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Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations"

by
LISA E. KEY*

Introduction

An individual who smokes a pack of cigarettes a day develops lung cancer. Another who is completely deaf refuses to undergo surgery recommended by his physician to receive a cochlear implant that will enable him to hear. A third person with diabetes refuses to follow her prescribed diet, causing her health to deteriorate. Each of these people has a disability. Yet, their disabilities were caused, continue to exist, or are being worsened as a result of their own voluntary conduct.

This Article will address the question of whether a person with a "voluntary" disability (i.e., one that was caused, continues to exist, or is worsened by that person's voluntary conduct) is entitled to the full protections of the Americans with Disabilities Act of 1990 (the "ADA"), particularly in the private employment context. Part I will briefly describe the purpose and mechanics of the ADA. Part II will then explore some of the public policy arguments for limiting the scope of the ADA with respect to persons with voluntary impairments. I will argue that a distinction should be made between persons with impairments that are immutable, even though originally caused by voluntary conduct, and persons with impairments that are mutable, either because they could be eliminated or reduced if some sort of voluntary conduct were taken or because they are being exacerbated as a result of voluntary conduct. My analysis will demonstrate that the

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coverage of the ADA should be restricted only with respect to individuals with mutable impairments. Part II will conclude by offering two possible alternatives to limit the scope of the ADA.

The first of these alternatives, excluding certain voluntary impairments from the definition of "disability," will be discussed in Part III. I will conclude that this alternative is not practical. Part IV will examine the second alternative, which is to require consideration of the actions of an individual with a mutable impairment in the analysis of what accommodations are reasonable. I will assert that this alternative satisfies many of the public policy concerns raised by giving full protection under the ADA to persons with voluntary impairments. Further, I will suggest that it could easily be implemented by borrowing concepts from the well-developed area of avoidable consequences under tort law.

I will conclude with two recommendations. First, courts should not make determinations of whether an accommodation is reasonable in a vacuum, in which only the circumstances and actions of the accommodator are considered. Rather, each situation should be viewed in its entirety, and the conduct of an individual with a mutable impairment should be a factor of great importance. Second, the Equal Employment Opportunity Commission (the "EEOC") should promulgate regulations directing consideration of the conduct of a person with a mutable impairment as a factor in assessing the reasonableness of an accommodation.2

I. The Basic Framework of the ADA

The purpose of the ADA is to eliminate discrimination against persons with disabilities by providing clear, strong, consistent, enforceable standards prohibiting such discrimination.3 The ADA is di-

2. Rulemaking authority under the ADA has been delegated to several different federal agencies, depending on the particular subject matter involved. The EEOC is authorized to issue regulations governing private employment discrimination. 42 U.S.C. § 12116. The Department of Justice is designated as the agency with authority to issue regulations with respect to the provision of programs and services, other than transportation services, by state and local governments, 42 U.S.C. § 12134(a), and by public accommodations and commercial facilities, 42 U.S.C. § 12186(b). The Department of Transportation has rulemaking authority with respect to provisions governing transportation services. 42 U.S.C. §§ 12149(a), 12186(a). The focus of this Article is on discrimination in the workplace and the accommodations required of private employers. Thus, the recommendations provided in the Conclusion are directed at the EEOC. However, other provisions of the ADA raise similar issues and the solutions proposed by this Article are relevant to these provisions as well.

vided into five titles, each prohibiting discrimination against individuals with disabilities, but in different contexts. Title I prohibits discrimination by private employers\(^4\) and is the focus of this Article.\(^5\)

To be entitled to the protections of Title I, a person must be a qualified individual with a disability.\(^6\) A person is an individual with a disability if he has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment.\(^7\) Major life activities are those basic activities that the average person in the general population can perform with little or no difficulty, "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."\(^8\) An individual is substantially limited in a major life activity if he is unable to perform that activity in the same manner, under the same conditions, or for the same amount of time as an average person in the general population.\(^9\) Factors to be consid-

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5. Although there is a large degree of overlap among the Titles of the ADA and the concepts that they employ, there are many slight, but significant, variations in language. For example, although Title I requires employers to make reasonable accommodations for employees with disabilities unless such accommodation would cause an undue hardship to the business, 42 U.S.C. § 12112(b)(5)(A), Title III requires public accommodations to make reasonable modifications to rules, practices, and procedures and to take any other steps necessary to allow access by persons with disabilities unless such steps would fundamentally alter their business or create an undue burden, 42 U.S.C. § 12182(b)(2)(A). Also, because the administrative agency with the authority to promulgate regulations varies among the Titles, the regulations are not consistent. Although the point of this Article has applicability to each of the Titles, because of the language variations found in the statute and the differences in the regulations under each of the Titles, it is best illustrated by concentrating on only one Title.


8. ADA Title I EEOC Regulations, 29 C.F.R. § 1630.2(i); ADA Title I Interpretive Guidance, 29 C.F.R. app. § 1630.2(i) (1996). The EEOC published the Interpretive Guidance as an appendix to the regulations. Although it is not controlling upon the courts, it does constitute "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 672 (1st Cir. 1995) (quoting Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 65 (1986)). The Interpretive Guidance notes that the list of major life activities contained in the regulations is meant to be illustrative, not exhaustive. It states, for instance, that sitting, standing, lifting, and reaching are also major life activities. 29 C.F.R. app. § 1630.2(i).

9. 29 C.F.R. § 1630.2(j)(1).
ered in determining whether an individual is substantially limited in a major life activity are the nature and severity of the impairment, the duration of the impairment, and the permanent or long-term impact of the impairment.\(^\text{10}\)

If a person is found to be an individual with a disability, the next step is to determine whether she is a qualified individual with a disability. To be a qualified individual with a disability, an individual first must satisfy the prerequisites for the job, such as having the appropriate education, skills, and licenses.\(^\text{11}\) The individual then must be able, either with or without a reasonable accommodation, to perform the essential functions of the job.\(^\text{12}\) In general, a job function is considered essential if the reason the job exists is to perform the function, if there are a limited number of employees among whom the function can be assigned, or if the function is highly specialized and the person was hired because of her expertise or ability to perform the function.\(^\text{13}\) Factors to be considered in assessing whether a job function is essential include the employer's judgment as to which functions are essential, written job descriptions, the amount of time spent on the job performing a particular function, the consequences of not requiring the person who holds the job to perform a particular function, the terms of applicable collective bargaining agreements, the work experience of previous persons who held the job, and the current work experience of those who hold similar jobs.\(^\text{14}\)

Once the essential functions of a job are ascertained, it must be determined whether an individual can perform those functions, with or without a reasonable accommodation. In most cases, a reasonable accommodation is a modification or adjustment to the manner in which a job is performed or to the work environment itself.\(^\text{15}\) Examples of modifications or adjustments that may be considered reasonable accommodations include making facilities accessible or usable, restructuring the job,\(^\text{16}\) modifying work schedules, reassigning the em-

\(^{10}\) 29 C.F.R. § 1630.2(j)(2). For a more detailed discussion, including examples, of what is meant by the term "substantially limits," see 29 C.F.R. app. § 1630.2(j).

\(^{11}\) 29 C.F.R. § 1630.2(m).

\(^{12}\) 42 U.S.C. § 12111(8).

\(^{13}\) 29 C.F.R. § 1630.2(n)(2).

\(^{14}\) 29 C.F.R. § 1630.2(n)(3).

\(^{15}\) See 29 C.F.R. § 1630.2(o)(1)(ii).

\(^{16}\) An employer restructures a job by reallocating or redistributing nonessential, marginal job functions to other positions. An employer is not required to reallocate or redistribute essential job functions. 29 C.F.R. app. § 1630.2(o).
ployee to a different position if one is vacant,\footnote{17} acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing readers or interpreters.\footnote{18}

The ADA requires employers to make reasonable accommodations unless such an accommodation would impose an undue hardship on the business of the employer.\footnote{19} An undue hardship is created if the accommodation would require significant difficulty or expense.\footnote{20} The nature and cost of the accommodation, the availability of financial resources, the number of employees, and the impact of the accommodation on the operation of the business are all factors to be considered in determining whether an accommodation will cause an undue hardship.\footnote{21} Moreover, an employer is not obligated to make an accommodation if, even with the accommodation, the employee would pose a direct threat to the health or safety of others.\footnote{22}

II. Voluntary Impairments and the ADA

The purpose of the ADA is a noble one—to eliminate the discrimination against persons with disabilities that has been pervasive in our society for years.\footnote{23} In enacting the ADA, Congress found that society had historically isolated and segregated persons with disabilities, intentionally excluding them from services, activities, programs, benefits, jobs, and other opportunities.\footnote{24} As Congress noted, the discrimination that has occurred has been based upon negative stereotypical assumptions about characteristics beyond the control of the person with the disability and not truly indicative of that person's abil-

\footnote{17} According to the Interpretive Guidance, reassignment to another position should only be considered when there are no reasonable accommodations that could be made to the individual's current position without causing an undue hardship to the employer. 29 C.F.R. app. § 1630.2(o).
\footnote{18} 42 U.S.C. § 12111(9)(B). See also 29 C.F.R. app. § 1630.2(o) (providing explanations and examples of some of the accommodations listed by the statute as reasonable accommodations).
\footnote{19} 42 U.S.C. § 12112(b)(5)(A).
\footnote{20} 42 U.S.C. § 12111(10)(A).
\footnote{21} 42 U.S.C. § 12111(10)(B). See also 29 C.F.R. app. 1630.2(p) (giving examples to illustrate what is meant by an undue hardship).
\footnote{22} 42 U.S.C. § 12113(a), (b).
\footnote{23} See 42 U.S.C. § 12101(a), (b). The discrimination that the ADA is aimed at eliminating includes not only intentional discrimination, but also actions and inactions that, because of thoughtlessness or indifference, have a discriminatory effect, even if not discriminatory by design. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 29 (1990).
\footnote{24} See 42 U.S.C. § 12101(a). This finding was based on numerous instances of discrimination documented in the ADA committee reports. See S. REP. No. 116, 101st Cong., 1st Sess., 6-9 (1989); H.R. REP. No. 485, supra note 23, at 28-32.
It should be the goal of this country, Congress stated, to guarantee persons with disabilities "equality of opportunity, full participation, independent living, and economic self-sufficiency."

The public must perceive the ADA as equitable and just if its noble purpose is to be accomplished. If the public views the ADA as unfair or easily susceptible to abuse, it will become cynical and will insist that the provisions of the ADA be drastically watered down or repealed altogether. If the critics are able to gain enough support, the result may well be the loss of protection for those who are truly deserving.

Unfortunately, many critics are already touting the ADA as a vehicle for people with bogus or dubious disabilities to keep jobs that they would otherwise lose or to collect undeserved damage awards or settlements. One commentator stated that "rarely do rhetoric and reality diverge so sharply as they have in connection with the Americans With Disabilities Act." Another opined that "[w]e've unwittingly created a Frankenstein's monster that, if not restrained, will plunder the countryside in the name of compassion, justice and civil rights." Sentiments of this type have prompted some to lobby for the repeal of the ADA.

27. Kim Norris, Rights Law Falls Short of Target, Critics Say, St. PETERSBURG TIMES, June 19, 1995, at 10. See also James Bovard, Very Bad Craziness and the Disabilities Act, WASH. TIMES, July 26, 1994, at A19 (stating that the ADA creates instant empowerment to anyone who even claims a disability); Brain Doherty, Disabilities Act: Source of Unreasonable Accommodations, SAN DIEGO UNION-TRIB., July 16, 1995, at G1 (opining that firing for poor performance or excessive absenteeism can be difficult if the person alleges a disability, even absent medical or psychological evidence of a disability); Michael Fumento, Is it Time to Reform the Americans with Disabilities Act? Rulings Terrorize Small Business, SAN DIEGO UNION-TRIB., Aug. 6, 1995, at G3 (expressing opinion that behaviors society used to condemn, such as drinking to excess, can now be handsomely rewarded under the ADA); Stephen Moore, Disabilities Act Makes a Mockery of Civil-Rights Law, LAS VEGAS REV.-J., Apr. 24, 1994, at 1C (stating belief that "[i]nresponsible behavior is being increasingly classified as a disability"); Mike Rosen, ADA Spawns Lame Lawsuits, DENVER POST, July 14, 1995, at B11 (noting several absurd claims that have been brought under the ADA); Michael Verespej, A Pandora's Box of Ailments, INDUSTRY WK., Apr. 18, 1994, at 61 (quoting the opinion of an attorney that anyone who wants to be taken off of a repetitive job and reassigned to a light-duty job merely has to make an allegation of back injury or carpal-tunnel syndrome); Walter E. Williams, ADA: Stranger than Fiction, BOSTON HERALD, Aug. 9, 1995, at O25 (characterizing several lawsuits brought under the ADA as blatant attempts at extortion).
30. See, e.g., Edward B. Bennett III, Critics Distort Realities of Disabilities Act, AUSTIN AM. STATESMAN, July 26, 1995, at A13 (warning that some critics of the ADA advocate
One aspect that commentators have pointed to in criticizing the ADA is the possibility that it affords protection to persons with voluntary impairments.31 Consider, for example, the following hypothetical.32 A janitor at a private high school is in a car accident and sustains a back injury. In no way could the injury be considered the janitor’s fault—he was a passenger in the car and was properly wearing his seatbelt. As a result of this injury, the janitor is unable to lift anything over thirty pounds. Prior to his injury, the janitor was required to perform tasks that entailed lifting more than thirty pounds about once a week. The janitor’s doctor recommends that the janitor undergo physical therapy three times a week to rehabilitate his back. The janitor’s employer agrees that it will not assign the janitor any tasks that require lifting more than thirty pounds until he has regained the strength in his back—it will assign all such tasks to other employees. The janitor is able to adequately perform all of his other tasks. Six months later, the janitor has missed most of his physical therapy sessions. The strength in his back has not improved, and he is still unable to lift anything over thirty pounds. The janitor’s employer no longer wants to employ him if he is not able to lift more than thirty pounds and terminates him.

31. See e.g., Defining Disability Down, Chi. Trib., Dec. 12, 1993, at 2 (criticizing the EEOC’s position that a condition does not have to be involuntary or immutable to be considered a disability under the ADA); Rush Limbaugh, Victim?, Richmond Times-Dispatch, Nov. 26, 1993, at A20 (questioning why labeling a condition a disability should absolve an individual from responsibility); Daniel Seligman, Growth Situation (Expanded Definitions of Discrimination), Fortune, Dec. 13, 1993, at 195 (questioning why an individual with a correctable condition should be given protection under the ADA).

32. For an actual case that is factually similar, see Ricks v. Xerox Corp., 877 F. Supp. 1468, 1471, 1474-77 (D. Kan. 1995). Although the Ricks court found (1) that the plaintiff was not a “qualified individual” with a disability, and alternatively (2) that the accommodation requested by the employee was not a “reasonable accommodation,” the plaintiff’s failure to attend the physical therapy recommended by his physician was not discussed by the court and did not appear to be a factor in its decision. However, the plaintiff stated that physical therapy had not helped his condition in the past.
The janitor sues, alleging that his employer violated the ADA. The court finds that the janitor, because he is unable to lift the same amount of weight as the average person in the general population, is substantially limited in a major life activity as the result of a physical impairment and is therefore an individual with a disability.\(^3\) The court then determines that the tasks that require the janitor to lift more than thirty pounds are not essential functions of his job because they are a small part of his job and can be reassigned to other employees. Therefore, because the janitor is able to perform all the essential functions of his job, he is a qualified person with a disability. Finally, the court concludes that restructuring the janitor's job by reassigning the tasks that require lifting more than thirty pounds to other employees is a reasonable accommodation that would not cause an undue hardship. Thus, the court holds that the employer has violated the ADA.

This scenario is not unlikely, primarily because the ADA contains nothing that specifically requires a court to consider the actions of the disabled person in determining whether a violation of the statute has occurred. Yet, this result seems neither equitable nor just. The janitor in the hypothetical has refused to help himself, while at the same time expecting others, in this case his employer, to bear the cost of accommodating his disability. An employer should not be forced to bear the cost and responsibility of making an accommodation for a disability

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33. Note that some courts have recently begun to take the approach in employment cases that an individual does not meet the definition of having a disability unless she has an impairment that substantially limits her ability to work, which is exceedingly difficult to prove. See, e.g., Leslie v. St. Vincent New Hope, Inc., 916 F. Supp. 879, 883-85 (S.D. Ind. 1996) (ignoring plaintiff's inability to lift more than fifteen pounds or lift anything between the floor and her waist and requiring plaintiff to demonstrate that she is substantially limited in the major life activity of working); Williams v. Avnet, Inc., 910 F. Supp. 1124, 1131-32 (E.D.N.C. 1995) (finding that plaintiff did not have a disability because she was not substantially limited in her ability to work, despite the fact that plaintiff could not lift over 25 pounds). These decisions appear to ignore whether the impairment substantially limits any other major life activity. This approach is contrary to the regulations, which direct that an inquiry be made as to whether an impairment substantially limits the major life activity of working if the individual is not able to show that he or she is substantially limited in any other major life activity. See 29 C.F.R. app. § 1630.2(j). Other courts have also recognized that this is not the correct approach. See McCollough v. Atlanta Beverage Co., 929 F. Supp. 1489, 1496 (N.D. Ga. 1996) (acknowledging that a literal application of the regulation allows a finding of disability if plaintiff is substantially limited in a major life activity, even if not substantially limited in the major life activity of working); Bell v. Elmhurst Chicago Stone Co., 919 F. Supp. 308, 309 (N.D. Ill. 1996) (rejecting cases that only focus on plaintiff's ability to work, stating that plaintiff "need not show that his ability to work is 'substantially limited' if his ability to breathe is so limited").
that continues to exist solely because an employee chooses not to bear any of the cost or responsibility of mitigating it.\textsuperscript{34}

Moreover, compelling the employer to accommodate the janitor in this hypothetical does not comport with Congress’ intent in enacting the ADA. Congress did not intend the ADA to relieve persons with disabling conditions of personal responsibility. Rather, as previously stated, its purpose is to eliminate discrimination—discrimination resulting from stereotypical assumptions regarding the abilities of persons with disabilities based on characteristics that are beyond their control.\textsuperscript{35} No such discrimination occurred in the hypothetical.

Now consider a slightly different situation. Assume that the janitor in the previous hypothetical does not injure his back in a car accident. Rather, the janitor is injured by jumping into shallow, murky water without first checking the depth of the water. Assume also that, unlike the first hypothetical, the janitor follows all of his physician’s advice, including diligently attending all recommended physical therapy. Yet, despite his efforts at rehabilitation, the janitor is still unable to lift more than thirty pounds. Finally, as in the first hypothetical, assume that his employer fires him because of this limitation, that he sues his employer under the ADA, and that the court finds that the employer violated the ADA.

Although both of the hypotheticals involve what could be considered voluntary impairments, there are significant differences between an impairment that results from voluntary conduct and an impairment that continues or is exacerbated by voluntary conduct. First, in most cases in which an impairment results from voluntary conduct, an accidental factor or an element of chance is also involved. The person cannot act with full knowledge of the outcome because the outcome is to some degree indeterminate. Although the person may be aware

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34. As Professor McCormick stated in discussing the principles behind the doctrine of avoidable consequences:
Legal rules and doctrines are designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community. Consequently, it is important that the rules for awarding damages should be such as to discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts, or from actively increasing such loss where prudence would require that such activity cease.
\textit{Charles T. McCormick}, \textit{Handbook on the Law of Damages} § 33, at 127 (1935). \textit{See also} \textit{Restatement (Second) of Torts} § 918 cmt. a (1977) (stating that “public policy requires that persons should be discouraged from wasting their resources, both physical and economic”).

35. \textit{See supra} notes 24-26 and accompanying text.
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that the conduct in which he is engaging is dangerous or increases his risk of harm, he probably does not know for certain that he will be seriously injured or harmed as a result. If he knew the outcome, he probably would have changed his course of action. Thus, although the conduct itself may have been voluntary, it cannot be said that the person voluntarily chose to be disabled.

By contrast, someone who chooses not to mitigate his condition voluntarily chooses to be disabled. Although there may be some element of chance with regard to whether a prescribed treatment will in fact reduce or eliminate the impairment, a failure to act almost certainly will result in the continued existence of the condition. The person knows that, as a result of his conduct, he will continue to have the impairment or the impairment will continue to worsen. He is making an informed, conscious decision to continue living with the impairment. This is his prerogative. However, society should not be obligated to bear the cost of his choice.\(^3\)\(^6\)

A second distinction can be made based on the current status of impairments. Again, although in both cases the impairments could be characterized as voluntary, only in the second hypothetical is the impairment immutable. There is nothing that the janitor can do to eliminate his disability. Denying him the full protections of the ADA, therefore, would not create any positive incentives for him to change his behavior.\(^3\)\(^7\)

In the first hypothetical, on the other hand, the impairment is not immutable. If the janitor followed his prescribed physical therapy, he likely would decrease the severity of his impairment, and possibly eliminate it altogether. He may not have any incentive to do this, however, if the ADA requires his employer to make accommodations regardless of his conduct. Suppose that, outside of his job, he gener-

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36. See Bonnie P. Tucker, *Deafness—Disability or Subculture: The Emerging Conflict*, 3 Cornell J.L. & Pub. Pol’y 265, 271-74 (1994). Professor Tucker argues that, although deaf individuals have every right to choose not to “fix” their deafness, they do not at the same time have the right to demand that society pay for the costs of their choice. As she states, “[a]ccommodation is not required to provide equal opportunities where the condition that renders opportunity unequal may itself be eliminated.” Id. at 273. See also Andrew Solomon, *Defiantly Deaf*, N.Y. Times, Aug. 28, 1994, § 6 (Magazine), at 40, 65 (arguing that deaf people who do not characterize deafness as a disability, and therefore object to any “cures,” should not be entitled to protection under the ADA).

37. One article has noted that ignoring the cause of a disability is consistent with the notion that the way a person becomes disabled is a private matter. Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act and the Americans with Disabilities Act*, 31 Cal. W. L. Rev. 41, 56 (1994).
ally does not have occasion to lift more than thirty pounds, and while at work, he would prefer not to perform the jobs that require lifting more than thirty pounds.\textsuperscript{38}

To assure that the janitor acts responsibly, the protections of the ADA should be limited in the case of an individual with an impairment that is not immutable, but continues to exist or is exacerbated as the result of the individual’s voluntary conduct, regardless of its cause.\textsuperscript{39} This could be accomplished in one of two ways. The first would be to interpret the term “disability” under the ADA as not including impairments that are mutable. The second option would be to consider the voluntary actions of a person with a mutable impairment in determining whether an employer has satisfied its obligation under the ADA to make a reasonable accommodation. Each of these alternatives will be discussed in turn.

\section*{III. Exclusion of Mutable Impairments from the Definition of “Disability”}

\textbf{A. Per Se Exclusion}

As previously discussed, only individuals with disabilities are entitled to protection under the ADA.\textsuperscript{40} Thus, one means of limiting the scope of the ADA is to exclude from the definition of “disability” any impairment that is mutable. This is in fact what some courts have done when interpreting state laws that prohibit discrimination against

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\textsuperscript{38} In essence, this is an externalities problem. Externalities are costs imposed on others as a result of an individual’s actions that the individual is not required to take into account in his or her decision-making. See Werner Z. Hirsch, \textit{Law and Economics} 14-16 (2d ed. 1988). Because the individual’s decision is not based on an accurate cost/benefit analysis, it often results in inefficiencies. See id. In the example in the text, the janitor, when deciding on his course of action, does not have to consider the cost to his employer of an accommodation. The question, then, is how to cause the individual, in this case the employee, to consider or internalize these external costs when making a decision.

\textsuperscript{39} See Andrea M. Brucoli, Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals: \textit{Morbid Obesity as a Protected Disability or an Unprotected Voluntary Condition}, 28 Ga. L. Rev. 771, 798-800 (1994) (arguing that, although the voluntariness of the initial cause of an impairment should not affect the determination of whether an individual is protected under the ADA, the current voluntary mutability of the impairment should be relevant); Daniel Seligman, \textit{Growth Situation}, \textit{Fortune}, Dec. 13, 1993, at 195, 197-98 (distinguishing between impairments that the individual brought on himself and impairments that are now correctable, and questioning why the government should be providing protection in the latter case).

\textsuperscript{40} See supra notes 6-10 and accompanying text.
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persons with disabilities. In the first of these cases, Greene v. Union Pacific Railroad Co., the court held that an obese plaintiff was not handicapped under Washington’s civil rights statute because his condition was not immutable. The court reached a similar holding in Missouri Commission on Human Rights v. Southwestern Bell Telephone Co. In that case, the plaintiff was obese and suffered from high blood pressure. The court found that she did not have a disability and was not entitled to the protections of the Missouri disability law because she ignored her condition and failed to take any steps to treat or control it.

42. 548 F. Supp. at 5.
43. The term “disability” is now preferred over the term “handicapped,” although there is no difference in their legal meaning. H.R. Rep. No. 485, supra note 23, at 50-51; S. Rep. No. 116, supra note 24, at 21. Because many older statutes and cases use the term “handicapped,” this Article will also use this term when discussing these statutes and cases.
44. WASH. REV. CODE § 49.60.030 (Supp. 1996).
45. Whether obesity is a voluntary or mutable condition is controversial. See James G. Frierson, Obesity as a Legal Disability Under the ADA, Rehabilitation Act, and State Handicapped Employment Laws, 44 LAB. L.J. 286, 288-89 (1993); Scott Petersen, Discrimination Against Overweight People: Can Society Still Get Away With It?, 30 GONZ. L. REV. 105, 106, 120 (1994/95); Jay R. Byers, Comment, Cook v. Rhode Island: It’s Not Over Until the Morbidly Obese Woman Works, 20 J. CORP. L. 389, 398-401 (1995); William C. Taussig, Note, Weighing In Against Obesity Discrimination: Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans with Disabilities Act, 35 B.C. L. REV. 927, 929-32 (1994); Steven M. Ziolkowski, Case Comment, The Status of Weight-Based Employment Discrimination Under the Americans with Disabilities Act After Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals, 74 B.U. L. REV. 667, 669-72 (1994). This Article is not concerned with whether obesity is actually voluntary or mutable. Rather, what is relevant for purposes of this Article is how courts treat conditions perceived, rightly or wrongly, to be voluntary or mutable.
46. 699 S.W.2d at 79.
47. Id. at 76.
49. 699 S.W.2d at 79.
An early case decided under the Rehabilitation Act of 1973\(^50\) (the "Rehabilitation Act"), \textit{Tudyman v. United Airlines},\(^51\) also determined that impairments that are caused and continue to exist as the result of an individual's voluntary actions do not fall within the definition of a disability. The plaintiff in \textit{Tudyman}, who was a bodybuilder, applied to United Airlines for a position as a flight attendant, but was rejected because his weight exceeded United's weight guidelines.\(^52\) The plaintiff claimed that United's rejection of his application impermissibly discriminated against him on the basis of a handicap.\(^53\) In dismissing the plaintiff's claim, the court emphasized that his weight was self-imposed and voluntary.\(^54\) The court stated that the Rehabilitation Act "was not intended to protect those with voluntary 'impairments.'"\(^55\)

More recently, however, courts have adopted a different approach when confronted with the issue of whether a mutable impairment can be a disability.\(^56\) The decision of the New York Court of Appeals in \textit{State Division of Human Rights ex rel. McDermott v. Xerox Corp.},\(^57\) was the first to explicitly hold that the mutability of an impairment is irrelevant to the determination of whether an individual has a

\(^{50}\) 29 U.S.C. §§ 701-797b (1994). The Rehabilitation Act was the first federal statute to address discrimination against individuals with disabilities. Its application, however, is limited to the federal government, federal contractors, and recipients of federal funds. 29 U.S.C. § 794. The ADA, although more comprehensive in its application, was modeled after the Rehabilitation Act and the regulations promulgated thereunder. See, e.g., H.R. Rep. No. 485, supra note 23, at 50 (stating that the term "disability" is comparable to the term "individual with handicaps" as used in the Rehabilitation Act), 54-55 (stating that the range of employment decisions covered by Title I of the ADA is intended to be consistent with regulations implementing the Rehabilitation Act), 62 (directing that interpretation of the concept of a "reasonable accommodation" is to be generally consistent with interpretations of that term under the Rehabilitation Act), 67 (noting that the concept of "undue hardship" is derived from and should be interpreted consistently with regulations implementing the Rehabilitation Act). Thus, cases decided under the Rehabilitation Act are instructive and looked to for guidance in interpreting the ADA. Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996).


\(^{52}\) Id. at 740.

\(^{53}\) Id.

\(^{54}\) Id. at 746.

\(^{55}\) Id.


\(^{57}\) 480 N.E.2d at 698.
disability. The plaintiff in *McDermott* brought a claim alleging that the defendant's refusal to hire her because she was obese was a violation of New York's Human Rights Law, which prohibits discrimination on the basis of a disability. In response, the defendant argued that the Human Rights Law applies only to immutable disabilities and does not apply to disabilities that are correctable. The court rejected this argument, finding that "the statute protects all persons with disabilities, and not just those with hopeless conditions."  

The First Circuit echoed the *McDermott* opinion with respect to the Rehabilitation Act in *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*. The plaintiff in *Cook* reapplied for a position she had previously held with the defendant as an attendant at an institution for mentally retarded persons. The plaintiff had voluntarily left this same position two years earlier, and at the time of her departure, had a spotless work record. The defendant refused to rehire the plaintiff because of her obesity, claiming, among other things, that her weight would compromise her ability to evacuate patients in an emergency. The plaintiff sued, alleging that the defendant had violated the Rehabilitation Act by refusing to rehire her.

The defendant asserted that the plaintiff was not handicapped within the meaning of the Rehabilitation Act for two reasons. First, the defendant argued that mutable impairments are not protected by the Rehabilitation Act. The court found it unnecessary to address this argument, however, because the jury could have found, based on evidence that the court determined to be credible, that the plaintiff's condition was in fact immutable. Nonetheless, the court questioned

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58. N.Y. Exec. Law §§ 292, subd. 21, 296, subd. 1(a) (McKinney 1996).
59. 480 N.E.2d at 696.
60. Id. at 698.
61. Id. The court thus found it unnecessary to resolve a dispute between the parties regarding whether plaintiff's condition was the result of bad dietary habits or whether it had a physical cause.
62. 10 F.3d 17, 23-24 (1st Cir. 1993).
63. Id. at 20.
64. Id. The plaintiff apparently was morbidly obese during the time she previously worked for the defendant. See *Cook v. Rhode Island, Dep't of Mental Health, Retardation, & Hosps.*, 783 F. Supp. 1569, 1571 (D.R.I. 1992), aff'd, 10 F.3d 17 (1st Cir. 1993). Thus, her obesity was not a new condition.
65. 10 F.3d at 21.
66. Id.
67. Id. at 23.
68. Id.
69. Id. at 23-24.
the conclusion of the district court that an impairment must be immutable to be a handicap under the Rehabilitation Act.\textsuperscript{70} The court noted that neither the statute nor the regulations mention mutability as an automatic disqualifier to having a protected handicap, and the court stated that it saw no reason to impose such a requirement.\textsuperscript{71}

The second argument that the defendant proffered was that obesity cannot be an impairment within the scope of the Rehabilitation Act because it is caused, or at least exacerbated, by voluntary conduct.\textsuperscript{72} Looking again at the language of the statute and the regulations, the court emphasized that nothing therein suggests that the cause of an individual’s impairment, even if it were the individual’s own voluntary conduct, is a factor in determining whether an individual is handicapped.\textsuperscript{73} In fact, as the court pointed out, many impairments that are unquestionably protected by the Rehabilitation Act are often caused or exacerbated by voluntary conduct, such as AIDS, diabetes, lung cancer, and heart disease.\textsuperscript{74}

Significantly, the EEOC supported the position of the First Circuit expressed in \textit{Cook}.\textsuperscript{75} In an amicus brief filed with the First Circuit in \textit{Cook}, the EEOC stated that “[i]t is not necessary that a condition be involuntary or immutable to be covered under the Rehabilitation Act.”\textsuperscript{76} In reaching this conclusion, the EEOC relied on the language of the statute, which it said neither demands nor even suggests consideration of the cause of an impairment or whether an individual contributed to the existence of the impairment.\textsuperscript{77} The EEOC also noted that this approach is not unique to obesity cases, stating that all impairments should be treated in the same manner.\textsuperscript{78}

The idea that an impairment need not be involuntary or immutable to be a covered disability can also be applied to Title I of the ADA. In its amicus brief in \textit{Cook}, the EEOC indicated that its analysis of voluntary or mutable impairments under the Rehabilitation Act is equally applicable to the ADA.\textsuperscript{79} Like the Rehabilitation Act, Title I of the ADA and the applicable regulations thereunder do not con-
tain any language to suggest that either voluntary or mutable impairments are excluded from the term "disability" as used in the statute.80

The legislative history of the ADA provides further evidence that Congress did not intend voluntary or mutable impairments to be automatically excluded from the term "disability." The House Report on the ADA explicitly states that "[t]he cause of a disability is always irrelevant to the determination of disability."81 In addition, the Senate Report lists specific conditions that will always be considered disabilities,82 including being infected with Human Immunodeficiency Virus ("HIV").83 Further, in the Interpretive Guidance, the EEOC also states that an individual with HIV is conclusively presumed to have a disability.84 There is no indication that either of these presumptions would be altered if an individual contracted the virus as a result of the individual's voluntarily having unprotected intercourse or if the individual refused to follow doctor's orders to minimize the effect of the virus.

Other examples of disabilities described in the Senate Report are being paraplegic and being deaf.85 Both of these conditions could have been caused by a voluntary act. A person may be a paraplegic because she was injured while skiing recklessly. Similarly, a person may be deaf because he played in a rock band for twenty-five years without wearing proper ear protection. Both of these conditions may be "curable" through physical therapy or through surgery. Again, however, nothing in the ADA suggests that either of these conditions would not be considered a disability if it were in fact caused by a voluntary act or if it were in fact mutable.86

Thus, recent case law, the legislative history of the ADA, and the EEOC's interpretation of the ADA all suggest that mutable impairments are not to be automatically excluded from the definition of disability. Although one could argue that the courts and the EEOC

80. See id.
82. S. REP. No. 116, supra note 24, at 22.
83. Id.
84. 29 C.F.R. app. § 1630.2(j).
85. S. REP. No. 116, supra note 24, at 22.
86. The Senate Report also lists a variety of conditions as impairments that would be considered disabilities if they were severe enough to result in a substantial limitation of a major life activity. S. REP. No. 116, supra note 24, at 22. This list contains many conditions, such as cancer, heart disease, and diabetes, that can be caused by voluntary action, continue to exist as the result of voluntary action, or can be exacerbated by voluntary action. Id. Yet, none of these factors would appear to affect the characterization of these conditions as impairments or disabilities.
should reverse their position, such an argument is unlikely to succeed because virtually no authority exists to support this position. If any change were to be made, Congress would probably be the entity to initiate it.

A per se exclusion of mutable conditions from the definition of disability, however, is not desirable for another reason. Such an exclusion is not desirable because it would automatically exclude an individual with a mutable disability from protection under the ADA without considering other relevant factors, such as the reasonableness of the action necessary to eliminate or reduce the disabling condition. Obvious factors, such as the cost, risks, and likelihood of success of the mitigating action, would be ignored. Another important factor that would not enter into the equation is the burden to the employer of making an accommodation. Failure to consider these factors would likely lead to inefficient results.

As an illustration, return to the previous example of the janitor who injured his back. Assume that instead of physical therapy, surgery, costing thousands of dollars, is required to alleviate his condition. Also assume that the cost to the janitor's employer of accommodating his inability to lift more than thirty pounds is approximately $200 per year. If mutable impairments were automatically excluded from the definition of "disability," the janitor would not be covered under the ADA. Thus, he would be forced to choose between undergoing the costly surgery or losing his job, despite the fact that his employer could accommodate his condition for a fraction of the cost of the surgery.

It is feasible to formulate a definition of disability in which mutability, as well as factors such as the cost, time, and likelihood of success of a mitigating action, are considered. However, to factor into the definition of disability the cost to an employer of making an accommodation seems incongruous. If this cost were a factor, it could lead to the bizarre result that an individual would be regarded as an individual with a disability in one context, but not in another, with the sole variant being the cost to the employer of accommodating the condition. Not only is it clear from the structure of the ADA that the cost of an accommodation is to be considered separately from the determination of a disability, but also to create a definition of disability this fluid would be confusing and illogical. Thus, a better approach is needed.
B. The Relevance of Mutability in Determining Whether a Major Life Activity Has Been Substantially Limited

Even absent a per se exclusion of mutable impairments from the definition of disability, a court could nonetheless find that some mutable impairments do not constitute disabilities because they do not substantially limit a major life activity. As previously discussed, the ADA defines disability as an impairment that substantially limits a major life activity. Three factors that enter into a determination of whether an individual is substantially limited in a major life activity are the nature and severity of the impairment, the duration of the impairment, and the permanent or long-term impact of the impairment. Mutability is relevant to each of these factors and thus is relevant to a finding of disability.

Although relevant, a finding of mutability is not determinative. Merely because an impairment is capable of being eliminated or reduced does not necessarily lead to the conclusion that the impairment does not substantially limit a major life activity, and is therefore not a disability. The First Circuit in Cook indicated that mutability precludes a finding of disability only if the impairment can easily and quickly be reversed. On the one hand, this may eliminate a concern associated with a per se exclusion by injecting an element of reasonableness into the formula. Presumably, if an impairment could be easily and quickly reversed, it would be reasonable to expect the individual with the impairment to take the necessary actions to reverse the impairment.

On the other hand, many impairments, while reversible, are incapable of being easily and quickly reversed. For example, a person who suffers a spinal injury and loses use of his legs may be able to walk again, but only after numerous operations and years of intense physical therapy. Furthermore, other impairments may be mutable in the sense that they can be reduced or minimized, but are not capable of being altogether reversed. For example, a person with diabetes may be able to reduce the effects of the disease by following a pre-

87. See supra notes 7-10 and accompanying text.
88. 29 C.F.R. § 1630.2(j)(2).
89. See Cook, 10 F.3d at 23 n.7; Brief of EEOC as Amicus Curiae at 16, Cook, 10 F.3d 17 (1st Cir. 1993) (No. 93-1093).
90. 10 F.3d at 23 n.7.
91. See also Brief of EEOC as Amicus Curiae at 16, Cook, 10 F.3d 17 (1st Cir. 1993) (No. 93-1093) (stating that “[v]oluntariness is relevant to determining whether an impairment is substantially limiting only where an individual can easily and quickly reverse the condition by changing his or her behavior”).
scribed diet, yet she will always be diabetic. Thus, although requiring that an impairment must substantially limit a major life activity to be a disability may prevent some abuse of the ADA, it will only do so with respect to individuals with mutable impairments that can easily and quickly be reversed. Therefore, this requirement at best offers only a partial solution.

IV. A Reasonable Interpretation of “Reasonable Accommodations”

A. Current Status of the Law

A second means of limiting the ADA’s protections with respect to mutable disabilities is to consider the conduct of the disabled individual as a factor in determining whether her employer has satisfied its duty of making a reasonable accommodation. Focus in this instance is placed on the term “reasonable.” Guidance as to what is meant by the term “reasonable” as a modifier of “accommodation” is scarce. The statute lists several types of accommodations that an employer may be required to make to enable an employee with a disability to perform the essential functions of a job. However, the statute does not describe the circumstances under which any of these accommodations would be considered reasonable or unreasonable. The regulations, in addition to listing types of accommodations that an employer may be required to make, explain when accommodations should be made and how an appropriate accommodation can be identified. As with the statute, however, they do not discuss how to determine whether a particular accommodation is reasonable.

Most courts that have addressed the issue of whether an employer has violated the ADA by failing to make a reasonable accommodation have ignored the question of whether a proposed accommodation is reasonable. Instead, courts have focused primarily on whether the employer has a valid defense for not making the accommodation—namely that the accommodation would not enable the individual to perform all the essential functions of the job, the ac-

93. See 42 U.S.C. § 12111(9).
94. 29 C.F.R. § 1630.2(o).
95. See id.
96. See 42 U.S.C. § 12111(8). In order for an employer to be required to make an accommodation, the applicant or employee must be a qualified individual with a disability. See 42 U.S.C. § 12112. To be a qualified individual with a disability, the individual must be able, with or without a reasonable accommodation, to perform all the essential functions of
commodation would cause an undue hardship to the employer, or the individual with a disability, even with an accommodation, would pose a direct threat to the health or safety of others. Nonetheless, an accommodation that enables an employee to perform all the essential functions of the job without imposing an undue hardship on the employer and without posing a direct threat to the health or safety of others may not be reasonable.

The Seventh Circuit recognized this argument in Vande Zande v. Wisconsin Department of Administration. The plaintiff in Vande Zande unsuccessfully argued that "reasonable," as it modifies "accommodation" under the ADA, means nothing more than appropriate or effective. Factors such as cost, she claimed, are irrelevant to a determination of whether an accommodation is reasonable. According to the plaintiff, cost comes into the analysis only at the stage of determining whether an accommodation will impose an undue hardship.

the job. See 42 U.S.C. § 12111(8). Thus, an employer is not required to make an accommodation if there is no reasonable accommodation that will enable the individual to perform all the essential functions of the job. For examples of cases involving a question of whether an employee is able to perform the essential functions of a job, see Gore v. GTE South, Inc., 917 F. Supp. 1564, 1571-73 (M.D. Ala. 1996), Miller v. Department of Corrections, 916 F. Supp. 863, 866-69 (C.D. Ill. 1996), and Miller v. Blue Cross Blue Shield, Inc., 894 F. Supp. 1463, 1467-69 (D. Kan. 1995).


99. 44 F.3d 538 (7th Cir. 1995).
100. Id. at 542.
101. Id.
102. Id.
The court disagreed. The court stated that to accommodate a disability means to make some change that will enable an individual with a disability to perform the essential functions of a job. If a change is inappropriate or ineffective, it is not an accommodation. Thus, the court reasoned that if the term “reasonable” is to be given any meaning it must qualify what is meant by “accommodations.” In other words, “reasonable” must mean something other than appropriate or effective, which are already embodied within the concept of accommodation.

The court recognized that generally when the term “reasonable” is used, it is meant to weaken the duty required. As an illustration, the court noted that “reasonable effort” means less than the maximum possible effort. The court stated that similar reasoning could be applied to the meaning of the word “reasonable” as used in the term “reasonable accommodations.” The ADA, therefore, does not require employers to make every conceivable accommodation. Rather, their obligation is something less. In assessing whether an accommodation satisfies the reasonableness test under the ADA, the court in Vande Zande indicated that a cost-benefit analysis is appropriate. Thus, an accommodation for which the cost is disproportionate to the benefit may not be reasonable even if the cost would not cause an undue hardship to the employer.

The court in Vande Zande concluded that the defendant was not required to lower a sink in an employee breakroom to permit use by the plaintiff, who was in a wheelchair. The court reached this con-
clusion, even though the cost was only $150, because there was a nearby bathroom sink that was accessible to the plaintiff.\textsuperscript{113} Despite the fact that $150 would clearly not impose an undue hardship on the defendant, the court determined that the accommodation requested by the plaintiff was unreasonable in light of the surrounding circumstances.\textsuperscript{114}

B. A Proposal

If the term "reasonable" as a modifier of the term "accommodation" is to be given meaning, then the burden placed on employers under Title I of the ADA must be something less than requiring them to make any possible accommodation. The next question, then, is under what circumstances can an employer refuse to make an accommodation because the accommodation is not reasonable. The court in \textit{Vande Zande} suggested that an accommodation is not reasonable if the cost of making the accommodation is disproportionate to the benefit that it would produce.\textsuperscript{115} In accordance with the cost-benefit analysis discussed in \textit{Vande Zande}, I propose that an accommodation also may not be reasonable if the individual with the disability has a mutable impairment and refuses or fails to take reasonable steps to improve or eliminate the condition.

Although no court has specifically endorsed this proposition, there is some authority to support it. In \textit{D'Amico v. New York State Board of Law Examiners},\textsuperscript{116} the court stated its opinion that the nature and extent of the disability is an important factor in determining whether an accommodation is reasonable. Mutability clearly relates to the nature and extent of the disability.

In addition, some decisions have indicated that the conduct of the employee is a factor in determining whether an employer has violated the ADA.\textsuperscript{117} \textit{Crane v. Lewis}, a case decided under the Rehabilitation Act, involved an employee with a hearing disability.\textsuperscript{118} The court found that the defendant had violated the Rehabilitation Act by failing to suggest to the plaintiff that he use a compensatory device, such as a hearing aid or a telephone amplification device, that could enable

\footnotesize{\begin{itemize}
\item\textsuperscript{113} Id.
\item\textsuperscript{114} See id.
\item\textsuperscript{115} Id. at 542.
\item\textsuperscript{116} 813 F. Supp. 217, 221-22 (W.D.N.Y. 1993).
\item\textsuperscript{117} See, e.g., Siefken v. Village of Arlington Heights, 65 F.3d 664, 667 (7th Cir. 1995); Crane v. Lewis, 551 F. Supp. 27, 31-32 (D.D.C. 1982).
\item\textsuperscript{118} Crane, 551 F. Supp. at 28.
\end{itemize}}
him to perform his job. The court stated, however, that if the employee refused to use such a compensatory device, then no further actions would be required by the defendant.

The court in *Siefken v. Village of Arlington Heights* applied similar reasoning. The plaintiff in *Siefken* was a police officer with diabetes. He was fired after he experienced a diabetic reaction that resulted in his driving his squad car erratically and at high speeds through residential areas. The court found that an employee does not have a cause of action under the ADA if he is dismissed due to his own failure to control a controllable disability.

The existence of a mutable disability should not, however, automatically lead a court to conclude that any accommodation would be unreasonable. Rather, courts should consider all the facts and circumstances in determining whether it is reasonable to require the individual to take the action needed to eliminate, reduce, or prevent the exacerbation of the disability. If a court finds that it is not reasonable to require the employee to undergo the mitigating action, then the employer would be required to make an accommodation, provided that doing so otherwise fits within the parameters of the ADA. Conversely, if a court finds that the mitigating action is reasonable, then the only accommodation that an employer would be required to make is one necessary to permit the employee to take the mitigating action, again assuming that it otherwise fits within the parameters of the ADA, with one exception.

If the mitigating action is found to be reasonable, but there is a viable accommodation that could be made, the employee could choose to forego the mitigating action and the employer would be required to provide the accommodation, but at the employee’s cost. This not only gives the employee some freedom of choice, but also promotes economic efficiency. A previous example was given in which the condition of a janitor with an injured back could be eliminated by a surgical procedure that cost thousands of dollars. At the same time, an accommodation was available for a cost of $200 per

119. *Id.* at 31.
120. *Id.* at 31-32.
121. *See Siefken*, 65 F.3d at 665.
122. *Id.* at 666.
123. *Id.* at 665.
124. *Id.* at 667. *See also* Franklin v. United States Postal Serv., 687 F. Supp. 1214, 1218 (S.D. Ohio 1988) (finding that defendant’s firing of plaintiff was not discriminatory under the Rehabilitation Act because it was plaintiff’s election not to take her medication that resulted in incidents leading to her firing).
year. The janitor had very little reason to have the surgery other than in connection with his ability to perform his job. In this scenario, the janitor could choose not to undergo the more costly surgery and instead reimburse his employer for the cost of the accommodation, which the employer would then be required to make.

C. Delineating When It Is Reasonable To Require a Mitigating Action

The rule of avoidable consequences as it has developed under tort law provides a helpful guide for ascertaining when it is reasonable to require an individual with a disability to take a mitigating action. The general premise of the rule of avoidable consequences is that a party should not be awarded a recovery for losses that she reasonably could have avoided. Its purpose is similar to the purpose behind the proposal for limiting coverage under the ADA when an individual has a mutable impairment—to discourage persons from passively suffering losses that could be averted by reasonable efforts and from actively increasing such losses where prudence would require that such activity cease.

Thus, under the rule of avoidable consequences, a plaintiff’s damages are reduced only to the extent that losses could have been avoided through reasonable efforts. An individual “is not required to accept great risks, undertake heroic measures, or accept great personal sacrifices.” Rather, an individual is only obligated to take

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125. Likewise, worker’s compensation cases may prove helpful. Generally, worker’s compensation laws permit an employer to refute a claimant’s assertion that she is permanently disabled with evidence that the claimant unreasonably failed to follow medical advice or refused medical treatment. See, e.g., Nelson v. EBI Cos., 674 P.2d 596, 599-600 (Or. 1984).


127. The rule of avoidable consequences is frequently referred to as a duty to mitigate or minimize damages, although, as Professor McCormick points out, this is somewhat of a misnomer. See McCormick, supra note 34, § 33, at 128.

128. See also RESTATEMENT (SECOND) OF TORTS § 918 cmt. a (1977) (explaining that rule of avoidable consequences denies recovery for harm because harm is in part the result of injured person’s lack of care, and public policy requires that persons should be discouraged from wasting resources).

129. See DAN B. DOBBS, LAW OF REMEDIES § 3.9, at 271 (1993).

those actions that an ordinarily prudent person would take under the circumstances in an effort to better his condition.\textsuperscript{131} The risk involved, the pain involved, the probability of success, the cost, and the amount of effort required are all considered.\textsuperscript{132} In evaluating the reasonableness of the mitigating action, these considerations are weighed against the consequences of not taking the mitigating action.\textsuperscript{133}

Therefore, in most circumstances, an injured person is required, at a minimum, to seek medical care and to follow the advice of the physician consulted.\textsuperscript{134} This includes taking prescribed medication,\textsuperscript{135} following a recommended physical therapy regimen,\textsuperscript{136} and refraining

\begin{itemize}
\item \textsuperscript{130} In using terms such as "obligated," "required," and "must," I do not mean to suggest that a person can be forced to do these things. What I do mean is that a person will not be fully compensated for his or her losses if he or she fails or refuses to do these things.
\item \textsuperscript{131} Jacobs v. New Orleans Pub. Serv., Inc., 432 So. 2d 843, 845-46 (La. 1983); Favier v. Winick, 583 N.Y.S.2d 907, 908 (N.Y. Sup. Ct. 1992); Zimmerman v. Ausland, 513 P.2d 1167, 1170 (Or. 1973); Yost v. Union R.R., 551 A.2d 317, 322 (Pa. Super. Ct. 1988); Rusoff v. O'Brien, 206 A.2d 209, 212 (R.I. 1965); Lobermeier v. General Tel. Co., 349 N.W.2d 466, 476 (Wis. 1984). \textit{Accord RESTATEMENT (SECOND) OF TORTS} § 918 cmt. c (1977). See also \textit{Yarrow v. United States}, 309 F. Supp. 922, 932 (S.D.N.Y. 1970) ("[a] person who has suffered by reason of a defendant's negligence is bound to use reasonable and proper effort to make the damage as small as practicable and to act in good faith to adopt reasonable methods to restore himself"); Preston v. Keith, 584 A.2d 439, 441 (Conn. 1991) ("[w]e have long adhered to the rule that one who has been injured by the negligence of another must use reasonable care to promote recovery and prevent any aggravation or increase of the injuries") (internal quotation marks and citations omitted); Michaud v. Steckino, 390 A.2d 524, 531 (Me. 1978) (stating rule that person injured through negligence of another has duty to minimize damages and use reasonable diligence to secure medical or surgical aid).
\item \textsuperscript{132} Lucas v. Deville, 385 So. 2d 804, 815 (La. Ct. App. 1979); Zimmerman, 513 P.2d at 1170. \textit{Accord Dobbs, supra} note 128, § 3.9, at 272-73.
\item \textsuperscript{133} Lucas, 385 So. 2d at 815. See also Corlett v. Caserta, 562 N.E.2d 257, 263 (Ill. App. Ct. 1990) (noting that gravity of current condition is factor to be considered in determining reasonableness of plaintiff's refusal to be treated).
\item \textsuperscript{134} See Casimere v. Herman, 137 N.W.2d 73, 78 (Wis. 1965). See also Dohmann v. Richard, 282 So. 2d 789, 793 (La. Ct. App. 1973) (stating rule that injured person must minimize damages by accepting customary, non-dangerous medical treatment recommended by physician); Stipp v. Karasawa, 318 S.W.2d 172, 176 (Mo. 1958) (upholding jury determination that plaintiff failed to exercise reasonable care to minimize damages when he failed to procure proper medical attention); Booth Tank Co. v. Symes, 394 P.2d 493, 495-96 (Okla. 1964) (upholding jury instruction on mitigation of damages when plaintiff refused medical treatment and evidence was presented that this worsened her condition); Collova v. Mutual Serv. Casualty Ins. Co., 99 N.W.2d 740, 742-43 (Wis. 1959) (relying on plaintiff's refusal to seek appropriate medical care and failure to follow the advice of physicians in refusing to set aside damage award as inadequate).
\item \textsuperscript{135} See, e.g., Kears v. Bottarielli, 645 A.2d 1029, 1031 (Conn. App. Ct. 1994) (affirming finding of trial court that plaintiff failed to take reasonable action to lessen damages by neglecting to take prescribed medication and otherwise not following physician's instructions).
\item \textsuperscript{136} See, e.g., Reeves v. Louisiana & Ark. Ry., 304 So. 2d 370, 376 (La. Ct. App. 1974) (refusing to increase plaintiff's damage award when injuries resulted from plaintiff's failure
from engaging in specified activities.\textsuperscript{137} In Casimere v. Herman,\textsuperscript{138} for instance, the court, citing to the duty to exercise reasonable care to minimize damages, found that the plaintiff was not entitled to damages for a permanent disability when she failed to follow a course of exercises prescribed by her physician that would have alleviated her back pain.\textsuperscript{139} The court stated that the defendant “cannot be expected to pay for a lifetime’s disability or pain if proper medical treatment . . . can reasonably correct the [plaintiff’s] ailments.”\textsuperscript{140}

Similarly, the court in Rusoff v. O’Brien\textsuperscript{141} upheld a lower court decision denying damages to the plaintiff for a permanent injury.\textsuperscript{142} The plaintiff, despite his physician’s advice not to engage in strenuous activities, had lifted an anchor, changed a tire, and carried a heavy suitcase.\textsuperscript{143} The plaintiff claimed that at least some of these activities were necessary for his business.\textsuperscript{144} The court found that this was not a sufficient reason for the plaintiff to breach his obligation to act with due regard for his own recovery.\textsuperscript{145}

Nonetheless, a cost-benefit analysis is always involved, and in extraordinary situations treatments such as taking prescribed medication, following a recommended physical therapy regimen, or refraining from engaging in specified activities might not be considered reasonable. For example, in Williams v. Reading & Bates Drilling Co.,\textsuperscript{146} the plaintiff suffered from a skin condition on his foot that was

\begin{footnotes}
\item[138] 137 N.W.2d 73 (Wis. 1965).
\item[139] Id. at 78.
\item[140] Id.
\item[141] 206 A.2d 209 (R.I. 1965).
\item[142] Id. at 212.
\item[143] Id. at 210.
\item[144] Id. at 212.
\item[145] Id.
\item[146] 750 F.2d 487 (5th Cir. 1985).
\end{footnotes}
the result of a previous injury.\textsuperscript{147} The condition was treatable through systemic steroid injections.\textsuperscript{148} The plaintiff refused to receive the steroids, however, because they were likely to cause severe side effects, such as hypertension, ulceration of the stomach, and thinning of the bones.\textsuperscript{149} The court found that the plaintiff's refusal of the steroid treatment was not unreasonable under the circumstances.\textsuperscript{150}

Although the analysis remains the same, greater scrutiny is dictated when the mitigating action requires surgery for the obvious reason that surgery is more likely to involve significant risk, pain, and expense. Nevertheless, the analysis is possible and courts frequently engage in it in personal injury cases. Generally, an injured person will not be required to undergo surgery if there is more than a slight risk that the surgery will result in death, an aggravation of the existing condition, or the development of a new health problem.\textsuperscript{151} Thus, in \textit{Sarantis v. Sheraton Corp.},\textsuperscript{152} the court found that it was not unreasonable for the plaintiff to refuse surgery where there was a twenty-five percent chance that her condition either would not improve or would worsen as a result of the surgery.\textsuperscript{153} In addition, because of the risks inherent in any surgical procedure, it also is not unreasonable for an injured person to refuse surgery if the prospect for improvement is minimal.\textsuperscript{154} For example, the plaintiff in \textit{Fitzpatrick v. United States}\textsuperscript{155} was not obligated to undergo a surgical procedure when it was uncertain whether the procedure would alleviate her pain or improve her condition.\textsuperscript{156} On the other hand, if an injury can be cured or allevi-

\begin{itemize}
\item \textsuperscript{147} Id. at 489.
\item \textsuperscript{148} Id. at 490.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id.
\item \textsuperscript{152} 688 P.2d 99 (Or. Ct. App. 1984).
\item \textsuperscript{153} Id. at 103. See also Horton v. McCrary, 620 So. 2d 918, 933 (La. Ct. App. 1993) (finding that plaintiff was not obligated to undergo surgery to correct double vision in one eye when there was risk that surgery could adversely affect both of his eyes).
\item \textsuperscript{154} See Hildyard, 522 P.2d at 600; Hall, 620 N.E.2d at 673; Restatement (Second) of Torts § 918 cmt. d (1977).
\item \textsuperscript{155} 754 F. Supp. 1023 (D. Del. 1991).
\item \textsuperscript{156} Id. at 1039. See also Stark v. Shell Oil Co., 450 F.2d 994, 998 (5th Cir. 1971) (holding that it was not unreasonable for plaintiff to refuse surgery when it did not offer a reasonable possibility for improvement); McGinley v. United States, 329 F. Supp. 62, 66 (E.D. Pa. 1971) (finding it not unreasonable for plaintiff to refuse surgery where, if questionable diagnosis was correct, surgery had only a 60-70% success rate, and if diagnosis was incorrect, surgery would not relieve condition at all). Cf. Futterlieb v. Mr. Happy's, Inc., 548 A.2d 728, 731 (Conn. App. Ct. 1988) (finding in error trial court's decision not to give
ated by a simple and safe surgical operation, then a refusal to undergo such a procedure is unreasonable.\textsuperscript{157} In \textit{Jenkins v. American Automobile Insurance Co.},\textsuperscript{158} for instance, the court found that it was not just or equitable to compel the defendant to pay damages to the plaintiff who refused to submit to a surgical procedure that did not involve undue pain, was not regarded as presenting any serious danger, and was almost always successful.\textsuperscript{159}

Personal injury cases and the rule of avoidable consequences also provide guidance for how to treat some of the more controversial issues likely to arise under the ADA, such as obesity and smoking. With respect to both of these issues, courts have taken the approach that an injured person satisfies his obligation to minimize damages if he makes a reasonable effort either to lose weight\textsuperscript{160} or quit smoking,\textsuperscript{161} as the case may be. Whether the individual ultimately is successful is not of primary relevance.\textsuperscript{162} For example, the plaintiff in \textit{Blanchard v. Means Industries, Inc.} injured his back in an accident and underwent surgery in an attempt to correct his condition.\textsuperscript{163} The plaintiff's heavy smoking, however, may have been preventing his back from properly healing, and his physician advised him to quit.\textsuperscript{164} Although the plaintiff had not been able to quit smoking completely, he was successful in substantially reducing the number of cigarettes that he smoked per day.\textsuperscript{165} The court found that he had made sufficient effort to mitigate his damages.\textsuperscript{166} Likewise, in \textit{Close v. New York},\textsuperscript{167} the court determined that the plaintiff had fulfilled her obli-


\textsuperscript{158} 111 So. 2d 837 (La. Ct. App. 1959).

\textsuperscript{159} Id. at 840-41. \textit{See also} \textit{Young v. American Export Isbrandtsen Lines}, 291 F. Supp. 447, 449-50 (S.D.N.Y. 1968) (finding that plaintiff failed to mitigate damages by refusing to undergo a simple and safe surgical procedure that had reasonable chance of success); \textit{Yosuf v. United States}, 642 F. Supp. 432, 441 (M.D. Pa. 1986) (finding that plaintiff did not mitigate damages because he refused to have safe surgical procedure recommended by physician).


\textsuperscript{161} \textit{See} \textit{Blanchard v. Means Indus., Inc.}, 635 So. 2d 288, 293-94 (La. Ct. App. 1994).

\textsuperscript{162} \textit{Tanberg}, 473 N.W.2d at 196; \textit{Close}, 456 N.Y.S.2d at 439. \textit{See Blanchard}, 635 So. 2d at 293-94.

\textsuperscript{163} \textit{Blanchard}, 635 So. 2d at 290.

\textsuperscript{164} Id. at 293-94.

\textsuperscript{165} Id. at 294.

\textsuperscript{166} Id.

vation to lose weight, even though she had not lost all the weight that her doctor recommended.\textsuperscript{168} She had lost some weight and the court found that she had made a good faith effort to lose additional weight.\textsuperscript{169}

This type of analysis is very appealing because it eliminates the difficult question of whether the continued existence of a condition is in fact voluntary.\textsuperscript{170} The injured person is required to make reasonable attempts to improve her condition. If she is able to lose weight or quit smoking, then the continued existence of the condition must have been the result of her own conduct. Injured persons will not be penalized, however, if they are unable to actually lose weight or quit smoking. It is only if they fail to make a reasonable effort to follow a treatment plan recommended by their physician, which may include such things as wearing a nicotine patch for smokers or following a specified diet and exercise program for overweight individuals, will they be found not to have mitigated their damages.

By following the principles that have developed under the rule of avoidable consequences, it should not be difficult to assess whether an individual with a mutable impairment has taken all reasonable actions to minimize his condition. If the individual has not, then it will not be reasonable under any circumstances for his or her employer to bear the cost of an accommodation. Thus, the burden on an employer to make an accommodation under the ADA will arise only if the individual with the disability has first made all reasonable efforts to help himself. This will eliminate any potential for abuse and leave us with a result that is fair, just, and efficient.

**Conclusion**

If left unchecked, the tentacles of the ADA have the potential to reach much farther and much wider than our sense of fairness and justice would dictate. This Article has identified one aspect of the ADA that needs to be reined in—the protections offered under the ADA to individuals with mutable impairments. This Article has also

\textsuperscript{168} Id. at 439.

\textsuperscript{169} Id. \textit{Cf.} Muller v. Lykes Bros. S.S. Co., 337 F. Supp. 700, 706 (E.D. La. 1972) (finding that plaintiff, who cooperated in weight loss program for five months, but then grew tired of it and discontinued treatment, regaining all previously lost weight, failed to mitigate damages); Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193, 196 (Iowa 1991) (holding that where a plaintiff is not as faithful in following his diet as he should have been, a jury could find that he did not reasonably mitigate his damages).

\textsuperscript{170} Concededly, this analysis may raise some difficult evidentiary problems, particularly in connection with whether an individual has followed a prescribed diet.
offered a means of properly limiting the scope of the ADA in this context—requiring employers to bear the cost of an accommodation only if the individual with the disability first has taken all reasonable steps to eliminate or reduce his impairment. This solution can easily be implemented by including as a factor in the assessment of what constitutes a “reasonable accommodation” the conduct of the employee with a mutable impairment.

The burden is on the EEOC and the courts to act. The EEOC should promptly issue regulations requiring interpretation of the term “reasonable accommodations” in the manner set forth in this Article. Courts also have the ability to interpret the meaning of the term “reasonable accommodations.” Following the lead of the Seventh Circuit in Vande Zande, courts should give more weight to the word “reasonable” as a modifier of “accommodation.” If faced with an individual with a mutable impairment and the question of what constitutes a reasonable accommodation, courts should take the opportunity to analyze the issue consistently with the solution this Article proposed. If these suggestions are followed, the only losers will be those who would seek to take unfair advantage of the ADA.