A FALSE SENSE OF SECURITY: IS PROTECTION FOR EMPLOYEES WITH LEARNING DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT MERELY AN ILLUSION?

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I. INTRODUCTION

Michael was always a bright child, eager to learn and take on new challenges. Now a senior in college at a nationally ranked university, Michael is a Finance and Marketing double major with a 3.4 grade point average. Michael’s passion for the stock market has inspired him to pursue a career as an investment banker in a large New York City investment firm. Given his impressive resume and keen interview skills, Michael has received many enticing offers for employment upon graduation. Yet, while Michael is a young man of seemingly limitless potential, he faces great obstacles that could obstruct his Wall Street dreams.

Michael is different from most college students. He has struggled with learning disabilities his entire life, specifically with Attention Deficit Disorder (ADD) and disabilities in auditory processing and visual perception. While Michael’s intelligence and determination are critical factors to his academic success, his achievements are also dependent on the numerous accommodations he receives for his learning disabilities.  

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1. Michael’s story is based on a true account of a student who has struggled with learning disabilities. The name of the student has been changed to protect the student’s privacy.

2. In light of the increase of disabled students pursuing higher education, most universities have developed disability coordinators and disability offices that readily provide accommodations to students with disabilities. See Linda Lee, To Teach, or Merely Accommodate, N.Y. TIMES, Apr. 9, 2000, at ED30 (“[According to a 1998] study by the American Council on Education, the number of college freshmen identifying themselves as
Michael meets with each of his professors before the semester begins to give them his "Letter of Accommodation," which documents his learning disabilities and recommends accommodations, which in turn are implemented by the professors. To ensure that he is free from distractions, Michael takes his examinations in a private room in the disability office. Additionally, he is allowed 'time and a half' to complete all exams and assignments. To help counter his limited attention span, Michael always sits in the front of the classroom and tape records each lecture for later study. Upon request, the university also provides tutors in all subjects, and note takers who attend class and take notes for learning disabled students. Michael takes advantage of both of these services.

While these accommodations have enabled Michael to excel academically, he faces a terrific challenge upon graduation. Although colleges have made great strides in accommodating learning disabilities, the workplace remains a mostly uncharted terrain. This article explores the particular obstacles that individuals like Michael must overcome when trying to obtain accommodations in the workplace. More specifically, this article addresses the impediments posed by the current Equal Employment Opportunity Commission (EEOC) regulations that make recovery for a learning disabled employee under the Americans with Disabilities Act (ADA) virtually impossible. This article aims to rectify this problem by altering the current EEOC standard, which calls for comparing a learning disabled individual to the average person in the population in determining if he meets the definition of disabled under the ADA. This article proposes that learning disabled individuals should be compared to others with similar skills and backgrounds so that their achievements will not undermine their ability to receive accommodations.

Part I offers a definition and explanation of learning disabilities, specifically focusing on the impediments caused by ADD. Part II examines the ADA and its relationship to the learning disabilities arena. This section specifically discusses the standard of proof necessary to secure accommodations under the ADA and the role of various agencies in interpreting the ADA's definition of disability. Part III discusses the many barriers impeding recovery for learning disabled employees. Part IV details courts' consistent inability to find protection for
learning disabled employees under the ADA. This section specifically highlights the EEOC’s proposed standard and the manner in which it hampers recovery by compelling a demographic comparison group that consistently results in the determination that learning disabled individuals fail to qualify for protection under the ADA. Part V recommends that the nature of learning disabilities would support using similarly educated individuals as the comparison group for determining if an individual is disabled under the ADA, rather than the average person in the general population. It explains how the current standard precludes academically successful students like Michael from receiving accommodations in the workplace because their disability status is undermined by their academic achievements. Concluding in Part VI, this article demonstrates how the proposed comparison group would help learning disabled individuals secure the accommodations in the workplace necessary to their success.

II. DEFINING LEARNING DISABILITIES

To empathize with Michael’s plight, it is essential to first understand the difficulties encountered by individuals with learning disabilities. As defined by the Individuals with Disabilities Education Act (IDEA), a “learning disability” is a “disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which . . . may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” Believed to be caused by a malfunction of the central nervous system, the effects of a learning disability may include specific deficits in one or more of the following areas: oral comprehension, organization, coordination, perception, expressive language, the ability to sustain attention, nonverbal reasoning, integration of information, and social judgment. Learning disabilities can be diagnosed by a psychologist or physician through a series of tests that examine whether an individual has a noticeable disparity between intelligence and achievement. Despite the myth that learning

7. Id. Jeff Brown, a learning disabled attorney, describes this disparity:

Even though I have nineteen years of formal education, I cringe whenever someone asks me to spell a simple word, and I still am angered when I cannot look up a word in the dictionary because I cannot spell. Although I understand complex ideas and concepts, I still have trouble knowing where to put a comma
disabilities are akin to mental retardation and result in limited intelligence, learning disabled individuals are typically of average or above average intelligence.\textsuperscript{8}

While there are many different types of learning disabilities, one of the most common is ADD, which impinges on an individual’s ability to pay attention and learn effectively.\textsuperscript{9} Affecting approximately eight million American adults,\textsuperscript{10} ADD is a neurological disorder that impairs parts of the brain “responsible for decision-making [sic], judgment, and concentration.”\textsuperscript{11} Because ADD affects a person’s ability to learn and to retain knowledge, it often results in underachievement.\textsuperscript{12}

ADD creates a constant battle with forgetfulness, restlessness, and an inability to stay focused.\textsuperscript{13} Other characteristics include disorganization, inattentiveness, and failure to attend to details, resulting in many seemingly careless mistakes.\textsuperscript{14} Accordingly, those who suffer from ADD often have trouble finishing tasks, following instructions, organizing large amounts of information, remembering appointments, and being on time.\textsuperscript{15} Recommended accommodations for individuals with ADD “include room in a sentence. . . . I read, but not like a normal individual. I am unable to sound out words.”


8. See Fike, supra note 6, at 493 (“Typically, individuals with learning disabilities have average or above average intelligence.”); Paul J. Gerber, \textit{At First Glance: Employment for People with Learning Disabilities at the Beginning of the Americans-with-Disabilities-Act Era}, 15 LEARNING DISABILITY Q. 330, 331 (1992) (“[S]ometimes ‘learning disability’ is confused with mental retardation, attention-deficit disorder, and other disabilities.”).


10. Id. at 26. ADD is the second-most common psychological problem in adults after depression. Id.


13. See id. at 78 (“[I]ndividuals often have difficulty sustaining attention in tasks . . . and find it hard to persist with tasks until completion.”). For example, a doctor describes a patient’s struggle with ADD: “Her friends in college teased her about her constant need to move some part of her body. She described being distracted by any sound. She recalled examples . . . of listening to what was going on in the hall rather than in class.” LARRY B. SILVER, M.D., \textit{THE MISUNDERSTOOD CHILD: A GUIDE FOR PARENTS OF LEARNING DISABLED CHILDREN} 279-80 (1992).

14. Id.

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dividers, partitions, soundproofing, or visual barriers" as well as “[m]oving the individual to a quieter location, lowering the pitch of telephones, or permitting use of headphones to block distractions.”

III. LEARNING DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT

While learning disabilities are also covered by Section 504 of the Rehabilitation Act and the IDEA, this article only focuses on the coverage of learning disabilities within the ADA. Enacted in 1990 to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” the ADA protects the disabled from discrimination in “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”

The first three titles of the statute are relevant to the protection of individuals with learning disabilities. Title I applies to employers, employment agencies, labor organizations, and joint-labor management committees. It ultimately prevents discrimination against a “qualified individual with a disability because of the disability of such individual 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.” Title II addresses public entities, including any state or local government, and any departments, agencies, special purpose districts, or other instrumentalities of a state or local government. This title protects a qualified individual with a disability from being “excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” Title III prohibits public accommodations and services operated by private entities from

20. Id. § 12101(b)(1).
21. Id. § 12101(a)(3).
22. The term “employer” is defined under the ADA as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” Id. § 12111(5)(A).
23. Id. § 12111(2).
25. Id. § 12131(1).
26. Id. § 12132.
discriminating against individuals with disabilities. Undergraduate and postgraduate private schools are included under Title III’s protection.

A. The Role of Agencies in Interpreting the ADA

The task of interpreting the ambiguous language of the ADA including terms such as “physical or mental impairment,” “substantially limits” and “major life activities,” falls primarily on the EEOC and the Department of Justice (DOJ). Consequently, courts must grapple with the issue of what deference should be attached to the regulatory guidelines that are issued by these agencies. Generally, if the intent of Congress is clear from the language of the statute itself, the court “must give effect to the unambiguously expressed intent of Congress.” If the statute is silent or ambiguous with respect to a certain issue, the court has discretion whether to defer to an agency’s interpretation of the statute.

In determining whether to defer to the agency’s interpretation, the court is typically guided by two principles. First, the court asks whether Congress has delegated to an agency, either implicitly or explicitly, the authority to explain a specific provision of the statute by regulation. Second, if such delegation is found, the court will then give legislative regulations “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”

Such deference is supported by the notion that Congress expressly delegated authority to the EEOC and the DOJ to promulgate regulations

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27. Id. § 12181.
28. Id. § 12181(7)(J).
29. Id. § 12102(2)(A).
30. Id.
31. Id.
32. See Patricia Illingworth & Wendy E. Parmet, Positively Disabled: The Relationship between the Definition of Disability and Rights under the ADA, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 3-4 (Leslie Pickering Francis & Anita Silvers eds., 2000) [hereinafter AMERICANS WITH DISABILITIES] (discussing the interpretation of the ADA’s ambiguous language); Mary Crossley, Impairment and Embodiment, in AMERICANS WITH DISABILITIES, supra, at 113 (discussing the Supreme Court’s reliance on the EEOC’s interpretive guidelines on pregnancy).
33. See Illingworth & Parmet, supra note 32, at 3 (“[The language in the ADA] is amenable to an infinite array of interpretations.”); Arlene Mayerson & Matthew Diller, The Supreme Court’s Nearsighted View of the ADA, in AMERICANS WITH DISABILITIES, supra note 32, at 125 (dissertating the Supreme Court’s lack of deference to “the clear legislative history . . . as well as the view of the federal agency charged with interpret[ing]” the ADA).
35. Id.
36. Id. at 843-44.
37. Id. at 844.
filling in the gaps created by the statute and explaining ambiguous terms. However, courts do occasionally refuse to defer to the EEOC regulations in interpreting Title I provisions, reasoning that Congress did not delegate authority to the EEOC to draft regulations with respect to terms defined outside the employment provisions of the ADA. As a result, any deference that Congress may have given the EEOC in interpreting Title I of the ADA is unclear.

In addition to the regulations, the EEOC Interpretative Guidance interprets the statute. However, the EEOC did not intend for the Interpretive Guidance to be given the same weight as the regulations. For example, in the introduction of the Interpretative Guidance for ADA Title I, the EEOC states that it aims to be “guided by” the Interpretive Guidance, rather than bound by it. Additionally, Courts have given less deference to the Interpretive Guidance. Judge Kennedy, in Gilday v. Mecosta County, states:

The appendix constitutes a set of interpretative, rather than legislative, rules and is, therefore, not binding law. . . . Nevertheless, “[s]uch administrative interpretations . . . [do] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” An interpretive rule is still entitled to “some deference” where the rule is a “permissible construction of the statute.”

B. The ADA’s Definition of “Disability”

A disability is defined under the ADA as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” The Supreme Court has stated that the terms “major” and “substantial” are to be interpreted strictly, to create a demanding standard for qualifying as disabled. The Court has declared that the word “substantially” in the phrase “substantially limits” should be read as “considerable” or “to a large degree,” and therefore does
not include impairments that interfere in only a minor way with performing manual tasks. Moreover, because "major" means important, "major life activities" refers to "those activities that are of central importance to daily life." 

Additionally, the EEOC regulations list several factors to be considered in determining whether an individual is substantially limited in a major activity, such as the nature and severity of the impairment, the duration or expected duration of the impairment, and the actual or expected permanent or long-term impact of the impairment. Examples of major life activities listed in the EEOC's regulations include functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

The term disability is evaluated in terms of the individual. Consequently, courts determine whether an individual is substantially limited in a major life activity on a case-by-case basis. For this reason, the ADA does not attempt a "laundry list" of impairments that constitute disabilities. Instead, the determination of whether an individual is disabled under the ADA is based on the effect of a particular impairment on the individual's life. Thus, "[s]ome impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, [and] the presence of other impairments that combine to make the impairment disabling," such as social and environmental

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45. Id. at 196.
46. Id. at 197.
47. EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(i)(2) (2006); see also Carroll v. Xerox Corp., 294 F.3d 231, 244 (1st Cir. 2002) (applying these factors to find that plaintiff's anxiety disorder did not "substantially limit" his ability to work, affirming the district court's grant of summary judgment with respect to the disability discrimination claims and dismissal of the state common law claims). It is important to note that any restrictions on the performance of a major life activity must be the result of a condition that is an impairment. See 29 C.F.R. § 1630.2(j) (defining "substantially limits"). Advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. See id. § 1630.2(h) (defining "physical or mental impairment").
48. 29 C.F.R. § 1630.2(i).
49. 42 U.S.C.A. § 12102(2).
51. 29 C.F.R. § 1630, App. § 1630.2(j). In an individualized assessment, "[w]e do not decide whether every diabetic is disabled, and we do not decide whether every severely obese person is not disabled." Fraser v. Goodale, 342 F.3d 1032, 1039 (9th Cir. 2003).
52. 29 C.F.R. § 1630, App. § 1630.2(j).
factors. The determination of whether a plaintiff is disabled under the ADA requires a fact-based analysis which includes, among other considerations, the nature and severity of impairment, and the effectiveness and burdens of mitigating measures used by the plaintiff.

Although learning disabilities are not expressly included in the language of the ADA, they are included in the EEOC's interpretation of the Act. According to the EEOC, a disability includes "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." Further evidence that learning disabilities are covered under the ADA exists in the EEOC's guidelines, which includes "learning" as an example of a major life activity the ADA has been interpreted to cover.

C. Obtaining Accommodations under the ADA

To obtain accommodations under the ADA, an employee must first establish that he is a "qualified individual with a disability." For the court to make this determination under Title I, the individual must have a disability, be discriminated against on the basis of it, and be able to perform the essential functions of the position with or without reasonable accommodation. To satisfy the essential functions of the job position, the individual must display "the requisite skill, experience, education, and other job-related requirements of the employment position" at stake. A job function is considered essential if the "position exists to perform that function ... [if a] limited number of employees [are] available" to perform that job function, or if the function is highly specialized so that an "incumbent in the position is hired for his or her expertise or ability to perform the particular function." In determining the essential functions of the position, courts generally give substantial consideration to those

53. Id.
54. 29 C.F.R. § 1630.2(j)(2)(i).
55. See Sutton, 527 U.S. at 481 (affirming the trial court's dismissal of the applicants' claims under the ADA because the applicants were not disabled within the meaning of the statute).
58. 29 C.F.R. § 1630.2(i) (2005).
60. Id.
61. 29 C.F.R. § 1630.2(m) (2005).
62. Id. § 1630.2(n)(2) (2005).
functions listed in a written job description prepared by the employer.\textsuperscript{63}

Reasonable accommodations under the ADA may include “making existing facilities used by employees readily accessible to and usable by individuals with disabilities, . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, [and] acquisition[s] or modification[s] of equipment or devices.”\textsuperscript{64} Other accommodations determined to be reasonable include the “adjustment or modifications of examinations, training materials, or policies,” as well as the provision of qualified readers and interpreters.\textsuperscript{65}

Employers are allowed to discriminate against individuals with disabilities if they are unable to perform an essential function of the position and no reasonable accommodation would enable them to perform that function, or the necessary accommodation would impose an undue hardship to the employer.\textsuperscript{66} An undue hardship exists when an accommodation would require a covered entity to incur a “significant difficulty or expense, when considered in light of the” nature and cost of the necessary accommodation, the overall financial resources and size of the business, and the type of operation of the covered entity.\textsuperscript{67} Additionally, employers can discriminate against individuals who pose a direct threat to the health or safety of others in the workplace.\textsuperscript{68}

IV. BARRIERS TO RECOVERY FOR THE LEARNING DISABLED IN THE WORKPLACE

In the university setting, special disability coordinators represent the university’s willingness to accommodate students.\textsuperscript{69} However, upon graduation, these same services are not available to employees with disabilities.\textsuperscript{70} In this litigious age, it seems odd that few employees with learning disabilities seek protection under the law. No landmark case exists and according to Patricia Latham, author of a series of seminal books

\begin{footnotes}
\item[63] 42 U.S.C.A. § 12111(8) (2005); See Buha, supra note 15, at 146 (indicating the evidence a court will examine to determine essential function).
\item[65] Id.
\item[66] Id. § 12111(10)(A).
\item[67] Id. § 12111(10).
\item[68] See id. § 12113(b) (creating health exceptions for employees handling food); 29 C.F.R. § 1630.2(r) (2005) (defining the acceptable level of health risk).
\item[69] See generally Suzanne Abram, Chalk Talk: Reasonable Accommodations for Learning-Disabled University Students Under the ADA, 28 J.L. & EDUC. 121 (1999) (describing the evolution of ADA application in the university setting).
\item[70] See David M. Engel & Frank W. Munger, Re-Interpreting the Effect of Rights: Career Narratives and the Americans with Disabilities Act, 62 OHIO ST. L.J. 285, 331 (2001) (discussing the variety of reasons employment accommodations are less likely to be sought).
\end{footnotes}
on disabilities and the law, "[t]he message sent by the scattered cases that do exist . . . is not encouraging to others who might think of bringing [lawsuits]."  

While the ADA protects learning-disabled individuals in both the university and employment settings, additional barriers exist for employees wishing to bring claims in the workplace. For example, an employee "must show that [he is] highly debilitated by [a] disorder, yet still capable of doing [the] job . . . [with] 'reasonable accommodations.' Regardless of whether the particular impairment is a learning disability, it is always a difficult task for an employee to prove that he is "substantially impaired [but not so impaired that [he does] not qualify for [the] job in the first place." Understandably, "defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level." Additionally, when employees appealed the court's decision, the judgment was affirmed eighty-four percent of the time. Such results are far worse than those in other areas of law. Those who counsel employees with learning disabilities and whose employers are unwilling to provide accommodations typically advise them, "[y]ou can sue, but you won't win." Thus, the burden is on the learning disabled employee to help himself.

A. Social Barriers that Impede Recovery

The inherent difficulty in quantifying learning disabilities prevents employers from readily providing accommodations. Combined with employers' general lack of comprehension, the invisible nature of learning

71. Belkin, supra note 9, at 29 (citing Latham).
72. As one learning disabled graduate noted, "I thought school was the big hurdle. But it turns out it isn't . . . I really don't see that I'm ever going to eliminate the fact that I take twice as long to do things as other people." STEPHEN T. MURPHY, ON BEING L.D.: PERSPECTIVE AND STRATEGIES OF YOUNG ADULTS 102 (1992).
73. Belkin, supra note 9, at 29.
74. Id. at 29 (quoting Latham).
75. Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (citations omitted). Results of plaintiffs prevailing at the trial court level in ADA employment discrimination claims are most likely even worse, since the data studied only contained reported outcomes which tend to be biased in favor of plaintiffs. Id. at 109. See generally Peter Siegelman & John J. Donohue III, Studying the Iceberg from its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases, 24 L. & SOC'Y REV. 1133 (1990) (discussing the bias inherent in reported decisions).
76. Colker, supra note 75, at 100.
77. Id. Only prisoner rights cases tend to be as difficult for plaintiffs to win. Id.
78. Belkin, supra note 9, at 8 (quoting Harold Meyer, an advisor to companies and employees on ADD friendly workplace strategies).
79. Id.
disabilities causes many employers to treat them as an excuse. In fact, twenty percent of Americans think Attention Deficit Hyperactivity Disorder (ADHD) does not really exist. Because it is difficult for employers to be sensitive to a syndrome whose symptoms suspiciously look like bad work habits, employers constantly question the legitimacy of an employee who does not appear to be disabled, but claims to be. As a result, incorrect assumptions that learning-disabled individuals are simply lazy are often made.

Such skepticism by employers causes individuals to be hesitant about revealing their learning disabilities once they enter the employment context. The learning disabled, like all individuals with hidden disabilities, feel strong pressure to "pass for normal." The advantages of passing include "avoiding the prejudices and daily acts of discrimination and patronizing behavior that people with obvious disabilities are subjected to." The ability to 'pass' poses an especially troubling problem "[i]f an employer is unaware of an applicant or employee's disability, he is not expected to accommodate the disability." Yet, revealing a disability could create a no-win situation if employers are unwilling to provide accommodations and an individual is terminated and forced to sue. Because of this, most employees with learning disabilities believe "[i]mpairment is safer not mentioned at all" and choose to keep their disability to themselves.

One employee, in her decision to not reveal her learning disabilities, reasoned that, "[w]ork isn't like school, where they have to give you more time on the tests. . . . In the real world, if you tell during the interview, they won't hire you. And if you tell after you're hired, they can fire you." Such silence among learning-disabled employees often causes

80. See Gerber, supra note 8, at 330 (indicating that employers are perplexed by learning disabilities as they are less easy to perceive).
82. Lee, supra note 2, at 30.
84. Id. at 27.
85. Fike, supra note 6, at 494.
86. Wendell, supra note 83, at 21.
87. Id. at 29.
88. Fike, supra note 6, at 499.
89. See generally Belkin, supra note 9 (discussing the difficulty inherent in ADA lawsuits).
90. Wendell, supra note 83, at 22.
91. Belkin, supra note 9, at 26.
difficulties in maintaining employment. One poll indicates that adults with ADHD held 5.4 jobs over the past ten years, in comparison to adults without the impairment, who held only 3.4 jobs. Additionally, only 52% of adults with ADHD were employed, as compared to 72% of non-disabled adults. Even drugs such as Ritalin and Adderol, which are made to control the inattentiveness of ADD and ADHD, rarely eliminate the additional difficulties that arise in the workplace for those struggling with attention impairments.

Learning-disabled individuals also fail to reveal their disability because they are concerned they will be seen as expecting 'special' treatment, even though they are just attempting to level the playing field. They worry that employers will be disturbed by the inconvenience of providing accommodations. Additionally, they commonly fear that asserting their rights will cause resentment among co-workers and employers, which will result in alienation and stigmatization. A "politics of resentment" motivates some employers to expect virtually every employee, despite a given impairment, to conform to the normal workplace demands.

B Trilogy of Supreme Court Cases that Contribute to Employees' Difficulty in Prevailing Under the ADA

The Supreme Court decided three landmark ADA cases on the same day, each having a substantial effect on a plaintiff's recovery under the Act. These cases impact the learning disabilities arena. The three cases, Sutton v. United Airlines, Murphy v. United Parcel Service Inc., and Albertsons, Inc. v. Kirkingburg, all raise the disability threshold bar by holding that courts should take mitigating actions into account when assessing if a disability substantially limits a major life activity. In Sutton v. United Airlines, the Supreme Court determined that in

92. See generally Belkin, supra note 9 (discussing the trials and tribulations of several ADHD effected members of the work force).
93. Id. at 28.
94. Id.
95. Id. at 29.
96. Engel & Munger, supra note 70, at 331.
97. Id.
98. Id. Coworker resentment results from the fact that most workers feel frustrated by their working conditions and their employer's demands on their time and energy. Wendell, supra note 83, at 27.
99. Wendell, supra note 83, at 27 (citations omitted).
assessing whether twin sisters who both suffered from severe myopia\textsuperscript{101} were disabled under the ADA, the corrective lenses available that improved the girls' eyesight should be taken into account when evaluating their condition.\textsuperscript{102} The Court held that the question of whether an individual has a disability should be assessed with regard to mitigating measures, concluding that a person whose physical or mental impairment was corrected by medication or other measures did not have an impairment that substantially limited a major life activity.\textsuperscript{103}

Similarly, in \textit{Murphy v. United Parcel Service Inc.}, the Court held that Murphy's high blood pressure should be considered post-medication, concluding that his hypertension was not a disability because when medicated, "he functions normally doing everyday activities that an everyday person does."\textsuperscript{104} The Court went a step further in \textit{Albertsons Inc. v. Kirkingburg}, determining that a plaintiff who suffered from monocular vision, an uncorrectable eye condition, was not disabled because his brain had developed a subconscious mechanism for coping with his visual impairment.\textsuperscript{105} Thus, the Supreme Court established that even corrections by an individual's own body that compensate for a disability would negate a claim of a substantial impairment of a major life activity.\textsuperscript{106}

\textit{Sutton},\textsuperscript{107} \textit{Murphy},\textsuperscript{108} and \textit{Albertsons}\textsuperscript{109} have greatly impacted the ability of the learning disabled to recover under the ADA. Individuals with learning disabilities inevitably develop coping mechanisms that help them to successfully perform their jobs.\textsuperscript{110} As seen in \textit{Albertsons},\textsuperscript{111} such coping mechanisms make it difficult for individuals to qualify as disabled under the ADA since "success negates the existence of the disability, whereas failure justifies dismissal for incompetency."\textsuperscript{112} Thus, when a plaintiff with a learning disability exhibits compensatory abilities, he most likely will be unable to qualify as disabled under the ADA.\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{101} Myopia is an eye condition that causes impaired vision. \textit{See} \textit{Sutton}, 527 U.S. at 475 (indicating the effects of myopia).
\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} \textit{Id.}
\item \textsuperscript{104} \textit{Id.} at 520 (citations omitted).
\item \textsuperscript{105} \textit{Albertsons}, 527 U.S. 555, 565-66 (1990).
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} 527 U.S. at 471.
\item \textsuperscript{108} \textit{Id.} at 516.
\item \textsuperscript{109} \textit{Id.} at 555.
\item \textsuperscript{110} Frances M. Nicastro, \textit{The Americans With Disabilities Act: Determining Which Learning Disabilities Qualify for Reasonable Accommodations}, 26 J. LEGIS. 355.
\item \textsuperscript{111} 527 U.S. at 555.
\item \textsuperscript{112} Andrew Weis, \textit{Jumping to Conclusions in "Jumping the Queue,"} 51 \textit{Stan. L. Rev.} 183, 205 (1998).
\item \textsuperscript{113} \textit{Id.}
\end{itemize}
V. COURTS' CONTINUOUS REFUSAL TO FIND PROTECTION FOR THE LEARNING-DISABLED UNDER THE ADA

While there have been few suits for discrimination based on a learning disability under the ADA, the case law that does exist is rather discouraging to individuals ready to muster up the courage to sue. These decisions demonstrate a continual trend of courts granting summary judgment to employers, asserting that no duty exists for the employer to accommodate the impairment because it does not qualify as "'substantially limiting' within the meaning of the ADA."\(^{114}\) For example, a 1997 National Disability Law Reporter survey of ADA cases showed that a judge found the plaintiff able to meet the statutory definition in only 6 of the 110 cases in which the issue was raised.\(^{115}\)

A. The EEOC's Interpretation of the Act Hinders Recovery for Learning Disabled Individuals.

Hardly any cases exist in which a learning-disabled plaintiff is determined to have an impairment that rises to the level necessary for the court to mandate that the employer provide accommodations. Courts' consistent failure to hold that learning disabilities substantially limit a major life activity turns on the EEOC's definition of a substantial limitation.\(^{116}\)

The ADA's legislative history offers some additional guidance to the phrase 'substantially limits.' The Senate Committee on Labor and Human Resources\(^{117}\) acknowledges that substantially limiting impairments cannot be "minor" or "trivial."\(^{118}\) The legislative history further states that the impairments must restrict an individual's major life activity as to the "conditions, manner, or duration under which [the activity] can be performed in comparison to most people."\(^{119}\) For example, according to the Senate Report discussing the ADA, "[a] person who can walk for 10 miles continuously is not substantially limited in walking merely because on the


\(^{116}\) See supra Part II B (explaining the EEOC's definition of 'substantially limited').

\(^{117}\) This Congressional Committee developed the ADA's structure.


\(^{119}\) Id. "'Most people' can be reasonably interpreted to mean that the individual is restricted to a greater degree than a majority of people[,]" and is equivalent to the standard of comparison to the "average person" recommended by the EEOC. Price v. Nat'l Bd. of Med. Exam'r, 966 F.Supp. 419, 425-27 (S.D.W.Va. 1997) (citations omitted).
eleventh mile, he or she begins to experience pain because *most people* would not be able to walk eleven miles without experiencing some discomfort."\textsuperscript{120}

However, the courts fail to compare an individual to the average person in the population when determining if he or she is substantially limited in the major life activity of working.\textsuperscript{121} In reference to the major life activity of working, courts instead assess whether an individual is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person having comparable training, skills, and abilities."\textsuperscript{122} An individual's ability to perform the major life activity of working is only considered if the individual is not substantially limited with respect to any other major life activity.\textsuperscript{123} This standard is rarely considered for individuals with learning disabilities since working is not the only major life activity they would experience limitations in.\textsuperscript{124}

It is insufficient to prove an individual has a disability under the ADA by demonstrating that a particular impairment prevents that individual from performing up to his or her capacity.\textsuperscript{125} The ADA uses the term in a narrower fashion to cover only those people who are substantially limited in a major life activity. Major life activity is measured by "tasks central to most people's daily lives" and not by the unique needs of a particular position.\textsuperscript{126} "The law [only] compels accommodation for someone who is 'disabled' as that term is used in the [ADA], but not for everyone who may have a condition described as a 'learning disability.'"\textsuperscript{127} Therefore, an individual will only be deemed to be covered by the ADA if his disability does not enable him to perform to the level of an average person.\textsuperscript{128}

Because courts fail to examine the discrepancy between an individual's own ability and achievement, many problems are posed for the learning disabled who statistically have average to superior intelligence.\textsuperscript{129} For example, the ability to learn at an average level exempts a learning disabled individual from recovery, despite the fact that the individual's success might be largely due to the accommodations he has received.\textsuperscript{130}

\textsuperscript{121} 29 C.F.R. § 1630.2(j)(3)(2005).
\textsuperscript{122} Id. § 1630.2(j)(3)(i).
\textsuperscript{123} EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(j)(2005).
\textsuperscript{124} Abram, *supra* note 69, at 121 (indicating that learning disabled individuals also experience limitation in the scholastic setting).
\textsuperscript{126} Id. at 200.
\textsuperscript{127} Wong v. Regents of the Univ. of Cal., 379 F.3d 1097, 1109 n.6 (9th Cir. 2004).
\textsuperscript{128} Toyota, 534 U.S. at 201.
\textsuperscript{129} Gerber, *supra* note 8, at 331.
\textsuperscript{130} Eichhorn, *supra* note 5, at 61.
While evidence of past academic success is relevant to the ultimate factual determination of whether an employee is disabled, it should by no means entitle the employer to judgment as a matter of law. Otherwise, doctors or lawyers could never be considered to have a learning disability because admittance into medical or law school alone would automatically negate their claim.  

B. Cases that Demonstrate Obstacles for the Learning Disabled Posed by the EEOC’s Interpretation of “Substantially Limited”

*Hopkins v. St. Joseph’s Creative Beginning,* a recent case in the Eastern District of Pennsylvania, illustrates how courts incorrectly assume that an individual cannot be substantially limited compared to the average person if he participates in activities in which the above average person participates.  

Mary Hopkins was diagnosed with a learning disability that interfered with her ability to understand abstract concepts, relationships, and written material. Hopkins submitted a recent doctor’s psychological evaluation to her employer, documenting her learning disability and explaining her limitations. These documentations note that she received a score of seventy-six on an I.Q. test, putting her in the fifth percentile. Additionally, the psychological evaluation found that Hopkins received a below average score in verbal skills and was considered impaired in the areas of arithmetic, abstract verbal thinking, and reasoning processes.  

Hopkins alleged that she was substantially impaired in her ability to read and learn and was discriminated against because of her learning disabilities. As evidence of discrimination, she claimed that before submitting her psychological evaluation to her employer, she was a highly regarded employee and had received positive reviews. After informing her employer of her learning disability, Hopkins alleged that she began to receive repeated warnings about her carelessness on the job, which resulted in her termination.

The court found that Hopkins’ reading and learning disability was akin to a ‘mere difference’ rather than a substantial impairment when

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131. *See Wong,* 379 F.3d. at 1113 (noting that admission into a medical school would definitively disprove the existence of a learning disability) (Thomas, J., dissenting).
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at *6.
138. *Id.*
139. *Id.*
compared to the average person, dismissing the case on summary judgment.\textsuperscript{140} Even though Hopkins' psychological evaluation claimed she was below average in many areas of learning, the court relied on the fact that Hopkins' doctor merely made recommendations as to how she might improve her performance in college courses.\textsuperscript{142} Thus, the court concluded that the doctor's reports did not suggest that Hopkins was substantially impaired in any activity besides taking difficult college courses.\textsuperscript{143} In determining that Hopkins was not substantially limited in her ability to learn and read, the court additionally relied on evidence that Hopkins was taking college courses and working towards earning a college degree, had extensive employment history, and was currently a Sunday school teacher at her church.\textsuperscript{144} Thus, the court incorrectly concluded that Hopkins could not be substantially limited compared to the average person because of such accomplishments.\textsuperscript{145}

The EEOC's interpretation of 'substantially limited' poses similar barriers for individuals with ADD and ADHD attempting to recover under the Act. In \textit{Demar v. Car-Freshner Corp.},\textsuperscript{146} a United States District Court case from the Northern District of New York, Demar brought an action against his employer for denying him accommodations for ADHD and for subsequently discharging him after learning of his disability.\textsuperscript{147} The court found that Demar failed to establish that he was substantially limited in his ability to concentrate, despite his allegations that compared to the average person he could not "concentrate in normal duration or under normal conditions . . . [because his ADHD] restricts his ability to screen out distractions."\textsuperscript{148}

The court noted that Demar's diagnosis of ADHD alone does not automatically lead to the conclusion that his ability to concentrate is substantially limited.\textsuperscript{149} Rather, Demar bears the burden of providing evidence to prove that his ability to concentrate is limited in comparison to the average person.\textsuperscript{150} In concluding that Demar failed to meet this burden,
the court considered that he had obtained a college degree and completed his first year of law school as evidence that Demar was able to concentrate as well as the average person. As a result, the court granted summary judgment in favor of Car-Freshner Corporation, stating that neither Demar's "conclusory statements, conjecture, [n]or speculation" suffices to defeat summary judgment.

Similarly, in a seventh circuit case, Davidson v. Midelfort Clinic Limited, Davidson filed suit under the ADA, claiming that her employer refused to accommodate her diagnosis of ADD. When Davidson interviewed for a job as a school psychologist, she disclosed that she struggles with ADD and requested specific accommodations, including a portable dictaphone and the ability to work after hours to complete her work. Davidson was denied accommodations and discharged from her job due to complaints that she was disorganized and consistently submitted her dictation late, even though she explained to her employer that such behavior resulted from her ADD and could be prevented with accommodations.

The court found no proof that the difficulty posed by Davidson's ADD was any more severe than what the average person experiences. Even though Davidson presented evidence of her lifetime struggle with ADD and the accommodations that were necessary for her success in college and graduate school, the court found insufficient evidence to determine that ADD hampered her ability to learn in the workplace anymore than the average person.

Finally, Price v. National Board of Medical Examiners also demonstrates the impediments posed for academically successful individuals with ADD in attempting to qualify as disabled. Although this case is outside the employment context, it is illustrative of the general difficulty the learning disabled experience in recovering under the ADA because of the standard of being compared to the average person in the population.

evidence that demonstrates that he is substantially limited in his ability to concentrate in comparison to the general population. Id.

151. Id. at 87.
152. Id. at 91 (quoting Kuluk v. City of N.Y., 88 F.3d 63, 71 (2d. Cir. 1996)).
153. Davidson v. Midelfort Clinic Ltd., 133 F.3d 499 (7th Cir. 1998).
154. Appellant earned a master's degree in psychology from the University of Wisconsin-Stout in 1990 and is a licensed school psychologist and counselor. Id. at 502.
155. Therapists were required to dictate patient notes for transcription by other staff members, which was extremely time-consuming and difficult for Davidson. Id. at 503.
156. Id.
157. Id. at 504.
158. Id. at 505.
159. Id.
In *Price*, three medical students brought suit against Marshall University School of Medicine under the ADA, requesting the National Board of Medical Examiners to provide each of them with additional time for the United States Medical Licensing Examination (USMLE) and a separate room in which to take the examination.\(^{161}\) Each plaintiff was diagnosed by the National Center of Higher Education for Learning Problems with ADHD, and two of the three plaintiffs were diagnosed with specific learning disabilities in written expression and reading.\(^{162}\)

The court denied the plaintiffs accommodations, holding that they were not disabled under the ADA because they were able to learn as well as or better than the average person.\(^{163}\) The court found that even though the plaintiffs had provided documentation of their diagnoses, such documentation was insufficient to support a definition of a disability under the ADA because the plaintiffs had not exhibited a pattern of substantial academic difficulties.\(^{164}\) For example, the court reasoned that Plaintiff Price was not disabled under the ADA because he was able to graduate from high school with a 3.4 grade point average and from college with a 2.9 grade point average, discounting the fact that such success was due in part to the accommodations he had received.\(^{165}\) Also, because the plaintiffs were medical students and the average person in the population is not academically qualified to attend medical school, they were automatically precluded from entitlement to accommodations, no matter how substantially limiting their disabilities might be on their own abilities to learn.\(^{166}\) Because an individual who has a college degree or a degree of higher education has demonstrated greater skills in reading, writing, and learning than the average person in the general population, the court's holding in *Price* unfairly punishes individuals with learning disabilities for academic achievement.\(^{167}\)

\[^{161}\text{Id. at 421.}\]
\[^{162}\text{Id. at 422.}\]
\[^{163}\text{Id.}\]
\[^{164}\text{Id. at 423.}\]
\[^{165}\text{Id.}\]
\[^{166}\text{Id.}\]
\[^{167}\text{Susan M. Denbo, *Disability Lessons in Higher Education: Accommodating Learning-Disabled Students and Student-Athletes Under the Rehabilitation Act and the Americans with Disabilities Act*, 41 AM. BUS. L.J. 145, 163 (2003). The Eastern District of Michigan also addressed a similar case brought by a medical student with learning disabilities, claiming the National Board of Medical Examiners discriminated against him by denying him additional time to take the USMLE. Gonzalez v. Nat'l Bd. of Med. Exam'rs, 60 F. Supp. 2d. 703 (E.D. Mich. 1999). The court held for the Board, relying on Plaintiff's record of academic achievements and his medical degree in determining that he was not substantially limited in his ability to learn compared to the average person. Id.}\]
VI. RECOMMENDATIONS

Courts’ interpretation of the EEOC regulations turns the central purposes of the ADA around “by holding that, as a matter of law, academic success definitively disproves the existence of a learning disability. This interpretation places individuals with disabilities in a classic Catch-22 situation.”

For example, when Michael begins his job as an investment banker, the intense pace will likely cause him frustration and difficulty. He will find himself having no choice but to inform his employer of his learning disabilities and to request particular accommodations. Given most employers’ general unwillingness to understand and accommodate what is often believed to be nothing more than an imaginary impairment, the investment bank Michael works for will most likely not comply with his request.

If Michael wishes to file suit against his employer for failing to provide him with accommodations, the ADA will not provide him with any protection. Michael’s academic success will negate his claim of being substantially limited in the major life activity of learning because the current comparison group used by the court, the average person in the population, does not graduate from a national university with a B+ average. Despite Michael’s documented diagnosis and the testimony at trial by his college disability office explaining the severity of his impairments, the fact that Michael is able to both attend and perform well in college will outweigh his claim of a substantial impairment.

Thus, under the current standard, Michael is unable to receive any protection under the ADA, despite the extent of his learning disabilities and the fact that his academic success is due in part to the accommodations he receives in college.

The current standard unfairly suggests that a learning disabled student who has earned a decent grade point average at a national university will not be entitled to accommodations since his academic record is superior to that of the average individual. Since the court only examines how the individual functions in comparison to the average person, this standard precludes learning disabled individuals who have remarkably achieved academic success from receiving accommodations under the ADA. Such reasoning fails to take into account an important factor — how severe a

169. See supra Part III, Section A (“[E]mployers constantly question the legitimacy of an employee who does not appear to be disabled, but claims to be.”).
170. See supra Part IV. (Courts show a “continuous refusal to find protection for the learning disabled under the ADA”).
171. Wong 379 F.3d at 1097.
particular disability may be to the individual's own ability to learn. Due to educational difficulties, few learning disabled students are able to continue to post-secondary education. Rather than punish those that have accomplished more than the average person, courts should recognize that such achievements are largely due to accommodations, and help the learning disabled to continue to succeed by providing them with similar protection in the workplace.

A. Why a Similarly Qualified Person Instead of the Average Person Should Become the Comparison Group

The nature of learning disabilities would support using similarly educated individuals in the comparison group rather than the average person in the general population. The pivotal difference between the test for substantial impairment in most major life activities and the test for substantial impairment in the major life activity of working is the appropriate demographic group to which the plaintiff is compared. When assessing whether a learning disability qualifies for protection under the ADA, courts should use the demographic group they use for the major life activity of working and compare individuals to the average person with comparable training, skills, and abilities. This proposed comparison group would create a crucial distinction in a case where the plaintiff's history of self-accommodation has allowed him to achieve great accomplishments.

Assessing learning disabilities under this proposed standard would entail a lack of deference to the EEOC. Many courts, including the U.S. Supreme Court, have continually refused to defer to the EEOC's ADA regulations. As a result, the regulations have regularly been a "victim of the agency's historic second-class status; the courts continue to disregard its [the EEOC's] regulations and guidance, even when a very strong case can be made that Congress intended courts to give deference to those rules.

172. See id. (explaining that while Wong was able to achieve academic success without accommodations, the court did not take into account how much more he may have achieved with accommodations).
174. See supra Part V (discussing how comparing a person's success with the average person is an unfair assessment of the person's abilities and how a learning disability may be negatively impacting that potential).
175. See 29 C.F.R. § 1630.2(j)(1)(i)-(ii)(2004) (defining "substantially limited" as significantly impaired or lack of ability as compared to the average person).
177. Colker, supra note 75, at 135.
under the ADA." Therefore, it is permissible for courts to disregard the agency guidelines in evaluating learning disabilities under the ADA.

1. How the Proposed Standard Would Help the Learning Disabled Prevail Under the Act

An example of how the proposed standard would enable learning-disabled employees to recover is demonstrated in the New York District Court case *Bartlett v. New York State Board of Law Examiners.* While the decision in this case was vacated in part, it illustrates how plaintiffs will benefit by using the comparison group of similarly educated individuals that this article proposes.

Bartlett, a dyslexic law school graduate, failed the bar exam four times without special accommodation. She failed a fifth time after being granted "time and a half." Requesting that the next time she take the exam she receive double time, permission to tape-record her essays, and the opportunity to circle the multiple choice answers in the test booklet rather than use a scantron, Bartlett was denied all accommodations and subsequently brought suit under the ADA. Bartlett alleged that she qualified for accommodations because dyslexia substantially impaired her ability to learn, read, write, and work.

The Court held, as it had in many similar cases, that Bartlett was not disabled in the major life activities of reading and writing, even though dyslexia is a condition that specifically impedes one’s ability to read and write. The Court’s conclusion was based on the fact that by earning a

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178. *Id.* at 136.


181. On appeal, the court affirmed the judgment in part, finding that appellee was entitled to reasonable accommodations, but that it was error for the district court to reach the issue of whether Bartlett was disabled in her ability to work. The judgment was vacated and remanded to determine the proper amount of compensatory damages. *Bartlett v. N.Y. State Bd. of Law Exam’rs*, 156 F.3d 321, 324 (2nd Cir. 1998). See 29 C.F.R. app. § 1630.2(j) (2006) (“If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.”).


183. *Id.* at 1103.

184. *Id.* at 1098, 1102.

185. *Id.* at 1121.
bachelor of science, a master's degree in education, and a law degree. Bartlett had demonstrated skills that were superior to those of the general population. The Court reasoned that Bartlett's "history of self-accommodation has allowed her to achieve great accomplishments, one of which includes roughly average reasoning skills (on some measures) when compared to the general population." Bartlett's impressive achievements, due to the coping mechanisms she had developed and the accommodations she had previously received to mitigate the effects of her dyslexia, cut against her claim that she was disabled under the ADA.

However, when applying the definition of "substantially limited" contained in the EEOC regulations for the major life activity of working, the Court found Bartlett to be disabled when compared to the other students who had comparable training, skills, and abilities. When using this comparison group, a completely different evaluation of Bartlett's abilities emerges. All of Bartlett's tremendous accomplishments are pushed aside when compared to this population and Bartlett is determined to read at a level much less than the average law student.

The judge in Bartlett, in agreeing that the proper comparison group used to assess her disability should be people with comparable educational achievement, relied on the fact that "in 1993, 21.9% of the adult U.S. population had graduated from a four-year college. In 1994, less than one half of one percent of the adult population . . . were lawyers." As demonstrated in this case, the comparison group that is used in the Court's assessment of a plaintiff's impairment is determinative of whether the

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186. At Vermont Law School, Bartlett had received time and a half for examinations, use of a yellow legal pad for exams, and permission to circle her multiple choice answers rather than filling out a scantron sheet. Id. at 1101.
187. Id.
188. Id. at 1120.
190. Bartlett v. New York State Board of Law Examiners, 970 F.Supp. 1094, 1121, 1126 (S.D.N.Y. 1997), aff'd in part and vacated in part, 156 F.3d 321 (2nd Cir. 1998). The Court reasoned that the bar exam was an employment test and so the appropriate demographic group to which Bartlett should be compared "is a group of individuals with similar background, skills, and abilities . . . ." Id. at 1126. The N.Y. Court of Appeals later found it was error for the district court to reach the issue of whether Bartlett was disabled in her ability to work. Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 324 (2nd Cir. 1998). See also 29 C.F.R. app. § 1630.2(j) (2006) ("If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.").
191. Additionally, the Court determined that Bartlett's dyslexia substantially limited her ability to participate in a broad class of jobs because, without accommodations on the bar examination, she would be precluded from the entire field of law practice. Bartlett, 970 F.Supp. at 1121, 1123. The Court considered the practice of law to be a broad class of jobs. Id. at 1121.
plaintiff meets the definition of “disabled” under the ADA.\textsuperscript{193} When compared to a population of similarly educated individuals, Bartlett’s reading skills are well below normal, but when compared to the general population, Bartlett is squarely average.\textsuperscript{194}

B. Implications of the Proposed Standard

1. Accommodating More Employees with Learning Disabilities Should Not Pose an Undue Hardship on Employers

While Title I does not require an employer to make any accommodations that would impose an “undue hardship” on the employer,\textsuperscript{195} a high standard exists for employers attempting to utilize this affirmative defense.\textsuperscript{196} While an undue hardship is vaguely defined by the EEOC regulations as a “significant difficulty or expense incurred by a covered entity,”\textsuperscript{197} Congress has additionally provided some guidance, stating that an undue hardship “may be something less than a cost that would drive the employer to the verge of going out of business,” but at the same time it must impose more than a negligible cost.\textsuperscript{198} The Court’s analysis has centered on balancing the business needs of employers against the rights of individuals with disabilities.\textsuperscript{199}

Four factors must be balanced:

(1) the nature and cost of the accommodation; (2) the overall financial resources of the facilities involved, the number of persons employed at these facilities, and the accommodation’s impact on the facilities’ operation; (3) the overall financial resources of the business, the number of employees, and the number, type and location of its facilities; and (4) the type of business operation, including the structure and functions of its

\textsuperscript{193} See supra Part V. (arguing that the comparison group should include similarly educated individuals for determining if an individual is disabled under the ADA, rather than the average person in the general population). \textit{Cf. Bartlett,} 970 F.Supp. 1094 (S.D.N.Y. 1997) (demonstrating how using different comparison groups can yield different results).

\textsuperscript{194} Bartlett, 970 F.Supp. at 1121.


\textsuperscript{197} 29 C.F.R. § 1630.2 (p)(1) (2004).


workforce, and the geographic, administrative, or fiscal relationship between the facilities involved and the business as a whole.\textsuperscript{200}

These four factors are not exclusive.\textsuperscript{201} Congress also indicated that other factors, including the availability of financial assistance or tax credits to help pay for an accommodation, and the number of employees sharing the benefit of an accommodation are to be considered.\textsuperscript{202}

Congress also specifically adopted a much more burdensome standard for an employer claiming undue hardship under the ADA than it had under Title VII of the Civil Rights Act of 1964.\textsuperscript{203} As a result, it can be assumed that Congress recognized that the ADA would require great expenditures on employers, so an expansion of the definition of a learning-disabled plaintiff would not exceed the scope of the ADA. Senator Lowell Weicker, in consideration of the social costs that would stem from excluding disabled individuals from the pursuit of their chosen professions, boldly stated that “the costs associated with this bill are a small price to pay for opening up our society to persons with disabilities.”\textsuperscript{204} Congress itself has even stated that the cost of discrimination far exceeds the costs of eliminating it.\textsuperscript{205} Accordingly, Congress concluded that it was inappropriate to focus on the cost of compliance by covered entities given “[t]he economic benefits to society in terms of reductions in the deficit from getting people off of welfare, out of institutions, and onto the tax rolls.”\textsuperscript{206}

Additionally, a large percentage of the situations covered under Title I of the ADA involve accommodation with negligible costs to the employer.\textsuperscript{207} In fact, the Senate Committee on Labor and Human


\textsuperscript{202} Id.

\textsuperscript{203} Id. at 68; see S. REP. No. 101-116, at 36 (1989) (emphasizing the inapplicability of the standards from Title VII religion cases). Under Title VII, an employer is not required to provide accommodations for employees' religious beliefs if doing so creates undue hardship. 42 U.S.C. § 2000e(j)(2000).

\textsuperscript{204} 134 CONG. REC. S5109 (daily ed. April 28, 1988) (statement of Sen. Weicker).


\textsuperscript{207} Harger, \textit{supra} note 200, at 790.
Resources estimated that the cost of an ADA accommodation would be less than 100 dollars per worker for 30% of disabled workers, with 51% of such accommodations requiring no expense at all.\(^{208}\) The lowest costs were associated with the types of accommodations often implemented for the learning disabled: relocating work-sites, changing hours, work procedures, task assignments, and transferring workers to new jobs.\(^{209}\)

In addition to the obvious gain to individual employees, economists contend that ADA accommodations will also create efficiencies for employers.\(^{210}\) Studies suggest that overall profitability improves when accommodations provide individual employees with greater potential for success.\(^{211}\) Indeed, one federal agency found that “on average, for every dollar spent on accommodation, companies saved $50 in net benefits.”\(^{212}\) Companies also received net benefits greater than $5,000 in two-thirds of cases where accommodations were under $500.\(^{213}\) These figures were “based on quantitative evidence finding that disabled workers receiving accommodations had lower job turnover rates and equivalent or lower absenteeism rates, thus saving their employers replacement expenses.”\(^{214}\) Other economic benefits, termed ‘ripple effects’ also result when employers provide accommodations.\(^{215}\) These include greater productivity and dedication, and a stronger corporate culture.\(^{216}\)

\(^{208}\) S. REP. NO. 101-116, at 89 (1989). Another study led by Professor Peter Blanck additionally concludes that many of the necessary expenses under the ADA are “recurrently nonexistent or minimal.” Stein, supra note 197, at 103. From 1978 to 1997, Blanck examined 500 accommodations made by Sears, Roebuck and Co., concluding that the average-out of pocket expense was about $120 for each accommodation. Id. “From 1993 to 1996 that average dropped to $45. Overall, 72 percent of accommodations required no cost . . . .” Id.


\(^{210}\) Stein, supra note 197, at 83.

\(^{211}\) Id. at 104.

\(^{212}\) Id.

\(^{213}\) Id.; see also James G. Frierson, The Legality of Medical Exams and Health Histories of Current Employees Under the Americans with Disabilities Act, 17 J. REHABILITATION ADMIN. 83, 86 (1993) (describing how one company saved $4 million annually by providing necessary accommodations for their disabled employees).

\(^{214}\) Stein, supra note 197, at 104-105; see also Peter D. Blanck & Mollie W. Marti, Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act, 42 VILL. L. REV. 345, 378 (1997) (arguing that positive benefits of employing disabled workers are widespread).

\(^{215}\) Stein, supra note 197, at 105.

\(^{216}\) Id. Beyond these ripple effects, accommodations may also result in “positive externalities,” including public cost savings. Id. at 106.
2. Congressional Intent Supports the Use of the Proposed Comparison Group

While the proposed comparison group expands the scope of the ADA by offering protection for more individuals, allowing the definition of "disability" a more generous construction is necessary to be faithful to the remedial purpose of the ADA. Justice Stevens has argued that the "forty-three million Americans suffer[ing] from disabilities" cited by Congress in voicing the need for the ADA was not intended to be a fixed cap on the Act's protected class. Justice Stevens had stated that, coverage of the Act should not be confined simply "because an interpretation of 'disability' that adheres to Congress' method of defining the class it intended to benefit may also provide protection for 'significantly larger numbers' of individuals than estimated in the Act's findings." Legal scholars have also contended that it is a more desirable option to allow the ADA "to cover a larger scope of the population than Congress intended" than limiting the Act's coverage so that some who should be entitled are not. It has been suggested that the ADA's purpose is to "afford equal opportunity to qualified individuals with disabilities; it is not to deny opportunity to the disabled solely because meeting the prerequisites of qualification demonstrate their abilities.

Additionally, when deciding *Bragdon v. Abbott*, which expanded the scope of the ADA to include individuals substantially limited in their ability to reproduce, the Supreme Court recognized that this decision could possibly result in more litigation and an increased workload for the courts and the EEOC. However, the Court acknowledged that even though an expansion of the class of disabled persons may produce some negative results, the clear intent of Congress was to protect all disabled individuals from discrimination. Like the *Bragdon* decision, this article's proposed

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218. Id. at 1462
221. Wong v. Regents of Univ. of Cal., 379 F.3d 1097, 1111-12 (9th Cir. 2004) (Thomas, J., dissenting). When an individual meets the prerequisites of a challenging job position that requires skill, establishing qualification proves the individual is not impaired, which makes it virtually impossible for him to qualify as disabled under the ADA. *Id.* at 1110.
224. *Id.* at 261.
standard of comparison captures the necessity of allowing the ADA a "generous, rather than a miserly, construction" to ensure faithfulness to the ADA's remedial purpose.225 Furthermore, the Court has "consistently construed [other anti-discrimination] statutes to include comparable evils within their coverage, even when the particular evil at issue was beyond Congress' immediate concern in passing the legislation."226 For example, Justice Stevens calls attention to the fact that Congress' primary concern in enacting Title VII of the Civil Rights Act of 1964227 was to eliminate discrimination against African-Americans, "[b]ut that narrow focus could not possibly justify a construction of the statute that excluded Hispanic-Americans or Asian-Americans from its protection."228

If the ADA is to provide a comprehensive mandate to eliminate discrimination, "then broad application is necessary. Nowhere does the language of the ADA require that its application be limited to a narrow class of individuals."229 With this purpose in mind, and the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes,"230 a broader interpretation of the ADA is necessary. To construct the Act any differently would disregard its legislative history and leave a class of individuals it was intended to protect completely defenseless.231

VII. CONCLUSION

So what will happen to Michael if the standard of comparison this Comment proposes is adopted? Michael will have the opportunity to succeed as an investment banker, as he will finally receive the protection to which he is entitled under the ADA. Rather than be compared to the average person in the population, Michael will be compared to others with

225. Sutton, 527 U.S. at 495 (Stevens, J., dissenting).
226. Id. at 505.
228. Sutton, 527 U.S. at 505; see also United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 202-03 (1979) (noting that a central goal in enacting Title VII was to prevent discrimination against African Americans). Additionally, the Supreme Court even prohibited racial discrimination against whites and male-on-male sexual harassment in private employment, even though these were not the principal evils Congress was concerned with when it enacted Title VII. Julie McDonnell, Sutton v. United Airlines: Unfairly Narrowing the Scope of the Americans with Disabilities Act, 39 BRANDEIS L.J. 471, 484 (2000).
231. See H.R. REP. No. 101-485, pt. 2, at 52 (1990) (stating that disability should not be assessed with regard to mitigating circumstances, but that those with impairments should be covered by the Act).
similar skills and backgrounds — individuals with college diplomas.232 When using this comparison group, Michael will be able to receive accommodations in the workplace, for his learning disabilities are clearly substantially impairing him when compared to other college graduates.233

While courts have been concerned that comparing the plaintiff to individuals with similar a background, skills, and abilities would be unmanageable, employees with learning disabilities who sue under the current Title I definition of “substantially limited” are unable to win their lawsuits.234 The virtual impossibility of a learning disabled employee’s recovery should be of greater concern to the courts since the purpose of the ADA is to provide individuals who have experienced discrimination on the basis of a disability with legal recourse to redress such discrimination.235 The proposed comparison group supports the overall purpose of the ADA, which is “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency” for individuals with disabilities.236

In adopting the ADA, President George H.W. Bush stated that “[d]iscrimination, whether on the basis of race, national origin, sex, religion, or disability, is worse than wrong. It is a fundamental evil that tears at the fabric of our society.”237 Using a comparison group of individuals with comparable training, skills, and abilities in assessing learning disabled employees would destroy the evil of discrimination that lies ahead for the 5 million children in America that currently struggle with learning disabilities.238

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232. See supra Part IV (explaining that the comparison group used by the EEOC excludes learning disabled individuals from protection under the ADA, unlike the comparison group proposed by this comment).
233. This evidence is based on Michael’s doctor’s documentation of the limitations resulting from his learning disability, which Michael wishes to remain confidential.
234. See supra Part IV (explaining several cases which demonstrate the difficulties of the EEOC’s interpretation of “substantially limited” on plaintiffs with learning disabilities).
237. Lerner, supra note 57, at 1049.