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Who Says You’re Disabled?  
The Role of Medical Evidence in the  
ADA Definition of Disability

Deirdre M. Smith*

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offered disabled people a hope for equality and access that has not been fulfilled. Court decisions  
halt an overwhelming majority of claims at the summary judgment stage. A key mechanism for  
fencing out disabled people’s claims is an improper and pernicious requirement, based upon the very  
construction of disability that the ADA’s proponents aimed to dispel, that medical evidence is  
required as a threshold matter to demonstrate that the statute applies. The stated rationales applied to  
the medical evidence requirement, such as the need for corroborating evidence, objective evidence,  
or evidence to assist juries in assessing disabilities that are not obvious, do not withstand analysis  
under either the substantive law of the ADA or broader summary judgment principles. Such a  
requirement in fact reflects an unstated rationale: a deep-seated skepticism of those claiming  
disability generally and ADA plaintiffs specifically. As a result, judges disregard the proper analysis  
to be applied to summary judgment motions and instead impose a hypertechical, heightened  
evidentiary burden on plaintiffs in an effort to foreclose potential malingerers’ claims from reaching  
the trial stage. The determination of whether a person is truly disabled or merely exaggerating her  
condition to achieve some secondary gain through ADA litigation is one more properly left to jurors  
than to doctors. The continued hegemony of medicine in identifying disability; as demonstrated in  
the view that physicians can and should serve as gatekeepers of disability claims, wrongly  
pathologizes and demeans the category of disability and undermines the statute’s effectiveness as a  
tool to advance civil rights.

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I. INTRODUCTION

II. THE ADA, REGULATIONS, AND MODELS OF DISABILITY
   A. Models of Disability and Impairment
   B. The Requirement of "Individualized Inquiry" and Corroborating Evidence Under Agency Regulations and Interpretive Commentary

III. JUDGES' IMPOSITION OF A MEDICAL EVIDENCE REQUIREMENT IN DISABILITY DETERMINATIONS UNDER THE ADA
   A. Courts Requiring Expert Medical Evidence To Establish Disability
   B. Courts Requiring Medical Evidence in Some, but Not All, Cases
   C. Courts Holding that Medical Evidence Is Never Required To Establish Disability

IV. THE STATED RATIONALE OF THE REQUIREMENT OF MEDICAL EVIDENCE—JUDGES' IMPROPER INSISTENCE ON "CORROBORATION" OF PLAINTIFFS' STATEMENTS
   A. Court Decisions Improperly Import the Substantive Law of Other Causes of Action To Hold That Plaintiffs' Testimony Alone is Insufficient To Establish Disability Under the ADA
   B. The Requirement of Corroborating Medical Evidence Runs Contrary to Summary Judgment Principles Regarding Credibility Determinations

V. THE UNSTATED RATIONALE—THE PHYSICIAN AS GATEKEEPER AGAINST MALINGERING
   A. Malingeri ng and the ADA
   B. Roots of the Problem in the Development of Federal Benefits Programs
   C. Courts' Misplaced Reliance on Physicians

VI. EVIDENTIARY CONSIDERATIONS AND QUESTIONS
   A. The Evolving Role of the Medical Expert and the Prima Facie Case
   B. Evidentiary Limitations on a Layperson's Testimony of Disability

VII. CONCLUSION: THE BROADER IMPLICATIONS FOR DISABILITY AS A POLITICAL CATEGORY
I. INTRODUCTION

The Americans with Disabilities Act (ADA), enacted by Congress seventeen years ago, offered disabled people a hope of equality and access that has not been fulfilled.¹ Court decisions halt an overwhelming majority of claims, particularly in the employment context, at the summary judgment stage.² A key mechanism for fencing out disabled people's claims is the pernicious requirement, based upon the very construction of disability that the ADA's proponents aimed to dispel, that medical evidence is required as a threshold matter to demonstrate that the plaintiff is entitled to seek protection under the statute.³ The medical evidence requirement embodies and applies a model of disability that pathologizes disabled people and undermines the statute's effectiveness as a tool to advance civil rights.

The stated rationales applied to the medical evidence requirement, such as the need for "corroborating" evidence, "objective" evidence, or evidence to assist juries in assessing disabilities that are not "obvious,"⁴ in fact reflect a common unstated rationale: a deep-seated skepticism of those "claiming disability" generally and ADA plaintiffs specifically.⁵ As a result, judges disregard the proper analysis to be applied to summary judgment motions and instead impose a

². See infra notes 73-74 and accompanying text. Summary judgment is a court action that resolves part or all of a claim prior to trial. See Fed. R. Civ. P. 56. Generally, a motion for summary judgment is made after discovery is completed. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Galvin v. Eli Lilly & Co., 488 F.3d 1026, 1030 (D.C. Cir. 2007); Triple Tee Golf, Inc. v. Nike, Inc., 485 F.3d 253, 261 (5th Cir. 2007); Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 2007 FED App. 05-6053 (6th Cir.). The moving party, most often the defendant, assembles and presents to the court a compilation of certain evidence (i.e. affidavits, exhibits, and deposition testimony) and asserts that in light of such evidence, there is no genuine issue of material fact, that no reasonable jury could find in favor of the other party, and that the only issue(s) to be resolved are legal, not factual, in nature. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-52 (1986). To avoid summary judgment, generally the nonmoving party must present admissible evidence to the court demonstrating that there is a disputed issue of material fact to be resolved at trial. Id. at 248.
³. See infra notes 79-107 and accompanying text.
⁴. See infra notes 96-107 and accompanying text.
⁵. See Michael Bérubé, Foreword: Pressing the Claim to SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY, at vii-viii (1998) ("'claiming disability' is sure to become one of the most politically sensitive endeavors a body can undertake. . . . In the wake of the Americans with Disabilities Act of 1990, 'claiming disability' will involve taking up a contested place in an intricate socio-legal apparatus . . . ."); infra notes 174-230 and accompanying text.
hypertechnical, heightened evidentiary burden on plaintiffs in an effort to foreclose potential malingerers' claims from reaching the trial stage. This skepticism, however, is itself another form of entrenched, invidious discrimination against people with disabilities, and the continued reliance on physicians to identify "true" disability unreasonably limits the ADA's reach.

Moreover, judges' reliance on medical evidence to screen out claims brought by people faking or exaggerating disability is misplaced. The determination of whether a person is truly disabled or merely exaggerating her condition to achieve some secondary gain through ADA litigation is one more properly left to jurors than to doctors. Doctors themselves do not profess to be able to ascertain disability or malingerer or to accurately assess limitations on major life activities to any degree of accuracy. A plaintiff's testimony is sufficient to establish a prima facie claim of disability. Whether such evidence, standing alone, is ultimately persuasive in proving disability is a question for the fact finder.

This Article argues that many courts improperly require plaintiffs to produce expert medical evidence to establish that they meet the statute's definition of an individual with a disability. As explained in 6. See infra notes 73-107 and accompanying text. 7. See infra notes 174-230 and accompanying text. 8. See infra notes 231-259 and accompanying text. 9. See BLACK'S LAW DICTIONARY 1228 (8th ed. 2004) (defining "prima facie case" as "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor"). One possible basis for the entry of summary judgment in favor of a defendant is a plaintiff's failure to demonstrate that she could present sufficient admissible evidence at trial to establish a prima facie claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The Celotex Court stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. 10. The scope of this Article is limited primarily to cases decided under the ADA. However, this is not the only antidiscrimination law used to assert the rights of people with disabilities. Every state in the country has enacted some form of protection for people with disabilities in employment and other contexts. Nat'l Council on Disability, The Americans with Disabilities Act Policy Brief Series: Righting the ADA—No. 6 Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of
Part II, the statute and regulations are silent on any such requirement, and the agency interpretive guidance on the ADA offers few explicit references to the role of medical evidence in ADA disability analyses. That Part also reviews how disability studies scholars and the ADA's proponents aimed to shift the predominant thinking on sources of "disability" from individual pathology to externally imposed barriers that limit a person's access to all segments of society. Part III's review of the approaches taken by court decisions expressly addressing the role of medical evidence in an ADA plaintiff's prima facie case reveals that the strongest trend among the courts is to require such evidence to corroborate a claim of disability. However, the stated rationale for that dominant line of cases does not withstand analysis under either the substantive law of the ADA or broader summary judgment principles, as Part IV demonstrates. Part V argues that the unstated rationale of such cases reflects a view that physicians can and should serve as gatekeepers of such claims to prevent malingerers from getting to trial and that such sentiment wrongly pathologizes and demeans the category of "disability." Part VI reviews some evidentiary questions and implications raised by this examination of the role of medical evidence and concludes that the rules of evidence do not preclude plaintiffs from testifying as to their own disabilities. Finally, Part VII concludes that the continued hegemony of medicine in identifying disability impedes the advancement of civil rights of people with disabilities.

LIMITATIONS AS OPPOSED TO FAIR TREATMENT AND EQUAL OPPORTUNITY 12-21 (2003), available at http://www.ncd.gov/newsroom/publications/pdf/extentoflimitations.pdf [hereinafter NAT'L COUNCIL ON DISABILITY, POLICY BRIEF]. Most of these statutes were enacted, in some part, in advance of the ADA, and several statutes were modeled to some extent on the language of the Rehabilitation Act or amended to parallel the ADA. See id. The statutes may be more or less restrictive in terms of coverage than the federal antidiscrimination laws. See id.; Sande L. Buhai, In The Meantime: State Protection of Disability Civil Rights, 37 LOY. L.A. L. Rev. 1065, 1065 (2004) (arguing that "[d]evelopments in the various states ... will ultimately make federal civil rights protections more effective").

11. There is some debate and disagreement within academic and activist settings regarding the appropriate and acceptable language to use to describe the group of people the statute seeks to protect, such as "people with disabilities" or "disabled people." Both terms have their defenders, and I will use both interchangeably throughout this Article, following the rationale applied by psychologist Joan Ostrove and her coauthor Danette Crawford:

Many disability rights activists believe that the term "people with disabilities" puts the person first without undue focus on their physical (or psychological) condition. Other disabled individuals, particularly in the UK, assert that "disabled person" should be used to highlight the salience of disability oppression. The use of both terms is meant to recognize and support both perspectives.
II. THE ADA, REGULATIONS, AND MODELS OF DISABILITY

The starting point for the evaluation of any claim under the ADA is the question of whether the plaintiff is entitled to protection under the statute as an individual with a "disability." There is no catalog or list of medical diagnoses or conditions that constitute "disabilities" for purposes of the ADA. Rather, the definition includes the following three categories:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

The issue of medical evidence comes into play most clearly in cases brought by individuals seeking to establish disability under the first category of the ADA's definition, which may be referred to as "actual disability" claims. In such cases, one must demonstrate disability in two steps: (1) the presence of a physical or mental impairment (2) that
substantially limits one or more specifically identified major life activities.\textsuperscript{15}

The text of the ADA's definition of disability, quoted above, is silent on the role of medical evidence in the determination of either or both of these two steps for establishing the presence of a qualifying disability. The same is true of the regulations promulgated to guide implementation and enforcement.\textsuperscript{16} However, as discussed in Part III, most federal judges assume, with little discussion or analysis, that most or all ADA claimants have the burden of proving that they are disabled through the use of expert medical evidence.\textsuperscript{17} Such conclusion may derive from the statute's use of the term \textit{impairment} and its association with physical or mental pathology, combined with the individualized assessment of disability required by the implementing regulations and case law.

A. Models of Disability and Impairment

The use of the term "physical or mental impairment" in the ADA's definition of disability merits particular examination when considering the role of medical evidence in ADA claims. The term is derived directly from the definition of disability found in the Rehabilitation Act of 1973, which was the first federal statute to prohibit discrimination on the basis of disability in employment and public services.\textsuperscript{18} There was little, if any, attention given to the term at the time of the enactment of the earlier statute.\textsuperscript{19} However, disability studies theorists and disability activists attach significance to the term \textit{impairment}, particularly as it indicates an inextricable connection between medicine and disability.

British scholar Michael Oliver, in his 1990 essay \textit{The Politics of Disablement}, was one of the first scholars to analyze the specific implications of the terms \textit{impairment} and \textit{disability}.\textsuperscript{20} The term \textit{impairment}, these scholars argue, refers solely to a physical (or mental) condition, a "\textit{description} of the physical body."\textsuperscript{21} Disability, by

\textsuperscript{15} § 12102(2)(A).
\textsuperscript{16} See 29 C.F.R. § 1630 (2007).
\textsuperscript{17} See infra notes 80-95 and accompanying text.
\textsuperscript{18} 29 U.S.C. § 794 (2000). The statute's reach, however, is restricted to recipients of federal funding. \textit{Id.} § 794(a).
\textsuperscript{19} See infra note 32 and accompanying text.
\textsuperscript{21} Mary Crossley, \textit{The Disability Kaleidoscope}, 74 NOTRE DAME L. REV. 621, 700 (1999) (quoting MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE
contrast, stems solely from society's reaction to the impairment, in
terms of physical barriers or discriminatory attitudes. Thus, people
do not have disabilities, they are disabled by others.

This approach to the concept of disability draws a sharp
distinction between, on the one hand, what disability scholars have
dubbed the traditional "medical model" of disability, in which the
"disability" was something contained within the individual and was the
subject of diagnosis, treatment, and rehabilitation, and, on the other
hand, the "social model" of disability, in which the disability is
understood as something externally imposed on the individual. In
creating this dichotomy, disability scholars and activists challenged the
hegemony of concepts of disability derived from medicine and
pathology. As Simi Linton observed:

[T]he medicalization of disability casts human variation as deviance
from the norm, as pathological condition, as deficit, and, significantly,
as an individual burden and personal tragedy. Society, in agreeing to
assign medical meaning to disability, colludes to keep the issue within
the purview of the medical establishment, to keep it a personal matter
and "treat" the condition and the person with the condition rather than

35 (1996)); see Harlan Hahn, Accommodations and the ADA: Unreasonable Bias or Biased
Reasoning?, in Backlash Against the ADA: Reinterpreting Disability Rights 26, 28
(Linda Hamilton Krieger ed., 2003) (discussing the impact of the "traditional model of
impairments" on the "subordination of disabled individuals"). Inclusion of the adjectives
"physical or mental" serves to distinguish such impairments from "social" disabilities such as
poverty, race, gender, and other characteristics. See id. at 26-27.

22. See Lianne C. Knych, Note, Assessing the Application of McDonnell Douglas to
Employment Discrimination Claims Brought Under the Americans with Disabilities Act, 79
Minn. L. Rev. 1515, 1518-20 (1995) (arguing that society lumps all disabled people into one
category regardless of their ability and classifies people as either able-bodied or disabled).

(stating that the medical model of disability views those with disabilities as "sick and in need
of a cure," while the social or human rights model of disability places the responsibility on
society to eliminate the unequal treatment of disabled people).

24. See, e.g., Martin Sullivan, Subjected Bodies: Paraplegia, Rehabilitation, and the
Politics of Movement, in Foucault and the Government of Disability 27-42 (Shelley
Tremain ed., 2005). Sullivan describes how the use of "medical power" transformed patients
into "subjects." Id. He goes on to note, "The medical judges (the priests and priestesses of
secular society), having assumed the right to absolve or condemn [through diagnosis and
other forms of dividing practices], exercise immense power over people's bodies, their health,
and their lives." Id. at 30; see Harlan Lane, The Mask of Benevolence: Disabling the
Deaf Community 24-26 (1992) (describing the "medicalization" of deafness from
"difference into deviance" by medical professionals).
“treating” the social processes and policies that constrict disabled people’s lives.25

A second alternative to the medical model is the minority group model,26 also referred to as the civil rights model,27 which is distinct from the social model in its focus on the notion that there is (or should be) a core set of rights to be free from discrimination based upon a disability.28

Each of these alternatives compels a reexamination of what we assume renders a person “disabled.” For example, a person who uses a wheelchair rather than her legs for mobility due to the residual effects of rheumatoid arthritis, is “disabled” under the social model only to the extent that buildings contain stairs, revolving doors, and counters that are more than thirty-four inches off the ground.29 If ramps and other features of universal design were ubiquitous, her inability to use her legs for mobility would have the same impact on her daily life as an

25. LINTON, supra note 5, at 11; see Samuel R. Bagenstos, The Americans with Disabilities Act as Risk Regulation, 101 COLUM. L. REV. 1479, 1486 (2001) (“One of the most strongly held tenets of disability rights ideology is the critique of professionalism. To many disability rights advocates, ‘expert’ professionals are more threat than help.”).

26. See Harlan Hahn, Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?, 21 BERKELEY J. EMP. & LAB. L. 166, 178-79 (2000) (stating that the minority group model contends that Americans with disabilities are entitled to the legal and constitutional protections that other disadvantaged groups receive); Harlan Hahn, Introduction: Disability Policy and the Problem of Discrimination, 28 AM. BEHAV. SCI. 293, 294-99 (1985) (explaining the minority group model); Harlan Hahn, The Potential Impact of Disability Studies on Political Science (As Well as Vice-Versa), 21 POLY STUD. J. 740, 741 (1993) (stating that the minority group model differs from the traditional medical and social models of disability).


28. See Claudia Center & Andrew I. Imparato, ‘Redefining “Disability” Discrimination: A Proposal to Restore Civil Rights Protections for All Workers, 14 STAN. L. & POL’Y REV 321, 324-31 (2003) (demonstrating that the civil rights model includes a role of the environment in disability discrimination); Rovner, Disability, supra note 27, at 1054 (arguing that the civil rights model is an outgrowth of the social model); Laura L. Rovner, Perpetuating Stigma: Client Identity in Disability Rights Litigation, 2001 UTAH L. REV. 247, 272 [hereinafter Rovner, Perpetuating Stigma] (stating that with the final revision of the Rehabilitation Act of 1973, Congress moved towards a civil rights model of disability where the obstacles facing disabled people stem from both their physical limitations as well as the limitations imposed on them by society).

inability to juggle or to raise one eyebrow, which are not generally regarded as disabilities. 

While the medical and social models of disability each represent oversimplified descriptions of attitudes and experiences, contrasting the two approaches reveals important considerations regarding the role of medical concepts in the enforcement of a civil rights statute such as the ADA. 

There was no examination of these theoretical models of disability at the time of the 1973 Rehabilitation Act's enactment (indeed, there was little, if any input, from disabled people in the drafting of the statute). The three-prong definition of disability from that earlier statute was included, in nearly identical form, in the ADA seventeen years later. The decision was not based upon a conclusion that the specific text of the provision was the best vehicle for advancing the civil rights of people with disabilities—in fact, many disability rights advocates felt that the Rehabilitation Act language, with its focus on impairment and limitations, held too closely to the medical model. However, federal courts had adopted a broad view of

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30. See generallyCtr. for Universal Design, N.C. State Univ. et al., Universal Design Education Online, http://www.udeducation.org/learn/index.asp (last visited Nov. 10, 2007) ("Universal Design is an approach to the design of all products and environments to be usable by everyone, to the greatest extent possible, regardless of age, ability, or situation.").

31. More recently, many disability studies scholars have questioned the utility of strict compliance with the social model, particularly as it has been explained and used by British scholars. For example, Tom Shakespeare, a British disability studies scholar who once, as he describes it, "was a critical friend of the social model," has more recently argued that it is now time to abandon the model. TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS 5 (2006). Some scholars criticize the social model for "neglect[ing] the role of impairment" in the lives of disabled people. Id. at 38-39 (citing the work of Sally French, Liz Crow, and Carol Thomas); see OLIVER, supra note 21, at 31, 37-41 ("Alongside th[e] proliferation of different models [of disability,] disabled people themselves have begun to question the explanatory power of the social model. I myself questioned the way the social model was becoming a straight jacket for our experience . . . .").


34. See, e.g., Center & Imparato, supra note 28, at 333 (noting that, when the ADA was initially proposed in 1988, the National Council on the Handicapped, later renamed the National Council on Disability, "asserted that the [Rehabilitation Act] approach was problematic because it forced a plaintiff to identify as an individual with a disability according to a medical model that emphasized the nature and scope of their 'impairments' and 'limitations''); NAT'L COUNCIL ON DISABILITY, POLICY BRIEF, supra note 10, at 6 (stating
WHO SAYS YOU'RE DISABLED?

disability when applying the Rehabilitation Act, and advocates had every reason to expect that the identical text would receive the same treatment under the ADA. The introduction of new definitional language, ADA proponents feared, could result in the defeat of the statute or lead to a more restrictive view of disability.

Thus, there was little, if any, discussion of the extent to which the ADA or the Rehabilitation Act either followed or rejected the medical model, or, conversely, adopted an alternative view such as the social or civil rights model. Indeed, scholars today have not reached a consensus on the extent to which the ADA reflects one model or the other. These differing opinions likely result from the fact that different models seem to be reflected in different parts of the statute. The requirements for barrier removal in existing buildings, accessible design in new construction, and reasonable accommodation, along with notions of perceived disability, all reflect aspects of the social or political rights views of disability discrimination. However, the definition of disability itself, with its individualized focus on impairment, is seemingly tied to the medical model.

In its 2004 report, Righting the ADA, the National Council on Disability, the staff of which were among the drafters of the ADA, asserted that the “ADA embodies a social concept of discrimination”

that the National Council on Disability’s recommendation to Congress regarding disability legislation rejected the approach of Section 504 of the Rehabilitation Act because of its emphasis on the medical model of disability).


36. See Feldblum, supra note 33, at 91-92, 128-29.

37. Compare Diller, supra note 27, at 72 (“The ADA’s embrace of the civil rights model represents a break with the tradition of viewing the problems faced by people with disabilities as being principally medical in nature.”), with Rovner, Perpetuating Stigma, supra note 28, at 273 (“While the new definition represents significant progress toward conceiving disability as a civil rights construct; an unpacking of its terms reveals remnants of the medical and social pathology models lurking just below the surface.”).

38. See Samuel R. Bagenstos, Subordination, Stigma, and “Disability”, 86 Va. L. Rev. 397, 433 (2000); Rovner, Disability, supra note 27, at 1044 (noting that by “including the reasonable accommodation mandate,” Congress “embraced and endorsed the socio-political model of disability”)

39. See O'BRIEN, supra note 12, at 6-7 (arguing that modern disability policy, including the ADA, reflects the “whole man theory” of disability, advanced by physicians in the field of rehabilitative medicine, which posits that “disabled people could, by striving, achieve normalcy”).

while, at the same time, acknowledging that the Rehabilitation Act definition of disability (which is the same as that found in the ADA) "forced people to identify as a person with a disability according to a medical model that emphasized the nature and scope of their 'impairments' and 'limitations.'" The legal concept of "impairment" has its origins in disability determinations by physicians who were assessing a disability applicant's ability to work. The persistence of the term "impairment" created a tension in the ADA between notions of disability as being, on the one hand, a severe medical condition precluding employment, and, on the other, a disadvantage stemming largely from a socially imposed set of barriers, both physical and attitudinal.

Disability rights advocates have argued in the wake of pro-defendant rulings in ADA cases that the "domination of the medical definition" of disability in legal contexts serves as a major impediment to shifting notions of disability from a medical to a social or political category. While a requirement of medical proof does not necessarily follow from the presence of the term "impairment," the importation of the term to the ADA likely played into a long-standing series of assumptions that led to judges’ improper requirement of such evidence to prove disability. Under a traditional medical-based understanding of disability, as long as the source of the problem of a person’s

acknowledges that such a model is not explicit in the statute’s language, and it proposes amending the legislative findings supporting the statute to reflect such model. See id.

41. NAT'L COUNCIL ON DISABILITY, POLICY BRIEF, supra note 10, at 6.

42. DEBORAH A. STONE, THE DISABLED STATE 109-11 (1984). Stone states that the evolution of the means of evaluating impairment as a physician-based process was the result of the medical establishment’s concerted effort to ensure that disability determination was their province, rather than that of agency bureaucrats. Id. at 111-13.

43. See LINTON, supra note 5, at 11 (stating that society’s continued emphasis on the medical model of disability keeps the issue within the medical community and treats the individual with the condition, instead of challenging the social policies that restrict disabled people); Crossley, supra note 21, at 668 (“A closer inspection of how agencies and courts approach the threshold concept of impairment... reveals that, by and large, the application of the widely acclaimed civil rights statute reflects a medical model understanding of disability.”); Rovner, Disability, supra note 27, at 1044-45 (“Over the past decade... the success of the disability community in infusing the socio-political model of disability into federal law has begun to be eroded by judicial decisions interpreting the ADA that appear to be grounded in—and espousing—the medical model of disability.”); cf Margaret A. Winzer, Disability and Society Before the Eighteenth Century: Dread and Despair, in THE DISABILITY STUDIES READER 75, 84 (Lennard J. Davis ed., 1997) (“Throughout history, the medical aspects of disabilities have been paramount; other concerns relating to disability have been secondary, where they have been considered at all.”).

limitations is regarded as residing altogether with the person's body (or mind) as a defective, or abnormal, or pathological feature, there is no need to look beyond the body itself for a solution. Such a view suggests that the best way to overcome the limitations is to diagnose, treat, and, if possible, cure the pathology. Where such efforts to address the pathology fail short, they are nonetheless the extent of what can be done, and there is no need to broaden the inquiry of the source of limitations beyond the disabled person herself to any potential external causes. It follows, then, that the medical-based approach to disability would assume that medical providers serve as the primary source of information regarding limitations experienced by the individual. However, such an assumption is based not upon a reasonable reading of the statute's text but rather on precisely the notions about disability that lead to the disability-based discrimination that disability scholars sought to dispel.

B. The Requirement of "Individualized Inquiry" and Corroborating Evidence Under Agency Regulations and Interpretive Commentary

As noted above, the ADA itself provides no guidance on what evidence is needed to meet the definition of disability. Specifically, the statute does not indicate to what extent, if any, medical evidence is an indispensable requirement to establishing either the presence of

45. See Katharina Heyer, A Disability Lens on Sociological Research: Reading Rights of Inclusion from a Disability Studies Perspective, 32 LAW & SOC. INQUIRY 261, 265 (2007) (reviewing DAVID M. ENGEL & FRANK W. MONGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORY OF AMERICANS WITH DISABILITIES (2003)) (stating that under the medical model of disability, the person's mental and physical impairments are responsible for the disability).

46. See Paula E. Berg, Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law, 18 YALE L. & POL'Y REV. 1, 8 (1999) (“Since [under the prevailing biomedical model] disability is understood as a scientific fact, the entire domain—from determining its existence to prescribing its management—becomes the exclusive province of medical professionals.”).

47. By contrast, a few state statutes do contain specific references to a medical evidence requirement. For example, Kentucky's statute, apparently the most restrictive in this regard, defines physical disability as: “the physical condition of a person whether congenital or acquired, which constitutes a substantial disability to that person and is demonstrable by medically accepted clinical or laboratory diagnostic techniques.” KY. REV. STAT. ANN. § 207.130(2) (LexisNexis 2007) (emphasis added). Other states' statutes provide a plaintiff with a series of means to prove disability, one of which is through the results of medical tests. The New York statute's definition of disability states: "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . ." N.Y. EXEC. LAW § 292(21)
impairment or the substantial limitation on one or more major life activities.\textsuperscript{48} The legislative history is similarly silent regarding what proof would be required to prove disability or whether there would be a need for corroborating or medical evidence for meeting the definition of disability.\textsuperscript{49}

With little in the statute to guide litigants and courts on the application of the definition of disability, much of the analysis in litigation has focused on the agency interpretive regulations, most notably those promulgated in 1991 by the Equal Employment Opportunity Commission (EEOC) to apply to Title I of the ADA, which prohibits discrimination in employment.\textsuperscript{50} While these regulations say little regarding the role of medical evidence in evaluating claims, certain language in the regulations ultimately served as a basis for many courts’ requirement of medical evidence.\textsuperscript{51} Most significant is the EEOC implementing regulations’ emphasis on individualized inquiry on the issue of disability. Specifically, the regulations define the term \textit{substantially limits} in the definition of disability\textsuperscript{52} as follows:

(McKinney 2005 & Supp. 2007) (emphasis added). New Jersey’s definition of \textit{disability} includes: “any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions \textit{or} is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.” N.J. STAT. ANN. § 10:5-5(q) (West 2007) (emphasis added). Notwithstanding the use of the disjunctive “\textit{or},” the case law of New York and New Jersey is generally regarded as imposing a requirement of medical evidence to prove disability. See NAT’L COUNCIL ON DISABILITY, POLICY BRIEF, supra note 10, at 19, 32 n.43, 33 n.45.

48. The regulations and cases set forth a clearer role for medical evidence in “direct threat” affirmative defenses, an area that is outside the scope of this Article. Briefly stated, the ADA permits employers’ job qualifications to “include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace.” 29 C.F.R. § 1630.15(b)(2) (2007); accord 42 U.S.C. § 12113(b) (2000); see Chevron U.S.A. Inc. v. Echazabal, 556 U.S. 73, 86 (2002). A requirement of medical evidence to support such a defense is appropriate since the operation of the defense does not turn on facts inherent to the plaintiff and her life but upon questions of contagion and risk assessment that are properly within the sphere of expert testimony. See Tory L. Lucas, \textit{Disabling Complexity: The Americans with Disabilities Act of 1990 and Its Interaction with Other Federal Laws}, 38 CREIGHTON L. REV. 871, 898 (2005).

49. See Feldblum, supra note 33, at 126-34.

50. See 29 C.F.R. §§ 1630.1-1630.16 (2007); Susan E. Dallas, Sutton: \textit{Use of Mitigating Measures to Determine Disability Under the ADA}, COLO. L. AW., Mar. 1999, at 59, 59 (stating that the courts often look to the EEOC’s interpretive guidance because the ADA does not define “physical or mental impairment,” “substantially limits,” or “major life activity”). The statutory authority for the promulgation of interpretive regulations by the EEOC is found at 42 U.S.C. § 12116.


52. 42 U.S.C. § 12102(2).
1. The term *substantially limits* means:
   i. Unable to perform a major life activity that the average person in the general population can perform; or
   ii. Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

2. The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
   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.

Professor Chai Feldblum, one of the advocates centrally involved in the drafting and passage of the ADA, has observed: "[T]he EEOC regulations introduced, for the first time in disability jurisprudence, the concept that an individualized assessment would be required, in most cases, to determine whether a person had a disability under the ADA." This, Feldblum argues, is at odds with traditional notions of a civil rights classification, which would "not necessarily require a searching, individualized assessment of whether a person is really a 'handicapped individual,' any more than Title VII requires a searching, individualized assessment of whether a plaintiff is really a woman or an African-American." However, advocates were not especially concerned with the enactment of these regulations when they were initially promulgated because court decisions applying the Rehabilitation Act had rarely engaged in extensive analysis of the definition of disability and had employed a broad view of the statute's scope.

The ADA regulations suggest, however, that specific information is required regarding the impact of the impairment on the plaintiff, along with comparative evidence regarding how that impact compares with limitations experienced by the average person in the general population. This language leaves little question that a diagnosis alone

54. Feldblum, supra note 33, at 135.
55. Id. at 111.
56. Id. at 137.
57. See 29 C.F.R. § 1630.2(f) (2007). A few courts have interpreted the reference in the EEOC regulations to an individual's relative limitations as compared with the "general population" to require expert medical testimony on not only the plaintiff's condition, but that of others generally. See, e.g., Rieger v. Orilor, Inc., 427 F. Supp. 2d 105, 118 (D. Conn. 2006)
will be insufficient to establish disability, and signals that there are several components of proof required to establish that an individual meets the definition. The EEOC's "Interpretive Guidance" to the Title I regulations notes:

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The 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. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis. Courts have followed this guidance and consistently applied the case-by-case approach to disability evaluations. Thus, although the nearly

(finding that the plaintiff failed to produce evidence that her difficulty in sleeping was greater than that of the general population); Duncan v. Convergys Corp., No. 1:03CV35DAK, 2004 WL 2358104, at *5 (D. Utah Oct. 13, 2004) (stating that the plaintiff failed to show that her problems interacting with others were any worse than those of the average person and so concluding that no substantially limiting impairment existed). However, most courts addressing the issue specifically have concluded that the reference to comparative limitations in major life activities in the EEOC regulations does not necessarily require the use of expert testimony. See, e.g., EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 802 (7th Cir. 2005) (holding that because no comparative evidence is needed to support the plaintiff's claim, jurors could evaluate testimony based on their "own life experience[s]"); Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1174 (10th Cir. 1996) (stating that although comparative evidence could be helpful for fact finder, it is not required where a plaintiff with multiple sclerosis provided sufficient evidence that she could not lift items in excess of fifteen pounds); Crutcher v. Mobile Hous. Bd., No. Civ.A.04-0499-WS-M, 2005 WL 2675207, at *10-11 (S.D. Ala. Oct. 20, 2005) (finding that no comparative evidence is needed to demonstrate substantial limitations arising from the plaintiff's inability to use an arm); EEOC v. Yellow Freight Sys., Inc., No. 98civ.2270(THK), 2002 WL 31011859, at *15-16 (S.D.N.Y. Sept. 9, 2002) (holding that there is no "rigid evidentiary requirement" of comparative evidence, and that "[c]ommon sense and life experiences will permit finders of fact to determine whether someone who cannot sit for more than this period of time is significantly restricted as compared to the average person"); Witt v. Nw. Aluminum Co., 177 F. Supp. 2d 1127, 1131 (D. Or. 2001) (noting that no comparative evidence is needed to demonstrate substantial limitation in activity of walking).
identical definition of disability is used under the ADA as was used in the Rehabilitation Act, courts approach the question of coverage much differently.\footnote{For a general discussion, see Feldblum, supra note 33, at 139-60. Feldblum notes that “[i]n cases brought under the Rehabilitation Act, courts rarely considered what it meant for an impairment to substantially limit a major life activity, and rarely considered what made a life activity sufficiently major.” Id. at 147. She suspects that part of the reason that the issue of whether a plaintiff is disabled became a central issue in ADA litigation is due to the large number of seminars for employers and other potential defendants that focused on each aspect of the statute. Id. at 138-39.}

The United States Supreme Court confirmed the appropriateness of the individualized inquiry in \textit{Albertson's, Inc. v. Kirkingburg}, where the Court chastised the United States Court of Appeals for the Ninth Circuit for being “too quick to find a disability” in the case of a plaintiff who had “20/200 vision in his left eye and monocular vision in effect.”\footnote{527 U.S. 555, 559, 564 (1999).} The Court wrote: “[T]he Court of Appeals did not pay much heed to the statutory obligation to determine the existence of disabilities on a case-by-case basis. The [ADA] expresses that mandate clearly by defining ‘disability’ ‘with respect to an individual,’ and in terms of the impact of an impairment on ‘such individual.’”\footnote{Id at 566 (citations omitted).} Specifically, this means that plaintiffs must “prove a disability by offering evidence that the extent of the limitation in terms of their own experience . . . is substantial.”\footnote{Id at 567.}

This suggests that courts must engage in a searching analysis of whether a person who self-identifies as “disabled,” in fact meets the definition of disabled under the ADA.\footnote{For an insightful critique of this “individualized” inquiry approach by Professor Wendy E. Parmet, see \textit{Individual Rights and Class Discrimination: The Fallacy of an Individualized Determination of Disability}, 9 \textit{Temp. Pol. & Civ. Rts. L. Rev.} 283, 285 (2000). She notes that the notion of an “individualized determination of disability” may initially appear “to be consistent with the ADA’s goals” of protecting individual rights. Id. at 284. However, as she demonstrates, this approach, which requires a retrospective determination of whether the plaintiff is “disabled,” in fact precludes the ADA from operating as a measure to prevent discrimination and to improve access. Id. at 297. She also notes that many of the problems of such approach “derive not from the fact of an individualized analysis but from the rigor with which it is applied.” Id. at 298. The imposition of a medical evidence requirement discussed herein serves as one example of such unwarranted rigor.} The decision makes no reference, however, to whether medical evidence is required to meet the definition.\footnote{The Supreme Court has never weighed in on whether or to what extent medical evidence is required to establish disability. In \textit{Bragdon v. Abbott}, 524 U.S. 624, 630-31 (1998), decided the year before \textit{Albertson's}, the Court held that the HIV-positive plaintiff had established that she was disabled under the first prong of the ADA’s definition of disability.}

\footnote{60. For a general discussion, see Feldblum, supra note 33, at 139-60. Feldblum notes that “[i]n cases brought under the Rehabilitation Act, courts rarely considered what it meant for an impairment to substantially limit a major life activity, and rarely considered what made a life activity sufficiently major.” Id. at 147. She suspects that part of the reason that the issue of whether a plaintiff is disabled became a central issue in ADA litigation is due to the large number of seminars for employers and other potential defendants that focused on each aspect of the statute. Id. at 138-39.}

\footnote{61. 527 U.S. 555, 559, 564 (1999).}

\footnote{62. Id at 566 (citations omitted).}

\footnote{63. Id at 567.}

\footnote{64. For an insightful critique of this “individualized” inquiry approach by Professor Wendy E. Parmet, see \textit{Individual Rights and Class Discrimination: The Fallacy of an Individualized Determination of Disability}, 9 \textit{Temp. Pol. & Civ. Rts. L. Rev.} 283, 285 (2000). She notes that the notion of an “individualized determination of disability” may initially appear “to be consistent with the ADA’s goals” of protecting individual rights. Id. at 284. However, as she demonstrates, this approach, which requires a retrospective determination of whether the plaintiff is “disabled,” in fact precludes the ADA from operating as a measure to prevent discrimination and to improve access. Id. at 297. She also notes that many of the problems of such approach “derive not from the fact of an individualized analysis but from the rigor with which it is applied.” Id. at 298. The imposition of a medical evidence requirement discussed herein serves as one example of such unwarranted rigor.}

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In interpretive materials, the EEOC has not taken a clear or consistent approach to the role of medical evidence in such individualized inquiries. One of the few references to such evidence in the postenactment commentary on implementation of the ADA is contained in the EEOC's 1997 EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities. In discussing "substantial limitation" of a major life activity, the Commission notes:

Relevant evidence for EEOC investigators includes descriptions of an individual's typical level of functioning at home, at work, and in other settings, as well as evidence showing that the individual's functional limitations are linked to his/her impairment. Expert testimony about substantial limitation is not necessarily required. Credible testimony from the individual with a disability and his/her family members, friends, or coworkers may suffice.

This language unequivocally states that medical evidence is not required per se. By contrast, however, in the part discussing the Title I (employment) definition of the term "disability" contained in the Commission's ADA Compliance Manual, a publication directed at EEOC investigators, the EEOC suggests that medical documentation may be necessary as part of an investigation if the claimed disability is not "obvious" to the investigator, in which case the investigator is to take steps to obtain medical documentation. In a footnote, the agency reminds investigators that medical documentation may also be necessary to determine if the impairment results in a substantial limitation of one or more major life activities. Medical evidence may

There was no dispute that the plaintiff was in fact HIV-positive; rather, the controversy focused on whether the HIV infection resulted in a substantial limitation of a major life activity. Id. at 641. It appears from the Court's decision that while the record was replete with epidemiological research and other medical literature about the course and effects of the HIV infection (which was supplemented by several amicus curiae briefs from various medical organizations), there was no reference to medical evidence from the plaintiff's own physician. Id. at 633-41. The plaintiff offered evidence, through her own statements, that "HIV infection placed a substantial limitation on her ability to reproduce and to bear children." Id. at 637.

67. Id. (emphasis added).
68. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 902(b) (2001).
69. A diagnosis is relevant to determining whether a charging party has an impairment. It is important to remember, however, that a diagnosis may be insufficient to
also be viewed as a good starting point for evaluating the duration and impact of impairment.\(^7\)

While courts have relied heavily on the EEOC's interpretation of the ADA when adopting the case-by-case individualized inquiry described in the EEOC regulations and guidance, no courts have referred to the above-quoted passages in their analyses of the need (or lack thereof) to produce medical documentation to establish a prima facie case.\(^7\) Nonetheless, as discussed below, the language used by courts, particularly with respect to notions of "corroboration" and "obviousness," parallels the guidance language in the regulations and manual.\(^7\)

### III. JUDGES’ IMPOSITION OF A MEDICAL EVIDENCE REQUIREMENT IN DISABILITY DETERMINATIONS UNDER THE ADA

The reported decisions applying the ADA have overwhelmingly favored defendants, especially in the employment context.\(^7\) Most notably, and unexpectedly, a substantial number of plaintiffs' claims are found to fall short of a prima facie case at the summary judgment stage for failing to establish that the plaintiff is a person with a

\[^{70}\text{id at 902.2(h) n.6; see id. § 902.4(c).}\]

\[^{71}\text{See id. § 902.4(d).}\]

\[^{71.1}\text{See, e.g., Marinelli v. City of Erie, 216 F.3d 354, 360-61 (3d Cir. 2000) (citing the EEOC's interpretation, but ultimately holding that the plaintiff's ADA claim failed because he did not produce any medical evidence of his disability).}\]

\[^{72}\text{For example, in the EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, the use of the word "and" between "the individual with a disability" and the other categories of potential sources of information suggests that the agency contemplated the need for some kind of corroborating evidence of disability, but not necessarily medical evidence. EEOC Enforcement Guidance, supra note 66, at 4.}\]

Several judges specifically note a failure to include expert medical evidence in the summary judgment record as being the primary deficiency in the evidence offered by a plaintiff to demonstrate the existence of a genuine issue of material fact.\footnote{74} Court opinions follow several different approaches regarding the role of medical evidence in meeting the definition of disability under the ADA, either with respect to showing the presence of an impairment or demonstrating that such impairment substantially limits a major life activity. While judges apply a variety of approaches and rationales, the results can be divided into three broad categories. First, led primarily by the courts under the United States Court of Appeals for the Second Circuit, one group of courts imposes a requirement of expert medical evidence to establish disability, with no apparent exceptions.\footnote{76} A second group takes a case-by-case approach to the requirement, basing the need for medical evidence upon the nature of the claimed disability and whether such condition is obvious and presumably within the understanding of the jury.\footnote{77} The third group, comprised of the smallest number of courts, states unequivocally that expert medical evidence is \textit{not} required to establish a prima facie claim under the ADA.\footnote{78} Thus, the dominant trend in the decisions is to assign a central and indispensable role to medical professionals in establishing disability for purposes of the ADA.

\footnote{74. See Berg, \textit{supra} note 46, at 2-3 (stating that the majority of ADA cases deal with the issue of whether the plaintiff is disabled and most conclude that they are not); Feldblum, \textit{supra} note 33, at 93.}

\footnote{75. Implicit in these holdings is that the medical evidence offered by a plaintiff in support of her claim of disability would need to satisfy the requirements of Federal Rule of Evidence 702 as such evidence would be based upon "scientific, technical or other specialized knowledge," even if the evidence is offered through a plaintiff's treating physician. \textit{Fed. R. Evid.} 701-02, \textit{see, e.g.,} Musser v. Gentiva Health Servs., 356 F.3d 751, 756 n.2 (7th Cir. 2004) (noting that treating physicians are not exempt from the "expert" testimony requirements of Rule 702). This requirement would therefore trigger the plaintiff's obligations under the Federal Rules of Civil Procedure regarding the designation of expert witnesses expected to testify at trial, and the furnishing of qualifications and other materials during the discovery period. \textit{See Fed. R. Civ. P. 26(a)(2); Musser, 356 F.3d 756-57 (holding that a plaintiff must designate her treating physician as a potential expert witness during discovery if such physician's testimony will be offered at trial).}

\footnote{76. See \textit{infra} notes 79-95 and accompanying text.}

\footnote{77. See \textit{infra} notes 96-107 and accompanying text.}

\footnote{78. See \textit{infra} notes 108-125 and accompanying text.}
A. Courts Requiring Expert Medical Evidence To Establish Disability

The first line of cases holds that medical evidence is always required to establish disability under the ADA and that absent such evidence in a summary judgment or trial record, a plaintiff necessarily fails to establish a prima facie case of disability. Based upon these cases, even in the absence of any evidence generated by a defendant controverting a plaintiff’s claims of disability, a court can nonetheless enter judgment for a defendant if it concludes that the plaintiff has failed to make such a prima facie showing.\footnote{79} This line of cases originated with a Rehabilitation Act case decided by the Second Circuit, \textit{Heilweil v. Mount Sinai Hospital}, shortly after the effective date of the ADA.\footnote{80} The court affirmed the entry of summary judgment for the defendant-employer and noted briefly that among other inadequacies in the plaintiff’s record evidence, there was an absence of medical evidence to support her claim that she could not work in poorly vented areas as a result of her asthma.\footnote{81}

This opinion led to the rigid imposition of the requirement that medical evidence is invariably required to establish disability under the ADA in the district courts of the Second Circuit. For example, in \textit{Douglas v. Victor Capital Group}, the United States District Court for the Southern District of New York granted the defendant-employer’s motion for summary judgment on a plaintiff’s claim that he was terminated from employment after his employer discovered that he had Legg-Perthes disease, spinal stenosis, and anxiety.\footnote{82} The primary basis for the court’s decision (as articulated by the magistrate judge in a recommended decision ultimately adopted by the court) was the plaintiff’s failure to offer admissible medical evidence to support his claim of disability.\footnote{83} The plaintiff submitted an affidavit and deposition testimony describing his conditions and their impact on his ability to walk.\footnote{84} The only medical evidence submitted by the plaintiff consisted

\footnote{80} 32 F.3d 718 (2d Cir. 1994).
\footnote{81} Id at 723.
\footnote{82} 21 F. Supp. 2d at 380-81 (affirming recommended decision of magistrate judge).
\footnote{83} Id. at 383-84.
\footnote{84} Id. The magistrate judge’s recommended decision describes the sworn evidence offered by the plaintiff in support of his claim that he has substantial limitation in the major life activity of walking as follows:

According to Douglas, his medical conditions affect his walking and standing:
of two unserved letters from his physicians, which were excluded from the record as inadmissible hearsay. The court reasoned, relying upon several other cases, that "Douglas'[s] testimony as to the (alleged) limits on his ability to walk, without supporting medical testimony, simply is not sufficient to establish his prima facie case under the ADA." Stating it another way, and making it unequivocally clear that medical evidence is an indispensable requirement for establishing a prima facie case, the magistrate judge stated: "Accordingly, I recommend that defendants' summary judgment motion be granted for Douglas'[s] failure to make out a prima facie case, that is, his failure to submit any admissible medical evidence to demonstrate that his impairment substantially limits a major life activity."

The courts following this line of cases did not analyze the issue of requiring medical evidence until the 2003 opinion of the Southern District of New York in *Sussle v. Sirina Protection Systems Corp.* The plaintiff contended that he was substantially limited by Hepatitis C and the medication he took to treat it in the major life activities of

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I can't walk that far. I can't walk a half a block, a block at any time without stopping for five, ten minutes, leaning to rest and then continue. For that reason, he drives to work. Douglas expanded on this in his affidavit, under the heading "My Physical Limitations and Restrictions":

1. As a result of the above conditions, I have the following limitations and restrictions throughout all of my daily activities:
   a) I cannot walk more than one-half a street block without having to stop and wait for the pain or discomfort to subside.
   b) I cannot run and I cannot lift anything.
   c) I cannot put on my socks or tie my shoes. My wife does this for me.
   d) I cannot function without substantial daily medication. Among many drugs, I presently take three percocets per day for pain.
   e) I cannot attend any sporting event for I cannot sit on hard chairs or benches. I require special chairs and can endure only a limited sitting time.
   f) I cannot walk anywhere without a cane to assist me. I own 15 canes.
   g) I use crutches more frequently as the years go by, and now perhaps three times per month. I own 3 sets of crutches.
   h) In addition to a cane, I walk with a decided limp, which is apparent to anyone who looks at me.

*Id.* at 383 (internal citations omitted).

The court also noted apparently contradictory deposition testimony regarding the extent of plaintiff's limitations. *Id.* However, such contradictions bear on the plaintiff's credibility, not on whether there is a genuine issue of material fact regarding the extent of his disability.

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85. *Id.* at 383-84. The court gave the plaintiff a deadline to submit admissible medical documentation in support of his claim, but he failed to do so. *Id.* at 381, 384 n.4.

86. *Id.* at 392.

87. *Id.* at 393.

reproduction, sexual relations, walking, concentrating, and climbing stairs. In support of his assertion, he submitted an affidavit and deposition testimony describing "various limitations which he attributed to Hepatitis C" and the prescribed treatment.

The court described the plaintiff's affidavit as containing "descriptions [that] were based wholly on his personal characterizations of those limitations," and that he offered no medical evidence to "substantiate the extent of his limitations." The court noted the long line of cases in the district courts of the Second Circuit requiring medical evidence and concluded: "These cases persuade us that where the Plaintiff relies solely on his own testimony and fails 'to offer any medical evidence substantiating the specific limitations to which he claims he is subject due to his condition,' he cannot establish that he is disabled within the meaning of the ADA." "[T]o allow otherwise," the court reasoned, "would ensure that a plaintiff could defeat a motion for summary judgment on the basis of conjecture or surmise." A significant number of cases in other jurisdictions follow the Second Circuit approach, accounting for many of the ADA claims that were

89. Id. at 301. In that case, there was no issue regarding the showing of an impairment for the first step of the analysis; the court noted that it was well-settled in other cases that Hepatitis C was an impairment for purposes of the ADA, and the defendants did not dispute that finding. Id. at 297.

90. Id. at 301.

91. Id.

92. Id. at 302. The court observed, "[d]istrict courts in the Second Circuit have repeatedly held that a plaintiff's personal testimony which describes the alleged limits that affect a major life activity, 'without supporting medical testimony, simply is not sufficient to establish his prima facie case under the ADA.'" Id. at 301 (quoting Douglas, 21 F. Supp. 2d at 392).

93. Id. at 303.

halted at the summary judgment stage for failing to meet the statutory
definition of disability.\textsuperscript{55}

\textbf{B. Courts Requiring Medical Evidence in Some, but Not All, Cases}

A second line of cases holds that expert medical evidence is
sometimes needed to establish a prima facie case of disability, and that
the necessity depends upon the type of disability claimed and whether
it is found by the court to be within the comprehension of the average
lay juror.\textsuperscript{56} In \textit{Katz v. City Metal Co.}, the United States Court of
Appeals for the First Circuit touched on the issue of the role of medical

\textsuperscript{55} A small group of cases \textit{purports} not to impose a strict requirement of producing
medical evidence but, nonetheless, weighs the absence of such evidence heavily when
granting summary judgment for a defendant, effectively resulting in the imposition of such
requirement. Such courts reason that a plaintiff's failure to produce medical evidence can
"cut against" a claim of disability, but do not rule against a plaintiff on that basis alone, as
done expressly by the courts following the Second Circuit approach discussed above. For
example, in \textit{Lakota v. Sonoco Products Co.}, the United States District Court for the District of
Massachusetts ruled that a plaintiff's failure to present medical evidence to show the
existence of the claimed impairment (deep vein thrombosis) was only "a factor weighing
against his claim." No. Civ.A. 00-30219-FH, 2002 WL 596211, at *3 (D. Mass. Apr. 4,
2002); \textit{see also} \textit{Dom v. Potter}, 191 F. Supp. 2d 612, 623 (W.D. Pa. 2002) (noting that the lack
of medical evidence in support of plaintiff's claims was "especially damaging ... given the
other weaknesses in plaintiff's claim of disability").

\textsuperscript{56} This approach is considered by some courts to be the "majority" rule. Marinelli
\textit{v. City of Erie}, 216 F.3d 354, 360 (3d Cir. 2000) (referring to the "off-cited" discussion of the
301 F. Supp. 2d 431, 444 (M.D.N.C. 2004) (stating that the failure to produce medical
evidence of a disability is not necessarily fatal to a plaintiff's claim of disability under the
ADA). However, that position appears to be held by the Second Circuit, based upon this
Author's survey and compilation of cases, for which a case chart is on file with the Author.
WHO SAYS YOU'RE DISABLED?  

2007

In that case, the plaintiff alleged that he was fired from his job as a result of a heart attack and subsequent complications. After the plaintiff's physician declined to appear at trial on the scheduled date, the trial court denied the plaintiff's requests to offer the testimony in rebuttal or to continue the trial, and later granted the defendant's motion for judgment as a matter of law.

On appeal, the panel noted that while medical evidence was not required to demonstrate that the plaintiff had an impairment on the facts below, such evidence was required to establish that the plaintiff was substantially limited in a major life activity from such impairment. The court cautioned: "There is certainly no general rule that medical testimony is always necessary to establish disability." There may be "[s]ome long-term impairments [that] would be obvious to a lay jury (e.g., a missing arm)," and the court did not preclude the possibility that a plaintiff could "himself ... offer a description of treatments and symptoms over a substantial period that would put the jury in a position ... [to] determine that he did suffer from a disability within the meaning of the ADA."

The Katz decision is remarkable in that it was one of the first to suggest expressly that the requirement of medical evidence to establish a prima facie case of disability should turn on the nature and, more specifically, the "obviousness" of the claimed impairment (or its long-
term impact) and whether the limitations from such impairment would be understood by a lay jury without the assistance of expert testimony. This approach was followed by the United States Court of Appeals for the Third Circuit in Marinelli v. City of Erie, where the panel held that the nature of the plaintiff’s disability—a shoulder and arm injury—was within the comprehension of the jury. 103 Although the court followed Katz in holding that the requirement of medical evidence turns on the nature of the claimed impairment, the reasoning employed actually runs somewhat counter to that in Katz.104 The court characterized the plaintiff’s condition as “among those ailments that are the least technical in nature and are the most amenable to comprehension by a lay juror.”105 Since the plaintiff’s claimed limitations resulted almost entirely from pain, which is of course not “obvious” to anyone other than the person experiencing it, the court demonstrated little concern for issues of credibility or corroboration.106

A handful of district courts have cited Katz, Marinelli, or both when holding that a plaintiff’s failure to offer expert medical evidence in support of a claim of disability was not necessarily fatal, due to the nature of the specific impairment at issue in the case.107

As a practical matter, the difference between the approach taken by this line of cases and that of the Second Circuit’s Heidweil progeny is largely a matter of degree. Defendants likely raise the issue of an absence of medical evidence more often in cases where a disability is

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103. 216 F.3d 354, 361 (3d Cir. 2000). However, the panel ultimately vacated the trial court’s judgment upholding the jury’s verdict for the plaintiff on the basis that there was insufficient evidence of substantial limitation of a major life activity. Id. at 366.

104. See id. at 360.

105. Id. at 361.

106. See id. (stating that because the plaintiff’s arm and neck pain are readily understandable by a lay person, his failure to present corroborating medical testimony is not fatal to his disability claim under the ADA).

not obvious, and therefore, the defendant is challenging whether the plaintiff falls within the scope of the ADA's protections, which does not occur in every ADA case. It is improbable that the seemingly inflexible approach would be in fact that exacting in all conceivable cases. Despite their use of mandatory language, it is unlikely that courts following the *Heilweil* line would require a paraplegic plaintiff who uses a wheelchair for mobility to provide medical evidence that he is substantially limited in the major life activity of walking. Thus, the distinction between the approaches is largely a matter of how broadly each line of cases regards the notion of an "obvious" disability.

C. Courts Holding that Medical Evidence Is Never Required To Establish Disability

Finally, the third line of cases suggests that while medical evidence can be used to bolster a claim of disability, its absence should not be fatal to a plaintiff's prima facie case. The leading cases in this line are *Haynes v. Williams*, decided by the United States Court of Appeals for the District of Columbia in 2004, and *Head v. Glacier Northwest, Inc.*, decided by the United States Court of Appeals for the Ninth Circuit the following year.

The *Haynes* panel's discussion of the issue of whether courts should require ADA plaintiffs to offer expert medical evidence of disability arose in the context of an employee's appeal from the entry of summary judgment for the defendant-employer on claims that the defendant failed to provide a reasonable accommodation for plaintiff's disability (idiopathic pruritis, a skin condition) and then terminated him on the basis of the disability. The district court concluded that the plaintiff had failed to demonstrate that he was substantially limited in the major life activity of sleeping because he relied solely upon "self-serving assertions" and failed to submit expert testimony in support of such assertions.

On appeal, the panel affirmed the entry of summary judgment but noted in dictum that the trial court erred in requiring the plaintiff to produce expert medical testimony. Quoting the Supreme Court's

108. 392 F.3d 478 (D.C. Cir. 2004).
109. 413 F.3d 1053 (9th Cir. 2005).
110. *Haynes*, 392 F.3d at 480-82.
111. *Id.* at 482 (quoting *Haynes v. Williams*, 279 F. Supp. 2d 1, 10 (D.D.C. 2003)).
112. *Id.* at 482, 485. The panel affirmed on the alternate basis for the entry of judgment for the defendant, which was the plaintiff's failure to offer evidence that locations other than his office triggered his symptoms. *Id.* at 482-85.
language in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, observing that the ADA requires plaintiffs to offer evidence of disability "in terms of their own experience," the panel concluded: "Whatever the comparative credibility of medical versus personal testimony, a plaintiff's personal testimony cannot be inadequate to raise a genuine issue regarding his own experience." The Ninth Circuit's Head decision follows a similar logic but provides a somewhat more detailed discussion of the issue. The trial court granted partial summary judgment for the defendant on the basis of the plaintiff's failure to present medical evidence in support of his claim that he was disabled due to depression and bipolar disorder. The plaintiff had provided a detailed affidavit describing the impact of these conditions on his ability to sleep, interact with others, read, and think. On appeal, the panel stated unequivocally:

We hold that Ninth Circuit precedent does not require comparative or medical evidence to establish a genuine issue of material fact regarding the impairment of a major life activity at the summary judgment stage. Rather, our precedent supports the principle that a plaintiff's testimony may suffice to establish a genuine issue of material fact.

The appeals court also emphasized, however, that supporting affidavits "must not be merely self-serving and must contain sufficient detail to convey the existence of an impairment."

A separate approach, somewhat related to this nonmandatory view, followed by a few courts in ADA cases, is to take judicial notice of certain medical facts, such as whether a condition is an "impairment" or substantially limiting, rather than requiring a plaintiff to provide expert medical testimony on such facts. In these cases, judicial notice substitutes for a physician's testimony, records, or affidavit regarding a plaintiff's condition. Thus, while the courts

113. Id. at 482 (quoting Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002)).
114. Id.
115. See Head v. Glacier Nw., Inc., 413 F.3d 1053, 1058-59 (9th Cir. 2005).
116. Id. at 1057.
117. Id. at 1059-62.
118. Id. at 1058.
119. Id. at 1059.
120. See Fed. R. Evd. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").
121. See, e.g., Wright v. City of Tampa, 998 F. Supp. 1398, 1402 (M.D. Fla. 1998) (holding that the plaintiff's deposition testimony, together with the relevant excerpts from
consider some medical facts to be important to the determination of disability, they do not require plaintiffs to procure expert testimony regarding their specific conditions. As these cases demonstrate, it would seem appropriate and efficient that with respect to certain well-settled medical information, and at least for summary judgment purposes (leaving it to the plaintiff to determine whether she wishes to present a live witness to explain such information to the jury), a court should take judicial notice of medical information contained within indisputably authoritative texts such as the *Merck Manual*. The summary judgment record on the issue of whether a plaintiff met the definition of disability would thus contain the plaintiff's testimony of her condition and its impact on her major life activities, supplemented by explanations provided in medical references identified by the plaintiff or by the court itself.

The judicial notice approach would, of course, not satisfy many courts, particularly those following the lead of the Second Circuit, which requires expert medical testimony to confirm a plaintiff's specific description of a medical condition and the resulting limitations. In other words, medical texts cannot provide testimony regarding the validity and veracity of an individual's specific claims of
disability. However, as explored below, these courts’ insistence on corroborating medical evidence as a prerequisite to establishing disability is contrary to the application of summary judgment principles, as outlined by the Supreme Court and is based upon misplaced concerns regarding ADA plaintiffs’ motives.

IV. THE STATED RATIONALE OF THE REQUIREMENT OF MEDICAL EVIDENCE—JUDGES’ IMPROPER INSISTENCE ON “CORROBORATION” OF PLAINTIFFS’ STATEMENTS

Judges’ insistence on the presence of expert medical testimony in the record is based upon improper reasoning and imposes an unwarranted and inappropriate burden on ADA plaintiffs. More is at stake in these cases than just the practical lesson that when faced with a defendant’s summary judgment motion, a plaintiff’s attorney should be sure to obtain an affidavit from a doctor that supports her client’s allegations of impairment and resulting limitations. The approaches followed by courts requiring such evidence superimpose requirements on ADA plaintiffs that have no basis in the statute itself and misapply the core principles of summary judgment analysis.

Many court decisions explicitly refer to the inadequacy of a plaintiff’s “self-serving” affidavit or deposition testimony standing alone to establish disability and the corresponding necessity of medical evidence to corroborate or support a plaintiff’s assertions of disability. These decisions do not suggest that a plaintiff cannot offer evidence of a disability in opposition to a summary judgment motion, but, rather, state that such evidence will be insufficient as a matter of law to establish a prima facie case unless it is also accompanied by evidence from a physician validating what she professes to be her disability.

127. 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, 523 (2000). In the authors’ view, the failure to produce sufficient medical evidence and pursuing only one type of ADA claim are strategic errors on the part of plaintiffs’ attorneys. Id.

disability. Other courts characterize the evidentiary failing of a plaintiff’s claim as being a lack of “objective” evidence of disability, and that such evidence is needed to corroborate a plaintiff’s description of a substantially limiting impairment. Many courts hold that medical evidence is required where a plaintiff’s condition is not one that the jury can readily assess without having to rely solely upon a plaintiff’s subjective description of the impairment and the resulting limitations. Thus, the notion of “obviousness” of disability is also tied to the issue of corroboration. However characterized, none of the courts’ explanations for the requirement of medical evidence to establish disability withstands close analysis.

A. Court Decisions Improperly Import the Substantive Law of Other Causes of Action To Hold That Plaintiffs’ Testimony Alone is Insufficient To Establish Disability Under the ADA

The court opinions holding that “self-serving” statements of a plaintiff alone are insufficient as a matter of law to establish a genuine issue of material fact often base such holdings upon non-ADA case law that appears to require corroborating evidence of a plaintiff’s claims. An examination of the issues presented in the precedents

129. This question is very different from that discussed below regarding who is competent to offer testimony on medical conditions. See infra notes 303-332 and accompanying text.

130. See, e.g., Buchanan v. Safeway Stores, Inc., No. C 95-1658 FMS, 1996 WL 723089, at *3 (N.D. Cal. Dec. 6, 1996) (“Plaintiff failed to produce any objective medical evidence demonstrating a restriction of either his short or long term work capacity in any job.”); Farley v. Gibson Container, Inc., 891 F. Supp. 322, 326 (N.D. Miss. 1995) (“He has presented absolutely no medical reports or other objective evidence substantiating his claim that his injury and subsequent surgery left him with a condition which rises to the level of a physical impairment.”).


132. See, e.g., Baerga, 2003 WL 22251294, at *5 (“Plaintiff offers only self-serving, uncorroborated statements to support his contention that his panic disorder substantially limits his ability to sleep, think and interact with others.”); Dorn, 191 F. Supp. 2d at 623 (holding that a plaintiff’s own self-serving evidence was not enough to show that he was substantially limited in a major life activity when the alleged acts of discrimination occurred); Cardwell v. Bd. of Educ., No. 00C7147, 2001 WL 1064334, at *4 (N.D. Ill. Sept. 10, 2001) (granting the defendant's motion for summary judgment because the plaintiff failed to submit any corroborating evidence, other than his own self-serving affidavit, to prove his substantial limitation of a major life activity).
themselves, however, demonstrates that this use is misplaced. To begin with, any evidence offered by a plaintiff, whether in affidavit, deposition, or otherwise, in support of her claim is, by definition, self-serving to at least some extent. But that does not render the evidence necessarily defective or inadmissible. While historically, a party to a civil matter was not competent to provide testimony in his or her own case, that rule was eventually abolished in English common law and has no basis in modern American jurisprudence. Similarly, the ancient legal principle of testis unus—testis nullus (one witness—no witness), which states that a single witness is effectively no witness at all for purposes of proving a fact in court proceedings, has been long abandoned.

Rather, under contemporary American law, for purposes of both summary judgment and trial, an individual witness’s account (including that of the plaintiff who has a direct financial stake in the

133. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1581 (4th ed. 2000), defines self-serving as follows: “1. Serving one’s own interests, especially without concern for the needs or interests of others. 2. Exhibiting concern solely for one’s own interests: a speech full of self-serving comments.”

134. The Supreme Court described the abolition of this rule in Ferguson v. Georgia, 365 U.S. 570, 573-77 (1961). The Court noted that:

The disqualification of parties as witnesses characterized the common law for centuries. Wigmore traces its remote origins to the contest for judicial hegemony between the developing jury trial and the older modes of trial, notably compurgation and wager of law. Under those old forms, the oath itself was a means of decision. Jury trial replaced decision by oath with decision of the jurors based on the evidence of witnesses; with this change “[T]he party was naturally deemed incapable of being such a witness.” Incompetency of the parties in civil cases seems to have been established by the end of the sixteenth century. In time the principal rationale of the rule became the possible untrustworthiness of the party’s testimony; for the same reason disqualification was applied in the seventeenth century to interested nonparty witnesses.

135. See In re Roe’s Will, 143 N.Y.S. 999, 1003 (N.Y. Sur. Ct. 1913) (“In old testamentary law and in the Ecclesiastical Courts one witness was no witness, ‘testis unus, testis nullus,’ or, as the jurist Loyset said, ‘The voice of one is the voice of none.’ This rule of Hebraic origin dominated the whole procedure of the Middle Ages, and was very potent in the canon Law and in the Ecclesiastical Courts of England.”); see also Lawrence Douglas, Wartime Lies: Securing The Holocaust in Law and Literature, 7 YALE J.L. & HUMAN. 367, 386 (1995) (“The medieval canonical stricture of testis unus testis nullus (one witness, no witness), though formally abandoned in modern rules of evidence, suggests an attitude that continues to inform contemporary jurisprudence, one that enfolds all testimony in suspicion.”); Toni M. Massaro, The Dignity Value of Face-to-Face Confrontations, 40 U. FLA. L. REV. 863, 912 n.163 (1988) (“Sir William Holdsworth observed that during the sixteenth and seventeenth centuries, English law required evidence of two witnesses for a conviction of some offenses. This rule of ‘testis unus testis nullus,’ however, had a relatively small effect on modern English law. The result was an emphasis on the proper weight of the evidence rather than the number of witnesses who swore to a fact.” (citations omitted)).
account) may be sufficient to support a finding against the defendant assuming that the witness can present admissible testimony on each element of the claim. In *Celotex Corp. v. Catrett*, the Supreme Court emphasized that summary judgment is appropriate only where a party who will have the burden of proof at trial "fails to make a showing sufficient to establish the existence of an element essential to that party's case." In other words, there must be "a complete failure of proof" concerning such an essential element. Reference to the inadequacy of "self-serving" testimony is only appropriate in cases where, for example, the plaintiff is making conclusory statements concerning a defendant's motives, where a specific motive comprises one of the necessary elements of a claim as a matter of substantive law, without any actual evidence of such motives. Another way of stating the infirmity of the testimony is that the plaintiff has no personal knowledge of the facts asserted (such as a defendant's belief and intent), and, therefore, the proffered affidavit or deposition testimony does not "set forth such facts as would be admissible in evidence." Specifically, such speculative assertions would be the appropriate basis to sustain a defendant's trial objection raised under Federal Rule of Evidence 602. Thus, the shortcoming of such proffered evidence is not that it is a statement by a plaintiff in support of her own claim, but that a plaintiff is trying to win a case by offering nothing more than her own interpretation of events, including the allegedly impermissible and undisclosed motives of others.

136. See C. A. J. Coady, *Testimony: A Philosophical Study* 34 (1992) ("Corroboration has an important role in the assessment of testimony but in modern English law uncorroborated testimony is perfectly acceptable as evidence, except for some categories of witness (such as unsworn children). This was not always so in English law nor is it so today in Scottish law and canon law where the tradition of Roman law is strong and the maxim "testis unius, [sic] testis nullus is the rule.").


138. Id. at 323.

139. See, e.g., Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 5 (1st Cir. 1998) ("A plaintiff [claiming discrimination] "may not prevail simply by asserting an inequity and tacking on the self-serving conclusion that the defendant was motivated by a discriminatory animus."") (quoting Coyne v. City of Somerville, 972 F.2d 440, 444 (1st Cir. 1992)).

140. FED. R. CIV. P. 56(e).

141. FED. R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

142. See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53 (1st Cir. 2000) ("[A] 'party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment.'" (quoting Cadle Co. v. Haynes, 116 F.3d 957, 961 n.5 (1st Cir. 1997)).
This important distinction, however, is lost in the application of this case law to require the use of corroborating medical evidence to support a plaintiff's claim of actual disability under the ADA, to which a defendant's beliefs and motives are wholly irrelevant. An example of this misplaced use of precedent is a decision of the United States Court of Appeals for the Seventh Circuit, *McPhaul v. Board of Commissioners*. The panel affirmed the entry of summary judgment for the employer-defendant on an ADA claim brought by a woman who claimed that she was entitled to reasonable accommodation by her employer for her fibromyalgia. The plaintiff presented evidence that her symptoms included “fatigue, insomnia, shortness of breath and muscle pain, including sore hands and joints” and “that her condition made it difficult for her to concentrate, bathe, walk, write and work.”

The panel noted the absence of medical evidence regarding the potential benefits of the requested accommodations and that “[a]ll that McPhaul can present in support of her reasonable accommodation claim is her own self-serving testimony, and in this case, that is just not sufficient for a reasonable jury to find that she is a qualified individual with a disability under the ADA.” The authority offered for that holding was an earlier decision by that court, *Sowiak v. Land O'Lakes, Inc.*, which held that “[s]elf-serving affidavits without factual support in the record will not defeat a motion for summary judgment.”

However, the earlier quote arose in an antitrust case alleging price fixing, a completely different context in which a plaintiff is required to offer admissible evidence of the defendant's alleged conspiracy to set prices to establish one of the elements of the claim.

Thus, the question of whether evidence in the record beyond the statements of a plaintiff is required to create a genuine issue of material fact turns upon the substantive law of the plaintiff's particular claims—either as set forth by statute or developed through case law—

143. 226 F.3d 558 (7th Cir. 2000).
144. Id. at 562, 564.
145. Id. at 562.
146. Id. at 564. The *McPhaul* case is one of the few considered in this Article in which the failure to include medical evidence in the record is specifically noted with respect to the question of reasonable accommodation, in addition to meeting the definition of disability. See id. The appellate panel noted the absence of corroborating medical evidence with respect to both issues. Id. at 563-64.
147. 987 F.2d 1293, 1295 (7th Cir. 1993).
148. Id. at 1295-97. The panel followed the admonition against “self-serving” statements standing alone with a quote from another decision: “[A] plaintiff's speculation is not a sufficient defense to a summary judgment motion.” Id. at 1295 (alteration in original) (quoting Karazanos v. Navistar Int'l Transp. Corp., 948 F.2d 332, 337 (7th Cir. 1991)).
not on the general procedural rules regarding summary judgment. In contrast to the antitrust laws at issue in *Slowiak*, the ADA definition of disability under the “actual disability” category requires no evidence beyond that which would be known firsthand by the plaintiff.\(^{149}\) Nor is there any basis in the ADA text or regulations, discussed above,\(^{150}\) to require corroboration of any fact within a plaintiff’s own knowledge in order to survive summary judgment.\(^{151}\) The distinction is between testifying about the “self,” as noted by the D.C. Circuit in *Haynes v. Williams*, and making speculative assertions about others’ motives (“He fired me because I’m deaf”) and actions.\(^{152}\)

**B. The Requirement of Corroborating Medical Evidence Runs Contrary to Summary Judgment Principles Regarding Credibility Determinations**

The decisions based upon the inadequacy of “self-serving” testimony of facts within one’s own knowledge and experience are not only incorrect as a matter of substantive law but are also entirely inconsistent with Supreme Court precedent on the proper approach to issues of credibility presented in a motion for summary judgment. In *Anderson v. Liberty Lobby, Inc.*, another case in the 1986 *Celotex* trilogy of cases on summary judgment, the Court held: “‘[A]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.’”\(^{153}\) The Court stressed that “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”\(^{154}\) Accordingly, the Court noted:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary

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149. *See 42 U.S.C. § 12102(2) (2000).* In contrast, some evidence of an employer’s subjective belief would be required in cases brought by plaintiffs who allege that they were subjected to discrimination based upon a record of disability or perceived disability. *See* *Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1230 (11th Cir. 1999).

150. *See supra* notes 12-72 and accompanying text.


154. *Id.*
judgment or for a directed verdict. *The evidence of the nonmovant is to be believed,* and all justifiable inferences are to be drawn in his favor.\(^{155}\)

Accordingly, assuming that in resisting summary judgment an ADA plaintiff offers admissible evidence\(^{156}\) describing an impairment that substantially limits her in one or more major life activities, no further analysis is needed of whether the plaintiff has satisfied the definition of disability for summary judgment purposes.

Indeed, this was precisely the analysis followed in both the *Haynes* and *Head* opinions. However, by requiring expert medical evidence in addition to a plaintiff's own statements, other courts have improperly blurred the important line—emphasized repeatedly by the Supreme Court—between providing *sufficient* evidence and providing *persuasive* evidence.\(^{157}\) There is a distinction between the problem of conclusory, nonspecific evidence, which is not sufficient to create an issue of fact, and "self-serving" or uncorroborated evidence, which is merely potentially (but not necessarily) unconvincing evidence. If a plaintiff does not offer expert medical testimony regarding disability at trial, then she perhaps runs the risk of not persuading the jury that she is disabled. But, as the decisions of the *Celotex* trilogy and their progeny make clear, the role of the trial court at summary judgment is not to engage in such weighing of the evidence but only to determine if there is sufficient evidence upon which a jury *could* base a verdict.\(^{158}\)

Judges' improper approach to summary judgment in ADA cases stands in marked contrast to the case law of the Rehabilitation Act, under which federal courts routinely reserved factual issues regarding whether a plaintiff was disabled for juries.\(^{159}\) The Supreme Court specifically noted in *School Board v. Arline* that the issue of whether an individual was disabled within the meaning of the Rehabilitation Act was a factual, not legal, question.\(^{160}\) Under the ADA, however, "judges are routinely deciding fact-intensive cases without sending

\(^{155}\) *Id* at 255 (emphasis added).

\(^{156}\) See infra notes 260-332 and accompanying text for a discussion of the special issues involving admissibility.

\(^{157}\) See, e.g., *In re Estate of Swan*, 293 P.2d 682, 689 (Utah 1956) (stating that a party's burden of persuasion is to convince the fact finder that the evidence is in his favor, while to meet its burden of production, the party only needs to make a prima facie showing of the facts).


\(^{159}\) See Colker, *Windfall*, supra note 73, at 111-12 (stating that under the Rehabilitation Act, juries determined whether someone was disabled and Congress therefore intended juries to have the same role under the ADA).

2007] WHO SAYS YOU'RE DISABLED? 37

them to the jury.\textsuperscript{161} Professor Ruth Colker’s analysis of outcomes in ADA employment discrimination cases revealed that over 93% of reported decisions yielded results that are favorable for the defendant.\textsuperscript{162} She concluded that “the summary judgment tool was a device used with great frequency at the trial court level to dispose of ADA cases in favor of defendants,”\textsuperscript{163} and attributed the bulk of ADA decisions unfavorable to the plaintiff as being evidence of courts “abusing the summary judgment device by creating an impossibly high threshold of proof” for ADA plaintiffs to survive summary judgment.\textsuperscript{164} Courts’ improper requirement of medical evidence at the summary judgment stage serves as one of the most significant causes of these lopsided results.

Indeed, imposing a demanding evidentiary standard of “corroborating” evidence in ADA claims is inconsistent with the approach taken in other antidiscrimination statutes, such as the prohibition on religious discrimination found in Title VII of the Civil Rights Act of 1964, which, like the ADA, requires certain reasonable accommodations in the employment setting.\textsuperscript{165} As part of a prima facie case alleging an employer’s failure to reasonably accommodate a

\begin{footnotesize}
\begin{enumerate}
\item Colker, \textit{Windfall}, supra note 73, at 116.
\item See id. at 126.
\item Id.
\item COLKER, DISABILITY PENDULUM, supra note 73, at 115. As a side note, this discussion takes place with a backdrop of a broader question about summary judgment in the federal courts, particularly in civil rights litigation, which has been the focus of much recent commentary. See, e.g., Henry L. Chambers, Jr., \textit{Recapturing Summary Adjudication Principles in Disparate Treatment Cases}, 58 SMU L. REV. 103, 105-106 (2005) (arguing that federal courts have failed to adhere to the principle that summary judgment is not appropriate when a plaintiff’s employment discrimination case is “weak but winnable”); Arthur R. Miller, \textit{The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?}, 78 N.Y.U. L. REV. 982, 984-85 (2003) (arguing that courts have extended the use of summary judgment and the motion to dismiss to resolve disputes that are better left to trial and the jury); Martin H. Redish, \textit{Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix}, 57 STAN. L. REV. 1329, 1348 (2005) (arguing that changes in the law of summary judgment have led to a decrease in federal trials). One commentator referred to summary judgment as the “new fulcrum of federal civil dispute resolution.” Paul W. Mollica, \textit{Federal Summary Judgment at High Tide}, 84 MARQ. L. REV. 141, 141 (2000). Two recent essays offer provocative arguments in favor of the wholesale elimination of summary judgment. See John Bronstein, \textit{Against Summary Judgment}, 75 GEO. WASH. L. REV. 522, 522, 526-27 (2007) (arguing that abolishing summary judgment would make court systems fairer and more efficient); Suja A. Thomas, \textit{Why Summary Judgment Is Unconstitutional}, 93 VA. L. REV. 139, 140 (2007) (arguing that summary judgment is unconstitutional because it denies a party his or her Seventh Amendment right to a trial by jury).
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religious practice, a plaintiff must establish the “sincerity” of her bona fide religious views. As one court explained:

In order to satisfy this element, the plaintiff must demonstrate both that the belief or practice is religious and that it is sincerely held.

... The element of sincerity is fundamental, since “if the religious beliefs that apparently prompted a request are not sincerely held, there has been no showing of a religious observance or practice that conflicts with an employment requirement.”

Thus, the required showing is in many ways analogous to meeting the definition of disability in a claim for a reasonable accommodation under the ADA.

However, the two protected categories receive vastly different treatment in terms of required evidence to establish a prima facie claim. Employee-plaintiffs are not required to provide proof of religion, beyond their own statements, to establish the sincerity of their beliefs. Courts consistently hold:

The finding on this issue [of sincerity] generally will depend on the factfinder's assessment of the employee's credibility. Credibility issues such as the sincerity of an employee’s religious belief are quintessential fact questions. As such, they ordinarily should be reserved “for the factfinder at trial, not for the court at summary judgment.”

Further, there is no requirement for a sworn statement or other evidence from a clergyperson or other individual attesting to the frequency of attendance at worship services or other “objective” indicators of sincerity. No doubt, such evidence would bolster a plaintiff’s claims and would perhaps make the difference at trial between whether the fact finder does or does not believe her sincerity. But courts properly reserve that question for fact finders.

There is no reason why claims of reasonable accommodation on the basis of disability should be subjected to any different treatment.

166. EEOC v. Unión Independiente de la Autoridad, 279 F.3d 49, 55-56 (1st Cir. 2002).
167. Id. at 56 (quoting EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569, 1575 (7th Cir. 1997)).
168. See id. (stating that the determination of whether a religious belief is sincerely held is generally an issue of the employee's credibility for the fact finder to determine).
169. Id. (quoting Simas v. First Citizen's Fed. Credit Union, 170 F.3d 37, 49 (1st Cir. 1999)) (other citations omitted) (emphasis added); see Ilona of Hungary, 108 F.3d at 1575.
170. Cf. Tiano v. Dillard Dep't Stores, Inc., 139 F.3d 679, 682-83 (9th Cir. 1998) (holding that the plaintiff failed to establish prima facie case of sincerity of belief that she needed to undertake a pilgrimage at a specific time because of the absence of specific statements in her own testimony regarding the “temporal mandate” of the pilgrimage).
One reaction to this view might be that religion is different in that employers (and courts) must be careful not to invade the privacy of one's religious practice by involving a clergyperson or others in the inquiry. But why should the privacy, and most particularly the medical privacy, of people with disabilities be any different? The different attitudes toward proving disability versus religion suggest that courts (and therefore society) have more concern about people who falsely "claim disability" than those who falsely claim to have a particular belief. Religious individuals are perhaps regarded more like "normal" people and are not associated with those who seek government support or workers' compensation or similar claims. Thus, we do not generally question their credibility. But a potential plaintiff's incentive to deceive is identical in any kind of reasonable accommodation claim, and the respective roles of the court and the jury in determining the veracity of a plaintiff's claims should be consistent as well.\footnote{As a final note for purposes of the analysis offered here, it should be acknowledged that in some of the opinions reviewed in Part III, it is difficult to determine the specific failing in terms of the sufficiency of the evidence. It may well have been that the only testimony offered was a single-line affidavit to the effect of "I have _____ and it substantially limits me in the daily activity of _____," with nothing more. While an argument could be made that nothing in the ADA requires extensive, detailed testimony about disability, there is clear consensus of the courts, relying in large part on the EEOC's regulations and other interpretive materials regarding the need for individualized assessment of disability, that some description of an impairment and resulting limitations is needed to establish disability. See Feldblum, supra note 33, at 158-59. This is the case despite the fact that under the case law developed with the use of the identical definition of disability under the Rehabilitation Act, such assertions likely would have been accepted on all sides as sufficient to establish disability. See id. at 106 ("[C]ourts hearing Section 504 cases rarely tarried long on the question of whether a plaintiff was ‘really a handicapped individual.").

Thus, in some cases, there may be an overall paucity of specific evidence of a disability, and the problem lies with the content (or lack thereof) of the plaintiff's statements—that they were conclusory and not sufficiently specific—and not necessarily the absence of medical evidence. In other words, there may be certain cases where, if the plaintiff had offered more detailed admissible evidence of the effects of an impairment or a substantial limitation of a major life activity, the absence of medical evidence should not have been fatal or perhaps even noteworthy. Furthermore, an outcome could also depend upon whether the absence of detailed evidence was raised in a defendant's summary judgment briefing. In many such cases, courts invoke an oft-cited mandate that mere evidence of a diagnosis is insufficient to establish disability. One example is Machín-Rodríguez v. C & C Partnership Coca Cola Puerto Rico, where the plaintiff alleged that he was disabled due to depression. No. Civ03-1746 SEC, 2005 WL 2293574, at *1 (D.P.R. Sept. 20, 2005). The district court noted, in addition to the inadequacy of the medical evidence provided (which “simply states his diagnosis and treatment”), the failure of the plaintiff's affidavit “to describe or provide any specific information on the effects, let alone the ‘substantial' effects, that his diagnosis has or has had on his major life activities.” Id. at *4; accord Burks v. Wis. Dep't of Transp., 464 F.3d 744, 756-57 (7th Cir. 2006); Stein v. Ashcroft, 284 F.3d 721, 726-27 (7th Cir. 2002); Cook v. Deloitte & Touche, LLP, No. 03 Civ. 3926LAKFM, 2005 WL 2429422, at *12 (S.D.N.Y. Sept. 30, 2005); Dorn v. Potter, 191 F. Supp. 2d 612, 622 (W.D. Pa. 2002);
As demonstrated above, there are a significant number of cases in which, despite a plaintiff’s detailed testimony or affidavit regarding a medical condition and its impact on her life, a court has found such evidence insufficient as a matter of law to generate a genuine issue of material fact. Such decisions demonstrate a fundamental misapplication of the ADA and the rules of summary judgment. Indeed, in few of the cases cited or discussed in Part III do the courts in fact engage in an analysis of the proper approach to summary judgment on questions of disability under the ADA. Rather, they merely cite to one (or several) of the earlier cases that impose the medical evidence requirement, as if it were a matter of settled ADA jurisprudence. The result is the creation of a significant body of case law, based upon a wholly erroneous rationale, which has been used to block numerous ADA plaintiffs’ claims from proceeding to trial.

V. THE UNSTATED RATIONALE—THE PHYSICIAN AS GATEKEEPER AGAINST MALINGERING

If requiring medical evidence to corroborate a plaintiff’s allegation that she is disabled has no basis in the statute’s text and is at stark variance with proper summary judgment practice, as explained in the preceding Part, why are courts imposing this additional evidentiary burden on ADA plaintiffs specifically? The reasons likely stem from a common origin: namely, courts’ concern that those “claiming disability” may be malingering by exaggerating or even inventing the claimed disability. This preoccupation with malingering is revealed

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172. See, e.g., Brandon v. Klingensmith Healthcare, Inc., No. Civ.A.03-1963, 2005 WL 3434141, at *3-4 (W.D. Pa. Dec. 13, 2005) (granting the defendant’s motion for summary judgment despite the plaintiff’s detailed answers to interrogatories describing how her daily life was affected by her fibromyalgia); Douglas v. Victor Capital Group, 21 F. Supp. 2d 379, 383 (S.D.N.Y. 1998) (granting the defendant’s motion for summary judgment because the only medical evidence that the plaintiff presented of his disability was two unsworn and inadmissible letters from physicians); supra notes 82-87 and accompanying text.

173. See, e.g., Douglas, 21 F. Supp. 2d at 392 (citing several decisions requiring the plaintiff to produce medical evidence of a disability).

174. Professor Samuel R. Bagenstos has suggested that a preoccupation with feigned disability may be behind lower courts’ use of the term “truly disabled” when ruling against plaintiffs deemed to fall outside that category. Bagenstos, supra note 38, at 469-70. Indeed, such concern may serve as the source for many overly restrictive interpretations of the statute, as well as for the improper imposition of evidentiary requirements, as is argued here.
by courts' persistence in assigning physicians the role of screening out specious claims of disability.\footnote{175} Courts that require expert medical testimony as part of a prima facie case are essentially delegating credibility determinations to physicians.\footnote{176} If there is no corroboration of a plaintiff's own description of her disability, then these courts assume the plaintiff's assertions of limitations may be discounted to the point that they are effectively nonexistent.\footnote{177} Further, if a plaintiff's accounting of her disability is at variance with what is described by her physician, this is not seen as a disputed issue of fact—thus a credibility determination to be resolved at trial by the jury—but as a failure to satisfy the requirements for a prima facie case.\footnote{178} It is as if she offered no testimony at all. A treating physician's deposition testimony (in response to questions posed by the defendant's attorney, most likely) may include statements to the effect that the physician is aware of no reason why the plaintiff could not work or perform the major life activity that the plaintiff alleges to be impaired.\footnote{179} For example, in \textit{Baerga v. Hospital for Special Surgery}, the trial court noted that although the plaintiff alleged to have difficulty sleeping, there was no

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\item \textit{See, e.g.,} Sussle v. Sirina Protection Sys. Corp., 269 F. Supp. 2d 285, 302 (S.D.N.Y. 2003) (holding that a plaintiff needs medical evidence to prove that he is disabled for purposes of the ADA).
\item \textit{See, e.g.,} \textit{The New Wigmore: A Treatise on Evidence: Expert Evidence} § 1.5, at 23-24 (2004) (noting that federal courts often rely upon the "helpfulness criterion of Rule 702" to exclude expert testimony on credibility); \textit{Steven I. Friedland, On Common Sense and the Evaluation of Witness Credibility}, 40 CASE W. RES. L. REV. 165, 166 (1989) ("Jurors are expected to make credibility decisions based on their common sense, which is also termed intuition or experience. This concept of common sense is considered essential to the jury's task. When jurors exercise their common sense in evaluating a witness' testimony, a full and fair credibility determination is presumed to follow. Special assistance from a judge or expert, therefore, would be superfluous and invade the exclusive province of the jury." (footnotes omitted)).
\item \textit{See, e.g.,} Baerga v. Hosp. for Special Surgery, No. 97 Civ.0230(DAB), 2003 WL 2225129, at *6 (S.D.N.Y. Sept. 30, 2003) (finding that the plaintiff's testimony was self-serving and uncorroborated).
\item \textit{See, e.g.,} Crum vel v. Hampton Univ, No. CIV.A. 4:05CV31, 2005 WL 3357315, at *7 (E.D. Va. Dec. 8, 2005) (concluding that the plaintiff failed to show that he was substantially limited in the major life activity of breathing where his medical records, submitted in support of the defendant's motion for summary judgment, conflicted with his own "self-serving" affidavit regarding the extent of his allergy symptoms as he had "not provided sufficient evidence to refute the medical evidence").
\end{itemize}
mention of such limitation in a psychiatric evaluation included in the record.\textsuperscript{180} Therefore, in the court’s view, notwithstanding his own testimony on the issue, the plaintiff failed to establish that he had a substantial limitation in the major life activity of sleeping.\textsuperscript{181}

Casting doubt on the credibility of those claiming “disability” is not limited to the case law of the ADA, and the notion of disability as essentially and exclusively a medical phenomenon is tied to such skepticism.\textsuperscript{182} As the political scientist Deborah Stone explains:

People could either be truly injured or feign injury. In the modern understanding of disability, deception has become part and parcel of the concept itself, and the nature of this deception is tied to the particular form of validation used to detect it. The definition of disability and the means to determine it became critically linked.\textsuperscript{183}

We require a doctor’s note for absence from work or school and medical documentation in numerous other contexts. Indeed, the requirement of providing such documentation is done so frequently as to not be questioned.

Thus, the ADA’s enactment in 1990 simply created another forum for this fear of deception to emerge. Such skepticism has been and remains directed at the entire class of people who self-identify as disabled. The prior case law developed under federal disability benefits programs, with its explicit requirement of medical evidence to corroborate claims, compounded the problem.\textsuperscript{184} Society has embraced medicine as the only reliable means to weed out the nefarious individuals who seemingly exploit the opportunity to gain some advantage by claiming disability. These three interrelated factors have converged to create a judicial culture, successfully exploited by defendants’ attorneys, under which ADA claims of disability are subjected to unwarranted evidentiary requirements.

\textsuperscript{180} 2003 WL 22251294, at *5.
\textsuperscript{181} Id. at *6; accord Cassimy v. Bd. of Educ., 461 F.3d 932, 936 (7th Cir. 2006) (noting that while the plaintiff alleged that his depression led to, among other things, “severe pressure on his brain” and an inability to eat, the medical evidence “reveals” that he had never reported those particular symptoms to his physician).
\textsuperscript{182} See STONE, supra note 42, at 28.
\textsuperscript{183} Id. (emphasis added).
\textsuperscript{184} See infra notes 206-230 and accompanying text.
A. Malingering and the ADA

Much of the anti-ADA sentiment expressed in the popular discourse reflects a suspicion of those who "claim disability." As Professor Colker noted in 1999, the popular media reflected a false perception that the ADA was a "windfall statute for plaintiffs." One magazine columnist referred to the ADA as creating "a lifelong buffet of perks, special breaks and procedural protections' for people with questionable disabilities." Journalist Mary Johnson documented numerous examples of virulent negative (and quite frequently false) portrayals of the ADA in mainstream media and notes that much of it was directed against the perceived "fakers." Indeed, there was a specific discussion in Congress of ways to structure the implementation of the ADA so as to "eliminate any potential for abuse" by those asserting rights under the statute.

The public criticisms of the ADA reveal a recurring theme of skepticism and distrust directed by the public against those asserting their rights under the statute. One judge acknowledged public remarks made in 1995 by the President of Boston University, Jon Westling, in a lawsuit brought by Boston University students with learning disabilities:

"[T]he . . . disability movement is a great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence, and also genuinely for human social order. . . ."

". . . [B]y "seiz[ing] on the existence of some real disabilities and conjur[ing] up other alleged disabilities in order to promote a particular vision of human society," the learning disabilities movement cripples allegedly disabled students who could overcome their academic difficulties "with concentrated effort," demoralizes non-disabled students who recognize hoaxes performed by their peers, and "wreak[s] educational havoc" . . . . The policies that have grown out of learning disabilities ideology leach our sense of humanity."

185. See, e.g., John Elvin, ADA's Good Intentions Have Unintended Consequences, INSIGHT ON NEWS, Feb. 21, 2000, at 18, 18-19.
186. Colker, Windfall, supra note 73, at 99.
188. See MARY JOHNSON, MAKE THEM Go AWAY: CLINT EASTWOOD, CHRISTOPHER Reeve & THE CASE AGAINST DISABILITY RIGHTS 22-75 (2003).
189. See Crossley, supra note 21, at 653 (internal quotation marks omitted).
The media coverage of the ADA provides numerous examples of cynical attitudes about the scope of the statute and the honesty of those seeking its protections. For example, the Washington Times' James Brovard offered this exaggerated view of the statute's impact in a 1996 editorial:

[The ADA] has turned disabilities into prized legal assets, something to be cultivated and flourished [sic] in court rooms to receive financial windfalls. The ADA creates a powerful incentive to maximize the number of Americans who claim to be disabled, since the claim of disability amounts to instant empowerment in the eyes of the law.191

This view is by no means unique or isolated.192

Notions of “claiming disability” by malingering or faking disability have long-standing roots in American culture. Scholars have documented the development of negative attitudes, stereotypes, and assumptions about disabled people from the post-Civil War era through to the present and have noted a striking consistency in such attitudes.193 Professor Peter Blanck concluded from his historical


192. Other examples of this reaction compiled by Professor Blanck, supra note 191, at 205 n.323, include: Trevor Armbrister, A Good Law Gone Bad, READER'S DIG., May 1998, at 145, 149 (claiming that a flood of frivolous ADA lawsuits has clogged the courts); Editorial, The Horrors of the ADA, N.Y. POST, May 1, 1999, at 16 (quoting Senator Armstrong's view of the ADA as "a legislative Rorschach test, whose meaning and significance will be determined by years of costly litigation"); Editorial, Laws Protecting Disabled Too Susceptible to Abuse, ATLANTA J. & CONST., Feb. 9, 1999, at 10A ("History may record the Americans with Disabilities Act as one of the most costly and abused pieces of legislation Congress ever brought forth."); Dan K. Thomasson, Op-Ed, Bureaucracy: Creating Disabilities Where None Existed, DAYTON DAILY NEWS, Apr. 30, 1999, at 19A ("[T]he [ADA] at times seems more like a prescription for absurdity than an effort to redress injustices for those less fortunate.").

193. See Blanck, supra note 191, at 203 n.309, 217 n.379, 217 n.378, 210 n.349, also cites WALTER OLSON, THE EXCUSE FACTORY 134 (1997) ("Few laws have done as much as the Americans with Disabilities Act to make a note from your doctor something you can take to the bank"); Shalit, supra note 187, at 16; Michelle Stevens, High Court Must Define Disability, CHI. SUN TIMES, May 2, 1999, at 35A (stating that "[a]ll manner of malingers have jumped onto the ADA bandwagon," and that the ADA protects "shameless shirkers"); Editorial, Cleaning Up the Mess, LAS VEGAS REV-J., Jan. 12, 1999, at 6B (arguing that the ADA has generated more litigation than predicted, mostly by persons with questionable disabilities). Parenthetical explanations for the previous citations were also provided by Professor Blanck, supra note 191.193. See Blanck, supra note 191, at 210 (observing that criticism of the ADA as "foster[ing] frivolous litigation" is "[f]eminiscent of President Cleveland's 1887 veto message warning of the ‘race after [Civil War] pensions' as placing 'a premium on dishonesty and mendacity'"); see also Peter David Blanck & Michael Millender, Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America, 52 ALA. L. REV. 1, 2
research of depictions of people with disabilities: "One hundred years ago, and today . . . disabled people are portrayed by some as shirkers, malingerers, and free-loaders." His findings illustrate that "historically, as in contemporary society, negative and stereotypical views, either purposefully or unknowingly, contribute to conceptions of disabled persons as 'illegitimate,' 'malingering,' and 'unworthy' . . . despite evidence to the contrary." Thus, it appears that the "malingering problem"—that is, the prospect of the existence of some individuals who may falsely claim to be disabled for secondary gain—has long colored the entire category of "the disabled" as a group of individuals with automatically suspect credibility. Accordingly, it is not surprising that society would
embrace a tool that holds promise to minimize such occurrence, perhaps saving everyone much time and expense. Society identified medicine as that tool and assigned a central role to physicians in pronouncing who is (or is not) truly disabled, thereby presumably weeding out any potential malingers in the disability determination process. The cases requiring expert medical evidence in some or all claims of disability both reflect and are a direct result of this notion and suspicion.

An explicit demonstration of such attitude is found in a district court case, *Farley v. Gibson Container, Inc.*,198 that is frequently cited as authority by other courts.199 There, the United States District Court for the Northern District of Mississippi granted the defendant's motion for summary judgment on a claim brought by an employee who asserted that he was disabled based upon complications from hernia surgery, including pain, dizziness, bleeding, and nausea.200 While the court acknowledged that there was no dispute that the surgery occurred (indeed, the surgery was required for a work-related injury and the employee was out of work for six weeks following the surgery), and the plaintiff had offered evidence of limitations resulting from the surgery, the court concluded: "[The plaintiff] has presented absolutely no medical reports or other objective evidence substantiating his claim that his injury and subsequent surgery left him with a condition which rises to the level of a physical impairment. This court, as have others, finds this omission significant."201 Thus, the court concluded, the plaintiff failed to establish that he was a person with a disability.202 The court's rationale for requiring such objective evidence was as follows:

To hold otherwise would render the requirement of a physical impairment superfluous and meaningless and would allow anyone with any kind of condition, regardless of the severity, to claim a physical impairment. Employers should not be expected to recognize a physical impairment solely on an employee's "say-so," as Farley expects Gibson

201. *Id.* at 326. The plaintiff alleged that in the months following the surgery, his surgical scar repeatedly opened when he engaged in heavy lifting at work, resulting in the described pain, bleeding, nausea, and dizziness, causing him to leave work early each time this occurred. *Id.* at 324.
202. *Id.* at 326-27.
to do. The logical consequences of such blind acceptance are simply too obvious to state.\textsuperscript{203}

Of course, this rejection of "blind acceptance" of the "say-so" of those who "claim a physical impairment" is directly contrary to the requirement established by the Supreme Court under the \textit{Celotex} trilogy.\textsuperscript{204} Courts must apply all reasonable inferences in favor of the nonmoving party in a summary judgment motion and accept the nonmovants' version of facts as true, provided that it is supported by \textit{any} admissible evidence, with no weighing of evidence or determinations of credibility by the court.\textsuperscript{205} However, time and again, courts deciding summary judgment motions on ADA claims fail to heed this requirement.

\textbf{B. Roots of the Problem in the Development of Federal Benefits Programs}

The question of "disability" that federal judges encounter most often, and have for decades, is in the context of appeals of disability determinations in the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs.\textsuperscript{206} The political scientist Deborah A. Stone traces the historical roots of the central placement of medical expertise in disability determinations for public entitlement programs in her book, \textit{The Disabled State}.\textsuperscript{207} Although her focus is on disability determinations for government-based benefits programs, such as SSDI and SSI, and she wrote before the enactment

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\item \textsuperscript{203} \textit{Id.} at 326. Although the court couches the requirement for documentation as something that the employer was entitled to, the rationale was in fact addressing whether the court must "recognize a physical impairment solely on an employee's "say-so,"" as there was no issue in the case regarding a failure to provide medical documentation to the employer-defendant. \textit{Id.} Thus, it appears that the reference to the "employer" was perhaps intended to suggest that a defendant should not be expected to concede the issue of disability in litigation absent medical evidence of such disability.
\item \textsuperscript{204} \textit{See supra} notes 153-158 and accompanying text.
\item \textsuperscript{205} \textit{See e.g.}, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-58 (1970); 10A \textit{CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE} § 2727, at 459, 462 (1998) ("Because the burden is on the movant, the evidence presented to the court always is construed in favor of the party opposing the motion and the opponent is given the benefit of all favorable inferences that can be drawn from it... [F]acts asserted by the party opposing the motion, if supported by affidavits or other evidentiary material, are regarded as true." (emphasis added)).
\item \textsuperscript{207} \textit{See generally} \textit{STONE}, \textit{supra} note 42, at 90-117 (discussing how disability benefits programs came to rely on medical evidence).
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of the ADA, her conclusions help answer the question of why courts, especially federal courts, place central importance on corroborating medical evidence for meeting the definition of disability under the ADA.

Stone notes that the association between “disability” and “deception” has its origins at least as far back as the English Poor Laws and the control of “beggars” in local communities. Thus, she concludes, “[T]he very category of disability was developed to incorporate a mechanism for distinguishing the genuine from the artificial.” But it was also the result of a political debate regarding who was an appropriate recipient of public aid and accordingly excused from the workplace economy.

208. Id. at 32.
209. Id. People with disabilities are by no means the only category of people who have been subjected to skepticism and scrutiny in connection with participation in “entitlement” programs, broadly defined. So-called “welfare queens,” immigrants, and other social groups identified with entitlement programs have and continue to be the objects of public disdain, distrust, and urban myths regarding those allegedly “working the system.” See generally ANNE MARIE CAMMISA, FROM RHETORIC TO REFORM? WELFARE POLICY IN AMERICAN POLITICS 7-17 (1998) (describing prevalent myths and negative opinions associated with “welfare” in various forms); THEODORE R. MARMOR ET AL., AMERICA’S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 82-83 (1990) (discussing standard beliefs about welfare in American society). Indeed, it is this historical association with such groups that has led to deep-seated suspicion of those claiming disability that persists to this day and threatens to restrict the expansion of their civil rights.

Recent studies by evolutionary psychologists suggest that in the course of our evolution as social beings benefiting from communal norms of “reciprocal altruism,” humans may have developed specific “cheater-detection” abilities and strong dispositions to punish what are perceived as violations of such norms among members of a community. See, e.g., Dan Sperber & Vittorio Girotto, Does The Selection Task Detect Cheater-Detection?, in NEW DIRECTIONS IN EVOLUTIONARY PSYCHOLOGY (J. Fitners & K. Sterelny eds., forthcoming), available at http://www.dan.sperber.com/cheater%20detection.pdf; see also Leda Cosmides & John Tooby, Cognitive Adaptations for Social Exchange, in THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE 180-206 (Jerome Barkow et al. eds., 1992) (arguing that people’s minds have reasoning procedures that detect cheaters in a social context).


Public benefit programs use the concept of disability to create an economic and moral boundary that separates those who are required to work from those whose participation in the labor force is excused. Despite its appearance of medical objectivity, disability is a socially constructed status that can be defined in any number of ways. Definitions of disability both reflect and reinforce a series of normative values about the nature and extent of the social obligation to work.

The 1948 Advisory Council charged with determining a design of the SSDI program recommended to the Senate that "compensable disabilities be restricted to those which can be objectively determined by medical examination or tests. . . . The danger of malingering which might be involved in connection with such claims would thereby be avoided."[211] Physicians initially resisted being placed in the role of determining disability, although there were various distinct bases for this resistance.[212] The "overwhelming majority" of physicians offering testimony before Congress on the proposed program asserted that "physicians could not possibly provide the kind of objective determination desired by program advocates."[213] These physicians made three "technical" objections to the role proposed for physicians in the new program: (1) that disability determination is an "inherently subjective" process, and "honest physicians could legitimately disagree about whether a person is disabled"; (2) that labeling a person as "disabled" could be "therapeutically harmful," by impeding the recovery and rehabilitation process, and possibly encouraging malingering; and (3) the process of certifying disability would place physicians in an "uncomfortable, if not conflictual, role."[214] Nonetheless, notions of "medical objectivity" were incorporated in subsequent amendments to the Social Security Act; indeed, it was "faith in the techniques of medical examination and the powers of clinical judgment" that encouraged many legislators to support expansions of the disability insurance programs.[215]

Stone argues that courts applying the Social Security Act reinforced the "myth of objective clinical determination," and she cites

Sharon L. Harlan & Pamela M. Robert, The Social Construction of Disability in Organizations, 25 WORK & OCCUPATIONS 397, 402 (1998) (noting the historical trend for the state to use physicians to certify the legitimacy of disabilities "[t]o separate those who have authentic impairments from those who might take undeserved advantage of public aid for the purpose of avoiding work").

211. STONE, supra note 42, at 79 (quoting S. REP. No. 80-162, at 6 (1948)) (emphasis added by Stone).
212. Id. at 80.
213. Id.
214. Id. at 80-81. Other objections raised by physicians pertained to feared effects on the medical profession and the delivery of health care. Id. at 80, 88.
215. Id. at 83, 86. Economist Edward Yelin has examined the SSDI program and its impact (or lack thereof) on withdrawal from the workforce. He concludes that the occurrence of true malingering is significantly exaggerated, and that the cry of widespread false claims is a "myth," which has been "used [by politicians] to legitimate cutbacks in disability benefits." BLANK & SONG, "Never Forget What They Did Here", supra note 193, at 1167 (quoting Edward Yelin, The Myth of Malingering: Why Individuals Withdraw from Work in the Presence of Illness, 64 MILBANK Q. 622, 647 (1986)).
the 1976 Supreme Court decision in *Mathews v. Eldridge* by way of example: "The medical assessment of the worker's condition [in an SSDI determination] implicates a more sharply focused and easily documented decision than the typical determination of welfare entitlement. The decision whether to discontinue disability benefits will normally turn upon routine, standard, and unbiased medical reports by physician specialists." Stone also notes that focus upon "impairment" is not the only mechanism used to determine disability. For example, in some epidemiological studies of disability, the classification is based entirely upon the individuals' statements of limitations in activities. Thus, "a medical conception of disability is not the only possible conception." It is, however, the approach generally followed when a person may claim disability for some secondary benefit, where the specter of the "malingering problem" looms.

The requirement of medical corroboration in ADA cases may also stem from some courts' view that the ADA is not a civil rights statute aimed at eliminating discrimination and barriers but nothing more than another form of a "special rights" or "entitlements" program for people with disabilities, similar to SSDI and SSI. The regulations and case law (over which federal courts have exclusive jurisdiction) for these two disability benefits programs make it clear that the presence of a "medically determinable physical or mental impairment" is the predominant factor in assessing "disability," that medical evidence is

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218. See *id.* at 109.

219. *Id.* Indeed, as James L. Charlton notes in his cross-cultural examination of disability, *NOTHING ABOUT US WITHOUT Us* (1998), many non-Western cultures have strictly religious or spiritual conceptions of disability and that a clergyperson, not a healer, is given a central role in "determinations" of disability. *Id.* at 62-65.


required in order to establish eligibility, and that the presence of
disability is the central question.223

The ADA, however, is plainly not an entitlement program. Its
scope and objectives are markedly different from those of the disability
benefits programs and reflect an important advancement in notions of
the respective roles of people with disabilities and the society in which
they live and work.224 When federal courts fail (consciously or
unconsciously) to note the distinctions between notions of disability in
the ADA as opposed to those developed under entitlement programs,
this leads to continued reliance on the same notions of disability
reflected in the SSDI and SSI programs.225

223. See, e.g., 20 C.F.R. § 416.908 (2007) (requiring SSI applicants to demonstrate
that claimed “physical or mental impairment(s) . . . results from anatomical, physiological, or
psychological abnormalities which can be shown by medically acceptable clinical and
laboratory diagnostic techniques” and requiring that such impairment “be established by
medical evidence consisting of signs, symptoms, and laboratory findings, not only by [an
individual’s] statement of symptoms” (emphasis added)).

Professor Crossley has observed that the SSDI program “illustrates the medical model
of disability in action,” because:

[S]ociety allocates to physicians the authority to validate the existence of disability
and thus to provide an individual with access to whatever social assistance may be
available to disabled persons. It is up to a physician to diagnose or categorize the
cause of an impairment and to measure and document its functional impact. The
individual’s own subjective experience of impairment or limitation is irrelevant
unless it can be professionally validated.

Crossley, supra note 21, at 650-51.

224. See Diller, Dissonant Disability Policies, supra note 210, at 1019-32; see also
Patricia Illingworth & Wendy E. Parmet, Positively Disabled: The Relationship Between the
Definition of Disability and Rights Under the ADA, in Americans with Disabilities:
Exploring Implications of the Law for Individuals and Institutions 3, 11 (Leslie
Pickering Francis & Anita Silvers eds., 2000) (“[T]he ADA draws upon the traditions of both
civil rights laws as well as disability entitlement programs to create a complex, ‘second-
generation’ statute that aims to achieve the negative liberty of self-sufficiency while fostering
the positive right to accommodation.”); Christine Jolls, Antidiscrimination and
Accommodation, 115 Harv. L. Rev. 642, 643 (2001) (stating that commentators contrast Title
VII of the Civil Rights Act of 1964 with the ADA, arguing that the former is a true
antidiscrimination law while the latter is a mere accommodation law); Michael Ashley Stein,
Same Struggle, Different Difference: ADA Accommodations As Antidiscrimination, 153 U.
device for effectuating equality on behalf of people with disabilities.”).

225. See Samuel R. Bagenstos, The Americans with Disabilities Act as Welfare
Reform, 44 Wm. & Mary L. Rev. 921, 927 (2003) (arguing that the “basic premise”
underlying the enactment of the ADA was that it would “reduce the cost of dependency
of people with disabilities” and that such a “welfare reform” approach is a fundamentally
inadequate “guide to disability employment policy”). Thus, to the degree that the ADA is
linked with public benefits programs, even as a means to “resolve” the problem of
dependency, it is not surprising that such connection blurs the distinction between notions of
disability in the otherwise distinct benefits and civil rights contexts.
During the first ten years after the ADA’s enactment, federal courts struggled with how to handle cases brought by individuals who had applied for SSDI or SSI benefits (i.e., claiming that their disability rendered them unable to engage in any “substantial gainful activity”) but also brought actions under the ADA claiming to be qualified individuals with a disability.226 Several courts applied the doctrine of judicial estoppel to such claims and entered summary judgment for the defendants.227 Scholars criticized this approach and noted the myriad significant distinctions between notions of “disability” under each statute.228 The issue was eventually addressed in 1999 by the Supreme Court in Cleveland v. Policy Management Systems Corp., which rejected the per se application of judicial estoppel to such claims, holding that benefits applicants who brought claims under the ADA are entitled to explain the apparent self-contradictory assertions.229 However, the conflation of notions of disability under benefits programs (where such claims must always be validated by medical evidence) and civil rights statutes remains and limits the ADA’s use as a tool for advancing civil rights for people with disabilities.230

C. Courts’ Misplaced Reliance on Physicians

Judges (and policymakers) appear to take physicians’ opinions of disability as descriptions of definitive and irrefutable fact. The ADA’s...

226. See Diller, Dissonant Disability Policies, supra note 210, at 1014, 1033.
228. See Diller, Dissonant Disability Policies, supra note 210, at 1055-59. Professor Diller also noted that:

The ADA is premised on the recognition that barriers to full participation in society are socially created, rather than the inevitable consequence of medical impairments... The disability benefit programs are grounded on the premise that inability to work is a consequence of medical impairments, rather than barriers created by social institutions.

Id. at 1005-06.
230. One can see the same skepticism in federal courts when applying other disability-related statutes. For example, several courts have held that in order to demonstrate a “serious health condition” to trigger the application of the Family and Medical Leave Act (FMLA) a plaintiff must present medical evidence. See, e.g., Dowell v. Ind. Heart Physicians, Inc., No. 1:03-CV-01410-DFH-TA, 2004 WL 3059788, at *6 (S.D. Ind. Dec. 22, 2004) (holding that an FMLA plaintiff “must offer evidence from a treating health care provider that her pregnancy and related depression qualified as a serious health condition”).
developing case law reflects, in one scholar’s words, “the modernist faith in medical science and the dominance of the medical profession within society.”

But while physicians unquestionably have much expertise, this does not necessarily extend either to detecting malingerers or to understanding the impact of a specific impairment on a specific individual in a specific setting, whether work or otherwise. As noted above, doctors at one time resisted being foisted into the role of determining disability, rather than simply medical impairment. The reasons for such resistance provide a further basis to question the role they have been assigned.

The medical profession as a whole does not claim to be especially skilled at detecting malingerers. Indeed, the current medical literature suggests precisely the opposite: physicians cannot detect malingerers to a reliable degree. Two researchers conducted a recent meta-analysis of the literature on malingerers in the medical-legal context and concluded that physicians have no place making determinations of malingerers in legal cases. They note that

232. See Stone, supra note 42, at 80-83 (recounting the testimony offered by physicians in opposition to the impairment-based approach to disability proposed for the enactment of SSDI program and specifically denying that physicians were capable of making objective medical determinations of disability). Stone also states that “[the medical] profession steadfastly maintains that ‘inability to work’ itself is not quantifiable, at least by doctors.” Id. at 113.
233. See George E. Ehrlich & Fredrick Wolfe, On the Difficulties of Disability and its Determination, 22 RHEUMATIC DISEASE CLINICS N. AM. 613, 616 (1996) (“The physician’s important task is to aid his patient in becoming what the patient wishes; but in the disability adjudication process the physician’s best role is to stay away from determining disability, that interaction between function and society, and only to determine functional ability.”); Erin O’Fallon & Steven Hillson, Physician Discomfort and Variability in Disability Assessments, 20 J. GEN. INTERNAL MED. 852, 853 (2005) (reporting results of study that lists completing a “disability assessment” to be the task that gives physicians most discomfort, ahead of assessing domestic abuse and having end-of-life discussions with patients, and also noting great variability in the results of such disability assessments among physicians).
234. See Mark Thimineur et al., Malingering and Symptom Magnification: A Case Report Illustrating the Limitations of Clinical Judgment, 64 CONN. MED. 399, 400 (2000) (“There are currently no reliable methods to identify the malingering chronic pain patient and no peer reviewed literature on symptom magnification.”).
235. See, e.g., id. at 399-401 (describing a case in which several physicians assumed a patient with a workers’ compensation claim to be malingering, when a lesion was later found to be the source of her complaints); Kenneth D. Craig & Melanie A. Badali, Introduction to the Special Series on Pain Deception and Malingering, 20 CLINICAL J. PAIN 377, 378-80 (2004); David A. Fishbain et al., Is There a Relationship Between Nonorganic Physical Findings (Waddell Signs) and Secondary Gain/Malingering?, 20 CLINICAL J. PAIN 399 (2004); Mark Sullivan, Exaggerated Pain Behavior: By What Standard? 20 CLINICAL J. PAIN 433 (2004).
physicians are often forced into this role: "Regrettably, in many . . . cases, judges virtually invite the expert witness to usurp the fact-finding role of the court and to offer evidence about issues that properly belong to the court, including whether or not the plaintiff is truthful or lying." Even where such invitation is not "express," this is nonetheless the effect when courts require plaintiffs to offer expert medical evidence as part of their claim. Lawyers too "may attempt to seduce the expert witness to express an opinion that is beyond the legitimate limits of his or her professional expertise, either attesting to the veracity of the lawyer's client or labeling the opponent's client as a malingering.

A pair of physicians writing on this subject observed: "[T]he features associated with disability are not those for which the physician is either the primary source of information or the best judge." They note that a physician's assessment of a patient may be distorted in the legal context. For example, if a physician notes on a chart that a patient is "better,' it may mean that he is coping better, marshaling resources better, or is happier, but not necessarily that he is functioning any better. However, such statement would be no doubt damaging to the patient's ability to establish disability. Similarly, some physicians may feel that attaching a label of "disabled" to a patient is disadvantageous to their patients; many physicians hold the "general professional belief in the value of communicating a sense of hope to the patient; a determination of disability is thought to deprive the patient of belief in recovery and therefore of a will to recover.

The parameters set by courts regarding the role of medical evidence often reflect a lack of understanding of how physicians approach assessment of patients. For example, some courts that require medical evidence to prove disability in ADA claims further insist that any medical evidence be limited to a physician's "independent" assessment of the nature of the impairment and the extent of any limitations, unpolluted by the statements and claims of the plaintiff-patient. Thus, in some instances, the medical evidence offered in support of a claim of disability is disregarded where it is not

237. Id. at 428.
238. Id. at 431.
239. Ehrlich & Wolfe, supra note 233, at 619.
240. See id. at 620.
241. Id. The authors, in fact, go so far as to suggest that doctors should withhold progress notes when they are sought in legal cases, "since in sharing them we may violate our responsibility to our patients." Id.
242. STONE, supra note 42, at 151.
sufficiently “objective.” For example, in *Baerga v. Hospital for Special Surgery,* the court commented that the evidence in a psychological report was less than persuasive because it merely “relies on Plaintiff’s self-reporting and conclusory allegations.” In *Kriskovic v. Wal-Mart Stores, Inc.,* the plaintiff alleged that he was denied a promotion due to a disabling foot injury, which restricted his physical activities, including his ability to walk. The court entered summary judgment for the defendant on the plaintiff’s claims, holding that he had failed to produce evidence that he was substantially limited in the major life activities of standing and walking. The court dismissed the deposition testimony of the plaintiff’s physician as being probative on that issue because it was couched in “imprecise, subjective terms,” that “no objective tests” were performed to determine the plaintiff’s ability to walk, and that the doctor’s estimates of the plaintiff’s limitations were based “only on his familiarity with [the plaintiff’s] type of injury and [the plaintiff’s] comments to him.” Thus, his opinions were “too uninformed and speculative to create a triable issue [of fact].” These cases overlook the fact that subjective complaints are a significant basis of evaluation and diagnosis in medicine, especially in the areas of chronic pain conditions such as fibromyalgia, and mental illness, yielding no less valid diagnoses in the eyes of the medical profession.

Historically, medicine was not always associated with objective assessments. The concept of objective determinations of medical conditions accompanied developments in medical technology, starting with the invention of the stethoscope in 1819, and, most significantly, with the X-ray machine. Much of the motivation to develop such

245. Id. at 1363-64.
246. Id. at 1364.
247. Id.
248. See STONE, supra note 42, at 109 (“In epidemiological studies of disability conducted by governmental agencies, interviews are generally used (rather than medical examination), and the classification of people as disabled is made on the basis of whether they say they have limitations on their normal activities.”).
249. Id. at 104-06; see also MILOS JENICEK, FOUNDATIONS OF EVIDENCE-BASED MEDICINE 5-7 (2003) (“In Ancient Greece and throughout history, physicians were often outstanding philosophers first and only later became biologists.”); J. ROSSER MATTHEWS, QUANTIFICATION AND THE QUEST FOR MEDICAL CERTAINTY 4 (1995) (examining the debate in nineteenth-century Europe regarding the use of statistical analysis in medicine and noting the criticisms of physicians of such use on the basis that medicine was an “art” rather than a “science”).
250. See STONE, supra note 42, at 104-06.
technologies was to separate the patient from the diagnostic process, and with it, the possibility for exaggeration or feigning of symptoms. ̈

The purported deficiencies in the expert opinions raised in the decisions discussed immediately above, such as an absence of laboratory findings or exclusive reliance upon a patient's report of symptoms, are classic fodder for cross-examination of treating or evaluating physicians at trial. Imposing a requirement of introducing objective evidence, however, guarantees that a plaintiff who does not (and in the case of certain conditions, cannot) produce this type of evidence will never present her case to a jury. Courts can and should leave the ultimate decision on the sufficiency and weight of medical evidence, whatever its content or basis, to the fact finder. ̈

Assigning physicians a central role in validating disability claims is also based upon an assumption that physicians themselves have a solid grasp on their patients' experiences. However, several studies point to physicians' inability to accurately judge patients' subjective complaints, especially pain. ̈ Such studies conclude that physicians, especially ones who have been practicing for several years, routinely rate pain as being far milder than their patients' own assessments of their pain. ̈ One medical commentator has observed: "[T]here is widespread underassessment and underestimation of pain, badly deserving correction. This undoubtedly is fed by reservations about the credibility of self-report expressed not only by scientists, but also

251. See id.

252. In dictum in an unreported per curiam decision, the Seventh Circuit correctly notes that the evaluation of subjective complaints of pain is a credibility issue and therefore inappropriate for summary judgment. Beasley v. Ind. Bell Tel. Co., No. 95-3477, 1996 WL 102546, at *4 (7th Cir. Mar. 6, 1996). The court's brief but careful discussion of the issue stands in stark contrast to its later decisions, and those of the district courts applying such decisions, regarding the need for corroborating evidence of disability. See, e.g., McPhaul v. Bd. of Comm'rs, 226 F.3d 558, 564 (7th Cir. 2000) ("All that [the plaintiff] can present in support of her reasonable accommodation claim is her own self-serving testimony, and in this case, that is just not sufficient for a reasonable jury to find that she is a qualified individual with a disability under the ADA."). Likely because it was unpublished, the Beasley decision has never been cited by another court.

253. See John T. Chibnall et al., The Effects of Medical Evidence and Pain Intensity on Medical Student Judgments of Chronic Pain Patients, 20 J. BEHAV. MED. 257, 266-68 (1997).

254. See, e.g., id. at 258 (explaining how studies show that as patient pain levels increase, observers progressively discount the pain); John T. Chibnall et al., Internist Judgments of Chronic Low Back Pain, 1 PAIN MED. 231, 236 (2000); Laetitia Marquie et al., Pain Rating by Patients and Physicians: Evidence of Systematic Pain Miscalibration, 102 PAIN 289, 289-94 (2003); Maida J. Sewitch et al., Measuring Differences Between Patients' and Physicians' Health Perceptions: The Patient-Physician Discordance Scale, 26 J. BEHAV. MED. 245, 260 (2003).
As literature scholar Elaine Scarry stated succinctly: "[T]o have great pain is to have certainty; to hear that another person has pain is to have doubt." For these reasons, an argument can be made that physicians are frequently not competent, in the evidence rules' application of the word, to offer testimony about an individual's disability. Since the ADA and the Supreme Court require an individualized review of disability, including the specific limitations experienced by the individual, then the most (and in many cases, only) relevant evidence should be a description of the plaintiff's daily life and the barriers (literal and figurative) that she encounters. Since few physicians are fully aware of the barriers encountered by and the daily experiences of their patients (because such matters are often not seen as relevant to the diagnosis and treatment of diseases and conditions), testimony by physicians may offer little to aid the fact finder's understanding of the plaintiff's disability. In contrast, it is plaintiffs who can provide the most reliable evidence of disability.

As seen above, societal preoccupation with malingering and the role of physicians' opinions in determining disability developed together from the earliest examples of legal remedies and public benefits extended to people on the basis of medical conditions. They are now nearly inextricably tied and account at least in part for the courts' straying from the mandates of summary judgment procedure in ADA claims.

VI. EVIDENTIARY CONSIDERATIONS AND QUESTIONS

Although both the stated and unstated rationales of courts' insistence upon expert medical evidence to establish disability are misplaced, there are some additional issues that warrant consideration. Many of these questions broaden the discussion beyond the issue of disability discrimination and the ADA's parameters to considerations...
of evidence law generally, including the role of expert medical testimony in contemporary trials and the extent to which the Federal Rules of Evidence allow an ADA plaintiff to establish the fact of her disability solely through her own testimony. The resolution of these questions further underscores courts' errors in concluding that expert medical evidence is an indispensable requirement for establishing disability under the ADA.

A. The Evolving Role of the Medical Expert and the Prima Facie Case

The ADA is not the only context in which some courts require a party to introduce expert testimony to establish a prima facie case. In certain other settings, courts require a party to offer expert testimony, including expert medical evidence, to establish a particular fact "where more than common knowledge and experience are needed to understand the issues and to form an opinion." Stated another way, expert testimony is not required where "the subject of inquiry is one which is plainly comprehensible by the jury and of such a nature that unskilled persons would be capable of forming correct conclusions respecting it without the opinion of experts." This rule is a contemporary manifestation of the evolving notions of the respective roles of the jury and the expert witness. At one time, the pretrial controversy was almost exclusively over whether to permit the introduction of expert testimony. Courts viewed such "experts" with suspicion, as overeducated hired guns who would confuse the jury or who would usurp the role of the jury or judge. Thus, under the common law rule, such testimony was admissible only where a necessity for such evidence had been demonstrated. A nineteenth-century opinion of the Supreme Judicial Court of Maine demonstrates this caution well. In Pulsifer v. Berry, one of the issues on appeal was whether the trial court had properly permitted the testimony of a railroad engineer regarding the care that should have

262. See KAYE ET AL., supra note 176, §§ 1.2-1.2.2, at 5-7.
263. Id. § 1.2.1, at 6-7 (noting that at common law, experts were limited to testifying about issues that were sufficiently outside of the knowledge of the jury).
264. Id. § 1.2, at 5-6.
265. Id. § 1.2.1, at 6-7.
266. Pulsifer v. Berry, 32 A. 986 (Me. 1895).
been taken to prevent the spread of a fire.\textsuperscript{267} The court held that the testimony should have been excluded and noted:

It is an elementary rule respecting the introduction of oral evidence that, in general, witnesses are only permitted to state facts within their knowledge, and not to give their opinions or conclusions. The testimony of experts constitutes one of the exceptions to this rule. . . . But the opinions of experts are not deemed admissible where the subject of the inquiry is one of general observation or experience, and not such as require any peculiar habits or study in order to qualify a man to understand it. . . . The jurors may have less skill and experience than the witnesses, and yet have enough to draw their own conclusions, and do justice between the parties. Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them, and draw inferences from them, as witnesses, then there is no occasion to resort to expert or opinion evidence. . . . With respect to all matters which may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, it is deemed safer to take the judgment of unskilled jurors than the opinion of biased experts.\textsuperscript{268}

Many of these notions regarding the limitation on expert opinion evidence were eventually codified in courts' rules of evidence, including those applied to the federal courts.\textsuperscript{269} However, during the second half of the twentieth century, courts moved away from notions of necessity and towards analyses of whether such evidence would be "helpful" to the jury.\textsuperscript{270} What is remarkable is that in some jurisdictions, the standard for whether expert testimony was admissible has been transformed, in some cases, into the standard for whether such testimony is required.\textsuperscript{271} Thus, as a general rule, "if a party seeks to prove an issue that is beyond the ken of the jury, that party must present expert testimony."\textsuperscript{272} Although the language mirrors the common law approach to the admissibility of expert testimony, this requirement is not an evidentiary rule at all but, rather, a requisite of the substantive law underlying a plaintiff's claim for relief. Thus, the

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\textsuperscript{267} See KAYE ET AL., supra note 176, § 1.2.2, at 7-9.
\textsuperscript{269} See id. at 987-88.
\textsuperscript{270} Id. (citations and internal quotations marks omitted) (emphasis added).
\textsuperscript{272} KAYE ET AL., supra note 176, § 1.6, at 38.
absence of such testimony necessarily results in the failure to establish each of the elements of such claim.

To a certain degree, the Katz-Marinelli line of cases reflects the notion that there are certain medical conditions—those that are “obvious”—regarding which a jury need not receive medical testimony to evaluate and consider. But for certain other claimed impairments, these courts hold, a physician’s opinion is an indispensable prerequisite to establishing disability. Under this approach, conditions calling for expert testimony include: a heart condition,\(^{273}\) deep vein thrombosis,\(^{274}\) fibromyalgia,\(^{275}\) a learning disorder,\(^{276}\) anxiety disorders,\(^{277}\) and agoraphobia.\(^{278}\) Although the courts in the Second Circuit follow a sine qua non rule of medical evidence, the district court in \textit{Sussle v. Sirina Protection Systems Corp.}, which sets forth the most detailed analysis of the issue, specifically noted that the claimed disability at issue in that case, Hepatitis C, would not be understood by the jury.\(^{279}\) By comparison, those conditions found to be sufficiently “obvious” and therefore not requiring expert testimony include: arm and neck pain,\(^{280}\) back and abdominal pain,\(^{281}\) and hearing loss.\(^{282}\)

Thus, these ADA cases demonstrate how, in modern case law, the relevant inquiry for allowing the admission of expert evidence has morphed into a nearly identical inquiry for whether such testimony is required as a matter of substantive law. However, as discussed above, there is no basis in the text or regulations of the ADA to conclude that expert testimony is required to establish a prima facie claim of disability.\(^{283}\)

This conclusion is reaffirmed by examining and contrasting contexts other than the ADA definition of disability in which courts

\(^{273}\) Katz \textit{v. City Metal Co.}, 87 F.3d 26, 32 (1st Cir. 1996).
\(^{278}\) \textit{Id.}
\(^{283}\) See supra notes 132-173 and accompanying text.
require a plaintiff to offer expert medical evidence to support not simply a given fact, but a prima facie case. One such context is medical malpractice litigation, where a common law rule (codified by some states)\textsuperscript{284} evolved requiring the use of expert medical testimony to establish a prima facie case.\textsuperscript{285} There, the requirement is not based on the use of a physician's testimony to disclose, explain, or validate the plaintiff's own experience, but to provide competent evidence of one of the elements of claim.\textsuperscript{286} Only a physician (with the appropriate training and experience) can testify to the standard of professional medical care in a given context.\textsuperscript{287} The same requirement applies equally in other professional malpractice cases: expert testimony by a member of the profession must be presented (or an expert on the profession must testify) as to the profession's standards of care.\textsuperscript{288} Thus, in these contexts, the focus of the expert testimony is, to a great extent, on the defendant's actions or inaction, rather than the plaintiff's condition. Indeed, in some medical malpractice cases, where the breach-of-duty issue to be determined in a case is one within the common knowledge of jurors, such as the failure to remove a foreign object or instrument (e.g., "the overlooked sponge") used in surgery or a failure to provide informed consent, no such testimony is required; courts rule that a jury is competent to determine the standard of care without the aid of a medical expert.\textsuperscript{289}

Another example of the potential need for medical evidence in a tort claim is where a plaintiff is alleging a complex causation fact, such as the effect of exposure to certain toxins, the development of cancer,
or other illnesses. In the absence of such evidence, jurors would be asked to engage in pure speculation about the existence of a causal link between an exposure and an illness. Thus, while there are at least some contexts in which courts appropriately require expert medical testimony before submitting a case to a jury, in no context is the medical evidence required to provide corroboration of a plaintiff's claims.

Moreover, if we broaden the question to the requirement of medical evidence in personal injury cases generally, such as to prove the harm to the plaintiff, courts have little basis to preclude a plaintiff from going to trial without an expert. There are few reported cases in which a plaintiff's failure to provide expert testimony on the issue of injuries resulting from a defendant's negligence was the sole basis to preclude her from going to trial. There can be little question that the testimony of a well-qualified expert to explain the nature and extent of a plaintiff's injury enhances a plaintiff's credibility and therefore the likelihood of her recovery, but this is an issue distinct from whether such testimony is necessary to established the elements of a plaintiff's claim. Indeed, one of the central tactics of defending a personal injury claim is to expose exaggerated levels of injury through the use of discovery tools or cross-examination. A plaintiff who proceeds to trial without some medical evidence to support her claims of harm does so at her own peril, but, of course, courts allow imperiled claims to go to trial all the time.

Another context in which courts debate the requirement of medical documentation of disability is bankruptcy adversary proceedings in which a debtor seeks a discharge of an educational loan, which are categorically excluded from dischargeable debts.

290. See KAYE ET AL., supra note 176, § 1.6, at 38; see also Jones v. Ortho Pharm. Corp., 209 Cal. Rptr. 456, 461 (Ct. App. 1985) ("Although juries are normally permitted to decide issues of causation without guidance from experts, the unknown and mysterious etiology of cancer is beyond the experience of laymen and can only be explained through expert testimony." (internal quotations marks omitted)).

291. Historically, one exception has been in the case of emotional distress torts where there needed to be an expert medical witness to testify as to the objective physical manifestations of emotional distress. It is now well-settled, however, that a plaintiff need not present expert testimony to establish such distress or harm. Such emotional distress may be demonstrated solely through a plaintiff's own testimony, including in employment discrimination claims, although a plaintiff is generally permitted to offer corroborating testimony. See Price v. City of Charlotte, 93 F.3d 1241, 1254 (4th Cir. 1996); Bolden v. Se. Pa. Transp. Auth., 21 F.3d 29, 34 n.3 (3d Cir. 1994); Zerilli v. N.Y. City Transit Auth., 973 F. Supp. 311, 323 (E.D.N.Y. 1997), rev'd on other grounds, Nos. 97-7921, 97-9219, 1998 WL 642465 (2d Cir. Apr. 6, 1988).
otherwise, on the basis of "undue hardship." Several courts have recognized that a disability that limits one's ability to work may constitute such hardship, but are not in agreement regarding the evidentiary burden on debtor-plaintiffs in such cases. In many ways, the arguments there are similar to and parallel with those in ADA cases. The discussion, however, is focused more on the overall burden of a plaintiff to prevail on such claims (in which the court sits as fact finder) rather than to establish a prima facie case for purposes of surviving summary judgment. The undue hardship exception imposes a demanding burden on debtors seeking discharge. If one is claiming hardship from a medical condition, she must establish that it will prevent her from maintaining a standard of living "for a significant portion of the repayment period of the student loans." Courts require debtors to present "[s]ubstantial credible evidence . . . to support the existence of such a medical condition," more than "bare allegations." Even under this standard, however, few courts require the presentation of expert medical testimony. The general trend in these cases is to permit a debtor to demonstrate that a medical condition limits her ability to repay the loan through judicial notice, documentation of eligibility for certain public benefits programs such as SSDI, or the production of medical records, to corroborate the debtor's own testimony. And some courts simply conclude that the

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293. See In re Nash, 446 F.3d 188, 192-93 (1st Cir. 2006) (ruling that a mental illness could be an undue hardship, but the plaintiff needs to provide reliable evidence of the long-term prognosis and effect of the illness); In re Shilling, 333 B.R. 716, 722-23 (Bankr. W.D. Pa. 2005) (holding that a judge's determination that a debtor temporarily "met the disability requirements of the Social Security Act" was not sufficient evidence of a permanent or prolonged hardship).
294. Compare Baerga v. Hosp. for Special Surgery, No. 97 Civ.0230(DAB), 2003 WL 22251294, at *4 n.5 (S.D.N.Y. Sept. 30, 2003) (stating that one can be substantially limited in the area of working if his disability precludes him from doing more than one type of job), with Nash, 446 F.3d at 192-94 (stating that the plaintiff failed to show that she was entitled to undue hardship discharge of her student loan debt because she did not show that her mental illness would prevent her from working in the future).
295. See Nash, 446 F.3d at 194 (holding that a bankruptcy judge did not err in finding that a plaintiff did not satisfy her burden of proof where she failed to provide evidence of a future period of unemployability due to her mental illness).
298. See id. at 842-43.
299. Id. at 843-45.
debtor's testimony is sufficiently detailed and credible to support a discharge.\textsuperscript{300}

Thus, judges evaluating ADA claims appear to be alone in requiring expert medical testimony to corroborate a plaintiff's assertions of a medical condition to establish a prima facie case. Courts have not articulated a reason why ADA claims should receive such additional scrutiny. In both ADA and tort claims, a plaintiff must disclose and discuss the details of the impact of an impairment on her daily life.\textsuperscript{301} Certainly, there are important differences between offering evidence to quantify and explicate the specific harm resulting from a tortious act so that a fact finder may attach a numeric value to such harm and establishing that one belongs to a class of individuals which is disadvantaged by a combination of personal physical characteristics and a physical environment structured by society in such a way as to render one disabled. But such differences do not support imposing an additional burden on ADA plaintiffs. Indeed, one could argue that the opposite should be the case because an ADA plaintiff is not asking that a monetary value be placed on her medical condition.\textsuperscript{302}

B. Evidentiary Limitations on a Layperson's Testimony of Disability

A companion question to whether expert medical testimony is required in ADA, tort, or other cases is whether such evidence is required, even as a purely practical matter, because testimony regarding certain elements of a claim cannot be offered by the plaintiff herself. In other words, can a plaintiff describe to a jury her medical condition and the resulting impairments without running afoul of evidentiary limitations on such testimony? If the answer is “no,” it suggests that medical evidence would be needed to prove the existence of the disability.

There are two closely related evidentiary rules that may be implicated with testimony of one's disability. First, a witness is limited

\textsuperscript{300} Id. at 846-47.

\textsuperscript{301} Holt v. Grand Lake Mental Health Ctr. Inc., 443 F.3d 762, 765 (10th Cir. 2006) (“To establish a valid claim under the ADA, a plaintiff must . . . . (1) have a recognized impairment, (2) identify one or more appropriate major life activities, and (3) show the impairment substantially limits one or more of those activities.”).

\textsuperscript{302} While the ultimate outcome of an ADA claim may well involve some cost to the defendant and gain by the plaintiff, such costs and gains are not calculated as part of the disability determination stage of the claim, but, rather, are based upon findings of whether there was disparate treatment, denial of a reasonable accommodation, or some other violation of the statute. See Douglas M. Staudmeister, Comment, Grasping the Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process, 46 AM. U. L. REV. 189, 203-05 (1996).
to testifying to facts within her personal knowledge. This requirement restricts testimony to those facts that can be perceived and were in fact directly perceived by the witness. A second distinct rule is that against the admission of hearsay statements, or assertions of fact told to the witness out-of-court. Thus, if a witness testifies to a fact as told to her by another, this is hearsay, which is generally inadmissible unless a particular exception applies. If she testifies to a fact for which no foundation for her knowledge has been established (and, indeed, the context indicates that she could be aware of such fact only as a result of being the recipient of a hearsay statement rather than perceiving such fact for herself), such evidence should be excluded because of a lack of personal knowledge, not because her only basis of knowledge is likely to be hearsay, although practitioners and courts frequently confuse the two rules.

However, it is not always apparent what facts are based solely upon a witness’s personal knowledge. Indeed, as some commentators have observed: “The personal knowledge requirement does not demand knowledge in an absolute or literal sense.” Indeed, a witness cannot testify as to what she has perceived without relating it, consciously or unconsciously, to her own past experience and existing foundation of knowledge and understanding. As the modern editors of McCormick on Evidence observed: “When the witness ... bases his testimony partly upon firsthand knowledge and partly upon the account of others, the problem calls for practical compromise.” Specifically, such testimony should be admitted (or excluded) based upon the court's determination of the overall reliability of the

303. FED. R. EVID. 602.
304. MCCORMICK ON EVIDENCE § 247, at 424-25 (Kenneth S. Broun ed., 6th ed. 2006) (examining the difference between the hearsay rule and the rule requiring firsthand knowledge).
305. Id. § 248, at 425.
306. See, e.g., FED. R. EVID. 801(d).
307. See MCCORMICK, supra note 304, § 247, at 424 (“The distinction is one of the form of the testimony, whether the witness purports to give the facts directly upon his or her own credit (though it may appear later that the statement was made on the faith of reports from others) or whether the witness purports to give an account of what another has said and this is offered to establish the truth of the other's report.”).
308. 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6023, at 221 (2007).
309. Id. § 6023, at 228 & n.22 (citing discussion of “knowledge structures” in RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 28-42 (1980)).
310. MCCORMICK, supra note 304, § 10, at 23.
The oft-cited example of such knowledge is an individual's age or date of birth. Since no person recalls the actual events surrounding one's own birth, one is necessarily relying upon, to some degree, reports from others regarding the date of that event. The same is true regarding kinship (how can you know someone is your brother, aunt, grandfather, etc. but from what others have told you?), and, as with a witness's age, courts generally permit testimony of such facts.

How do these evidentiary principles apply when a witness offers testimony regarding a medical condition? The general rule stated by courts in reported opinions has been essentially unchanged for years. A plaintiff may testify as to her "general condition" and describe symptoms and their impact on her daily life, but she may not testify as to her medical diagnoses and prognosis.

In practice, the line between what a plaintiff can testify to and what is reserved for the province of medical expertise is unsettled. Some courts may permit use of a diagnostic term by a plaintiff in her testimony, but most will rule that anything "medical" beyond the diagnosis itself is necessarily outside the expertise of the plaintiff or is

311. See also Wright & Gold, supra note 308, § 6026, at 254-57.
312. See, e.g., Antelope v. United States, 185 F.2d 174, 175 (10th Cir. 1950) (holding that the alleged victim of statutory rape could testify as to her age); McCormick, supra note 304, § 10, at 45; Wright & Gold, supra note 308, at § 6026, at 255.
313. See Antelope, 185 F.2d at 175.
314. This practice is reflected in Federal Rule of Evidence 804(b)(4), which created a limited hearsay exception for statements regarding family history.
315. See, e.g., Robinson v. Wieboldt Stores, Inc., 433 N.E.2d 1005, 1010 (Ill. App. Ct. 1982) ("While it would have been proper for plaintiff to describe any symptoms or physical limitations which she did not experience prior to the incident [at issue in the litigation], as well as testify to how she felt, it was improper for her to testify concerning special medical conditions such as high blood pressure and angina. Plaintiff was not qualified as an expert and was therefore incompetent to testify regarding specific medical diagnoses." (citations omitted)); Morphew v. Morphew, 419 N.E.2d 770, 777 (Ind. Ct. App. 1981) ("[A] lay witness may testify about his or her illness. However, [w]ith regard to diagnosis, causes and effects of disease . . . opinions of lay or nonexpert witnesses are not competent evidence."), superseded by statute on other grounds, Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 423(a), 98 Stat. 494, 799; 32 C.J.S. Evidence § 551 (1996) ("While a nonexpert or lay witness may not give expert testimony as to his physical condition, he may state simple inferences drawn from his conscious subjective sensations concerning such condition. . . . According to some authority, a witness should be confined to testimony or statements relating to the outward appearance of his injuries and to the symptoms experienced by him, such as pain, suffering, and the like, and should not be permitted to testify as to the nature of his injuries, the applicable medical terminology, and the like, and the medical prognosis or treatment. . . . According to some cases, a witness may not testify as to whether or not he had a particular disease or was treated for a particular disease.").
based upon out-of-court statements made by a treating physician. There is little question that a person can describe subjective experiences of pain and other symptoms or that he or she is in a state of general good health. One may also testify as to what actions may lead (based upon reasonable inference) to an exacerbation of symptoms ("My back hurts when I lift my infant daughter" or "My medication makes me sleepy"). Courts generally permit one to testify as to the impact of a medical condition on one's ability to perform work or other tasks as compared with the time before the onset of the condition.

316. See, e.g., Marcus v. Lindsey, 592 So. 2d 1045, 1046 (Ala. 1992) (noting prior case law holding that a plaintiff may generally testify as to the fact and symptoms of a fractured bone, but cannot testify as to other medical effects of the injury itself); Howard v. Feld, 298 N.W.2d 722, 723 (Mich. Ct. App. 1980) (holding that a plaintiff may testify as to an injury, as long as there are no disputed issues beyond a layperson's knowledge, such as scope and cause of injury).

317. See, e.g., Collins v. Kibort, 143 E.3d 331, 337 (7th Cir. 1998) ("A witness does not need to be a doctor to discuss his or her health in general terms."); Graves v. Graves, 531 So. 2d 817, 822 (Miss. 1988) (noting that a plaintiff may testify as to his own pain and suffering and to describe his physical injuries).

318. See, e.g., Guyer v. Mayor and Aldermen of Savannah, 292 S.E.2d 445, 448 (Ga. Ct. App. 1982) (holding that a plaintiff could testify as to her "observations of the effect on her work" of her injury); McMahon v. Richard Gorazd, Inc., 481 N.E.2d 787, 796 (Ill. App. Ct. 1985) (holding that a plaintiff may testify as to symptoms experienced after taking certain medications).

319. See, e.g., Sheffield Co. v. Phillips, 24 S.E.2d 834, 839 (Ga. Ct. App. 1943) ("The court did not err in permitting the plaintiff to answer the following question: 'Tell the jury whether or not you are able physically to do the duties that you have to do now as you were before you were hurt by this elevator?' The extent of the plaintiff's injuries and his disability physically were for the jury, and it was not improper to allow the plaintiff to answer the question."). Furthermore, the court in Carter v. Bradford, 126 S.E.2d 158, 160 (N.C. 1962), noted:

The testimony to which objection was made involved her statement that from the date of her injury to the date of her testimony she had lost 90 per cent of the use of her right hand. The defendant insists this evidence involves the expression of opinion which plaintiff is not qualified to give and that the objection should have been sustained on that ground. However, a lay witness may express opinion about his present state of health, ability to do work, etc. "The ability of a party to perform physical or mental labor is not a question of such exclusively technical significance as to permit expert testimony to be given conclusive effect." The plaintiff, a typist and bookkeeper, was in a better position than any other person to know what she had done with her right hand prior to the injury and what she was able to do with it afterwards. The testimony does not attempt to project the disability or to anticipate its future effect. She was merely testifying as to how the injury had handicapped her to the date of the testimony. Its admission was not error.

Id (citations omitted). The court in Roberts v. Motor Cargo, Inc., 104 N.W.2d 546, 550 (Minn. 1960) noted:
To the extent that a plaintiff is deemed to be offering an opinion of her own condition, her testimony must fall within the requirements of "Opinion Testimony by Lay Witnesses" in Federal Rule of Evidence 701:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. More specifically then, the question can be phrased as whether a plaintiff's opinion about her own condition is "rationally based" upon her own perception of the condition rather than upon "scientific, technical, or other specialized knowledge."

The reported opinions indicate that few courts permit one to testify that she has a particular disease or condition, or the permanency of a condition. It would seem, however, that a diagnosis or condition is the sort of fact, noted by the McCormick on Evidence editors, that a plaintiff would offer based upon both reports of others (specifically, her health care provider's diagnosis, for example, of a "spastic colon") and her own perception of the condition (her experience of frequent and painful bowel movements). Thus, courts should not exclude such testimony out of hand, but, as is done with the fact of a person's age, should consider the overall reliability of such evidence given the circumstances in which it is offered, perhaps in light of facts appropriate for judicial notice. Indeed, in practice, courts and

Generally, an injured person may testify with regard to the results he has experienced from his injury, his symptoms, pain he has suffered, the effect of his injury on his physical condition and on his ability to do work or certain kinds of work. For instance, a witness has been permitted to testify that as a result of his injury he had no use of his foot; that the injury he suffered had reduced his ability to do carpenter work and to what extent; that a stone cutter, an injured layman, could testify that if his arm remained the same he would not be able to resume his trade.

Id.

320. FED.R.EVID. 701.
322. McCormick, supra note 304, § 10, at 23.
323. See Gage v. Metro. Water Reclamation Dist., 365 F. Supp. 2d 919, 929 (N.D. Ill. 2005) ("While medical evidence may be difficult to understand without the use of an expert
opposing counsel will likely raise few barriers to an individual stating a diagnosis unless the fact of the diagnosis is truly a central dispute in the case.

In the ADA context, only a few courts have specifically acknowledged the potential evidentiary limitations on a plaintiff’s ability to testify as to her medical condition in the context of proving that she is disabled under the statute. In *Cruz Carroll v. AMR Eagle, Inc.* a court noted that the plaintiff was not competent to testify as to the impact of HIV infection on his ability to reproduce, and his failure to produce medical evidence on the issue, in contrast to the plaintiff in *Bragdon v. Abbott* was fatal to his claim. In *Holt v. Olmsted Township Board of Trustees*, the United States District Court for the Northern District of Ohio ruled that the plaintiff could not testify to her diagnoses of cytomegalovirus, chronic fatigue syndrome, and fibromyalgia, but she could generally describe her “condition”.

In *Mehta v. Council for Jewish Elderly*, the United States District Court for the Northern District of Illinois denied a defendant’s motion to exclude the plaintiff’s testimony regarding her medical condition (patchy bulbar duodentis). The court noted that the plaintiff may testify as to her own perceptions and opinions of her medical condition and that it was up to the jury whether to credit her testimony. This approach was followed in the same district several years later in *Denson v. Northeast Illinois Regional Commuter Railroad Corp.*, which held that a plaintiff may testify as to her own experience of her condition (an arm and shoulder injury) but not what her doctors have told her.

In the ADA context, where issues of causation, prognosis or the adequacy of medical treatment play no role, rules regarding the

opinion, courts have routinely held that lay individuals are certainly capable of reliably understanding and testifying to their own medical conditions.

325. 524 U.S. 624, 630 (1998) (holding that an HIV-positive plaintiff was disabled under the ADA even though the “medical” evidence offered consisted of medical literature on HIV infection rather than evidence specific to the plaintiff herself).
326. Such a fact may be appropriate for judicial notice, however. See supra notes 120-126 and accompanying text.
329. Id. at *3.
330. No. 00 C 2984, 2003 WL 1732984, at *2 (N.D. Ill. Mar. 31, 2003); cf. So. Cal. Housing Rights v. Los Feliz Towers Homeowners Ass’n, 426 F. Supp. 2d 1061, 1069-70 (C.D. Cal. 2005) (holding that under the Fair Housing Amendment Act, medical evidence was required to prove disability because the plaintiff could only testify as to symptoms and their impact on her life, not the actual medical condition).
competency of an individual to testify to her own medical condition need not be so strictly applied as in cases in which such issues are in dispute. Indeed, as described above with respect to testimony about birth and kinship, it is not logical or practical to push the personal knowledge or hearsay rules to an absurd point. There is something inherently odd about not permitting a person with cancer to utter the words “I have cancer” or likewise for an individual to testify “I have a broken leg” or “I have diabetes” if she has such conditions. Of course, in the most literal sense, she does not really “know” she has a tumor, and that is something that her physicians could not themselves discern until they ran a scan, X-ray, or blood tests. She can certainly testify that she has pain, fatigue, and physician-imposed restrictions on her activities, but why should she not state the reason for such pain, fatigue, and restrictions? She can testify that she goes to the hospital once a week and has an intravenous drip; she should not be precluded from testifying that such treatment is “chemotherapy.” Similarly, statements such as “They removed a lobe of my lung last March” need not be excluded. There is unquestionably a point at which a person’s subjective experience of her illness becomes melded with her personal knowledge and awareness based upon information from reliable sources. In other words, does not one gain personal knowledge of one’s own body at some point such that one is no longer merely parroting the words of a physician? To at least some degree, courts’ overly technical division of “knowledge” of medical conditions is a further reflection of the role we expect physicians to play in society; that to the exclusion of the patients themselves, physicians are the sole guardians of the knowledge and understanding of their patients’ illnesses and physical limitations.

Moreover, since the regulations and case law dictate an individualized case-by-case review of the impact of an alleged impairment on the individual, the central facts in an ADA disability determination analysis must be the plaintiff’s individual experience of her disability, particularly as they impact her major life activities. As discussed above, no witness can provide more direct and competent personal knowledge of such facts than the plaintiff herself. For this reason as well, it seems that courts must take a more reasonable approach to the admissibility of such evidence in ADA claims.

332. For example, such evidence may be particularly appropriate for admissibility under the “residual exception” to the rule against hearsay provided in the Federal Rules of
VII. CONCLUSION: THE BROADER IMPLICATIONS FOR DISABILITY AS A POLITICAL CATEGORY

This discussion leads us to a final question: Why should we care if courts impose a requirement of producing corroborating medical evidence to establish that one is disabled under the ADA? The answer goes to the fulfillment (or not) of the ADA's mandate to eradicate discrimination on the basis of disability. The continued hegemony of medicine in notions of disability, with a focus on personal impairment and malingering, serves as an impediment to reframing notions of disability as urged by disability scholars and activists. A requirement of "proof" of disability from a medical provider impedes the class of disability from emerging as a truly protected status, approaching that of race, gender, religion, and age. It serves to perpetuate the central role of medicine in notions of disability, preventing a broader, more powerful conceptualization of the term.

The continued association of disability with medicine—and therefore with sickness, tragedy, dependence, and other stigmatizing notions of powerlessness and victimhood—undermines the very paradigm shift that many advocates sought to bring about with the ADA's enactment. By making the plaintiff's role as "patient" the

Evidence. Fed. R. Evid. 807 (permitting admissibility of certain evidence that would otherwise be hearsay with "circumstantial guarantees of trustworthiness").

333. Professor Mary Crossley noted the problem of the courts' requirement of medical evidence to prove disability in her 1999 article, The Disability Kaleidoscope, and observed:

As a political matter, disability studies scholars view the identifying or labeling of who is disabled as an exercise of unequal power, and have argued that the power to define who is disabled has historically been used to advance the interests of groups providing services to disabled people rather than to advance the interests or well-being of disabled people themselves.

Crossley, supra note 21, at 690 (footnotes omitted); accord Berg, supra 46, at 44 ("[T]he practice of determining disability on an individualized basis undermines a sustained political consciousness among people with disabilities and, in turn, undermines a unified disability rights movement.").

334. Linton has observed:

When medical definitions of disability are dominant, it is logical to separate people according to biomedical condition through the use of diagnostic categories and to foreground medical perspectives on human variation. When disability is redefined as a social/political category, people with a variety of conditions are identified as people with disabilities or disabled people, a group bound by common social and political experience.

LINTON, supra note 5, at 12.

335. See Diller, Dissonant Disability Policies, supra note 210, at 1059. Professor Diller notes that:

[A] disturbing tendency to adhere to the "medical abnormality" view of disability has become apparent in cases dealing with the ADA. This tendency threatens to
preliminary question—before considering her role as employee, patron, or citizen—judges immediately place a plaintiff in a position of being pathologized, pitied and therefore disempowered. If a plaintiff declines to put forth a construct of herself as “patient,” as is the case where a plaintiff offers only her own narrative of her disability, she is precluded entirely from presenting her account of discrimination to the fact finder.

Imposing a requirement of expert medical testimony that goes beyond diagnosis also places many plaintiffs in the position of having to disclose information to attorneys, judges, and perhaps the general public that is deeply personal, private, and perhaps humiliating in the prosecution of her ADA claims. No other category of employment discrimination forces a plaintiff to do so. Thus, the medical evidence requirement itself may serve as a powerful deterrent to those seeking to vindicate their rights under the ADA.

drain Title I of the ADA of its vitality, rendering its provisions an exercise in the rhetoric of equality, rather than a means of achieving real social change.

Id. 336. Professor Laura Rovner provides a thoughtful discussion of the question of “whether litigation, a traditional vehicle for enforcing civil rights, may create its own boxes and stereotypes” and therefore poses a “risk to persons with disabilities of allowing lawyers to conceptualize their stories and define their identities.” Rovner, Perpetuating Stigma, supra note 28, at 249. For example, a disabled person who is an active, accomplished person may not, in her own mind, fit the stereotype of the “helpless cripple.” Id at 282-83. As Professor Rovner has observed: “[M]any disability rights advocates have made careful, concerted efforts to reject imagery and language that portray disabled people as being pitiable, powerless, or victimized by virtue of their disabilities.” Id at 291-92.

337. See Berg, supra note 46, at 39-41 (“Within the structure of disability determinations, the plaintiff’s body is an object to be investigated by lawyers, doctors, and vocational experts, and ultimately codified by the judge. . . . [P]laintiffs who wish to persuade a judge that they are disabled have no choice but to portray their impairment—in all its corporeal detail—as the central and defining feature of their identity and daily lives.”); see also Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (B.D. Pa. 1997) (holding that an ADA plaintiff claiming disability due to depression had waived the psychotherapist-plaintiff privilege, without limitation, and “must therefore authorize the release of all records that contain confidential communications with her psychiatrist that are relevant to her mental condition during the time she was in Defendant’s employ”).

338. See supra notes 165-171 and accompanying text.

339. An experience from my own practice illustrates the hazards faced by ADA plaintiffs. I represented a deaf couple claiming discrimination in public accommodations; specifically, a medical practice that refused to provide American Sign Language (ASL) interpreters for office visits. The defendants vigorously contested that my clients were disabled (despite the fact that they both used ASL and received all of their education at schools for the Deaf). Defense attorneys attempted to subpoena medical records, including records of their marriage counseling sessions, as well as emergency dispatch tapes in an attempt to locate and reveal contexts in which my clients used speech instead of ASL. The federal magistrate judge granted my motion for a protective order regarding most of the items sought, including the counseling records, and specifically rejected the defendant’s arguments
Overreliance on medical evidence similarly reinforces false notions of the objectivity and certainty of medicine, most importantly that of a medical diagnosis. There is no objective basis in science for the discrete and judgmental categories of "normal" and "abnormal" as distinct from the statistically more or less numerous. Moreover, the act of diagnosis and classification is not free from elements of social control, stigma, and political labeling. An ADA plaintiff therefore is compelled to adopt and promote the labels assigned by the medical profession (with accompanying connotations of being disordered or defective) even where such labels may conflict with her self-identity, including her political identity as a citizen entitled to obtain and maintain employment and to have full access to public accommodations and services.

As I have argued previously, courts' hypertechnical readings of the ADA definition of disability preclude analysis of the larger questions posed by the ADA regarding the place of people with disabilities in workplaces, public accommodations, and public

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that the plaintiffs had put their entire medical history in play by filing an ADA claim. However, because the issue of what evidence is discoverable in ADA cases was not clearly defined in the law, the matter had to be briefed and argued before a magistrate. Although my clients ultimately prevailed on many of the issues raised in the motion for a protective order, the very discussion of these categories of evidence threatened to compromise my clients' privacy and dignity.

As cultural historian Douglas Beynton notes:

With the focus on plaintiffs' bodies, disabled people are placed in the undignified (to say the least) position of having to impress a judge with the seriousness of their impairment. By locating the crux of the issue in the body of the individual rather than in discriminatory attitudes and practices, people who have experienced discrimination on the basis of a physical, mental or psychological difference from the majority can nevertheless be excluded from ADA protection.


services. Rejecting such a reading would not mean that every ADA plaintiff would prevail. Indeed, the case law of Title VII and the Age Discrimination in Employment Act reveals that courts have spent decades working through the myriad of issues presented by claims of discrimination on the basis of race, sex, religion, age, and other characteristics. But the discussion of the corresponding issues in the disability category cannot begin in earnest in ADA cases until courts loosen the restrictive grip on the class of individuals entitled to present their claims to a fact finder.

This Article has argued that in view of the current language of the ADA, and more generally, contemporary approaches to evidence and summary judgment, courts are wrong to grant summary judgment to defendants based solely on an absence of corroborating expert medical evidence to support a finding of disability. Others elsewhere make compelling arguments for revisions to the text of the ADA, such as introducing a nonexhaustive list of diseases and conditions which would establish disability per se. Such revisions may well address other problems with the application of the law and could move notions of disability away from medically associated terms such as impairment.

The question will remain, however, of how one proves that one has something “on the list.” Other commentators have proposed eliminating the requirement of proof of a substantial limitation of a major life activity in order to meet the statute’s definition of disability. Under this approach, the focus would be on “barriers in that person’s environment,” rather than requiring “cumbersome evidentiary showings . . . . [with an emphasis on] irrelevant medical details about the impairment in order to state a claim.” While such an amendment would certainly compel an appropriately refocused inquiry in ADA claims, there is unlikely to be sufficient political support for the change at this time, leaving the questions of proof,
and, ultimately, fairness, to be resolved through litigation under the existing definition of disability. However, there is nothing in the current definition of disability to prevent courts from permitting plaintiffs to establish through their own testimony that they fall within the statute's protections by describing the substantial limitations—imposed by both physiological and social sources—on their lives.

It is important to emphasize that the instant discussion is about establishing a prima facie case, what is required to get to a fact finder's determination, and not about what is ultimately persuasive for a fact finder. The court system is, of course, always and appropriately concerned with issues of deception and fakery by litigants for personal (or corporate) gain. However, warnings about the specter of "abuse" in the disability context fail to recognize that the "system" we worry about protecting from liars and manipulators already has a guardian—the fact finder—and an adversarial process designed to permit parties to test the sufficiency of others' allegations.

This Article is not calling for a legal mandate preventing any plaintiff from losing in court as the result of an absence of expert medical testimony. That is not warranted, practical or appropriate, or consistent with the ADA as presently drafted. But courts should not dismiss claims before trial on the basis that jurors will not likely find

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347. Other commentators have argued that courts can and should take a significantly different approach to determining disability within the existing statutory framework. For example, Professor Bagenstos argues that when assessing whether a plaintiff is an individual with a disability within the meaning of the ADA, courts should require a plaintiff to establish "only that she has an (actual, past, or perceived) impairment to which society's choices are likely to attach systematic disadvantage . . . . by illustrating the ways in which society—through a variety of contingent decisions—stigmatizes and/or attaches systematic disadvantage to [her] particular impairment[]." Bagenstos, supra note 38, at 473, 481. While I agree that "such an approach has a strong pedigree in disability rights thought," it may not eliminate courts' requirement of medical evidence of the claimed "impairment," perhaps coupled with requiring other expert testimony on how the plaintiff's impairment is substantially limiting through stigmatization. Id at 481.

348. See supra note 209 (regarding findings in evolutionary psychology of "cheater detection" mechanisms in human cognitive functioning).

349. This could occur, for example, if a judge did not require any evidence to demonstrate that the plaintiff fell within the statute's protected class or instructed the jury that it must find the plaintiff to be disabled. However, it would be appropriate to include a jury instruction explaining that the plaintiff is not required to produce medical evidence to succeed on her claim to prevent jurors from exercising bias regarding the need for such evidence (such as that exemplified in courts and media as described in this Article) and to move away from a purely medicalized notion of "disability."
the plaintiff to be disabled in the absence of corroborating testimony. It is the job of the defendant's attorney at trial to raise the issue of the sufficiency and quality of the plaintiff's evidence. It is perfectly valid for a defendant's attorney to cross-examine a plaintiff on the extent of a plaintiff's limitations. It is also appropriate for a defense attorney to argue in closing, as would be true in any kind of case, that the plaintiff's testimony should be disbelieved and to point out the dearth of other evidence, whether lay observation or expert opinion, to support such testimony. A defense attorney may or may not succeed with such an approach. A jury may decide that even in the absence of other "corroborating" evidence, the plaintiff's own account of her limitations is credible and sufficient. Courts, then, must step aside to allow fact finders to do their job.