[191] Furthermore, the EEOC did not promulgate a "laundry list" of disabilities, but the cases under the Rehabilitation Act indicate that courts were willing to accept many disabilities as per se.[192] Employers began to challenge the notion of per se disabilities, however, relying on the EEOC Interpretative Guidance and forcing plaintiffs to demonstrate how the disability substantially limits a major life activity.[193] Specifically, employers assert that the EEOC mandates inquiry on a case-by-case basis.[194] The EEOC states that "[t]he determination of whether an individual has a 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." However, the Rehabilitation Act regulations do not expand on the manner which a disability should be determined.[195] Therefore, the Rehabilitation Act case law that advocates per se disabilities are out of sync with the current EEOC position and the ADA. As a result, courts moved away from recognizing disabilities per se and have used the case-by-case model now advocated by the EEOC.[196]

Note that a tension exists between the requirements for disability status and the per se approach to alcoholism as a disability.[197] The social stigma that follows alcohol abuse often is cited for the need for a per se rule.[198] However, a per se rule means that alcoholic plaintiffs never need to assert how alcohol has affected their life, and therefore, they will always qualify for protection

189. EEOC Interpretative Guidance, *supra* note 112, at § 1630.2(j)(2001). The EEOC gives an example of how an impairment can affect people differently: a person with a mild form of Type II non-insulin dependent diabetes does not have limits on her major life activities and is not disabled even though diabetes is usually considered a disability. *Id.*

190. Job Accommodation Network, *supra* note 33.

191. *Id.*

192. Locke, *supra* note 128, at 113. EEOC Interpretative Guidance, *supra* note 112, at § 1630.2(j) (2001).

193. Locke, *supra* note 128, at 113.

194. *Id.*

195. 29 C.F.R. § 1613.702 (2001).

196. Locke, *supra* note 128, at 113-14. Locke notes that the judiciary has changed in response to suits brought alleging minor impairments and has become "increasingly intolerant of what they perceive to be attempts by minimally impaired individuals to manipulate the law." *Id.* at 114.

197. Voss, *supra* note 50, at 911.

198. The element of social stigma is especially relevant to the "regarded as" prong of disability. 42 U.S.C. § 12102(2)(c) (1994).

under the ADA.[199] The per se rule is contrary to Congress' goal of enhancing employment protection for people with actual disabilities.[200] A per se rule gives people relief based on a name, not a condition that affects a major life activity. Individual inquiry advocates assert that a case-by-case analysis will properly evaluate the unique situation of each alcoholic asking for protection and will result in the correct reflection of Congressional intent.[201]

IV. ANALYSIS

The current circuit split should be resolved by giving deference to circuits that advocate the use of an individualized inquiry when determining if a person's alcoholism qualifies as a disability.[202] A per se definition of alcoholism is not only counterintuitive, but rests on broad generalizations about the addiction which may or may not have a basis in truth. The need for an individualized inquiry is firmly grounded in Congressional intent.[203] Furthermore, Supreme Court cases dealing with the definition of "disability" under the ADA give credence to the notion that alcoholism is not a per se disability and advocate a case by case evaluation of each plaintiff.[204] Most importantly, an individualized inquiry approach will best act to preserve the interests of the truly disabled in the employment arena, which was the intent of Title I.[205]

A. Congressional Intent

Determining Congressional intent does not necessitate looking any further than the statute itself.[206] Congress specifically stated that the ADA was designed with the intention to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[207] The statute itself follows this purpose by defining disability as a "substantial limit" on a "major life activity," and, additionally, the EEOC regulations list the factors to be considered in determining if someone is substantially limited.[208] Furthermore, the EEOC regulations do not provide a

199. Voss, *supra* note 150, at 912.

200. *Id.*

201. *Id.* at 947 n.77.

202. For a list of the circuits which follow the individualized inquiry approach, see *supra* note 6.

203. *See generally* 42 U.S.C. § 12101(b) (1994).

204. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998).

205. 42 U.S.C. § 12101 (1994).

206. *Id.*

207. *Id.* at (b)(1).

208. 29 C.F.R. § 1630.2(i) & (j) (2001).

"laundry list" of disabilities, demonstrating that Congress advocated an "individualized approach" when structuring the ADA.[209]

The general framework provided by Congress as to what constitutes a disability has been criticized as vague.[210] The suggestion has been made that Congress deliberately intended the ADA to be vague in order to allow courts to interpret the statute broadly, which would ensure an expansive reading of the statute.[211] In order to prevent this, the courts need to consistently follow the statutory scheme to prevent the adoption of "sweeping rules" concerning specific disabilities.[212] Congress intended the ADA to have a broad scope of coverage, however, Congress also intended to limit the ADA to individuals who genuinely need protection.[213] There can be no doubt that Congress intended an individualized inquiry to determine if an alcoholic is disabled as defined by Title I of the ADA.

Congress considered the status of alcoholism as a disability during the debates leading up to the ratification of the ADA.[214] In fact, there was a movement in the House of Representatives to specifically exclude alcoholism and addiction to illegal drugs from protection under the ADA.[215] The Chandler Amendment,[216] which was ultimately defeated, demonstrates that some members of the House had reservations about alcoholism as a disability.[217]

Congress specifically discussed alcoholism in the context of the definition of disability.[218] Concerned about the status of alcoholism as a disability, Representative Don Edwards, of the House Subcommittee of Civil and Constitutional Rights, thoroughly questioned Chai R. Feldblum, a

209. *See supra* note 112.

210. *See supra* note 26.

211. Laing P. Akers, *The Wrong Standard, The Right Decision: Opening Pandora's Box in Bragdon v. Abbott*, 28 CAP. U. L. REV. 421, 452 (2000) (asserting that the *Bragdon* Court's decision to include reproduction as a major life activity broadens the statute and "represents a step backward from the intent of Congress").

212. *Id.*

213. *Id.*

214. *Id.*

215. *Hoyer Cites Chandler's Recovery from Alcoholism in ADA Debate*, 18 THE ALCOHOLISM REP., at 4 (June 1990).

216. *Id.* The Chandler Amendment, proposed by Representative Rod Chandler (interestingly, Chandler was a recovering alcoholic), would allow an employer to take into consideration an individual's history of drug and alcohol addiction or alcoholism, the time period the individual has been free of the substance and the individual has successfully completed treatment before being assigned to a safety sensitive position. *Id.* The amendment was rejected, and it was noted in the debate that the ADA provided that if a person's use of alcohol was s direct threat then the person does not need to be hired. *Id.*

217. *Id.* The bill was rejected by a vote of 280 to 143. *Id.*

218. *Hearings*, *supra* note 24, at 73 (statement of Chai R. Feldblum, Legislative Counsel, Am. Civil Liberties Union).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

representative of the American Civil Liberties Union.[219] Ms. Feldblum stated that a person with alcoholism is to be treated the same as any other person with a disability in that they also must make out the prima facie case.[220] A person alleging their alcoholism amounts to a disability under the ADA must assert that he or she is "qualified," and, therefore, must undergo an individualized inquiry.[221]

The *Duda* court, in which the Seventh Circuit followed a per se approach, initially stated that to determine if the plaintiff was qualified to bring a claim under the ADA it was necessary for the court to turn to the statutory definitions.[222] The Seventh Circuit cited the ADA definition of disability, major life activity, and the factors for determining if an impairment qualifies as substantially limiting in its majority opinion.[223] In reaching the conclusion that medically diagnosed mental conditions are disabilities, the Seventh Circuit did not follow its own claim that "Mr. Duda must satisfy the threshold requirement of demonstrating that he is a 'qualified individual with a disability' under the ADA."[224] The court did not show how Duda's alcoholism substantially limited a major life activity because it accepted him as disabled by the mere diagnosis of his condition.[225] The court set the stage for an individualized inquiry; however, it ignored its own words by advocating a per se approach.

Ultimately, Congress recognized that forty-three million Americans have one or more physical or mental disabilities.[226] The source of Congress' finding is not clear, with several sources attributed to the forty-three million person figure.[227] The Supreme Court in *Sutton v. United Air Lines* asserted, "the finding that 43 million Americans are disabled gives content to the ADA's terms, specifically the term 'disability.'"[228] The Court found that Congress did not intend to include individuals who use corrective devices to mitigate their disabilities; if they did they would have recognized a "much higher number" of

219. *Id.* During Ms. Fledblum's talk, Rep. Dannemeyer interrupted, stating, "I don't think that there is anybody in this room that objects to a law stating that for the construction of new buildings we have to make those buildings accommodating to persons in wheelchairs. There is no quarrel about that. We don't have to spend our time on that." The debate then returned to the discussion of alcoholism and the ADA. *Id.* at 75.

220. *Id.* at 73.

221. 42 U.S.C. § 12111(8) (1994).

222. *Duda*, 133 F.3d at 1058.

223. *Id.*

224. *Id.* at 1059.

225. *Id.*

226. 42 U.S.C. § 12101 (1994).

227. *Sutton*, 527 U.S. at 484. The Court notes that while the exact source of the 43 million person finding is not known, the finding used in the 1968 precursor to the ADA was taken from a report prepared by the National Council on Disability. *Id.* For a complete discussion on the possible origination of the 43 million figure, see *id.* at 484-88.

228. *Id*. at 487.

disabled individuals in their findings.[229] The Court's assertion that individuals who use mitigating measures are not disabled for the purposes of the ADA, curbed the number of people who can obtain relief under the ADA.[230] Accordingly, recognizing every alcoholic as per se disabled would necessitate enlarging Congress' forty-three million people finding, as there are approximately 13.8 million alcoholics in the United States.[231] Congress could not have intended that every alcoholic, regardless of the addiction's effect on their life, be included under the protections of the ADA because this would make up a large segment of Congress' perception of the nation's disabled population. Rather, Congress only intended to include individuals whose alcoholism substantially limits one or more major life activities to fall within the parameters of the ADA.

B. *Supreme Court jurisprudence*

It is not necessary to look any further than prior Supreme Court decisions to determine that an individualized approach is necessitated by the ADA. Notably, several courts, including the Supreme Court, have taken a restrictive view of which individuals are protected by the ADA.[232] Employee plaintiffs often lose at the summary judgment level because they are unable to demonstrate they have a disability under the ADA.[233] Although the Supreme Court has not granted certiorari in an ADA case with an alcoholic plaintiff, two recent cases discuss the correct standard to use when determining if an individual is disabled within the meaning of the ADA.

In *Bragdon v. Abbott* [234] the Court interpreted §12102 to determine that the plaintiffs' a-symptomatic HIV infection constituted a disability within the protection of the ADA.[235] In *Bragdon* the Court asserted that disability status could be determined by asking whether a physical or a mental impairment substantially limits an individual's major life activities.[236] The Court did not accept a-symptomatic HIV as a disability per se, but rather applied the statutory test to determine how the a-symptomatic HIV affected the plaintiff's

229. *Id.*

230. *Id.* at 484-86

231. *See* Job Accommodation Network, *supra* note 33.

232. Claudia Maclachlan, *Employers Winning ADA Suits*, NAT'L. L.J., July 31, 2000, at B1. Maclachlan notes that employers win nine out of ten disability cases in federal court. *Id.* This rate has actually increased since the enactment of the ADA. *Id.* However, this number does not take into account settlements, which generally favor employees. *Id.*

233. *Id.* Recall the prima facie elements of a Title I ADA claim. *See supra* note 3.

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

235. *Id* at 631. The Court found that a-symptomatic HIV substantially limited Bragdon's major life activity of reproduction. *Id.* at 639.

236. *Id.* at 632.

major life activities.[237] This case provides a thorough examination of how an individual can be substantially limited in a major life activity.[238] The Court used the statutory scheme, namely the definition of "substantially limits," to determine that reproduction is a major life activity and that a-symptomatic HIV is considered a disability.[239] The Court found that Bragdon's HIV infection substantially limited a major life activity, therefore, they declined to address whether HIV qualified as a per se disability.[240] Importantly, the Supreme Court used the individual inquiry to determine if an impairment amounts to a disability.[241] The Supreme Court's analysis should be extended from the realm of a-symptomatic HIV to all disabilities, including alcoholism.

The Supreme Court in *Sutton v. United Air Lines, Inc.*[242] reaffirmed the need for an individualized inquiry, this time in the context of severe myopia.[243] The Court asserted that whether a person has a disability is an individualized inquiry; and therefore, looked into the twin plaintiffs' disabilities on an individual basis.[244] The Court spent considerable time interpreting the phrase "substantially limits" before determining that it was in the "present indicative verb form," and therefore, a person must be presently limited, not hypothetically or potentially limited.[245] The Court rejected taking a view that people are disabled because of the name of their impairment and the general effect it has on a person, stating this would create a system where people are treated as a member of a group and not as individuals.[246] The Court notes that this approach is "[c]ontrary to both the letter and spirit of the ADA."[247] The ADA is based on the principle of treating people as individuals, which is

237. *Id.* at 639-40.

238. *Bragdon,* 524 U.S. at 639-42.

239. *Id.* at 641. The Court determined that a-symptomatic HIV substantially limits the major life activity of reproduction. *Id.* Included in their reasoning is that the ADA addresses substantial limitations, not utter inabilities. *Id.* While a person with a-symptomatic HIV can potentially conceive, it is dangerous to public health. *Id.* The Court asserted that this meets the definition of a substantial limitation. *Bragdon,* 524 U.S. at 641.

240. *Id.* at 641-42.

241. *See generally id.* at 639-42.

242. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). This case stands primarily for the proposition that mitigating measures may be taken into account in determining if an individual is a person with a disability. *Id.* In *Sutton* twin plaintiffs sued United for under the ADA for rejecting their employment applications for position of pilot because they did not meet the minimum requirement of uncorrected visual acuity of 20/100 or better. *Id* at 475.

243. Myopia is an eye impairment. *Id.* In this case each of twin plaintiffs had 20/200 vision or worse in their right eye and 20/400 in their left eye. *Id*. at 475.

244. *Sutton*, 527 U.S. at 483.

245. *Id.* at 482.

246. *Id.* at 483. The Court noted that by this approach a diabetic whose illness does not impair his or her daily activities would be considered disabled only because they have diabetes. *Id*.

247. *Id.* at 483-84.

accomplished through an individualized inquiry into a person's disability. Failure to perform an individualized inquiry in favor of a per se approach is contrary to the stated purpose of the ADA to eliminate discrimination against people with actual disabilities.

C. *Protection of the truly "disabled"*

The majority of the recent cases litigated under the ADA deal with determining whether "fringe" disabilities constitute disabilities under the ADA.[248] In fact, in many cases people with "self-inflicted illnesses" were included under the protections of the ADA despite the objection of disability rights groups.[249] Furthermore, many people view addiction as a correctable behavior.[250] For example, through treatment, many alcoholics have learned to live with alcoholism and function normally in society; and, therefore, they do not a have a condition that substantially limits a major life activity. Many alcoholics are not substantially limited in their ability to work, walk, talk, sleep or perform other major life functions; therefore, they are not entitled to protection under the ADA. The ADA did not intend to protect people with temporary problems, but meant to cover people with permanent problems that substantially limit a major life activity.[251] If properly followed, the statutory definition of disability ensures that individuals with actual disabilities receive ADA protection.[252] Including alcoholism as a per se disability would undermine the claims of the truly disabled, thus making the true victims the very people the ADA was written to protect. While this is not to say that an alcoholic can never be considered disabled, only individuals with alcoholism that "substantially limits a major life activity" should be entitled to the protections of the ADA.

V. CONCLUSION

The ADA is a well-intentioned statute that has positively affected the lives of many of America's disabled. However, the protection of the ADA should not be expanded arbitrarily to people who do not meet the statutory test for disability. The importance of the definition of disability is seen because it is a

248. Edward McEntee, *There's a Big Difference Between a 'Stress Disorder' and Quadriplegia*, THE WASH. TIMES, Nov. 9, 1997, at B2.

249. *Id.* McEntee includes in the category of self-inflicted illness stress disorder, drug dependence, and alcoholism. *Id.* Not everyone believes that alcoholism is a self-inflicted illness. *See supra* note 38. People who follow the disease theory advocate that alcoholics are not responsible for having the disease. *Id.*

250. *Lawsuit Addiction: 'Disabled' by Drugs; Methadone Clinic Doesn't Deserve ADA Protection*, THE CINCINNATI ENQUIRER, Feb. 10, 2000 at A20.

251. Gary S. Becker, *Are We Hurting or Helping the Disabled?*, BUS. WK. , Aug. 2, 1989, at 21.

252. 42 U.S.C. § 12102(2) (1994).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

prima facie element of a plaintiff's case. While some alcoholics deserve protection under the ADA, we owe it to the truly disabled to rationally determine if an alcoholic deserves protection under the ADA. A clearly defined standard adopted uniformly by all circuits would take the risk out of employer-employee relations and enable employers to effectively run businesses without fear of being challenged by a baseless claim. Additionally, preservation of judicial time and resources can be served if all circuits apply an individualized inquiry. Most importantly, the individualized inquiry will best serve the truly disabled as mandated by the purposes and provisions of the ADA.

BETH HENSLEY ORWICK*

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