AN EMPLOYER'S GUIDE TO ANALYZING ISSUES UNDER THE AMERICANS WITH DISABILITIES ACT

KEITH L. HAMMOND[1]

I. INTRODUCTION

Employers frequently address issues in the workplace under the Americans with Disabilities Act of 1990 ("ADA" or the "Act").[2] The ADA comes into play whenever an employee requests an accommodation in the workplace, such as a specialized computer keyboard or an adjustment to the employee's work schedule. Typically, when faced with an ADA issue, the first question employers usually ask themselves is whether the employee is requesting a "reasonable accommodation" under the ADA. However, the true threshold inquiries should be whether the employer is even a "covered entity" under the ADA and whether the employee is a "qualified individual with a disability."

This article provides practical suggestions for employers in connection with analyzing ADA issues. Section II of this article sets forth a step-by-step method for analyzing issues arising or potentially arising under the ADA. Section III discusses four recent Supreme Court decisions that illustrate the Court's analysis of ADA claims. Finally, Section IV of this article raises issues and concerns of which employers should be mindful when addressing ADA matters.

II. ANALYZING ISSUES UNDER THE ADA

Employers often begin their analyses of ADA issues in the middle of a proper ADA analysis, rather than at the beginning. For example, an employer may seek to determine whether a requested accommodation is reasonable before even considering whether the employer is a covered entity under the ADA or whether the

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[1] B.A., University of South Florida; J.D., *cum laude*, Stetson University. Mr. Hammond is an attorney with the Orlando, Florida office of Jackson Lewis LLP. His practice consists of representing and advising management in matters pertaining to workplace law, including the Age Discrimination in Employment Act, Americans with Disabilities Act, Family Medical Leave Act, Equal Pay Act, Title VII of the Civil Rights Act of 1964 (as amended), Uniformed Services Employment and Re-employment Act, Worker Adjustment and Retraining Notification Act, state civil rights, and whistleblower and anti-retaliation laws.

[2] 42 U.S.C. §§ 12101 (2001) *et seq.*

employee or job applicant is a qualified individual with a disability. After all, an employer's denial of an accommodation to an individual who is not a qualified individual with a disability does *not* violate the ADA because the individual is not protected under the Act.[3] An employer evaluating a claim or potential claim under the ADA should always undertake the following sequential, step-by-step analysis to determine the merits of the claim.

The black-letter language of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . .."[4] Thus, an employer should ask the following four questions in assessing issues under the ADA:

(1) Is the employer a "covered entity"?
(2) Is the employee or job applicant a "qualified individual with a disability"?
(3) Would the employer "discriminate" if it refused the requested accommodation or took other adverse employment action?
(4) Would the action be taken "but for" the individual's disability?

As an initial inquiry, an employer should always determine whether it is a "covered entity." The ADA sets forth a fifteen-employee minimum threshold before an employer is subject to its requirements and prohibitions.[5] Thus, smaller employers with fourteen (14) or fewer persons are *not* covered entities under the ADA. However, if an employer had fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, it *is* a covered entity under the ADA.[6] This is one of the few instances in which a definitive answer may be easily ascertained—the employer either had the

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[3] *See* 42 U.S.C. § 12112(a) (2001) (prohibiting discrimination against a *qualified individual with a disability*).

[4] *Id.*

[5] *Id.* § 12111(5)(A). The term "covered entity" includes not only employers, but also employment agencies, labor organizations, and joint labor-management committees. *Id.* § 12111(2). The scope of this article, however, is limited to employers who are considered "covered" entities under the ADA.

[6] *Id.* § 12111(2)(5)(A).

minimum number of employees for the requisite amount of time in the current or preceding year, or it did not.[7]

The second issue an employer should address is whether the employee is a "qualified individual with a disability."[8] The ADA does *not* provide blanket protection to all individuals with disabilities. The employee must first show that she has a "disability"[9]—a physical or mental impairment that substantially limits one or more of her major life activities, a record of such impairment, or being regarded as having such an impairment.[10] The employee must then show that she is "qualified"—that she can perform the essential functions of the employment position that she holds or desires with or without a reasonable accommodation.[11]

It is often difficult for an employer to determine with any degree of certainty whether an employee is a qualified individual with a disability. At the same time, an employee's burden to show that she is entitled to the protections of the ADA is onerous. The employee must show that she is disabled enough to be considered an individual with a disability but not so disabled that she cannot perform the essential functions of the job with or without a reasonable accommodation.[12] The Supreme Court maintains that the inquiry as to whether an employee is a qualified individual with a disability is highly individualized and fact specific.[13] As such, courts and

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[7] Employers must be mindful, however, of state anti-discrimination laws with lower thresholds than the ADA with regard to the minimum number of employees.

[8] 42 U.S.C. § 12112(a).

[9] *Id.* § 12102(2) (defining "disability").

[10] *Id.* § 12111(8) (defining "qualified individual with a disability").

[11] *See id.* § 12111(8). Consideration will be given to the employer's judgment and to any written job descriptions prepared before advertising or interviewing applicants for the job as to what functions of a job are essential. *See id.* But, these are not the only factors a court will examine to determine the essential functions of a particular job: the regulations list several other types of evidence a court may examine, including the amount of time spent on the job performing the function, the consequences of not requiring the incumbent to perform the function, the terms of a collective bargaining agreement, and the work experience of past and current incumbents. 29 C.F.R. § 1630.2(n)(3) (2001).

[12] *See* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 282 (3d ed. 1996).

[13] *See* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999).

employers alike have few bright-line rules to follow in determining whether an individual is protected under the ADA.[14]

The next step in the analysis is to determine whether the employer's refusal to accommodate or other adverse employment action amounts to discrimination against the employee or job applicant. The ADA states that covered entities shall not "discriminate," and the Act lists numerous acts that constitute discrimination.[15] One of the most common allegations ADA plaintiffs raise, and likely the issue employers encounter most frequently, is an employer's failure to reasonably accommodate the plaintiff.[16] Failure to make a reasonable accommodation is not, however, the only form of discrimination prohibited by the ADA.[17] Employers should be mindful that the ADA also considers numerous other acts to be discrimination, such as using qualification standards or other selection criteria that

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[14] The regulations list a small number of *per se* exceptions to the definitions of "disability" and "qualified individual with a disability." 29 C.F.R. § 1630.3. For example, "disability" does not include certain psychosexual conditions, compulsive gambling, kleptomania, pyromania, homosexuality, or bisexuality. *Id.* § 1630.3(d). "Disability" and "qualified individual with a disability" also do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use. *Id.* § 1630.3(a), (d)(3). Employers must be cautious, however, because the terms "disability" and "qualified individual with a disability" may *not* exclude an individual who has been successfully rehabilitated or is participating in supervised rehabilitation and is no longer engaging in illegal use. *Id.* § 1630.3(b)(1), (2). In other words, such individuals *are* qualified individuals with disabilities entitled to the ADA's protections. Further, individuals who are erroneously regarded as engaging in illegal use of drugs, but are not actually engaging in such use, are qualified individuals. *See id.* § 1630.3(b)(3). For related material, see generally John R. LaBar, *Combating the Costs of Doing Business: The Benefits of Implementing a Tennessee Drug-Free Workplace*, 3 TRANSACTIONS, Spring 2002, at 25.

[15] *See* 42 U.S.C. § 12112(a), (b).

[16] Under the ADA, the term "discriminate" includes an employer's failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability or an employer's denial of employment opportunities to an otherwise qualified individual if such denial is based on the need for a reasonable accommodation. *See id.* § 12112(b)(5)(A)-(B). However, there is no discrimination if the employer demonstrates that the accommodation would impose an undue hardship on the operation of the business of such covered entity. *See id.* § 12112(b)(5)(A).

[17] *See* 42 U.S.C. § 12112(b)(1)-(7); 29 C.F.R. § 1630.4-1630.13 (setting forth various examples of prohibited discrimination). This article does not encompass the myriad of actions considered discrimination under the ADA and the regulations, and employers are cautioned that even the regulations do not set forth an exhaustive list of the types of conduct amounting to discrimination. *See* 29 C.F.R. § 1630.4 (noting that the term discrimination is not limited to the acts described therein).

screen out or tend to screen out qualified individuals with disabilities[18] or classifying an applicant or employee in a way that adversely affects her employment opportunities or status.[19]

The final step in determining whether a plaintiff has a viable claim under the ADA is to determine whether the discrimination was "because of the disability of such individual."[20] Even if the previous inquiries have all been answered in the affirmative—that the employer is a "covered entity," the plaintiff is a "qualified individual with a disability," and that the employer has "discriminated"—the plaintiff will not prevail unless she proves that the discrimination was *because of* her disability.[21] As such, there must be a causal connection between the complained of conduct and the plaintiff's disability.

Employers must be particularly cautious in addressing this stage of the ADA analysis. It is very easy for them to develop tunnel vision and analyze the facts subjectively and not objectively. Although an employer's motivation for a particular employment action may have been based entirely on reasons other than the employee's or applicant's disability, the employer must be mindful that a jury—and not the employer—may ultimately opine whether the action was taken because of the disability. A jury may not view the facts in the same way the employer views them. Rather, the jury may be leery of the employer's true motives and find discrimination *because of* a disability when, in fact, the employer was motivated by completely legitimate reasons.

Moreover, employers must not convince themselves that they are undertaking a particular action for a legitimate reason when the reason *is* actually because of a qualified individual's disability. For example, assume that an employer decides to terminate a qualified disabled employee because it does not want to deal with the perceived "hassle" of providing reasonable accommodations or otherwise

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[18] *See* 42 U.S.C. § 12112(b)(6). The ADA's inclusion of this type of employment action in its definition of "discrimination" is analogous to the "disparate impact" theory of discrimination under other anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, as amended.

[19] *See* 42 U.S.C. § 12112(b)(1). The prohibition of this type of conduct may be considered analogous to "disparate treatment" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, as amended.

[20] *See* 42 U.S.C. § 12112(a).

[21] *Id.*

monitoring its compliance with the ADA. The employer decides it will terminate the employee in connection with a previously planned downsizing of its operations. The employer feels that its action was taken for a legitimate reason—downsizing—and has not violated the ADA. In this hypothetical, however, the employer has clearly violated the ADA. Such employment action is prohibited because the employer's decision to terminate the employee was based on the employee's disability.[22]

The analysis of claims and issues under the ADA is seldom clear-cut, and issues frequently arise that are not easily answered by the black-letter law of the statute. Nor is the statute the sole source of ADA law. The Equal Employment Opportunity Commission ("EEOC") has promulgated regulations interpreting the ADA,[23] and there is a wealth of case law from all levels of the federal courts addressing issues under the ADA. The next section of this article examines another source of ADA law: decisions delivered by the United States Supreme Court.

III. RECENT SUPREME COURT INTERPRETATIONS OF THE ADA

This section examines four recent Supreme Court decisions addressing some of the most frequently litigated aspects of the ADA: the meaning of "qualified individual with a disability," whether a requested accommodation is reasonable, and the extent to which an employer may deny opportunities to an employee who is a threat to himself or others in the workplace. In the first two cases, *Sutton v. United Air Lines, Inc.*[24] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[25] the Court analyzed the terms "disability" and "qualified individual with a disability." The Court in the third case, *U.S. Airways, Inc. v. Barnett*,[26] balanced the ADA's requirement that an employer make a "reasonable accommodation" against the rights of employees working under an established seniority system. Finally, the Court in *Chevron U.S.A.,*

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[22] This is not to say, however, that a disabled employee can never be terminated in connection with a legitimate business downsizing or reduction in workforce. In *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997), for example, the court found that the employer had not violated the ADA when it terminated a disabled employee in connection with a reduction in workforce even though he was discharged because he had missed significant work during the previous year due to his condition. *Id.* at 1198. The court noted that he was not discharged *because of* the disability but rather because of a *consequence* of his disability, i.e. his absence from work. *Id.*

[23] *See* 29 C.F.R. § 1630.1 *et seq.*

[24] 527 U.S. 471 (1999).

[25] 122 S. Ct. 681 (2002).

[26] 122 S. Ct. 1516 (2002).

Inc. v. Echazabal[27] addressed the validity of the "threat-to-self" defense set forth in the federal regulations.

A. Sutton v. United Air Lines, Inc.

The ADA prohibits discrimination by covered entities, including private employers, against qualified individuals *with a disability*. The plaintiffs in *Sutton* were twin sisters who applied to United Air Lines ("United") for employment as commercial airline pilots.[28] The sisters both had severe myopia with uncorrected visual acuity of 20/200 or worse in the right eye and 20/400 or worse in the left eye.[29] However, the sisters could correct their vision to 20/20 or better with the use of corrective lenses.[30] Because the sisters did not meet United's minimum vision requirement of uncorrected visual acuity of 20/100 or better, neither sister was offered a pilot position.[31]

The sisters filed a charge of disability discrimination under the ADA with the EEOC and subsequently sued in federal district court.[32] The district court dismissed the sisters' complaint for failure to state a claim upon which relief could be granted because the sisters had failed to sufficiently maintain that they were disabled within the meaning of the ADA.[33] The court held that the sisters were not actually "substantially limited" in any major life activity because they could fully correct their visual impairments.[34] The sisters appealed to the Tenth Circuit, where the court affirmed the district court's judgment.[35]

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[27] 122 S. Ct. 2045 (2002).

[28] Sutton v. United Air Lines, Inc., 527 U.S. 471, 475-76 (1999).

[29] *Id.* at 475.

[30] *Id.*

[31] *Id.* at 476.

[32] *Id.*

[33] *See id.*

[34] *Id.* The court also determined that the sisters had not made sufficient allegations to support their claim that United Air Lines regarded them as being disabled. *Id.*

[35] *Id.* at 477.

The sisters appealed to the Supreme Court and argued that the EEOC guidelines specifically direct that the "determination of whether an individual is substantially limited in a major life activity be made without regard to mitigating measures" such as corrective lenses.[36] United, however, countered that "an impairment does not substantially limit a major life activity if it is corrected" and urged the Court not to defer to the EEOC guidelines because the guidelines conflicted with the plain meaning of the ADA.[37] The Court agreed with United and found that the EEOC's guidelines—that "persons are to be evaluated in their hypothetical, uncorrected state"—was an incorrect interpretation of the ADA for three reasons.[38]

First, the Court noted that the ADA defines a disability as a "physical or mental impairment that *substantially limits* one or more of the major life activities of an individual."[39] The Court stated that the language in the Act is properly read as requiring that a person be "presently—not potentially or hypothetically—substantially limited" in order to demonstrate a disability.[40] In other words, a disability exists only where the impairment substantially limits a major life activity, not where the impairment *might, could, or would* be substantially limiting if corrective measures were not taken.

Second, the Court noted that the Act's definition of disability also requires that disabilities be evaluated "with respect to an individual," meaning that a disability must be determined based on whether an impairment substantially limits the major life activities of that particular individual.[41] The Court noted that the EEOC's guidelines, which directed that individuals be "judged in their uncorrected or unmitigated state" conflicts with the individualized inquiry mandated by the ADA.[42]

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[36] *Id.* at 481.

[37] *Id.*

[38] *See id.* at 482.

[39] *See id.* at 482-83 (emphasis added).

[40] *See id.*

[41] *Id.* at 483 (quoting 42 U.S.C. § 12102(2)).

[42] *Id.* at 483.

Finally, the Court cited to Congress' findings that "some 43 million Americans have one or more physical or mental disabilities."[43] The Court noted that such a low figure could only have been derived from a functional definition of disability.[44] A non-functional definition of disability would have included "those whose impairments are largely corrected by medication or other devices," such as the 100 million Americans requiring corrective lenses to see properly.[45] Clearly, Congress did not intend to protect "all those whose uncorrected conditions amount to disabilities" under the ADA.[46]

B. Toyota Motor Manufacturing, Kentucky, Inc. v. Williams

In *Toyota Motor Manufacturing,* the Supreme Court examined whether the plaintiff had a disability. Williams began working at Toyota's manufacturing plant in Kentucky ("Toyota") in 1990.[47] She was placed on an engine fabrication line and worked with pneumatic tools.[48] Use of the tools eventually caused pain in Williams' hands, wrists, and arms.[49] Williams sought treatment at the factory's in-house medical service, where she was diagnosed with bilateral carpal tunnel syndrome and bilateral tendonitis.[50] A personal physician placed her on permanent work restrictions precluding her from lifting more than twenty (20) pounds or from frequently lifting or carrying more than ten (10) pounds.[51] Williams was also precluded from engaging in any constant repetitive flexing or extension of her wrists or elbows, performing overheard work, or using particular types of tools.[52]

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[43] *Id.* at 484-87.

[44] *Id.* at 485-87.

[45] *Id.* at 487.

[46] *Id.* at 484.

[47] Toyota Motor Mfg., Ky., Inc. v. Williams, 122 S. Ct. 681, 686 (2002).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* Williams also settled two separate claims against Toyota under the state workers' compensation law and the ADA, and she returned to work after each settlement. *Id.*

Williams was eventually assigned to the Quality Control Inspection Operations department, which was responsible for four tasks at the plant: (1) assembly paint; (2) paint second inspection; (3) shell body audit; and (4) surface repair.[53] Williams was initially placed on a team that only performed the first two tasks—assembly paint and paint second inspection—and she had no problems with the physical demands of these duties.[54]

Later, however, Toyota decided that it wanted the Quality Control employees to rotate through all four tasks.[55] Shortly after Williams began performing the shell body audit function, she began experiencing pain in her neck and shoulders, and she requested that Toyota accommodate her by requiring her to do only her original two jobs.[56] Toyota did not grant her request, and Williams' physicians subsequently placed her under a "no-work-of-any-kind" restriction.[57]

After obtaining a right-to-sue letter from the EEOC, Williams filed suit in district court alleging that Toyota failed to reasonably accommodate her disability and unlawfully terminated her employment.[58] The district court granted summary judgment in favor of Toyota and found that Williams was not disabled, as defined by the ADA.[59] Specifically, the district court found that Williams' physical impairment did not substantially limit any major life activity.[60]

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[53] *Id.* at 686.

[54] *Id.* at 687.

[55] *See id.*

[56] *Id.*

[57] *Id.* There was some dispute as to whether Toyota refused Williams' request and forced her to continue working in the shell body audit job, causing her greater physical injury, or whether Williams simply began missing work. It was not disputed, however, that Williams' treating physicians placed her on a no-work-of-any-kind restriction on the last day she worked at the plant. *Id.*

[58] *Id.* at 687.

[59] *Id.* at 687-88.

[60] *Id.* at 688. Williams alleged that she was limited in six major life activities: (1) manual tasks, (2) housework, (3) gardening, (4) playing with her children, (5) lifting, and (6) working. *Id.* at 687. The district court rejected Williams' contention that housework, gardening, and playing with her children were "major life activities," and found that the evidence was insufficient to show that Williams was substantially limited in lifting or working. *Id.* at 688. With regard to the major life activity of manual tasks, the district court rejected Williams claim that she was substantially limited because of her

Additionally, the court rejected Williams' claim that her termination violated the ADA because even if she was disabled at the time of her termination, she was not a "qualified individual with a disability."[61] At the time of her termination, Williams' physicians had restricted her from performing work of any kind, and thus, she was unable to perform the essential functions of her job with or without a reasonable accommodation.[62]

The Sixth Circuit Court of Appeals reversed the district court's ruling on whether Williams was disabled at the time she sought an accommodation, but affirmed the district court's ruling on the wrongful termination claim.[63] The Sixth Circuit addressed only one of Williams' arguments—that she was disabled because she was substantially limited in her ability to perform manual tasks.[64] The Sixth Circuit asserted that in order for Williams to prove that she was "disabled due to a substantial limitation in the ability to perform manual tasks at the time of her accommodation request," she was required to show that "her manual disability involved a class of manual activities affecting the ability to perform tasks at work."[65] Williams satisfied this test because her ailments "prevented her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs, and manual building trade jobs (such as painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time."[66]

The Supreme Court disagreed and reversed the Sixth Circuit's ruling. The Court began its analysis by noting that no agency has been given authority to issue regulations interpreting the term "disability" in the ADA but that the EEOC had

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insistence that she could perform the tasks in assembly paint and paint inspection without difficulty. *Id.*

[61] *Id.*

[62] *See id.* As set forth in this Section II, *infra*, an ADA plaintiff must establish that she is limited enough to be considered "disabled," but not so limited that she cannot perform the essential functions of the job with or without a reasonable accommodation.

[63] *Toyota Motor Mfg.*, 122 S. Ct. at 688.

[64] *Id.* Williams did not, however, appeal the district court's ruling that housework, gardening, and playing with her children were not "major life activities." *Id.*

[65] *Id.* at 688-89 (quoting Williams v. Toyota Motor Mfg., Ky., Inc., 224 F.3d 840, 843 (6th Cir. 2000)).

[66] *Id.* at 688 (quoting Williams v. Toyota Motor Mfg., Ky., Inc., 224 F.3d 840, 843 (6th Cir. 2000)).

nonetheless done so.[67] Because both parties accepted the EEOC regulations as reasonable, the Court so assumed without actually deciding that the regulations were reasonable.[68] The Court then went on to discuss the highly individualized inquiry necessary for determining whether a disability exists under the ADA.[69]

The Court rejected the Sixth Circuit's analysis, which suggested that "a plaintiff must show that her manual disability involves 'a class of manual activities, and that those activities' affect the ability to perform tasks at work."[70] Although the Court recalled that it previously held in *Sutton* that a claimant would be required to show an inability to work in a broad range of jobs (rather than a specific job), *Sutton* did not suggest that a class-based analysis should be applied to any major life activity other than working.[71] Further, the Court noted that the EEOC regulations only mentioned the class concept in the context of the major life activity of working.[72]

Additionally, the Court found that the Sixth Circuit's analysis "circumvented *Sutton* by focusing on [Williams'] inability to perform manual tasks associated only with her job."[73] The Court emphasized that the fundamental inquiry must be "whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."[74] The Court chided the Sixth Circuit for treating

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[67] *Id.* at 689 (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999)).

[68] *Id.*

[69] *Id.* at 690. "Merely having an impairment does not make one disabled for purposed of the ADA." *Id.* The ADA rejects the notion that some impairments constitute disabilities *per se*, and thus it is insufficient for a claimant "to merely submit evidence of a medical diagnosis of an impairment." *Id.* at 691. For example, cancer, in and of itself, is not necessarily a covered disability. *See Gordon v. E.L. Hamm & Assoc.*, 100 F.3d 907, 912 (11th Cir. 1996) (holding that the plaintiff, who had cancer and received chemotherapy treatments, was not substantially limited in a major life activity), *cert. denied*, 522 U.S. 1030 (1997). Claimants *must* show that the impairment substantially limits a major life activity. *Toyota Motor Mfg.*, 122 S. Ct. at 690.

[70] *Toyota Motor Mfg.*, 122 S. Ct. at 692-93 (quoting Williams v. Toyota Motor Mfg., Ky., Inc, 224 F.3d 840, 843 (6th Cir. 2000)).

[71] *See id.* at 693.

[72] *Id.*

[73] *Id.* at 693.

[74] *Id.*

Williams' ability to tend to her personal hygiene and to carry out personal or household chores as irrelevant.[75] "[H]ousehold chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives . . .."[76] Therefore, Williams' ability to perform these tasks should have been part of the Sixth Circuit's assessment of whether Williams was substantially limited in performing manual tasks.[77]

C. U.S. Airways, Inc. v. Barnett

In *U.S. Airways,* the Supreme Court addressed the conflict between a disabled worker's interest in seeking assignment to a particular position as a "reasonable accommodation" under the ADA and the interests of other workers with superior rights under an established seniority system to bid for the job sought by the disabled worker. While working in a cargo-handling position, Barnett injured his back. After the injury, Barnett invoked his seniority rights and transferred to a mailroom position that was less demanding on him physically.[78] Barnett's new mailroom position was often the target for many senior employees under U.S. Airways' seniority-based bidding system.[79] Once Barnett learned that senior employees were eyeing his position, he asked U.S. Airways to accommodate his disability-imposed limitations and allow him to remain in the mailroom despite the seniority-based bidding system.[80] U.S. Airways declined to make an exception, and Barnett ultimately lost his job in the mailroom.[81]

The district court granted summary judgment for U.S. Airways.[82] The court found that U.S. Airways' "seniority system had been in place for decades and governed over 14,000 [employees]."[83] Further, similar seniority policies were

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] U.S. Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1519 (2002).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1520.

common throughout the airline industry.[84] The district court agreed with U.S. Airways in that "any significant alteration of that policy would result in undue hardship to both the company and its non-disabled employees."[85] The Ninth Circuit reversed and held that whether undue hardship was created by a re-assignment had to be determined on an intensive case-by-case basis.[86]

The Supreme Court vacated the Ninth Circuit's judgment and remanded the case.[87] The Court framed the issue as whether "that circumstance mean(s) that the proposed accommodation is not a 'reasonable' one?"[88] The Court held that "the answer to this question ordinarily is 'yes' and that the [s]tatute does not require proof on a case-by-case basis that a seniority system should prevail."[89] Ordinarily, the Court added, it will be unreasonable for the assignment in question to trump the rules of a seniority system.[90]

In support of this conclusion, the Court first noted that an employer is not required under Title VII in the religious discrimination context to "adapt to an employee's special worship schedule as a reasonable accommodation where doing so would conflict with the seniority rights of other employees."[91] Similarly, "collectively bargained seniority trumps the need for a reasonable accommodation" under the

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[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 1525. In undertaking its analysis, the Court expressed two preliminary assumptions: First, the plaintiff was an "individual with a disability," and second, normally, a request such as Barnett's to be assigned to a mailroom position would be reasonable within the meaning of the statute, if only the assignment would not violate the rules of a seniority system. *Id.* at 1520.

[88] *Id.* at 1524.

[89] *Id.*

[90] *Id.*

[91] *Id.*

Rehabilitation Act.[92] The Court also noted that several circuits had reached a similar conclusion in the context of seniority and the ADA itself.[93]

The Court noted that "the typical seniority system provides important employee benefits by creating and fulfilling employee expectations of fair, uniform treatment," and that "to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment . . .."[94] The Court found "nothing in the statute to suggest that Congress intended to undermine seniority systems in this way and conclud[ed] that the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient to demonstrate undue hardship."[95]

However, the Court left open the opportunity for a plaintiff under the ADA to show that special circumstances warrant a finding that, despite the presence of a seniority system, the requested accommodation is reasonable on the particular facts. Specifically, a plaintiff must demonstrate how these "special circumstances" alter the expectations of consistent, uniform treatment under the seniority system.[96] The Court provided two examples of such circumstances. First, the Court suggested that a plaintiff might show that "an employer [who retains] the right to change the seniority system unilaterally [and] exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference."[97] As a second example, the Court noted that a plaintiff might show that "the system already contains exceptions such that, in circumstances, one further exception is unlikely to matter."[98]

Notably, two dissenting opinions were filed. In the first dissenting opinion, Justices Scalia and Thomas criticized the portion of the majority's opinion suggesting

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[92] *Id.*

[93] *Id.* (citing Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999); Feliciano v. Rhode Island, 160 F.3d 780 (1st Cir. 1998); Eckles v. Consol. Rail Corp., 94 F.3d 1041 (7th Cir. 1996)).

[94] *U.S. Airways,* 122 S. Ct. at 1524.

[95] *Id* at 1525.

[96] *Id.*

[97] *Id.*

[98] *Id.*

that a seniority system could ever be overridden under the guise of "reasonable accommodation."[99] On the other end of the ideological spectrum, Justices Souter and Ginsberg were critical of the majority's failure to adopt a case-by-case analysis to determine whether a proposed accommodation would be reasonable when considered in conjunction with an existing seniority system.[100]

D. Chevron U.S.A., Inc. v. Echazabal

At issue in *Chevron*, was the direct threat defense. The ADA creates an affirmative defense for action under a qualification standard shown to be job-related for the position in question and consistent with business necessity, such as a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.[101] The EEOC enacted a regulation that carried the defense one step further by providing employers with an affirmative defense when a worker with a disability poses a direct threat not only to the health and safety of other individuals in the workplace, but to herself as well.[102]

Echazabal began working at Chevron's El Segundo oil refinery in 1972 as an employee of various maintenance contractors.[103] Echazabal worked primarily in the coker unit at the refinery.[104] When Echazabal applied to work directly for Chevron in the same coker unit location in 1992, Chevron determined that Echazabal was qualified and extended him an offer contingent on a physical examination.[105] The physical examination "revealed that Echazabal's liver was releasing certain enzymes at a higher than normal level."[106] Chevron rescinded its offer because Chevron

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[99] *See id.* at 1528 (Scalia, J. dissenting).

[100] *See id.* at 1533-34 (Souter, J. dissenting).

[101] *See* 42 U.S.C. § 12113(a), (b).

[102] *See* 29 C.F.R. § 1630.15(b)(2).

[103] Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045, 2047 (2002).

[104] Echazabal v. Chevron U.S.A., Inc., 226 F.3d 1063, 1065 (9th Cir. 2000), *rev'd and remanded*, 122 S. Ct. 2045 (2002).

[105] *Id.* at 1065.

[106] *Id.*

"concluded that Echazabal's liver might be damaged by exposure to the solvents and chemicals present in the coker unit." [107]

Echazabal continued to work at the coker unit for one of Chevron's maintenance contractors.[108] Echazabal was subsequently "diagnosed with asymptomatic, chronic active Hepatitis C."[109] However, none of Echazabal's doctors advised him to stop working at the refinery because of this medical condition.[110]

When Echazabal applied to Chevron for a position at the coker unit in 1995, Chevron again turned down Echazabal because there was a risk that his liver would be damaged if he worked at the coker unit.[111] This time, however, Chevron wrote to the maintenance contractor for whom Echazabal was working and requested that it "immediately remove [him] from the refinery or place him in a position that would eliminate his exposure to solvents and chemicals."[112] Consequently, Echazabal was not permitted to work at the Chevron refinery any longer.[113]

The district court granted Chevron's motion for summary judgment based upon the EEOC's regulation permitting the defense that Echazabal's "disability on the job would pose a *direct threat* to his own health."[114] The Ninth Circuit reversed the summary judgment and held that the regulation exceeded the EEOC's scope of permissible rulemaking under the ADA.[115] The Ninth Circuit based its position on the text of the ADA itself, which explicitly recognizes an employer's right to bar anyone whose disability would place others in the workplace at risk but says nothing about threats to the disabled employee himself.[116] The court asserted that "by

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[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Chevron*, 122 S. Ct. at 2048 (emphasis added).

[115] *Echazabal*, 226 F.3d at 1072.

[116] *Id.* at 1066-67.

specifying only threats to other individuals in the workplace, the statute made it clear that threats to other persons—including the disabled individual himself are not included within the scope of the [direct threat] defense."[117]

The Supreme Court reversed the Ninth Circuit unanimously.[118] The Court listed three reasons for rejecting the Ninth Circuit's reasoning and upholding the EEOC's regulation. First, the Court noted that the language of the ADA, while not explicitly recognizing a threat-to-self defense, creates an affirmative defense for action under a qualification standard shown to be "job-related" for the position in question and consistent with "business necessity" that "may" include a threat-to-others defense.[119] The Court noted that there was no language in the statute suggesting that the "threat-to-others" defense was the exclusive qualification standard under this provision.[120]

Second, the Court noted that Echazabal and the Ninth Circuit failed "to identify any established series, including both threats to others and threats to self from which Congress appeared to have made a deliberate choice to omit the latter item as a signal of the [scope of the affirmative defense]."[121]

Finally, the Court noted that "there is no apparent stopping point to the argument that by specifying a 'threat-to-others' defense Congress intended a negative implication about those whose safety could be [concerned]."[122] Congress could not "possibly have meant that an employer could not defend a refusal to hire when a worker's disability would threaten others *outside* the workplace."[123] Rhetorically, the Court asked whether a meat packer would have been defenseless if Typhoid Mary had sued under the ADA after being turned away.[124]

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[117] *Id.* at 1067.

[118] *Chevron*, 122 S. Ct. at 2050.

[119] *Id.* at 2053.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 2051.

[123] *Id.* (emphasis added).

[124] *Id.*

IV. ASSESSING THE SUPREME COURT'S RECENT DECISIONS AND IDENTIFYING CONCERNS FACING EMPLOYERS

These and other recent Supreme Court decisions provide interpretation of some key ADA concepts for employers navigating ADA issues. However, these cases do not always simplify the analyses that employers must undertake; they frequently raise additional questions and issues to consider. This section discusses some of the concerns of which employers must remain mindful when analyzing ADA issues.

Employers must not jump to conclusions as to whether or not an employee or applicant is disabled. The Supreme Court steadfastly maintains that whether an employee or applicant is a qualified individual with a disability is a highly individualized inquiry that must be undertaken on a case-by-case basis.[125] A mere medical diagnosis of impairment will not automatically make one "disabled."[126] However, if an employer regards an individual as having a disability—even if the individual does not, in fact, have an impairment that substantially limits her in any major life activity—then she will satisfy the ADA's definition of "disability."[127]

It is not always clear whether an individual has an impairment that will be considered a disability. The EEOC's regulations and the Supreme Court's decisions have made it less, rather than more, clear as to when an impairment will rise to the level of disability. For example, the EEOC's regulations list nine non-exclusive examples of "major life activities."[128] ADA plaintiffs frequently attempt to raise other activities as major life activities, and employers do not always have guidance as to which activities will or will not be considered major life activities. For example, the plaintiff in *Toyota* alleged that she was limited in six major life activities: "(1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working."[129] Three of these activities are not listed in the regulations as major life activities.[130] Thus, employers face a problem in determining whether or

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[125] *See, e.g., Toyota Motor Mfg.*, 122 S. Ct. at 692.

[126] *See id.* at 690.

[127] *See* 42 U.S.C. § 12102(2)(C).

[128] *See* 29 C.F.R. § 1630.2(i) (listing caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working as examples of "major life activities").

[129] *See Toyota Motor Mfg.*, 122 S. Ct. at 687.

[130] *See* 29 C.F.R. § 1630.2(i).

not a particular activity is a major life activity when there is little guidance as to the limits of the term.

Employers also face uncertainty in determining whether an impairment "substantially limits" a major life activity because there are no clear-cut guidelines instructing employers as to how limited an individual must be before the limitation will be considered "substantial."[131] The Supreme Court also struggled with the ambiguity of this term and resorted to quoting the dictionary's definition of "substantially" in the *Toyota* decision.[132] Although it is clear that a minor limitation on a major life activity will not trigger the protections of the ADA,[133] it remains difficult for employers to ascertain whether a limitation is sufficient to constitute a substantial limitation.[134]

Adding to the uncertainty employers face in analyzing ADA issues is the Supreme Court's occasional disagreement with, and constant threat to strike down, the EEOC's interpretive regulations. For example, the *Sutter* Court rejected the EEOC's guideline and held that an individual's ability to take corrective measures to mitigate the impairment—such as wearing corrective lenses to correct vision—must be considered when determining whether the impairment substantially limits a major life activity.[135] Further, the Court frequently reminds the EEOC and ADA litigants that no agency has been given authority to issue regulations interpreting the term "disability."[136] Nevertheless, the Court has to date declined to address the level of deference, if any, to which the EEOC's regulations are entitled.[137]

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[131] The regulations define "substantially limits" as meaning (i) unable to perform the a major life activity that the average person in the general population can perform, or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. *See id.* § 1630.2(j)(i), (ii).

[132] *See Toyota Motor Mfg.*, 122 S. Ct. at 691.

[133] *See id.*

[134] *See generally Sutton*, 527 U.S. 471.

[135] *See id.* at 482.

[136] *See Toyota Motor Mfg.*, 122 S. Ct. at 689; *Sutton*, 527 U.S. at 479.

[137] *Id.*

V. CONCLUSION

Employers face numerous obstacles in analyzing ADA issues, including ambiguous terminology and a diverse, sometimes conflicting body of regulations and case law. Employers must be cautious not to jump into the latter inquiries of analysis, such as whether a requested accommodation is reasonable before assessing the threshold issues, such as whether the employer is a covered entity or whether the employee or applicant is a qualified individual with a disability. Employers should accordingly analyze ADA issues in the sequential, step-by-step manner outlined in Section II.[138] Perhaps most importantly, employers must realize that concrete answers are seldom ascertainable without careful consideration at each step of the analysis.

[138] *See supra* notes 3-22 and accompanying text.