South Carolina Law Review

Volume 57 | Issue 2 Article 4

Winter 2005

Limiting Limitations: The Scope of the Duty of Reasonable Accommodation under the Americans with Disabilities Act

Kelly Cahill Timmons
Georgia State University College of Law

LIMITING "LIMITATIONS": THE SCOPE OF THE DUTY OF REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT

KELLY CAHILL TIMMONS*

I. INTRODUCTION

A truck driver with a back problem is disabled under the Americans with Disabilities Act (ADA) because the back problem substantially limits him in the major life activity of reproduction.[1] His back problem also renders him unable to perform the lifting required in his current job.[2] Does the duty of reasonable accommodation require his employer to transfer him to a vacant position that involves no lifting?[3]

---

* Assistant Professor, Georgia State University College of Law. B.A., Michigan State University; J.D., Vanderbilt University School of Law. I would like to thank my colleagues Mary Radford and Wendy Hensel for their helpful comments.

1. *See* Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 686 (8th Cir. 2003).
2. *Id.*
3. *See id.* at 684, 686–87.

An office worker with diabetes is disabled under the ADA because her diabetes substantially limits her in the major life activity of eating.[4] Her diabetes caused her to develop a vision impairment called background retinopathy.[5] Does the duty of reasonable accommodation require her employer to provide her with a device to enlarge the text on her computer screen?[6]

The ADA includes in its definition of prohibited employment discrimination "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[7] Courts and scholars have devoted considerable attention to several parts of this statutory language, exploring the meaning of "disability," "qualified," and "reasonable accommodation." Receiving less judicial scrutiny—and no scholarly scrutiny—is the meaning of "limitations" in the ADA's description of the duty of reasonable accommodation. What limitations faced by a disabled individual must an employer accommodate?

The ADA differs from other statutes prohibiting employment discrimination in two main respects. First, the statute limits its protected class to qualified individuals with disabilities, generally meaning individuals who have a physical or mental impairment that substantially limits one or more major life activities but are able to perform the essential functions of a particular job with or without reasonable accommodation.[8] Second, the statute's duty of reasonable accommodation requires more than mere equal treatment of disabled individuals; employers must make reasonable adjustments to both the workplace and the disabled employee's job to provide protected individuals an equal opportunity to succeed in the workplace.[9]

A recent line of cases, best represented by the decision of the United States Court of Appeals for the Second Circuit in *Felix v. New York City Transit Authority*,[10] reads these statutory provisions together, restricting the scope of the duty of reasonable accommodation. The *Felix* court held that employers need to accommodate only those limitations causally connected to the employee's substantially limited major life activity.[11] If the requested accommodation is unrelated to the substantially limited major life activity that brought the employee within the ADA's protected class, the employer is not required to provide it, even if the employee needs the accommodation because of another limitation caused by the disability.[12]

Is the *Felix* limit on the limitations an employer must accommodate an appropriate interpretation of the scope of the duty of reasonable accommodation

---

4. *See* Lawson v. CSX Transp., Inc., 245 F.3d 916, 926 (7th Cir. 2001) (finding that an individual with diabetes may be substantially limited in the major life activity of eating).

5. *See id.* at 919.

6. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT 39 (2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html ("Since the retinopathy is a consequence of the diabetes (an ADA disability), the request must be granted unless undue hardship can be shown").

7. 42 U.S.C. § 12112(b)(5)(A) (2000).

8. *See infra* Part II.A.

9. *See infra* Part II.B.

10. 324 F.3d 102 (2d Cir. 2003).

11. *Id.* at 107.

12. *Id.*

under the ADA? The duty of reasonable accommodation is a critical component of the ADA's protections, requiring employers to view their standard workplace structures and policies—developed based on a norm of a worker without physical or mental impairments—as contingent. Interpreting the scope of the duty of reasonable accommodation too narrowly will thwart Congress's goal of equal employment opportunity for individuals with disabilities. On the other hand, courts have frequently stated that the ADA's requirement of reasonable accommodation should result in a level playing field for individuals with disabilities, rather than providing them an unfair advantage through preferential treatment.[13] Requiring employers to accommodate any limitation flowing from an employee's disability—even when the limitation is minor and shared by other, nondisabled employees—could arguably grant the disabled employee preferential treatment.

This Article explores whether the *Felix* limit on the limitations an employer must accommodate represents the appropriate balance between guaranteeing equal opportunity and avoiding unwarranted preferential treatment for individuals with disabilities. Part II outlines the limited class protected by the ADA and the statute's duty of reasonable accommodation. Part III describes both the *Felix* district and appellate court decisions and critiques the reasoning of both courts. Part III then discusses judicial decisions rejecting as well as following *Felix*. The latter category includes *Wood v. Crown Redi-Mix, Inc.*,[14] a case presenting a strong argument that—unless the *Felix* limit on limitations applies—the plaintiff will receive preferential treatment.[15]

Part IV assesses the *Felix* limit on limitations in light of the concern about preferential treatment, considering lessons from the debate over whether there is a duty to accommodate plaintiffs who are only regarded as disabled and the implications of *US Airways, Inc. v. Barnett*,[16] the only Supreme Court decision interpreting the duty of reasonable accommodation. Based on this guidance—and on insight from the recent scholarship highlighting the similarities between the duty of reasonable accommodation and Title VII's prohibition of disparate impact discrimination—this Article rejects the *Felix* rule. The duty of reasonable accommodation should not encompass only those limitations causally connected to an individual's substantially limited major life activity. This Article contends, however, that the duty of reasonable accommodation should apply only when there is a substantial conflict between the individual's disability-related limitation and the challenged workplace practice or structure. Part V concludes by discussing the practical dangers of *Felix* and its progeny.

13. *See infra* note 202.
14. 339 F.3d 682 (8th Cir. 2003).
15. *Id.* at 687.
16. 535 U.S. 391 (2002).

II. THE ADA: PROVIDING SIGNIFICANT PROTECTION TO A LIMITED PROTECTED CLASS

A. Limited Protected Class and the Catch-22 of "Disability" and "Qualified"

Unlike Title VII of the Civil Rights Act of 1964, which does not limit its protection to members of certain classes,[17] the ADA protects only qualified individuals with disabilities from discrimination because of disability.[18] Title I of the ADA defines "qualified individual with a disability" as "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."[19] An individual has a disability within the meaning of the ADA if he or she has "a physical or mental impairment that substantially limits one or more of [his or her] major life activities," "a record of such an impairment," or is "regarded as having such an impairment."[20]

The definition of disability turns on the meaning of two phrases: "substantially limits" and "major life activities."[21] Courts have interpreted both phrases narrowly, excluding many individuals with physical or mental impairments from the ADA's protected class.[22] However, the Supreme Court's first decision interpreting the ADA, *Bragdon v. Abbott*,[23] adopted a broad view of what constitutes a major life activity and when that activity is substantially limited.[24] Noting that the term "major" indicates "'comparative importance'" and "'significance,'"[25] the Court held that reproduction is a major life activity because "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself."[26] The Court concluded, moreover, that the plaintiff—who had asymptomatic HIV—was

17. 42 U.S.C. §§ 2000e-1 to -17 (2000). *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 504 (1999) (Stevens, J., dissenting) (noting that "every single individual in the work force" is protected by Title VII); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279–80 (1976) (holding that Title VII's prohibition of race discrimination is enforceable by whites as well as blacks); Brill v. Lante Corp., 119 F.3d 1266, 1270 (7th Cir. 1997) (stating that all men and women are members of the protected class in sex discrimination cases).

18. 42 U.S.C. § 12112(a) (2000).

19. *Id.* § 12111(8).

20. *Id.* § 12102(2).

21. In most cases, the parties do not dispute whether the plaintiff has a physical or mental impairment. The ADA does not define the term "impairment," but regulations issued by the Equal Employment Opportunity Commission (EEOC) provide that a physical or mental impairment includes "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more" specified body systems, or "[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)–(2) (2004).

22. According to the Supreme Court, the phrases "substantially limits" and "major life activities" must be "interpreted strictly to create a demanding standard for qualifying as disabled." Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

23. 524 U.S. 624 (1998).

24. *Id.* at 639, 641.

25. *Id.* at 638 (quoting Abbott v. Bragdon, 107 F.3d 934, 939, 940 (1st Cir. 1997)).

26. *Id.* In light of "[t]he breadth of the term," the Court rejected the defendant's argument that only activities with a "public, economic, or daily dimension" could be major life activities. *Id.*

substantially limited in the major life activity of reproduction because "[t]he Act addresses substantial limitations on major life activities, not utter inabilities."[27]

In subsequent cases, however, the Court took a stricter view of major life activities and substantial limitation. In *Sutton v. United Air Lines, Inc.*,[28] the Court held that when determining whether an impairment substantially limits a major life activity, courts must consider the impairment in its corrected or mitigated state.[29] The Court also expressed doubt regarding the viability of characterizing "working" as a major life activity,[30] and held that an individual is substantially limited in working only if the impairment prevents the individual from working in a broad class of jobs.[31] In *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*,[32] the Court held that, to be substantially limiting, an impairment must "prevent[] or severely restrict[]" the performance of the major life activity.[33] Without referencing its holding in *Bragdon* that reproduction is a major life activity,[34] the Court reasoned that "major life activities" are "those activities that are of central importance to daily life."[35]

This narrow approach to the definition of disability has continued in the lower courts. Courts generally agree that the activities listed by the Equal Employment Opportunity Commission (EEOC) in its regulations—"caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"[36]—are major life activities,[37] and many courts have found thinking, eating, and sleeping to be major life activities as well.[38] However, courts have rejected driving as a major life activity,[39] some courts have concluded that

---

27. Bragdon v. Abbott, 524 U.S. 624, 641 (1998). The Court noted that conception and childbirth—while not impossible for an individual with HIV—"are dangerous to the public health" and concluded this limitation "meets the definition of a substantial limitation." *Id.*

28. 527 U.S. 471 (1999).

29. *Id.* at 482. Accordingly, individuals whose impairments are corrected by measures such as medication are unprotected from discrimination because of their impairments unless they can show their employer regarded them as disabled or treated them differently because of a record of disability.

30. *Id.* at 492.

31. *Id.* Moreover, even if an employer rejects an applicant for employment because of the applicant's impairment, the applicant will not necessarily succeed in establishing that the employer regarded him or her as substantially limited in the major life activity of working. Rather, to make such a showing, the applicant must prove that the employer regarded him or her as unable to perform a broad class of jobs. *Id.* at 494–95.

32. 534 U.S. 184 (2002).

33. *Id.* at 198.

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

35. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 197.

36. 29 C.F.R. § 1630.2(i) (2004).

37. *See, e.g.*, EEOC v. United Parcel Serv., Inc., 306 F.3d 794, 801 (9th Cir. 2002) (holding that seeing is a major life activity); Emerson v. N. States Power Co., 256 F.3d 506, 511 (7th Cir. 2001) (holding that learning and working are "established major life activities"); Muller v. Costello, 187 F.3d 298, 312 (2d Cir. 1999) (holding that breathing is a major life activity).

38. *See, e.g.*, Brown v. Cox Med. Ctrs., 286 F.3d 1040, 1044–45 (8th Cir. 2002) (holding that "the ability to perform cognitive functions" is a major life activity); Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1134 (9th Cir. 2001) (holding that "'caring for oneself'" is a major life activity) (quoting 29 C.F.R. § 1630.2(i)); Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001) (holding that eating is a major life activity); Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999) (holding that sleeping is a major life activity).

39. *See, e.g.*, Chenoweth v. Hillsborough County, 250 F.3d 1328, 1329–30 (11th Cir. 2001) (stating that "[i]t would at the least be an oddity that a major life activity should require a license from the state, revocable for a variety of reasons including failure to insure"); Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998) (stating that plaintiff "identified a number of activities

concentrating is not a major life activity,[40] and two federal appellate courts have suggested that interacting with others is not a major life activity.[41] Moreover, some courts have adopted exacting standards for determining when individuals are substantially limited in performing various major life activities, such as walking,[42] lifting,[43] and sleeping.[44] Claims based on the major life activity of working also rarely succeed, due to the difficulty of proving inability to work in a broad class of jobs.[45]

Plaintiffs who satisfy the disability requirement for membership in the ADA's protected class often risk not satisfying the other requirement: that they are qualified for the position in question,[46] meaning they are able to perform the essential functions of the position with or without reasonable accommodation.[47] Both courts and commentators have noted this Catch-22 between "disability" and "qualified":

---

that cannot be deemed major league, such as driving").

40. Linser v. Ohio Dep't of Mental Health, No. 99-3887, 2000 U.S. App. LEXIS 25644, at *9 (6th Cir. Oct. 6, 2000) (holding that "concentrating is not a major life activity"); *Pack*, 166 F.3d at 1305 ("Concentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an 'activity' itself.").

41. Davis v. Univ. of N.C., 263 F.3d 95, 101 n.4 (4th Cir. 2001) (expressing "some doubt" as to whether "the ability to get along with others is a major life activity"); Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (suggesting that getting along with others is not a major life activity because "[t]he concept . . . is remarkably elastic, perhaps so much so as to make it unworkable as a definition"). The Second and Ninth Circuits, however, have held that interacting with others is a major life activity. *See* Jacques v. DiMarzio, Inc., 386 F.3d 192, 202 (2d Cir. 2004); McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999).

42. McCoy v. USF Dugan, Inc., 42 F. App'x 295, 297 (10th Cir. 2002) (holding as a matter of law that an individual with multiple sclerosis—whose equilibrium was affected during flare-ups of her condition, requiring her to hold onto the wall when walking and causing her to fall at times—was not substantially limited in the major life activity of walking); Kelly v. Drexel Univ., 94 F.3d 102, 105–08 (3d Cir. 1996) (holding as a matter of law that an employee with degenerative hip disease was not substantially limited in the major life activity of walking, even though he walked with a limp, could walk only a limited distance, had trouble climbing stairs, and, according to his physician, had "great difficulty in walking around").

43. Marinelli v. City of Erie, Pa., 216 F.3d 354, 363–64 (3d Cir. 2000) (holding that an employee's inability to lift more than ten pounds "does not render him sufficiently different from the general population such that he is substantially limited in his ability to lift").

44. Boerst v. Gen. Mills Operations, Inc., 25 F. App'x 403, 407 (6th Cir. 2002) ("Getting between two and four hours of sleep a night, while inconvenient, simply lacks the kind of severity we require of an ailment before we will say that the ailment qualifies as a substantial limitation under the ADA."); Pack v. Kmart Corp., 166 F.3d 1300, 1306 (10th Cir. 1999) (holding that the plaintiff who experienced periods of sleep disruption—such as sleeping only two or three hours per night—was not substantially limited in the major life activity of sleeping).

45. In one noteworthy case, the District of Columbia Circuit overturned a jury verdict in favor of a plaintiff whose degenerative disc disease limited the amount he could lift to no more than 20 pounds, who lacked a high school diploma, and whose entire job history consisted of heavy labor. The court overturned the jury verdict because he "offered no significantly probative evidence . . . of the number and types of positions available in his local job market." Duncan v. Washington Metro. Area Transit Auth., 240 F.3d 1110, 1113 (D.C. Cir. 2001) (en banc). Because the plaintiff failed "to demonstrate that his back impairment substantially limited his ability to work," the court concluded that he was not disabled under the ADA. *Id. See also* Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996) (holding that a "twenty-five pound lifting limitation—particularly when compared to an average person's abilities—does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity").

46. 42 U.S.C. § 12112(a) (2000) (prohibiting "discriminat[ion] against a qualified individual with a disability").

47. *Id.* § 12111(8) (defining "qualified individual with a disability" as "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").

an individual's impairment must be limiting enough that it constitutes a disability, yet not so limiting that it renders the individual unable to perform the essential functions of his or her job.[48] Faced with evidence that a plaintiff performed his or her job well, some courts have concluded that the plaintiff must not have an actual disability.[49] The conflict inherent in demonstrating disability while remaining qualified for one's position may be particularly formidable for plaintiffs asserting substantial limitation in the major life activities of thinking[50] and interacting with others.[51]

---

48. *See, e.g.*, Calero-Cerezo v. United States Dep't of Justice, 355 F.3d 6, 22–23 (1st Cir. 2004) (noting the "conundrum" of the law requiring "the individual to be both substantially limited and reasonably functional"); Oliva v. Pride Container Corp., 81 F. Supp. 2d 907, 911 (N.D. Ill. 2000) (stating that plaintiff "falls into this catch-22 situation faced by ADA plaintiffs, i.e. the difficult task of proving that they are sufficiently impaired to be considered disabled yet still able to perform the essential duties of the job"); Jonathan Brown, *Defining Disability in 2001: A Lower Court Odyssey*, 23 WHITTIER L. REV. 335, 381 (2001) (noting that "[t]he two requirements—showing that one is both disabled and qualified—stand in tension with one another and create a catch-22 for plaintiffs"); Chai R. Feldblum, *Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. J. 91, 160 (2000) (referring to the "'catch-22'" facing plaintiffs who "must prove that their impairments (even with mitigating devices or medication) cause a substantial limitation in some life activity, and yet, at the same time, do not make them unqualified for the jobs they seek").

49. *See, e.g.*, Steele v. Thiokol Corp., 241 F.3d 1248, 1254 (10th Cir. 2001) (holding that a plaintiff with depression and obsessive-compulsive disorder was not substantially limited in the major life activity of sleeping because he presented "no evidence that his sleep problems made it difficult for him to go to work and do his job well or affected his overall health in a severe or permanent manner"); Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 953 (3d Cir. 1996) (concluding that plaintiff's "ability to function normally despite what appear to be serious psychological and emotional problems. . . . ironically establishes that he was not substantially limited in a major life activity").

50. Courts have held that for individuals to be substantially limited in the major life activity of thinking, an impairment must prevent or severely restrict them from thinking. Collins v. Prudential Inv. & Ret. Servs., 119 F. App'x 371, 374–75 (3d Cir. 2005). Based on this standard, one court concluded that a plaintiff who, following a serious head injury, "was diagnosed with traumatic brain injury with cognitive impairments, including reduced short term memory, reduced problem solving capability, and extended mental processing time" was not disabled. Mulholland v. Pharmacia & Upjohn, Inc., 11 AD Cases 1233, 1235, 1240–41 (W.D. Mich. 2001). *See also* Doyal v. Okla. Heart, Inc., 213 F.3d 492, 495, 498 (10th Cir. 2000) (concluding that the plaintiff who had major depression and anxiety attacks was not substantially limited in thinking, despite the fact that she was discharged due to "her inability to make decisions and her lapses of memory, judgment, and confidentiality" and despite her observed difficulty "making even simple decisions"). *But see* Head v. Glacier Nw., Inc., 413 F.3d 1053, 1057, 1061 (9th Cir. 2005) (holding that the plaintiff who testified—without medical evidence—that his bipolar disorder and/or depression caused him to be unable to stay focused for more than brief periods of time and limited his short-term memory, "alleged sufficient evidence to demonstrate a substantial impairment in the major life activity of thinking"). Courts have reasoned, moreover, that plaintiffs who perform their jobs successfully cannot be substantially limited in thinking. *Collins*, 119 F. App'x at 376 (affirming a directed verdict in favor of the defendant employer on the ground that plaintiff did not have a disability because "her testimony clearly shows that her claimed life-long ADHD/ADD affliction did not [a]ffect her ability to successfully engage in a wide variety of professional and community activities").

51. Case law suggests that an impairment substantially limits the major life activity of interacting with others only when it renders the plaintiff completely unable to engage in such interaction. *See, e.g.*, Jacques v. DiMarzio, Inc., 386 F.3d 192, 203 (2d Cir. 2004) (holding that a plaintiff is "'substantially limited' in 'interacting with others'" only "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" and that "a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful" does not satisfy the standard); Rohan v. Networks Presentations LLC, 375 F.3d 266, 275 (4th Cir. 2004) (holding that a plaintiff with PTSD was not substantially limited in interacting with others even though "'she avoid[ed] making friends,'" could only "'make a minimal effort [at having] a social life,'" and suffered intermittent episodes in which she was completely unable

In light of the Catch-22 between "disability" and "qualified," some commentators have argued that plaintiffs should be strategic in selecting an arguably substantially limited major life activity and, in particular, avoid relying on the major life activity of working.[52] Commentators have appeared to assume, however, that once a plaintiff falls within the ADA's protected class the plaintiff could access all of the statute's protections against disability discrimination, including the duty of reasonable accommodation.[53] They expressed no concern that the plaintiff's choice of asserted major life activity would restrict the plaintiff's ability to access such protection.

B. A Broader Understanding of Discrimination: The Duty of Reasonable Accommodation

As discussed above, the ADA protects far fewer people from discrimination because of their impairments than Title VII protects from discrimination because of their race or sex. One oft-asserted reason for the ADA's limited coverage is that

---

to interact with others); Bell v. Gonzales, No. Civ. A. 03-163 (JDB), 2005 WL 691865, at *8 (D.D.C. Mar. 25, 2005) (holding that a plaintiff with Tourette's Syndrome, whose "visible and audible tics cause some people to avoid or ridicule him, people often regard him as 'strange,' and co-workers have often misinterpreted his words, gestures, and behaviors as rude, dismissive, aggressive, nasty, and controlling," was not substantially limited in interacting with others because he "has the basic ability to communicate and interact with others in an objective mechanical sense"). *But see Head*, 413 F.3d at 1060–61 (holding that a plaintiff who testified that his bipolar disorder, depression, or both, caused him to "avoid[] crowds, stores, . . . doctor's appointments" and even "telephone interaction . . . alleged sufficient evidence to demonstrate a substantial impairment in the major life activity of interacting with others"). Plaintiffs who are completely unable to interact with others, however, are likely to be qualified for few jobs. *See, e.g.*, Gilday v. Mecosta County, 124 F.3d 760, 765 (6th Cir. 1997) ("The ability to get along with coworkers and customers is necessary for all but the most solitary of occupations."); Boldini v. Postmaster Gen., 928 F. Supp. 125, 131 (D.N.H. 1995) (stating that "essential to the adequate performance of any job is the ability of an employee to accept and follow instructions and refrain from contentious arguments and insubordinate conduct with supervisors, co-employees or customers"). *See also* Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1188 (noting that plaintiffs relying on the major life activity of interacting with others "are thus placed in an unenviable Catch-22: if they are disabled, they are not qualified, and if they are qualified, they are not disabled").

52. Brown, *supra* note 48, at 382 (noting that the Catch-22 is particularly problematic "for plaintiffs claiming that they are restricted only in the major life activity of working"); Feldblum, *supra* note 48, at 145–46 (asserting that the plaintiff in a particular case should have claimed substantial limitation in the major life activity of writing, rather than that of working); *id.* at 161 (suggesting that individuals with diabetes may be substantially limited in the major life activity of eating).

53. *See* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 22 (2005) (stating that once a plaintiff proves she is disabled and qualified, the plaintiff "is within the ADA's protected class and . . . the employer is required to redesign workplace policies, practices, equipment, and procedures"); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 317 (2001) (stating that the ADA "direct[s] that the finding of a disability affecting a major life activity triggers a duty of reasonable accommodation"); Erica Worth Harris, *Controlled Impairments under the Americans with Disabilities Act: A Search for the Meaning of "Disability,"* 73 WASH. L. REV. 575, 586 (1998) (suggesting that once a plaintiff falls within the ADA's protected class, the plaintiff is entitled to "the benefits of reasonable accommodation"); Brian R. Gin, *Genetic Discrimination: Huntington's Disease and the Americans with Disabilities Act*, 97 COLUM. L. REV. 1406, 1413 (1997) ("If an employee or applicant belongs to a protected class, the employer must offer 'reasonable accommodations' that will enable the individual to perform the essential functions of the job—unless such accommodations will cause the employer to suffer 'undue hardship.'").

the ADA demands more of employers than Title VII.[54] Both statutes prohibit discrimination,[55] but the ADA defines prohibited discrimination as including the failure to reasonably accommodate the limitations of disabled individuals.[56] Employers cannot avoid liability under the ADA simply by treating all employees the same; sometimes employers must take the limitations of an individual with a disability into account and alter the workplace or the job accordingly.[57]

The ADA defines "reasonable accommodation" broadly—including both physical and nonphysical changes to the work environment.[58] The statute provides that reasonable accommodation may involve

> making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[59]

Other than these examples of possible reasonable accommodations, the statute does not provide guidance as to when a particular accommodation is or is not reasonable. The ADA does contain, however, an outer limit on the duty of reasonable accommodation in the concept of "undue hardship." An employer is not required

---

54. *See* Issacharoff & Nelson, *supra* note 53, at 358 (arguing that the Supreme Court's "narrowing of the definition of 'disabled' may prove the easiest and most effective way for the Court to limit the seemingly unfathomable potential sweep of ADA claims" due to the duty of reasonable accommodation). Even Susan Stefan, who has been very critical of courts' narrow interpretations of the definition of disability, acknowledges that "[t]he substantial limitation requirement makes sense as a parallel to the reasonable accommodation requirement imposed on employers. If employers must spend money or readjust their policies and practices, then there is an understandable incentive to reasonably limit the number of people who can assert such claims." SUSAN STEFAN, HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES 88 (2002).

55. 42 U.S.C. § 2000e–2(a) (2000); *id.* § 12112(a).

56. Three provisions of the ADA embody the duty of reasonable accommodation. The determination of whether one is "qualified" includes an inquiry into reasonable accommodation: the individual must be able to perform the essential functions of the position "with or without reasonable accommodation." *Id.* § 12111(8). Moreover, as part of the statute's prohibition of disability discrimination, the ADA prohibits: (1) "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business," *id.* § 12112(b)(5)(A), and (2) "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of [the employer] to make reasonable accommodation to the physical or mental impairments of the employee or applicant," *id.* § 12112(b)(5)(B).

57. *See* Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1199–1200 (2003) (explaining that "discrimination under the ADA means something quite distinct from what it means under Title VII" because the "distinctive thrust [of the ADA] is a 'difference' model, requiring employers to treat individuals with disabilities differently and more favorably than others"); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 2–3 (1996) (noting that "unlike Title VII, the ADA also requires employers to take some disabilities into account by providing 'reasonable accommodations' to disabled workers who request them").

58. 42 U.S.C. § 12111(9) (2000).

59. *Id.*

to make a reasonable accommodation if the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."[60] Undue hardship is defined as "an action requiring significant difficulty or expense," viewed in light of "the nature and cost of the accommodation," as well as specific factors relevant to the particular employer, such as its overall size and financial resources and the size and financial resources of the facility in question.[61]

In contrast to its multiple decisions interpreting the definition of disability, the Supreme Court has decided only one case interpreting the duty of reasonable accommodation, *US Airways, Inc. v. Barnett*.[62] In *Barnett*, the Court resolved the specific question of whether the duty of reasonable accommodation required an employer to reassign a disabled employee—unable, by reason of his disability, to perform his current job—to a vacant position if the employer's seniority system granted other employees superior rights to bid for the job in question.[63] The Court held that the duty of reasonable accommodation ordinarily does not require employers to transfer disabled employees to vacant positions in conflict with the provisions of a seniority system.[64] In making this decision, the Court clarified that the term "reasonable" functions as a limit on the duty of employers to accommodate disabled employees.[65] A plaintiff must show that an accommodation is reasonable "ordinarily or in the run of cases"; if a plaintiff makes such a showing, the employer can attempt to prove "special . . . circumstances that demonstrate undue hardship in the particular circumstances."[66]

Lower court decisions generally have provided little guidance on the scope of the duty of reasonable accommodation. Rather than explaining what makes a particular accommodation reasonable, courts have held that certain accommodations requested by plaintiffs are unreasonable as a matter of law, such as reassigning the plaintiff to a different supervisor[67] and providing a leave of absence for an indefinite period.[68] Two appellate court decisions, however, are more instructive on the boundaries of the duty of reasonable accommodation, holding that courts must

---

60. *Id.* § 12112(b)(5)(A).
61. *Id.* § 12111(10)(A)–(B).
62. 535 U.S. 391, 393 (2002).
63. *Id.* at 393–94.
64. *Id.* at 403.
65. *Id.* at 400. The *Barnett* Court rejected the plaintiff's argument that "reasonable" simply meant "effective," rendering the affirmative defense of undue hardship as the only limit on an employer's duty to provide effective accommodations to a disabled employee. *Id.* at 399–400. The Court noted that "[i]t is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness" because "[a]n *ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations." *Id.* at 400.
66. US Airways, Inc. v. Barnett, 535 U.S. 391, 401–02 (2002).
67. *See, e.g.*, Coulson v. Goodyear Tire & Rubber Co., 31 F. App'x 851, 858 (6th Cir. 2002) (holding that transferring the plaintiff "so that he will not be required to work with certain other people" is not a required reasonable accommodation); Kennedy v. Dresser Rand Co., 193 F.3d 120, 123 (2d Cir. 1999) (holding that assigning the plaintiff to a different supervisor is not a required reasonable accommodation).
68. *See, e.g.*, Wood v. Green, 323 F.3d 1309, 1314 (11th Cir. 2003) (holding that a leave of absence for an indefinite period is not a reasonable accommodation because the ADA only "covers people who can perform the essential functions of their jobs presently or in the immediate future"); Walsh v. United Parcel Serv., 201 F.3d 718, 727 (6th Cir. 2000) (holding that "when the requested accommodation has no reasonable prospect of allowing the individual to work in the identifiable future, it is objectively not an accommodation that the employer should be required to provide").

balance the costs and benefits of a proposed accommodation in determining whether it is reasonable.[69]

Even though there may be a cost-benefit limit on the scope of the duty of reasonable accommodation, and even though courts have held that some accommodations are unreasonable as a matter of law, it is important to recognize the significance of the duty and its utility to disabled employees. Outside the context of the ADA, employees generally must take jobs and workplaces as they find them.[70] If a worker can perform a job only if the employer provides special equipment or an adjustment in policies, the employer is free to fire or refuse to hire that worker unless the worker is a qualified individual with a disability.[71] But if the worker falls within the ADA's protected class, the duty of reasonable accommodation may require the employer to provide the special equipment or adjust the policy.[72] Moreover, even if a disabled worker is unable to perform all of the functions of the job, the employer still must accommodate the worker by judging him or her based solely on the worker's ability to perform the job's essential functions.[73] Finally, even if the disabled worker is unable—despite reasonable accommodation—to perform the essential functions of the current position, the

---

69. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) ("'Reasonable' is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce."); Vande Zande v. Wisc. Dep't of Admin., 44 F.3d 538, 542–43 (7th Cir. 1995) (noting that the duty of reasonable accommodation does not require even extremely large and wealthy employers, which would have difficulty pleading undue hardship, "to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee"); *see* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 86 (2003) (noting that while appellate courts generally have provided little guidance on the scope of the duty of reasonable accommodation, "a pair of opinions by Judges Posner and Calabresi" are two exceptions). Just as the Supreme Court did seven years later in *Barnett*, *see* 535 U.S. at 399–400, the *Vande Zande* court rejected the plaintiff's argument that reasonable only means "apt or efficacious," such that "[a]n accommodation is reasonable . . . when it is tailored to the particular individual's disability." *Vande Zande*, 44 F.3d at 542. Rather, Judge Posner, writing for the court, noted that "'reasonable' may be intended to qualify (in the sense of weaken) 'accommodation,' in just the same way that . . . the duty of 'reasonable care,' the cornerstone of the law of negligence, requires something less than the maximum possible care." *Id.*

70. Karlan & Rutherglen, *supra* note 57, at 9 (noting that Title VII "essentially takes jobs as it finds them," such that "[t]he failure to undertake positive steps to revamp the job or the environment does not constitute discrimination").

71. *See id.* at 9 (contrasting the ADA, which "declares it illegal to deny an individual an employment opportunity by failing to take account of her disability when taking account of it—in the sense of changing the job or the physical environment of the workplace—would enable her to do the work," with Title VII, which "defines discrimination in a negative sense: employment practices are unlawful only if they prevent individuals from doing the job as the employer defines it").

72. *See* 42 U.S.C. § 12111(9)(B) (2000) (listing "acquisition or modification of equipment or devices" and "appropriate adjustment or modifications of . . . policies" as examples of reasonable accommodations); Skerski v. Time Warner Cable Co., 257 F.3d 273, 286 (3d Cir. 2001) (holding that the duty of reasonable accommodation may have required the employer to provide the plaintiff—who was unable to climb due to a panic and anxiety disorder—with a bucket truck for use during overhead work); Nawrot v. CPC Int'l, 259 F. Supp. 2d 716, 725–26 (N.D. Ill. 2003) (concluding that adjusting the workplace break policy, by providing the diabetic plaintiff extra breaks to allow him to check his blood sugar levels and administer insulin, may be a reasonable accommodation).

73. *See* 42 U.S.C. § 12111(8) (2000) (providing that individuals with a disability are "qualified" if they, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"); Hamlin v. Charter Twp. of Flint, 165 F.3d 426, 429–30 (6th Cir. 1999) (upholding the jury's verdict that the fire department violated the ADA by firing the assistant fire chief who was unable to engage in front-line firefighting because there was "a genuine issue as to whether firefighting [was] an essential function of the position").

ADA lists "reassignment to a vacant position" as a possible reasonable accommodation.[74]

The duty of reasonable accommodation grants considerable rights to individuals falling within the ADA's protected class. However, the exact scope of those rights, according to several commentators, "remains the great unsettled question under the ADA."[75] Unsurprisingly, given this background, some courts have attempted to set boundaries on the duty of reasonable accommodation.[76] Some of these courts have set their boundaries not based on the meaning of "reasonable," but rather on the meaning of "limitations." The holdings of these courts present serious obstacles for some plaintiffs attempting to avoid the Catch-22 between "disability" and "qualified" through their selection of a substantially limited major life activity.

III. *FELIX V. NEW YORK CITY TRANSIT AUTHORITY*: EMPLOYERS NEED ACCOMMODATE ONLY LIMITATIONS CAUSALLY CONNECTED TO PLAINTIFF'S SUBSTANTIALLY LIMITED MAJOR LIFE ACTIVITY

A. District and Appellate Court Opinions in Felix

Felix v. New York City Transit Authority[77] is the primary case holding that the scope of the duty of reasonable accommodation turns on the definition of disability. The plaintiff in *Felix* worked as a railroad clerk for the New York City Transit Authority.[78] As the plaintiff was on her way to relieve another clerk in a subway token booth, she learned that the booth had been firebombed and that the other clerk died in the attack.[79] Following the incident, the plaintiff was diagnosed with post-traumatic stress disorder (PTSD).[80] Characteristics of her condition included sleep

74. 42 U.S.C. § 12111(9)(B) (2000). Some courts have held that the duty of reasonable accommodation requires employers to assign disabled employees to a vacant position even when more qualified individuals also seek that position. *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154, 1169 (10th Cir. 1999) (holding that "reasonable accommodation may require reassignment to a vacant position" and that "requiring the reassigned employee to be the best qualified employee for the vacant job, is . . . unwarranted by the statutory language or its legislative history"); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304–05 (D.C. Cir. 1998) (holding that interpreting "the reassignment provision [in the ADA] as mandating nothing more than that the employer allow the disabled employee to submit his application along with all of the other candidates . . . would render the provision a nullity"). *But see* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000) (holding that "the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant").

75. Karlan & Rutherglen, *supra* note 57, at 8; *see also* Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 144 (2000) (quoting Karlan & Rutherglen, *supra* note 57, at 8); Schwab & Willborn, *supra* note 57, at 1201 (quoting same); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 646 (2004) (quoting same).

76. *See* Issacharoff & Nelson, *supra* note 53, at 358 (referring to "the seemingly unfathomable potential sweep of ADA claims").

77. 154 F. Supp. 2d 640 (S.D.N.Y. 2001), *aff'd*, 324 F.3d 102 (2d Cir. 2003).

78. *Id.* at 644.

79. *Id.* at 645.

80. *Id.* at 654.

disturbance and an inability to work in the subway.[81] Although most railroad clerks worked in underground booths, approximately fifty clerks worked in above-ground offices.[82] The transit authority refused to reassign the plaintiff to an above-ground office as an accommodation of her disability and ultimately discharged her due to her inability to return to a subway position.[83]

The *Felix* trial court found that the plaintiff had a disability within the meaning of the ADA because her PTSD was an impairment that substantially limited her in the major life activity of sleeping.[84] The court also found that a reasonable jury could conclude that the plaintiff was qualified for the position of an office-duty railroad clerk because the ability to work in the subways on an as-needed basis may not be an essential function of that position.[85] Finally, the court found that the plaintiff's known inability to work in the subway placed the transit authority on notice as to the plaintiff's need for the office job reassignment accommodation.[86]

Nonetheless, the district court found that the duty of reasonable accommodation did not require the employer to reassign the plaintiff to an office job "because there was no nexus or causal connection between Felix's ADA-qualifying limitation and the reasonable accommodation sought."[87] The court reasoned that because the plaintiff's substantially limited major life activity was sleeping, she was only entitled to reasonable accommodation of her sleep difficulties, "such as permission to come in late or to take naps during the day."[88] Because the plaintiff did not allege that her sleep difficulties affected her ability to work, the court found she was not entitled to reasonable accommodation in the workplace.[89] According to the court, accommodating limitations other than the limitation defining a plaintiff's disability would broaden the effect of the ADA beyond equal opportunity and create a preference for disabled persons, contrary to the statute's purpose.[90]

On appeal, the United States Court of Appeals for the Second Circuit affirmed the district court.[91] The appellate court first examined the language of the ADA prohibiting "discrimination against an employee 'because of the disability of such individual.'"[92] Based on this language, the court reasoned that "an employer

---

81. *Id.* at 645–46. The plaintiff explained that following the firebombing incident, she was "terrified of being alone and closed in." Felix v. N.Y. City Transit Auth., 324 F.3d 102, 107 (2d Cir. 2003).

82. *Felix*, 154 F. Supp. 2d at 645.

83. Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 645–47 (S.D.N.Y. 2001).

84. *Id.* at 654.

85. *Id.* at 656. The court reasoned that "[g]iven how infrequently office duty Railroad Clerks are actually required to work in the subways each year, and the number of subway duty Railroad Clerks who could fulfill this function, a jury could find that Felix could have been transferred to an office duty position without causing the NYCTA undue hardship." *Id.*

86. *Id.* at 657–58.

87. *Id.* at 660.

88. Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 661 (S.D.N.Y. 2001).

89. *Id.* at 661–62. The court stated that "in deciding ADA employment cases, courts necessarily look at a plaintiff's general ability to work." *Id.* at 661.

90. *Id.* at 662.

91. Felix v. N.Y. City Transit Auth., 324 F.3d 102, 108 (2d Cir. 2003). The Second Circuit's decision included both a concurring opinion and a dissenting opinion, but neither disagreed with the holding that there must be a causal connection between the plaintiff's substantially limited major life activity and the accommodation sought. *See id.* at 108 (Jacobs, J., concurring); *id.* at 109 (Leval, J., dissenting) (expressing agreement "with the majority's perception of this requirement").

92. *Id.* at 104–05 (majority opinion) (quoting 42 U.S.C. § 12112(a) (2000)).

discriminates against an employee with a disability only by failing to provide a reasonable accommodation for the 'disability' which is the impairment of the major life activity."[93] The plaintiff's disability, the court asserted, "was her insomnia which substantially limited her ability to sleep," while her "inability to work in the subway did not substantially limit any major life activity."[94] According to the court, although the plaintiff's insomnia and her inability to work in the subway "stemmed from the same traumatic incident and resultant psychological disorder, the PTSD[,]. . . . this common traumatic origin" did not mean that the plaintiff was entitled to an accommodation for her inability to do subway work,[95] just like an individual who suffered several injuries in a single car accident can receive accommodation only for the injury that left him or her unable to perform a major life activity.

In the court's view, the plaintiff sought "a workplace accommodation for a mental condition which does not flow directly from her disability—the mental condition of insomnia that prevents her from sleeping."[96] The court concluded that only limitations caused by the plaintiff's disability—here, her insomnia—need be accommodated."[97] Like the district court, the court of appeals reasoned that requiring employers to accommodate other limitations of disabled employees would provide them with a preference rather than equal opportunity: it "would transform the ADA from an act that prohibits discrimination into an act that requires treating people with disabilities better than others who are not disabled but have the same impairment for which accommodation is sought."[98] Persons without disabilities who are terrified to work underground are not entitled to any accommodation.[99] Because what entitled the plaintiff to accommodation under the ADA was insomnia—something unconnected to her inability to work in the subway—her request for non-subway work should be rejected just as a request made by an individual with no disabilities would be rejected.

B. Flaws in the Reasoning of the Felix *Courts*

There are serious problems with the reasoning of both the *Felix* district court and appellate court decisions. The district court suggested that disabled individuals are entitled to reasonable accommodation only if they are substantially limited in the major life activity of working.[100] The text of the ADA, however, requires

93. *Id.* at 105.
94. *Id.*
95. Felix v. N.Y. City Transit Auth., 324 F.3d 102, 105 (2d Cir. 2003). The court provided the example of someone injured in a car accident who loses the ability to walk and also suffers some injury to his arms which reduces his typing speed. *Id.* The court stated this individual would not be entitled to accommodation for his arm injury because that injury does not substantially limit a major life activity and is unrelated to his substantially limited major life activity of walking. *Id.*
96. *Id.* at 106.
97. *Id.* at 107.
98. *Id.*
99. Felix v. N.Y. City Transit Auth., 324 F.3d 102, 107 (2d Cir. 2003).
100. *See* Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 661 (S.D.N.Y. 2001) (stating that "[p]laintiffs fail to recognize that in deciding ADA employment cases, courts necessarily look at a plaintiff's general ability to work"); *id.* at 662 (noting that "the limitation that qualified [plaintiff] as a disabled person did not affect her ability to work").

employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,"[101] without any indication that this duty applies only to individuals disabled in the major life activity of working. Not only has the Supreme Court expressed doubt regarding the viability of working as a major life activity,[102] the Court has flatly rejected the proposition that "the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace."[103] With respect to the duty of reasonable accommodation, nothing suggests that the Court would adopt a different view favoring the characterization of working as a major life activity and defining disability in a workplace-specific manner.[104] Moreover, the standard for being substantially limited in the major life activity of working is so exacting that few disabled individuals will satisfy it,[105] yet nothing in the text or legislative history of the ADA indicates that Congress intended the duty of reasonable accommodation to apply to only a narrow subsection of individuals with disabilities.[106]

The *Felix* district court also used questionable reasoning in distinguishing *Bragdon v. Abbott*,[107] in which the Supreme Court held that a plaintiff with asymptomatic HIV was disabled under the ADA because the disease substantially limited her in the major life activity of reproduction.[108] The *Felix* district court asserted that, "given its myriad of symptoms," HIV infection "is *sui generis*."[109] The

---

101. 42 U.S.C. § 12112(a), (b)(5)(A) (2000).

102. Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 200 (2002); Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999).

103. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 201. According to the Court, "the fact that the Act's definition of 'disability' applies not only to" the statute's employment provisions, but also to its provisions on public transportation and public accommodations "demonstrates that the definition is intended to cover individuals with disabling impairments regardless of whether the individuals have any connection to a workplace." *Id. See also* Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 508 (7th Cir. 1998) (noting that a plaintiff's limitations need not "manifest specifically in the workplace before the plaintiff may be accorded disabled status under the statute").

104. Working is disfavored as a major life activity, as evidenced by statements of both lower courts and the EEOC that working should be considered "only when a complainant cannot show she or he is substantially impaired in any other, more concrete major life activity." Mahon v. Craven Crowell, 295 F.3d 585, 590 (6th Cir. 2002); *see also* Pryor v. Trane Co., 138 F.3d 1024, 1026–27 n.15 (5th Cir. 1998) ("'If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.'" (quoting Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 n.10 (5th Cir. 1998))); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, SECTION 902 DEFINITION OF THE TERM DISABILITY § 902.4(c) (2000) ("[T]he determination of whether a person's impairment is substantially limiting should first address major life activities other than working."); *id.* § 902.4(c)(2) ("[O]ne need not determine whether an impairment substantially limits an individual's ability to work if the impairment substantially limits another major life activity.").

105. *See supra* note 45 and accompanying text. Individuals who do satisfy this difficult standard risk falling outside the ADA's protected class because of the Catch-22 between "disability" and "qualified." *See supra* notes 46–49 and accompanying text.

106. *See* 42 U.S.C. § 12101(a)(5) (2000) (stating Congress's finding that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices"); 136 Cong. Rec. 17376 (1990) (providing Senator Dole's statement that the ADA will offer "reasonable accommodations to empower persons with disabilities to utilize their full potential in strengthening the work force").

107. 524 U.S. 624 (1998).

108. Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 660 (S.D.N.Y. 2001) (citing *Bragdon*, 524 U.S. at 641).

109. *Id.* at 661.

court then quoted the Supreme Court's statement in *Bragdon* that "'HIV infection must be regarded as a physiological disorder with a constant detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection,'"[110] in support of the proposition that "[g]iven the panoply of symptoms, it was not a big leap for the Court to decide that HIV infection is an ADA disability for the purposes of Title III."[111] However, the *Bragdon* Court made the quoted statement in the course of concluding that asymptomatic HIV was a "physical *impairment*."[112] The Court never suggested that the numerous symptoms of HIV meant that it did not need to identify a major life activity substantially affected by the impairment. Instead, the Court emphasized that the ADA "is not operative, and the definition [of disability] not satisfied, unless the impairment affects a major life activity."[113] The Court proceeded to hold that the plaintiff's HIV infection substantially limited her in the major life activity of reproduction, and the ADA therefore protected the plaintiff from disability discrimination.[114] The Court did not indicate that the plaintiff would receive protection from the discrimination alleged in the case—the defendant dentist's refusal to treat her in his office—only if the dentist discriminated against her based on the HIV's effect on her ability to reproduce.[115]

Unlike the district court, the Second Circuit in *Felix* recognized that "a plaintiff can seek accommodation at work even if the impairment only qualifies as a disability because of a life activity other than working."[116] Nonetheless, the appellate court decision also features questionable reasoning. The court repeatedly referred to the plaintiff's disability as insomnia.[117] Certainly, if the plaintiff's disability was insomnia, her inability to work in the subway would not be a limitation caused by that disability, and the plaintiff would not be entitled to her requested accommodation. Determining a plaintiff's disability, however, must begin

---

110. *Id.* (quoting *Bragdon*, 524 U.S. at 637).

111. *Id.*

112. *Bragdon*, 524 U.S. at 637 (following its observation about the "constant and detrimental effect" of HIV infection with the conclusion that "HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease") (emphasis added).

113. Bragdon v. Abbott, 524 U.S. 624, 637 (1998). The Court noted, however, that "[g]iven the pervasive, and invariably, fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry." *Id.* The Court also expressed its confidence that "had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities." *Id.*

114. *Id.* at 639.

115. *Id.* at 648. Rather, the Court stated that "[n]otwithstanding the protection given [the plaintiff] by the ADA's definition of disability, [the defendant] could have refused to treat her if her infectious condition 'pose[d] a direct threat to the health or safety of others.'" *Id.* (quoting 42 U.S.C. § 12182(b)(3) (2000)). The Court remanded the case to the court of appeals to determine whether the plaintiff was entitled to summary judgment on the issue of direct threat. *Id.* at 655.

Despite the flaws in the district court's reasoning, however, *Bragdon* is arguably distinguishable from *Felix*. Accordingly, *Bragdon* does not provide a definitive answer regarding the propriety of the *Felix* limit on limitations. *See infra* note 201.

116. Felix v. N.Y. City Transit Auth., 324 F.3d 102, 106 (2d Cir. 2003).

117. *Id.* at 105 (stating that "her disability was her insomnia which substantially limited her ability to sleep"); *id.* at 106 ("Felix seeks a workplace accommodation for a mental condition which does not flow directly from her disability—the mental condition of insomnia that prevents her from sleeping.").

by identifying a physical or mental impairment.[118] The ADA defines disability as "a physical or mental *impairment* that substantially limits one or more . . . major life activities,"[119] rather than as a *limitation* of a major life activity caused by a physical or mental impairment. Insomnia that is not tied to any physical or mental condition is unlikely to qualify as a physical or mental impairment.[120]

The fact that insomnia is a short-hand term for a limitation on the major life activity of sleeping eased the Second Circuit's task in defining the plaintiff's disability as only the limitation on a major life activity,[121] rather than, as the statue indicates, the "physical or mental impairment that substantially limits . . . [a] major life activit[y]."[122] Accordingly, the court's characterization of plaintiff's disability as insomnia rather than PTSD appears simple and accurate. The flaw in the court's rhetoric would be more obvious if the case involved a different major life activity. For example, it would seem awkward if, as in *Bragdon*, the plaintiff had the physical impairment of HIV infection, which substantially limited her major life activity of reproduction, and the court referred to her disability as "reproductive limitations" rather than HIV infection.[123]

The *Felix* plaintiff did not claim—nor did the district court find—that her insomnia constituted an impairment. Rather, the district court properly found that her PTSD constituted a mental impairment, relying on a regulation defining "mental impairment" as "any mental or psychological disorder, such as . . . emotional or mental illness."[124] Given that the plaintiff's impairment, and thus her disability, was PTSD and not insomnia, does either the text of the ADA or precedent support the Second Circuit's holding that the law only entitles the plaintiff to accommodation for her sleeping difficulties?[125]

Although the plaintiff's PTSD constituted a disability only because it substantially limited her major life activity of sleeping, the ADA includes in its definition of prohibited discrimination "not making reasonable accommodations to the known physical or mental *limitations* of an otherwise qualified individual with

---

118. *See Bragdon*, 524 U.S. at 631 (stating that in determining whether plaintiff had a disability, "[f]irst, we consider whether [her] HIV infection was a physical impairment").

119. 42 U.S.C. § 12102(2)(A) (2000) (emphasis added).

120. With the exception of *Felix*, cases consider insomnia an effect of a separate physical or mental impairment and determine whether that *impairment* is a disability because it substantially limits the major life activity of sleeping. *See, e.g.*, Harris v. H&W Contracting Co., 102 F.3d 516, 522 (11th Cir. 1996) (discussing plaintiff's insomnia as a symptom of Graves' disease); Guice-Mills v. Derwinski, 967 F.2d 794, 796 (2d Cir. 1992) (discussing plaintiff's insomnia as a symptom of depression); Fink v. Printed Circuit Corp., 204 F. Supp. 2d 119, 122 (D. Mass. 2002) (discussing plaintiff's insomnia as a symptom of Graves' disease). Other than the *Felix* court, courts have not referred to insomnia as a disability.

121. *Felix*, 324 F.3d at 105.

122. 42 U.S.C. § 12102(2)(A).

123. *See Bragdon*, 524 U.S. at 631 ("We hold respondent's HIV infection was a disability under subsection (A) of the definitional section of the statute."). Similarly, if the plaintiff's mental impairment was obsessive-compulsive disorder, which substantially limited her in the major life activity of caring for herself, it would seem awkward for the court to refer to her disability as "limitations on caring for self."

124. Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 653–54 (S.D.N.Y. 2001) (quoting 29 C.F.R. § 1630.2(h)(2)).

125. *Felix*, 324 F.3d at 107 ("If the requested accommodation addressed a limitation caused by Felix's insomnia, it would be covered by the ADA. . . . However, other impairments caused by the disability need not be accommodated.").

a disability."[126] Significantly, this statutory language delineating the duty of reasonable accommodation does not state that, to be accommodated, limitations must be causally connected to the plaintiff's substantially limited major life activity. The statutory language indicates that Congress anticipated that more than one limitation could flow from an individual's disability, arguably including limitations unconnected to the substantially limited major life activity, and suggests that Congress intended to require employers to accommodate all such limitations.[127] Moreover, the other statutory provision tying reasonable accommodation to the ADA's definition of disability discrimination prohibits employers from "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of [the employer] to make reasonable accommodation to the physical or mental *impairments* of the employee or applicant."[128] This language reinforces the fact that the duty of reasonable accommodation applies to an individual's *impairment*, provided that the impairment satisfies the definition of disability, not to an individual's substantially limited major life activity.

The Second Circuit claimed that the text of the ADA supported its interpretation of the scope of the duty of reasonable accommodation by noting that the duty is imposed as part of the prohibition of discrimination "'because of the disability of such individual.'"[129] According to the court, such discrimination occurs only if the employer does not provide an accommodation for the individual's substantially limited major life activity.[130] However, this understanding of disability discrimination is unduly narrow. When an employer intentionally discriminates against an individual with an actual disability because of that disability, courts do not require the plaintiff to prove that the employer was motivated by—or even knew about—the plaintiff's substantially limited major life activity.[131] Similarly, a plaintiff with an actual disability claiming discrimination in the form of failure to provide reasonable accommodation should not face restrictions based on the

126. 42 U.S.C. § 12112(b)(5)(A) (2000) (emphasis added).

127. This is the position taken by the EEOC. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 6, at 39 ("Reasonable accommodation extends to all limitations resulting from a disability," including the side effects of medication or treatment and "any symptoms or related medical conditions resulting from the disability that cause limitations."); Brief of Amicus Curiae EEOC in Support of Plaintiffs in Favor of Reversal at 9, Felix v. N.Y. City Transit Auth., 324 F.3d 102 (2d Cir. 2003) (No. 01-7967), 2001 WL 34377950 (contending that "the employer must accommodate any known work-related limitations, not just substantial limitations of a major life activity, resulting from the individual's disability").

128. 42 U.S.C. § 12112(b)(5)(B) (2000) (emphasis added).

129. *Felix*, 324 F.3d at 104–05 (quoting 42 U.S.C. § 12112(a)).

130. Felix v. N.Y. City Transit Auth., 324 F.3d 102, 105 (2d Cir. 2003).

131. Assume that the plaintiff has the mental impairment of depression, and that the impairment constitutes a disability because it substantially limits her major life activity of sleeping. Provided that the plaintiff is a qualified individual, the plaintiff only needs to prove that her employer took an adverse employment action against her because of her depression to establish intentional disability discrimination. She does not need to prove that her sleeping difficulties caused the employer's action. An employer's belief about the impairment's effect on the plaintiff's major life activities is relevant only if the plaintiff is attempting to prove that the employer regarded the plaintiff as disabled. *See* Sutton v. United Air Lines, Inc. , 527 U.S. 471, 489 (1999) (stating that a plaintiff satisfies the "regarded as" definition of disability where "(1) a covered entity mistakenly believes that [the plaintiff] has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.").

plaintiff's substantially limited major life activity. At the very least, the fact that the violation of the duty of reasonable accommodation is a form of disability discrimination does not compel such restrictions.[132]

Not only did the Second Circuit strain the language of the ADA, the court also used tenuous reasoning to distinguish other cases,[133] including the Ninth Circuit's decision in *McAlindin v. County of San Diego*.[134] The plaintiff in *McAlindin* suffered from "anxiety disorders, panic disorders, and somatoform disorders" and the court held that those disorders may have substantially limited him in the major life activities of "sleeping, engaging in sexual relations, and interacting with others."[135] The court also concluded that the plaintiff's employer may have violated its duty of reasonable accommodation by "fail[ing] to transfer [the plaintiff] to another job, fail[ing] to give him necessary training, and disciplin[ing] him for sleeping that was caused by his medications."[136] In *Felix*, the Second Circuit stated that "*McAlindin* differs from Felix's situation because McAlindin appeared to be seeking accommodation for the same mental impairments, such as the inability to interact with other people, as constituted his claimed disability."[137] However, the *McAlindin* plaintiff asserted that he was substantially limited in the major life activity of engaging in sexual relations, yet none of his requested accommodations

---

132. The Second Circuit relied on this unduly narrow understanding of disability discrimination to distinguish *Bragdon*. *See Felix*, 324 F.3d at 106–07. Despite the lack of evidence that the plaintiff's limited ability to engage in reproduction influenced the defendant dentist in *Bragdon*, the *Felix* court stated that the discrimination was because of her disability because "the same specific medical condition—the risk of HIV transmission—was responsible for both the impairment of her reproductive capacity and the dentist's unreasonable failure to accommodate her." *Id.* at 106. Other than in its discussion of the "direct threat" defense, however, the Supreme Court's opinion in *Bragdon* indicates no concern with what effect of the plaintiff's HIV infection may have motivated the dentist to refuse to treat her. *See* Bragdon v. Abbott, 524 U.S. 624, 648–55 (1998). Nothing in the opinion suggests that the dentist would not have discriminated against the plaintiff because of her disability if he refused to treat her for a reason other than the risk of HIV transmission—such as a belief that persons infected with HIV are mentally unstable or financially unreliable.

133. The court failed to adequately distinguish its earlier decision in *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001). In *Lovejoy-Wilson*, the court permitted the reasonable accommodation claim of a plaintiff with epilepsy to survive summary judgment, where she requested permission to make bank deposits using a means other than driving, even though driving is not considered a major life activity. *Id.* at 217. If driving is not a major life activity, the *Lovejoy-Wilson* plaintiff should not have been entitled to that accommodation. However, the Second Circuit in *Felix* attempted to distinguish *Lovejoy-Wilson* by stating that "Lovejoy-Wilson's inability to drive is due to the same disability—periodic and sudden loss of all motor control—that qualifies her as disabled because it substantially impairs a major life activity." *Felix*, 324 F.3d at 106. The *Felix* court admitted in a footnote that the *Lovejoy-Wilson* court failed to identify any major life activity substantially limited by the plaintiff's epilepsy. *Id.* at 106 n.1 (citing *Lovejoy-Wilson*, 263 F.3d at 216). The *Lovejoy-Wilson* court concluded that the plaintiff was disabled by noting that the defendant employer "does not dispute that the plaintiff suffers from epilepsy or that epilepsy constitutes a disability under the ADA, a proposition that is well established." *Lovejoy-Wilson*, 263 F.3d at 216. Yet if the *Lovejoy-Wilson* court did not identify a major life activity substantially limited by the plaintiff's epilepsy, but nonetheless held that the plaintiff was entitled to reasonable accommodation, the scope of the duty of reasonable accommodation cannot be coextensive with the substantially limited major life activity. Otherwise a court could never consider a plaintiff's reasonable accommodation claim without identifying the major life activity upon which the plaintiff based the claim of disability status.

134. 192 F.3d 1226 (9th Cir. 1999), *amended by* 201 F.3d 1211 (9th Cir. 2000).

135. *Id.* at 1230.

136. *Id.* at 1236, 1238. The plaintiff sought a transfer because "several of his doctors had advised that he not return to his previous work setting because the negative associations there would impede his recovery." *Id.* at 1231.

137. *Felix*, 324 F.3d at 106.

were causally connected to that activity.[138] Moreover, the *McAlindin* court expressly rejected the proposition that disabled individuals are entitled to accommodation only for limitations causally connected to their substantially limited major life activity:

> [O]nce McAlindin is viewed as disabled, the major life activities affected by the impairment are relevant only to the extent that they affect the type of accommodation that may be necessary and whether the employer has provided a reasonable accommodation. . . . Thus, the sleep disorder and the sexual dysfunction merely help to establish that the impairment (panic disorder after treatment) affects a major life activity; they are not relevant to the reasonable accommodation discussion, however, which focuses on the post-treatment panic disorder's manifestations in the workplace and the employer's response to them.[139]

Perhaps the most illuminating aspect of the Second Circuit's opinion in *Felix* is the court's attempt to distinguish *Vande Zande v. Wisconsin Department of Administration.*[140] In *Vande Zande* the Seventh Circuit held that the duty to accommodate a partially paralyzed woman, who was substantially limited in the major life activity of walking, extended to pressure ulcers that she developed due to her paralysis.[141] The *Felix* court acknowledged that the pressure ulcers did not relate directly to walking but, quoting *Vande Zande*, stated "the ulcers were 'a characteristic manifestation of [the] disability' and thus were 'a part of the underlying disability.'"[142] Thus, the *Felix* court easily accepted that the physical impairment of paralysis may cause pressure ulcers and that the duty of reasonable accommodation requires employers to accommodate a paralyzed employee's pressure ulcers. Later in the Second Circuit's opinion, the court engaged in the same type of reasoning with respect to the physical impairment of AIDS, stating that "[i]n cases involving conditions like AIDS that are discrete diseases with pervasive effects, it will frequently be obvious that the lesser impairment is caused by the disability."[143]

The *Felix* court's approach was different, however, for mental impairments like PTSD. The court stated, "We do not view her insomnia and fear of the subway as a singular mental condition: They are two mental conditions that derive from the same traumatic incident."[144] According to the court, "[I]n situations like plaintiff's

---

138. *McAlindin*, 192 F.3d at 1230, 1236–38.

139. *Id.* at 1237 (citing Bragdon v. Abbott, 524 U.S. 624 (1998)) (describing the opinion in *Bragdon v. Abbott* as "discussing the ability to reproduce as the major life activity at issue with respect to HIV even though the discrimination involved refusal to provide medical care that was in no way connected to reproduction").

140. Felix v. N.Y. City Transit Auth., 324 F.3d 102, 106 (2d Cir. 2003) (distinguishing Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543–44 (7th Cir. 1995)).

141. *Vande Zande*, 44 F.3d at 544.

142. *Felix*, 324 F.3d at 106 (quoting *Vande Zande*, 44 F.3d at 544).

143. *Id.* at 107.

144. *Id.*

where it is not clear that a single, particular medical condition is responsible for both the disability and the lesser impairment, the plaintiff must show a causal connection between the specific condition which impairs a major life activity and the accommodation."[145]

Why was the *Felix* court uncertain that a single medical condition was responsible for both the plaintiff's sleeping problems and her inability to work in the subway? The court was correct that one would not automatically view an inability to work in the subway as a "characteristic manifestation" of PTSD in the same way that pressure ulcers may be a "characteristic manifestation" of paralysis.[146] However, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) provides that "[t]he essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity."[147] The DSM-IV includes "persistent avoidance of stimuli associated with the trauma" as one of the "characteristic symptoms resulting from the exposure to the extreme trauma."[148] A person exhibiting this symptom "commonly makes deliberate efforts to avoid thoughts, feelings, or conversations about the traumatic event . . . and to avoid activities, situations, or people who arouse recollections."[149] Another characteristic symptom of PTSD is "[i]ntense psychological distress . . . or physiological reactivity . . . occur[ing] when the person is exposed to triggering events that resemble or symbolize an aspect of the traumatic event."[150] This description of PTSD reveals why a person would experience an extreme fear of returning to the subway if she developed PTSD after narrowly avoiding death by firebomb in the subway in an incident that killed another worker.[151]

If the *Felix* court was uncertain that the plaintiff's PTSD caused both her sleeping problems and her inability to work in the subway,[152] the court should have responded by requiring medical evidence of such a causal connection, just as a court presumably would require of a plaintiff with any other physical or mental impairment. Moreover, the court's standard of review should be whether a reasonable jury could find such a causal connection. A court should not require the plaintiff to demonstrate a causal connection not only between her impairment and

145. *Id.*

146. *Id.* at 106 (quoting *Vande Zande*, 44 F.3d at 544).

147. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994) [hereinafter DSM-IV]. Other extreme traumatic stressors, exposure to which might trigger PTSD, include "witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate." *Id.*

148. *Id.* at 424–25.

149. *Id.*

150. *Id.* The DSM-IV provides the example of "entering any elevator for a woman who was raped in an elevator." *Id.* at 424.

151. The DSM-IV description of PTSD demonstrates that the plaintiff's insomnia was also a predictable consequence of the impairment. DSM-IV, *supra* note 147, at 425 (stating that an individual with PTSD "has persistent symptoms of anxiety or increased arousal that were not present before the trauma," which "may include difficulty falling or staying asleep").

152. Interestingly, the district court in *Felix* recognized that the plaintiff's impairment "was PTSD which limited her ability to sleep and also prevented her from working in the subways." Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 661 (S.D.N.Y. 2001).

the limitation she wants accommodated, but also between her substantially limited major life activity and the requested accommodation.

The court's reasoning and distinguishment of PTSD from paralysis and AIDS suggest a suspicion about mental impairments as disabilities which merit the full protection of the ADA.[153] The court was forced to conclude that the plaintiff had a disability because PTSD was clearly a mental impairment and medical reports indicated that the plaintiff was "only sleeping one or two hours per night."[154] However, the court restricted the plaintiff's ability to access the protections of the ADA by greatly limiting the scope of the duty of reasonable accommodation.[155] Under the *Felix* court's holding, with the exception of limitations directly related to her insomnia, the plaintiff was protected from discrimination because of her PTSD only to the extent that she could prove disparate treatment.[156] If her PTSD renders her different from other employees in ways other than insomnia, such that equal treatment of the plaintiff is not enough to provide equal opportunity in the workplace, she would have no recourse under the ADA.

C. Judicial Responses to Felix

Despite the demonstrable weaknesses in the *Felix* opinions, only one post-*Felix* case has expressly rejected their holding that employers must accommodate only limitations causally connected to a disabled individual's substantially limited major life activity.[157] The plaintiff in *Arnold v. County of Cook*[158] was a county probation department officer who had back and neck conditions that substantially limited him

---

153. Suspicion of PTSD as an impairment worthy of ADA protection is particularly apparent in the concurring opinion. Judge Jacobs reasoned as follows:

> The dissent puts store in the medical diagnosis that this plaintiff's insomnia is a product of post-traumatic stress disorder. That syndrome is real enough, but it is (as the phrase denotes) a diagnostic grouping in each case of whatever nervous manifestations a particular person suffers in the wake of stress. One person may react to stress by insomnia, another by sleeping overmuch; one person is manic, another is enervated; one overeats, another fasts; one cannot go out in public, another needs a crowd. The diagnosis does not predict the symptom of insomnia, does not suggest its severity or treatment, and therefore cannot be used by an employer to differentiate the disabled from persons who are merely impaired or uncomfortable.

Felix v. N.Y. City Transit Auth., 324 F.3d 102, 109 n.1 (2d Cir. 2003) (Jacobs, J., concurring) (citations omitted). In fact, the DSM-IV lists insomnia as a common consequence of PTSD. *See supra* note 151. Moreover, employers may be unfamiliar with the symptoms of many impairments. In such a case, they will need to rely on information from an employee's doctor to know if the impairment is serious enough to constitute a disability and what limitations flow from that impairment. PTSD is not unusual in this regard.

154. *Felix*, 324 F.3d at 109 n.1 (Leval, J., dissenting).

155. *See id.* at 107 ("However, other impairments not caused by the disability need not be accommodated.").

156. Along with requiring reasonable accommodation, the ADA also prohibits disparate treatment on the basis of disability. Peebles v. Potter, 354 F.3d 761, 765 (8th Cir. 2004). Disparate treatment occurs when an employer treats a person differently from others because of a protected trait such as a disability. *Id.* at 765.

157. As discussed *supra* in notes 133–44 and accompanying text, *McAlindin* and *Vande Zande* also conflict with the *Felix* holding, but those cases were decided prior to *Felix*.

158. 220 F. Supp. 2d 893 (N.D. Ill. 2002).

in the major life activities of pushing and pulling.[159] Because his conditions also made long-distance driving painful, the plaintiff sought as a reasonable accommodation a reduction in the amount of driving associated with his job.[160] His employer asserted that driving was not a major life activity[161] and, relying on *Felix*, contended that "a reasonable accommodation claim fails unless the requested accommodation is directed toward a major life activity impairment."[162]

According to the *Arnold* court, the *Felix* holding conflicts with the text of the ADA, because the statutory provision requiring "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability"[163] "includes nothing to suggest that it applies only to 'substantial' limitations or limitations that impact 'major life activities.'"[164] The court also proposed the following hypothetical:

> Suppose an office worker has severe allergies to a wide range of organic substances. As a result, the worker's ability to care for herself, which is a major life activity under applicable regulations, is substantially impaired in multitudinous ways. One relatively minor effect of her allergies is that she cannot touch rubber bands. Her employer refuses to allow her to substitute metal binder-clips for rubber bands, even though they are equally effective and the cost difference is slight.[165]

Using rubber bands is certainly not a major life activity,[166] nor does it relate directly to the major life activity of caring for oneself. However, the court stated, "it is partly because the rubber band limitation is minor that not accommodating it is unreasonable."[167] Moreover, the court was not concerned that requiring accommodation of all limitations caused by a disabling impairment would result in an unfair preference for individuals with disabilities, reasoning that "[e]very accommodation is in some sense a preference."[168] Rather, the court concluded that the ADA's purpose of eliminating "discrimination 'because of' disability . . . . is served directly by requiring employers to accommodate the limitations of employees where those limitations derive from a disability."[169]

---

159. *Id.* at 895. The plaintiff also alleged that he was substantially limited in the major life activities of standing, sitting, bending, lifting, carrying, and walking. *Id.* The court did not address whether the plaintiff presented sufficient evidence of substantial limitation in those areas. *Id.*

160. *Id.*

161. *Id.* at 895. The court did "note that there are compelling reasons to think that driving should qualify as a major life activity." *Id.* at 895 n.3. *But see* Chenoweth v. Hillsborough County, 250 F.3d 1328, 1329–30 (11th Cir. 2001) (distinguishing driving from established major life activities); Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998) (rejecting driving as a major life activity).

162. Arnold v. County of Cook, 220 F. Supp. 2d 893, 895–96 (N.D. Ill. 2002).

163. 42 U.S.C. § 12112(b)(5)(A) (2000).

164. *Arnold*, 220 F. Supp. 2d at 896.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* Given that "the ADA clearly requires accommodation in some circumstances," the court stated that "[t]he question is not whether, but when." *Id.*

169. Arnold v. County of Cook, 220 F. Supp. 2d 893, 897 (N.D. Ill. 2002).

In contrast to *Arnold*, the single case expressly rejecting *Felix*, a few opinions appear at first glance to follow the *Felix* limit on the limitations an employer must accommodate. Two cases, *Coleman-Adebayo v. Leavitt*[170] and *Liljedahl v. Ryder Student Transportation Services, Inc.*,[171] involved plaintiffs with multiple physical impairments, at least one of which might have constituted a disability and triggered the duty of reasonable accommodation. However, the accommodations the plaintiffs sought related only to their nondisabling impairments.[172] Although the courts in both cases rejected the plaintiffs' accommodation claims by relying on the *Felix* limit on limitations,[173] these cases are unlike *Felix* because neither involved a request for an accommodation of a limitation that was caused by the plaintiff's disabling impairment. Rather, these cases stand for the uncontroversial proposition that employers are not required to accommodate any limitations other than those caused by the plaintiff's disability.[174]

Peebles v. Potter,[175] another case purporting to rely on the *Felix* limit on limitations, is also distinguishable. The plaintiff in *Peebles* suffered groin and back

---

170. 326 F. Supp. 2d 132 (D.D.C. 2004).

171. 341 F.3d 836 (8th Cir. 2003).

172. The plaintiff in *Coleman-Adebayo* suffered from multiple sclerosis, glaucoma, optic neuritis, and high blood pressure, and she claimed that these impairments substantially limited her in the major life activities of breathing, walking, and seeing. *Coleman-Adebayo*, 326 F. Supp. 2d at 141. She sought permission to work from home as a reasonable accommodation but only supported that request by her cardiologist's opinion that her blood pressure could be better controlled if she worked at home. *Id.* While plaintiff's multiple sclerosis, glaucoma, and optic neuritis may have qualified as disabling impairments, her inability to work at the office was not a limitation caused by those impairments. *Id.* at 143. The reason she requested the accommodation—her high blood pressure—did not substantially limit any of her major life activities and thus it was not a disability under the ADA. *Id.* at 142.

The plaintiff in *Liljedahl* had emphysema and was later diagnosed with lung cancer. *Liljedahl*, 341 F.3d at 838. The court concluded that because her "cancer surgery was successful and her recuperation period was limited," the plaintiff's cancer did not substantially limit any of her major life activities. *Id.* at 841. While the plaintiff's emphysema may have substantially limited her major life activity of breathing, the only accommodation she sought was a modified work schedule to allow her to have surgery for her cancer and to recuperate from that surgery. *Id.* at 842–43. The court noted that "[n]othing suggests [the plaintiff's] emphysema or breathing problems required an accommodation." *Id.* at 842.

173. *See Liljedahl*, 341 F.3d at 842–43 (discussing the *Felix* limit on limitations as addressed in *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 687 (8th Cir. 2003)); *Coleman-Adebayo*, 326 F. Supp. 2d at 143–44. See the discussion of *Wood infra* notes 183–95 and accompanying text.

174. Although unlike *Felix*, these cases are like *Buckley v. Consolidated Edison Co.*, 155 F.3d 150 (2d Cir. 1998) (en banc). The *Buckley* court assumed that the plaintiff fell into the ADA's protected class because he was a former substance abuser. *See id.* at 154–56; *see also* 42 U.S.C. § 12114 (b)(1) (2000) (providing that an individual who "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs" may be a qualified individual with a disability). The plaintiff's employer required him to undergo regular urine testing for drugs and fired him when he was unable to provide a timely urine sample because of a neurogenic bladder condition. *Id.* at 151. The plaintiff claimed that his employer should have reasonably accommodated his bladder condition by providing him more time to urinate. *Id.* at 156. The plaintiff's bladder condition did not substantially limit any major life activities and did not result from the plaintiff's former substance abuse. *Id.* at 154, 156. Accordingly, the court rejected the plaintiff's reasonable accommodation claim because the only condition the employer failed to accommodate—the plaintiff's neurogenic bladder condition—"neither is *nor results from* the only impairment here alleged to be a disability with the meaning of the ADA." *Id.* at 157 (emphasis added). Although the above language suggests that employers must accommodate all limitations resulting from disabilities, and not only those implicating a major life activity, the Second Circuit in *Felix* never mentioned its earlier decision in *Buckley*.

175. 354 F.3d 761 (8th Cir. 2004).

injuries while working as a letter carrier.[176] The postal service was unable to provide him with work that satisfied his physician-imposed work restrictions, and he did not work for a two-year period.[177] He then obtained a different physician who imposed less-restrictive work prohibitions.[178] When the plaintiff attempted to return to work, his supervisor informed him that he could not return until he provided documentation substantiating that his physician-imposed work restrictions continued throughout his absence.[179] The plaintiff never provided the documentation and his employer never allowed him to return to work, ultimately terminating him due to his long absence from the workplace.[180]

The *Peebles* court rejected the plaintiff's accommodation claim, citing the *Felix* limit on limitations in support of its conclusion that the ADA does not require employers "to level the playing field beyond those undulations that are related to the person's disability."[181] Unlike in *Felix*, however, the accommodation sought by the plaintiff in *Peebles*—waiver of his employer's substantiation rule—was not necessary due to any limitation caused by his disabling impairment. Even though he would not have missed work and would not need to comply with the substantiation rule if he were not disabled, his back and groin injuries made it no more difficult for him to comply with that rule. Because *Peebles* did not involve a disability-related limitation, agreement with the result in *Peebles* does not mean that the *Felix* court was correct in its holding that employers need to accommodate only those disability-related limitations causally connected to a substantially limited major life activity.

Only one judicial decision has relied on *Felix* to reject a plaintiff's claim for an accommodation of a limitation related to his disability because the limitation was not causally connected to the plaintiff's substantially limited major life activity.[182] The plaintiff in *Wood v. Crown Redi-Mix, Inc.*[183] was a ready-mix concrete truck

---

176. *Id.* at 764. It was undisputed that the plaintiff was disabled within the meaning of the ADA. *Id.* at 765.

177. *Id.*

178. *Id.* at 764.

179. *Id.*

180. Peebles v. Potter, 354 F.3d 761, 764 (8th Cir. 2004).

181. *Id.* at 769. Like *Liljedahl*, *Peebles* discusses the *Felix* limit on limitations by citing *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682 (8th Cir. 2003). *Peebles*, 354 F.3d at 769. Thus, *Peebles* relies on a case citing *Felix*, rather than *Felix* itself. *See* the discussion of *Wood infra* notes 183–95 and accompanying text.

182. A somewhat similar case is *Nuzum v. Ozark Automotive Distributors, Inc.*, 320 F. Supp. 2d 852 (S.D. Iowa 2004). The plaintiff in *Nuzum* developed tendinitis, which rendered him unable to perform the lifting requirements of his job as an order picker. *Id.* at 856–57. As a reasonable accommodation, the plaintiff sought another position that fell within his lifting restrictions. *Id.* at 857–58. The court concluded that the plaintiff was not substantially limited in the major life activities of lifting, working, or sleeping and thus did not have a disability under the ADA. *Id.* at 870. The court also stated in dicta:

> Even assuming Nuzum was substantially limited in the major life activity of sleeping (or driving, hugging his wife, doing outside chores, etc., if considered major life activities), Ozark does not have a duty to accommodate such a limitation. . . . Nuzum did not request any accommodations related to his alleged difficulty sleeping; rather the accommodations sought were related to his lifting restriction. Thus, there is no causal connection between the accommodation sought and the activity limited.

Id. at 867 n.11.

183. 339 F.3d 682 (8th Cir. 2003).

driver who suffered a back injury at work, which limited his ability to perform some daily activities and rendered him unable to perform the requirements of his job.[184] He sought transfer to a non-ready-mix truck job as a reasonable accommodation.[185] The court concluded that although the plaintiff's injury caused moderate limitations on his ability to walk, stand, turn, bend, lift, and work, he was not substantially limited in any of these major life activities.[186]

The plaintiff in *Wood* also alleged that his injury rendered him completely unable to procreate, but the court concluded that disability status based on the major life activity of procreation did not entitle him to any reasonable accommodation.[187] Relying on *Felix*, the court stated that "there must be a causal connection between the major life activity that is limited and the accommodation sought."[188]

Like the reasoning in both *Felix* opinions, some of the reasoning in *Wood* is questionable. The *Wood* court quoted the Fifth Circuit's interpretation of the ADA's reasonable accommodation provision[189] in *Taylor v. Principal Financial Group, Inc.*,[190] as meaning "that 'the ADA requires employers to reasonably accommodate limitations, not disabilities.'"[191] The Fifth Circuit, however, never suggested that employers need accommodate only limitations causally connected to a substantially limited major life activity. Rather, *Taylor* involved the notice component of the duty of reasonable accommodation, and the court held that communication of an employee's disability status does not place the employer on notice of the employee's disability-related limitations and resulting need for accommodation.[192] Accordingly, *Taylor* does not support the *Felix* limit on limitations.

However, some of the *Wood* court's reasoning is more persuasive. The *Wood* court suggested that the requested accommodation might constitute preferential treatment for the plaintiff, rather than merely creating a level playing field. The court noted that the plaintiff "requested a non-ready-mix truck job not because of his inability to procreate, but because of limitations in his ability to lift, bend, stand, and walk."[193] If the plaintiff had all of those limitations but was still able to procreate, he would have no ADA-qualifying disability and would be entitled to no accommodation.[194] The court concluded that "[i]t would be a strange result, and one we do not believe Congress intended, to have the viability of Wood's claim that he

184. *Id.* at 684. The plaintiff's physician "prohibited him from driving a ready-mix truck, from lifting in excess of fifty pounds, and from performing extensive bending, twisting, and lifting." *Id.*

185. *Id.* at 687.

186. *Id.* at 685–86. With regard to the activity of working, the court noted that "[t]he evidence shows that Wood's injuries prevent him from driving only a ready-mix concrete truck and that he is able to drive other trucks." *Id.* at 686.

187. Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 686–87 (8th Cir. 2003).

188. *Id.* at 687.

189. 42 U.S.C. § 12112(b)(5)(A) (2000) (requiring employers to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability").

190. 93 F.3d 155 (5th Cir. 1996).

191. *Wood*, 339 F.3d at 687 (quoting *Taylor*, 93 F.3d at 164).

192. *Taylor*, 93 F.3d at 164 ("[I]t is important to distinguish between an employer's knowledge of an employee's disability versus an employer's knowledge of any limitations experienced by the employee as a result of that disability."). The *Taylor* court noted that the plaintiff told his supervisor only that he was diagnosed with bipolar disorder and did not mention any limitations caused by his impairment. *Id.*

193. *Wood*, 339 F.3d at 687.

194. *Id.*

should have been accommodated as an employee of a truck-driving company turn solely on whether or not he was impotent."[195]

Prior to *Felix* and *Wood*, other courts expressed doubt that disability status based on the major life activity of reproduction entitled a plaintiff to reasonable accommodation in the workplace.[196] For example, in *Quick v. Tripp, Scott, Conklin & Smith, P.A.*,[197] the court acknowledged that the *Bragdon* decision required the finding that the plaintiff's Hepatitis C was a disability because it substantially limited the major life activity of reproduction.[198] The court commented, however, "*Bragdon* does not identify how an employer, or any other covered entity, can reasonably accommodate an ADA plaintiff whose asserted impairment substantially limits the reproductive system."[199] Thus, the *Quick* court defined the duty of reasonable accommodation much like the *Felix* court, as covering only limitations connected to a plaintiff's substantially limited major life activity.[200]

The language of the ADA does not compel the *Felix* rule, nor does the precedent relied upon by the *Felix* or *Wood* courts. The preferential treatment argument is harder to refute, however, as is the apparent incongruity of mandating accommodation in the workplace of a person disabled with respect to the major life

---

195. *Id.*

196. For example, the plaintiff in *Chenoweth v. Hillsborough County*, who had epilepsy which affected her ability to drive, asked her employer to permit her to work from home on some days and vary her schedule at the office to accommodate her transportation needs. *Chenoweth*, 250 F.3d 1328, 1329 (11th Cir. 2001). The court rejected her claim, holding that she did not have a disability: driving was not a major life activity, and the plaintiff's condition did not substantially limit her ability to work. *Id.* at 1329–30. The court also noted the plaintiff's reference "to the effect of epilepsy on her reproductive capacity" but concluded that "the increase in risk in this regard had no relevance at all to her work for the County or to her request to the County for accommodation." *Id.* at 1330.

Similarly, the plaintiff in *Rook v. Xerox Corp.* had cancer that resulted in a partial hysterectomy, leaving her unable to bear any more children. *See* Rook v. Xerox Corp., No. 02-20109, 2002 WL 31933126 at *1 (5th Cir. Dec. 18, 2002); Brief of Amicus Curiae EEOC in Support of Plaintiff and in Favor of Reversal at 3, Rook v. Xerox Corp., No. 02-20109, 2002 WL 1933126 (5th Cir. Dec. 18, 2002) [hereinafter EEOC Brief]. The plaintiff's cancer recurred after she began working for defendant Xerox, and she alleged that Xerox denied her reasonable accommodation by firing her when she was on leave for treatment of her cancer. EEOC Brief at 7, 14. The district court granted Xerox summary judgment on the plaintiff's ADA claim without opinion, but during the summary judgment hearing, the court questioned plaintiff's counsel about the relation between the plaintiff's leave request and her inability to bear children. *See id.* at 7–8. According to the court, the only way that the plaintiff—who was disabled in the major life activity of reproduction—would be entitled to leave as a reasonable accommodation would be if she went "to the Philippines to adopt a child." *See id.* at 8. The Fifth Circuit, however, affirmed the grant of summary judgment on other grounds, without considering whether the ADA required a "nexus between [the plaintiff's] physical limitation and the reasonable accommodation she sought." *Rook*, 2002 WL 31933126 at *4–5.

197. 43 F. Supp. 2d 1357 (S.D. Fla. 1999).

198. *Id.* at 1367–68. Hepatitis C is an incurable disease that an infected mother can transmit to a fetus, and the plaintiff testified that having the virus caused her to forego having more children. *Id.* at 1360–61, 1367.

199. *Id.* at 1368 n.7. The court noted further that it could not "find any accommodation that could suffice to increase reproductive capabilities, especially in the employment context." *Id.*

In my General Employment Law course, students have expressed similar incredulity that a plaintiff disabled pursuant to the major life activity of reproduction could assert a viable reasonable accommodation claim for anything other than leave to adopt a child or obtain infertility treatment.

200. *Id.*

activity of reproduction.[201] In light of these concerns, is the *Felix* limit on limitations an appropriate interpretation of the scope of the duty of reasonable accommodation?

IV. PREFERENTIAL TREATMENT AND THE *FELIX* RULE: WOULD ACCOMMODATION OF ALL LIMITATIONS FLOWING FROM A DISABILITY CONSTITUTE AN UNFAIR ADVANTAGE FOR INDIVIDUALS WITH DISABILITIES?

Since the ADA's inception, courts have stated that the statute's requirement of reasonable accommodation should be understood as leveling the playing field for individuals with disabilities rather than providing them preferential treatment.[202] It is most apparent that the duty of reasonable accommodation does not result in an unfair advantage for disabled individuals when the accommodation sought is causally connected to their substantially limited major life activity. For example, an individual with diabetes may be substantially limited in the major life activity of eating.[203] If the individual receives an exception from a neutral work rule allowing employees to eat only during designated meal breaks, that accommodation does not unfairly benefit the individual compared to other employees.[204] While some of the disabled individual's coworkers might like the ability to snack during the workday—and might even perform their jobs better if their employer permitted them to do so—these coworkers are not similarly situated to the individual with diabetes in this regard. The work rule regarding eating does not pose a similar barrier to their ability to succeed in the workplace.

However, if the individual with diabetes receives an accommodation unrelated to the major life activity of eating, the preferential treatment argument becomes stronger. During periods of low blood sugar, individuals with diabetes may experience disorientation, memory loss, difficulty concentrating, difficulty standing, irritability, and mood swings.[205] An individual with diabetes may request as a reasonable accommodation a brief "cooling off" period when agitated because of low blood sugar, even though this agitation does not render the individual substantially limited in the major life activity of interacting with others. Some of the

---

201. The Supreme Court's decision in *Bragdon*, recognizing reproduction as a major life activity, does not resolve the *Felix* issue because *Bragdon* only involved a prohibition of intentional discrimination because of disability. Bradgon v. Abbott, 524 U.S. 624, 629, 639 (1998). Reasonable accommodation places a greater burden on employers than does a mere prohibition of disparate treatment, and one could argue that the greater burden is justifiable only where the limitation an employee wants accommodated directly relates to the substantially limited major life activity. *See supra* note 54.

202. *See, e.g.*, Malabarba v. Chicago Tribune Co., 149 F.3d 690, 700 (7th Cir. 1998) ("While Congress enacted the ADA to establish a 'level playing field' for our nation's disabled workers, . . . it did not do so in the name of discriminating against persons free from disability.") (citing Schmidt v. Methodist Hosp., 89 F.3d 342, 344 (7th Cir. 1996)); Terrell v. USAir, 132 F.3d 621, 627 (11th Cir. 1998) ("We cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers.").

203. *See* Fraser v. Goodale, 342 F.3d 1032, 1041 (9th Cir. 2003).

204. Analogous examples include an individual who is substantially limited in sleeping and receives a later start to his or her work day as a reasonable accommodation; an individual who is substantially limited in seeing and receives the assistance of a reader as a reasonable accommodation; or an individual who is substantially limited in walking and receives specialized furniture for his or her wheelchair as a reasonable accommodation.

205. *See* Siefken v. Vill. of Arlington Heights, 65 F.3d 664, 665–66 (7th Cir. 1995); Bugg-Barber v. Randstad US, L.P., 271 F. Supp. 2d 120, 122–23 (D.D.C. 2003).

individual's coworkers may have difficulty controlling their anger and would also benefit from this adjustment of work rules. In fact, some coworkers may experience bouts of irritability or anger due to their own physical or mental impairments which do not rise to the level of disabilities.[206] In contrast to the eating accommodation, the individual with diabetes is arguably similarly situated to other workers with respect to this "cooling off" accommodation. The accommodation would assist both the disabled employee and other workers by addressing an impairment-related limitation that does not constitute a substantial limitation of a major life activity. Does accommodating only the disabled individual's bouts of irritability constitute an unfair advantage rather than a level playing field?

A similar issue arises when individuals without actual disabilities fall into the ADA's protected class only because an employer regards them as having a physical or mental impairment that substantially limits a major life activity.[207] These individuals often have impairments that limit their ability to perform various workplace tasks, even though they are not limiting enough to constitute actual disabilities; accordingly, these individuals often would benefit from a reasonable accommodation.[208] By defining "disability" as including those "regarded as" disabled[209] and including the concept of reasonable accommodation in the definition of "qualified individual with a disability,"[210] the ADA indicates that individuals who are regarded as disabled are entitled to reasonable accommodation.[211]

---

206. For example, bipolar disorder and PTSD may include irritability and outbursts of anger as characteristic symptoms. DSM-IV, *supra* note 147, at 328–29, 425. Courts have rejected the ADA claims of some plaintiffs with bipolar disorder or PTSD, finding that they failed to establish that these mental impairments substantially limited one of their major life activities. *See, e.g.*, Hewitt v. Alcan Aluminum Corp., 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001) (finding that PTSD did not substantially limit the plaintiff in caring for herself); Kramer v. Hickey-Freeman, Inc., 142 F. Supp. 2d 555, 559 (S.D.N.Y. 2001) (finding that bipolar disorder did not substantially limit the plaintiff's ability to work).

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

208. *See, e.g.*, Kelly v. Metallics West, Inc., 410 F.3d 670, 676 (10th Cir. 2005) (holding that an employer must permit an employee with a pulmonary embolism to use a supplemental oxygen device at work as a reasonable accommodation, even though the ailment did not constitute an actual disability); Weber v. Strippit, Inc., 186 F.3d 907, 910, 914 (8th Cir. 1999) (stating that a plaintiff with heart disease required postponement of his relocation as a reasonable accommodation, even though his condition did not constitute an actual disability).

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

210. *See* 42 U.S.C. § 12111(8) (2000) (defining "qualified individual with a disability" as "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"); *id.* § 12112(b)(5)(A) (prohibiting "not making reasonable accommodations to . . . an otherwise qualified individual with a disability").

211. *See* D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005) (concluding that "a review of the plain language of the ADA yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense"); Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) ("On the face of the ADA, failure to provide reasonable accommodation to 'an otherwise qualified individual with a disability' constitutes discrimination. And, on its face, the ADA's definition of 'qualified individual with a disability' does not differentiate between the three alternative prongs of the 'disability' definition." (quoting 42 U.S.C. §§ 12102(2), 12111(8), 12112(b)(5)(A)) (citations omitted)). The text of the statute also indicates that employers must accommodate all limitations flowing from a disability, not just those causally connected to a substantially limited major life activity. *See supra* notes 126–32 and accompanying text.

However, federal appellate courts are divided on whether there is a duty to accommodate employees regarded as disabled[212] because some courts believe that doing so would constitute unwarranted preferential treatment. According to the Eighth Circuit, "The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but nondisabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees."[213] Similarly, the Ninth Circuit reasoned that providing employees regarded as disabled with a right to reasonable accommodation would constitute a "windfall," by making impaired employees "better off under the statute if their employers treated them as disabled even if they were not."[214] Do either of these arguments support the *Felix* limit on the disability-related limitations an employer must accommodate?

In the words of the Eighth Circuit in *Weber*,[215] could the ADA reasonably have been intended to create a disparity in treatment between disabled employees and those impaired but not actually "disabled," allowing only the former to receive accommodation for their impairment-related but nondisabling limitations? The answer is yes. Any statute with a limited protected class inherently provides that those falling within the class will receive the benefits of the statute while those falling outside the class will not. Given that disability status turns on how limiting an individual's impairment is, a slight difference in the amount of limitation can make a great difference in terms of protection: some individuals will barely fall

---

212. *Compare D'Angelo*, 422 F.3d at 1239 (holding that there is a duty to accommodate employees who are regarded as disabled) *and Kelly*, 410 F.3d at 676 (same) *and* Williams v. Philadelphia Hous. Auth. Police Dep't, 380 F.3d 751, 773–76 (3d Cir. 2004) (holding that "to the extent [the employer] regarded him as disabled, [the plaintiff] was entitled to reasonable accommodation") *and* Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996) (assuming there is such a duty of reasonable accommodation), *with Kaplan*, 323 F.3d at 1233 (holding that there is no duty to accommodate employees regarded as disabled) *and Weber*, 186 F.3d at 917 (stating that the ADA was not intended to provide reasonable accommodation to some moderately impaired employees, while denying assistance to others based solely on an employer's misperception) *and* Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999) (assuming that there is no such duty when an employee is "'regarded as' having a disability") *and* Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998) (assuming that an employer's misperception does not create a duty to reasonably accommodate).

213. *Weber*, 186 F.3d at 917; *see also* Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 965 (2000) ("Granting perceived disability plaintiffs the full range of traditional, operational accommodations advantages them over other nondisabled workers because perceived disability plaintiffs are, objectively, already similarly situated with members of the nondisabled majority.").

214. *Kaplan*, 323 F.3d at 1232. The *Kaplan* court's narrow interpretation of the duty of reasonable accommodation is foreshadowed by the first sentence of its analysis. The court stated that "[t]he ADA represents a Congressional judgment that an individual's education, experience, will to succeed, and adaptability may often overcome mere disability." *Id.* at 1229. This statement suggests that disability is something inherent in the individual for that person to overcome, rather than a product of the interaction between a person's impairment and an environment constructed around the norm of an able-bodied worker. *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 427–428 (2000) (contrasting the medical model of disability, which "treated disability as an inherent personal characteristic that should ideally be fixed, rather than as a characteristic that draws its meaning from social context," with the social model which "treats disability as the interaction between societal barriers (both physical and otherwise) and the impairment"). The duty of reasonable accommodation is based on the latter idea that sometimes the environment must change, an idea that is absent from the *Kaplan* court's summary description of the ADA.

215. *See Weber*, 186 F.3d at 917.

within the protected class, while others will barely fall outside the class.[216] The statute does not protect employees with impairments that do not substantially limit a major life activity, even against irrational disparate treatment based on their impairments. Accordingly, it is unpersuasive to argue that because employees outside the protected class are not entitled to accommodation for limitations caused by their impairments, Congress could not have intended employees who fall within the protected class to receive accommodation for all of the limitations caused by their disabling impairments.[217] The fact that those outside the protected class receive no protection should not be interpreted as reducing the protection received by those within the protected class. On the contrary, the difficulty of establishing an actual disability suggests that qualifying impairments are likely to limit individuals with those impairments in numerous ways, not all of which will be causally connected to a substantially limited major life activity.[218]

Moreover, the difficulty of establishing an actual disability indicates that accommodating all of the disability-related limitations of disabled employees would not provide them with a windfall. Individuals with disability-related limitations not directly connected to their substantially limited major life activity are not similarly situated to nondisabled individuals with impairment-related limitations, even if both groups would benefit from the same accommodation in the workplace. Unless an individual is disabled only in the major life activity of working,[219] the individual's disability will also have a significant effect on life outside the workplace. In fact, according to the Supreme Court, if the disability affects the individual only in the workplace, then by definition the individual cannot be substantially limited in a major life activity other than working.[220] Any reasonable accommodation, of course, assists the individual only in the workplace.[221] Accordingly, it is incorrect to suggest

---

216. For example, an individual whose impairment restricts her to one to two hours of sleep per night may be substantially limited in the major life activity of sleeping, while an individual whose impairment restricts her to two to three hours of sleep per night may not be so limited. *Compare* Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 654 (S.D.N.Y. 2001) (holding that "Felix's chronic inability to sleep was a substantial limitation of a major life acitivity"), *with* Pack v. Kmart Corp., 166 F.3d 1300, 1306 (10th Cir. 1999) (holding that Pack failed to demonstrate that her impairment substantially "limited her major life activity of sleeping").

217. *Cf.* Kelly v. Metallics West, Inc., 410 F.3d 670, 676 (10th Cir. 2005) (rejecting the preferential treatment argument against accommodating employees regarded as disabled because "it is in the nature of *any* 'regarded as disabled' claim that an employee who seeks protections not accorded to one who is impaired but not regarded as disabled does so because of the additional component—'regarded as' disabled").

218. *See* Brief of the EEOC as Amicus Curiae in Support of Rehearing En Banc at 14, Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640 (S.D.N.Y. 2001) (No. 98 Civ. 5687 (SAS)) ("A medical condition that is serious enough to substantially limit a major life activity will likely also limit the individual in other ways, some or all of which affect the workplace.").

219. In such a case, it would seem that the *Felix* rule would allow the plaintiff to receive any accommodation in the workplace because any accommodation would be causally connected to the plaintiff's substantially limited major life activity. Notably, however, courts and the EEOC disfavor working as a major life activity. *See supra* note 104.

220. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 200–02 (2002).

221. According to the EEOC, ADA accommodations must be "job-related"; "if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide." 29 C.F.R. pt. 1630 app. § 1630.9 (2004). *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 35–37, 50–54 (2004) (identifying this rule as one significant way in which the antidiscrimination focus of the ADA limits the statute's ability to eliminate the most deeply rooted structural barriers to the employment of individuals with disabilities).

that a disabled individual is somehow better off than a nondisabled individual because only the former can obtain reasonable accommodation of nondisabling limitations in the workplace. To qualify as an actual disability, one's impairment must prevent or severely restrict performance of a significant activity or an activity "of central importance to daily life."[222] Providing some adjustment to conventional workplace structures only for actually disabled individuals does not constitute a windfall.

However, questioning the significance of the disabled individual's substantially limited major life activity makes granting a right to accommodation based on that activity appear more like a windfall. Reproduction is, perhaps, the most criticized major life activity. In his dissenting opinion in *Bragdon*, Chief Justice Rehnquist contended that reproduction is unlike the activities contained in regulations issued under the Rehabilitation Act and incorporated by reference in the ADA[223]: "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[224] The common thread among those activities, according to Chief Justice Rehnquist, is not their importance but that they "are repetitively performed and essential in the day-to-day existence of a normally functioning individual."[225] Numerous commentators have agreed that reproduction is not a major life activity, referring to reproduction as a "lifestyle choice,"[226] asserting that the inability to reproduce does not keep individuals "out of mainstream American life,"[227] and contending that "qualifying reproduction as a major life activity . . . extends the ADA's protection to cover emotional, personalized pain."[228]

Following *Bragdon*, some courts have held that unless an individual planned on having children in the absence of the impairment, reproduction is not a major life activity for that individual.[229] In response to these cases, one commentator has

---

222. *See supra* notes 25–26, 32–35 and accompanying text.

223. 42 U.S.C. § 12201(a) (2000).

224. Bragdon v. Abbott, 524 U.S. 624, 659 (1998) (Rehnquist, C.J., dissenting) (quoting 45 C.F.R. § 84.3(j)(2)(ii) (1997)).

225. *Id.* at 660.

226. Sarah Lynn Oquist, Casenote, *Reproduction Constitutes a "Major Life Activity" under the ADA: Implications of the Supreme Court's Decision in* Bragdon v. Abbott, 32 CREIGHTON L. REV. 1357, 1415 (1999); *see also* Christiana M. Ajalat, *Is HIV Really a "Disability"?: The Scope of the Americans with Disabilities Act after* Bragdon v. Abbott, *118 S. Ct. 2196 (1998)*, 22 HARV. J. L. & PUB. POL'Y 751, 763 (1999) (noting that "plenty of perfectly healthy, well-functioning people choose not to reproduce").

227. Ajalat, *supra* note 226, at 763.

228. Timothy D. Johnston, Note, *Reproduction Is Not a Major Life Activity: Implications for HIV Infection as a Per Se Disability under the Americans with Disabilities Act*, 85 CORNELL L. REV. 189, 254 (1999). According to Johnston,

> [T]he primary consequence of a reproductive impairment like infertility or HIV, aside from the obvious physical consequences, comes in the form of the disappointment, shattered dreams, embarrassment, and hopelessness that must surely flow from discovering that one cannot enjoy the pleasures of fathering or bearing his or her own child.

Id. at 253.

229. *See, e.g.*, Blanks v. Sw. Bell Commc'ns, Inc., 310 F.3d 398, 401 (5th Cir. 2002) ("Because Blanks does not want to have any more children, and because he fails to assert any facts to the contrary, he does not raise a triable issue of fact to indicate that his HIV status substantially limited his major life activity of reproduction."); Worster v. Carlson Wagon Lit Travel, Inc., 353 F. Supp. 2d 257, 266 (D. Conn. 2005) ("In the absence of any specific evidence that plaintiff's alleged disability, rather than

asserted that major life activities "should not vary from person to person" and that the result of these cases is that "plaintiffs are encouraged to lie about whether they intend to have children."[230] Indeed, it seems odd that a hypothetical coworker of the plaintiff in *Wood*—one who has the same work-related injury but does not intend to have children and is either unwilling or unable[231] to lie about that intention—would not be entitled to any accommodation in the workplace. Yet, if a person truly uninterested in reproduction is able to successfully assert an inability to reproduce as a substantially limited major life activity, any accommodation received by the individual would arguably constitute a windfall—the person would receive a gain without sustaining a commensurate loss.

In fact, an individual's claim that reproduction is a major life activity for him or her may appear least persuasive when the individual seeks a reasonable accommodation unrelated to reproduction. Persons skeptical about reproduction as a major life activity are likely to be less suspicious of plaintiffs claiming to be substantially limited in that activity who seek only to avoid disparate treatment[232] or who seek accommodations causally connected to their reproductive difficulties, such as leave to obtain infertility treatment.[233] In contrast, the *Wood* plaintiff's request for accommodation of his lifting restrictions[234] may appear like someone "seiz[ing] on the reproduction loophole to get [his] foot in the court's door."[235]

Many people will instinctively respond to the two factual scenarios presented at the beginning of this Article by supporting the claim of the individual with diabetes, who was substantially limited in eating and needed a device to assist her in reading, but rejecting the claim of the individual with the back problem, who was substantially limited in reproduction and needed to transfer to a position involving no lifting.[236] As discussed above, this reaction likely reflects discomfort with the concept of reproduction as a major life activity, rather than indicating the theoretical

---

other factors, circumscribed reproduction, the plaintiff has failed to demonstrate that the impairment significantly restricted his ability to reproduce."); Gutwaks v. American Airlines, Inc., No. 3:98-CV-2120-BF, 1999 WL 1611328, at *5 (N.D. Tex. Sept. 2, 1999) ("Gutwaks' claim that he is substantially limited in the activity of reproduction, when he professes no desire to ever father children, must fail.").

230. Jason M. Metnick, *Evolving to Asymptomatic HIV as a Disability Per Se: Closing the Loophole in Judicial Precedent*, 7 DEPAUL J. HEALTH CARE L. 69, 92 (2003). However, the plaintiff in *Blanks* would have been unlikely to succeed in such a lie because, following the birth of their daughter and long before the plaintiff became HIV-positive, "his wife underwent a procedure to prevent her from having any more children." *Blanks*, 310 F.3d at 401.

231. For example, the plaintiff may have been surgically sterilized or have experienced menopause.

232. The *Bragdon* plaintiff, for example, sought equal treatment by the defendant dentist despite her HIV-positive status. Bragdon v. Abbott, 524 U.S. 624, 629 (1998).

233. For example, the plaintiff in *Erickson v. Board of Governors* claimed that her employer discharged her because she took leave for fertility treatment. 911 F. Supp. 316, 318 (N.D. Ill. 1995). Interestingly, the plaintiff's claim was for disparate treatment—that her employer fired her for utilizing her sick leave for infertility treatment rather than for some other medical condition. *Id.* She did not contend that her employer needed to accommodate her disability by providing leave that her employer did not provide to other employees. *Id.* at 320–22.

234. Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 684 (8th Cir. 2003).

235. Johnston, *supra* note 228, at 255. Aside from whether reproduction was an important activity for the plaintiff, the plaintiff did not convince the *Wood* court that the impairment actually limited his reproductive activity. *See Wood*, 339 F.3d at 686 ("We are hesitant to conclude that an unsubstantiated declaration of Wood's difficulties with sexual relations creates a genuine issue of material fact as to Wood being disabled.").

236. *See supra* notes 1–6 and accompanying text.

and practical soundness of the *Felix* rule. One can be concerned that claims like that of the *Wood* plaintiff might give rise to preferential treatment and a windfall without being convinced that employers should have a duty to accommodate only limitations causally connected to a substantially limited major life activity.

The Supreme Court's opinion in *US Airways, Inc. v. Barnett*[237] is also instructive on the issue of whether the *Felix* limit on limitations is necessary to avoid unwarranted preferential treatment of individuals with disabilities. In *Felix*, the Second Circuit cited *Barnett* in support of the proposition that "[t]he ADA mandates reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled; it does not authorize a preference for disabled people generally."[238] However, the Supreme Court in *Barnett* rejected the employer's argument that the duty of reasonable accommodation does not require employers to grant preferential treatment to individuals with disabilities.[239] According to the Court:

> [T]he Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially.[240]

After *Barnett*, characterizing a proposed reasonable accommodation as providing preferential treatment to the disabled individual does not render the accommodation unreasonable.[241]

In his dissenting opinion in *Barnett*, Justice Scalia articulated a narrower interpretation of the duty of reasonable accommodation, and the majority's rejection of his interpretation further undermines the *Felix* rule. Justice Scalia contended that an exception to a seniority rule could never be a potential reasonable accommodation because "the ADA eliminates workplace barriers only if a disability prevents an employee from overcoming them—those barriers that would not be barriers *but for* the employee's disability."[242] According to Justice Scalia, unless the requested accommodation "removes an obstacle . . . arising solely from the disability," the ADA never requires accommodation.[243] Justice Scalia's view of the

---

237. 535 U.S. 391 (2002).

238. Felix v. N.Y. City Transit Auth., 324 F.3d 102, 107 (2d Cir. 2003).

239. *Barnett*, 535 U.S. at 397–98.

240. *Id.* at 397.

241. *See* Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 952 (2004) ("The Court in *Barnett* for the first time explicitly ruled that the ADA often requires that employers provide their disabled employees with preferential treatment.").

242. *Barnett*, 535 U.S. at 413 (Scalia, J., dissenting).

243. *Id.* at 415. The *Barnett* plaintiff's insufficient seniority status to obtain the position he sought was, Justice Scalia reasoned, an obstacle that had "nothing to do with his disability." *Id.* at 416. Even though the plaintiff's disability rendered him unable to perform the duties of his former position, such that he needed an exception to the seniority rules to remain employed, Justice Scalia considered

very close causal connection needed between an employee's disability and requested accommodation suggests that he might support the *Felix* rule. Like seniority rules, impairment-related limitations not causally connected to a substantially limited major life activity could be said to "burden[] the disabled and nondisabled alike" and to "pose no *distinctive* obstacle to the disabled."[244] The *Barnett* majority's implicit rejection of Justice Scalia's strict causation requirement[245] suggests that a disabled individual need not demonstrate a causal connection between an impairment-related limitation and a substantially limited major life activity.[246]

Moreover, recent scholarship on the ADA's duty of reasonable accommodation supports an understanding of that duty as encompassing disability-related limitations that have no causal connection to the substantially limited major life activity. Several commentators have highlighted the similarities between the duty of reasonable accommodation and Title VII's prohibition of disparate impact discrimination,[247] which occurs when a facially neutral employment practice disproportionately harms members of a protected class and is not job-related or consistent with business necessity.[248] Prior to the enactment of Title VII, many workplaces intentionally excluded women and racial minorities, causing employment practices and work environments to develop according to a white male norm.[249] In *Griggs v. Duke Power Co.*,[250] the Supreme Court first recognized that

---

the causal connection between the disability and the accommodation insufficient. *See* Vikram David Amar & Alan Brownstein, *Reasonable Accommodations Under the ADA: The Supreme Court in* Barnett, 5 GREEN BAG 2d 361, 365 (2002) ("The short of it is that if we remove Barnett's disability from the picture, he would not need an exemption from the seniority policy, because he could fill and perform other, more physical, jobs to which his current seniority level would entitle him.").

244. US Airways, Inc. v. Barnett, 535 U.S. 391, 412, 413 (2002).

245. *See* Ball, *supra* note 241, at 966 n.89 ("The majority in *Barnett*, by failing to apply Justice Scalia's causation standard, can be understood to have implicitly rejected it."); *see also* Giebeler v. M & B Assocs., 343 F.3d 1143, 1151 (9th Cir. 2003) ("*Barnett* . . . recognized that the obligation to 'accommodate' a disability can include the obligation to alter policies that can be barriers to nondisabled persons as well.").

246. Even though *Barnett* ultimately held that accommodation requests for reassignment that conflict with seniority rules are ordinarily not reasonable, this holding provides no support for the *Felix* rule. *Barnett*, 535 U.S. at 393–94. In reaching this conclusion, the Court emphasized "the importance of seniority to employee-management relations," a factor irrelevant to an analysis of what disability-related limitations an employer must accommodate. *Id.* at 403. *Barnett* also involved reassignment to a vacant position as a reasonable accommodation, "one of the most difficult and controversial of all accommodation issues." Stephen F. Befort, *Reasonable Accommodation and Reassignment under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions after* US Airways, Inc., v. Barnett, 45 ARIZ. L. REV. 931, 933 (2003); *see also* Cheryl L. Anderson, *"Neutral" Employer Policies and the ADA: The Implications of* US Airways, Inc. v. Barnett *Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 2 (2002) ("In a statute castigated by some for creating preferential rights for individuals with disabilities, the reassignment provision raises particularly difficult issues."). In contrast, the *Felix* rule potentially applies to all types of reasonable accommodations and not just accommodations dealing with seniority and reassignment.

247. *See* Mary Crossley, *Reasonable Accommodation As Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 861–62 (2004); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 669 (2001); Stein, *supra* note 75, at 636–37.

248. *See* 42 U.S.C. § 2000e–2(k)(1)(A) (2000).

249. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1191 (1989); Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable under Title VII?*, 81 NEB. L. REV. 1152, 1208 (2003).

250. 401 U.S. 424 (1971).

those practices—even when they were facially neutral—violated Title VII because "they operate[d] to 'freeze' the status quo of prior discriminatory employment practices."[251] Such practices "operate[d] as 'built-in headwinds' for minority groups,"[252] and equal employment opportunity required the "remov[al of] barriers that have operated in the past to favor an identifiable group of white employees over other employees."[253]

Individuals with disabilities have also experienced intentional exclusion from the workplace, causing employment practices and workplace environments to develop according to the norm of an able-bodied worker.[254] Like the disparate impact theory of discrimination, the duty of reasonable accommodation views those practices and environments as contingent rather than natural and thus subject to change to meet the needs of disabled workers.[255] Rather than providing disabled individuals an unfair advantage over their nondisabled coworkers, accommodating disabled workers levels the playing field because "[t]he practices and policies of most employers are developed and implemented in such a way so as to take into account the physical needs and limitations of able-bodied employees."[256]

One could argue the analogy to disparate impact discrimination supports the *Felix* rule. Workplaces were not constructed around a norm of a disabled worker—one substantially limited in a major life activity—so a worker is entitled to accommodations, or removal of barriers, related to that limitation.[257] In *Felix*, the

---

251. *Id.* at 430.
252. *Id.* at 432.
253. *Id.* at 429–30.
254. *See* Crossley, *supra* note 247, at 915 (noting that "both the physical workplace and conventional expectations about how job functions should be performed—while apparently neutral—are products of a history in which persons with disabilities were shunned, ignored, and excluded from the workplace"); Stein, *supra* note 75, at 598 (referring to "a status quo that has already excluded disabled participation in the workplace").
255. *See* Crossley, *supra* note 247, at 863–64 (noting that "the primary barriers faced by people with disabilities lie in how society has historically structured its institutions, attitudes, and physical environments" and that "[r]easonable accommodations address this barrier, which in the context of employment opportunity typically can be distilled down to the employer's implicit or explicit assertion that 'that's just how we [meaning people without disabilities] do things in this workplace'"); Stein, *supra* note 75, at 673 ("ADA-mandated accommodations are consistent with other antidiscrimination measures because each remedies artificial exclusion from employment opportunity by questioning the necessity of established workplace norms.").
256. Ball, *supra* note 241, at 960. Professor Ball reasons further that
> equality of opportunity already exists for able-bodied individuals because workplace practices are, as a matter of course, tailored to meet their needs and interests. It is the needs of employees with disabilities that have traditionally been ignored by employers, and it is for that reason that the ADA requires employers to account for the disabilities of their employees in fashioning and implementing employment related policies.

Id. at 990 (footnote omitted).
257. The similarities between the duty of reasonable accommodation and the disparate impact theory of discrimination also provide some insight into the skepticism expressed by some courts about individuals substantially limited in the major life activity of reproduction who request accommodation in the workplace. *See supra* notes 193–99 and accompanying text. Does the standard structure of workplaces and jobs conflict with the needs of persons with reproductive difficulties? According to Professor Samuel Bagenstos, "[s]ociety's treatment of fertility and parenthood as 'normal' provides reason to fear that people with infertility will suffer from prejudice and stereotypes and that social institutions and structures will (if only inadvertently) deny them opportunities." Bagenstos, *supra* note 214, at 489. Bagenstos acknowledges, however, that "those fears do not appear to be realized equally for all forms of 'infertility'" and "whether a particular instance of 'infertility' is sufficiently stigmatizing to constitute a 'disability'" depends on the underlying physical impairment "and the

employer's failure to construct the workplace around a norm of a worker substantially limited in sleeping would entitle the plaintiff to accommodation of her sleeping difficulties. The nondisabled majority, however, includes workers with impairment-related limitations that do not rise to the level of a substantial limitation of a major life activity, and most workplace environments developed around that majority.[258] With regard to limitations not causally connected to a substantially limited major life activity, the *Felix* plaintiff arguably is no different from the nondisabled majority. In a case like *Wood*, one could argue that the nondisabled majority includes many individuals with back problems who have restrictions on their lifting ability.

However, the better argument is that leveling the playing field for individuals with disabilities—eliminating the disability-related barriers to their equal employment opportunity—requires accommodation of all limitations caused by a disabling impairment, instead of only those causally connected to a substantially limited major life activity. Jobs and workplaces developed according to the norm of an able-bodied worker, one without physical or mental impairments.[259] Although many workers with physical or mental impairments are deemed nondisabled under the ADA because they fall outside the statute's narrow protected class, it is incorrect to say that employers structured jobs and workplaces based on the abilities and needs of workers who are impaired but not quite limited enough to be disabled. The conventional structure of jobs and workplaces can have a disproportionately harsh impact on workers other than those whose impairments substantially limit them in a major life activity, although workers with such significant impairments that the ADA deems them disabled are likely to face more barriers from existing workplace conditions. Congress's choice to protect only the latter group of employees—even though other employees could benefit from such protection—does not suggest that Congress intended to allow employees with actual disabilities to challenge only a narrow range of the disability-related barriers posed by conventional workplace practices.[260]

There are many examples of disability-related limitations that are not causally connected to a substantially limited major life activity but which, if not accommodated, could clash with the typical structure of jobs and work environments. As discussed previously, an individual with diabetes may be

---

measures that are likely to be necessary to overcome it." *Id.* at 489–90. Accordingly, the reproductive limitation at issue in the *Wood* case—arising out of the plaintiff's back injury—may be less stigmatizing and less removed from "the 'norm' for which social institutions and physical structures are designed" than a reproductive limitation based on HIV-positive status. *See id.* at 446.

258. *Cf.* Travis, *supra* note 213, at 965–66 (reasoning that "perceived disability plaintiffs—who are really a part of the nondisabled majority—are among those who typically benefit from the conventional workplace design" because their "nondisabling impairments are the type frequently possessed by the correctly perceived nondisabled majority workforce" and asserting that "those with actual disabilities . . . are only accommodated for disabling impairments that the nondisabled majority does not possess").

259. *See* Stein, *supra* note 75, at 640 (noting the assertion of disability rights advocates that "our physical surroundings are structured to include an idealized bodily norm").

260. The *Barnett* majority opinion indicates that the scope of the duty of reasonable accommodation is not limited by the fact that nondisabled employees could also benefit from a proposed accommodation. *See* Giebeler v. M. & B. Assocs., 343 F.3d 1143, 1151 (9th Cir. 2003) (noting that *Barnett* "recognized that the obligation to 'accommodate' a disability can include the obligation to alter policies that can be barriers to nondisabled persons as well").

substantially limited in the major life activity of eating and also experience vision problems or bouts of irritability caused by low blood sugar. An individual with renal disease may be substantially limited in the major life activities of caring for one's self or eliminating waste from blood[261] and also be unable to lift heavy objects.[262] An individual with Down Syndrome may be substantially limited in the major life activity of thinking and also experience hearing problems.[263] An individual with cerebral palsy may be substantially limited in the major life activity of performing manual tasks and also experience difficulties in learning.[264] An individual with obsessive-compulsive disorder may be substantially limited in the major life activity of caring for one's self[265] and also have difficulty switching between job tasks.[266]

Conventional practices could operate as exclusionary barriers or built-in headwinds to the ability of these disabled individuals to succeed in the workplace, while accommodating their limitations through an adjustment of those practices may be inexpensive. Providing equipment to magnify material the employee is required to read could accommodate a vision problem. To the extent that an employee's irritability conflicts with a work rule requiring courtesy or cordial relationships among coworkers, possible accommodations could include allowing the disabled

---

261. *See* Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 380, 385–86 (3d Cir. 2004) (holding that plaintiff with end-stage renal disease—who "was required to undergo time-consuming and uncomfortable dialysis treatments to cleanse and eliminate waste from her blood"—may have experienced a substantial limitation in the major life activities of eliminating waste from the blood and caring for herself); Gilbert v. Frank, 949 F.2d 637, 641 (2d Cir. 1991) ("We are inclined to view persons whose kidneys would cease to function without mechanical assistance, or whose kidneys do not function sufficiently to rid their bodies of waste matter without regular dialysis, as being substantially limited in their ability to care for themselves.").

262. *See Fiscus*, 385 F.3d at 381 n.1 (noting the plaintiff, a baker/wrapper in a store's bakery department, "need[ed] assistance with tasks that involved heavier lifting"); *Gilbert*, 949 F.2d at 638 (noting a physician stated that the plaintiff could only lift up to 25 pounds due to his polycystic kidney disease). Mere inability to lift heavy objects is unlikely to constitute substantial limitation in the major life activity of lifting. *See supra* notes 43 and 45 (discussing the difficulty of showing substantial limitation in the major life activity of lifting).

263. DOWN SYNDROME NSW, A LIFE WITH DOWN SYNDROME (1998), http://www.dsansw.org.au/publications/ALifeWithDS.html ("70% of the adult population with Down syndrome have mild hearing loss.").

264. *See* Emory v. Astrazeneca Pharm. LP., 401 F.3d 174, 183 (3d Cir. 2005) (holding that plaintiff with cerebral palsy "created a genuine issue of fact as to whether he is disabled in the major life activities of performing manual tasks and learning"). The National Institute of Neurological Disorders and Stroke defines cerebral palsy as "an umbrella-like term used to describe a group of chronic disorders impairing control of movement." NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, NAT'L INST. OF HEALTH PUBL'N NO. 93–154, CEREBRAL PALSY: HOPE THROUGH RESEARCH (2001), *available at* http://www.ninds.nih.gov/disorders/cerebral_palsy/detail_cerebral_palsy.htm. Symptoms of cerebral palsy differ among persons and vary in severity but include difficulty with fine motor tasks, difficulty maintaining balance and walking, and difficulty controlling involuntary movements. *Id.* Mental impairment is often associated with cerebral palsy: "About one-third of children who have cerebral palsy are mildly intellectually impaired, one-third are moderately or severely impaired, and the remaining third are intellectually normal." *Id.* Accordingly, an individual with cerebral palsy could be substantially limited in performing manual tasks but not in learning, substantially limited in learning but not in performing manual tasks, substantially limited in both activities, or not substantially limited in either.

265. *See* Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1134–35 (9th Cir. 2001) (holding a plaintiff who felt compelled to perform a series of obsessive rituals and took "significantly more time than the average person to accomplish the basic tasks of washing and dressing" was substantially limited in the major life activity of caring for herself).

266. *See* Breen v. Dep't of Transp., 282 F.3d 839, 840, 842 (D.C. Cir. 2002) (noting that a plaintiff with obsessive-compulsive disorder had "difficulty in dealing with unexpected interruptions in assigned tasks").

employee to take a break to cool off when he becomes angry at work.[267] Although cases featuring a reasonable accommodation related to lifting often involve a request for transfer to a vacant position,[268] under some circumstances the requested accommodation could be as simple as having a coworker perform the heavy lifting only intermittently required by the plaintiff's current position.[269] A supervisor may be able to accommodate hearing problems merely by speaking louder and more slowly or by providing instructions in writing rather than verbally. Allowing an employee limited in learning to take oral rather than written tests or providing increased time to perform administrative tasks could constitute a reasonable accommodation.[270] Finally, an employer could accommodate the difficulty of an employee in switching between job tasks by providing a period during the work day when the employee could concentrate on one task without any interruptions.[271]

The fact that disability-related limitations are not so restrictive as to constitute a substantial limitation of a major life activity may make them easier to accommodate.[272] Of course, the costs of any accommodation will vary based on the particular circumstances of each disabled individual, job, and workplace, and sometimes an accommodation will be unreasonable because its cost exceeds its benefit. It seems likely, however, that accommodating a "secondary" limitation of a disabled individual will often be less costly than accommodating the substantial limitation that renders the individual disabled under the ADA. For example, a supervisor may be able to accommodate an individual whose Down Syndrome causes a moderate reduction in hearing simply by speaking louder and more slowly, whereas if the individual were substantially limited in hearing, the supervisor may be completely unable to communicate orally with her—requiring a more burdensome accommodation. The *Felix* rule would require the employer to

---

267. For examples of other possible accommodations that may help employees avoid disability-related violations of conduct rules and for an argument that sometimes a second chance to comply with conduct rules is a reasonable accommodation, see Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 286–93 (2005).

268. *See, e.g.*, US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (involving a cargo handler who sought transfer to a vacant position); Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 684 (8th Cir. 2003) (involving a truck driver who was terminated because no vacant position existed); Nuzum v. Ozark Auto. Distribs., Inc., 320 F. Supp. 2d 852, 857–58 (S.D. Iowa 2004) (involving an injured picker who failed to identify a vacant position).

269. Reassignment of the heavy lifting to a coworker would not be a reasonable accommodation, however, if that lifting is an essential function of the plaintiff's job. *See* Bratten v. SSI Servs., Inc., 185 F.3d 625, 632–33 (6th Cir. 1999) (holding that the duty of reasonable accommodation does not require employers to reassign essential functions of a disabled employee's job).

Professor Michael Stein makes the important point that the accommodation of reassignment of marginal tasks, while not requiring an easily quantifiable out-of-pocket expense, nonetheless involves soft costs, which might include having "a human resource manager meet with other employees to explain the change in their daily duties" or requiring a supervisor "to learn how to take these alterations into consideration when evaluating overall job performance." Stein, *supra* note 75, at 646 n.295.

270. *See* Emory v. Astrazeneca Pharm. LP., 401 F.3d 174, 177 (3d Cir. 2005) (noting that the plaintiff needed to have test questions read aloud to him and that the plaintiff "was frequently criticized for . . . the length of time it took him to complete administrative tasks").

271. *See* Breen v. Dep't of Transp., 282 F.3d 839, 840–41 (D.C. Cir. 2002) (holding that the plaintiff raised an issue of fact as to the reasonableness of her proposed accommodation of allowing her time to do solid filing after business hours, which "would have permitted her to complete her filing without the interruptions she found difficult to deal with as a consequence of her obsessive-compulsive disorder").

272. *See supra* text accompanying notes 165–67.

accommodate the employee's disability-related hearing problems only when those problems rise to the level most difficult to accommodate—when the problems constitute a substantial limitation in the major life activity of hearing. This narrow interpretation of the scope of the duty of reasonable accommodation would cause more employees to confront the Catch-22 between "disability" and "qualified," where if they are limited enough to be disabled, they are unlikely to be able to perform the essential functions of their job even with reasonable accommodation.[273]

While many accommodations may be simple and relatively inexpensive, they are accommodations nonetheless because they involve adjusting the work environment to fit the disabled individual. A simple prohibition on disparate treatment would allow employers to terminate disabled employees who could not perform satisfactorily under their standard structure of jobs and work environments, even though that structure developed based on a norm of a worker without physical or mental impairments. The *Felix* rule—requiring accommodation only of limitations causally connected to a substantially limited major life activity—removes some disability-related barriers but leaves many others standing.

Finally, although the analogy to disparate impact discrimination does not support the *Felix* rule, it does suggest there should be some limit on the disability-related limitations an employer must accommodate.[274] Under the disparate impact theory of discrimination, not all impacts are sufficiently adverse to be actionable.[275] According to the Supreme Court, the challenged employment practice must disqualify members of the protected class at a "substantially higher rate" than persons outside the class.[276] Similarly, employers should have a duty only to accommodate disability-related limitations when the conventional workplace practice or structure poses a substantial barrier to the disabled individual.[277] Under this interpretation, to receive accommodation, individuals must be substantially limited in their ability to function under the employer's standard mode of operation. For example, an employer must accommodate a disability-related vision problem by providing the disabled individual with magnification equipment for reading only if the employee is substantially limited in reading required material without the equipment. Under the facts of *Felix*, for the plaintiff to challenge the requirement that office-duty railroad clerks work in the subway on an as-needed basis, she would

---

273. Under the *Felix* rule, if a plaintiff with diabetes wants to request a reasonable accommodation for her irritability during periods of low blood sugar, she must assert that interacting with others is her substantially limited major life activity. If she is substantially limited in that major life activity, however, she will likely be unqualified for most jobs. *See supra* note 51 and accompanying text.

274. Professor Mary Crossley makes this point in her article comparing reasonable accommodation and disparate impact. *See* Crossley, *supra* note 247, at 954.

275. Garcia v. Spun Steak Co., 998 F.2d 1480, 1488 (9th Cir. 1993) ("Title VII is not meant to protect against rules that merely inconvenience some employees . . . [but rather] protects against only those policies that have a *significant* impact."); *see also* Timmons, *supra* note 249, at 1224–25 (discussing various approaches as to the requisite level of disparity).

276. Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971).

277. *Cf.* Crossley, *supra* note 247, at 953–54 (supporting "a middle ground approach to the question of when an accommodation that removes a barrier to equal workplace opportunity for a disabled individual is reasonable," which "could recognize the psychological or stigmatic impact that even seemingly trivial barriers may have, while simultaneously acknowledging that not every barrier demands an employer response").

have to prove that her PTSD substantially limited her ability to comply with that rule.

Requiring a substantial conflict between the employee's disability-related limitation and the challenged employment practice reduces the concern that accommodating all of the limitations of disabled individuals grants them unwarranted preferential treatment. Moreover, the need for a substantial conflict may be particularly important when the requested accommodation relates to workplace conduct rules. If an employee's disability makes it only slightly more difficult for him to comply with a conduct rule, adjusting the rule only for that employee may seem unfair, and doing so provides the employee with little incentive to attempt compliance.[278] Accordingly, an employee would not be entitled to a cooling-off period as a modification of a conduct rule mandating courtesy to coworkers if, absent such a period, his ability to comply with the rule is only slightly limited. An employee with diabetes may be able to demonstrate substantial limitation in her ability to comply with a work rule allowing meal breaks only at certain times, requiring modification to that rule as a reasonable accommodation. However, if the employee could obtain her manager's permission to go into the back room when she needs to eat something, she might not be substantially limited in her ability to comply with a work rule prohibiting employees from consuming anything while in view of customers. Accordingly, the employee would not be entitled to a reasonable accommodation excusing her from complying with the rule prohibiting eating in front of customers.[279] In short, disabled individuals cannot assert that the slightest breeze constitutes a built-in headwind to their success in the workplace—an argument that seems likely to provoke resentment among other employees.

V. CONCLUSION

The *Felix* limit on limitations may initially appear to be an appropriate answer to "the great unsettled question under the ADA"[280]—the scope of the duty of reasonable accommodation. Given that what places an individual within the ADA's protected class is an impairment substantially limiting a major life activity, it seems logical that employers should have a duty to accommodate only limitations causally connected to that activity. After all, nondisabled individuals may also have impairment-related limitations, yet they have no right to accommodation. Granting disabled individuals a right to accommodation of all limitations raises the specter of preferential treatment rather than a level playing field.

However, closer scrutiny reveals that the *Felix* opinions misinterpret both precedent and the text of the ADA. Moreover, the *Felix* limit on limitations is

278. *See* Timmons, *supra* note 267, at 258–59. On the other hand, requiring the employee to prove that the disability compelled him to violate the rule—rather than substantially limited his ability to comply with the rule—conflicts with the reality of many impairments, particularly mental ones. *See id.* at 257–58.

279. Note that this requirement of a substantial conflict between the employee's disability-related limitation and the challenged employment practice applies even when the limitation is causally related to the employee's substantially limited major life activity—in this example, eating.

280. *See supra* note 74 and accompanying text.

inconsistent with the policies underlying the statute. As highlighted by the scholarship comparing the duty of reasonable accommodation to disparate impact discrimination, Congress's intent in imposing the duty of reasonable accommodation was to remove unnecessary barriers to equal employment of disabled individuals. These barriers—which exist because standard workplace policies and structures developed based on a norm of a worker without physical or mental impairments—often exclude disabled individuals due to disability-related limitations that are not causally connected to a substantially limited major life activity. It may impose little burden on an employer to provide to an individual with OCD, who is substantially limited in caring for herself, a period during the work day to concentrate on one task without interruption. Because switching between job tasks is not a major life activity, under the *Felix* rule, the employee could obtain her needed accommodation only by asserting substantial limitation in working. Even if the employee could make that difficult showing, the Catch-22 between "disability" and "qualified" would likely bar her from the ADA's protected class.

Barriers to equal employment opportunity also may exist for individuals with nondisabling impairments, but the lack of protection for those outside the ADA's protected class does not dictate less protection for those within the protected class. Rather, the difficulty of establishing an actual disability indicates that individuals with disabling impairments are likely to face numerous limitations due to those impairments, some of which will not be causally connected to a substantially limited major life activity. Moreover, the Supreme Court's opinion in *Barnett* established that a proposed accommodation is not necessarily unreasonable either because it could be characterized as providing preferential treatment to the disabled individual or because nondisabled employees could also benefit from the proposed accommodation. Concern about preferential treatment is better addressed by requiring a substantial conflict between the individual's disability-related limitation and the challenged workplace practice or structure. Requiring such a conflict also reinforces the similarities between the duty of reasonable accommodation and disparate impact discrimination.

The *Felix* limit on limitations is not only an incorrect interpretation of the duty of reasonable accommodation—it is also a dangerous one. One of Congress's goals in enacting the ADA was to encourage an interactive process between employers and employees where both would share information and come to an agreement about accommodations.[281] The *Felix* rule, however, gives employers an incentive to resist the accommodation requests of many disabled individuals, asserting that even if the individual falls within the ADA's protected class, the requested

281. *See* Jackan v. N.Y. State Dep't of Labor, 205 F.3d 562, 566 (2d Cir. 2000) ("The ADA envisions an 'interactive process' by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated."); 29 C.F.R. § 1630.2(o)(3) (2005) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."); Karlan & Rutherglen, *supra* note 57, at 19 (asserting that "the interaction of individualized litigation with individualized compliance is particularly significant under the ADA").

accommodation is unrelated to the individual's substantially limited major life activity.[282]

Cases that purport to follow the *Felix* limit on limitations, but actually present much easier issues,[283] are particularly dangerous. Courts may agree with those cases' common sense results and decide that the *Felix* rule must be correct. Then, in cases involving a controversial impairment—such as mental impairments like PTSD, or a controversial major life activity, like reproduction—courts may use the *Felix* rule to substantially restrict the protections provided to certain disabilities.[284]

Congress viewed the duty of reasonable accommodation as essential to the ADA's goal of equal employment opportunity for individuals with disabilities. The *Felix* limit on limitations significantly restricts the ability of disabled individuals—particularly those with disfavored disabilities—to access that protection. Because the *Felix* rule leaves many unnecessary disability-related barriers standing, it must be rejected.

---

282. A fairly standard accommodation is allowing an individual time during the work day to take medication. *See, e.g.*, Amos v. Wheelabrator Coal Servs., Inc., 47 F. Supp. 2d 798, 801 (N.D. Tex. 1998) (stating that the plaintiff's employer "accommodated him by allowing him breaks to take medication"). Under the *Felix* rule, an employer may resist even that accommodation request unless the individual can demonstrate that the medication treats the part of the impairment that substantially limits a major life activity, rather than another limitation caused by the impairment.

283. *See supra* notes 170–81 and accompanying text.

284. As discussed *supra* notes 223–35 and accompanying text, the concept of reproduction as a major life activity presents some difficulties. More troubling is the reasoning of the *Felix* court, which reflects a suspicion about mental impairments as disabilities worthy of the ADA's full protection, even though the statute expressly covers both physical and mental impairments. *See supra* notes 140–56 and accompanying text. Under the *Felix* rule, to receive necessary accommodations for their disability-related limitations, individuals with mental impairments may need to assert substantial limitation in thinking, interacting with others, or working, thus risking exclusion from the ADA's protected class due to the Catch-22 between "disability" and "qualified." *See supra* notes 46–51 and accompanying text.