ADDING WEIGHT TO THE ADA: WHY ANOREXIA SHOULD CONSTITUTE A DISABILITY AND THUS BE PROTECTED UNDER THE AMERICANS WITH DISABILITIES ACT

> [*Individuals with eating disorders*] *feel so powerless and overwhelmed that they turn inward to find a world they can control. Because inside their bodies, they have absolute control. Control over food, family, and everything important to them. Even if that control means they are slowly taking their own lives.*[1]

I. INTRODUCTION

The critics who dismiss anorexia as a minor, self-induced problem are certainly uninformed that up to fifteen percent of individuals suffering from anorexia die every year.[2] What is so frightening about anorexia is not just its deadliness but also how its strangling grip on society is both expanding and growing tighter.[3] As many as ten million women and one million men "are fighting a life-and-death battle" with eating disorders such as anorexia,[4] a statistic that excludes the countless individuals in a less critical stage of an eating disorder. The rise in anorexia cases is evidenced by the fact that eating disorder treatment centers are a growing business and talk shows often exploit the ordeals of individuals with eating disorders to bolster ratings.[5]

The magnitude of this anorexia epidemic is revealed by society's growing mission to fight the disease. Because the media realizes that the anorexia of everyday people is less newsworthy, the most sensationalized reports of anorectics are those of actresses, models, and other famous individuals.[6] Society

1. IRA M. SACKER & MARC A. ZIMMER, DYING TO BE THIN: UNDERSTANDING AND DEFEATING ANOREXIA NERVOSA AND BULIMIA—A PRACTICAL, LIFESAVING GUIDE 11 (1987).

2. *Id.* at xiii.

3. *See* CAROLYN COSTIN, THE EATING DISORDER SOURCEBOOK: A COMPREHENSIVE GUIDE TO THE CAUSES, TREATMENTS, AND PREVENTION OF EATING DISORDERS 1 (2007) (explaining that eating disorders are "alarmingly common"); SACKER & ZIMMER, *supra* note 1, at xiv (describing "rapid spread of anorexia").

4. COSTIN, *supra* note 3, at 23. Eating disorders thus affect more individuals than HIV/AIDS. *Id.*

5. *Id.* at 3. Furthermore, "[l]arge corporations are now 'investing' in this industry as a result of their market research." *Id.*

6. *See* Steve Kingstone, *Brazil Weighs In on Skinny Models*, BBC NEWS, Jan. 27, 2007, http://news.bbc.co.uk/2/hi/americas/6305657.stm (discussing how twenty-one-year-old top Brazilian model, Ana Carolina Reston, died from generalized infection due to anorexia, weighing only eighty-eight pounds at death); *Mary-Kate Olsen Discharged from Eating Facility*, CNN.COM, July 26, 2004, http://www.cnn.com/2004/SHOWBIZ/Movies/07/26/mary.kate.olsen/index.html (explaining Mary Kate Olsen's eating disorder and treatment); Jennifer Rosenberg, *Diana, Princess of Wales*, ABOUT.COM: 20TH CENTURY HISTORY, http://history1900s.about.com/od/1980s/p/princessdiana.htm (last visited Nov. 28, 2008) (showing that Princess Diana suffered from bulimia). Other famous individuals who

has responded with an enhanced desire to combat eating disorders by criticizing anorexic or even seemingly anorexic famous individuals who serve as role models for many young females.[7] Various countries and organizations have even taken part in the societal battle against anorexia by taking steps to eliminate eating disorders among these role models who are most exposed to the world. Notably, in order to repel the wave of eating disorders that has stricken models, countries have banned or considered banning ultrathin women from fashion shows.[8]

Although it is impossible to calculate the exact number of anorexic employees currently in the workforce, it is suspected that the number is extremely high.[9] Certain professions seem to attract individuals suffering from eating disorders, such as jobs in fitness, dance, theater, and modeling.[10] On the other hand, sometimes it is the job environment itself that creates the body-weight issues that lead to eating disorders, such as exposure to constant pressure to be the "ideal professional."[11] Recognizing the threat from employers, one registered dietician stated that an employer should not fire an individual because

have suffered from eating disorders include Gilda Radner, Sally Field, Elton John, Tracy Gold, Paula Abdul, Felicity Huffman, Jamie-Lynn DiScala, and Jane Fonda. COSTIN, *supra* note 3, at 2-3.

7. For example, in 2005, young actress Lindsay Lohan "slammed reports" that she suffered from an eating disorder, attributing her slim body to exercising. Wenn.com, *Lohan Slams Eating Disorder Rumors*, HOLLYWOOD.COM, May 23, 2005, http://www.hollywood.com/news/Lindsay_Lohan_Slams_Eating_Disorder_Rumors/2440768. In 2006, she admitted that her very low body weight was due to bulimia. Jennifer Vineyard, *Lindsay Lohan Admits Eating Disorder, Drug Use in* Vanity Fair *Interview*, MTV NEWS.COM, Jan. 4, 2006, http://www.mtv.com/news/articles/1519731/20060104/lohan_lindsay.jhtml. Also, actress Keira Knightley has had to repeatedly deny rumors that she is anorexic. Monique Jessen, *Keira Knightley 'Devastated' by Anorexia Rumors*, PEOPLE.COM, May 2, 2007, http://www.people.com/people/article/0,,20037486,00.html.

8. *Skinny Models Banned from Catwalk*, CNN.COM, Sept. 13, 2006, http://www.cnn.com/2006/WORLD/europe/09/13/spain.models/index.html (explaining how Madrid banned ultrathin models from participating in top fashion show, which was world's first such ban). *But see* Rebecca Smithers & Jess Cartner-Morley, *London Fashion Week Refuses to Ban Ultra-thin Models*, GUARDIAN (London), Jan. 25, 2007, at 3, *available at* http://www.guardian.co.uk/uk_news/ story/0,,1997976,00.html (detailing British Fashion Council's refusal to ban ultrathin models from appearing in fashion shows). Ironically, it is possible that legislation banning ultrathin models from modeling would violate the ADA under the cause of action for anorectics proposed in this Comment. Nevertheless, this Comment will not address whether an employer violates the ADA when the discrimination is solely aimed at protecting the anorexic employee and is also meant to discourage widespread anorexia within a certain employment area in which such eating disorders are routine. For example, in the modeling industry, models who do not have eating disorders are sometimes considered "abnormal." *Eating Disorders in the Workplace*, MYEDHELP.COM, http://www.therenewcenter.com/PDF/Eating%20Disorders%20and%20the%20Workplace.pdf (last visited Nov. 28, 2008) [hereinafter MYEDHELP].

9. Mark Stuart Ellison, *Anorexia and the Workplace*, SUITE 101.COM, May 30, 2000, http://www.suite101.com/article.cfm/anorexia/40443.

10. MYEDHELP, *supra* note 8. Despite the fact that eating disordered individuals are drawn to these jobs, there are still many other such individuals in completely different working environments, such as an office job. *Id.*

11. *See* Something Fishy: Website on Eating Disorders, Relationships, http://www.something-fishy.org/prevention/relationships.php (last visited Nov. 28, 2008) (explaining that body-weight issues can come from pressure to be "the ideal professional," gossiping and comments by coworkers, sexual harassment, and bosses advising employees to lose weight in order to obtain promotions).

of her psychological problems, such as anorexia, "'as that would be discriminatory.'"[12] Under the current law, however, she would be wrong.

The Americans with Disabilities Act ("ADA" or the "Act") is federal legislation designed to protect disabled individuals from employment discrimination, among other types of discrimination, on the basis of their disabilities.[13] Although the statute does not explicitly exclude eating disorders from being a disability, not one court in the United States has found anorexia or any other eating disorder to be protected under the Act.[14] Since the ADA's enactment in 1990, courts have frequently expanded the statute's coverage by recognizing and protecting new disabilities.[15] Anorexia is a growing problem that is only going to get worse.[16] The time is long overdue for anorexic employees to be legally protected from employment discrimination on the basis of their anorexia.

This Comment concludes that anorexia should constitute a "disability" within the meaning of the ADA and therefore should be entitled to appropriate legal protection. Part II presents an overview of the ADA and the prima facie elements of an ADA claim, primarily in the context of eating disorders and the "major life activity" of eating. Part II also discusses the psychological and physical characteristics of, and treatment for, anorexia. Part III.A argues that anorexia can satisfy all of the elements of an ADA claim and suggests various reasonable accommodations that employers could implement for when the anorexic employee is not otherwise qualified. Part III.B provides several reasons why offering ADA protection to employees with anorexia is both necessary and beneficial. Part III.C explains why recognizing ADA claims based on anorexia will neither lead to excess litigation nor create an undue burden for employers.

II. OVERVIEW

A. The Americans with Disabilities Act

1. Purpose of the ADA

In 1990, Congress enacted the ADA to address and resolve the extensive discrimination against individuals with disabilities.[17] The enactment of the ADA

12. Ellison, *supra* note 9 (quoting Joanne Larsen, registered dietician).

13. 42 U.S.C. § 12112(a) (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a)(1), 122 Stat. 3553, 3557.

14. *See, e.g.*, Frank v. United Airlines, Inc., 216 F.3d 845, 857 (9th Cir. 2000) (concluding plaintiffs' eating disorders did not amount to "disability" status); Shalbert v. Marcincin, No. 04-5116, 2005 U.S. Dist. LEXIS 16564, at *15, *25 (E.D. Pa. Aug. 9, 2005) (concluding that plaintiff's anorexia was not "disability" under ADA); Rio v. Runyon, 972 F. Supp. 1446, 1456 (S.D. Fla. 1997) (refusing to find plaintiff's anorexia to be "disability").

15. *See, e.g.*, Bukta v. J.C. Penney Co., Inc., 359 F. Supp. 2d 649, 663-64 (N.D. Ohio 2004) (explaining that it is first court to find "conversion disorder" to be disability within meaning of ADA).

16. See *supra* notes 3-5 and accompanying text for a discussion of the prevalence and growth of eating disorders.

17. PGA Tour, Inc. v. Martin, 532 U.S. 661, 674 (2001) (describing purpose of ADA enactment).

was significantly motivated by Congress's finding that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[18] After a thorough investigation, Congress decided that "there was a 'compelling need' for a 'clear and comprehensive national mandate' to eliminate discrimination against disabled individuals, and to integrate them 'into the economic and social mainstream of American life.'"[19] The ADA bans discrimination against disabled individuals in important areas of public life, including employment (Title 1 of the ADA),[20] public services (Title II),[21] and public accommodations (Title III).[22] The scope of this Comment will be limited to employment discrimination against anorexic individuals.

2. A Prima Facie Case of Employment Discrimination Under the ADA

The ADA prevents employers from discriminating "against a *qualified individual* on the basis of *disability* in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[23] A qualified individual with a disability is one "who, with or without reasonable accommodation, can perform the essential functions" of the job.[24] Thus, in order to have a valid claim under the ADA, "'a plaintiff must prove by a preponderance of the evidence that (1) she has a disability; (2) she is qualified for the position; and (3) her employer discriminated against her because of her disability.'"[25]

a. Proving a Disability Within the Meaning of the ADA

The first prong in proving an ADA claim is showing that the individual suffers from a "disability," defined in the statute as "a physical or mental impairment that substantially limits one or more major life activities of such individual."[26] The Supreme Court has held that this definition requires that (1) the individual have an impairment, (2) the individual rely on what the ADA

18. 42 U.S.C. § 12101(a)(2) (2006).

19. *PGA Tour*, 532 U.S. at 675 (quoting S. REP. NO. 101-116, at 20 (1989); H.R. REP. NO. 101-485, pt. 2, at 50 (1990)).

20. 42 U.S.C. §§ 12111-12117.

21. *Id.* §§ 12131-12165.

22. *Id.* §§ 12181-12189.

23. *Id.* § 12112(a), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a)(1), 122 Stat. 3553, 3557 (emphasis added).

24. *Id.* § 12111(8).

25. Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1250 (10th Cir. 2005) (quoting Poindexter v. Atchison, Topeka & Santa Fe Ry. Co., 168 F.3d 1228, 1230 (10th Cir. 1999)) (affirming lower court decision that plaintiff was substantially limited in major life activity of working and that plaintiff could perform essential functions of her job); *see also* Kees v. Wallenstein, 161 F.3d 1196, 1199 (10th Cir. 1998) (restating ADA claim requirements in slightly different language).

26. 42 U.S.C. § 12102(1)(A), *amended by* ADA Amendments Act § 4(a), 122 Stat. at 3555.

considers a "major life activity," and (3) the impairment "substantially limit" the major life activity.[27]

i. Physical Impairment or Mental Impairment

The first step in establishing a disability under the ADA is proving that the individual's condition constitutes a physical or mental impairment. Because the ADA does not define "physical or mental impairment," the courts turn to regulations issued by the Department of Health and Human Services ("HHS") (previously the Department of Health, Education, and Welfare), which define a "[p]hysical or mental impairment" as

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
>
> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[28]

HHS purposely refrained from listing all disorders that would constitute a "physical or mental impairment" for fear that "any specific enumeration might not be comprehensive."[29]

Courts have explicitly and implicitly acknowledged that eating disorders constitute an "impairment" within the meaning of the ADA.[30] In *Shalbert v. Marcincin*,[31] after citing the devastating effects of anorexia, the court conclusively stated that "[u]ndoubtedly, anorexia is a serious and potentially debilitating condition."[32] Because the "impairment" criterion was easily satisfied, the court instead primarily focused on whether the plaintiff was substantially limited in a major life activity.[33] In *Frank v. United Airlines, Inc.*,[34] the Ninth Circuit proceeded directly to the third prong and affirmed a ruling that the plaintiffs' eating disorders did not substantially limit any major life activities[35]

27. Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

28. 45 C.F.R. § 84.3(j)(2)(i) (2006). These regulations were first issued in 1977 to interpret the Rehabilitation Act. *Bragdon*, 524 U.S. at 632. Congress specifically explained in the ADA that nothing in the Act should be construed to apply a lower standard than that which existed under the Rehabilitation Act of 1973. *Id.* at 632 (referring to 42 U.S.C. § 12201(a)).

29. *Bragdon*, 524 U.S. at 633 (citing 42 Fed. Reg. 22,685 (1977)).

30. *See, e.g.*, Frank v. United Airlines, Inc., 216 F.3d 845, 857 (9th Cir. 2000) (acknowledging that eating disorders can substantially limit major life activities without explicitly stating that they are "impairments" within meaning of ADA); Shalbert v. Marcincin, No. 04-5116, 2005 U.S. Dist. LEXIS 16564, at *10 (E.D. Pa. Aug. 9, 2005) (finding no dispute over whether anorexia constitutes impairment).

31. No. 04-5116, 2005 U.S. Dist LEXIS 16564 (E.D. Pa. Aug. 9, 2005).

32. *Shalbert*, 2005 U.S. Dist. LEXIS 16564, at *10.

33. *Id.* at *10-11. The court held that the plaintiff was not substantially limited. *Id.* at *25.

34. 216 F.3d 845, 857 (9th Cir. 2000).

35. *Frank*, 216 F.3d at 857 (finding plaintiffs' eating disorders were not disabilities within

without discussing whether they were impairments within the meaning of the ADA.

Because anorexia is a psychological disorder[36] and there is a paucity of case law addressing anorexia ADA claims, it is instructive to examine how courts have handled other psychological disorders in this context. Courts have found depression,[37] obsessive-compulsive disorder,[38] mental retardation,[39] bipolar disorder,[40] manic depression,[41] and conversion disorder,[42] for example, to constitute "mental impairments." In deciding that conversion disorder, a "'chronic psychiatric disability' arising from seriously insulting and humiliating situations," is a "mental impairment," a federal district court noted that the psychological disorder can create "debilitating physical symptoms, panic attacks and anxiety."[43] After being berated by her boss in public, the plaintiff in that case experienced severe headaches, chest pain, and blurred vision.[44] Despite the fact that up to that point no court had treated conversion disorder as an "impairment" under the ADA, the court felt comfortable in extending the breadth of the ADA and holding that conversion disorder constituted a "mental impairment" and ultimately a "disability" within the meaning of the statute.[45]

ii. Major Life Activity

The second step in showing a disability under the ADA is proving that the individual's disability affects a "major life activit[y]."[46] If the impairment does not affect a major life activity, it cannot be considered a disability under the ADA.[47] Congress recently amended the ADA to provide that major life

meaning of ADA because major life activity of eating was not substantially limited).

36. See *infra* Part II.B.1 for a discussion of how anorexia is a psychological disorder.

37. *See*, *e.g.*, Criado v. IBM Corp., 145 F.3d 437, 442 (1st Cir. 1998) (noting that depression is considered ADA disability in some circumstances); Pritchard v. S. Co. Servs., 92 F.3d 1130, 1132 (11th Cir. 1996) (observing that depression can be considered mental impairment). Oftentimes, the court does not have to determine whether depression constitutes a mental impairment because the defendant employer concedes as much. *See*, *e.g.*, Pack v. Kmart Corp., 166 F.3d 1300, 1304 (10th Cir. 1999) (stating that Kmart conceded that depression is mental impairment).

38. *See* Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999) (affirming that obsessive-compulsive disorder constitutes disability, meaning that court considered it a "mental impairment").

39. Haswell v. Marshall Field & Co., 16 F. Supp. 2d 952, 961 (N.D. Ill. 1998). The court found mental retardation to be a mental impairment because of the plaintiff's low IQ, his limited vocabulary, and his inability to perform functions such as driving, reading, and subtracting. *Id.*

40. Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1284 (7th Cir. 1996).

41. Miller v. Nat'l Cas. Co., 61 F.3d 627, 629-30 (8th Cir. 1995).

42. Bukta v. J.C. Penney Co., Inc., 359 F. Supp. 2d 649, 664 (N.D. Ohio 2004) (finding that "conversion disorder is a mental disorder and impairs [plaintiff's] sight, respiratory and cardiovascular functions," and therefore constitutes "mental impairment").

43. *Id.* at 655.

44. *Id.*

45. *Id.* at 656.

46. 42 U.S.C. § 12102(1)(A) (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555.

47. Bragdon v. Abbott, 524 U.S. 624, 637 (1998) (describing requirements necessary for proving

activities "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.[48] Before the recent amendments to the ADA, effective January 1, 2009, courts relied on regulations promulgated by the Equal Employment Opportunity Commission ("EEOC"), which do not include "eating" within its nonexhaustive list of major life activities.[49]

Congress's recent recognition that eating constitutes a major life activity represents an endorsement of the decisions of several circuit courts that had previously held that eating was a major life activity[50] even when the EEOC regulations did not so provide. Courts holding that eating constitutes a major life activity before Congress codified it as such did so because eating satisfied the Supreme Court's definition that a major life activity be "'central to the life process itself.'"[51] Indeed, eating is a more crucial life process than many of the activities previously acknowledged by the Supreme Court[52] or by the EEOC regulations[53] as major life activities. All of the circuit courts that had addressed the issue before Congress's recent amendments reached the same conclusion that eating constitutes a major life activity.[54]

iii. Substantial Limitation on a Major Life Activity

The third requirement for proving a disability is showing that the impairment "substantially limits" the major life activity.[55] In the ADA Amendments Act of 2008, Congress, among other things, significantly relaxed the standard for "substantially limits" that had been developed by the Supreme Court in the previous two decades. Although the Supreme Court has held that to

individual has disability under ADA).

48. 42 U.S.C. § 12102(2)(A), *amended by* ADA Amendments Act § 4(a), 122 Stat. at 3555 (emphasis added).

49. *See* 29 C.F.R. § 1630.2(h)(2)(i) (2007) (stating that major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

50. Waldrip v. Gen. Elec. Co., 325 F.3d 652, 655 (5th Cir. 2003); Vailes v. Prince George's County, 39 F. App'x 867, 869 (4th Cir. 2002); Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001); *Amir*, 184 F.3d at 1027.

51. *Waldrip*, 325 F.3d at 655 (quoting *Bragdon*, 524 U.S. at 638).

52. *Id.* (citing *Bragdon*, 524 U.S. at 637-39 (reproduction); Ivy v. Jones, 192 F.3d 514, 516 (5th Cir. 1999) (hearing); Talk v. Delta Airlines, Inc., 165 F.3d 1021, 1025 (5th Cir. 1999) (walking); Still v. Freeport-McMoran, Inc., 120 F.3d 50, 52 (5th Cir. 1999) (seeing)).

53. *Id.* at 655 (citing 29 C.F.R. § 1630.2(i) (2007)).

54. *Id.* The Third Circuit held that waste elimination constitutes a major life activity. Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 384 (3d Cir. 2004). In a subsequent case, the Third Circuit explained that the language from *Fiscus* indicated but did not hold that eating is a major life activity. Mikruk v. U.S. Postal Serv., 115 F. App'x 580, 583 (3d Cir. 2004). Because the issue was waived in that case, the court refrained from deciding whether eating constitutes a major life activity in its jurisdiction. *Id.*

55. 42 U.S.C. § 12102(1) (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555.

be "substantially limit[ing]," the impairment must "prevent[] or severely restrict[]" the disabled person from performing a major life activity,[56] Congress's recent amendments specifically rejected the onerous standard implemented by the Court because that standard "require[d] a greater degree of limitation than was intended by Congress."[57] Congress concluded that the Supreme Court in various opinions had "narrowed the broad scope of protection intended to be afforded by the ADA,"[58] and consequently "lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities."[59] Therefore, the purpose of the 2008 amendments was to, among other things, demonstrate congressional intent that the Supreme Court's "substantially limits" standard "had created an inappropriately high level of limitation necessary to obtain coverage under the ADA" and that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[60]

Although the 2008 amendments make clear that the "substantial limitation" standard must be lowered, Congress did not actually articulate a standard. Therefore, the EEOC regulations continue to provide guidance for the inquiry by explaining that "substantially limits" means that a person is

> (i) [u]nable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[61]

The EEOC further advises that, in making this determination, the courts should consider "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[62] The Supreme Court has elaborated on the EEOC's guidelines by

56. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002), *superseded by statute,* ADA Amendments Act, 122 Stat. 3553.

57. ADA Amendments Act, § 2(a)(7), 122 Stat. at 3553.

58. *Id.* § 2(a)(4).

59. *Id.* § 2(a)(6).

60. *Id.* § 2(b)(5).

61. 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (2007). It is crucial to note that, in the ADA Amendments Act of 2008, Congress found that the EEOC's regulations, which define "substantially limits" as "significantly restricted," are "inconsistent with congressional intent, by expressing too high a standard." ADA Amendments Act § 2(a)(8), 122 Stat. at 3554. Therefore, a partial purpose of the 2008 amendments was to articulate Congress's expectation that the EEOC will revise the portion of the regulations that defines "substantially limits" as "significantly restricted" to be consistent with the ADA, including the 2008 amendments. *Id.* § 2(b)(6). At the time of this Comment's publication, the EEOC had yet to amend this portion of its regulations, and thus its precise impact on the courts' analyses remains to be seen. Nonetheless, it is indisputable that the EEOC's impending revision will lower a plaintiff's burden in establishing a "substantial limitation."

62. 29 C.F.R. § 1630.2(j)(2)(i)-(iii).

explaining that, although the ADA only requires substantial limitations and "not utter inabilities,"[63] the significant restriction must be more than a "mere difference" between how a disabled individual performs the major life activity as compared with the average population.[64]

The ADA requires a plaintiff to establish a "substantial[] limit[ation]" to prevent her from obtaining disability status merely because she has an "impairment."[65] As a means of furthering this objective, the ADA defines "disability" so that it is evaluated "with respect to an individual," and consequently the impairment must substantially limit the "major life activities *of such individual*."[66] The Supreme Court has effectuated this mandate by declining to announce per se rules, opting instead for plaintiff-specific inquiries into whether a particular individual's disorder constitutes a disability.[67] For example, in *Albertson's, Inc. v. Kirkingburg*,[68] the Court held that monocular individuals, like others filing a claim under the ADA, must offer evidence that their own personal limitations are substantial enough to prove a disability under the Act.[69]

Courts have frequently found a substantial limitation on the major life activity of eating where the individual's diet is severely limited[70] but have declined to do so for mere dietary restrictions[71] or brief periods in which the individual is or was unable to eat.[72] Also, courts have commonly acknowledged that eating disorders are in fact capable of substantially limiting major life activities, namely eating, but nevertheless concluded that plaintiffs' evidence of *their* eating disorders did not demonstrate a substantial limitation.[73] In reaching

63. Bragdon v. Abbott, 524 U.S. 624, 641 (1998) (finding that, although conception and childbirth are not impossible for HIV victims, substantial limitations exist on these activities because of threat to public health).

64. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999) (explaining that ADA only concerns "limitations that are in fact substantial").

65. 42 U.S.C. § 12102(1) (2006), *amended by* ADA Amendments Act § 4(a), 122 Stat. at 3555.

66. *Id.* (emphasis added).

67. *See Bragdon*, 524 U.S. at 641-42 (declining to determine whether HIV is per se disability).

68. 527 U.S. 555 (1999).

69. *Kirkingburg*, 527 U.S. at 567. The Court refused to find monocularity a per se disability because its effects on individuals vary greatly. *Id.* at 566.

70. *See* Lawson v. CSX Transp., Inc., 245 F.3d 916, 926 (7th Cir. 2001) (concluding that diabetic individual had substantial limitation on eating where he had to immediately eat certain foods to remedy debilitating symptoms from daily insulin injections); Erjavac v. Holy Family Health Plus, 13 F. Supp. 2d 737, 747 (N.D. Ill. 1998) (finding substantial limitation on eating where individual had to eat "specific foods on a constant basis").

71. Land v. Baptist Med. Ctr., 164 F.3d 423, 425 (8th Cir. 1999) (finding child's allergic reaction to peanut-laden foods did not substantially limit eating because allergy impacted "her life only 'a little bit'").

72. Dicino v. Aetna U.S. Healthcare, No. 01-3206 (JBS), 2003 U.S. Dist. LEXIS 26487, at *26-27 (D.N.J. June 23, 2003) (concluding that eating was not substantially limited where plaintiff was unable to eat solid foods for four months and no evidence showed that eating was limited after that period).

73. *See, e.g.*, Frank v. United Airlines, Inc., 216 F.3d 845, 856-57 (9th Cir. 2000) (affirming district court's ruling that plaintiffs failed to show that *their* eating disorders substantially limited major life activities); Shalbert v. Marcincin, No. 04-5116, 2005 U.S. Dist. LEXIS 16564, at *15 (E.D. Pa. Aug. 9, 2005) (finding no substantial limitation on ability to eat when plaintiff failed to present evidence about

such a conclusion in *Frank*, the court did not explain what the plaintiffs claimed as substantial limitations nor did it explain how or why their claims were lacking; instead, it just dismissed the claims by swiftly stating that "plaintiffs have not presented evidence that *their* eating disorders" create a substantial limitation.[74]

In *Shalbert*, the plaintiff alleged that her employer refused to rescind her resignation because of her anorexia and depression.[75] The plaintiff claimed that her anorexia rendered her substantially limited in the major life activity of eating,[76] yet she did not assert how. The court found that anorexia was an impairment and eating was a major life activity but declined to find that her ability to eat was "substantially limited."[77] In deciding that no substantial limitation existed, the court focused more on the severity of the eating disorder itself and less on the actual eating restrictions.[78] It noted that the plaintiff described her anorexia as "occasional[]."[79] The court suggested that, had the plaintiff presented sufficient evidence of the "severity, duration, or permanency" of her anorexia, it would have acknowledged a substantial limitation on her ability to eat.[80]

In another case, a court did not find plaintiff's anorexia to be a disability because, although the plaintiff had briefly abused laxatives, her body weight was normal and she had undergone liposuction to remove excess body fat.[81] A doctor in that case testified that it is very unusual to find excess body fat on an individual suffering from anorexia.[82] There is no other case law that addresses anorexia in the context of an ADA claim.

b. Proving an Individual Is Qualified to Perform the Essential Functions of the Job with or Without Reasonable Accommodation

i. A Qualified Individual Without Reasonable Accommodation

The next step in establishing a prima facie case of employment discrimination under the ADA is showing that the disabled individual is qualified to perform the essential functions of the job. The term "qualified individual" means "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[83] The EEOC regulations further add that

severity, duration, or permanency of her anorexia).

74. *Frank*, 216 F.3d at 857.

75. *Shalbert*, 2005 U.S. Dist. LEXIS 16564, at *3-5.

76. *Id.* at *11.

77. *Id.* at *11-15.

78. *Id.* at *15.

79. *Id.*

80. *Shalbert*, 2005 U.S. Dist. LEXIS 16564, at *13.

81. Rio v. Runyon, 972 F. Supp. 1446, 1456 (S.D. Fla. 1997).

82. *Id.*

83. 42 U.S.C. § 12111(8) (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(c), 122 Stat. 3553, 3557.

to be a "qualified individual with a disability," the disabled individual must satisfy "the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires."[84]

Courts consider the employer's judgment as to what constitutes essential functions of the job.[85] The EEOC regulations elaborate by defining "essential functions" as "fundamental" rather than "marginal" duties.[86] The regulations further explain that

> [e]vidence of whether a particular function is essential includes, but is not limited to: (i) [t]he employer's judgment as to which functions are essential; (ii) [w]ritten job descriptions prepared before advertising or interviewing applicants for the job; (iii) [t]he amount of time spent on the job performing the function; (iv) [t]he consequences of not requiring the incumbent to perform the function; (v) [t]he terms of a collective bargaining agreement; (vi) [t]he work experience of past incumbents in the job; and/or (vii) [t]he current work experience of incumbents in similar jobs.[87]

Although the plaintiff has the burden of proving that he is a "qualified individual," if the employer contends that the plaintiff cannot perform the essential functions of the job, the burden shifts to the employer to "put on some evidence of those essential functions."[88]

There are no anorexia ADA cases that discuss essential functions of the job because those cases never reached that point in the litigation. Nevertheless, other examples of disabled individuals are insightful. The Fifth Circuit had to determine whether a diabetic plaintiff, a chemical-process operator, was able to perform the essential functions of his job.[89] It concluded that, although plaintiff had a disability under the ADA, he was not a qualified individual because his diabetes prevented him from walking, climbing, and concentrating, all of which are required of, and thus are essential functions of, a chemical-process operator.[90]

In *Kees v. Wallenstein*,[91] the plaintiff-employees sued their employer alleging that they were terminated from their positions as correction officers in violation of the ADA.[92] The employer claimed that the employees, who suffered various disabilities such as neck and back injuries and an amputated toe that prevented direct inmate contact, were unable to perform the essential function of the job.[93] After carefully considering the EEOC guidelines for ascertaining

84. 29 C.F.R. § 1630.2(m) (2007).

85. 42 U.S.C. § 12111(8), *amended by* ADA Amendments Act § 5(c), 122 Stat. at 3557.

86. 29 C.F.R. § 1630.2(n)(1).

87. *Id.* § 1630.2(n)(3)(i)-(vii).

88. McClean v. Case Corp., 314 F. Supp. 2d 911, 917 (D.N.D. 2004) (quoting Fenney v. Dakota, Minn. & E. R.R. Co., 327 F.2d 707, 712 (8th Cir. 2003)).

89. Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1091, 1093 (5th Cir. 1996).

90. *Id.* at 1093-94.

91. 161 F.3d 1196 (9th Cir. 1998).

92. *Kees*, 161 F.3d at 1197.

93. *Id.* at 1198.

whether a certain job function is essential, the court concluded that direct inmate contact is an essential function of a corrections officer.[94] Therefore, the plaintiffs were not qualified individuals with disabilities under the ADA.[95]

ii. A Qualified Individual with Reasonable Accommodation

If an individual has established that he suffers a disability but he is not qualified to perform the essential functions of the job on his own, the individual may establish unlawful discrimination by showing that he was not provided with a reasonable accommodation which, if implemented, would have allowed him to be a qualified individual.[96] Under the ADA, reasonable accommodations include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities," "job restructuring," and "part-time or modified work schedules,"[97] but the list is nonexhaustive.[98] The employer only has a duty to provide a reasonable accommodation if the employee disclosed the disability to the employer.[99] In addition, the plaintiff is responsible for making a prima facie showing that reasonable accommodation is possible.[100]

No court has ever had to consider providing a reasonable accommodation to an anorexic employee because anorexia has not yet been found to be a disability and therefore no reasonable accommodation has been legally mandated. Therefore, by comparison, it is useful to consider how courts have provided reasonable accommodations for individuals suffering from other mental impairments. In *Hardy v. Sears, Roebuck and Co.*,[101] the plaintiff-employee suffered from bipolar disorder and had several explosive episodes at work in which he threatened various employees.[102] His employer attempted to accommodate him reasonably by modifying his schedule and granting him several leaves of absence so that he could obtain psychiatric care.[103] He was later fired, and he sued his employer under the ADA.[104] The court concluded that the reasonable accommodations that the employer provided complied with the ADA.[105]

94. *Id.* at 1199.

95. *Id.*

96. Rio v. Runyon, 972 F. Supp. 1446, 1455 (S.D. Fla. 1997).

97. 42 U.S.C. § 12111(9)(A)-(B) (2006).

98. Corbett v. Nat'l Prods. Co., No. 94-2652, 1995 U.S. Dist. LEXIS 3949, at *11 (E.D. Pa. Mar. 27, 1995) (finding that nonexhaustive list of reasonable accommodations includes leave of absence for medical treatment).

99. Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1108 (Fed. Cir. 1996) (concluding that, although denial is part of alcoholism, disclosure of disease is in best interests of both employer and employee).

100. Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996).

101. No. 4:95-CV-0215-HLM, 1996 U.S. Dist. LEXIS 19008 (N.D. Ga. Aug. 28, 1996).

102. *Hardy*, 1996 U.S. Dist. LEXIS 19008, at *2, *5.

103. *Id.* at *4.

104. *Id.* at *6-7.

105. *Id.* at *24-25.

As just noted, one particularly common example of a reasonable accommodation is a leave of absence to obtain medical treatment. In *Corbett v. National Products Co.*,[106] the plaintiff-employee, an alcoholic, sued his employer for allegedly terminating him in violation of the ADA.[107] The employer fired the plaintiff-sales representative almost immediately after learning that he entered a twenty-eight-day inpatient treatment program.[108] The court found that granting a leave of absence to attend the treatment program would have been a reasonable accommodation because the program likely would have been successful.[109] The court additionally explained that one of the purposes behind the ADA is "to provide an otherwise able worker with a reasonable accommodation which may eliminate the effects of the disability on his work."[110]

If the reasonable accommodation would impose an undue burden on the employer, however, the employer will not be required to provide it.[111] Undue hardship is defined as "an action requiring significant difficulty or expense,"[112] and the ADA directs courts to consider various factors including the nature and cost of the accommodation and the financial resources of the employer.[113]

B. Anorexia

There are four conditions that must be satisfied for "anorexia nervosa" to be present:

> (1) Refusal to maintain body weight at or above a minimally normal weight for age and height . . . .
>
> (2) Intense fear of gaining weight or becoming fat, even though underweight.
>
> (3) Disturbance in the way in which one's body weight or shape is experienced; undue influence of body weight or shape on self-evaluation, or denial of the seriousness of the current low body weight;
>
> (4) In postmenarcheal females, amenorrhea, that is, the absence of at least three consecutive menstrual cycles.[114]

Anorexia primarily affects individuals in their teens or twenties, but physicians report that eating disorders can affect individuals well into their seventies.[115] Anorexia ranks third on the list of common chronic illnesses among young females in the United States.[116] Women comprise more than ninety percent of

106. No. 94-2652, 1995 U.S. Dist. LEXIS 3949 (E.D. Pa. Mar. 27, 1995).

107. *Corbett*, 1995 U.S. Dist. LEXIS 3949, at *1.

108. *Id.* at *4.

109. *Id.* at *11-12.

110. *Id.* at *14.

111. 42 U.S.C. § 12112(b)(5)(A) (2006).

112. *Id.* § 12111(10)(A).

113. *Id.* § 12111(10)(B).

114. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 583-84 (4th ed. 2000).

115. EATING DISORDERS SOURCEBOOK 33 (Dawn Matthews ed., 2001).

116. *Id.* at 3.

those who suffer from eating disorders.[117]

1. Psychological Effects

Although anorexia is widely known for its ensuing weight loss, few people realize the major psychological issues that are the antecedents of the illness: "[Anorexia] is an attempt to use food intake and weight control to solve unseen emotional conflicts or difficulties that in fact have little to do with either food or weight."[118] Thus, those observers who simply identify food and dieting issues as the problem misunderstand the severity and complex nature of anorexia.[119] For example, anorectics often feel inadequate and lonely, fear criticism, and are incapable of developing meaningful relationships.[120] Anorexia can also cause depression.[121] Individuals with anorexia take all of their internal concerns that they are unable to solve and transform them into an external concern about their body and weight, an aspect of their life they can control through dieting.[122] Anorexia is centrally motivated by "the fear (or the consequences) of eating high-calorie 'forbidden' foods that motivates the individual to attempt to diet and maintain restrictive control over eating behavior."[123] This psychological pressure to remain sickly thin takes such a toll on anorectics that even on the verge of death they still perceive starvation as necessary to their self-esteem.[124]

2. Physical Effects

Although the psychological effects are the root of anorexia, the physical effects are what cause the visible harm. Anorexia is marked by and known for its severe weight loss that resembles starvation. When the starvation is severe, heart failure can follow.[125] Symptoms of anorexia include brittle hair or nails, dry skin with a yellow or gray cast, excess hair on the face, arms, and body, constipation as well as diarrhea, and sensitivity to or intolerance for cold temperatures.[126] Women's breasts can become atrophied, decreasing in size and eventually

117. *Id.* It is therefore likely that this Comment's proposed ADA relief for anorectics would benefit more women than men.

118. MICHELE SIEGEL ET AL., SURVIVING AN EATING DISORDER: STRATEGIES FOR FAMILY AND FRIENDS 40 (rev. ed. 1997).

119. *See id.* (identifying "destructive myth that the only problem is the eating behavior"); *id.* at 59 ("The overt symptoms are just the tip of the iceberg.").

120. *Id.* at 49-54. In order to compensate for the loneliness, anorectics sometimes consider food to be their best friend. *Id.* at 52-53.

121. SIEGEL ET AL., *supra* note 118, at 45.

122. *Id.* at 42.

123. DAVID SCHLUNDT & WILLIAM JOHNSON, EATING DISORDERS: ASSESSMENT AND TREATMENT 28 (1990).

124. SIEGEL ET AL., *supra* note 118, at 42.

125. *Id.* at 122.

126. DAVID BARLOW & V. MARK DURAND, ABNORMAL PSYCHOLOGY: AN INTEGRATIVE APPROACH 263 (4th ed. 2005); EATING DISORDERS SOURCEBOOK, *supra* note 115, at 4, 41. It is also common for eyelashes to fall out and heads to go bald. SACKER & ZIMMER, *supra* note 1, at 7.

withering.[127] The onset of anorexia causes marked changes in behavior, and "previous[ly] compliant girls become negativistic, angry, and distrustful."[128] One disturbing illustration is that the only difference between a starving individual in Africa and an anorexic individual is that, for the anorexic individual, food is in fact available.[129]

3. Treatment

The immediate and most significant goal in treating anorexia is to quickly restore the patient's weight to within the low to normal range.[130] This first step, however, is the easiest part of the treatment, for the real difficulty is attempting to lower patients' anxiety over becoming obese, assuage fears of losing control of eating, and change their focus on thinness as an indicator of self-worth, well being, and achievement.[131] Although there is no universally accepted standard treatment for eating disorders, any successful treatment would incorporate the skills and advice of nutritionists, mental health professionals, endocrinologists, and other physicians.[132] Psychotherapy (such as cognitive-behavioral therapy, family and group therapy, and interpersonal therapy) and self-esteem enhancement and assertiveness training are also very effective and helpful to patients.[133]

It is important to take the time to address the attitudes of the patients, for otherwise they will run the risk of facing "a lifetime preoccupation with weight and body shape, struggl[ing] to maintain marginal weight and social adjustment, and be[ing] subject to repeated hospitalization."[134] In the absence of treatment, up to twenty percent of individuals with serious eating disorders will die; with treatment, only two to three percent will die.[135] On average, recovery takes about five years, which includes "starts, stops, slides backwards, and ultimately movement in the direction of mental and physical health."[136]

127. SACKER & ZIMMER, *supra* note 1, at 21.

128. PATRICIA QUEEN SAMOUR ET AL., HANDBOOK OF PEDIATRIC NUTRITION 192 (2d ed. 2003).

129. *See* SACKER & ZIMMER, *supra* note 1, at 19-20 (finding that, when food is available but not consumed by anorectics, anorectics are similar to people starving around world).

130. BARLOW & DURAND, *supra* note 126, at 277.

131. *Id.*

132. *See id.* at 277-78 (discussing effectiveness of cognitive-behavioral therapy and nutritional counseling).

133. *Id.* at 275-78.

134. *Id.* at 278.

135. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 34.

136. *Id.* at 35. Because the study of eating disorders is a new field, there is little information available on the long-term recovery process. *Id.* Nevertheless, scholars do know that "recovery usually takes a long time." *Id.*

III. DISCUSSION

Courts must finally recognize that anorexia constitutes a disability under the ADA and therefore employment discrimination based on anorexia should be prohibited by law. First, this discussion argues that anorexia can satisfy the disability standard because anorexia is a per se mental impairment, eating is a major life activity, and anorexia is capable of being sufficiently severe and debilitating to substantially limit the individual's major life activity of eating. It argues that, when conducting the "substantial limitation" inquiry, courts should use a totality of the circumstances test that considers the severity, duration, and permanency of anorexia, as well as the resulting dietary restrictions. Second, most anorexic individuals will be "qualified" under the ADA to perform the essential functions of the job, and when they are not, this discussion proposes three reasonable accommodations that employers can easily and cheaply implement.

Third, ADA protection is essential because those individuals most susceptible to anorexia are high achievers, and thus very productive workers; anorexia is most prominent among those individuals entering the workforce; the United States is a society that treats overweight individuals with prejudice; and offering ADA protection may encourage many employees who have thus far hidden their disease to disclose it and seek treatment. Fourth, the discussion concludes that protecting employees from discrimination based on anorexia will not lead to frivolous claims because the ADA analysis is always performed on an individualized, case-by-case basis.

A. Anorexia Can Satisfy a Prima Facie Case for an ADA Claim

As demonstrated below, an anorexic employee is more than capable of showing that (1) she suffers a disability within the meaning of the ADA, (2) she is a qualified individual, and (3) she suffered an adverse employment action because of the disability.[137]

1. Anorexia Can Constitute a "Disability" Under the ADA

Anorexia is a per se mental impairment that can substantially limit the major life activity of eating, rendering it a "disability" under the ADA.[138]

137. *See* Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1092 (5th Cir. 1996) (citing Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758, 763 (5th Cir. 1996)) (outlining elements of ADA claims).

138. *See* 42 U.S.C. § 12102(1)(A) (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (defining "disability" as "physical or mental impairment that substantially limits one or more major life activities").

a. Anorexia Is a Per Se Mental Impairment

All courts faced with this issue should recognize that anorexia is a per se mental impairment because it is a psychological disorder.[139] The HHS guidelines specifically state that mental impairments include "psychological disorder[s]."[140] Despite the fact that actual weight loss is a primary component of anorexia, the most notable aspect of the disease is an "intense fear of obesity" that causes anorectics to "relentlessly pursue thinness."[141] This fear prevents anorectics from ever feeling satisfied with weight loss, for "[s]taying the same weight from one day to the next or gaining any weight at all is likely to cause intense panic, anxiety, and depression."[142] In fact, the fear of weight gain overshadows the individual's fear of dying from self-induced starvation.[143] The mortality rate for eating disorders is the highest for any psychological disorder.[144] Also, anorexia is often accompanied by additional psychological disorders, namely anxiety and mood disorders.[145]

Moreover, the few courts with the opportunity to address the issue have either explicitly or implicitly acknowledged that anorexia constitutes an "impairment." In *Shalbert v. Marcincin*,[146] the court conclusively stated that anorexia qualifies as an impairment.[147] In finding that anorexia is "[u]ndoubtedly . . . a serious and potentially debilitating condition," the court noted that anorexia can be long term and permanent and that it can cause other medical conditions such as heart problems, osteoporosis, and even death.[148] In another case, when determining whether anorexia was a disability within the meaning of the ADA, the court only addressed the substantial limitation prong.[149] In ADA cases, courts always first determine whether there is an impairment, then whether there is an affected major life activity, and finally whether there is a substantial limitation. The court here would not have conducted an inquiry into the existence of a substantial limitation if it had not found an impairment;[150] thus it implicitly acknowledged that anorexia constitutes an impairment.

Furthermore, courts have held that a wide array of psychological disorders constitute "mental impairments," including but not limited to depression,

139. See *supra* note 28 and accompanying text for the HHS definition of a "physical and mental impairment."

140. 45 C.F.R. § 84.3(j)(2)(i)(B) (2006).

141. BARLOW & DURAND, *supra* note 126, at 262.

142. *Id.* at 262-63.

143. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 48.

144. BARLOW & DURAND, *supra* note 126, at 257; *see also* EATING DISORDERS SOURCEBOOK, *supra* note 115, at 4-5 (finding that anorexia has death rate among highest of any psychiatric disease).

145. BARLOW & DURAND, *supra* note 126, at 263.

146. No. 04-5116, 2005 U.S. Dist. LEXIS 16564 (E.D. Pa. Aug. 9, 2005).

147. *Shalbert*, 2005 U.S. Dist. LEXIS 16564, at *9.

148. *Id.* at *10.

149. Frank v. United Airlines, Inc., 216 F.3d 845, 856-57 (9th Cir. 2000).

150. And, logistically, the court could not have, because if there were no impairment, then there would be nothing that could "substantially limit" a major life activity.

obsessive compulsive disorder, mental retardation, bipolar disorder, manic depression, and conversion disorder.[151] Notably, in concluding that conversion disorder constitutes a "mental impairment" (and ultimately a "disability"), the federal district court pointed to the debilitating physical symptoms and anxiety the disease creates.[152] If courts were to focus on those effects with respect to anorexia, they would undoubtedly find anorexia to be a "mental impairment." Anorexia's debilitating physical symptoms are most clearly evidenced by the potential heart failure that can lead to death.[153] The anxiety it produces is evidenced by the fact that anorectics are terrified of high-calorie foods[154] and take great measures to avoid eating them.

Therefore, because anorexia is a psychological disorder and thus a "mental impairment" within the meaning of the ADA, and the few courts with the opportunity to address it have held or suggested the same, anorexia should be considered a per se mental impairment.

b. Eating Is a Major Life Activity

An anorexic plaintiff-employee's best path to a successful ADA claim is to show that the major life activity affected is eating because anorexia significantly interferes with the eating process.[155] The circuit courts addressing the issue and now Congress have made it definitively clear that eating constitutes a major life activity within the meaning of the ADA. All circuit courts but one that have had the opportunity to do so have held that eating is a major life activity,[156] and none have held to the contrary.[157] In *Waldrip v. General Electric Co.*,[158] the Fifth Circuit concluded that eating is a major life activity for four reasons.[159] First, eating satisfies the Supreme Court's requirements for a major life activity,

151. See *supra* notes 37-42 and accompanying text for a discussion of these psychological disorders.

152. Bukta v. J.C. Penney Co., Inc., 359 F. Supp. 2d 649, 655, 667 (N.D. Ohio 2004).

153. *See* EATING DISORDERS SOURCEBOOK, *supra* note 115, at 51 (noting that cardiac complications are most frequent cause of death in anorexic patients).

154. SCHLUNDT & JOHNSON, *supra* note 123, at 28.

155. *See* BARLOW & DURAND, *supra* note 126, at 262 (finding that anorectics have "severe caloric restriction[s]"). Nevertheless, it is very important to note that an anorexic employee could use any major life activity, as long as she could show that it was substantially limited due to the anorexia.

156. Waldrip v. Gen. Elec. Co., 325 F.3d 652, 655 (5th Cir. 2003); Vailes v. Prince George's County, 39 F. App'x 867, 869 (4th Cir. 2002); Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001); Forest City Daly Hous., Inc. v. Town of N. Hempstead, 175 F.3d 144, 151 (2d Cir. 1999); Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999). The Third Circuit held that waste elimination constitutes a major life activity. Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 384 (3d Cir. 2004). In a later case, the Third Circuit stated that *Fiscus* suggested but did not hold that eating is a major life activity. Mikruk v. U.S. Postal Serv., 115 F. App'x 580, 583 (3d Cir. 2004). Because the issue was waived in that case, the court refrained from deciding whether eating constitutes a major life activity in its jurisdiction. *Id.*

157. *Waldrip*, 325 F.3d at 655.

158. 325 F.3d 652 (5th Cir. 2003).

159. *Waldrip*, 325 F.3d at 655.

namely that the activity be "central to the life process itself."[160] Second, eating is of greater value to life than many of the activities previously recognized by the Supreme Court and the Fifth Circuit as major life activities,[161] such as reproduction,[162] hearing,[163] walking,[164] and seeing.[165] Third, at the time, already three other circuits had recognized eating as a major life activity.[166] Fourth, the court noted that the EEOC's regulations acknowledged less important activities as major life activities, including performing manual tasks and speaking.[167]

Any remaining doubt as to whether eating constitutes a major life activity was effectively eliminated by the ADA Amendments Act of 2008, in which Congress expressly included eating in the ADA's nonexhaustive list of major life activities.[168] Therefore, an individual asserting an ADA claim with respect to anorexia would face no resistance in asserting eating as her affected major life activity.

c. Anorexia Can Substantially Limit an Individual's Major Life Activity of Eating

Anorexic employees are capable of showing that their mental impairment substantially limits their ability to eat and therefore they can satisfy the final requirement in establishing a "disability."[169] In light of the ADA Amendments Act of 2008, in which Congress rebuked the Supreme Court's harsh interpretation of the "substantial limitation" requirement,[170] the courts' old practice of uniformly rejecting anorexia ADA claims because the anorexia did not "substantially limit" the plaintiffs' major life activity should become a thing of the past.

Anorexic individuals face serious obstacles that substantially limit their ability to eat. Individuals with anorexia both diet and fast,[171] and their diets consist of a "severe caloric restriction"[172] in which they eliminate all high-calorie foods[173] and significantly undereat.[174] Moreover, they set specific limits on what

160. *Id.* (citing Bragdon v. Abbott, 524 U.S. 624, 638 (1998).

161. *Id.*

162. *Bragdon*, 524 U.S. at 637-39.

163. Ivy v. Jones, 192 F.3d 514, 516 (5th Cir. 1999).

164. Talk v. Delta Airlines, Inc., 165 F.3d 1021, 1024-25 (5th Cir. 1999).

165. Still v. Freeport-McMoran, Inc., 120 F.3d 50, 52 (5th Cir. 1997).

166. *Waldrip*, 325 F.3d at 655.

167. *Id.* (citing 29 C.F.R. § 1630.2(i) (2007)).

168. ADA Amendments Act of 2008, Pub. L. 110-325, § 4(a), 122 Stat. 3553, 3555.

169. *See* 42 U.S.C. § 12102(1)(A) (2006), *amended by* ADA Amendments Act § 4(a), 122 Stat. at 3555 (stating that individual must be "substantially limit[ed]" in her major life activity).

170. *See* ADA Amendments Act § 2(a)(7), 122 Stat. at 3553 (stating that Supreme Court "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress").

171. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 4.

172. BARLOW & DURAND, *supra* note 126, at 262.

173. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 26.

174. *Id.* at 48.

they can eat, such as allowing only ten green beans or one tablespoon of ketchup.[175] In fact, many anorectics are so strict in monitoring their caloric intake that they measure the calories in chewing gum, medicines, and glue on postage stamps.[176] Although not all cases of anorexia will be this severe, courts must recognize that such extreme cases exist and must be willing to designate these circumstances as substantial limitations on eating when an ADA claim is brought.

Many courts have found various mental impairments to substantially limit a major activity and therefore constitute disabilities.[177] Courts have found, for example, obsessive compulsive disorder,[178] conversion disorder,[179] and mental retardation[180] to substantially limit major life activities. Although depression has received mixed treatment,[181] it can be attributed to the fact that the effects of depression are far from concrete. The First Circuit, in recognizing that a plaintiff's depression constituted a disability under the ADA, explained that "[p]roving the elements of a mental disability will not be as easy or as clear cut as cases of physical disability. But, though mental impairments create special problems under the ADA, Congress chose to recognize them as disabilities under the Act."[182] Therefore, even though analyzing an anorexia claim may inevitably pose a greater challenge to courts than claims for physical disabilities, it does not permit courts to shortchange anorexic employees who rightfully deserve protection under the ADA.

In determining whether the major life activity of eating has been substantially limited, the courts have generally taken two approaches. The first approach is to determine the existence of a substantial limitation in accordance with the EEOC regulations, that is, based on the "nature and severity" of the impairment, the "duration or expected duration" of the impairment, and the

175. *Id.*

176. *Id.* at 48-49.

177. *See, e.g.*, Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999) (affirming district court's finding that plaintiff had obsessive compulsive disorder and was substantially limited in eating and drinking because he could not do so without vomiting); Criado v. IBM Corp., 145 F.3d 437, 442 (1st Cir. 1998) (finding plaintiff suffering from depression was substantially limited in ability to work, sleep, and relate to others).

178. *Amir*, 184 F.3d at 1027 (finding plaintiff to be substantially limited in eating, drinking, and learning).

179. Bukta v. J.C. Penney Co., 359 F. Supp. 2d 649, 667 (N.D. Ohio 2004) (finding that conversion disorder substantially limited plaintiff in her major life activities of breathing and cardiovascular function partly because she was subject to anxiety attacks).

180. Haswell v. Marshall Field & Co., 16 F. Supp. 2d 952, 962 (N.D. Ill. 1998) (concluding that plaintiff's mental impairment substantially limited her ability to learn partly because impairment was permanent).

181. *Compare* Stradley v. LaFourche Commc'ns, 869 F. Supp. 442, 443 (E.D. La. 1995) (acknowledging that depression and other mental illnesses can qualify as disabilities for ADA purposes), *with* Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595, 598 (8th Cir. 1998) (finding that although depression caused difficulties it failed to amount to disability status), *and* Cooper v. Olin Corp., Winchester Div., 246 F.3d 1083, 1088 (8th Cir. 2001) (dismissing ADA claim for plaintiff's failure to show her depression created substantial limitation).

182. *Criado*, 145 F.3d at 443.

"permanent or long term impact, or the expected permanent or long term impact of or resulting from" the impairment.[183] The second approach taken by courts is looking at the dietary restrictions of the claimant.[184] The second approach seems to stem from the EEOC's suggestions to consider whether the individual is "[s]ignificantly restricted as to the condition, manner or duration" in how she can perform the major life activity as compared to the average person.[185] Some courts combine both approaches, thereby considering both the dietary restrictions and the impairment itself in determining whether a substantial limitation exists.[186]

Instead of haphazardly applying either the approach that focuses solely on the impairment or the approach that focuses solely on dietary restrictions and food intake, or some unclear balance of the two approaches, the courts should adopt a universal approach that considers both criteria in determining whether the plaintiff's anorexia has substantially limited the major life activity of eating. Under this proposed model, the nature and severity, the duration, and the permanency of the impairment, as well as the severity of the dietary restrictions, are all considered, but there is no requirement that any particular factor be satisfied. Nor is one factor dispositive; instead, a totality of the circumstances test should be employed.

For example, if the severity and permanency of an individual's anorexia are significant, the court should find a substantial limitation even if her dietary restrictions are only moderate. In other words, if one of the factors cannot be

183. 29 C.F.R. 1630.2(j)(2) (2007); *see also, e.g.*, Shalbert v. Marcincin, No. 04-5116, 2005 U.S. Dist. LEXIS 16564, at *12, *15 (E.D. Pa. Aug. 9, 2005) (finding that "substantial limitation" inquiry could not be determined because no evidence was presented on severity, duration, or permanency of plaintiff's anorexia).

184. *See* Lawson v. CSX Transp., Inc., 245 F.3d 916, 924 (7th Cir. 2001) (finding diabetic plaintiff's eating was substantially limited because of severe dietary restrictions); Land v. Baptist Med. Ctr., 164 F.3d 423, 425 (8th Cir. 1999) (concluding plaintiff with peanut allergy had no substantial limitation because only food she could not eat was peanut-laden food); Dicino v. Aetna U.S. Healthcare, No. 01-3206 (JBS), 2003 U.S. Dist. LEXIS 26487, at *26-27 (D.N.J. June 23, 2003) (finding that plaintiff with chronic pancreatitis was not substantially limited in eating because inability to eat solid foods was not long term or permanent); Beaulieu v. Northrop Grumman Corp., 161 F. Supp. 2d 1135, 1143 (D. Haw. 2000) (examining diabetic's monitoring of his diet to determine whether he was substantially limited in eating); Erjavac v. Holy Family Health Plus, 13 F. Supp. 2d 737, 747 (N.D. Ill. 1998) (concluding that "specific foods" that plaintiff must eat significantly restricted his eating).

185. 29 C.F.R. § 1630.2(j)(1)(ii) (2007). In *Erjavac*, after finding that the diabetic plaintiff had to eat "specific foods" to ensure that her blood sugar did not dangerously drop, the court concluded that this "'significantly restrict[s]' the 'condition, manner and duration'" of plaintiff's eating in comparison with the average individual. 13 F. Supp. 2d at 747 (citing 29 C.F.R. § 1630.2(j)(1)(ii) (2007)). Additionally, it is worth noting again that, pursuant to the ADA Amendments Act of 2008, the EEOC will soon be revising the "significantly restricted" language such that its regulations' new standard for "substantial limitation" will be less demanding. *See* ADA Amendments Act of 2008, Pub. L. 110-325, § 2(b)(6), 122 Stat. 3553, 3554 (expressing Congress's expectation that EEOC will revise that portion of regulations).

186. *See* Weber v. Strippit, Inc., 186 F.3d 907, 914 (8th Cir. 1999) (concluding that plaintiff did not suffer substantial limitation in eating because dietary restrictions were minor and plaintiff failed to introduce sufficient evidence to show "'nature, duration, and long-term impact'" of his heart disease (quoting Aucutt v. Six Flags Over Mid-Amer., Inc., 85 F.3d 1311, 1319 (8th Cir. 1996))).

met, the courts should not conclusively rule out the existence of a substantial limitation. The benefits of this universal approach are (1) greater predictability as to the courts' "substantial limitation" analysis, and (2) fairness by not preventing plaintiffs whose substantial limitation primarily manifests itself in either the nature of their anorexia or in their dietary restrictions from pursuing a legitimate claim just because their jurisdiction gives greater weight to one area over the other.

Furthermore, in applying this new approach, and especially in light of the ADA Amendments Act of 2008, courts should lower the threshold that they have thus far set for establishing a substantial limitation for anorexia. In an ADA case, not one court has found that an individual suffering from anorexia has been substantially limited in the major life activity of eating, or in any major life activity for that matter.[187] In 1997, one scholar stated that there were "no reported cases of discrimination on the basis of an eating disorder such as bulimia or anorexia."[188] Courts must be willing to find that anorexic people are substantially limited in their ability to eat because (1) Congress sought to protect such serious diseases when including "psychological disorder[s]" under the definition of mental impairment,[189] and (2) failure to ever recognize substantial limitations for anorexic employees will deter anorexic employees who truly are substantially limited from filing valid ADA claims.

2. Employees with Anorexia Are Commonly Qualified Individuals with or Without Reasonable Accommodation

Once courts finally acknowledge that anorexia warrants disability status under the ADA, plaintiffs will likely face little difficulty in proving that they are "qualified individuals" within the meaning of the ADA.[190] Because analysis of whether an individual is qualified to perform the "essential functions" of the job will always depend on the specific job and the individual's specific condition, it is impossible to generalize and say that all anorexic employees will be "qualified individuals"; however, there is certainly no reason to presume that anorexic employees will be any less capable of meeting this standard than other individuals suffering from disabilities currently recognized under the ADA. And, even when they do encounter difficulties in performing the essential functions of the jobs, reasonable accommodations can be employed that will still allow them to be considered "qualified individuals." Some potential difficulties for anorexic employees and the respective reasonable accommodations that could solve them are (1) a leave of absence to attend and complete treatment, (2) extra time to

187. This fact, in turn, might lead most individuals and the attorneys representing them to believe that the ADA does not provide protection for discrimination on the basis of an eating disorder.

188. Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 36 (1997). As to why this is the case, the author suggested that perhaps victims do not bring claims because they do not want to publicly disclose that they suffer from an eating disorder. *Id*. at 36 n.86.

189. 45 C.F.R. § 84.3(j)(2)(i)(B) (2006).

190. See *supra* Part II.A.2.b for a discussion of plaintiff's requirement of being a "qualified individual" under the ADA and how she can meet this standard.

complete various tasks due to easy distractibility, and (3) an opportunity to work away from the public to avoid the scrutiny, whether real or perceived, of the public.

a. Leave of Absence

The first reasonable accommodation that employers could effortlessly implement would be granting anorexic employees a leave of absence so that they can undergo treatment for their eating disorders.[191] Courts have frequently allowed employees to miss work in order to receive treatment for disabilities, such as psychological disorders[192] and alcoholism.[193] In *Hardy v. Sears, Roebuck and Co.*,[194] the court concluded that leaves of absence allowing an employee with bipolar disorder to seek psychiatric treatment and modified work schedules permitting the employee to attend counseling sessions were proper and reasonable accommodations under the ADA.[195] Because both bipolar disorder and anorexia are psychological disorders, employers should be required to provide leaves of absence to anorexic employees because employees with bipolar disorders already enjoy that benefit.

In *Corbett v. National Products Co.*,[196] the plaintiff-employee, an alcoholic, contended that he was fired from his job the day after he entered a twenty-eight-day inpatient treatment program.[197] In response to the employer's claim that the plaintiff was not a "qualified individual" due to an attendance problem, the court noted that any such attendance problem only arose while plaintiff was receiving treatment for alcoholism and that a reasonable accommodation, such as a leave of absence, would have removed any such attendance problem in the future.[198] Therefore, the court concluded that because the reasonable accommodations provided in the statute[199] are a nonexhaustive list, a "'leave of absence to obtain medical treatment is a reasonable accommodation [under the ADA] if it is likely

191. *See* Theodore E. Weltzin, Rogers Mem'l Hosp., *A Silent Problem*, *available at* http://www.eatingdisorderhope.com/silent_problem.html (last visited Nov. 28, 2008) (explaining that employee will need significant time off in order to attend appointments with dietician, therapist, and physician); MYEDHELP, *supra* note 8 (explaining that eating-disordered employees may require sick leave and that employers should grant it regardless of fact that it is for eating disorders).

192. *See, e.g.*, Hardy v. Sears, Roebuck & Co., No. 4:95-CV-0215-HLM, 1996 U.S. Dist. LEXIS 19008, at *23-24 (N.D. Ga. Aug. 28, 1996) (finding that leaves of absence provided by employer were reasonable accommodations for employee with bipolar disorder).

193. *See, e.g.*, Corbett v. Nat'l Prods. Co., No. 94-2652, 1995 U.S. Dist. LEXIS 3949, at *11 (E.D. Pa. Mar. 27, 1995) (finding that absences from work in order to obtain medical treatment would be reasonable accommodation if treatment would allow plaintiff to safely perform tasks after treatment is completed); *see also* Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1107 (Fed. Cir. 1996) (concluding that treatment is "essential to any accommodation for alcoholism").

194. No. 4:95-CV-0215-HLM, 1996 U.S. Dist. LEXIS 19008 (N.D. Ga. Aug. 28, 1996).

195. *Hardy*, 1996 U.S. Dist. LEXIS 19008, at *4, *24-25.

196. No. 94-2652, 1995 U.S. Dist. LEXIS 3949 (E.D. Pa. Mar. 27, 1995).

197. *Corbett*, 1995 U.S. Dist. LEXIS 3949, at *4.

198. *Id.* at *8-11.

199. 42 U.S.C. § 12111(9) (2006).

that, following treatment, plaintiff would have been able to safely perform his duties.'"[200]

Anorexic people who have undergone cognitive therapy have met with positive results.[201] This necessary treatment, however, can require a significant time commitment because it is often recommended that anorectics undergo psychotherapy, family therapy, and behavioral therapy.[202] In addition, patients often have to participate in inpatient or outpatient treatment, and the former may last up to twelve weeks.[203] It is also recommended that after being discharged patients take part in regular follow-up programs for months or even years.[204] Therefore, because treatment has traditionally been very helpful, employees should not be fired or otherwise penalized for taking a leave of absence in order to treat their eating disorder.

Although an employer is not obligated by law to provide an employee with an indefinite leave of absence,[205] such an issue would rarely arise for anorectics because their initial hospital treatment typically does not exceed several weeks or months. If the disease is caught early enough, the anorexic employee may not even require hospitalization and instead may begin treatment with therapy. Attending therapy sessions would only cause the employee to miss a few hours each week and thus she would not have to take the more drastic leave of absence.

Accommodating an anorexic employee's treatment schedule or the more drastic hospitalization would rarely, if ever, impose an undue hardship on employers. One court noted that an extended leave of absence would not have cast an undue hardship on the employer.[206] Although determining whether a leave of absence unduly burdens an employer requires a detailed analysis focusing on the employer's circumstances,[207] in general, leaves of absence for anorectics undergoing recovery at hospitals would not create an undue burden given that most hospitals aim to heal anorexic patients within weeks or months at the most. The employer should not have too difficult a time in finding a replacement for those weeks or months or in redistributing work to compensate for the anorexic individual's absence.

200. *Corbett*, 1995 U.S. Dist. LEXIS 3949, at *11 (alteration in original) (quoting Schmidt v. Safeway Inc., 864 F. Supp. 991, 996-97 (D. Or. 1994)).

201. *See* BARLOW & DURAND, *supra* note 126, at 277 (explaining how studies proved that initial process of restoring weight to anorectics is very effective, with eighty-five percent efficiency rate).

202. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 8.

203. *Id.* at 52-53.

204. *Id.* at 54.

205. *See* Nowak v. St. Rita High Sch., 142 F.3d 999, 1004 (7th Cir. 1999) (finding eighteen-month leave of absence too long to be reasonable accommodation); *see also* Walsh v. UPS, 201 F.3d 718, 727 (6th Cir. 2000) (stating that it could find no case that required employer to allow employee to have leave of absence in excess of one year, let alone indefinitely, to reasonably accommodate disabled employee).

206. Norris v. Allied-Sysco Food Servs., 948 F. Supp. 1418, 1440 (N.D. Cal. 1996) (finding lack of evidence to show extended leave of absence would have unduly burdened employer).

207. *See* Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1183 n.10 (6th Cir. 1996) (finding undue hardship must be analyzed with regard to employer's "specific situation").

b. Extended Time to Complete Tasks

Another employment challenge facing anorexic employees is the ease with which this disabled group becomes distracted. Employers should respond not by laying off every such individual but instead by offering them extended time to complete their duties. Individuals with anorexia are often very distractible, and "[i]t is not uncommon for these persons to have declining performances at work . . . because of their inability to concentrate on issues unrelated to food."[208] This inability to focus properly on tasks stems from the restriction in food intake, as evidenced by the most famous psychological study on food restriction.[209]

In this classic World War II study, normal-weight men were fed only seventy-five percent of their normal intake so that they were able to lose twenty-five percent of their original body weight.[210] After months of semistarvation, the men reported great difficulty in concentrating on tasks[211] as well as heightened irritability and greater negative emotions.[212] They also reported decreased ambition and self-discipline.[213] Although their focus on tasks performed in a quiet setting was superior to that of nondieters, as soon as the slightest distraction was presented, the men's performances dropped dramatically and were far worse than the performances of the nondieters.[214] Especially given that starved individuals are more productive absent any distractions,[215] employers should support anorexic employees' efforts by granting them extended time to complete assignments and tasks and by providing a quieter environment that would assist the employee in being more efficient.

c. Shifting Locations

Employers could further accommodate those anorexic employees with sickly physical appearances by shifting them to areas with less public interaction in order to prevent them from being subjected to condescending looks and possible criticism. The drastic physical toll of anorexia is visible and extensive. At around the time that treatment becomes necessary, the average body weight for an anorexic person is about twenty-five to thirty-five percent below normal,[216] thereby giving the body a disturbingly thin appearance. Other various and visibly disturbing symptoms of anorexia include brittle hair or nails, dry skin with a yellow or gray cast, and excess hair on the face, arms, and body.[217]

208. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 50.

209. *Id.* at 166-68 (describing cognitive and emotional effects on dieters in classic study of food restriction (citing ANCEL KEYS ET AL., THE BIOLOGY OF HUMAN STARVATION (1950)).

210. *Id.* at 166.

211. *Id.* at 167.

212. *Id.* at 168.

213. SCHLUNDT & JOHNSON, *supra* note 123, at 52.

214. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 167-68.

215. *See*, *e.g.*, *id.* at 167 (explaining that, when in quiet, nondistracting environment, restrained eaters focus and perform tasks better than unrestrained eaters).

216. BARLOW & DURAND, *supra* note 126, at 263.

217. *Id.*; EATING DISORDERS SOURCEBOOK, *supra* note 115, at 4, 41.

It is only logical that sensitive anorexic employees may be less productive if they are distracted by the fact that their sickly appearance is constantly scrutinized by the employer's customers or clients. Simultaneously, it is not unfair to suggest that employers, depending on the type of employment, might fear that customers or clients may develop negative impressions of the company based on the visibly disturbing appearance of the employee. Nevertheless, that fear simply cannot justify discriminatory actions taken against anorexic employees. One solution that employers should adopt is shifting employees to another location or position in order to eliminate or minimize public interaction. Possible reasonable accommodations include "job restructuring" or "reassignment to a vacant position."[218] Therefore, assuming that any such change still permits the employee to perform the essential functions of the job, that course of action should be mandated over the alternative of unreasonably and unfairly firing the employee for fear that her physical appearance would disrupt business.

Before these three or any other reasonable accommodations can be implemented, the anorexic employee must confront the employer and disclose the disease and subsequent need for reasonable accommodation.[219] It is therefore important that anorexic individuals, who typically hide the existence of their eating disorders,[220] feel comfortable in seeking help and are encouraged to approach employers, disclose their eating disorder, and perhaps request a reasonable accommodation.[221]

3. Showing an Adverse Employment Action on the Basis of the Employee's Anorexia

After an anorexic employee proves that she has a disability and is qualified, she then must show she suffered an adverse employment action, that is, that she "was terminated or prevented from performing the job."[222] The employee must

218. 42 U.S.C. § 12111(9)(B) (2006).

219. *See* McClean v. Case Corp., 314 F. Supp. 2d 911, 918 (D.N.D. 2004) (holding that employee is generally responsible for informing employer that she suffers from disability and requires reasonable accommodation).

220. *See* EATING DISORDERS SOURCEBOOK, *supra* note 115, at 7 (explaining how eating disorders often remain undiagnosed due to secretive eating habits).

221. Even if the employee did not confront the employer, there would be various signs an employer should notice that might suggest the employee was suffering from an eating disorder, including "[t]ardiness, sick days and decreased productivity due to employees engaging in abnormal eating behavior" while at work. Weltzin, *supra* note 191. Other signs include common trips to the bathroom, especially after eating, avoiding work events where food is present, and frequent talks about weight and dieting. MYEDHELP, *supra* note 8. If an employer suspected that an employee was suffering from an eating disorder and her work performance was deteriorating, rather than fire the employee or take another adverse employment action, the employer should consider discussing it with the employee with "clear communication" regarding her behaviors that have changed due to the weight loss. Ellison, *supra* note 9. Many patients explained that such a communication provided a strong springboard into treatment. *Id.*

222. Mikruk v. U.S. Postal Serv., 115 F. App'x 580, 582 (3d Cir. 2004) (citing Mengine v. Runyon, 114 F.3d 415, 418 (3d Cir. 1997)).

also show that the employer discriminated against her as a result of her disability.[223] Because this Comment's primary focus is showing that the disease anorexia can constitute a disability, it will assume that an "adverse employment action" on the basis of anorexia has taken place.

B. ADA Protection Is Essential for Employees with Anorexia

It is urgent that anorexic victims of employment discrimination be protected under the ADA and just as important that they be aware that this protection exists because our culture indirectly and increasingly promotes anorexia. Anorexia is one of "the most culturally specific psychological disorders" thus far identified[224] and is very common in industrialized societies where food is readily available and there is a high focus on thinness.[225] Americans in particular have a high prejudice against fat, which in turn makes it very difficult for them to be content with their body.[226]

The wave of eating disorders was sparked especially by television and the media.[227] A 1999 study that took place in Fiji demonstrates the unhealthy effect that American television shows have on women's self-esteem and body awareness.[228] In 1995, before television arrived on their island, the citizens of Fiji believed that the ideal body type was "round, plump, and soft."[229] Thirty-eight months after "Beverly Hills 90210 [sic]," "Melrose Place," and other Western shows came to the island, teenage girls on Fiji began to exhibit "serious signs of eating disorders."[230] Whether it comes from television show featuring numerous skinny actresses or from other sources, American society has established that it favors the slender female body. As we have seen, this preference for thin women can quickly lead to horrific eating disorders, and, considering that most of these women will be in the workplace, they need to be protected under the ADA when discrimination takes place.

Moreover, because the very character traits that may make individuals more susceptible to anorexia also make those individuals high achievers and highly productive workers, it is essential that society strives to keep them in the workforce. The typical anorexic person, for example, is a "high achiever," a "perfectionist and good student," "performance-driven," and "feels compelled to excel."[231] The mean onset of anorexia is age seventeen,[232] which is almost exactly

223. Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1250 (10th Cir. 2005) (citing Poindexter v. Atchison, Topeka & Santa Fe Ry. Co., 168 F.3d 1228, 1230 (10th Cir. 1999)).

224. BARLOW & DURAND, *supra* note 126, at 267.

225. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 46.

226. *Id.* at 28.

227. *See id.* at 18-20 (explaining how television encourages eating disorders by frequently portraying women as thin and young).

228. *Id.* at 19.

229. *Id.*

230. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 19.

231. *Id.* at 46; *see also* MYEDHELP, *supra* note 8 (stating that "people with an eating disorder are probably some of the most effective, hard working and loyal members of a workforce").

232. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 46. The potentially young age of

when the majority of the population is entering the workforce. It is therefore crucial that courts protect the wave of anorexic employees entering the workforce by refusing to allow employers to discriminate solely on the basis of anorexia. If they do not, they only ensure that a capable chunk of employees will be removed from the American marketplace.

A powerful incentive that will accompany ADA protection of anorexic employees is that it encourages them to disclose their eating disorders and to seek treatment. One scholar posited that these employees avoid bringing claims of discrimination on the basis of an eating disorder because they fear publicly admitting they have the disorder.[233] Anorexia often goes undiagnosed for a significant amount of time due to the "secretive habits" of the individuals.[234] Eating disordered individuals further try to hide their eating disorders because they are embarrassed by them.[235] Consequently, anorectics rarely seek out treatment on their own.[236] Because the longer an eating disorder persists the harder it is to overcome,[237] it is essential that anorectics come forward immediately with the disease and obtain treatment, a result that would ensue once courts finally acknowledge that the ADA's intended protected class includes anorexic employees.

C. Allowing ADA Claims Based on Anorexia Will Not Lead to Frivolous Claims

The courts' acceptance that the ADA was meant to protect anorexic employees from employment discrimination will not lead to a flood of frivolous claims that will overburden the federal courts, because the ADA has a built-in mechanism against such illegitimate claims. Any frivolous claims will be weeded out by the "substantial limitation" requirement. Although the courts undoubtedly must lower the standard for "substantial limitation" when addressing anorexia ADA claims, the mere existence of the "substantial limitation" requirement renders it unwise for plaintiffs and their attorneys to file meritless ADA claims. Moreover, the express language of the ADA, that a disability exist "with respect to an individual,"[238] ensures that courts will not provide relief under the ADA solely because an individual has anorexia.

Furthermore, the "substantial limitation" prong that requires a court to consider the effects of the disease rather than the mere existence of the disease will permit judges to eliminate by a motion to dismiss or a motion for summary judgment those invalid claims that merely seek to capitalize on the existence of

many anorexic employees likely only increases their susceptibility to suffering employment discrimination that goes unnoticed and unprotected.

233. Korn, *supra* note 188, at 36 n.86.

234. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 7.

235. *Id.* at 27.

236. BARLOW & DURAND, *supra* note 126, at 263.

237. EATING DISORDERS SOURCEBOOK, *supra* note 115, at 8.

238. 42 U.S.C. § 12102(1) (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a)(1), 122 Stat. 3553, 3555.

an eating disorder that in fact does not substantially limit a major life activity. Therefore, employers need not worry that the many employees who have a moderate and controlled form of anorexia will cry employment discrimination. In addition, the mandatory requirement that a reasonable accommodation not create an undue burden for the employer[239] protects anorexic plaintiffs from compelling the employer to do more than it should legally and fairly be required to do.

Because courts would not and should not consider anorexia to be a per se disability,[240] the chance for abuse is slim. Nevertheless, courts *must* start accepting that anorexia can be so substantially limiting that it constitutes a disability under the ADA in order to prevent valid claims from being rendered futile.

IV. CONCLUSION

Especially because the ADA is still quite young, it is perfectly reasonable for courts to extend its coverage to previously unrecognized disabled individuals that have yet to receive deserved benefits from its enactment. One prominent group of such individuals consists of employees suffering from anorexia. Anorexia is a mental impairment that may often substantially limit its victim's ability to eat, and in those circumstances the court should confer "disability" status on that individual. Neither the courts' current refusal to offer redress in anorexia ADA cases nor anorexia's exponential growth in society renders this disease any less worthy of protection than other disabilities. Fortunately for employers, reasonable accommodations that would not create an undue burden, such as a leave of absence and extended time for duties, can be easily and cheaply implemented. In the absence of sufficient reasonable accommodations, anorexic employees should therefore have a viable cause of action against employers that fail to comply with the ADA.

Chad E. Kurtz*

239. 42 U.S.C. § 12112(b)(5)(A).

240. The Supreme Court declined to consider whether an HIV infection is a per se disability under the ADA. Bragdon v. Abbott, 524 U.S. 624, 642 (1998).

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