DISABLED EMPLOYEE OR JUST A JERK?[+]

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I. INTRODUCTION

Matthew Weaving was a police officer whose employment was terminated following severe interpersonal problems with other police department employees.[1] Weaving contended that the interpersonal problems resulted from his attention deficit hyperactivity disorder (ADHD), a disability that entitled him to reasonable accommodation under the Americans with Disabilities Act (ADA)[2]. A jury returned a verdict for Weaving, finding that he was disabled and the department had discharged him in violation of the ADA.[3] The Ninth Circuit reversed holding, "as a matter of law that the jury could not have found that ADHD substantially limited Weaving's ability to work or to interact with others within the meaning of the ADA."[4] The result, and often the crux of the issue in such circumstances, was "[w]eaving isn't disabled, he's just a jerk?"[5]

To illustrate his attitude regarding his co-workers and his interaction with them, the Circuit Court quoted an email sent by Weaving:

> In May 2008, a fellow sergeant wrote an email to Weaving and two other officers complaining about the number of "unapproved reports" that had been waiting for him when he arrived for his shift on Sunday morning, and questioning an earlier shift's decision to tow two cars. Weaving replied in an email:
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> > Allow me to respond to your email that by the way is a "PUBLIC RECORD";

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[1] Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014).
[2] Americans with Disabilities Act of 1990, Pub. L. No. 101–336, § 102(a), July 26, 1990, 104 Stat. 328 § 102(a), 42 U.S.C. § 12112(a) (2008).
[3] Weaving v. City of Hillsboro, No. 10–CV–1432–HZ., 2012 WL 526425 (D. Or., Feb. 16, 2012) Opinion and Order; No. 3:10–CV–1432–HZ, 2012 WL 2367125 (D. Or. June 21, 2012), Finding of Facts and Conclusions of Law.
[4] Weaving v. City of Hillsboro, 763 F.3d 1106-07 (9th Cir. 2014).
[5] *Id.* at 1114 (Callahan, J., dissenting).

> I'll respond to the second part of your inquisitive email [the part about the two cars] with a metaphorical analogy. Envision a swimming pool with a deep end and a shallow end separated by a floating rope . . . .
>
> There are many more potential hazards in the deep end and a person would be foolish to venture there without the technical expertise, stamina and initiative to keep from drowning. There are countless people who are good swimmers but still remain in the shallow end for fear of the potential danger the deep end harbors. Still, there are others who negligently and recklessly venture to the deep end without any technical proficiency and tragically drown. My recommendation to you is that you remain in the shallow end where you can splash around with the kids.
>
> What really upsets me about your inquiry is not the simple fact that you question my judgment and knowledge but the manner in which you have done so. If you have any desire to discuss this incident further or any other incident please do not do so in a public record email, come and find me any day of the week! I'm easy to locate, I'm in the deep end so bring your water wings![6]

His lieutenant described Weaving's communication style with other officers as "arrogant" and "inspired fear."[7] A subordinate testified that "Weaving's responses to questions were "intimidating," making him "feel stupid and small."[8]

Unfortunately, many other employees share similar interpersonal communication issues. They have been described as: tyrannical, unapproachable, noncommunicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive.

These various mental impairments have been grouped under the heading of "Interacting with Others" and will be the focus of the discussion in this article.

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[6] *Id.* at 1108.
[7] *Id.*
[8] *Id.*

II. BACKGROUND

A. *Americans with Disabilities Act*[9]

In 1990, the ADA was signed into law, seventeen years after the passage of the Rehabilitation Act of 1973,[10] which only banned disability discrimination by recipients of federal funds. "For the first time in the United States, the law viewed the exclusion, segregation, and mistreatment of individuals with disabilities as discrimination, rather than as an ineluctable consequence of the impairments the disabilities themselves had on those who possessed them."[11]

There are three Titles in the ADA: Title I covers employment; Title II prohibits discrimination by public entities; and Title III covers public accommodations. This article will focus on Title I of the ADA with an emphasis on the mental impairment of failure to successfully "interact with others."

Definitions of the key terms in the ADA are essential to understanding the protections offered to disabled employees. The most significant terms are discussed below.

1. Disability

For purposes of the Americans with Disabilities Act (ADA)[12] the definition of disability, the most important and disputed term,[13] is:

> (2) Disability
> 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; (emphasis added).
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.[14]

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[9] Americans with Disabilities Act of 1990, codified at 42 U.S.C. §§ 12101-12213 (1994) (current version at 42 U.S.C. §§ 12101-12213 (2006 & Supp. 2009)).
[10] Rehabilitation Act of 1973, Pub. L. No. 93-112.
[11] James Concannon, *Mind Matters: Mental Disability and the History and Future of the Americans with Disabilities Act,* 36 LAW & PSYCHOL. REV. 89, 90 (2012).
[12] Americans with Disabilities Act of 1990, codified at 42 U.S.C. §§ 12101-12213 (1994) (current version at 42 U.S.C. §§ 12101-12213 (2006 & Supp. 2009)).
[13] Concannon, *supra* note 11, at 93.
[14] 42 U.S.C.A. § 12102(2) (West 2009).

The existence of an "physical or mental impairment" has not frequently been a contested issue and generally has not been difficult for an employee/plaintiff to establish. The EEOC broadly interpreted it as "[a]ny physiological disorder or condition, [or] cosmetic disfigurement" that affects a "body system."[15] Mental and psychological disorders such as "mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities" were also listed as examples.

a. Major Life Activities

Much more controversy arose over the ADA's meanings of "substantially limits"[16] and "major life activity."[17] Courts struggled with determining what activities should appropriately be defined as major life activities within the statute. The EEOC offered: "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[18] In addition, the courts were charged with deciding if such life activities had to be central to the lives of *most* individuals or, instead, simply central to the life of *the particular* individual before the court?[19]

Major life activities have been defined generally as, but are not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[20] Major bodily functions, including, but not limited to, "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions" are also listed as major life activities.[21] For life activities not expressly listed, federal courts have interpreted "major life activities" to be those "of central importance to most people's daily lives."[22] Similarly, in the appendix to its regulations, the EEOC defined major life activities to generally include "those basic activities that the average person in the general population can perform with little or no difficulty."[23]

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[15] EEOC Interpretative Guidelines, 29 C.F.R. § 1630.2(h) (2005).
[16] *Id.* § 1630.2(j).
[17] *Id.* § 1630.2(i).
[18] *Id*.
[19] Concannon, *supra* note 11, at 94.
[20] 42 U.S.C.A. § 12102(2)(A) (West 2009).
[21] 42 U.S.C.A. § 12102(2)(B) (West 2009).
[22] 29 C.F.R. § 1630.2(i)(2) (West 2012); Toyota Motor Mfg., Ky, Inc. v. Williams, 534 U.S. 184 (2002), superseded by statute 42 U.S.C.A. § 12101 (West 2009); Head v. Glacier Northwest Inc., 413 F.3d 1053, 1061-62 (9th Cir. 2005); Goodpaster v. Schwan's Home Serv., Inc., 849 N.W.2d 1, 8 (Iowa 2014).
[23] 29 C.F.R. § 1630.2(i)(2) (West 2004).

Only in its Compliance Manual did the EEOC specify that "[m]ental and emotional processes such as thinking, concentrating, and interacting with others" constitute additional examples of major life activities.[24] The EEOC emphasized that mental processes, including "interacting with others," constitute major life activities under the ADA.[25] "Unfortunately, the EEOC's guidance on the definition of major life activity has not led to uniform interpretation of the term. This is because courts, including the Supreme Court, have questioned the deference due the EEOC's regulations and enforcement guidelines."[26]

b. Substantially Limits

Attempting to clearly and consistently define major life activity was only the first hurtle for the courts. They then had to determine whether the individual's impairment substantially limited the life activity. Does substantially limit mean that the individual has some difficulty performing the major life activity, or must one be effectively prevented from carrying such activities out? The EEOC offered this explanation:

> (j)(1) The term substantially limits means:
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly 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.
> (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

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[24] Equal Employment Opportunity Comm'n, Compliance Manual §902.3(b): Definition of the Term Disability (2000), http:// www.eeoc.gov/policy/docs/902cm.html [hereinafter EEOC Definition of Disability]; Equal Employment Opportunity Comm'n, EEOC Notice No. 915.002, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (1997), http://www.eeoc.gov/policy/docs/psych.html [hereinafter EEOC on Psychiatric Disabilities].

[25] Lisa M. Benrud-Larson, Note, *Establishing a Substantial Limitation in Interacting with Others: A Call for Clearer Guidance from the EEOC,* 90 MINN. L. REV. 1791, 1795 (2006).

[26] *Id.*; *see, e.g.,* Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 n.2 (1st Cir. 1997) (noting that the EEOC Compliance Manual is "hardly binding" on courts); Bell v. Gonzales, 398 F. Supp. 2d 78, 87 (D.D.C. 2005) (noting that the EEOC Compliance Manual recognizes "interacting with others" as a major life activity under the ADA but that "its persuasive value remains undetermined"); *see also* John N. Ohlweiler, *Disability and the Major Life Activity of Work: An Un-"Work"-Able Definition,* 60 BUS. LAW. 577, 592 n.76 (2005).

(i) The nature and severity of the impairment;
(ii) The duration or expected duration of the impairment; and
(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.[27]

c. Qualified Individual

The next term open for interpretation under the ADA was qualified individual. The Act stated that "[n]o covered entity shall discriminate against a *qualified individual* with a disability because of the disability . . . ."[28] A "qualified individual" was defined as "an individual who, with or without *reasonable accommodation*, can perform the *essential functions* of the employment position that such individual holds or desires."[29] The ADA clarified that "consideration shall be given to the employer's judgment as to what functions of a job are essential."[30] However, even with this guidance, courts still struggled to determine which functions of jobs were "essential" and which were merely "marginal." For example, many courts found that uninterrupted attendance was an essential job function, while other courts were less willing to make such a presumption without an individualized inquiry.

The EEOC regulations provided some guidance by listing ten factors that could be considered, such as the amount of time spent doing the function, the "work experience of incumbents in similar jobs," and "the consequences of not requiring the incumbent to perform the function."[31]

d. Reasonable Accommodation

Reasonable accommodation is another term that was the subject of much debate. Unlike most civil rights statutes, which require nothing more than equal treatment of individuals, the "reasonable accommodation" requirement of the ADA obligated employers to occasionally treat disabled employees *differently* from their co-workers. Title I did not explicitly define reasonable accommodation, and instead merely listed a number of things such an accommodation may include: "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities;

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[27] 29 C.F.R. § 1630.2(j) (West 2004).
[28] 42 U.S.C. § 12112(a) (2009).
[29] 42 U.S.C. § 12111(8) (2009).
[30] *Id*.
[31] 29 C.F.R. § 1630.2(n)(iv), (vii) (West 2004).

and (B) job restructuring, part-time or modified work schedules, reassignment . . . and other similar accommodations."[32]

e. Undue hardship

Even after determining that an individual could, with a reasonable accommodation, perform the essential functions of the job, the employer still had an opportunity to show that the accommodation requested imposed an undue hardship in the particular circumstances. The ADA did not require an employer to make an accommodation if the accommodation would be "unreasonable" or would impose an "undue hardship."[33] The ADA provided that this determination was to be made considering all relevant factors, including the cost of the accommodation, the financial resources of the facility, and the size of the entity.[34] "The actual impact of the accommodation on the business (or operations of the employer) that was necessary to find undue hardship was the subject of debate in courts, and courts and academics wrestled with defining workable standards."[35] They did not want the accommodation requirement to become "affirmative action with a vengeance."[36]

2. ADA Amendments Act of 2008[37]

Eighteen years after the ADA was passed Congress, finding enforcement of disability discrimination ineffective, responded passing the "ADA Amendments Act of 2008." The ADAAA retained the disputed words "substantially limits" a "major life activity" but it added rules of construction that explicitly overruled Supreme Court and lower court decisions narrowing the definition of disability. In its findings for the ADAAA, Congress expressed its profound displeasure with the enforcement of the ADA:

> (1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act `provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage;

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[32] 42 U.S.C. § 12111(9) (1994) (amended 2008).
[33] 42 U.S.C. § 12111(10) (2009).
[34] 42 U.S.C. § 12112(b)(5)(A) (2009).
[35] Concannon, *supra* note 11, at 97.
[36] EEOC. v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028-29 (7th Cir. 2000).
[37] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.CA. §§ 12103, 12205a (2008)).

> (2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;
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> (3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;
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> (4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;
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> (5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;
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> (6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;
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> (7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress; and
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> (8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard.[38]

Not all the changes made by the ADAAA are relevant to the discussion in this article, but several of them directly impact the employee/plaintiffs who will charge that their inability to interact with others is a disability that must receive reasonable accommodation.

First, Congress made it clear that the term "disability" was to be given a broad interpretation.

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[38] *Id*. at § 2.

Second, it clarified the approach that should be taken when determining whether an activity qualifies as a "major life activity," Congress explicitly rejected the formulation given by the Supreme Court in *Toyota Motor Mfg. v. Williamson* that major life activities must be "activities that are of central importance to most people's daily lives."[39] A non-exhaustive list of major life activities that is intended to inform courts' interpretations of that term list includes "caring for oneself, performing manual tasks, seeing, hearing, eating . . . speaking, . . . learning . . . concentrating, thinking, communicating, and working."[40]

Third, Congressional intent requires a less-strict interpretation of "substantially limits." Addressing the EEOC regulations related to the interpretation of the "substantially limits" standard as "significantly restricted" Congress found it to be too high a standard."[41]

Fourth, the ADAAA clarified that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[42] Before the amendment, courts disagreed; some determined that episodic impairments and impairments in remission could qualify as disabilities under the Act, but others adopted a more restrictive interpretation.[43] Under the amended ADA impairments should be evaluated in their active states, even if they happen to be in remission or inactive at the time an evaluation is made.

Fifth, the amended ADA states that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . . ."[44] Mitigating measures such as "medication, medical supplies, equipment, or appliances . . . prosthetics . . . hearing aids and cochlear implants . . . use of assistive technology . . . learned behavior or adaptive neurological modifications" are included as non-exhaustive examples.[45]

Last, the ADAAA made significant changes to the meaning of "regarded as having an impairment that substantially limited a major life activity of that individual."[46] The amended section provides: [a]n individual meets the requirement of "being regarded as having such an impairment" if the

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[39] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002), 224 F.3d 840, *rev'd and remanded*.
[40] 42 U.S.C. § 12102(2)(A) (2008).
[41] ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2(a)(8), 122 Stat. 3554, § 2(a)(8) (2008).
[42] 42 U.S.C. § 12102(4)(D) (2009).
[43] Christine M. Muller, *Expanding Protection for Attention Deficit Hyperactivity Disorder Individuals under the Americans with Disabilities Act,* 17 LOY. J. PUB. INT. L 61, 103-04 (2015).
[44] 42 U.S.C. § 12102(4)(E)(i) (2009).
[45] *Id*. at (4)(E)(i)(I)-(IV).
[46] *Id*. at (4)(C).

individual establishes that he or she has been subjected to an action prohibited under this Chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits *or is perceived to limit* a major life activity.[47]

B. *Mental Disabilities*

Persons who have experienced employment discrimination based on race, color, sex, national origin, or religion were finally offered legal recourse in 1964 with enactment of the Civil Rights Act. However, people who have experienced discrimination on the basis of disability received minimal protection under the Rehabilitation Act until 1990 when the ADA was passed."[48] The battle to get the coverage that the ADA affords individuals with disabilities was difficult, especially with regard to the aspects of the proposed law that provided protections to individuals with substantially limiting mental disabilities.[49] Individuals with psychiatric disorders face a particularly high hurdle when attempting to establish a disability under the ADA.[50]

The ADA retained the "mental impairment" language from the Rehabilitation Act in its definition of disability, but "[m]ental illness was the only disability that was subject to attack on the floor of Congress."[51] During the Congressional debate two senators, Sen. William Armstrong from Colorado, and Senator Jesse Helms from Georgia, expressed concern about compromising the moral values of employers who may be required to accommodate mental illnesses. Senator Armstrong voiced his concerns:

> I came to work this morning thinking that we are going to vote on a bill to help the handicapped . . . I would not think you would have to be very smart to know that the ideals of our country certainly call upon the Senate to do whatever it can to be helpful to people in

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[47] *Id*. at (4)(C)(3).
[48] 42 U.S.C.A. § 12101(a)(4) (2008).
[49] Susan Stefan, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 84 (2001), American Psychological Association; also available through ProQuest.
[50] Lisa M. Benrud-Larson, *supra* note 25 at 1792; *see also* Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139 at 1168, 1175; Mark A. Rothstein et al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 244, 251-52 (2002); Mark DeLoach, Note, *Can't We All Just Get Along?: The Treatment of "Interacting with Others" as a Major Life Activity in the Americans with Disabilities Act*, 57 VAND. L. REV. 1313, 1315 (2004).
[51] Concannon, *supra* note 11.

> wheelchairs . . . . What concerns me is the thought that this disability might include some things which by any ordinary definition we would not expect to be included . . . .
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> . . . . Mental disorders, such as . . . delirium, hallucinosis, . . . delusional disorder, cocaine delirium . . . .
>
> I could not imagine the sponsors would want to provide a protected legal status to somebody who has such disorders, particularly those who [sic] might have a moral content to them . . . .[52]

Senator Helms actively questioned proponents of the ADA about what weight should be given to an employer's own moral standards when considering the coverage of kleptomaniacs or manic depressives and schizophrenics.[53] In addition to the attribution of moral impairment to mental impairment, other members of Congress expressed concerns that were rooted in common stereotypes rather than medical diagnosis.[54] Their concerns included the belief that "people with mental disabilities are inherently prone to violence and that they also lack the ability to make rational judgments."[55]

1. Antisocial Personality Disorders

When reviewing the medical definitions of antisocial personality disorders, it is easy to understand how Senators Armstrong and Helms could confuse mental disorders with moral standards. Before society understood the nature of mental illness it had already classified the associated behaviors as immoral. Those who suffer from antisocial personality disorder generally disregard and violate the rights of others. They don't conform to lawful and ethical behavior.

In contrast their behavior tends to be "inflexible, maladaptive, and persistent."[56] They are egocentric, showing a "callous lack of concern for others, accompanied by deceitful and manipulative behavior, irresponsibility, and/or risk taking."[57] Key maladaptive character traits include ambition, antagonism, persistence in reaching goals, and a need to control the environment. They are unwilling to trust the abilities of others blaming their victims for being "foolish, helpless, or deserving of mistreatment, using

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[52] 135 CONG REC. 112, S10753 (daily ed. Sept. 7, 1989) (statement of Sen. Armstrong).
[53] 135 CONG. REC. 112, S10765 (daily ed. Sept. 7, 1989) (colloquy between Sen. Harkin and Sen. Helms).
[54] Stefan, *supra* note49, at 7.
[55] *Id.*
[56] An*tisocial Personality Disorder,* MD Guidelines, http://www.mdguidelines.com/antisocial-personality-disorder.
[57] *Id.*

rationalizations such as "losers deserve to lose" or "they had it coming anyway."[58] Being unable or unwilling to conform to social standards that require respect and concern for others, individuals with the disorder tend to be "impulsive, forceful, aggressive, irresponsible, and seldom inhibited by danger or fear of punishment."[59] They are also likely to be dishonest, sexually irresponsible, argumentative, abusive, cruel, belligerent, vindictive, and deeply in debt. "These individuals usually display an inflated and arrogant self-appraisal and a lack of empathy and may display a superficial charm."[60]

2. Interacting with Others

An inability to interact with others has been recognized by some courts and by the EEOC as a disability that requires employer accommodation. The inability itself is not a mental impairment, but is a common symptom of various underlying diseases. Employees have alleged the disability based on a variety of impairments: adjustment disorder, anxiety disorder, attention deficit hyperactivity disorder (ADHD), autism, bipolar disorder, depression, intermittent explosive disorder, panic disorder, post-traumatic stress disorder, and Tourette's syndrome.[61]

One disorder that has received attention in the literature is Attention Deficit Hyperactivity Disorder (ADHD).[62] It is now one of the most common neurodevelopmental disorders,[63] but wasn't a recognized medical condition until 1980.[64] ADHD interferes with the brain's volume, maturation, and function.[65]

> ADHD is not a mere inattention or hyperactivity problem; rather, "ADHD is a complex mental disorder that affects a person's ability to regulate cognition and emotions." ADHD symptoms are hard to identify and may manifest themselves in a variety of ways.

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[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Kristine Cordier Karnezis, J.D., *What Constitutes Substantial Limitation on Major Life Activity of Interacting with Others for Purposes of Americans with Disabilities Act* (42 U.S.C.A. §§ 12101-12213), 2 A.L.R. Fed. 2d 347 (Originally published in 2005).
[62] Muller, *supra* note 43, at 63-64.
[63] *Id*. at 63, citing Express Scripts Lab, Turning Attention to ADHD: U.S. Medication Trends for Attention Deficit Hyperactivity Disorder, EXPRESS SCRIPTS 4, (Mar. 2014), http://lab.express-scripts.com/insights/industry-updates/~/media/89fb0aba100743b5956ad0b5ab286110.ashx.
[64] *Id.*
[65] *Id*., citing Tricia Kinman, ADHD and the Brain: Structure and Function, HEALTHLINE, (Dec. 17, 2012), http://www.healthline.com/health/adhd/the-brains-structure-and-function#1.

> Symptoms of hyperactivity include "excessive restlessness and the recurring desire to walk and run around." Persons with ADHD "can be fidgety, interruptive, incapable of awaiting their turn, and act on impulse regardless of the consequences." Hyperactivity symptoms manifest into angry outbursts and rash decision-making. Inattentive symptoms include difficulties in following instructions, paying close attention, being patient, waiting one's turn, recording important details, organization, engaging in tasks that require sustained mental effort, and remembering important facts and details. Inattention symptoms may also manifest into making avoidable careless mistakes.[66] (citations omitted).

According to a study conducted at the University of Massachusetts, 44.6% of adults with ADHD experienced behavioral problems at work, compared to a mere 2.4% of adults without ADHD. The study also found 17.4% of adults with ADHD had been fired from a job, compared to just 3.7% of adults without ADHD. However, federal judges have been skeptical of treating those with ADHD as disabled because, like other mental impairments, it is not a visually observable disorder and has been difficult to diagnose.[67]

III. LITIGATION

A. *ADA Cases*

Under the original ADA, claims based on mental disability made up approximately 15.3% of all claims brought under Title I;2.7% of Title I claims alleged discrimination based on an individual's anxiety disorder; 6.7% alleged depression; 2.3% alleged manic depressive disorder; 0.4% alleged post-traumatic stress disorder; 0.4% alleged schizophrenia; and 2.8% alleged other psychological disorders.[68] Plaintiffs with mental impairments are comparable to those with physical impairments in bringing successful claims, but "[w]hereas mentally-impaired plaintiffs lose most often because they are deemed *unqualified* by the court, physically impaired litigants lose most often because they do not establish that they are *disabled* within the meaning

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[66] *Id.*
[67] *Id.*
[68] ADA Charge Data by Impairments/Bases --Receipts FY 1997--FY 2008, EEOC (2009), http://archive.eeoc.gov/stats/ada-receipts.html (within the 15.3% an individual may file a charge claiming multiple impairments under the ADA).

of the statute."[69] "This distinction is important both for understanding how plaintiffs alleging mental disabilities were evaluated by courts pre-Amendments Act, and the potential impact of the ADAAA on such plaintiffs in the future."[70]

When contemplating the issues regarding the potential disability of "interacting with others" the circuit courts focused on two major questions: (1) whether interacting with others constitutes a major life activity; and (2) if so, what constitutes a substantial limitation in this area. Only three circuits addressed the first question regarding major life activity and they failed to agree on appropriate decision rules.

1. Interacting with Others as a Major Life Activity

a. *Soileau v. Guilford of Maine, Inc.* – The First Circuit

Randall Soileau, a process engineer, had been diagnosed with dysthymia, a chronic depressive disorder which is mild, but long term. Described as having a negative attitude when he refused to work to improve four performance deficiencies identified by his supervisor, he also refused to create his own improvement plan. Terminated after numerous conflicts with his supervisor and other work problems, he alleged that he was disabled under the ADA because his mental disorder substantially limited his ability to interact with others.[71] The First Circuit began its analysis by noting that the EEOC regulations promulgated under the ADA do not list the ability to interact with others as an example of a "major life activity."[72] The court did acknowledge in a footnote that the EEOC enforcement guidelines list interacting with others as a major life activity, but the opinion emphasized that such guidelines are not binding on courts.[73] The First Circuit then rejected the claim, declining to recognize interacting with others as a major life activity, reasoning that the "ability to get along with others"[74] is a "remarkably elastic" concept that could vary depending on subjective judgment and/or the particular situation.[75] The court refused to inflict a legal

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[69] Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 61 (2005).
[70] Concannon, *supra* note 11, at 107.
[71] *See* Soileau v. Guilford of Me., Inc., 105 F.3d 12 (1st Cir. 1997).
[72] *Id.* at 15.
[73] *Id*. at 15 n.2.
[74] Note that the court has used "ability to get along with others," verbiage, other than "interacting with others." "Getting along with" may be interpreted as setting a higher standard than just "interacting with."
[75] Soileau, 105 F.3d at 15.

duty on an employer "based on such an amorphous concept."[76] It noted, however, that "a more narrowly defined concept going to essential attributes of human communication could, in a particular setting, be understood to be a major life activity" under the ADA.[77]

b. *McAlindin v. County of San Diego* – The Ninth Circuit

Two years later, in 1999, the Ninth Circuit considered the issue of whether interacting with others was a major life activity and reached the opposite conclusion.[78] Richard McAlindin, a systems analysis for San Diego County, suffered from anxiety, panic, and somatoform disorders.[79] Severe symptoms caused him to be "essentially paralyzed."[80] He claimed that his diagnosed anxiety disorder substantially limited his ability to interact with others, thus constituting a disability under the ADA.[81] As accommodation he had requested disability leaves and transfers. After his second disability leave he was terminated. The Ninth Circuit looked to the EEOC regulations and interpretive guidelines for guidance in defining what constitutes a major life activity under the ADA,[72] noting that the EEOC recognized functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[82] The court concluded that "[b]ecause interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity.'"[83] The court expressly rejected the First Circuit's admonition that "getting along with others" is too amorphous a concept to constitute a major life activity under the ADA.[84] It pointed out that nothing in the statutory text implicated clarity as a criterion for defining a major life activity.[85] The court further noted that the well-recognized major life activity of "caring for oneself" is just as vague as "interacting with others."[86]

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[76] *Id*.
[77] *Id*.
[78] *See* McAlindin v. City of San Diego, 192 F.3d 1226, 1233 (9th Cir. 1999).
[79] Somatoform disorders are a group of psychological disorders in which a patient experiences physical symptoms that are inconsistent with or cannot be fully explained by any underlying general medical or neurologic condition. Medscape.com, http://www.medscape.com/?src=ppc_google_acq_solo&gclid=CPHOh4ms49ICFdFefgodxL0F5A.
[80] McAlindin, 192 F.3d 1226, 1230 (9th Cir. 1999).
[81] *Id.*
[82] *Id.* at 1233.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 1235.
[86] *Id.*

c. *Jacques v. DiMarzio, Inc.* – The Second Circuit

The Second Circuit concluded that "interacting with others" constitutes a major life activity under the ADA, although "getting along with others" does not.[87] Audrey Jacques, the plaintiff, suffered from Bipolar II Disorder and a longstanding history of psychiatric problems including Major Depressive Disorder.[88] Although she had worked for the employer for over seven years, and had received average to above average performance evaluations, she was unable to interact effectively with her supervisor and had "incessant conflicts" with her coworkers.[89]

Her supervisors described Jacques as a "problem employee":

> [S]he was prone to "[c]onfrontations with co-workers, . . . intolerance of [ethnic minorities in the] production department, [and][e]motional problems in dealing with supervisory staff"; she was the "most confrontational person we have ever employed"; her supervisors and coworkers felt obliged to treat her with "kid gloves." The statement further explained that Mr. DiMarzio, in firing Jacques, "saw no reason why his supervisory staff should be forced to make such an extreme effort to tiptoe around and cater to someone who was emotionally unstable." Summarized supporting statements by eight of Jacques plant coworkers suggested—at the very least—that her coworkers and supervisors found Jacques to be intimidating and mercurial.[90]

After being terminated from her job the plaintiff filed an ADA claim alleging she had a substantial limitation in interacting with others.[91] The Second Circuit began its analysis by distinguishing between the life activities of "getting along with others" (Soileau) and "interacting with others" (McAlindin).[92] It agreed that the First Circuit's conclusion that "getting along with others" was too subjective to be considered a major life activity under the ADA[93] and concurred with the Ninth Circuit's position that "interacting with others" is "'an essential, regular function' that 'easily falls within"' the ADA's definition of major life activity.[94]

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[87] Jacques v. DiMarzio, Inc., 386 F.3d 192, 202 (2d Cir. 2004).
[88] *Id.* at 195.
[89] *Id.*
[90] *Id.* at 197-98.
[91] *Id.*
[92] *Id.* at 202.
[93] *Id.*
[94] *Id.*

There were a number of circuits that never considered whether interacting with others was a major life activity. They had the potential before them, but decided to only consider whether the plaintiff had established a substantial limitation. When they found no substantial limitation existed, then they declined to determine if a major life activity existed.[95]

2. Standards for Establishing a Substantial Limitation in Interacting with Others

Since it had declined to find that getting along with others was a major life activity in *Soileau,* the First Circuit did not consider the second question, "Did the disability substantially limit the major life activity?" The Second and Ninth Circuits both discussed it, but did not reach a consensus on the applicable standard.

a. *McAlindin* – The Ninth Circuit

After concluding that interacting with others constitutes a major life activity, the Ninth Circuit followed the EEOC's recommendation to determine what constitutes a substantial limitation. It held that a plaintiff attempting to establish a substantial limitation in interacting with others "must show that his 'relations with others [a]re characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.'"[96] The court stressed that the limitation "must be severe" and that mere cantankerousness or "trouble getting along with coworkers" does not constitute a substantial limitation in this area.[97] The court focused on documented medical evidence pertaining to the plaintiff's symptoms when concluding that the evidence

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[95] *See* Rohan v. Networks Presentations LLC, 375 F.3d 266, 274 (4th Cir. 2004) ("We decline to resolve this issue here because, assuming that interacting with others is a major life activity, [plaintiff] has not demonstrated that it is an activity in which she is substantially limited."); MX Group, Inc. v. City of Covington, 293 F.3d 326, 337 (6th Cir. 2002) (noting "that it has been held that 'interacting with others,' is a major life activity" but declining to decide the issue); Heisler v. Metro. Council, 339 F.3d 622, 628 (8th Cir. 2003) (declining to hold that "interacting with others [is] a separate major life activity" because plaintiff failed to provide evidence that her mental impairment "substantially limited her ability to interact with others"); Steele v. Thiokol Corp., 241 F.3d 1248, 1254-55 (10th Cir. 2001) (declining to address whether interacting with others is a major life activity because plaintiff was not substantially limited in her ability to interact with others); *see also* Emerson v. Northern States Power Co., 256 F.3d 506, 511 (7th Cir. 2001) (describing "interacting with others" in apparent dicta as one of many "activities that feed into the major life activities of learning and working").

[96] McAlindin v. City of San Diego, 192 F.3d 1226, 1235 (9th Cir. 1999).

[97] *Id.*

demonstrated a genuine issue of fact regarding whether the plaintiff's anxiety disorder resulted in a substantial limitation in interacting with others.[98]

b. *Jacques* – The Second Circuit

The Second Circuit totally and thoroughly rejected the substantial limitation standard as articulated by the Ninth Circuit, characterizing it as "unworkable, unbounded, and useless as guidance to employers, employees, judges, and juries."[99] "Illusory" was the word selected by the Second Circuit to describe the Ninth's Circuit differentiation between hostility and mere cantankerousness.[100] The Second concluded that the Ninth's test "frustrates the maintenance of a civil workplace environment"[101] and asserted that a standard requiring "consistently high levels of hostility" would simply result in more protection under the ADA for the most "troublesome and nasty . . . employee."[102]

Instead the Second Circuit created a standard that requires plaintiffs to show that "the mental or physical impairment severely limits the fundamental ability to communicate with others."[103] Clarifying that only those with the most basic, severe limitations in communication would qualify under this test, it also noted that several severe psychiatric disorders may result in such impairment.[104]

> This standard is satisfied when the impairment severely limits the plaintiff's ability to connect with others, i.e., to initiate contact with other people and respond to them, or to go among other people--at the most basic level of these activities. The standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful. A plaintiff who otherwise can perform the functions of a job with (or without) reasonable accommodation could satisfy this standard by demonstrating isolation resulting from any of a number of severe conditions, including acute or profound cases of: autism, agoraphobia, depression or other conditions that we need not try to anticipate today.[105]

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[98] *Id.*
[99] Jacques, 386 F.3d at 202.
[100] *Id.* at 203.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 203-04.
[105] *Id.*

This is a much higher standard for plaintiffs than those set by the Ninth Circuit or the EEOC.

B. *ADAAA Cases*

Even though Congress clearly intended to broaden and expand the meaning of disability, Matthew Weaving, the police officer described in the introduction of the article, did not benefit from the Congressional effort. Although he was described as "tyrannical, unapproachable, non-communicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive," and lacking "[]acceptable interpersonal communication that suggests he does not possess adequate emotional intelligence to successfully work in a team environment, much less lead a team of police officers," the Ninth Circuit held that his ADHD did not substantially limit his ability to interact with others.[106]

There was evidence that Weaving's coworkers would "avoid interactions with him; he would engage in lengthy lectures in response to simple questions; he would send impulsive emails; he would "beat a dead horse"; he was "socially retarded"; he made coworkers feel intimidated and demeaned; he lacked any awareness of the reactions of others; and . . . he was hard to approach."[107] Weaving's doctor testified that he was "[u]nable to self-regulate" some of the other symptoms of ADHD without therapy, including impulsiveness, "not seeming to listen when spoken to, interrupting others, difficulty waiting his turn, blurting out comments without having emotional intelligence, [and lack of] awareness of the effect that that communication would have on his other workers at the police department."[108] Despite this evidence and testimony the Ninth Circuit determined that Weaving was merely a "cantankerous person" who had "trouble getting along with coworkers," not a disabled person who suffered from a disorder that substantially limited a major life activity.

The Ninth Circuit's 2014 decision in *Weaving v. City of Hillsboro*, has been characterized as the first published circuit level case narrowly interpreting the ADA's definition of disability post-ADAAA.[109] "While paying lip service to the ADA's newly broadened definition of disability, the court inexplicably relied on pre-ADAAA case law and pre-ADAAA EEOC guidance to find that a person with ADHD was not disabled because he was

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[106] Weaving v. City of Hillsboro, 762 F.3d 1106 (9th Cir. 2014).
[107] *Id.* at 1115.
[108] *Id.* at 1111.
[109] Kevin Barry, *Chasing the Unicorn: Anti-Subordination and the ADAAA,* 12 CONN. PUB. INT. L.J. 207, 241 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692257.

not "essentially homebound," "barely functional," and "suffer[ing] from a total inability to communicate at times."[110]

Although the jury returned a verdict for Weaving, finding that he was discharged because of his disability, the Ninth Circuit reversed holding that "as a matter of law that the jury could not have found that ADHD substantially limited Weaving's ability to work or to interact with others within the meaning of the ADA."[111] The court considered Weaving's contention that the evidence shows that he is substantially limited in the major life activities of working and of interacting with others. Regarding working, the Ninth Circuit concluded that Weaving could not satisfy even the lower ADAAA standard that he was limited in his ability to work compared to "most people in the general population."[112] In contrast there was evidence that he was a skilled police officer. Recognizing his knowledge and technical competence, his supervisors had selected him for high-level assignments and promotion. His ADHD only affected his interpersonal communications. The court then acknowledged that in *McAlindin v. County of San Diego*[113] it had specifically recognized interacting with others as a major life activity, but emphasized that it had also cautioned:

> Recognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited in a major life activity. Mere trouble getting along with coworkers is not sufficient to show a substantial limitation . . . .
>
> In addition, the limitation must be severe . . . . We hold that a plaintiff must show that his "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.[114]

According to the Ninth Circuit, Weaving was therefore not a person with a disability; he was merely a "cantankerous person" who had "trouble getting along with coworkers."[115] In contrast to the disabled employee in *McAlindin,* Weaving's interpersonal problems existed only with his peers

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[110] *Id*.
[111] Weaving, 762 F.3d at 1007.
[112] *See* 29 C.F.R. § 1630.2(j)(1)(ii).
[113] McAlindin, 192 F.3d 1226 (9th Cir. 1999).
[114] Weaving v. City of Hillsboro, 762 F.3d 1106, 1113 (9th Cir. 2014).
[115] *Id.* at 1114.

and subordinates. "He had little, if any, difficulty comporting himself appropriately with his supervisors."[116]

> One who is able to communicate with others, though his communications may at times be offensive, "inappropriate, ineffective, or unsuccessful," is not substantially limited in his ability to interact with others within the meaning of the ADA. To hold otherwise would be to expose to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues.[117] (citations omitted).

In a lengthy dissent, Judge Callahan accused the majority of substituting the jury's findings with its own "diagnosis": "Weaving isn't disabled, he's just a jerk."[118] Judge Callahan accused the majority of usurping the jury's role and gutting their controlling precedent in *McAlindin.* He contended that the majority sacrificed the Ninth Circuit precedent in favor of the Second Circuit's decision in *Jacques*.[119] Judge Callahan outlined a number of reasons why he was unable to concur with the majority decision:

> (1) The majority selectively reviewed the evidence to cast Weaving in an unsympathetic light, ignoring the more complete evidence available to the jury.[120]
>
> (2) The evidence showed that Weaving was well beyond being merely cantankerous or troublesome; he had problems in his interactions with just about everyone throughout his career in law enforcement. "The majority's suggestion that Weaving's "interpersonal problems" were limited to his interactions with peers and subordinates is dead wrong. . . . He was not simply being "a jerk" who refused to control himself."[121]
>
> (3) "Not all disabilities are obvious. To a casual observer, Matthew Weaving may not appear to be disabled. But that doesn't give a panel of appellate judges license to brush away the contrary medical evidence and jury findings. Mental disabilities that cause socially unacceptable behavior are less obvious than physical

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[116] *Id.* at 1113.
[117] *Id.*
[118] *Id.* at 1114, 1116 (Callahan, J., dissenting).
[119] Jacques v. DiMarzio, Inc., 386 F.3d 192 (2d Cir. 2004).
[120] Weaving v. City of Hillsboro, 762 F.3d 1106, 1114-15 (9th Cir. 2014).
[121] *Id.* at 1119-20.

disabilities, but the Americans with Disabilities Act protects those suffering from either form of disability equally."[122]

IV. ANALYSIS

Several legal scholars have agreed with Judge Callahan's dissent and argued that the *Weaving* case was badly decided.[123] Although the Ninth Circuit majority had noted that the ADAAA had broadened the definition of disability, specifically "substantially limits," it nevertheless still relied on *Jacques,* a pre-amendment case that was even more restrictive than the Ninth Circuit itseslf had been in *McAlindin*. "Had the Ninth Circuit bothered to look closely at post-ADAAA case law and the EEOC's post-ADAAA regulations and guidance, it would have understood that the ADA covered Weaving. Specifically, Weaving's ADHD, a neurobehavioral disorder, substantially limited him in interacting with others and also in neurological functioning."[124] The Ninth Circuit was mistaken in determining that Weaving was not substantially limited; he should have been evaluated without regard to the "compensatory mechanisms" that had allowed him to receive promotion and high-level assignments.[125] Considering the amended EEOC guidelines regarding substantial limitations,[126] Weaving would qualify; his ability to successfully interact in a broad range of jobs was limited.[127] In a post-ADAAA world, there should have been no question that the plaintiff was disabled: ADHD is a neurobehavioral disorder that substantially limits neurological functioning and interacting with others.[128]

On the other hand, the Ninth Circuit was appropriately concerned about "expos[ing] to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues,"[129] The potential for charges of illegal harassment would create liability for the police station if the administrators did not curb Weaving's belittling and intimidating abuse.

Also to be considered is the fact that apparently Weaving selected his victims. His targets were co-workers or subordinates. His superiors suffered no inappropriate communications from him. If Weaving were truly disabled would he be able carefully select his victims? By the very nature of a disability it is a disorder that is not controllable.

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[122] *Id.* at 1121.
[123] *See* Barry, *supra* note 109; Concannon, *supra* note 11; Muller, *supra* note43.
[124] Barry, *supra* note 109, at 225-26.
[125] *Id.* at 226.
[126] 29 C.F.R. § 1630.2(j)(5)-(6) (2011).
[127] Barry, *supra* note 109, at 226.
[128] *Id.* at 241.
[129] Weaving v. City of Hillsboro, 763 F.3d 1106, 1114 (9th Cir. 2014).

When the disability is extreme, i.e., the person is truly out of control and unable to interact with others, then another issue arises; is that person a qualified individual? Most employment situations require workers to be able to interact with supervisors, subordinates, co-workers and customers. That is an essential function of most positions. If disabled employees can prove an inability to interact with others haven't they also proven that they are not qualified for the positions?

Last, this particular disability, interacting with others, is unique in that the disability itself potentially inflicts harm on others in the workplace. Congress certainly intended to create a shield for those suffering from unjust disability discrimination, but it likely had not anticipated that some employees might attempt to use it as a sword arguing that they had a right to abuse others because of their disability.

V. CONCLUSION

In enacting the ADA, Congress consciously chose to protect individuals with both mental and physical impairments. In the 2008 amendments Congress intentionally expanded the definition of disability, disorders that substantially limit major life activities. For years the federal courts have struggled with the question if the ability to interact with others is a disability protected by the act. Two circuits have answered in the affirmative that interacting with others is a major life activity, but employee plaintiffs have consistently failed to prove that their specific disorder was one that substantially limits a major life activity. As one legal scholar has noted, "[j]udges, and indeed employers, are likely concerned that if they recognize interacting with others in the context of mental disability, they will be validating frivolous claims brought by 'otherwise normal' employees who are simply 'difficult' and manipulating the ADA to secure preferable and unwarranted concessions."[130] An even greater risk is that by protecting disabled employees who are unable to effectively interact with others, court may be creating greater liability for employers because of the damage done to others in the work environment.

[130] Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS .L. REV. 1139, 1169-70.