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(WHATEVER HAPPENED TO) THE ADA'S "RECORD OF" PRONG(?)

Alex B. Long*

Abstract. Of the three prongs in the Americans with Disabilities Act's (ADA) definition of disability, the "record of" prong is far less likely to be used by ADA plaintiffs in claiming protection under the Act than are the actual disability and "regarded as" prongs. Between the years 2000 and 2005, ADA and Rehabilitation Act plaintiffs who alleged employment discrimination in federal court relied upon the "record of" prong less than one-third as often as either the actual and "regarded as" prongs in claiming disability status. When they did rely on the "record of" prong, ADA plaintiffs did not enjoy any greater success during that time period. Congress, the Equal Employment Opportunity Commission (EEOC), and the federal courts bear much of the blame for the "record of" prong's diminished stature. The requirement of some federal courts that a "record of" plaintiff must actually produce a tangible record documenting the existence of disability has limited the scope of the second prong. The U.S. Supreme Court's restrictive interpretations of the actual and "regarded as" prongs have also limited the reach of the "record of" disability prong. Congress specifically intended the "record of" prong to address those situations in which an individual has recovered from a once-substantially limiting impairment; yet, because of the Court's conclusion that an individual's use of mitigating measures must be taken into account when assessing the existence of disability, even this use of the "record of" prong is in doubt. However, in at least some instances, plaintiffs' attorneys bear some of the blame for the limited role the "record of" prong plays in employment discrimination suits. This Article argues that the only way that the "record of" disability prong can play a meaningful role in the elimination of discrimination against individuals with disabilities is if attorneys take a fresh look at this forgotten portion of the ADA.

INTRODUCTION	671
I. THE "RECORD OF" PRONG'S ROLE WITHIN THE ADA'S DEFINITION OF DISABILITY	677
A. The Definition of Disability	677
B. The "Record of" Prong's Role in the Three-Pronged Approach to Disability.....	679
C. The "Record of" Prong's Role in Protecting Individuals Who Have Been Misclassified as Having a Disability or Who Have Recovered From a Disability.....	682
1. Irrational Discrimination and the "Record of" Prong.....	682

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2.	Rational but Uninformed Discrimination, Stereotypical Thinking, and the “Record of” Prong.....	684
3.	Rational but Misinformed Discrimination/Innocent Mistakes and the “Record of” Prong	685
4.	Rational Discrimination Stemming from Attitudinal Barriers and the “Record of” Prong.....	686
5.	Rational but Speculative Discrimination and the “Record of” Prong	687
II.	WHATEVER HAPPENED TO THE ADA’S “RECORD OF” PRONG?.....	688
A.	The “Record of” Prong’s Purpose in Addressing Discrimination Against Individuals Who Have Been Misclassified with a Disability (to the Extent Any Such Individuals Actually Exist).....	688
B.	The Reliance and Documentation Requirement	689
C.	The Individualized Inquiry Rule.....	694
1.	A Diagnosis of an Impairment Doth Not a Record of Disability Make: The Individualized Inquiry Rule.....	694
a.	Per Se Disabilities and the “Record of” Prong..	694
b.	Special Problems for Plaintiffs Proceeding Under the “Record of” Prong	697
c.	The Individualized Inquiry Rule in Practice	699
2.	A Record of Hospitalization Doth Not a Record of Disability Make: The Individualized Inquiry Rule Continued.....	703
3.	The Single-Job Rule Problem	705
4.	The Permanent or Long-Term Impact Rule Problem.....	706
D.	The Mitigating Measures and Permanent or Long-Term Impact Conundrum (The New Catch-22?)	708
1.	The Mitigating Measures Rule and the Window of Opportunity.....	708
2.	The “Cured” Versus “Controlled” Impairment Conundrum	710
3.	Are Cured Impairments Covered?: The New Catch-22.....	715
E.	Other Limitations on the “Record of” Prong.....	718
F.	Other Problems with the Prima Facie Case	721
G.	Summary.....	721
III.	RESTORING THE “RECORD OF” PRONG	722

ADA's "Record of Prong"

A. History (Not Records): Focusing on an Individual's History of Impairment	722
B. Use it (or Lose it): Making More Frequent Use of the "Record of" Prong	723
1. The "Record of" Prong as an Alternative to Coverage Under the "Regarded as" Prong.....	724
2. Better Lawyering = Better Results.....	725
C. Stateward Ho!(?): State Law as an Alternative to the ADA	730
CONCLUSION	731

INTRODUCTION

In 1974, the lower half of Evelyn Little's left leg was amputated as the result of an accidental shotgun wound.¹ It took a year before Little was fitted with a prosthesis and several years after that before she was able to walk without a cane.² According to Little, her impairment was visible to anyone who saw her walk.³ In 1996, Little applied for a food service worker position, a position in which she had considerable experience.⁴ Over the course of the next three years, she applied for other vacancies and interviewed with the same employer thirteen more times; she was rejected each time.⁵ After being rejected for the fourteenth time, she filed suit, alleging that she had been discriminated against on the basis of her disability.⁶

A Texas trial court granted summary judgment in favor of the employer, and Little appealed. On appeal, the court concluded that, regardless of whether Little had been discriminated against, she could not meet the threshold requirement of showing disability status.⁷ Texas's disability discrimination statute, like the Americans with Disabilities Act (ADA)⁸ and Section 504 of the Rehabilitation Act,⁹ uses a three-pronged

1. *Little v. Tex. Dep't of Criminal Justice (Little I)*, 147 S.W.3d 421, 422 (Tex. Ct. App. 2003), *rev'd*, 148 S.W.3d 374 (Tex. 2004).

2. *Id.* at 425.

3. *Id.*

4. *See Little v. Tex. Dep't of Criminal Justice (Little II)*, 148 S.W.3d 374, 378 (Tex. 2004).

5. *Little I*, 147 S.W.3d at 422.

6. *Id.* Little's suit was based on the Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. §§ 21.001–.556 (Vernon 1996 & Supp. 2004). This statute is parallel to Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12102–12111 (2000).

7. *Little I*, 147 S.W.3d at 425.

8. Pub. L. No. 101-336, 104 Stat. 327 (1990).

definition of disability under which a disability may arise from an actual physical or mental impairment that limits one or more major life activities, from a record of such an impairment, or from an individual being regarded as having such an impairment.¹⁰ The court concluded that although Little walked with a slight limp, could not “sit or walk like other people,” “walk quickly,” or “run at all,” she did not have an *actual* disability because her physical impairment did not substantially limit her in the major life activities of walking or running.¹¹ Turning to the other prongs in the definition of disability, the court concluded that, despite Little’s past experience and the employer’s awareness of her impairment, there was insufficient evidence that the employer *regarded* Little as having a disability.¹² Finally, despite the fact that Little had detailed her impairment on her application forms, had been without a leg for a year, and needed a cane to walk for several years thereafter, the court concluded that there was insufficient evidence of a *record* of a disability.¹³

The Texas Supreme Court subsequently reversed the trial court’s decision,¹⁴ thus suggesting to the casual observer that the lower court decisions simply amounted to aberrations. Students of disability law, however, know better. When viewed against the backdrop of state and federal disability discrimination case law, *Little* is hardly an aberration: studies have repeatedly found the success rate of ADA employment discrimination plaintiffs to be less than ten percent.¹⁵ *Little* is, nonetheless, a remarkable case. On appeal, the Texas Supreme Court reversed on the ground that there was a triable issue of fact over whether Little had an actual disability.¹⁶ The court did not comment on the plaintiff’s perceived (i.e., “regarded as”) or “record of” disability claims.

At least with respect to Little’s “record of” claim, the court’s failure to discuss the claim is excusable. Virtually no one discusses such claims in any detail. Discussion of the “record of” prong in published decisions

9. 29 U.S.C. § 794 (2000).

10. *Little I*, 147 S.W.3d at 424.

11. *Id.*

12. *Id.* at 425.

13. *Id.*

14. *Little II*, 148 S.W.3d 374, 376 (Tex. 2004).

15. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99–100 (1999).

16. *Little I*, 148 S.W.3d at 384.

ADA's "Record of Prong"

rarely involves more than one or two paragraphs of analysis,¹⁷ and most of the voluminous scholarship regarding the ADA's definition of disability focuses almost exclusively on the Act's actual and perceived disability prongs.¹⁸ Perhaps because courts and commentators have ignored the "record of" prong for so long, no one seems to have noticed that this prong barely exists in practice anymore.

Indeed, as this Article argues, despite theoretically being on equal footing with the ADA's actual disability and "regarded as" prongs, the "record of" prong is the least debated, least understood, and most poorly considered portion of Title I of the ADA. It is almost certainly the prong least likely to be used by employment discrimination plaintiffs in claiming protection under the Act. Between the years 2000 and 2005, ADA and Rehabilitation Act plaintiffs in federal court who alleged employment discrimination were less likely to rely upon the "record of" prong in claiming disability status than either of the other two prongs. As Figure 1 illustrates, in reported federal appellate decisions in which the existence of the plaintiff's disability was in dispute, a plaintiff's disability status under the "record of" prong was, in comparison with the other two prongs, rarely at issue.¹⁹ Disputes about a plaintiff's eligibility

17. See, e.g., *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 205 (2d Cir. 2004).

18. Some scholarship does, at least in a limited way, address the "record of" disability prong. See, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 502–03 (2000). Most scholarship, however, barely mentions the prong. For a representative sample, see Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes"*, 55 VAND. L. REV. 481, 494 (2002); Chai Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 116–17 (2000); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 351–55 (2000); Colker, *supra* note 15, at 112; Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1432 (1999). But see Justin S. Gilbert, *Prior History, Present Discrimination, and the ADA's "Record of" Disability*, 31 U. MEM. L. REV. 659 (2001). Gilbert's article appears to be the only piece of scholarship dealing primarily with the "record of" disability prong.

19. My research assistant and I conducted Westlaw searches of the database containing reported federal appellate court decisions, "U.S. Courts of Appeals Cases, Reported (CTAR)," for the years 2000 through 2005. We used "Americans with Disabilities Act" and "Rehabilitation Act" as our search terms and then used the "locate" function to narrow the search to employment discrimination cases in which the definition of disability was at issue. We then compiled a list of all such cases, noting which part or parts of the ADA's three-part definition of disability were at issue and whether the plaintiff avoided an unfavorable outcome (e.g., summary judgment) on this specific issue. My research assistant conducted the initial search, and I read all of the cases the research assistant had collected and coded to determine their accuracy. I also reproduced my research assistant's original search and spot-checked the results in an effort to assure that we had collected all of the relevant decisions. We chose the year 2000 as the starting point because the U.S. Supreme Court had decided

under the actual disability or “regarded as” prongs were more than three times as common on appeal as disputes concerning an individual’s disability status under the “record of” prong.

Figure 1: Number of Instances in Reported Federal Appellate Decisions in Which A Plaintiff’s Disability Status Was in Dispute²⁰

Year	Theory of Disability		
	Actual	Record	Perceived
2000	25	6	19
2001	33	10	28
2002	22	4	17
2003	14	5	19
2004	13	5	15
2005	15	4	12
Total	122	34	110

Is the failure of plaintiffs’ attorneys to utilize the “record of” prong an example of the bad lawyering that has allegedly plagued litigation under the ADA,²¹ or are plaintiffs’ attorneys behaving as rational actors when

a series of cases in 1999 that dealt with the ADA’s definition of disability: *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 520–22 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999). Thus, 1999 represents a defining moment in the development of the ADA. Establishing 2000 as the starting point enabled us to capture the period where the trial and appellate courts began to react to these decisions and allowed some pending cases to be considered in light of Supreme Court precedent. If an individual’s disability status was a basis for appeal, but the appellate court decided the case on other grounds (for example, whether the individual was “qualified”), the decision was included. Excluded were instances in which an individual did not pursue on appeal a theory of disability coverage that was pursued at the trial court level. Similarly excluded were instances in which it was impossible from the appellate court’s decision to tell exactly which of the three prongs of the ADA’s definition of disability was at issue on appeal. *See, e.g., Dolese v. Office Depot, Inc.*, 231 F.3d 202, 202–03 (5th Cir. 2000). There are, of course, inherent limitations in relying upon only (a) reported decisions and (b) reported decisions from federal appellate courts. *See Colker, supra* note 15, at 104–06 (describing problems). This Article is not intended to be the definitive statistical analysis of ADA cases in the twenty-first century to date. The decision to rely on reported federal appellate decisions was made because it was believed that (a) such a limitation would be more likely to screen out frivolous claims and (b) such a limitation would still yield meaningful results while being easier to produce.

20. *See supra* note 19.

21. *See* Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 515 (2000) (arguing that poor lawyering

ADA's "Record of Prong"

they bypass the "record of" prong? If the outcomes of those cases in which a plaintiff claims disability status under the "record of" prong are any indication, it would appear that plaintiffs' attorneys are behaving rationally when they choose not to assert coverage under this prong. Employment discrimination plaintiffs proceeding under Title I of the ADA have generally enjoyed little success in the years since its enactment.²² Plaintiffs who proceed under the "record of" prong appear to be no different. As Figure 2 illustrates, for reported federal appellate decisions between the years 2000 and 2005, ADA and Rehabilitation Act plaintiffs who alleged employment discrimination were no more likely to avoid an unfavorable outcome on a defendant's challenge as to the existence of a record of disability than they were with respect to claims brought under the actual disability and "regarded as" prongs.²³

accounts for some of the low success rate of ADA plaintiffs).

22. Colker, *supra* note 15, at 108–10.

23. This figure reports only those instances in which a plaintiff's claims were actually addressed by the appellate court. In some instances, for example, a plaintiff claimed coverage under more than one prong on appeal, but the court addressed only one prong. *See, e.g., Williams v. Toyota Motor Mfg., Ky., Inc.*, 224 F.3d 840, 843–44 (6th Cir. 2000), *rev'd*, 534 U.S. 184 (2002). In such cases, the figure reports only the result for the prong that was addressed; thus, the total number of cases reported in Figures 1 and 2 are not necessarily the same. A "favorable result" was defined as avoiding an unfavorable result on the disability question (e.g., avoiding summary judgment, surviving a motion to dismiss, etc.) as well as victory on the merits of a claim. If a plaintiff obtained a favorable result on the disability issue, but ultimately lost based on some other factor (e.g., whether the individual was "qualified"), the case was counted as a plaintiff "victory" for my purposes. There are so few reported appellate decisions involving the "record of" prong that it is difficult to draw any firm conclusions as to plaintiffs' success rates in comparison to the other two prongs. In perhaps the most extensive empirical analysis of ADA outcomes, Professor Ruth Colker found that a plaintiff's theory of disability "was not a significant factor in predicting appellate outcome." Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 271 (2001). It is worth mentioning that Professor Colker's study did not include cases decided after 1999; thus, it does not fully reflect the U.S. Supreme Court's later decisions that narrowed the scope of the ADA's definition of disability. These decisions, although dealing with the other two prongs in the ADA's definition of disability, could be expected to limit plaintiffs' success rates in cases involving the "record of" prong. *See infra* Parts III.C and III.D.

Figure 2: Plaintiff Success Rates Depending upon Theory of Disability²⁴

Year	Favorable Outcomes/Number of Asserted Claims Per Theory of Disability		
	Actual	Record	Perceived
2000	5/24	0/4	2/15
2001	7/28	3/7	5/25
2002	5/21	1/4	2/15
2003	2/14	1/4	5/17
2004	4/12	0/4	1/14
2005	5/15	0/4	4/12
Total	28/114 (24.6%)	5/27 (18.5%)	19/98 (19.3%)

This was not how things were supposed to be when the ADA was enacted. As originally conceived, the “record of” prong had some promise. It could have been a contender. Many forget that the U.S. Supreme Court’s first foray into disability discrimination in the workplace, *School Board of Nassau County v. Arline*²⁵ in 1987, involved the “record of” prong. In that case the Court established an extremely generous standard for qualification under the “record of” prong of the Rehabilitation Act’s definition of disability.²⁶ Nearly twenty years later, through a string of restrictive interpretations by the federal courts involving all three prongs of the ADA’s definition of disability, the “record of” prong is almost the vestigial definition of discrimination under the ADA, serving no independent purpose in the eyes of most ADA plaintiffs.

This Article addresses how we arrived at the present state of affairs. But the more important question is what can be done to restore to the “record of” prong to prominence. Congress, the Equal Employment Opportunity Commission (EEOC), and the federal courts bear much of the blame for the “record of” prong’s diminished stature. However, the failure of plaintiffs’ attorneys to pursue all available options has also been a contributing factor to the “record of” prong’s near-comatose state. This Article argues that the only way that the “record of” prong

24. See *supra* note 23 and accompanying text.

25. 480 U.S. 273 (1987).

26. See discussion of *Arline*, *infra* notes 155–163 and accompanying text.

ADA's "Record of Prong"

can play a meaningful role in the elimination of discrimination against individuals with disabilities is if attorneys take a fresh look at this forgotten portion of the ADA.

Part I of this Article describes the "record of" prong's place within the ADA's three-pronged definition of disability and the role Congress originally envisioned it would play in ending disability discrimination. Part II discusses the various ways in which the courts, Congress, and the EEOC have limited the reach of the "record of" disability prong. Part III argues that the only practical way to inject new life into the "record of" prong is for plaintiffs' attorneys to reevaluate this method of establishing the existence of a disability and to assert coverage under the prong more often.

I. THE "RECORD OF" PRONG'S ROLE WITHIN THE ADA'S DEFINITION OF DISABILITY

While Congress had several possible definitions of "disability" from which to choose in enacting the ADA, ultimately it chose to employ a three-pronged approach.²⁷ In theory, each prong has a distinct role to play in the fight against disability discrimination. This Part discusses Congress's conception of the role of the "record of" prong within the larger definition of disability under the ADA.

A. *The Definition of Disability*

The ADA's definition of disability has its roots in the Rehabilitation Act Amendments of 1974. Under both the ADA and Section 504 of the Rehabilitation Act:

- the term "disability" means, with respect to an individual—
- (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.²⁸

For purposes of this Article, there are two particularly noteworthy aspects of this definition.

27. See Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 625–27 (2004) (describing various pre-ADA state disability discrimination statutes).

28. Americans with Disabilities Act § 3, 42 U.S.C. § 12102(2) (2000); Rehabilitation Act, § 504, 29 U.S.C. § 794 (2000).

The first noteworthy aspect is Congress's decision to define the concept of disability in terms of functional limitations. Under the first prong, the existence of physical or mental impairment, standing alone, is insufficient to claim disability status. Instead, the impairment must substantially limit some major life activity, such as walking, hearing, or breathing.²⁹ This functional approach toward defining disability represented a departure from traditional approaches, which had defined the concept in medical or occupational terms.³⁰

The other noteworthy feature of the definition is the congressional decision to use the actual disability definition of 42 U.S.C. § 12102(2)(A) (the codification of Section 3(2)(A) of the ADA) as the anchor for the other two prongs. Both the "record of" and "regarded as" prongs derive their meaning from the actual disability definition. In order to have a record of disability, for example, the statute provides that the individual must have a record of "such an impairment," i.e., an impairment that substantially limits a major life activity. Thus, the "record of" and "regarded as" prongs will inevitably force the finder of fact back to the actual disability prong in order to assess whether an individual has a disability.³¹

This decision to link the three definitions of disability by reference to the actual disability definition had at least two important consequences. First, it meant that any judicial interpretation of the actual disability prong would have ripple effects for the second and third prongs. For example, years later when the U.S. Supreme Court would hold that the terms in the ADA's definition of an actual disability must be interpreted strictly in order to create a "demanding standard for qualifying as disabled,"³² plaintiffs proceeding under the "record of" prong would theoretically face the same "demanding standard." Second, by inextricably linking the three prongs together by reference to the first, Congress weakened the move toward a civil rights model of disability with respect to the second and third prongs. In keeping with the approach of other anti-discrimination laws, the inclusion of the second and third prongs represents a recognition on Congress's part that societal attitudes about disability may be as limiting as the actual effects of an

29. 29 C.F.R. § 1630.2(i) (2006).

30. Long, *supra* note 27, at 603–05.

31. Eichhorn, *supra* note 18, at 1432.

32. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

ADA's "Record of Prong"

impairment.³³ However, the linkage with the actual disability prong suggests an unwillingness to completely abandon the inquiry into functional limitations and throw open the door to individuals who have been discriminated against on the basis of some relatively minor impairment or personal characteristic.³⁴

B. The "Record of" Prong's Role in the Three-Pronged Approach to Disability

As Section 504 case law developed and as Congress was considering the ADA, it was widely assumed that the three prongs in the ADA's definition of disability each served different functions. The actual disability prong has the closest connection to the ADA's reasonable accommodation requirement, which requires that employers make reasonable modifications or adjustments to the way work is ordinarily performed or to the workplace itself so that individuals with disabilities can perform the essential functions of a job.³⁵ Under the Act, an individual with a disability must be qualified before he or she is entitled to the protection of the Act.³⁶ A qualified individual with a disability is one who, with or without reasonable accommodation, can perform the essential functions of the position the individual holds or desires.³⁷ Thus, the reasonable accommodation requirement is a device that helps remove the obstacles that prevent individuals with disabilities from participating fully in the workplace.³⁸ An individual who cannot perform the essential functions of a position, even with reasonable accommodation, is not qualified and is not entitled to the ADA's protection. Thus, the actual disability prong is typically thought of as applying to the individual who has an impairment that limits his or her ability to perform a job, but who would be capable of performing the job if the employer would make modest or relatively inexpensive

33. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 284–86 (1987).

34. *See Francis v. City of Meriden*, 129 F.3d 281, 287 (2d Cir. 1997) ("It would be inconsistent with [the] purposes [of the Acts] to construe the acts to reach alleged discrimination by an employer on the basis of a simple physical characteristic, such as weight.").

35. 42 U.S.C. § 12112(b)(5)(A) (2000); 29 C.F.R. app. § 1630.2(o) (2006).

36. 42 U.S.C. § 12112(a).

37. *Id.* § 12111(8).

38. *See Jeffrey O. Cooper, Interpreting the Americans with Disabilities Act: The Trials of Textualism and the Practical Limits of Practical Reason*, 74 TUL. L. REV. 1207, 1228 (2000).

modifications, such as modifying work schedules or purchasing special equipment or devices.³⁹

Congress, however, recognized that not all discrimination would involve disparate treatment on the basis of an actual disability, hence the inclusion of the “record of” and “regarded as” prongs. The “regarded as” prong was originally seen as the catch-all prong, which could be used as a fall back where a plaintiff could not establish the existence of an actual disability or a record thereof.⁴⁰ However, it was also the prong most commonly associated with one particular form of discrimination: discrimination resulting from society’s “accumulated myths and fears about disability and disease,” particularly with respect to those individuals especially vulnerable to discrimination because they suffer from stigmatized conditions.⁴¹ Even where an employer is not basing its decisions on myths, fears, and stereotypes, it may, based on faulty information or faulty information-processing, view an individual’s impairment as being more limiting than it actually is.⁴² Thus, the legislative history of the ADA indicates that the perceived disability prong was designed to cover those individuals who (1) have a physical or mental impairment that does not substantially limit a major life activity, but who are treated by a covered entity as having such a limitation, (2) have a physical or mental impairment that substantially limits a major activity only as a result of the attitudes of others toward

39. See, e.g., Elizabeth A. Pendo, *Substantially Limited Justice?: The Possibilities and Limits of a New Rawlsian Analysis of Disability-Based Discrimination*, 77 ST. JOHN’S L. REV. 225, 254 (2003).

40. Feldblum, *supra* note 18, at 141; Risa M. Mish, Essay, “*Regarded as Disabled*” *Claims Under the ADA: Safety Net or Catch-All?*, 1 U. PA. J. LAB. & EMP. L. 159, 160 (1998); Arlene B. Mayerson, *Restoring Regard for the “Regarded as” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 609 (1997).

41. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987); 29 C.F.R. app. § 1630.2(l) (2006) (discussing the “regarded as” prong in the context of “myths, fears, and stereotypes”); H.R. REP. NO. 101-485(II), at 53 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 335 (stating that the “regarded as” prong of the ADA’s disability definition “is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity”). Much of the scholarship produced shortly after the passage of the ADA drew a link between the “regarded as” prong and conditions associated with social stigma. See, e.g., Wendy K. Voss, Note, *Employing the Alcoholic under the Americans with Disabilities Act*, 33 WM. & MARY L. REV. 895, 912 (1992) (assuming that an individual with a condition to which a social stigma attaches would be covered under the “regarded as” prong).

42. See *Connman v. N.P. Dodge Mgmt. Co.*, 43 F. Supp. 2d 1066, 1071 (D. Minn. 1999) (suggesting that a plaintiff would be covered under the “regarded as” prong where the employer perceives plaintiff as suffering from a more severe impairment or being more limited in her life activities than she actually was).

ADA's "Record of Prong"

the impairment, and (3) have no physical or mental impairment but are treated by a covered entity as having such an impairment.⁴³

The legislative history of the Rehabilitation Act Amendments of 1974 suggests that the purpose of the "record of" prong is to protect individuals who have been "classified or labeled, correctly or incorrectly, as handicapped."⁴⁴ At first glance, this language from the report of the Senate Labor and Public Welfare Committee would seem to indicate that the distinguishing characteristic of individuals falling under the second prong is the existence of some type of tangible record that contains the classification or label of a disability. In the case of individuals who have *incorrectly* been labeled with a disability, for example, the misclassification would mostly likely be found in a document of some kind. However, a closer examination of the committee report reveals that the desire to protect individuals with a *history* of disability was *at least* as strong a motivation. According to the report, the protection of the "record of" prong extends to "persons who have recovered—in whole or in part—from a handicapping condition, such as a mental or neurological illness, a heart attack, or cancer and to persons who were classified as handicapped (for example, as mentally ill or mentally retarded)"⁴⁵

The legislative history of the ADA suggests that Congress devoted far less thought to the "record of" prong's place within the ADA's tripartite definition of disability than it did to the other two prongs. In comparison with the House Education and Labor Committee's discussion of the actual disability and "regarded as" prongs, the discussion of the "record of" prong is remarkably short.⁴⁶ However, what little legislative history exists concerning the prong is consistent with the legislative history of the Rehabilitation Act. The ADA's legislative history re-emphasized the two basic purposes of the second prong contained in the Rehabilitation Act Amendment's legislative history: to protect those individuals "who ha[ve] a history of, or [have] been misclassified as having, a mental or physical impairment that substantially limits one or more major life

43. H.R. REP. NO. 101-485(II), at 53 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 335.

44. S. REP. NO. 93-1297, at 38–39 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6373, 6389.

45. *Id.*

46. In one section devoted to the purposes and intended operation of the three prongs, the report devotes at least a page each to both the actual and "regarded as" disability prongs. In contrast, the report devotes a whopping four sentences, totaling under 150 words, to describe the purpose and intended operation of the "record of" disability prong. H.R. REP. NO. 101-485(II), at 51–54 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 333–36.

activities.”⁴⁷ This same theme was also carried over in the EEOC’s Interpretive Guidance to the ADA.⁴⁸ In describing the concept of a “history” of such an impairment, the legislative history is clear that it is referring to a *past*, not necessarily *recorded*, history of such an impairment.⁴⁹ Thus, the “record of” prong was designed in part “to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity.”⁵⁰

C. The “Record of” Prong’s Role in Protecting Individuals Who Have Been Misclassified as Having a Disability or Who Have Recovered From a Disability

Discrimination against individuals with disabilities occurs in many ways. In some instances, the “record of” and “regarded as” prongs address the same forms of discrimination. But, at least in theory, there are limited situations in which the “record of” prong might have an independent role to play in the fight against disability discrimination.

1. Irrational Discrimination and the “Record of” Prong

An individual who has been misclassified as having an impairment that substantially limits a major life activity or who has recovered from such an impairment might need protection from employment discrimination for several reasons. First and most obviously, the “record of” prong would seem to play a role in the case of truly irrational discrimination based on the stigma associated with some impairments. Individuals who have a history of disability or who have been misclassified as having such a condition may continue to carry a stigma with them throughout their employment life and remain vulnerable to irrational employer discrimination. For example, an individual who was once institutionalized with a mental impairment carries that stigma with her when she applies for a job and is vulnerable to any fears or discomfort her employer may have about mental illness.⁵¹ Individuals

47. *Id.* at 52, as reprinted in 1990 U.S.C.C.A.N. at 334.

48. 29 C.F.R. app. § 1630.2(k) (2006).

49. H.R. REP. NO. 101-485(II), at 52 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 334 (emphasis added).

50. *Id.*

51. *Cf. Allen v. Heckler*, 780 F.2d 64, 66 (D.C. Cir. 1985) (stating that, in the context of a “record of” disability claim, the handicap facing former institutionalized patients is the stigma of being a

ADA's "Record of Prong"

who have been misclassified as having certain physical impairments, such as cancer, may likewise need protection from the same type of irrational fears by employers.⁵²

As others have noted, there is considerable overlap between the "record of" and "regarded as" prongs in terms of addressing irrational discrimination.⁵³ Protection from irrational discrimination based upon the fears and stigmas associated with certain conditions is most frequently described as being the purpose of the "regarded as" prong.⁵⁴ Indeed, the ADA's legislative history specifically mentions that individuals with stigmatic conditions are covered under the perceived disability prong, but makes no explicit mention of coverage for these individuals under the "record of" prong.⁵⁵

Despite this omission, the fact that Congress used the ADA to place limitations on the ability of employers to require medical examinations or inquire into the medical histories of job applicants and employees supports the conclusion that the "record of" prong was meant to serve at least some role in protecting individuals with conditions associated with stigma. The ADA establishes three stages that determine when and under what circumstances an employer may delve into the medical history of an individual. Before extending a job offer, an employer may ask questions about an applicant's ability to perform job-related functions, but is prohibited from making disability-related inquiries or requiring medical examinations.⁵⁶ After the employer has made a conditional job offer, it may make medical inquiries or require medical examinations, but only if the same is required of all individuals in that job category.⁵⁷ Finally, after an individual starts work, an employer may

former psychiatric patient); *see also* *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 21 (1st Cir. 2002) (stating that "a person is disabled if she . . . is stigmatized by a 'record of such an impairment'"); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 509 (7th Cir. 1998) (stating that the "record of" disability prong "would include people who have recovered from previously disabling conditions (cancer or coronary disease, for example) but who may remain vulnerable to the fears and stereotypes of their employers").

52. *Davidson*, 133 F.3d at 509.

53. *Id.* (stating that the "record of" prong "is a close sibling to the 'perceived impairment' claim); *Bagenstos*, *supra* note 18, at 433 (noting the similar ideas that underlie both prongs); *Pendo*, *supra* note 39, at 247 (pointing to the "record of" and "regarded as" prongs as evidence "that the ADA seeks to prohibit discrimination on the basis of stereotype, stigma, and myth").

54. *See supra* notes 40–41 and accompanying text.

55. H.R. REP. NO. 101-485(II), at 53 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 335.

56. 42 U.S.C. § 12112(d)(2) (2000).

57. *Id.* § 12112(d)(3).

only make such inquires or require such examinations if they are job-related and consistent with business necessity.⁵⁸

The restrictions on medical examinations and inquiries reflect, in part, a congressional concern about irrational discrimination stemming from an employer's reliance on an individual's medical history.⁵⁹ The House Education and Labor Committee report noted that "there still exists widespread irrational prejudice against persons with cancer."⁶⁰ Thus, "if an employee starts to lose a significant amount of hair, the employer should not be able to require the person to be tested for cancer unless such testing is job-related."⁶¹ Similarly, to use an example from the legislative history of the Rehabilitation Act Amendments of 1974, an employer might base its decision on the stigma associated with being "mentally ill."⁶² Thus, the restrictions on the ability of employers to delve into the history of job applicants and employees may be seen, in part, as an attempt to prevent employers from learning about an individual's past history of a condition associated with stigma.

2. *Rational but Uninformed Discrimination, Stereotypical Thinking, and the "Record of" Prong*

The "record of" prong would also seem to play an important role in addressing rational but uninformed employer discrimination. In such a situation, an employer might base its decisions on sweeping generalizations about certain impairments that are completely untrue ("It might cost me more money in the long run to employ you since cancer is contagious."). Conversely, the employer might make sweeping generalizations that are true about some, but not all, individuals with the impairment in question ("I don't want to hire you since people with diabetes can't work long hours.").⁶³ Thus, an individual who still has an impairment, but who has recovered to the point that the impairment no

58. *Id.* § 12112(d)(4).

59. See Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMP. L. REV. 521, 536 (1991) (explaining that the motivation for an earlier version of the restriction on medical inquires and examinations was "to prohibit employers from inquiring into particular disabilities, such as HIV infection, which pose a social stigma simply by identification, but have no relevance to the person's ability to perform the job").

60. H.R. REP. NO. 101-485 (II), at 75 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 357-58.

61. *Id.*, as reprinted in 1990 U.S.C.C.A.N. at 357.

62. S. REP. NO. 93-1297 (1974), as reprinted in 1974 U.S.C.C.A.N. 6373, 6390.

63. See Travis, *supra* note 18, at 485.

ADA's "Record of Prong"

longer substantially limits her, might be vulnerable to these types of uninformed judgments. Similarly, an individual who has been misclassified as having an impairment might be vulnerable to the same misconceptions.

Once again, addressing stereotypical assumptions that are not truly indicative of an individual's ability is typically thought of as the domain of the perceived disability prong.⁶⁴ However, the legislative history surrounding the ADA's restrictions on medical examinations and inquiries also supports the view that the "record of" prong might have some role to play in such instances. The legislative history explains that the purpose of the ADA's prohibitions on pre-offer inquiries and medical examinations is "to assure that misconceptions do not bias the employment selection process."⁶⁵ A typical employer "misconception" might be the rational, but stereotypical, notion that all individuals with certain kinds of conditions would be unable to perform the functions of the position in question.⁶⁶ Therefore, Congress was understandably concerned that employers would rely on medical histories and records to deny an individual employment "before their ability to perform the job was even evaluated."⁶⁷

3. *Rational but Misinformed Discrimination/Innocent Mistakes and the "Record of" Prong*

The "record of" prong might also play a role where an employer was misinformed about the extent or existence of an individual's impairment, but acted rationally based on that misinformation. A perfect example of a situation in which an employer might make such an "innocent mistake"⁶⁸ is the case of an individual who has been misclassified as being mentally retarded and who is denied employment as a result of an employer's rational belief that the individual lacks the mental capacity to perform the essential functions of the position in question. According to

64. See 29 C.F.R. app. § 1630.2(l) (2006) (discussing the purpose of the perceived disability prong as to address employer "myths, fears, and stereotypes"); Travis, *supra* note 18, at 485 (discussing employer generalizations in the context of the "regarded as" prong).

65. H.R. REP. NO. 101-485 (II), at 72 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 355.

66. Travis, *supra* note 18, at 485.

67. H.R. REP. NO. 101-485 (II), at 72, as reprinted in 1990 U.S.C.C.A.N. at 355; see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § I-5.5 (1992) [hereinafter EEOC MANUAL] (repeating the same concern).

68. Travis, *supra* note 18, at 486.

the ADA's legislative history, such an individual is part of the "record of" prong's intended class.⁶⁹

4. *Rational Discrimination Stemming from Attitudinal Barriers and the "Record of" Prong*

Alternatively, an employer might engage in a different form of rational, but still exclusionary conduct. Take the case of an individual who has been misclassified as having an impairment or who has largely, but not fully recovered from a once-disabling impairment. The employer might conclude that it does not wish to hire the individual because the individual may require some type of accommodation which the employer would prefer not to make.⁷⁰ Alternatively, the employer might decline to hire the individual because it rationally (or even correctly) believes that although the individual is not substantially limited in a major life activity, the individual nonetheless remains somewhat limited and will have decreased productivity or might cause an increase in the employer's insurance or workers' compensation costs. In theory, this would seem to be a situation in which the "record of" prong would cover an individual who would fit under neither the actual disability prong nor the "regarded as" prong. The employer in such an instance would not be basing its decision on the belief that the individual was substantially limited, the negative reactions of others, or the stereotypical thinking one might naturally associate with perceived disabilities. Instead, the discrimination would result from a different type of attitudinal barrier on the part of the employer.⁷¹

69. See *supra* note 47 and accompanying text.

70. See Travis, *supra* note 18, at 486.

71. Interestingly, the report of the House Judiciary Committee viewed these types of attitudinal barriers as being particularly within the province of the "regarded as" prong. According to the report, "concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers" are the "attitudinal barriers that Congress clearly intended to include within the meaning of 'regarded as' having a disability under the Rehabilitation Act and now under the ADA." H.R. REP. NO. 101-485 (III), at 30 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 453; Travis, *supra* note 18, at 486 (explaining that the perceived disability prong covers this type of rational discrimination); see also *Downs v. Mass. Bay Transp. Auth.*, 13 F. Supp. 2d 130 (D. Mass. 1998) (involving "regarded as" claim where employer was aware of plaintiff's past impairments and receipt of workers' compensation benefits and allegedly acted out of concern over increased workers' compensation costs). There is no corresponding statement regarding the purposes of the "record of" prong.

ADA's "Record of Prong"

5. *Rational but Speculative Discrimination and the "Record of" Prong*

A final situation in which the "record of" prong might play some type of role, independent from the "regarded as" prong, is the situation in which the employer's discrimination is rational but speculative in nature. An example of rational but speculative discrimination might involve an individual whose cancer has gone into remission.⁷² An employer who discovers the individual's history of cancer during a review of the individual's medical records might regard the individual as having a propensity for relapse or being more prone to cancer.⁷³ Because the employer would be basing any adverse decision on unscientific judgments about the possibility of relapse of cancer or on the potential costs associated with a possible relapse, the situation would seem to call for a perceived disability analysis.⁷⁴ However, a perception that an individual has a *propensity* to develop an impairment is not the same thing as a perception of an *impairment*.⁷⁵ Thus, as several decisions attest, the employer might not regard the individual as having an impairment that substantially limits the individual in a major life activity and the individual might not be covered under the "regarded as" prong.⁷⁶ Because the individual would not have a current disability or be regarded as having a disability, the only option would be to claim protection under the "record of" prong based on a history of disability.⁷⁷

72. H.R. REP. NO. 101-485 (II), at 52-53 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 334.

73. Cf. *Cornman v. N.P. Dodge Mgmt. Co.*, 43 F. Supp. 2d 1066, 1071 (D. Minn. 1999) (involving this fact pattern).

74. See *Stokes v. Hamilton County*, 113 F. App'x 680, 684 (6th Cir. 2004) (affirming dismissal in favor of an employer who feared employee's cancer might relapse and result in future expenses for employer because the employer's decision was allegedly made on the basis of financial concerns, not the perception that employee would be substantially limited); see also MASS. COMM'N AGAINST DISCRIMINATION, GUIDELINES: EMPLOYMENT DISCRIMINATION ON THE BASIS OF HANDICAP—CH. 151B, §10(c)(1), <http://www.mass.gov/mcad/disability4.html> (last visited Oct. 8, 2006) ("Unjustified concern regarding a potential relapse into drug use may indicate that the employer regards the employee as addicted (handicapped).").

75. *Cornman*, 43 F. Supp. 2d at 1071 (citing 29 C.F.R. § 1630.2(h)).

76. *Id.* at 1071; see also *Conant v. City of Hibbing*, 271 F.3d 782, 786 (8th Cir. 2001) (concluding that employer did not perceive plaintiff as having a disability simply because it perceived him as likely to develop a medical condition in the future); *Stokes*, 113 F. App'x at 684 (concluding that employer did not regard plaintiff as having a disability where employer allegedly was concerned that plaintiff's cancer would relapse and result in future expenses, not that plaintiff would be substantially limited in his ability to work).

77. *Cornman*, 43 F. Supp. 2d at 1073 (finding that a reasonable jury could conclude that plaintiff in this fact pattern had a record of disability).

In sum, the “record of” prong theoretically has a distinct role to play in addressing discrimination against individuals with disabilities. In some instances, individuals who have a history of disability or have been misclassified as having a disability may already fall under the ADA’s “regarded as” prong. However, in other instances, the “record of” prong may be the only viable option for a plaintiff.

II. WHATEVER HAPPENED TO THE ADA’S “RECORD OF” PRONG?

As the preceding Part illustrated, the “record of” prong might serve several possible roles in addressing employment discrimination against individuals with histories of disability. Yet, as most employment lawyers instinctively know, ADA plaintiffs rarely utilize the second prong in practice and succeed under the prong even less frequently. The following Part explains how the federal courts’ restrictive interpretations of the ADA’s definition of an actual disability and the analytical shortcomings associated with the “record of” prong have created the current state of affairs. Specifically, it addresses situations involving individuals who have been misclassified with a disability; the requirement that a plaintiff must establish that an employer relied on records documenting the existence of a disability in order to fit under the “record of” prong; and several of the interpretive rules regarding the ADA’s definition of disability and their effect on the interpretation of the “record of” prong.

A. *The “Record of” Prong’s Purpose in Addressing Discrimination Against Individuals Who Have Been Misclassified with a Disability (to the Extent Any Such Individuals Actually Exist)*

As discussed, Congress viewed the second prong as covering two distinct groups of individuals: those with a history of disability and those who have been misclassified with a disability.⁷⁸ The fate of individuals misclassified with a disability under the “record of” prong can be dispensed with quite quickly. While those who have been misclassified as having a disability are certainly in need of protection from employment discrimination, the reality is that there have been virtually no such reported cases under either the Rehabilitation Act or the ADA.⁷⁹

78. See *supra* notes 44–48 and accompanying text.

79. One of the few reported cases involving a misclassification situation involved a group of

ADA's "Record of Prong"

Perhaps the absence of cases has resulted because misclassification is (hopefully) relatively rare to begin with. Perhaps it has something to do with the fact that the ADA generally prohibits medical examinations and disability-related questions during the interview process,⁸⁰ thus limiting employers' access to employee medical records.

Regardless, misclassification cases involving job applicants or employees are so uncommon as to be virtually non-existent. As such, the purpose and practical effect of the second prong in addressing employment discrimination in these types of cases is largely theoretical. Instead, it is cases involving the first group of individuals, those who have a history of once-substantially limiting impairment, that have generated the most case law—and confusion—regarding the “record of” prong.

B. The Reliance and Documentation Requirement

One feature of the “record of” prong that limits its overall reach is the requirement of some courts that an employer rely on some type of actual documentation of a past impairment. According to the EEOC, in order to satisfy the “record of” prong, a plaintiff must establish that, in making the employment decision, the employer relied on a record indicating that the plaintiff has or had a substantially limiting impairment.⁸¹ When discussing a “record” of disability, it is clear the EEOC is referring to tangible documents such as “education, medical, or employment records.”⁸² Therefore, under the EEOC's approach, it is insufficient for a plaintiff to simply demonstrate that she has recovered from a once-substantially limiting impairment in order to fall within the “record of” prong. Nor, presumably, is it sufficient that the employer had independent knowledge of the fact that the individual once had a disability.⁸³ Instead, the plaintiff must establish that the adverse employment decision was dependent on some type of tangible

students who had been misclassified by a school district as being mentally retarded. *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981).

80. *See supra* notes 56–62 and accompanying text.

81. 29 C.F.R. app. § 1630.2(k) (2006); EEOC MANUAL, *supra* note 67, § I-2.2(b).

82. 29 C.F.R. app. § 1630.2(k).

83. *Crock v. Sears, Roebuck & Co.*, 261 F. Supp. 2d 1101, 1120 (S.D. Iowa 2003) (“It does not matter whether Graft knew Crock had an impairment or not because mere knowledge of a physical or mental impairment is not enough to show that Crock has a history of a disability nor does it create a *record* of an impairment.”).

document. Several courts have likewise taken this approach.⁸⁴ This requirement is noteworthy in several respects.

First, the idea that an employer must rely upon a tangible record of such history in order for a plaintiff to satisfy the threshold question as to the existence of a disability is not mentioned in any of the committee reports accompanying the Rehabilitation Act Amendments or the ADA. Nor was it mentioned in the original regulations promulgated under the Rehabilitation Act by the Department of Health & Human Services.⁸⁵ Instead, these sources discuss the concept of a “history” of a disability almost solely in the sense of a past condition that is no longer substantially limiting.⁸⁶ Several early Rehabilitation Act cases approached the issue in much the same way, relying upon a plaintiff’s prior history, rather than an employer’s knowledge of that history derived from reviewing documentation, as the basis for concluding that an individual had a record of disability.⁸⁷ And while Congress’s

84. This approach is the announced position of the Eighth Circuit Court of Appeals. *Taylor v. Nimock’s Oil Co.*, 214 F.3d 957, 961 (8th Cir. 2000) (“In order to have a record of a disability, an employee’s ‘documentation must show’ that she has a history of or has been subject to misclassification as disabled.” (internal citations omitted) (citing *Weber v. Strippit, Inc.*, 186 F.3d 907, 915 (8th Cir. 1999))). Other courts have emphasized heavily the absence of documentation in their rulings against plaintiffs who have relied on the second prong. *See Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 192 (5th Cir. 1996) (holding that plaintiff did not have a record of disability, despite the fact employer was aware of plaintiff’s condition, because nothing in employee’s personnel file indicated that plaintiff had a disability); *Roberts v. Rayonier, Inc.*, 326 F. Supp. 2d 1323, 1332 (M.D. Fla. 2004) (“A person has a record of a disability if a record relied upon by an employer indicates that the individual has or had a substantially limiting impairment.” (internal citations omitted) (quoting *Couts v. Beaulieu Group, LLC*, 288 F. Supp. 2d 1292, 1305 (N.D. Ga. 2003))); *Campbell v. Prince George’s County Md.*, No. Civ.A. AW-99-87, 2001 WL 21257, at *4 (D. Md. Jan. 4, 2001) (concluding that plaintiff who had undergone a liver transplant and required medication in order for her liver to function effectively did not have a record of disability because she did not list her liver transplant on her employment application form); *Stone v. Sangamon County Sheriff’s Dep’t*, 168 F. Supp. 2d 925, 932 (C.D. Ill. 2001) (concluding that plaintiff’s failure to introduce a medical record of his disability was fatal to his “record of” claim); *Skinner v. Atl. Marine Corp.*, No. Civ.A. 96-0622-AH-S, 1997 WL 602446, at *5 (S.D. Ala. June 23, 1997) (concluding that the fact that co-workers were aware of plaintiff’s coronary problems and surgery was insufficient to establish a record of disability, especially where the plaintiff’s impairment did not qualify as an actual disability).

85. *See* 45 C.F.R. § 84.3(j)(2)(iii) (1978); *id.* app. A.

86. *See, e.g.*, H.R. REP. NO. 101-485 (II), at 52 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 334 (“This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity.”).

87. In *Doe v. N.Y. Univ.*, 666 F.2d 761, 775 (2d Cir. 1981), for example, the Second Circuit Court of Appeals concluded that an individual had a record of disability based upon her history of psychiatric problems. The court reached this conclusion despite the fact the individual had denied

ADA's "Record of Prong"

prohibitions on pre-employment medical examinations and inquiries certainly evince a concern that *documented* disabilities might have adverse consequences for an individual's employment prospects, the restrictions also implicitly demonstrate a concern over the consequences from an employer learning, from whatever source, about an individual's current or past *history* of an impairment.

In addition, the EEOC approach requires an ADA plaintiff to establish that the employer *relied* upon a record in reaching its decision in order to obtain coverage under the second prong. One important practical implication of this approach is that it turns the threshold question as to the existence of a disability into a question of causation.⁸⁸ For example, according to the EEOC's Technical Assistance Manual, "[i]f an employer relies on any record . . . containing . . . information [about a disability] to make an adverse employment decision about a person who currently is qualified to perform a job, the action is subject to challenge."⁸⁹ It is clear from this statement that the EEOC views the concept of an employer's reliance as being directly related to an employer's motivation. Any discrimination plaintiff must, of course, prove that the plaintiff's characteristic was the cause of the employer's adverse decision, and the ADA specifically provides that it is illegal to discriminate against a qualified individual "because of the disability of such individual."⁹⁰ Therefore, as part of a *prima facie* case, any plaintiff, regardless of the theory of discrimination, has to establish that the employer actually knew or believed that the plaintiff possessed the trait in question.⁹¹ Plaintiffs proceeding under the ADA's "record of" prong should be no different.⁹² However, there is a fundamental distinction between requiring plaintiffs to establish that they possess a particular trait and requiring them to prove that such a trait made a difference to the employer.⁹³ The latter requirement imposes an additional hurdle at

the existence of any such problems on her application forms. *Id.*; see also *Allen v. Heckler*, 780 F.2d 64, 66 (D.C. Cir. 1985) (emphasizing that plaintiff was covered under the second prong because of her history of disability); *Mahoney v. Ortiz*, 645 F. Supp. 22, 24 (S.D.N.Y. 1986) (concluding that plaintiff fit under the second prong because "he has a history" of shoulder dislocations).

88. Gilbert, *supra* note 18, at 666-67.

89. EEOC MANUAL, *supra* note 67, § I-2.2(b).

90. 42 U.S.C. § 12112(a) (2000).

91. See, e.g., *Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301 (11th Cir. 2002).

92. See *Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 932 (7th Cir. 1995) (stating that to discriminate against someone because of a disability requires knowledge of the disability).

93. See *Pace v. Paris Maint. Co.*, 107 F. Supp. 2d 251, 261 n.2 (S.D.N.Y. 2000) (declining to

the preliminary stage of establishing the existence of the trait in question that has no parallel in employment discrimination law.

This blurring of the distinction between the plaintiff's protected characteristic and the defendant's mental state is not necessarily limited to the "record of" prong. By making an individual's qualification for protected class treatment contingent on a defendant's perceptions, the "regarded as" prong likewise tends to blend the two analyses into the same inquiry.⁹⁴ However, the reliance requirement that the EEOC has imported into the "record of" prong comes much closer to completely obliterating the distinction than do the requirements of the "regarded as" prong because "reliance" necessarily presumes "dependence." Indeed, the reliance requirement may impose an even greater burden on "record of" plaintiffs than perceived disability plaintiffs if the "record" upon which the employer relies must be an actual, tangible document of some kind rather than the more generalized type of knowledge or belief on the part of an employer that is sufficient to establish coverage under the perceived disability prong.⁹⁵

One likely consequence of the requirement that an employer must rely on a tangible document in order to satisfy the prerequisites of the second prong is that the passage of time or the absence of resources will prevent at least some individuals from claiming coverage. For example, in *Little*, the case described in the Introduction of this Article, more than 20 years had elapsed from the time of the plaintiff's injury to the time she applied for employment.⁹⁶ Perhaps not surprisingly, the plaintiff failed to produce any medical records documenting her amputation or the subsequent limitations imposed by the amputation.⁹⁷ As a practical matter then, if a court requires an actual *record* of disability in order for a plaintiff to claim the protection of the "record of" prong, it may be that

adopt a reliance requirement as a prerequisite for coverage under the second prong, but noting the need for plaintiffs to establish knowledge on the part of the defendant in order to establish a prima facie case).

94. Compare *Ross v. Campbell Soup Co.*, 237 F.3d 701, 708–09 (6th Cir. 2001) (holding that evidence that employer's stated reason for taking adverse action against individual was pretextual may be used to support individual's contention that employer regarded the individual as being disabled) with *Rakity v. Dillon Cos., Inc.*, 302 F.3d 1152, 1165 (10th Cir. 2002) (rejecting the *Ross* approach on the grounds that it would collapse the distinction between the prima facie case and the pretext stages of such cases).

95. See *supra* note 84 and accompanying text.

96. *Little I*, 147 S.W.3d 421, 422 (Tex. Ct. App. 2003), *rev'd*, 148 S.W.3d 374 (Tex. 2004).

97. *Id.* at 425.

ADA's "Record of Prong"

some plaintiffs with legitimate claims are denied coverage simply because the records no longer exist or cannot be located.⁹⁸

In addition, as privacy concerns drive the current trend toward increased statutory restrictions on the disclosure of medical records, it may make it less likely in the near future that employers will be in possession of medical histories concerning their job applicants. Recognition that a breach of an individual's medical privacy could have dramatic consequences, including an adverse effect on future employment prospects,⁹⁹ helped spur the privacy provisions of the Health Insurance Portability Accountability Act (HIPAA).¹⁰⁰ Under HIPAA, a health plan, health care clearinghouse, or health care provider may generally only disclose protected health information with the consent of the individual.¹⁰¹ Thus, at least at the pre-offer stage, an employer is increasingly unlikely to have significant medical documentation concerning its job applicants.

Finally, the ADA's own provisions limiting the ability of employers to inquire into the medical histories of job applicants and employees and to require applicants and employees to undergo medical examinations also limit the number of instances in which employers will be in possession of records documenting the existence of a disability. If, for example, employers are prohibited from asking questions of job applicants that are likely to elicit information about a disability,¹⁰² the number of instances in which employers should have records detailing historical conditions from which their job applicants have recovered should be fairly limited. Thus, the EEOC's documentation requirement has the perverse effect of actually making it more difficult for ADA plaintiffs to establish coverage under the "record of" prong.

98. See *Pace*, 107 F. Supp. 2d at 260–61 (refusing to require medical evidence of a history of disability, in part, on the theory that such a requirement could force dismissal of legitimate claims).

99. See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,468 (Dec. 28, 2000) (codified at 45 C.F.R. pts 160 & 164 (2006)).

100. Pub. L. No. 104-91, 110 Stat. 1936 (1996) (codified at 42 U.S.C. § 201 (1996)).

101. 45 C.F.R. §§ 160.103, 164.502 (2006).

102. EEOC, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (last visited Oct. 2, 2006).

C. *The Individualized Inquiry Rule*

Another important consequence of the documentation requirement involves how the requirement can interact with the U.S. Supreme Court's instruction that the ADA's definition of disability requires an individualized inquiry. This individualized inquiry rule has generally made it more difficult for ADA plaintiffs to claim protection under the statute. In several instances, the rule has also imposed a significant burden on plaintiffs proceeding under the "record of" prong.

1. *A Diagnosis of an Impairment Doth Not a Record of Disability Make: The Individualized Inquiry Rule*

a. *Per Se Disabilities and the "Record of" Prong*

One of the supposed benefits of the ADA's definition of disability was that it would require courts and employers to look beyond the mere fact that an individual had a physical or mental impairment and look instead at the functional limitations to that individual stemming from the impairment.¹⁰³ By defining an actual disability in terms of an individual and whether the individual's impairment substantially limited a major life activity, ADA proponents believed the definition would limit the ability of employers to make blanket generalizations concerning certain types of impairments.¹⁰⁴ In short, employers would have to look at the individual, rather than simply the fact of his or her impairment. Accordingly, the statutory definition of an individual with a disability seemed to reject the concept that certain impairments were per se disabilities.¹⁰⁵

The legislative history of the Act, however, presents a more confusing picture of the concept of disability. Various portions of the legislative history seem to indicate that Congress believed certain types of impairment would almost always constitute actual disabilities. As examples, the House Education and Labor Committee report cited individuals who are paraplegic, deaf, have a lung disease, and who are

103. See *infra* note 161 and accompanying text (discussing the congressional intent to eliminate "reflexive reactions" to impairments).

104. Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1306 (2001).

105. See *id.*

ADA's "Record of Prong"

infected with the Human Immunodeficiency Virus (HIV).¹⁰⁶ Even with respect to these individuals, however, the report explains that such individuals would be considered to have disabilities by virtue of the fact that their impairments substantially limited certain major life activities (walking, hearing, breathing, and procreation and intimate sexual relations, respectively).¹⁰⁷ In the section concerning prohibited medical inquiries and examinations, the committee report again seems to view certain conditions as being almost per se disabilities, referring to "epilepsy, diabetes, emotional illness, heart disease and cancer" as the types of "hidden disabilities" of which employers were often cautious.¹⁰⁸ But, in other portions of the legislative history, Congress reiterated what appears to be the plain meaning of the statutory definition of an actual disability: "A physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a 'substantial limitation of one or more major life activities.'"¹⁰⁹

Nowhere is the confusion over whether certain impairments could constitute per se disabilities more evident than with respect to Congress's treatment of the "record of" prong. By defining the coverage of the second prong by reference to the actual disability definition, Congress directed courts back to the question of whether the impairment from which the plaintiff had recovered or with which she had been misclassified substantially limited a major life activity.¹¹⁰ Thus, one cannot make the determination that an individual has a record of disability without first reaching the conclusion that the documented or historical disability once substantially limited the individual in a major life activity. The problem, at least with respect to the "record of" prong, is that Congress does not necessarily appear to have viewed the prong as operating in this manner.

For instance, the legislative histories of the Rehabilitation Act Amendments of 1974 and the ADA indicate that Congress assumed that individuals who were classified as being "mentally ill or mentally retarded" would be covered under the second prong.¹¹¹ In other words,

106. H.R. REP. NO. 101-485 (II), at 52 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 334.

107. *Id.*

108. *Id.* at 72, as reprinted in 1990 U.S.C.C.A.N. at 355.

109. *Id.* at 52, as reprinted in 1990 U.S.C.C.A.N. at 334.

110. See *supra* notes 106–109 and accompanying text.

111. See H.R. REP. NO. 101-485 (II), at 52–53, as reprinted in 1990 U.S.C.C.A.N. 303, 334–35.

Congress either viewed mental illness and mental retardation as per se disabilities or as impairments that would almost always substantially limit an individual in a major life activity. Mental illness and mental retardation are certainly *impairments*.¹¹² However, if one takes the time to inquire whether an individual is substantially limited in a major life activity by the impairments, there is no guarantee that either condition will rise to the level of a disability in a given case. Indeed, ADA case law that has taken such an individualized approach confirms this fact.¹¹³

This somewhat contradictory approach to classifying impairments as disabilities continued when the EEOC promulgated its Technical Guidance (the Guidance). In those portions of the Guidance dealing with actual disabilities, the EEOC fairly consistently takes a case-by-case approach toward determining whether an impairment rises to the level of a disability.¹¹⁴ According to the Guidance, “[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.”¹¹⁵ Yet when discussing coverage under the “record of” prong, the EEOC almost as clearly takes the position that a diagnosis of certain types of impairments *does* in fact establish the existence of a disability. According to the Guidance, “[t]he impairment indicated in the record must be an impairment that *would* substantially limit one or more of the individual’s major life activities.”¹¹⁶ The inclusion of the word “would” suggests a hypothetical inquiry surrounding the general nature of an impairment, not an *actual* description in the record of how the impairment *actually* once substantially limited a major life activity.

In discussing the “record of” prong’s scope in its Technical Guidance, the EEOC simply assumed in several examples that the impairments it described *would* substantially limit an individual’s major life activities.¹¹⁷ For example, “[a] job applicant was hospitalized for

112. 29 C.F.R. § 1630.2(h)(2) (2006).

113. See *Horwitz v. L & J.G. Stickley, Inc.*, 122 F. Supp. 2d 350, 355 (N.D.N.Y. 2000) (holding that an individual with bipolar disorder did not have a disability); *Anderson v. Gen. Motors Corp.*, No. 97-3388, 1999 WL 240242, at *2 (10th Cir. Apr. 20, 1999) (holding that an individual with mild mental retardation did not have a disability).

114. Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of “Disability” Undermines the ADA*, 42 VILL. L. REV. 327, 338–39 (1997).

115. 29 C.F.R. app. § 1630.2(j) (2006) (emphasis added).

116. 29 C.F.R. app. § 1630.2(k) (emphasis added).

117. EEOC MANUAL, *supra* note 67, § I-2.2(b).

ADA's "Record of Prong"

treatment for cocaine addiction several years ago. He has been successfully rehabilitated and has not engaged in the illegal use of drugs since receiving treatment. This applicant has a record of an impairment that substantially limited his major life activities."¹¹⁸ Nowhere in the example is there any indication as to how exactly the individual's cocaine addiction once substantially limited a major life activity. Instead, the EEOC seems to proceed from the assumption that cocaine addiction is, per se, an impairment that substantially limits a major life activity.¹¹⁹

In an even clearer example, the EEOC discusses the situation of an applicant with a learning disability who had been labeled by her former employer as mentally retarded.¹²⁰ The prospective employer reviews this record and decides not to hire her. According to the EEOC, this individual would be protected by the "record of" prong because she had been misclassified by her former employer as being mentally retarded.¹²¹ But again, there is no indication from the hypothetical that the former employer ever described the functional limitations stemming from the supposed mental retardation. Instead, the EEOC simply assumes that mental retardation is, per se, a disability and that because the individual had been labeled as such, she is covered under the "record of" prong.

b. Special Problems for Plaintiffs Proceeding Under the "Record of" Prong

Although at odds with the statutory text, such a per se disability approach is arguably required in order for the "record of" prong to operate efficiently, both as a practical and a theoretical matter. As a practical matter, the "records" upon which most ADA plaintiffs rely include physician's records, findings of workers' compensation boards, and similar documents.¹²² The individuals and entities preparing these documents do not usually prepare them in anticipation of ADA litigation. Accordingly, they may limit their description of an individual's condition to a simple diagnosis, possibly expanded upon by

118. *Id.*

119. *See id.* (explaining that a casual drug user would not be covered "because casual drug use, as opposed to addiction, does not substantially limit a major life activity").

120. *Id.*

121. *Id.*

122. *See, e.g.,* *Faulkner v. ATC Vancom of Nev. Ltd. P'ship*, No. 98-16467, 1999 WL 1091872, at *4 (9th Cir. Dec. 2, 1999) (Veterans Administration).

a description of some of the individual's symptoms. If one takes seriously the ADA's seemingly clear command that an individual must have a history of an impairment that once substantially limited a major life activity, these records may often prove insufficient to establish the existence of a disability based on their vague or brief nature.¹²³ Thus, a mere diagnosis of heart disease, for example, would not be sufficient to establish a record of disability unless the diagnosis also described in detail the functional limitations flowing from the physical impairment.

In addition, requiring something beyond a diagnosis of certain conditions virtually eliminates the already-tiny misclassification category of "record of" plaintiffs. Theoretically, there are only two types of misclassification plaintiffs: (1) those who have the documented impairment, but are not as limited by the impairment as the documentation posits and (2) those who have been misdiagnosed (i.e., those who do not have the documented impairment at all). Requiring that the "record" document the functional limitations stemming from an impairment would not impact individuals in the former category. However, if there is no such thing as per se disability, one must ask a hypothetical question in order to resolve the issue of whether an individual in the latter category has a disability: *would the average individual* be substantially limited in a major life activity, *if*, in fact, the individual actually had the documented condition?¹²⁴ Any answer to the question (aside from being hypothetical in nature) would likely be irrelevant to the individual's plight. The danger that a person who has been misclassified as having an impairment faces is not primarily in the description of the functional limitations stemming from the misdiagnosed impairment. Indeed, in the mental retardation example from the EEOC above, there was no such description.¹²⁵ The danger such an individual faces is in the stigma that attaches to mental retardation. Indeed, in many instances, the primary concern associated with a misclassification is the stigma associated with the condition in question.¹²⁶ Thus, in order for the second prong to function in any meaningful sense with regard to individuals who have been misclassified

123. See *infra* notes 147–151 and accompanying text.

124. See *EEOC v. Woodbridge Corp.*, 124 F. Supp. 2d 1132, 1139 (W.D. Mo. 2000) (taking this approach in the case of an individual with a record of carpal tunnel syndrome).

125. See *supra* notes 120–121 and accompanying text.

126. See Feldblum, *supra* note 59, at 536 (noting the "social stigma [posed] simply by identification" of certain conditions).

ADA's "Record of Prong"

as having a certain impairment, a per se disability approach is actually required.

Indeed, the tendency on the part of employers to rely on incomplete information and to focus on the fact of an impairment, rather than looking at an individual as a whole, seems to be the exact evil Congress had in mind when it enacted the ADA's provisions regarding the use of medical inquiries and examinations.¹²⁷ As is the case with other types of records, a medical questionnaire that the employer asks applicants to complete is unlikely to elicit the type of in-depth responses that would document the functional limitations an individual once faced.¹²⁸ Naturally, this lack of detail could be expected to lead many employers to base their decisions on the name given to an impairment and any images that that name conjures up rather than on a complete assessment as to an individual's present ability to perform the essential functions of a position. As a theoretical matter then, it might make a good bit of sense to take a per se disability approach, at least with respect to the "record of" prong, and define that prong primarily in medical terms.¹²⁹

c. The Individualized Inquiry Rule in Practice

Unfortunately for ADA plaintiffs who rely on the second prong, courts have not taken a per se disability approach. In a number of cases involving the ADA's actual and perceived disability prongs, the U.S.

127. See *supra* notes 56–62 and accompanying text; see also H.R. REP. NO. 101-485 (II), at 74 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 357 (explaining that, in the context of the prohibition on medical inquiries and examinations "[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals"); *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 95–96 (2d Cir. 2003) ("[G]eneral diagnoses may expose individuals with disabilities to employer stereotypes . . .").

128. See generally *Dupre v. Charter Behavioral Health Sys.*, 242 F.3d 610, 615 (5th Cir. 2001) (holding that information provided by plaintiff on employer's "Employee Health Screening Form" that mentioned plaintiff's back pain, treatment by a physician, and back surgery lacked the detail necessary to constitute a record of disability).

129. This is similar to the proposal offered by Professor Mark A. Rothstein and several co-authors. Under this proposal, the ADA would be amended so that the EEOC is empowered to publish medical standards for determining when the most common mental and physical impairments are severe enough to be considered disabilities under the ADA. Mark A. Rothstein et al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 244 (2002). The EEOC, in consultation with the medical profession, would produce medical criteria that distinguish minor impairments from severe impairments. *Id.* at 271. Several states employ similar definitions of disability in their disability discrimination statutes, which define "disability" almost exclusively in medical, rather than functional, terms by providing non-exhaustive lists of severe impairments. Long, *supra* note 27, at 638–39. Proposed revision to the ADA's definition of disability is beyond the scope of this Article.

Supreme Court has made it clear that a mere diagnosis of an impairment is insufficient to establish the existence of a disability.¹³⁰ Instead, a plaintiff claiming disability status must produce evidence establishing that the diagnosed impairment substantially limits a major life activity. And, because the “record of” prong references the definition of an actual disability, the federal courts have applied the same logic to cases falling under the “record of” prong.¹³¹

In *Sutton v. United Air Lines, Inc.*,¹³² the U.S. Supreme Court emphasized that the ADA’s definition of disability requires an “individualized inquiry.”¹³³ In support of this conclusion, the Court pointed to the fact that the statutory definition of disability “requires that disabilities be evaluated ‘with respect to an individual’ and be determined based on whether an impairment substantially limits the ‘major life activities of such individual.’”¹³⁴ Three years later, the Court made its point even more clearly, stating unequivocally in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*¹³⁵ that “[i]t is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment.”¹³⁶ Instead, an individual must submit evidence that “the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial.”¹³⁷

The full ramifications of this “individualized inquiry” rule are best illustrated by the Court’s decision in *Albertson’s Inc. v. Kirkingburg*.¹³⁸ Although the Court did not decide the case on the grounds of whether the plaintiff had a disability, the Court scolded the Ninth Circuit Court of Appeals for being “too quick to find a disability” in the case of an individual with amblyopia, an uncorrectable condition that left the

130. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999).

131. See, e.g., *EEOC v. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir. 1999) (stating that the EEOC’s “broad position” regarding the “record of” prong outlined in the Guidance “cannot be the rule in the wake of *Sutton*, which emphasizes both the ADA’s requirement of individualized inquiry and a focus on the actual effects of the impairment”).

132. 527 U.S. 471 (1999).

133. *Id.* at 483.

134. *Id.* (quoting 42 U.S.C. § 12102(2) (2000)).

135. 534 U.S. 184 (2002).

136. *Id.* at 198.

137. *Id.* (quoting *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999)).

138. 527 U.S. 555 (1999).

ADA's "Record of Prong"

individual with monocular vision.¹³⁹ The fact that the plaintiff saw *differently* than most other people (i.e., only out of one eye) was not necessarily sufficient to establish that his impairment *substantially limited* the major life activity of seeing.¹⁴⁰ Instead, according to the U.S. Supreme Court, the lower court should have relied less on the diagnosis of plaintiff's condition and inquired more deeply into the extent of the plaintiff's visual restrictions.¹⁴¹ In short, while conceding that individuals with monocular vision will ordinarily be able to meet the ADA's definition of disability, the Court made clear that such individuals still must prove that the extent of their limitation is substantial.¹⁴² Following *Kirkingburg*, several courts have conducted the type of individualized inquiry mandated by the Court with respect to individuals with monocular vision and come to the conclusion that the individuals were not, in fact, substantially limited in the major life activity of seeing.¹⁴³

Sutton, *Toyota Motor*, and *Kirkingburg* all involved individuals claiming protection under either the actual or perceived disability prongs of the ADA's definition of disability. Because the "record of" prong references a reader back to the actual disability definition, however, the decisions apply with equal force to the second prong.¹⁴⁴ Unless the impairment once rose to the level of an actual disability, an individual cannot claim a record of disability.¹⁴⁵ Thus, unless individuals claiming protection under the second prong can produce a diagnosis that is accompanied by descriptive statements sufficient to establish that the impairment once substantially limited a major life activity, they may not be able to claim coverage. This is true regardless of whether the condition in question is one associated with social stigma.¹⁴⁶ As a result,

139. *Id.* at 564.

140. *Id.* at 565.

141. *Id.* at 566.

142. *Id.* at 567.

143. *See, e.g.*, *Flores v. Am. Airlines, Inc.*, 184 F. Supp. 2d 1287, 1292-93 (S.D. Fla. 2002); *Hoehn v. Int'l Sec. Servs. & Investigations, Inc.*, No. 97-CV-974A, 2002 WL 31987786, at *10 (W.D.N.Y. Nov. 26, 2002); *Rivera v. Apple Indus. Corp.*, 148 F. Supp. 2d 202, 214 (E.D.N.Y. 2001); *Sherman v. Peters*, 110 F. Supp. 2d 194, 199 (W.D.N.Y. 2000).

144. *See Edwards v. Ford Motor Co.*, 218 F. Supp. 2d 846, 851 n.4 (W.D. Ky. 2002) ("[T]his Court cannot perceive any reason why *Williams* would not apply also to claims brought under the companion statutory provision of subsection (B).").

145. *See, e.g.*, *Wood v. Redi-Mix, Inc.*, 339 F.3d 682, 687 (8th Cir. 2003).

146. *See Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002) (concluding that plaintiff who had recovered from breast cancer after eight months of radiation

numerous individuals have fallen prey to the special traps associated with the “record of” prong, either because their physicians¹⁴⁷ or other entities¹⁴⁸ failed to document the extent of their limitations, because the limitations that were documented failed to rise to the level of *substantial* limitations,¹⁴⁹ or because they were unable to produce any documentation at all.¹⁵⁰ In numerous instances, individuals have been denied coverage under the “record of” prong based on documentation problems, despite the fact that the legislative history indicates and the EEOC suggests that they were exactly the type of individuals Congress sought to protect.¹⁵¹

treatment and chemotherapy and who had endured a modified radical mastectomy did not have a record of disability).

147. See *Coons v. Sec’y*, 383 F.3d 879, 886 (9th Cir. 2004); *Burton v. Potter*, 339 F. Supp. 2d 706, 712–13 (M.D.N.C. 2004); see also *Williams v. Kerr-McGee Corp.*, No. 96-6090, 1997 WL 158176, at *8 (10th Cir. Apr. 1, 1997) (affirming summary judgment in favor of employer where doctor’s letter did not affirmatively state plaintiff had lupus or that plaintiff was substantially limited in any major life activity).

148. See *Faulkner v. ATC Vancom of Nev. Ltd. P’ship*, No. 98-16467, 1999 WL 1091872, at *4 (9th Cir. Dec. 2, 1999) (affirming summary judgment in favor of employer where plaintiff’s letter from the Veterans Administration stating that plaintiff was 40% disabled did not establish a record of disability because it did not describe the basis of plaintiff’s limitations or the nature, permanence, or severity of his condition); *Flasza v. TNT Holland Motor Exp., Inc.*, 156 F.R.D. 672, 677 (N.D. Ill. 1994) (granting employer’s motion for summary judgment where workers’ compensation records detailed varying degrees of loss of use of body parts, but failed to detail any substantial limitation of any major life activity).

149. See, e.g., *Weber v. Strippit, Inc.*, 186 F.3d 907, 915 (8th Cir. 1999).

150. See *Little I*, 147 S.W.3d 421, 425 (Tex. Ct. App. 2003), *rev’d*, 148 S.W.3d 374 (Tex. 2004). Even in those rare cases where an individual is misclassified as having an impairment, a mere diagnosis, without any record that the impairment substantially limited a major life activity, may be insufficient to establish coverage under the “record of” prong. See generally *EEOC v. Woodbridge Corp.*, 124 F. Supp. 2d 1132, 1139 (W.D. Mo. 2000) (stating that even if plaintiff had been misclassified as having carpal tunnel syndrome as she claimed, she did not have a record of a disability because carpal tunnel syndrome is not usually considered a disability).

151. See *supra* notes 41 & 103 (discussing legislative history listing individuals with a history of mental or neurological illness, heart attack, cancer, mental illness, or mental retardation as being within the coverage of the “record of” prong); *supra* note 106 and accompanying text (discussing legislative history listing individuals who are paraplegic, deaf, have a lung disease, and who are infected with the Human Immunodeficiency Virus (HIV) as being within the coverage of the actual disability prong); *supra* note 118 and accompanying text (discussing EEOC’s position that recovering cocaine addict would be covered under the “record of” prong); *Sebest v. Campbell City Sch. Dist. Bd. of Educ.*, 94 F. App’x 320 (6th Cir. 2004) (severe obstructive pulmonary lung disease); *Blanks v. Sw. Bell Commc’ns, Inc.*, 310 F.3d 398 (5th Cir. 2002) (HIV-positive status); *Taylor v. Nimock’s Oil Co.*, 214 F.3d 957 (8th Cir. 2000) (heart attack); *Ellison v. Software Spectrum*, 85 F.3d 187 (5th Cir. 1996) (cancer); *Horwitz v. L. & J.G. Stickley, Inc.*, 122 F. Supp. 2d 350 (N.D.N.Y. 2000) (bipolar disorder); *Jackson Mem. Hosp. Pub. Health Trust*, 33 F. Supp. 2d 1336 (S.D. Fla. 1998), *aff’d*, 198 F.3d 263 (11th Cir. 1999) (alcoholism).

ADA's "Record of Prong"

2. *A Record of Hospitalization Doth Not a Record of Disability Make: The Individualized Inquiry Rule Continued*

The extent to which the federal courts have insisted that courts focus on the "substantial limitation" language of the ADA's definition of disability has also undermined the ability of "record of" plaintiffs to rely on a previous U.S. Supreme Court precedent that established an expansive conception of the second prong. In the early years after the Rehabilitation Act Amendments of 1974, plaintiffs generally had little difficulty establishing the existence of a disability.¹⁵² Plaintiffs proceeding under the "record of" prong were no exception.¹⁵³ By the mid 1980s, however, a number of decisions began to pop up in which defendants successfully challenged the existence of a plaintiff's disability.¹⁵⁴ These decisions perhaps should have been a warning sign for disability rights advocates as they set to work drafting the ADA. However, any concerns that advocates may have had appear to have been allayed by the U.S. Supreme Court's seemingly expansive interpretation of the Rehabilitation Act's definition of disability in *School Board of Nassau County v. Arline*.

Arline involved a teacher who had been fired after a relapse of tuberculosis.¹⁵⁵ Over 20 years earlier, Arline had been hospitalized for tuberculosis.¹⁵⁶ The school board did not dispute the fact that it had discharged Arline due to its concern over her contagiousness, but argued instead that (a) Arline did not have a disability because Congress could not have intended to include contagious diseases within Section 504's definition of disability and (b) Arline was not qualified for the teaching position due to her contagiousness.¹⁵⁷ The U.S. Supreme Court concluded that a jury question existed as to whether Arline was qualified for the position, but before reaching that conclusion, it concluded that Arline fit neatly within Section 504's "record of" prong.¹⁵⁸

152. *Tudyman v. United Airlines*, 608 F. Supp. 739, 745-46 (C.D. Cal. 1984) (noting that, by 1984, only one court had found a plaintiff not to be handicapped).

153. *See Doe v. N.Y. Univ.*, 666 F.2d 761, 775 (2d Cir. 1981) (finding that plaintiff had a record of disability and was regarded as having such, based in part on the legislative history of the Act, "which indicates that the definition is not to be construed in a niggardly fashion").

154. *See, e.g., Pridemore v. Legal Aid Soc'y*, 625 F. Supp. 1171, 1175 (S.D. Ohio 1985) (concluding that attorney's cerebral palsy did not substantially limit any of his major life activities).

155. 480 U.S. 273, 276 (1987).

156. *Id.*

157. *Id.* at 277.

158. *Id.* at 281, 289.

In reaching its decision, the Court relied on the regulations promulgated by the Department of Health and Human Services, which defined the various terms within Section 504's definition of disability and which later served as the basis for the definition of the ADA's terms.¹⁵⁹ Although ostensibly ruling on the plaintiff's coverage under the "record of" prong, the Court spoke extensively about the Act's purposes as they related to the "regarded as" prong.¹⁶⁰ The Court discussed in detail the "irrational fear" that individuals who have recovered from infectious and even non-infectious diseases face, and explained that the Act was designed "to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments."¹⁶¹ It would therefore defeat the purposes of the Act if those with contagious diseases could be denied coverage based on the ignorance of others where reasonable accommodations could limit the threat of contagiousness to others.¹⁶²

Regarding proof that Arline had a record of disability, the fact that her "impairment was serious enough to require hospitalization [was] more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment."¹⁶³ If one takes *Arline* at its word, the decision seems to say that an individual's record of hospitalization should be sufficient to establish coverage under the "record of" prong. However, as disability rights advocates quickly learned, appearances can be deceiving.

In *Taylor v. United States Postal Service*,¹⁶⁴ a case decided four years after *Arline* and shortly before the ADA became effective, the Sixth Circuit Court of Appeals found *Arline* to be unhelpful as to the proper analysis of a claim brought under the "record of" prong.¹⁶⁵ The Sixth Circuit noted that the *Arline* Court had failed to provide any details concerning the length of Arline's hospitalization or the severity of her affliction.¹⁶⁶ "Therefore," the court concluded, "unless we read *Arline* as establishing the nonsensical proposition that *any* hospital stay is

159. *Id.* at 280.

160. *Id.* at 284.

161. *Id.* at 285.

162. *Id.* at 284.

163. *Id.* at 281.

164. 946 F.2d 1214 (6th Cir. 1991).

165. *Id.* at 1217.

166. *Id.*

ADA's "Record of Prong"

sufficient to evidence a 'record of impairment,' which we decline to do, the case offers us little guidance."¹⁶⁷

The *Taylor* decision struck two major blows against *Arline*. First, by pointing out the shortcomings of the U.S. Supreme Court's opinion with respect to the application of the second prong, *Taylor* effectively clued other federal courts in to the fact that *Arline*'s statements with respect to the "record of" prong might not hold up under a rigorous examination of the statutory language. In making this observation, *Taylor* also directed future courts and litigants to *Arline*'s much more detailed statements about the "regarded as" prong.¹⁶⁸ Thus, *Taylor* represented one more clue, in addition to *Arline* and the ADA's legislative history, that the "regarded as" prong was, between the two, the potentially more promising section in the ADA's three-part definition.

The second blow struck by *Taylor* was its dismissal of the idea that any record of hospitalization established a record of disability. Later courts would seize on *Taylor*'s reasoning about the "nonsensical" implications of *Arline*'s broad statements about hospitalization and reach the same conclusion.¹⁶⁹ Thus, those individuals who cannot establish coverage under the second prong by virtue of a mere diagnosis of an impairment are also now generally precluded from establishing coverage based on the mere fact that they were once hospitalized because of their impairment.

3. *The Single-Job Rule Problem*

Another interpretation of the ADA's definition of disability that has limited the scope of all three prongs is the U.S. Supreme Court's clarification as to what constitutes a substantial limitation in the specific major life activity of working. If an individual claims to be substantially limited in the major life activity of working, the individual must establish that she 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

167. *Id.*

168. *Id.*

169. *See* Guttridge v. Clure, 153 F.3d 898, 901 (8th Cir. 1998); *see also* Burch v. Coca-Cola Co., 119 F.3d 305, 317 (5th Cir. 1997); Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 645-46 (2d Cir. 1995); Byrne v. Bd. of Educ., Sch. of W. Allis-W. Milwaukee, 979 F.2d 560, 566 (7th Cir. 1992); *see generally* Sorensen v. Univ. of Utah Hosp., 194 F.3d 1084, 1087-88 (10th Cir. 1999) (holding that plaintiff with multiple sclerosis failed to establish a record of disability based upon five-day hospitalization).

abilities.”¹⁷⁰ An impairment that prevents an individual from performing “a single, particular job does not constitute a substantial limitation in the major life activity of working.”¹⁷¹ Accordingly, an employee who has a record of an impairment that only precluded the individual from working at a single job or who is perceived as having such an impairment does not have a disability under the ADA.¹⁷²

In the case of individuals proceeding under the “regarded as” prong, numerous commentators have made the charge that the single-job rule opens the door to exactly the type of irrational or uninformed decisions on the part of employers that the third prong was designed to guard against.¹⁷³ The single-job rule, in effect, gives license to whatever idiosyncratic fear or belief an employer might hold, provided that the employer’s belief about the individual’s impairment is not so sweeping that, if true, it would affect the individual’s ability to perform the duties of a class of jobs or a broad range of jobs.¹⁷⁴ Most of the criticism of the single-job rule has been directed at judicial treatment of individuals who claim to have been *regarded* as having an impairment that substantially limits the major life activity of working. However, because individuals with histories of certain impairments or who have been misclassified with certain impairments are vulnerable to exactly the same forms of discrimination,¹⁷⁵ the same criticisms apply with equal force to judicial decisions involving plaintiffs under the “record of” prong.

4. *The Permanent or Long-Term Impact Rule Problem*

The scope of the “record of” prong has also been limited by the approach of courts that requires either that the duration of the impairment be long-term or that the impact of the impairment be permanent or long-term. After the enactment of the ADA, the EEOC regulations provided that the following factors should be considered in determining whether an individual is substantially limited in a major life activity:

170. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999) (emphasis added) (quoting 29 C.F.R. § 1630.2(j)(3)(i) (2006)).

171. *Id.*

172. *See, e.g., Tice v. Cent. Area Transp. Auth.*, 247 F.3d 506, 513 (3d Cir. 2001).

173. *See, e.g., Samuel R. Bagenstos, The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 977 (2003).

174. *Id.*

175. *See supra* notes 51–52 and accompanying text.

ADA's "Record of Prong"

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.¹⁷⁶

Based on these factors, courts frequently found that impairments that lasted a relatively short period of time or that had little to no long-term impact on an individual did not substantially limit an individual's major life activities.¹⁷⁷ For example, an individual who was unable to work for a period of only a few days as a result of an impairment would be unlikely to prevail on a claim that he was substantially limited in the major life activity of working.¹⁷⁸

Theoretically, the duration of the impairment and the permanent or long-term impact of the impairment did not necessarily control in each case. In some cases, the nature and severity of the impairment might be sufficient to overcome the relative weakness of one of the other two factors.¹⁷⁹ In practice, however, courts often adopted something approximating a presumption, if not an outright interpretive rule, against finding a disability where either the duration of the impairment or the impact of the impairment was temporary or short-term.¹⁸⁰ This preoccupation with time occasionally led to bizarre results. In one instance, a federal district court concluded that an individual who had been fired from his job a year after being diagnosed as HIV-positive could not proceed under the "record of" prong because, although the impairment would exist for the rest of life, his one-year history with the impairment was not of sufficient length to constitute a history of impairment since his impairment was (in the words of the court) "virtually brand new."¹⁸¹

The U.S. Supreme Court's 2002 decision in *Toyota Motor Manufacturing* perhaps went further than the approach of some prior federal decisions by condensing the EEOC's three-factor test into a

176. 29 C.F.R. § 1630.2(j)(2) (2006).

177. *See, e.g.*, *Hilburn v. Murata Elec. N. Am., Inc.*, 181 F.3d 1220, 1229 (11th Cir. 1999).

178. *Cf. Thompson v. Eaton Corp.*, No. 02-C-051-C, 2002 WL 31995670, at *9 (W.D. Wisc. Dec. 11, 2002) (holding that the inability to work for five weeks was an insufficient period of time to establish a substantial limitation in the major life activity of working).

179. *See Navarro v. Pfizer Corp.*, 261 F.3d 90, 100 n.6 (1st Cir. 2001) ("[T]he three listed factors can combine in a number of different ways, even to the exclusion of one or more of them.").

180. *See, e.g.*, *Pollard v. High's of Balt, Inc.*, 281 F.3d 462, 468 (4th Cir. 2002).

181. *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1322 (E.D. Pa. 1994).

simple requirement that “[t]he impairment’s impact must . . . be permanent or long term.”¹⁸² While the EEOC’s approach allowed the fact finder to consider the severity and duration of the impairment along with the impact or residual effects of the impairment, the Court’s reformulation of the test focused on the residual effects of the impairment to the exclusion of the other factors. This means that individuals with cases that might previously have survived a motion to dismiss or summary judgment based on the severity of the impairment may now lose because they cannot show a permanent or long-term impact.¹⁸³ Consequently, the Court’s more restrictive holding from *Toyota Motor Manufacturing* significantly limits the number of individuals who can claim protection under any of the three prongs of the definition.

D. The Mitigating Measures and Permanent or Long-Term Impact Conundrum (The New Catch-22?)

The U.S. Supreme Court’s decision in *Sutton* that an individual’s use of mitigating or corrective devices must be taken into account when deciding whether the individual’s impairment substantially limits a major life activity has also limited the scope of the ADA’s actual disability prong. Initially, it appeared that the “record of” prong might provide an alternative avenue of coverage. However, in practice not only has the “record of” prong failed to provide plaintiffs with a way around the Court’s mitigating measures rule, “record of” plaintiffs who employ such measures may face a new Catch-22 by virtue of the Court’s restrictive reading of the ADA’s definition of disability.

1. The Mitigating Measures Rule and the Window of Opportunity

In keeping with its view that there must be an individualized inquiry into the existence of a disability under the ADA, the U.S. Supreme Court held in *Sutton* that an individual’s use of mitigating or corrective devices must be taken into account when deciding whether the individual’s impairment substantially limits a major life activity.¹⁸⁴ For example, an

182. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).

183. *Cf. McKenzie v. Dovala*, 242 F.3d 967, 973 (10th Cir. 2001) (deciding, under the EEOC’s approach, that a jury question existed as to whether the individual had a record of disability, but stating that “the permanent or long-term impact of [the individual’s] illness would not tend to support a finding of disability”).

184. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

ADA's "Record of Prong"

individual with epilepsy who takes medication that limits the number and intensity of seizures might not be substantially limited in any major life activity.¹⁸⁵ *Sutton's* mitigating measures rule, therefore, had the potential to limit dramatically the coverage of the ADA for the many individuals who employed some type of remedial or corrective measure to help them go about their daily lives.

There appeared, at first glance, to be one gaping hole in the decision, however. If an individual could not claim actual disability status because, through the use of mitigating measures, the individual was no longer presently substantially limited in a major life activity, the most logical alternative would be to proceed under a "record of" theory.¹⁸⁶ In other words, if an individual was not now substantially limited in a major life activity due to the use of mitigating measures, perhaps the individual had a history of disability and would be able claim the protection of the "record of" prong.¹⁸⁷ After all, the second prong was designed to cover those individuals who had recovered in whole or in part from a disabling condition.¹⁸⁸ And the EEOC had taken the position that the prong covered those "whose illnesses are either cured, *controlled* or in remission."¹⁸⁹ Thus, there remained at least the hope that the impact of *Sutton* would be relatively minor. However, now that more than six years have passed without a wave of plaintiffs taking advantage of this supposed loophole of *Sutton*, one must wonder whether the loophole is more imagined than real.

185. See *Brunke v. Goodyear Tire & Rubber Co.*, 344 F.3d 819, 821–22 (8th Cir. 2003).

186. See Gilbert, *supra* note 18, at 673 (suggesting that since *Sutton* limited the population of individuals with actual disabilities, "record of" claims may receive more attention from the courts"); Tucker, *supra* note 18, at 351–55 (arguing that an individual whose impairment had been completely "cured" should be able to claim protection under the "record of prong," despite *Sutton*, as should an individual whose impairment can be treated to the point that there is no longer a substantial limitation of a major life activity). Bagenstos, *supra* note 18, at 503 (arguing that the "record of" prong could be used by plaintiffs who might not have an actual disability by virtue of their use of mitigating measures); Shannon P. Duffy, *U.S. Supreme Court's ADA Rulings Shake Plaintiffs' Employment Bar*, LEGAL INTELLIGENCER, June 24, 1999, at 1 (quoting plaintiff's attorney as saying that, after *Sutton*, many cases can be saved "by going immediately to the second prong").

187. See Duffy, *supra* note 186, at 10 ("Most people who have mitigating measures will have a history that you can point to.").

188. See *supra* note 45 and accompanying text.

189. EEOC MANUAL, *supra* note 67 (emphasis added), § I-2.2(b).

2. *The “Cured” Versus “Controlled” Impairment Conundrum*

There are several reasons why plaintiffs’ attorneys might believe that the “record of” prong does not provide a meaningful alternative basis of coverage for those who utilize a mitigating or corrective device to control the effects of an impairment that once substantially limited a major life activity. First, in one section of the *Sutton* opinion, Justice O’Connor, writing for the majority, discusses various ways in which a plaintiff who employs mitigating measures that alleviate some of the effects of an impairment might nonetheless prove disability status. In one passage, Justice O’Connor suggests that “one whose high blood pressure is ‘cured’ by medication may be regarded as disabled by a covered entity, and thus disabled under subsection (C) [the perceived disability prong] of the definition.”¹⁹⁰ The passage is curious, in part, because one who is taking medication to regulate a condition has not “cured” the underlying condition so much as the person has controlled the condition. Thus, it would be more accurate to say that high blood pressure is a “treatable” or “controllable” condition. The passage is also curious in that Justice O’Connor references the “regarded as” prong, rather than the “record of” prong, as the relevant section of the ADA’s definition of disability. While the passage does not necessarily exclude the possibility that such an individual might be disabled under the “record of” prong, that prong would, nonetheless, seem to be the more natural alternative to an actual disability claim in the given circumstances. Therefore, one is left to wonder why Justice O’Connor would rush straight to the “regarded as” prong for coverage rather than stopping at the more logical spot.

The suspicion that the majority’s exclusion of the applicability of the “record of” prong in its hypothetical was intentional is heightened by the fact that this is exactly how Justice Stevens read the majority opinion. The “record of” prong, Justice Stevens observed in his dissent, “plainly covers a person who previously had a serious . . . impairment that has since been completely cured.”¹⁹¹ In contrast, the *Sutton* plaintiffs’ impairments had not been “completely cured.” Instead, they were “treatable” in the sense their effects could be controlled through the use of mitigating devices. Yet, Justice O’Connor failed to mention the “record of” prong when discussing where individuals with such treatable

190. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999).

191. *Id.* at 498–99 (Stevens, J., dissenting).

ADA's "Record of Prong"

conditions might find coverage under the ADA's definition of disability. This, perhaps, explains Justice Stevens's conclusion with respect to the extent of the Court's holding. "[I]f I correctly understand the Court's opinion," Stevens stated, "one who continues to wear a hearing aid that she has worn all her life might not be covered [under the definition]—fully cured impairments are covered, but merely treatable ones are not."¹⁹²

The final reason to suspect that ADA plaintiffs who have been disqualified under the actual disability prong by *Sutton* cannot use the "record of" prong as part of an end run around the holding is that, to date, plaintiffs and courts have largely failed to pursue this avenue. If ADA plaintiffs who employ mitigating measures to control the effects of an impairment could simply resort to the "record of" prong, the scope of *Sutton*'s holding would be dramatically limited.¹⁹³ Thus, one should naturally expect numerous plaintiffs to have asserted coverage under the "record of" prong when they have successfully employed mitigating measures to offset the effects of their impairments. One might also expect that at least some courts would have either raised the issue *sua sponte* or suggested such a course of action for future litigants. To date, however, this simply has not happened. Between the years 2000 and 2005, there were numerous reported federal appellate decisions in which an employment discrimination plaintiff's disability status under the ADA or Rehabilitation Act was at issue and the individual's use of mitigating measures was somehow relevant to the question of disability status.¹⁹⁴ As Figure 3 illustrates, however, if the "record of" prong provides a window of opportunity for individuals who employ corrective or mitigating measures, ADA plaintiffs have failed to take advantage of it.

192. *Id.* at 499 (Stevens, J., dissenting).

193. *See* Tucker, *supra* note 18, at 352, 372.

194. I conducted a Westlaw search of the database containing reported federal appellate court decisions, "U.S. Courts of Appeals Cases, Reported (CTAR)," for the years 2000 through 2005. *Sutton* was decided in June of 1999. Therefore, establishing the year 2000 as the starting point enabled both the lower and appellate courts to react to *Sutton* and to allow some pending cases to be considered in light of *Sutton*. I used the following search terms: "Sutton" & "Americans with Disabilities Act" "Rehabilitation Act" & "substantial! limit!" & "MITIGAT!" "CORRECT!" The limitations of this search are generally the same as those described in note 19 *supra*.

Figure 3: Number of Instances in Reported Federal Appellate Decisions in Which a Plaintiff's Disability Status Was in Dispute and in Which the Mitigating Measures Rule Was Relevant¹⁹⁵

Year	Theory of Disability		
	Actual	Record	Perceived
2000	8	3	5
2001	4	1	2
2002	4	1	4
2003	4	1	1
2004	4	1	3
2005	2	1	2
Total	26	8	17

As Figure 3 illustrates, “record of” claims involving the use of mitigating measures still lag far behind claims under the actual and “regarded as” prongs. Also, as Figure 4 illustrates, plaintiffs asserting claims under the second prong have not had any greater measure of success in cases involving the use of mitigating measures than they have in other situations under the ADA. Only once during this period did an individual avoid losing on appeal on the question of disability status while arguing the “record of” prong in a mitigating measures case.¹⁹⁶

195. *See supra* note 193.

196. *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001).

ADA's "Record of Prong"

Figure 4: Plaintiff Success Rates Depending Upon the Theory of Disability in Cases Involving the Mitigating Measures Rule¹⁹⁷

Year	Favorable Outcomes/Theory of Disability Per Theory of Disability		
	Actual	Record	Perceived
2000	2/8	0/3	0/5
2001	2/4	1/1	0/2
2002	1/4	0/1	0/4
2003	1/4	0/1	1/1
2004	2/4	0/1	0/3
2005	1/2	0/1	0/2
Total	9/26 (34.6%)	1/8 (12.5%)	1/17 (5.9%)

Anecdotally, it does not appear that plaintiffs fare any better under the "record of" prong at the trial court level or in unreported cases when the mitigating measures rule is at issue.¹⁹⁸ In numerous cases, individuals who employ corrective or mitigating devices have been denied coverage at the trial level under both the actual and "record of" prongs. Thus, to the extent there were predictions that the "record of" prong would be the silver bullet to the U.S. Supreme Court's mitigating measures rule, those predictions have not proved accurate.

There are three possible explanations for the general failure of plaintiffs to take advantage of the window of opportunity arguably left open by *Sutton*. First it may simply be, as Justice Stevens suggested, that *Sutton* leaves open no window at all for those who have not been totally "cured" of their underlying impairments but who instead continue to employ mitigating measures they have used their whole lives.¹⁹⁹ The

197. See *supra* note 193.

198. For a few examples, see *Manz v. Gaffney*, 56 F. App'x 50, 52 (2d Cir. 2003) (holding that plaintiff whose vision could be corrected to 20/20 in both eyes had neither an actual disability nor a record of disability); *Dunlap v. Boeing Helicopter Div.*, No. 03-CV-2111, 2005 WL 435228, at *6 (E.D. Pa., Feb. 23, 2005) (holding that plaintiff who wore hearing aids in both ears did not establish coverage under any of the ADA's disability prongs); *Mercer v. Brunt*, 299 F. Supp. 2d 21, 28 (D. Conn. 2004) (identifying all three prongs in ADA's definition of disability but holding that plaintiff's hypertension, anxiety, and depression did not constitute disabilities since they were controlled by medication).

199. See *supra* note 192 and accompanying text.

appellate courts' general silence in the face of facts that clearly raise the possibility of coverage under the "record of" prong,²⁰⁰ and occasionally their express statements on the subject,²⁰¹ may arguably be read in support of Stevens's view.

Second, it may simply be a case of bad lawyering. Plaintiffs' attorneys are not taking full advantage of the window of opportunity provided by *Sutton*. Perhaps, as is arguably the case more generally with the ADA, plaintiffs' attorneys are not making use of a potentially effective tool in the plaintiff's arsenal.

Finally, it may simply be that whatever window *Sutton* leaves open is rendered exceedingly small for individuals with treatable conditions by virtue of the Court's other holdings regarding the definition of an actual disability.²⁰² For example, in *Sutton*, the Court held that two individuals with up to 20/400 uncorrected vision that was corrected to 20/20 through the use of corrective lenses did not have actual disabilities.²⁰³ Presumably, these legally blind individuals were substantially limited in the major life activity of seeing for at least a period of time in their lives. However, if their conditions were detected and addressed early, they may have only been substantially limited for a short period of time. In that case, the duration of the impairment would be relatively short, thus possibly depriving such individuals under the approach of some courts, which focus heavily on time considerations.²⁰⁴ Since *Sutton*, several

200. See, e.g., *Davis v. Pennsylvania*, No. CIV.A. 01-3091, 2002 WL 334391, at *3-4 (E.D. Pa. Feb. 22, 2002) (noting plaintiff's failure to raise claims under the second and third prongs and dismissing plaintiff's actual disability claim because plaintiff's visual impairment could be corrected to a 20/20 visual acuity level with corrective lenses).

201. See *Winters v. Pasadena Indep. Sch. Dist.*, 124 F. App'x 822 (5th Cir. 2005). In *Winters*, the plaintiff had been hospitalized for depression. The Fifth Circuit of Appeals noted that the plaintiff's condition was treatable with medication. *Id.* at 824. "In this context," the court held, the plaintiff's evidence was insufficient to create a question for the jury on her "record of" claim. *Id.* See generally *Sanders v. FMS Corp.*, 180 F. Supp. 2d 698, 705 (D. Md. 2001) ("While Plaintiff may have a history of asthma, she does not allege that it substantially limits her in a major life activity and admits that it is controllable with medication.").

202. See, e.g., *Manz*, 56 F. App'x at 52 (holding that plaintiff whose vision could be corrected to 20/20 in both eyes had neither an actual disability nor a record of disability).

203. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475, 488 (1999).

204. See *supra* notes 176-182 and accompanying text; Bagenstos, *supra* note 18, at 502 (suggesting that because there was no evidence that the *Sutton* plaintiffs had spent a substantial amount of time with their impairments before employing mitigating measures, the plaintiffs likely would not have had a record of disability). But see *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 339-40 (6th Cir. 2002) (concluding in the context of a case brought under Title II of the ADA that, notwithstanding the mitigating effects of methadone on individuals' drug addictions, individuals had a record of disability since they had a history of at least one year of opiate or

ADA's "Record of Prong"

ADA plaintiffs have fallen victim to this approach.²⁰⁵ Some individuals seek treatment for conditions that, at the time of treatment, do not amount to actual disabilities, but which could evolve into disabilities if left untreated.²⁰⁶ Where such an individual undergoes treatment, it might be thought that the plaintiff could claim disability status as a result of being substantially limited during the period of treatment and recovery. However, unless the plaintiff was substantially limited for an extended period of time during the treatment and recovery, the relatively short duration of the impairment might prevent the plaintiff from claiming protection under the "record of" prong.²⁰⁷ And because the second prong is, as a matter of statutory interpretation, tied to the actual disability prong, other "record of" plaintiffs with treatable impairments may fall victim to any of the other general restrictive interpretations of the ADA's definition of an actual disability, such as the single-job rule.²⁰⁸

3. *Are Cured Impairments Covered?: The New Catch-22*

Numerous commentators have noted the various Catch-22s the ADA presents for plaintiffs. For example, an individual who is able to avoid the effects of the single-job rule by proving that an impairment is substantial enough to preclude the individual from a class or broad range of jobs may have also presented the same evidence the employer will

narcotic addiction, including physical dependence).

205. *See, e.g., Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1132 (10th Cir. 2003) (concluding that individual with bipolar disorder did not have a record of disability because her periods of incapacitation were limited); *Jewell v. Reid's Confectionary Co.*, 172 F. Supp. 2d 212, 214–15, 217 (D. Me. 2001) (concluding that plaintiff did not have a record of disability where he recovered from a heart attack within the span of several months after having an internal defibrillator implanted in his chest); *Horwitz v. L & J.G. Stickley, Inc.*, 122 F. Supp. 2d 350, 356–58 (N.D.N.Y. 2000) (concluding that plaintiff who had been briefly hospitalized for treatment of bipolar disorder and whose disorder was effectively controlled by medication and treatment did not have a record of disability); *see also Collado v. United Parcel Serv. Co.*, 419 F.3d 1143 (11th Cir. 2005) (concluding that individual with diabetes, who had been insulin-dependent since the age of 14, did not have a record of disability).

206. *See Tucker, supra* note 18, at 352 (noting that some individuals employ mitigating measures to alleviate the effects of a condition that does not constitute an actual disability).

207. *Gutridge v. Clure*, 153 F.3d 898, 901–02 (8th Cir. 1998).

208. *See Kiser v. Original, Inc.*, 32 S.W.3d 449, 452–53 (Tex. Ct. App. 2000) (concluding, under similar state statute, that an individual with controlled epilepsy did not have an actual disability because he did not have an impairment that precluded him from a class of jobs or a broad range of jobs, nor did he have a record of such an impairment). *See generally Simms v. City of New York*, 160 F. Supp. 2d 398 (E.D.N.Y. 2001) (holding that plaintiff with diabetes that was controllable with insulin did not have an actual disability or a record of disability because "maintaining stable blood [sugar] levels" is not a major life activity).

rely on to show that the individual was “too disabled” to be qualified for the position in question.²⁰⁹ However, the U.S. Supreme Court’s statement in *Toyota Motor Manufacturing* that the impact of an individual’s impairment must be permanent or long term, if read literally, may perhaps be the most ingenious Catch-22 ever devised for plaintiffs claiming protection under the “record of” prong.

The “record of” prong was designed to cover those individuals who have recovered, *in whole* or in part, from a once-disabling impairment.²¹⁰ Justice Stevens’ dissent in *Sutton* assumes that individuals who have been “cured” will be able to obtain coverage under the “record of” prong, despite *Sutton*’s mitigating measures rule.²¹¹ However, if the word “impact” is read to refer to the residual effects of an impairment,²¹² then the application of the U.S. Supreme Court’s rule from *Toyota Motor Manufacturing* to the “record of” prong context would mean that few plaintiffs who have been “cured” of their impairment will ever obtain coverage under the “record of” prong. In most cases, there will be no permanent, limiting impact on an individual who has been “cured”—by definition, a “cure” permanently alleviates a condition.²¹³ Presumably then, an individual who has been “cured” would suffer little or no permanent or long-term impact and no *future* long-term impact.

If this reading of *Sutton* and *Toyota Motor Manufacturing* is correct, there are only limited instances in which a “cured” individual could obtain (and would actually need) coverage under the “record of” prong. One such instance would be where the cure itself caused some permanent or long-term adverse impact, such as lingering side effects. However, if the side effects were substantial enough, the individual might have an actual disability and have no need for the “record of” prong.²¹⁴

209. See, e.g., Barbara Hoffman, *Between a Disability and a Hard Place: The Cancer Survivor’s Catch-22 of Proving Disability Status Under the Americans with Disabilities Act*, 59 MD. L. REV. 352, 353 (2000).

210. See *supra* note 45 and accompanying text.

211. See *supra* note 192 and accompanying text.

212. This is how the EEOC defines the term. 29 C.F.R. app. §1630.2(j) (2006) (“[T]he term ‘impact’ refers to the residual effects of an impairment.”).

213. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 316 (1986).

214. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475, 482 (1999) (stating that the effects of mitigating measures “—both positive and negative—must be taken into account when judging whether that person is ‘substantially limited’ in a major life activity”).

ADA's "Record of Prong"

Even if a court chose not to apply the U.S. Supreme Court's permanent or long-term impact rule to the "record of" prong, the focus on the duration of an impairment may work to prevent many individuals who have been "cured" from obtaining coverage under the "record of" prong. As discussed, an individual who is "cured" relatively quickly may fall victim to the requirement that the duration of the impairment be long-term before the impairment may qualify as a disability.²¹⁵ In other cases, an individual may need to wait a considerable length of time after the onset or diagnosis of the impairment before seeking treatment and ultimately being "cured" in order to escape this long-term duration rule.

In many cases (cancer, hypertension, etc.), such delay between diagnosis and treatment could be fatal, and in most other instances such a course of action is hardly prudent. Yet, it is the bind in which the permanent or long-term impact rule appears to place individuals. In most instances, by "curing" oneself of an impairment that was temporarily substantially limiting, one may very well be unprotected by the "record of" prong. Such a result seems almost too bizarre to contemplate given the fact that the second prong was designed to cover "cured" individuals.²¹⁶ But if *Toyota Motors Manufacturing* is read literally,²¹⁷ it will be the likely result in many cases. Even where it is not, the courts' focus on the duration of the impairment may limit coverage under the "record of" prong in such cases.

In sum, to date the "record of" prong has not proven to be an effective alternative for individuals who have been denied coverage under the actual disability prong by virtue of the mitigating measures rule. Plaintiffs seeking to avoid the confines of the Court's mitigating measures rule by resorting to the "record of" prong may find themselves ensnared by some of the Court's restrictive interpretations of the definition of disability. Thus, despite the fact that the "record of" prong was designed to cover those who have recovered in whole or in part

215. See *supra* notes 204–205 and accompanying text.

216. See *supra* note 45 and accompanying text.

217. See *Edwards v. Ford Motor Co.*, 218 F. Supp. 2d 846, 851 n.4 (W.D. Ky. 2002) ("[T]his Court cannot perceive any reason why [*Toyota Motor Manufacturing*] would not apply also to claims brought under the companion statutory provision of subsection (B)."). Some federal courts have ignored, without explanation, the Court's "permanent or long term" rule in the case of plaintiffs proceeding under the "record of prong" and relied instead upon the EEOC's original multi-factor approach. See, e.g., *McMullin v. Ashcroft*, 337 F. Supp. 2d 1281, 1297 (D. Wyo. 2004); *Lloyd v. E. Cleveland City Sch. Dist.*, 232 F. Supp. 2d 806, 812 (N.D. Ohio 2002); *Vandever v. Fort James Corp.*, 192 F. Supp. 2d 918, 936–37 (E.D. Wis. 2002).

from a once limiting condition, in practice, many such individuals have been or can expect to be denied coverage.

E. Other Limitations on the “Record of” Prong

Each of the general interpretive rules discussed above may individually limit the overall reach of the ADA’s definition of disability. However, these rules may also combine in any number of ways. When they work together or in conjunction with the special rule that a plaintiff must establish that an employer relied on a tangible document in order to fit within the “record of” prong, the rules may create a perfect storm with the potential to sink an even greater number of claims brought under the second prong.

For example, the requirement of some courts that a plaintiff must establish that an employer relied on a tangible record in order to fit within the “record of” prong may impose a significant obstacle for “record of” plaintiffs with treatable conditions. This obstacle may exist even where a plaintiff might otherwise escape the confines of the mitigating measures and permanent or long-term impact rules.²¹⁸ Even where plaintiffs can produce a record that contains a diagnosis or general description of their condition, other interpretive rules may rise up to defeat their claims. For example, plaintiffs like Evelyn Little, described in the Introduction, would seem to escape the permanent or long-term impact rule even though it was a year before she was fitted with a prosthetic and several more years before she could walk without a cane.²¹⁹ However, despite the fact that her prospective employer relied on a “record” (her application form) that noted her impairment, this record was (for some reason not explained by the court) insufficient to amount to the type of “record” required for coverage under the second prong.²²⁰ Perhaps the record was insufficient because it did not describe the functional limitations she formerly faced.²²¹ Regardless, she could

218. See *Campbell v. Prince George’s County Md.*, No. Civ.A. AW-99-870, 2001 WL 21257, at *4 (D. Md. Jan. 4, 2001) (concluding that plaintiff who had undergone a liver transplant and required medication for her liver to function effectively did not have a record of disability because she did not list her liver transplant on her employment application form).

219. *Little I*, 147 S.W.3d 421, 425 (Tex. Ct. App. 2003), *rev’d*, 148 S.W.3d 374 (Tex. 2004).

220. *Id.*

221. This is pure speculation on my part. However, it is difficult to come up with any other explanation for the court’s unwillingness to recognize Little as having a record of disability, other than the possibility that the court viewed the condition as being treatable, rather than cured, and thus not eligible for coverage under *Sutton*. See *supra* notes 190–192 and accompanying text.

ADA's "Record of Prong"

not claim coverage under the portion of the definition of disability that seems to have been tailor-made for her situation.

The ultimate consequence of the general interpretive rules combining with the more specific rules to deny coverage to ADA plaintiffs under the "record of" prong is that it is extremely difficult for the "record of" prong to serve *any* function in rooting out intentional discrimination. For example, in *Horwitz v. L & J.G. Stickley, Inc.*,²²² the United States District Court for the Northern District of New York denied an individual coverage under the "record of" prong, despite the fact that the case seemed to present a textbook example of discrimination based upon a history of disability. In *Horwitz*, the employer withdrew a job offer after requiring the applicant to complete a medical questionnaire.²²³ The employer's proffered reason for its about-face was the fact that the applicant had responded untruthfully and incompletely on the questionnaire.²²⁴ Specifically, the applicant had not answered the question regarding whether she had ever collected workers' compensation.²²⁵

The applicant testified she did not complete this section because she feared the fact she had collected workers' compensation for her bipolar disorder might be held against her.²²⁶ Interestingly, the applicant had disclosed on the questionnaire the fact that she had bipolar disorder, took medication, and had been hospitalized for the condition.²²⁷ After the employer pointed out the omission, the applicant disclosed her receipt of workers' compensation.²²⁸ The employer also claimed that the applicant had been untruthful in claiming not to have been treated by a physician within the past 12 months when she was, in fact, being seen by a psychiatrist at the time.²²⁹ In response, the applicant claimed to have been truthful insofar as she believed a psychiatrist to be different from a physician.²³⁰ After uncovering these supposed inconsistencies and omissions, the employer withdrew its job offer.²³¹

222. 122 F. Supp. 2d 350 (N.D.N.Y. 2000).

223. *Id.* at 352.

224. *Id.*

225. *Id.*

226. *Id.* at 351.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 351 n.2.

231. *Id.* at 351.

The employer's motivation for the withdrawal would seem to present a classic jury question. While the applicant's answers to the questionnaire may arguably have been false, the fact that the withdrawal of the job offer occurred after the employer learned of the applicant's bipolar disorder—a condition commonly associated with social stigma—might suggest the employer was motivated, at least in part, by a rational or irrational response to the applicant's history of bipolar disorder.²³² Given her past receipt of workers' compensation benefits, the plaintiff might also have encountered the kind of attitudinal barriers that cause some employers not to hire individuals with prior histories of impairment.²³³ Given the employee's recent history of psychiatric treatment, the facts could also easily support the conclusion that the employer was fearful that the plaintiff would have a propensity for relapse.²³⁴ Therefore, based on the individual's history of impairment, the fact that the case involved tangible documentation upon which the employer was relying, and alleged discrimination of the sort that the "record of" prong might logically address, the case seemed to present a perfect opportunity for the second prong to help root out intentional discrimination.

Despite the timing of the events and the fact that the ADA's legislative history specifically envisions that an individual with a history of a condition such as bipolar disorder would fall within the coverage of the second prong,²³⁵ the applicant's "record of" claim wound up being decided on the grounds that she did not have such a record, not on the employer's motivation for its actions. Specifically, her past hospitalization had been for only a short period of time and her condition was being effectively treated by medication at the time she applied for the position.²³⁶ Thus, the rules regarding hospitalizations, permanent or long-term impacts, and the use of mitigating measures all combined to prevent the applicant from reaching the jury in a situation where the applicant had at least a decent argument that the employer's decision to withdraw its job offer was motivated by the applicant's diagnosis of bipolar disorder.

232. *See supra* note 51 and accompanying text.

233. *See supra* note 71 and accompanying text.

234. *See supra* notes 72–76 and accompanying text.

235. *See supra* note 45 and accompanying text.

236. *Horwitz*, 122 F. Supp. 2d at 357.

ADA's "Record of Prong"

F. Other Problems with the Prima Facie Case

Establishing the existence of a disability is merely the first hurdle an ADA plaintiff must overcome in order to establish a prima facie case. Despite this Article's focus on the difficulties associated with the definition of a "record of" disability, it bears mentioning that there are other potential drawbacks to asserting coverage under the second prong that are unrelated to these difficulties.

One of the more interesting questions with regard to an ADA plaintiff's prima facie case is whether an employer must accommodate an individual with a history of disability. In order to be protected by the ADA, an individual with a disability must be qualified, i.e., capable of performing, with or without reasonable accommodation, the essential functions of the position such individual holds or desires.²³⁷ In the case of an individual who has largely recovered from a once-substantially limiting impairment, but who still has some limitations flowing from the impairment, the individual might not be able to perform the essential functions of the position *without* a reasonable accommodation. Similarly, an individual who has largely recovered from a condition or whose condition is controlled may nonetheless suffer an occasional flare-up and be unable to perform the essential functions of a position with reasonable accommodation.²³⁸ Yet, it remains an open question under the ADA whether individuals who do not have a current, actual disability are entitled to reasonable accommodation under the Act.²³⁹

G. Summary

To recap, the number of instances in which a "record of" claim is colorable under the ADA is, by its nature, quite small, based simply on the fact that claims under the second prong only involve instances where

237. See *supra* note 37 and accompanying text.

238. *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 509 n.6 (7th Cir. 1998).

239. See *Martinez v. Cole Sewell Corp.*, 233 F. Supp. 2d 1097, 1132 (N.D. Iowa 2002) (holding that individual with a record of disability is not entitled to a reasonable accommodation); see also *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 n.2 (3d Cir. 1999) (noting that requiring employers to accommodate "record of" plaintiffs might raise similar concerns as raised in "regarded as cases," but declining to address the issue); Michele A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901 (2000) (addressing the concern that requiring employers to provide reasonable accommodations for perceived disability plaintiffs would result in an unfair advantage for such individuals as compared to individuals with impairments who are not regarded by their employers as being substantially limited in a major life activity).

an individual had a once-disabling impairment or has been misclassified as having a disability. There are almost no examples of individuals in the latter category, so the protected class is, at the outset, made that much smaller. In the former category of cases, the interpretation given by the EEOC and the courts has resulted in a dramatic narrowing of the prong. Many individuals cannot claim coverage under the “record of” prong despite the fact that the ADA’s legislative history strongly suggests they should be covered. Thus, the “record of” prong has fallen into a position of neglect and disrepair within the ADA’s framework.

III. RESTORING THE “RECORD OF” PRONG

Despite the generally grim state of the “record of” prong, ADA plaintiffs can and should rely on the prong more frequently. The situation for ADA plaintiffs claiming coverage under the actual and “regarded as” prongs is, of course, similarly grim.²⁴⁰ But at least with respect to these two prongs, plaintiffs’ attorneys have not yet given up the fight. In contrast, it appears that most plaintiffs’ attorneys see little use in the “record of” prong. The problems with the “record of” prong—and indeed the ADA’s entire definition of disability—are substantial enough that they cannot fully be addressed without legislative amendment. However, assuming that congressional action will not be forthcoming in the near future,²⁴¹ the task for plaintiffs’ attorneys is to use more effectively those resources that already exist. In the following Part, I offer some suggestions.

A. *History (Not Records): Focusing on an Individual’s History of Impairment*

Plaintiffs’ attorneys need to think of the “record of” prong less in terms of *records* and more in terms of *history*. The second prong is not, as some attorneys apparently believe, simply a repetition of the actual disability prong but with the added requirement that a plaintiff possess a tangible record that affirmatively notes the existence of a disability. As the prohibitions regarding medical examinations and inquiries attests, Congress certainly evinced concern over the mischief that might result

240. See *supra* note 15 and accompanying text.

241. See William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 95 (2003) (“The era of federal employment legislation as the predominant type of employment law may be over—at least for a while.”).

ADA's "Record of Prong"

from employers reviewing "records" concerning physical or mental impairments. However, the ADA's legislative history makes clear that Congress was at least as concerned about employers basing their decisions on an individual's history of impairment, regardless of whether that history takes the form of a tangible record.²⁴²

Similarly, plaintiffs' attorneys should reject any attempts to impose any special evidentiary requirements regarding the presentation of actual documents demonstrating the existence of a past disability. While tangible records may be the most likely method of proof in establishing a history of disability, nothing in the ADA's text or legislative history requires that such a history be documented.²⁴³ Nor is there any support for the original view of the EEOC that an ADA plaintiff must establish that an employer relied on the record in order to establish coverage under the "record of" prong.²⁴⁴ Indeed, the federal courts' pre-ADA treatment of "record of" claims under the Rehabilitation Act and the legislative history concerning the ADA's "record of" prong actually, if anything, better support the conclusion that such documentation is *not* required.²⁴⁵ In short, the existence of a tangible record describing the limiting effect of an individual's impairment should not be the *sine qua non* of a claim under the "record of" prong. By directing courts away from the question of whether an employer relied on a record documenting a disability and more toward what will often be the more meaningful question of whether there is a verifiable history of disability, plaintiffs' attorneys may open somewhat the narrow window provided by the "record of" prong.

B. Use it (or Lose it): Making More Frequent Use of the "Record of" Prong

The most obvious way that the "record of" prong could be revitalized would be if plaintiffs' attorneys would actually utilize the prong. Simply put, better lawyering may produce better results. Admittedly, for the reasons discussed throughout this Article, the number of instances in which the "record of" may provide a viable alternative to coverage under either of the other two prongs may be limited. Occasionally, however,

242. See *supra* notes 44–50 and accompanying text.

243. See *supra* notes 85–87 and accompanying text.

244. See *supra* notes 85–87 and accompanying text.

245. See *supra* notes 86–87 and accompanying text.

there will be instances in which an ADA plaintiff may be able to slip in between the cracks of the exclusionary rules regarding the actual and perceived disability prongs and claim coverage under the “record of” prong.²⁴⁶

1. *The “Record of” Prong as an Alternative to Coverage Under the “Regarded as” Prong*

At a minimum, plaintiffs’ attorneys should perhaps consider a stop at the “record of” prong before proceeding directly to the “regarded as” prong in cases involving individuals who do not currently have a substantially limiting impairment. As originally conceived, the “regarded as” prong was to be the fall-back where coverage was unavailable under either of the first two prongs.²⁴⁷ Yet, plaintiffs’ attorneys are now far more likely to assert a perceived disability claim than they are a “record of” claim.²⁴⁸ At least at the appellate level, perceived disability plaintiffs have an equally low overall success rate and have enjoyed virtually no success when the mitigating measures rule is implicated.²⁴⁹ Perhaps, then, it is time to look elsewhere.

If interpreted properly, the “record of” prong does not present the same challenges with regard to employer perceptions as does the perceived disability prong. If the entirely unjustified burden of requiring a plaintiff to establish that the employer relied on a documented history of disability in order to obtain coverage under the “record of” prong is eliminated, employer perceptions should be irrelevant to the simple question of whether an individual has a history of an impairment that once substantially limited a major life activity. In contrast, the “regarded as” prong, by definition, requires some speculation into the mental state of the defendant. By relying on the “record of” prong rather than the “regarded as” prong, ADA plaintiffs can avoid the thorny question that has sunk so many perceived disability claims—what beliefs did the employer entertain about the nature of the plaintiff’s impairment? Instead, ADA plaintiffs can focus on the more concrete issue of whether a history of disability exists and rely on the “regarded as” prong only

246. *See* St. Onge v. Livingston County, No. 04-71329, 2005 WL 1838529 (E.D. Mich. July 29, 2005) (granting defendant’s motion for summary judgment on actual and perceived disability claims, but denying it on plaintiff’s record of disability claim).

247. *See supra* note 40 and accompanying text.

248. *See supra* note 19 and accompanying fig.1.

249. *See supra* note 194 and accompanying fig.3.

ADA's "Record of Prong"

where they cannot claim coverage under either of the first two prongs. In so doing, plaintiffs' attorneys may relieve the "regarded as" prong of a weight it does not appear equipped to carry and shift some of that load onto the "record of" prong.

2. *Better Lawyering = Better Results*

There are other instances in which ADA plaintiffs *should* be faring better based on existing law but are being let down by their attorneys. Now that it is well established that a mere diagnosis of an impairment is insufficient to establish a record of disability,²⁵⁰ in many instances there is little excuse for plaintiffs' attorneys who fail to present a more detailed evidentiary record of an ADA plaintiff's medical history.²⁵¹ Yet, in numerous cases, plaintiffs proceeding under the "record of" prong have watched their claims go down in defeat due to the failure to provide evidence as to how the impairment in question limited the individual in his or her daily life.²⁵²

Viewing the second prong in terms of history, rather than tangible records, may also open up other possibilities for ADA plaintiffs who may be thwarted by some of the other restrictive interpretations of the definition of disability. For example, in *Schneiker v. Fortis Insurance Co.*,²⁵³ the Seventh Circuit Court of Appeals held that an individual with major depression did not have an actual disability. The court reasoned that the plaintiff's depression was triggered by working under her supervisor.²⁵⁴ As a result, she was only precluded from working at this particular job, not a class of jobs or broad range of jobs; thus, she did not have an actual disability.²⁵⁵ However, according to the court's opinion, the individual had been diagnosed with depression and treated with

250. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).

251. Admittedly, where plaintiffs are bound by the requirement that they must provide tangible documentation of a substantially limiting impairment, it will be difficult in some instances to obtain such records.

252. For example, in *Starks-Umoja v. Fed. Express Corp.*, 341 F. Supp. 2d 979, 993 (W.D. Tenn. 2003), the plaintiff had been "under the care of various psychiatrists for a lengthy period of time" and "was on disability leave from her job . . . for approximately five years." These facts would seem to establish a strong foundation for coverage under the "record of" prong. Yet the plaintiff lost on summary judgment because all she did was submit evidence of her impairment, not how it substantially limited her. *Id.*

253. 200 F.3d 1055 (7th Cir. 2000).

254. *Id.* at 1061.

255. *Id.*

medication nearly five years prior to her discharge.²⁵⁶ She was hospitalized for depression in a psychiatric hospital on three occasions the following year and was released to an outpatient program, which she attended for six months.²⁵⁷ Although there are no other details provided by the court as to the plaintiff's history of depression, it seems perfectly reasonable to believe that she might have had a colorable claim under the "record of" prong. However, no such claim was made on appeal or at the trial court.²⁵⁸

More resourceful lawyering may also produce better results. In the case of individuals who have employed corrective or mitigating devices for extended periods of time, *Sutton*'s mitigating measures may not bar a claim under the "record of" prong even where it might under the actual disability prong. One frustrating tendency of ADA plaintiffs and courts is to focus almost exclusively on *recent* medical history.²⁵⁹ Yet, nothing about the second prong requires a recent history of a substantially limiting impairment. By looking farther back in time, some plaintiffs may see their prospects for success improve.

For example, in *Lawson v. CSX Transportation, Inc.*,²⁶⁰ the Seventh Circuit Court of Appeals held that a jury question existed as to whether an individual who had been diagnosed with Type I insulin-dependent diabetes at infancy had a record of disability. Despite the use of insulin, the individual had had great difficulty throughout his life regulating his blood sugar levels.²⁶¹ As a child the plaintiff had been hospitalized frequently.²⁶² And while he had not been hospitalized for over a dozen years at the time of the adverse employment action, he frequently had

256. *Id.* at 1058.

257. *Id.*

258. *Id.* at 1060 n.1.

259. See *Burrell v. Cummins Great Plains, Inc.*, 324 F. Supp. 2d 1000, 1015–16 (S.D. Iowa 2004) (focusing on plaintiff's medical problems during the relevant period of employment rather than on medical problems occurring during plaintiff's thirty-three year history of diabetes); *Bennett v. Calabrian Chems. Corp.*, 324 F. Supp. 2d 815, 819–20, 832 (E.D. Tex. 2004) (focusing on twenty-seven-day period during which plaintiff was off work recovering from surgery rather than on nineteen-month period during which plaintiff underwent three aortofemoral bypass surgeries and the time prior to such surgeries); *Smith v. Lattimore Materials, Inc.*, 287 F. Supp. 2d 667, 669–71 (E.D. Tex. 2003) (focusing on plaintiff's recent work history in a case involving a plaintiff with a thirteen-year history of pain associated with a shoulder injury and a ten-year history of depression and general anxiety).

260. 245 F.3d 916 (7th Cir. 2001).

261. *Id.* at 918.

262. *Id.*

ADA's "Record of Prong"

insulin reactions, including one fairly recent incident where he had lost consciousness.²⁶³ In addition, the plaintiff's difficulty in regulating his blood sugar levels made it difficult for him to maintain employment, and he was ultimately determined to be eligible for total disability benefits by the Social Security Administration.²⁶⁴ These factors led the court to conclude that a reasonable jury could find that the plaintiff had a record of disability.²⁶⁵

Even with the use of insulin, the plaintiff's condition in *Lawson* was severe enough that the court concluded that a jury question existed as to whether the plaintiff had an actual disability.²⁶⁶ Therefore, the plaintiff may not have needed the "record of" prong. However, many similarly-situated ADA plaintiffs will not have conditions that are presently as severe as those of the plaintiff in *Lawson*. Yet, the fact that they were diagnosed early in their lives or many years ago may mean that they have experienced similar difficulties over the course of their lives, even if they were not experiencing such difficulties at the time of the adverse employment action. For example, an individual who takes medication for epilepsy and who, as an adult, has experienced only infrequent occurrences of petit mal seizures and no grand mal seizures may have a difficult time claiming coverage under the actual disability prong.²⁶⁷ However, if one delves deeper into that individual's medical history and uncovers a history of grand mal seizures or greater frequency of petit mal seizures during the individual's younger years, the individual might have a better chance at claiming disability status by relying on the "record of" prong.²⁶⁸ Similarly, an individual who has largely recovered from an impairment as a result of surgery or who is able to control the

263. *Id.*

264. *Id.* at 927.

265. *Id.* at 929.

266. *Id.* at 926.

267. *See* EEOC v. Sara Lee Corp., 237 F.3d 349, 353 (4th Cir. 2001) (concluding that individual who had suffered infrequent occurrences of less severe forms of epileptic seizures did not have a disability).

268. *See* Shaver v. Ind. Stave Co., 350 F.3d 716, 720 (8th Cir. 2003) (concluding that individual who had suffered nocturnal epilepsy since he was a teenager, but had an operation to alleviate the condition, had a record of disability). *Cf.* EEOC v. J.H. Routh Packing Co., 246 F.3d 850 (6th Cir. 2001) (involving an individual who had taken medication for epilepsy since childhood but only claimed coverage under the actual disability prong); Cooper v. Olin Corp., 246 F.3d 1083 (8th Cir. 2001) (involving an individual who had been diagnosed with depression nearly thirty years earlier and who was taking medication to control the effects thereof, but who only claimed coverage under the actual and perceived disability prongs).

effects of an impairment through the use of corrective or mitigating devices may nonetheless have undergone a prolonged recovery or adjustment period, which might allow for coverage under the “record of” prong.²⁶⁹

Reliance on the “record of” prong might be particularly promising in situations in which an individual has learned to “self accommodate” to the point that the individual no longer has an actual disability. For example, in *Emory v. AstraZeneca Pharmaceuticals LP*,²⁷⁰ a custodian alleged discrimination based on his cerebral palsy.²⁷¹ The plaintiff’s actual disability claim was a close one because, through a combination of “force of will, perseverance, and some learned accommodations,” the plaintiff was able to perform a variety of manual tasks despite the severity of his impairment.²⁷² Relevant to the plaintiff’s claim was the U.S. Supreme Court’s decision in *Albertson’s*, which held that mitigating measures, both in the form of “artificial aids, like medications and devices,” as well as “measures undertaken, whether consciously or not, with the body’s own systems” must be considered in evaluating whether an individual is substantially limited in a major life activity.²⁷³ But learned accommodations, unlike medication or artificial devices, may take a significant period of time before reducing the effect of an impairment to the point that it is no longer substantially limiting. Indeed, in *Emory*, the plaintiff’s struggle to learn to live with and self-accommodate his cerebral palsy was a lifelong one.²⁷⁴ Given the

269. Cf. *Otting v. J.C. Penney Co.*, 223 F.3d 704 (8th Cir. 2000) (involving individual diagnosed with epilepsy seventeen years prior to the opinion and who continued to suffer seizures nine months after undergoing brain surgery to correct the condition, but who only claimed coverage under the actual disability prong); *Little I*, 147 S.W.3d 421, 422 (Tex. Ct. App. 2003), *rev’d*, 148 S.W.3d 374 (Tex. 2004) (involving individual who did not obtain a prosthetic leg for a year after shooting accident and who needed a cane to walk for several years after being fitted with the prosthetic). See generally *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 506 (5th Cir. 2003) (involving individual who underwent chemotherapeutic treatment for Hepatitis-C and underwent two surgeries for carpal tunnel syndrome, but who only claimed coverage under the “regarded as” prong). While such a history may establish coverage under the “record of” prong, ultimately a plaintiff still must establish that the adverse employment decision was because of the individual’s history of impairment.

270. 401 F.3d 174 (3d Cir. 2005).

271. *Id.* at 175.

272. *Id.* at 181.

273. *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999).

274. See *Emory*, 401 F.3d at 175–78 (describing plaintiff’s condition and his steps to self-accommodate).

ADA's "Record of Prong"

plaintiff's long history in dealing with the impairment, a "record of" claim was arguably the more logical basis on which to proceed.²⁷⁵

Finally, the possibility that effective advocacy may help rescue the "record of" prong and thereby restore some of the overall force to the ADA's broader definition of disability should not be discounted. The battles over the mitigating measures, single-job, and permanent or long-term impact rules may have been fought and lost in the context of the actual and perceived disability prongs, but to date the arguments in favor of more expansive coverage under the "record of" prong largely remain untried and untested. By asserting coverage under the "record of" prong in certain instances, ADA plaintiffs may force courts to confront some of the bizarre results produced if some of the U.S. Supreme Court's more controversial holdings on the actual and perceived disability prongs are applied to the "record of" prong.

Since *Sutton*, there have been virtually no mitigating measures cases brought under the "record of" prong in which the federal appellate courts have engaged in any meaningful discussion of the role of the "record of" prong. By asserting coverage under the second prong in the case of treatable or "cured" impairments, ADA plaintiffs may provoke defendants to raise arguments based upon *Sutton* or *Toyota Motor Manufacturing*. Rather than fearing such a response, plaintiffs' attorneys should use such responses as an opportunity to force courts to confront the legislative intent behind the "record of" prong and some of the potentially bizarre consequences that might follow if the holdings from those cases are applied literally in the "record of" disability context. At a minimum, increased use of the second prong and better lawyering in the pursuit of claims brought under that prong may lead to clearer standards. For example, the most logical course of action for a court would be to simply reject application of the permanent or long-term impact rule from *Toyota Motor Manufacturing* in the case of a "record of" claim and to rely upon the EEOC's three-factor approach, in which the permanent or long-term impact resulting from the impairment is simply one factor to consider.²⁷⁶

At least one court has suggested in the context of a "record of" case decided after *Toyota Motor Manufacturing* that "the words 'record' and

275. The plaintiff lost at the summary judgment stage at the trial court, but the appellate court reversed on the actual disability issue. *Id.* at 183. The court did not, however, address the plaintiff's "record of" claim. *Id.* at 183 n.6.

276. *See supra* note 51–52 and accompanying text.

'history' could indicate that the impairment [need not be] long-term or permanent."²⁷⁷ At a minimum, there is a strong argument that requiring the existence of a permanent impact would essentially render the "record of" prong a nullity in light of the fact that the prong was specifically designed to cover those individuals who had recovered from a once disabling impairment.²⁷⁸ At the same time, ADA plaintiffs who have invested considerable time, money, and energy in overcoming the effects of impairments may be more likely to persuade courts to adopt a lower threshold for what qualifies as a long-term impairment.

C. *Stateward Ho!(!): State Law as an Alternative to the ADA*

Finally, plaintiffs' attorneys should not discount the possibility of a remedy under state law. Nearly every state has a statute prohibiting employment discrimination against individuals with disabilities.²⁷⁹ It might be difficult in the face of more than twelve years worth of adverse authority to convince the federal courts to suddenly interpret the "record of" prong in the most logical manner and the manner in which it was intended to be interpreted. However, there is considerably less disability discrimination precedent at the state level. And while many state courts have simply decided to adopt the approach of the federal courts when interpreting their own statutes,²⁸⁰ a handful have been willing to buck the federal trend and have shown themselves to be more receptive to the types of policy and legislative history arguments the U.S. Supreme Court has thus far rejected.²⁸¹

Viewing the "record of" prong as being concerned with the question of whether an individual has a *history* of a once-disabling impairment rather than being solely focused on the question of whether the individual can establish that an employer relied upon a tangible *record* documenting the existence of an impairment potentially frees up plaintiffs' attorneys to rely more frequently upon the "record of" prong. This focus on history may also open up other avenues by which plaintiffs can bypass some of the restrictive approaches the federal courts have applied to the ADA's definition of disability. And while at

277. *Lloyd v. E. Cleveland City Sch. Dist.*, 232 F. Supp. 2d 806, 812 (N.D. Ohio 2002).

278. *See supra* note 43–44 and accompanying text.

279. Long, *supra* note 27, at 628.

280. Alex B. Long, "If the Train Should Jump the Track . . .": *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 483 (2006).

281. *See generally id.* at 539–50.

ADA's "Record of Prong"

least some battles over the meaning of the "record of" prong may not be worth fighting at the federal level, state courts may, in some instances, be more receptive to some of the logical arguments in favor of a more permissive reading of at least the "record of" portion of the ADA's definition of disability.

CONCLUSION

What happened to the "record of" prong is, in some ways, symptomatic of what happened to the Americans with Disabilities Act more generally. At present, the "record of" prong is the forgotten aspect of the ADA. To some extent, plaintiffs' attorneys who forsake reliance on the second prong can hardly be blamed for not pursuing this avenue. Congress, the EEOC, and the federal courts limited the potential of the prong before it was ever fully explored. For example, the failure of Congress to employ a categorical approach with respect to the "record of" prong that would classify individuals with histories of certain kinds of impairments as having disabilities has limited the reach of the "record of" prong. The requirement that a plaintiff must establish that an employer relied on a tangible record documenting the existence of a disability has likewise hindered "record of" plaintiffs. And the federal courts' restrictive approach with respect to the ADA's overall definition of disability has had dramatic consequences for plaintiffs proceeding under the "record of" prong.

Despite these difficulties, the "record of" prong does have some role to play in combating discrimination against individuals with disabilities. If interpreted properly by the courts and asserted more frequently by plaintiffs' attorneys, the prong has the potential to at least occasionally allow plaintiffs to cross the "demanding threshold" established by the U.S. Supreme Court. Of course, establishing the existence of a disability hardly insures victory. An ADA plaintiff who establishes the existence of a disability still must run the gauntlet of establishing that he or she is qualified for the position, and that the employer actually discriminated on the basis of disability. However, given the enormous difficulties ADA plaintiffs often have in meeting the threshold requirement that they qualify as disabled, resort to the "record of" prong may give more ADA plaintiffs a fighting chance. Thus, at a minimum, resort to the "record of" prong may open doors for ADA plaintiffs that have previously been closed. In theory, the "record of" prong has a role to play in combating discrimination against individuals with disabilities. Through more

Washington Law Review

Vol. 81:669, 2006

resourceful and aggressive lawyering, plaintiffs' attorneys may yet be able to restore some vitality to this once-promising component of the ADA.