

Section 902 Definition of the Term Disability

Notice Concerning The Americans With Disabilities Act Amendments Act Of 2008

This document was adopted by the Commission in 1995 to explain its interpretation of the term “disability as used in the ADA. In 1999, the Commission published an Addendum to this document explaining that the discussion of mitigating measures in Section 902.5 was no longer correct due to the Supreme Court’s decision in Sutton v. United Airlines, Inc. The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) was signed into law on September 25, 2008 and became effective January 1, 2009. Because this law makes several significant changes to the definition of the term "disability," the EEOC will eventually make extensive changes to this document, but not before publication of a final regulation implementing the ADAAA.

Since the ADAAA applies only to acts of alleged discrimination that occur on or after January 1, 2009, the guidance offered on the meaning of “disability” in this document (with the exception of Section 902.5) will still apply to alleged discrimination that occurred *prior* to January 1, 2009.

The EEOC published a Notice of Proposed Rulemaking on September 23, 2009. For information on the proposed ADAAA regulation and to learn about the major changes made to the definition of “disability”, see http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html.

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DEFINITION OF THE TERM "DISABILITY"

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SECTION 902

DEFINITION OF THE TERM "DISABILITY"

902.1 Introduction and Summary

(a) General -- Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-17 (Supp. IV 1992) [hereinafter ADA or Act], prohibits employment discrimination on the basis of disability.¹ The ADA protects a qualified individual with a "disability" from discrimination in job application procedures; hiring; advancement; discharge; compensation; job training; and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). To be protected by the ADA, a person must meet the definition of the term "qualified individual with a disability" as defined by the Act and implementing regulations.² This Compliance Manual section discusses the ADA definition of the term "disability."³ The definition of the term "qualified individual with a disability" and the appropriate analysis for determining whether a person meets that definition will be discussed in a separate forthcoming Compliance Manual section.

A major part of the inquiry in an ADA charge often will be the determination of whether the charging party is protected by the Act. This determination frequently requires more extensive analysis than does the determination of whether a person is protected by other nondiscrimination statutes. For example, it is generally clear whether a person is of a particular race, national origin, age, or sex that is alleged to be the basis of discrimination. By contrast, it often is less clear whether a person's physical or mental condition constitutes an impairment of sufficient degree to establish that the person meets the statutory definition of an individual with a "disability."

The definition of "disability" under the ADA reflects the intent of Congress to prohibit the specific forms of discrimination that persons with disabilities face. While individuals with disabilities may experience the types of discrimination that confront other groups, they also may encounter unique forms of discrimination because of the nature of their disabilities and the effect that their present, past, or perceived conditions have on other persons. The purpose of the ADA is to eliminate discrimination that confronts individuals with disabilities.

Since the definition of the term "disability" under the ADA is tailored to the purpose of eliminating discrimination prohibited by the ADA, it may differ from the definition of "disability" in other laws drafted for other purposes. For example, the definition of a "disabled veteran" is not the same as the definition of an individual with a disability under the ADA.⁴ Similarly, an individual might be eligible for disability retirement but not be an individual with a disability under the ADA. Conversely, a person who meets the ADA definition of "disability" might not meet the requirements for disability retirement.

(b) Statutory Definition -- With respect to an individual, the term "disability" means

(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.

42 U.S.C. § 12102(2); see also 29 C.F.R. § 1630.2(g). A person must meet the requirements of at least one of these three criteria to be an individual with a disability under the Act.

The first part of the definition covers persons who actually have physical or mental impairments that substantially limit one or more major life activities. The focus under the first part is on the individual, to determine if (s)he has a substantially limiting impairment. To fall under the first part of the definition, a person must establish three elements:

(1) that (s)he has a physical or mental impairment

(2) that substantially limits

(3) one or more major life activities.

The second and third parts of the definition cover persons who may not have an impairment that substantially limits a major life activity but who have a history of, or have been misclassified as having, such a substantially limiting impairment, or who are perceived as having such a substantially limiting impairment. The focus under the second and third parts is on the reactions of other persons to a history of an impairment or to a perceived impairment. A history or perception of an impairment that substantially

limits a major life activity is a "disability." These parts of the definition reflect a recognition by Congress that stereotyped assumptions about what constitutes a disability and unfounded concerns about the limitations of individuals with disabilities form major discriminatory barriers, not only to those persons presently disabled, but also to those persons either previously disabled, misclassified as previously disabled, or mistakenly perceived to be disabled. To combat the effects of these prevalent misperceptions, the definition of an individual with a disability precludes discrimination against persons who are treated as if they have a substantially limiting impairment, even if in fact they have no such current incapacity.

(c) Summary -- To determine whether a charging party is protected by the ADA, the EEOC investigator initially should determine why the charging party believes that the respondent has discriminated against him/her on the basis of disability. The charging party's response usually will provide the investigator with a starting point for analysis by identifying the type of condition at issue. For example, if the charging party replies that the respondent refused to hire him/her because it learned that the charging party had received psychiatric treatment, then the investigator will know to investigate whether the charging party has, has a record of, or is regarded as having a psychiatric disability. (Of course, further investigation may reveal other disabilities that may constitute the reason for the challenged employment action.)

The investigator then should determine whether the charging party meets the first part of the definition of "disability"; that is, the investigator should determine whether the charging party actually has a physical or mental impairment that substantially limits a major life activity. In that regard, the investigator should determine whether the charging party's condition is an impairment. See § 902.2, *infra*. If the condition is an impairment, then the investigator should determine whether the charging party's impairment substantially limits a major life activity other than working. See § 902.4(c)(1), *infra*. If the impairment does not, then the investigator should determine whether the charging party is substantially limited in the ability to work. See § 902.4(c)(2), *infra*.

If the charging party does not meet the first part of the definition of "disability," or if the investigator after attempting an analysis is unsure whether the charging party meets the first part, then the investigator should determine whether the charging party meets the second or third part of the definition. See §§ 902.7, .8 *infra*. With respect to the second part, the investigator should determine whether the charging party has a history of, see § 902.7(b), *infra*, or has been misclassified as having, see § 902.7(c), *infra*, an impairment that substantially limited a major life activity. With respect to the third part, the investigator should determine whether the charging party is regarded as having an impairment that substantially limits a major life activity. In that regard, the investigator should determine

whether the charging party (1) has an impairment that does not substantially limit a major life activity but that is regarded as being substantially limiting, see § 902.8(c), *infra*, (2) has an impairment that is substantially limiting only as a result of the attitudes of others, see § 902.8(d), *infra*, or (3) has no impairment but is regarded as having a substantially limiting impairment, see § 902.8(e), *infra*.

902.2 Impairment

(a) General -- The person claiming to be an individual with a disability as defined by the first part of the definition must have an actual impairment. If the person does not have an impairment, (s)he does not meet the requirements of the first part of the definition of disability. Under the second and third parts of the definition, the person must have a record of a substantially limiting impairment or be regarded as having a substantially limiting impairment.⁵

A person has a disability only if his/her limitations are, were, or are regarded as being the result of an impairment. It is essential, therefore, to distinguish between conditions that are impairments and those that are not impairments. Not everything that restricts a person's major life activities is an impairment. For example, a person may be having financial problems that significantly restrict what that person does in life. Financial problems or other economic disadvantages, however, are not impairments under the ADA. Accordingly, the person in that situation does not have a "disability" as that term is defined by the ADA. On the other hand, an individual may be unable to cope with everyday stress because (s)he has bipolar disorder. Bipolar disorder is an impairment. In that situation, the analysis proceeds to whether the individual's impairment substantially limits a major life activity.

(b) Regulatory Definition -- A physical or mental impairment means

(1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h); see also S. Rep. No. 116, 101st Cong., 1st Sess. 22 (1989) [hereinafter Senate Report]; H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 51 (1990)

[hereinafter House Education and Labor Report]; H.R. Rep. No. 485 pt. 3, 101st Cong., 2d Sess. 28 (1990) [hereinafter House Judiciary Report].

This regulatory definition does not set forth an exclusive list of specific impairments covered by the ADA. Instead, the definition describes the type of condition that constitutes an impairment.

The first step in investigating whether a charging party has a disability is investigating whether (s)he has an impairment, has a record of an impairment, or is regarded as having an impairment. In many cases, it is obvious that a condition is an impairment. In other cases, however, it is not obvious. When it is unclear whether a charging party has an impairment, the investigator should ask the charging party for medical documentation that describes his/her condition. Medical documentation that describes the charging party's condition or that contains a diagnosis of the condition will help to determine if the charging party has an impairment.⁶ In addition, the investigator should ask the respondent to provide copies of relevant medical documentation concerning the charging party's condition that the respondent has in his/her possession. Such documentation should include the results of any medical examination conducted or ordered by the respondent as well as copies of medical documentation that the charging party provided to the respondent. If the investigator requests the information directly from a third party, rather than from the charging party or the respondent, then the investigator first should obtain a signed medical release from the charging party and should submit the release with the request. Other information, such as the charging party's description of his/her condition or statements from the charging party's friends, family, or co-workers, also may be relevant to determining whether the charging party has an impairment.

(c) Conditions That Are Not Impairments

(1) Statutory and Legislative History Exceptions

-- The statute and the legislative history specifically state that certain conditions are not impairments under the ADA.⁷ The term "impairment" does not include homosexuality and bisexuality. 42 U.S.C. § 12211(a); see also 29 C.F.R. § 1630.3(e); H.R. Rep. No. 596, 101st Cong., 2d Sess. 88 (1990) [hereinafter Conference Report]; House Education and Labor Report at 142; House Judiciary Report at 75. Further, environmental, cultural, and economic disadvantages such as a prison record or a lack of education are not impairments. Senate Report at 22; House Education and Labor Report at 51-52; House Judiciary Report at 28. In addition, age, by itself, is not an impairment. See Senate Report at 22; House Education and Labor Report at 52; House Judiciary Report at 28. A person who has a medical condition (such as hearing loss, osteoporosis⁸, or arthritis) often associated with age has an impairment on the basis of the medical

condition. A person does not have an impairment, however, simply because (s)he is advanced in years. 29 C.F.R. pt. 1630 app. § 1630.2(h).

Example 1 -- CP has been unemployed for two years. Although she has actively sought work, CP has not been able to find a job. CP asserts that employers will not hire her because she is a convicted felon who served three years in prison for armed robbery. CP argues that her prison record is a disability because it prevents her from getting a job. CP, however, does not have a disability because she does not have a physical or mental impairment as defined by the ADA. A prison record is not an impairment for ADA purposes.

Example 2 -- CP applies for a job as a cashier at his neighborhood supermarket. The store manager speaks with CP briefly and then asks CP to fill out a written job application form. CP does not complete the form because he cannot read it. CP, who has the equivalent of a second-grade education, was never taught to read. CP does not have a physical or mental impairment as defined by the ADA. A lack of education is not an impairment for ADA purposes.

Example 3 -- Same as Example 2, above, except CP cannot read because he has a severe form of dyslexia. CP has an impairment as defined by the ADA. Dyslexia, a learning disability, is an impairment for ADA purposes.

Example 4 -- CP, who is sixty-three, has osteoporosis. The osteoporosis, a reduction in bone quantity, is an impairment as defined by the ADA. CP's age, sixty-three, is not a physical or mental impairment as defined by the ADA.

(2) Physical Characteristics -- Simple physical characteristics are not impairments under the ADA. For example, a person cannot claim to be impaired because of blue eyes or black hair. Senate Report at 22; House Education and Labor Report at 51; House Judiciary Report at 28. Similarly, a person does not have an impairment simply because (s)he is left-handed. *de la Torres v. Bolger*, 781 F.2d 1134, 39 EPD Par. 35,883, 1 AD Cas. (BNA) 852 (5th Cir. 986).⁹

Further, a characteristic predisposition to illness or disease is not an impairment. 29 C.F.R. pt. 1630 app. § 1630.2(h). A person may be predisposed to developing an illness or a disease because of factors such as environmental, economic, cultural, or social conditions. This predisposition does not amount to an impairment.

(3) Pregnancy -- Because pregnancy is not the result of a physiological disorder, it is not an impairment. 29 C.F.R. pt. 1630 app. § 1630.2(h); see also *Byerly v. Herr Foods, Inc.*, 61 EPD Par. 42,226, 2 AD Cas. (BNA) 666 (E.D. Pa. 1993). Complications resulting from pregnancy, however, are impairments.¹⁰

Example 1 -- CP is in the third trimester of her pregnancy. Her pregnancy has proceeded well, and she has developed no complications. CP does not have an impairment. Pregnancy, by itself, is not an impairment.

Example 2 -- Same as Example 1, above, except CP has developed hypertension. CP has an impairment, hypertension. (Remember that the mere presence of an impairment does not automatically mean that CP has a disability. Whether the hypertension rises to the level of a disability will turn on whether the impairment substantially limits, or is regarded as substantially limiting, a major life activity.)

(4) Common Personality Traits -- Like physical characteristics, common personality traits also are not impairments. In *Daley v. Koch*, 892 F.2d 212, 214, 52 EPD Par.39,534 at 60,471, 1 AD Cas. (BNA) 1549, 1550 (2d Cir. 1989), a psychological profile of an applicant for a police officer position determined that the applicant "showed 'poor judgment, irresponsible behavior and poor impulse control'" but did not have "any particular psychological disease or disorder." The court ruled that the applicant's personality traits did not constitute an impairment. 892 F.2d at 215, 52 EPD at 60,473, 1 AD Cas. at 1551.

Example 1 -- CP is a lawyer who is impatient with her co-workers and her boss. She often loses her temper, frequently shouts at her subordinates, and publicly questions her boss's directions. Her colleagues think that she is rude and arrogant, and they find it difficult to get along with her. CP does not have an impairment. Personality traits, such as impatience, a quick temper, and arrogance, in and of themselves are not impairments.

Example 2 -- Same as Example 1, above, except CP's behavior results from bipolar disorder. CP has an impairment, bipolar disorder.¹¹

Example 3 -- CP is an account manager who is in charge of developing a major advertising campaign for his firm's biggest client. Although he used to be easygoing and relaxed in the office, CP has become very irritable at work. He has twice lost his temper with his assistant, and he recently engaged in a shouting match with one of his superiors. CP has consulted a psychiatrist, who diagnosed a recurrence of the post-traumatic stress disorder for which CP was treated several years ago. CP has an impairment. CP's post-traumatic stress disorder, a mental disorder, is a mental impairment.¹²

(5) Normal Deviations in Height, Weight, or Strength -- Similarly, normal deviations in height, weight, or strength that are not the result of a physiological disorder are not impairments.¹³ 29 C.F.R. pt. 1630 app. § 1630.2(h); see also *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249, 36 EPD Par. 35,070 at 36,835, 1 AD Cas. (BNA) 706, 709 (6th Cir. 1985). At extremes, however, such

deviations may constitute impairments. Further, some individuals may have underlying physical disorders that affect their height, weight, or strength.

(i) For example, a four foot, ten inch tall woman who was denied employment as an automotive production worker because the employer thought she was too small to do the work does not have an impairment. See *American Motors Corp. v. Wisconsin Labor and Industry Review Commission*, 119 Wis. 2d 706, 350 N.W.2d 120, 36 EPD Par. 34,936, 1 AD Cas. (BNA) 611 (1984) (interpreting state law). The woman's height was below the norm, but her small stature was not so extreme as to constitute an impairment and was not the result of a defect, disorder, or other physical abnormality. On the other hand, a four feet, five inches tall man with achondroplastic dwarfism¹⁴ does have an impairment. See *Dexler v. Tisch*, 660 F. Supp. 1418, 1425, 43 EPD Par. 37,280 at 48,207, 1 AD Cas. (BNA) 1086, 1092 (D. Conn. 1987). The man's stature was the result of an underlying disorder, achondroplastic dwarfism, which is an impairment.

(ii) Being overweight, in and of itself, generally is not an impairment. See 29 C.F.R. pt. 1630 app. § 1630.2(h) (noting that weight that is "within 'normal' range and not the result of a physiological disorder" is not an impairment); see also *id.* § 1630.2(j) (noting that, "except in rare circumstances, obesity is not considered a disabling impairment"). Thus, for example, a flight attendant who, because of avid body building (which resulted in a low percentage of body fat and a high percentage of muscle), exceeds the airline's weight guidelines does not have an impairment. See *Tudyman v. United Airlines*, 608 F. Supp. 739, 746, 38 EPD Par. 35,674 at 40,015, 1 AD Cas. (BNA) 664, 669 (C.D. Cal. 1984). Similarly, a mildly overweight flight attendant who has not been clinically diagnosed as having any medical anomaly does not have an impairment. *Underwood v. Trans World Airlines*, 710 F. Supp. 78, 83-84, 51 EPD Par. 39,297 at 59,106-07 (S.D.N.Y. 1989) (plaintiff's state action preempted by federal law where plaintiff failed to establish that being mildly overweight brought her within class protected by state human rights law with broad definition of disability).

On the other hand, severe obesity,¹⁵ which has been defined as body weight more than 100% over the norm, see *The Merck Manual of Diagnosis and Therapy* 981 (Robert Berkow ed., 16th ed. 1992), is clearly an impairment. See *Cook v. Rhode Island Dep't of Mental Health, Retardation and Hosp.*, 10 F.3d 17, 63 EPD Par. 42,673, 2 AD Cas. (BNA) 1476 (1st Cir. 1993). In addition, a person with obesity may have an underlying or resultant physiological disorder, such as hypertension or a thyroid disorder. A physiological disorder is an impairment. See 29 C.F.R. § 1630.2(h).¹⁶

(6) **Persons with One of These Conditions and an Impairment** -- A person who has one or more of these characteristics or traits also may have other conditions that are physical or mental impairments. See Senate Report at

22; House Education and Labor Report at 52; House Judiciary Report at 28. Thus, a left-handed individual who has a heart condition has an impairment. Although left-handedness is not an impairment, heart disease is an impairment.

(d) Contagion -- A contagious disease is an impairment.¹⁷ The contagious nature of the disease does not, by itself, remove that condition from the protection of the ADA. In *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 42 EPD Par. 36,791, 1 AD Cas. (BNA) 1026 (1987), the United States Supreme Court considered the case of an elementary school teacher who had been discharged because she had experienced a recurrence of tuberculosis. The Supreme Court found that the tuberculosis, which had affected the teacher's respiratory system, constituted an impairment. 480 U.S. at 281, 42 EPD at 45,635, 1 AD Cas. at 1029. In so doing, the Court rejected the argument that the contagious effects of a condition (i.e., the effects of the condition on others) could be distinguished from the effects of the condition on the carrier. 480 U.S. at 282, 42 EPD at 45,636, 1 AD Cas. at 1029-30.

The legislative history to the ADA expressly provides that infection with the Human Immunodeficiency Virus (HIV) is an impairment under the Act. Senate Report at 22; House Education and Labor Report at 51; House Judiciary Report at 28. Thus, for the purposes of the ADA, an individual with HIV infection has an impairment.¹⁸

(e) Voluntariness -- Voluntariness is irrelevant when determining whether a condition constitutes an impairment. For example, an individual who develops lung cancer as a result of smoking has an impairment, notwithstanding the fact that some apparently volitional act of the individual may have caused the impairment. The cause of a condition has no effect on whether that condition is an impairment. See House Judiciary Report at 29 (noting that "[t]he cause of a disability is always irrelevant to the determination of disability"); see also *Cook v. Rhode Island Dep't of Mental Health, Retardation and Hosp.*, 10 F.3d 17, 63 EPD Par. 42,673, 2 AD Cas. (BNA) 1476 (1st Cir. 1993). Further, the voluntary use of a prosthetic device or other mitigating measure to correct or to lessen the effects of a condition also has no bearing on whether that condition is an impairment. See § 902.5, *infra*.

902.3 Major Life Activities

(a) General -- For an impairment to rise to the level of a disability, it must substantially limit, have previously substantially limited, or be perceived as substantially limiting, one or more of a person's major life activities. There has been little controversy about what constitutes a major life activity. In most cases, courts have simply stated that an impaired activity is a major life activity. In general, major life activities "are those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. pt. 1630 app. § 1630.2(i).

(b) Regulatory Definition -- Commission regulations define the term "major life activities" to mean "functions such as caring for oneself, performing manual tasks,

walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i); see also Senate Report at 22; House Education and Labor Report at 52; House Judiciary Report at 28.

This list is not an exhaustive list of all major life activities. Instead, it is representative of the types of activities that are major life activities. Specific activities that are similar to the listed activities in terms of their impact on an individual's functioning, as compared to the average person, also may be major life activities. Thus, as the interpretive appendix to the regulations notes, "other major life activities include, but are not limited to, sitting, standing, lifting, [and] reaching." 29 C.F.R. pt. 1630 app. § 1630.2(i). Mental and emotional processes such as thinking, concentrating, and interacting with others are other examples of major life activities.¹⁹

(c) **Judicial Interpretations** -- Courts interpreting the Rehabilitation Act of 1973 also have found that other activities constitute major life activities. Such major life activities include sitting and standing, *Oesterling v. Walters*, 760 F.2d 859, 861, 36 EPD Par. 35,201 at 37,485, 1 AD Cas. (BNA) 722, 723 (8th Cir. 1985); and reading, *Pridemore v. Rural Legal Aid Society*, 625 F. Supp. 1180, 1183-84, 40 EPD Par. 36,184 at 42,659, 2 AD Cas. (BNA) 382, 384 (S.D. Ohio 1985) (mild cerebral palsy affected, but did not substantially limit, plaintiff's ability to read); see also *DiPompo v. West Point Military Academy*, 708 F. Supp. 540, 549, 50 EPD Par. 39,182 at 58,435 (S.D.N.Y. 1989).

902.4 Substantially Limits

(a) **General** -- Unlike the term "major life activities," the term "substantially limits" frequently requires extensive analysis. The term "substantially limits" is a comparative term that implies a degree of severity and duration. The primary focus here is on the extent to which an impairment restricts one or more of an individual's major life activities. A secondary factor that may affect the analysis is the duration of the impairment.²⁰

When analyzing the degree of limitation, one must remember that the determination of whether an impairment substantially limits a major life activity can be made only with reference to a specific individual. The issue is whether an impairment substantially limits any of the major life activities of the person in question, not whether the impairment is substantially limiting in general. Thus, one must consider the extent to which an impairment restricts a specific individual's activities and the duration of that individual's impairment.

(b) **Regulatory Definition** -- Commission regulations define the term "substantially limits" and outline factors to consider when determining whether an impairment substantially limits any of an individual's major life activities. In that respect, the regulations state,

(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.

29 C.F.R. § 1630.2(j).

As the regulations make clear, a determination of whether an impairment substantially limits any of an individual's major life activities depends upon the extent, duration, and impact of the impairment. The factors to consider when making this determination will be discussed in more detail below.

(c) Extent to Which an Impairment Restricts a Major Life Activity -- An impairment is substantially limiting when it prevents an individual from performing a major life activity or when it significantly restricts the condition, manner, or duration under which an individual can perform a major life activity. 29 C.F.R. § 1630.2(j). The individual's ability to perform the major life activity must be restricted as compared to the ability of the average person in the general population to perform the activity. *Id.* The reference to the "average person" does not "imply a precise mathematical 'average.'" 29 C.F.R. pt. 1630 app. § 1630.2(j).

Example 1 -- CP has a permanent knee impairment that causes him pain when he walks for extended periods. He can walk for ten miles at a time without discomfort, but he experiences pain on the eleventh mile. CP's knee impairment does not

substantially limit his ability to walk. The average person in the general population would not be able to walk for eleven miles without experiencing some discomfort.

Example 2 -- CP, who has sickle cell anemia, frequently experiences severe back and joint pain. As a result of the sickle cell disease, CP often cannot walk for more than very short distances. CP's impairment (sickle cell anemia) substantially limits his ability to walk. The average person in the general population can walk for more than very short distances. (Note that allegations of employment discrimination based on sickle cell anemia also may be covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. See EEOC Dec. No. 81-8, 1983 EEOC Decisions (CCH) Par. 6764 (Nov. 18, 1980).)

Further, the limitation must be substantial, rather than minor. Not every impairment affects an individual's life to the extent that it is a substantially limiting impairment. A minor impairment, such as an infected finger, is not a disability. Senate Report at 23; House Education and Labor Report at 52.

Most of the discussion and analysis of the concept of substantial limitation has focused on its meaning as applied to the major life activity of working. This is largely because there has been little dispute about what is meant by such terms as "breathing," "walking," "hearing," or "seeing" but much dispute about what is meant by the term "working." Consequently, the determination of whether a person's impairment is substantially limiting should first address major life activities other than working. If it is clear that a person's impairment substantially limits a major life activity other than working, then one need not determine whether the impairment substantially limits the person's ability to work. See 29 C.F.R. pt. 1630 app. § 1630.2(j). On the other hand, if an impairment does not substantially limit any of the other major life activities, then one must determine whether the person is substantially limited in working. See *id.*

For example, if an individual's arthritis makes it unusually difficult (as compared to most people or to the average person in the general population) to walk, then the individual is substantially limited in the ability to walk. In that case, one would not need to ascertain whether the individual is also substantially limited in working. If, however, it was not clear whether the person's impairment substantially limited his/her ability to walk (or to perform other major life activities), then one would have to analyze whether the impairment substantially limited the person's ability to work.

(1) Substantial Limitation of Major Life Activities Generally -- In most cases, a careful, case-by-

case analysis is necessary to determine whether an impairment substantially limits any of a person's major life activities.

This analysis focuses on the individual in question and analyzes whether the individual's impairment is substantially limiting for that individual.

The key here is the extent to which the impairment restricts a major life activity. If there is no showing that the impairment significantly restricts a major life activity, then the impairment is not a disability. Thus, an individual who alleged that he had asthma but did not even assert that the asthma substantially limited a major life activity did not establish that he was an individual with a disability. *Harris v. Adams*, 873 F.2d 929, 933, 50 EPD Par. 38,973 at 57,217, 1 AD Cas. (BNA) 1475, 1477 (6th Cir. 1989). Similarly, an employee failed to establish that he was an individual with a disability when he presented no credible evidence to establish that his sinusitis and hypertension substantially limited major life activities. *Thomas v. General Services Administration*, 49 Fair Empl. Prac. Cas. (BNA) 1602, 1607, 51 EPD Par. 39,221 at 58,685 (D.D.C. 1989).

The investigator, therefore, should conduct a careful analysis of whether a charging party's impairment substantially limits one or more major life activities. The investigator should conduct this analysis even if the charging party does not make a specific allegation that his/her impairment is substantially limiting. (For guidance on how to conduct this analysis, refer to the suggestions for investigators at the end of this subsection, *infra*.)

Example -- CP alleges that her employer discriminated against her on the basis of disability. She defines her disability as a "knee injury." When the investigator asks how the injury affects her, CP responds, "I don't know." She provides no information in response to the investigator's inquiries about the extent to which the injury restricts her ability to walk or to perform any other activities. There is no showing that the knee injury limits CP in any way. As a result, there is no evidence that CP's knee injury substantially limits one or more of her major life activities.

To rise to the level of a disability, an impairment must significantly restrict an individual's major life activities. Impairments that result in only mild limitations are not disabilities. Thus, a mild case of varicose veins that moderately affect an individual's ability to stand and to sit is not a disability. *Oesterling v. Walters*, 760 F.2d 859, 861, 36 EPD Par. 35,201 at 37,485, 1 AD Cas. (BNA) 722, 723-24 (8th Cir. 1985). Similarly, a "borderline" case of cerebral palsy that only slightly interferes with an individual's ability to read (because of poor control over ocular muscles) and to speak also is not a disability. *Pridemore v. Rural Legal Aid Society*, 625 F. Supp. 1180, 1183-84, 40 EPD Par. 36,184 at 42,659, 2 AD Cas. (BNA) 382, 384 (S.D. Ohio 1985). In both instances, impairments may affect major life activities, but they do not substantially restrict those activities.

One of the reasons an individualized approach is necessary is because the same types of impairments often vary in severity and often restrict different people to different degrees or in different ways.

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.

29 C.F.R. pt. 1630 app. § 1630.2(j). For example, the plaintiff in *Perez v. Philadelphia Housing Authority*, 677 F. Supp. 357, 1 AD Cas. (BNA) 1170 (E.D. Pa. 1987), *aff'd*, 841 F.2d 1120, 2 AD Cas. (BNA) 1104 (3d Cir. 1988), sustained a back injury that resulted in considerable pain. The evidence indicated that the plaintiff's back pain restricted "her ability to walk, sit, stand, drive, care for her home and child, and engage in leisure pastimes." 677 F. Supp. at 360, 1 AD Cas. at 1173. As a result, the court found that the plaintiff was an individual with a disability. 677 F. Supp. at 360-61, 1 AD Cas. at 1173. In another case, however, a court determined that a general laborer who had sustained a back injury was not an individual with a disability. *Fuqua v. Unisys Corp.*, 716 F. Supp. 1201 (D. Minn. 1989) (applying state law similar to Rehabilitation Act). The plaintiff in that case had been able to continue an active life that included weight lifting and other recreational activities. *Id.* at 1203. In addition, he had obtained alternative employment as a security guard and had not been significantly restricted in employment. *Id.* Accordingly, the court found that the plaintiff's back injury did not rise to the level of a disability. *Id.* at 1206.

Example 1 -- CP has a mild form of Type II, non- insulin-dependent diabetes. She does not need to take insulin or other medication, and her physician has placed no significant restrictions on her activities. Instead, her physician simply has advised CP to maintain a well balanced diet and to reduce her consumption of foods that are high in sugar or starch. Although diabetes often substantially limits an individual's major life activities, CP's diabetes does not substantially limit any of her major life activities. It has only a moderate effect on what she eats, and it does not restrict her in any other way.

Example 2 -- Same as Example 1, above, except CP's condition requires CP to follow a strict regimen. She must adhere to a stringent diet, eat meals on a regular schedule, and ensure a proper balance between her caloric intake and her level of physical activity. A change of routine, such as a high- calorie meal or unexpected strenuous exercise, could result in blood-sugar levels that are dangerously high or low.

CP's condition significantly restricts how she functions in her day- to-day life. CP, therefore, has an impairment (diabetes) that substantially limits one or more of her major life activities.

In very rare instances, impairments are so severe that there is no doubt that they substantially limit major life activities. In those cases, it is undisputed that the complainant is an individual with a disability. Thus, courts accepted without discussion that a person was an individual with a disability when the impairment was insulin-dependent diabetes, *Bentivegna v. United States Department of Labor*, 694 F.2d 619, 621, 30 EPD Par. 33,211 at 27,791, 1 AD Cas. (BNA) 403, 405 (9th Cir. 1982); legal blindness, *Norcross v. Sneed*, 755 F.2d 113, 36 EPD Par. 35,006, 1 AD Cas. (BNA) 689 (8th Cir. 1985); deafness, *Davis v. Frank*, 711 F. Supp. 447, 453, 50 EPD Par. 39,157 at 58,339 (N.D. Ill. 1989), manic depressive syndrome, *Gardner v. Morris*, 752 F.2d 1271, 35 EPD Par. 34,906, 1 AD Cas. (BNA) 673 (8th Cir. 1985), and alcoholism, *Whitlock v. Donovan*, 598 F. Supp. 126, 129, 35 EPD Par. 34,815 at 35,533, 1 AD Cas. (BNA) 630, 632 (D.D.C. 1984), *aff'd sub nom. Whitlock v. Brock*, 790 F.2d 964, 1 AD Cas. (BNA) 1050 (D.C. Cir. 1986). Further, according to the legislative history, an individual who has HIV infection (including asymptomatic HIV infection) is an individual with a disability. Senate Report at 22; House Education and Labor Report at 52; House Judiciary Report at 28 n.18; see also *Doe v. Kohn Nast & Graf*, 862 F. Supp. 1310, 1321, 3 AD Cas. (BNA) 879, 885 (E.D. Pa. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559, 59 EPD Par. 41,656, 2 AD Cas. (BNA) 197 (D.D.C. 1992); Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, to Arthur B. Culvahouse, Jr., Counsel to President Reagan, 8 Fair Empl. Prac. Manual (BNA) No. 641, at 405:1 (Sept. 27, 1988); Federal Contract Compliance Manual App. 6D, 8 Fair Empl. Prac. Manual (BNA) No. 694, at 405:352 (Dec. 23, 1988).

Just as medical documentation submitted by a charging party is relevant to determining whether the charging party has an impairment, see *supra* § 902.2(b), it also is a good starting point for determining the extent to which a physical or mental impairment limits any of the charging party's major life activities. Such documentation often describes the restrictions that the impairment places on the charging party. For example, the documentation may state that the charging party cannot lift objects weighing more than a few pounds, cannot walk unassisted, or cannot hear at all. On the other hand, the documentation may state that the charging party's impairment results in only minimal limitations. The investigator should ask the charging party for copies of medical statements that describe the charging party's restrictions. In addition, the investigator should ask the respondent for copies of relevant medical documentation in the respondent's possession. Such documentation may include medical information that accompanied a request for light or limited duty as well as information obtained through fitness-for-duty examinations conducted or ordered by the respondent. If the investigator requests the information directly from a third party, rather than from the charging party or the respondent, then the investigator should obtain a signed medical release from the charging party and should submit the release with the request.

Although medical documentation can provide important information about the restrictions that an impairment places on an individual, the investigator should not rely solely on this information. The investigator should obtain other available relevant information that describes the restrictions resulting from the impairment. In this regard, it is essential that the investigator obtain a statement in which the charging party describes the nature of his/her condition and explains how the condition limits his/her performance of major life activities. In addition, the investigator should obtain statements from other persons who have direct knowledge of the individual's restrictions. For example, persons such as friends and family members, supervisors, rehabilitation counselors, and occupational or physical therapists may be able to describe the restrictions that the individual's impairment places on the individual. Further, the investigator's own observations of the charging party may supply or confirm information about the charging party's restrictions.

The information that the investigator obtains should be specific. For example, it is insufficient for the charging party merely to state that his/her condition interferes with the ability to walk. The charging party should explain the extent of the interference; that is, the charging party should provide such information as whether the condition prevents him/her from walking at all, whether (s)he can walk under certain conditions, and whether (s)he can walk for short or long distances and periods.

(2) Substantial Limitation of Major Life Activity of Working -- As noted previously, supra, one need not determine whether an impairment substantially limits an individual's ability to work if the impairment substantially limits another major life activity. If the individual is not substantially limited with respect to any other major life activity, then one should consider whether the individual is substantially limited in working.

The Commission has provided regulatory guidance for determining whether an impairment substantially limits an individual in the major life activity of working. The regulation states,

(3) With respect to the major life activity of working--

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3) (emphasis in the original).

As the regulation makes clear, an impairment that prevents an individual from working at one particular job, because of circumstances or materials unique to that job, does not substantially limit that individual's ability to work. See House Judiciary Report at 29. A person is not substantially limited in the ability to work simply because (s)he cannot perform one particular job for one particular employer. See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099, 24 EPD Par. 31,260 at 17,650, 1 AD Cas. (BNA) 220, 229 (D. Hawaii 1980). Rather, an individual is substantially limited in working if (s)he is prevented or significantly restricted (when compared to the average person having similar qualifications) from performing a class of jobs or a wide range of various jobs. See *id.*; see also 29 C.F.R. § 1630.2(j)(3).

In *E.E. Black*, an apprentice carpenter was denied employment after a preemployment physical examination disclosed a congenital back anomaly. The court held that the term "substantial limitation" means more than an inability to perform one particular job but less than a general inability to work. It suggested that the evaluation of whether an individual is substantially limited in working focus on such factors as the number and type of jobs from which the individual is disqualified and the geographical area to which the individual has reasonable access. 497 F. Supp. at 1099-1101, 24 EPD at 17,650-52, 1 AD Cas. at 229-30.

These criteria, when read together, indicate that an impairment is a substantial limitation to working if it disqualifies an individual from a class of jobs or a broad range of jobs in various classes. For example, a charging party is substantially limited in working if (s)he has a back impairment that precludes him/her from heavy lifting and, therefore, from the class of heavy labor jobs. See 497 F. Supp. at 1102, 24 EPD at 17,652, 1 AD Cas. at 231. Conversely, a postal clerk with a

mild case of crossed eyes that caused him to develop eye strain and headaches after operating a particular machine that required detailed eye work was not substantially limited in working. *Jasany v. United States Postal Service*, 755 F.2d 1244, 1250, 36 EPD Par. 35,070 at 36,835, 1 AD Cas. (BNA) 706, 710 (6th Cir. 1985). Unlike the charging party in the first example, this complainant did not have an impairment that precluded him from performing any other job or duty within a class of jobs. In fact, the parties agreed that his impairment had not affected his past work history or his ability to perform other duties at the post office. *Id.* The impairment had limited only his ability to perform this one particular job and perhaps a narrow range of like jobs. For the same reason, an individual whose vision impairment and high-tone hearing loss disqualified him from a position as a detention deputy but did not disqualify him from other positions (e.g., corrections officer) was not substantially limited in working. See *State v. Hennepin County*, 441 N.W.2d 106, 51 EPD Par. 39,383, 1 AD Cas. (BNA) 1490 (Minn. 1989) (applying state law with same definition of "disability").

Example 1 -- CP is a computer programmer. She develops a vision impairment that does not substantially limit her ability to see but does prevent her from distinguishing characters on computer screens (without reasonable accommodation). As a result, she cannot perform any work that requires her to read characters on computer screens. Her vision impairment prevents her from working as a computer programmer, a systems analyst, a computer instructor, and a computer operator. CP is substantially limited in working because her impairment prevents her from working in the class of jobs requiring use of a computer.

Example 2 -- Same as Example 1, above, except CP's vision impairment does not interfere with her ability to distinguish characters on most computer screens. It does prevent her, however, from distinguishing characters on the peculiar type of computer screens that R uses. Although CP cannot work with the unique screens that R uses, she can work with other computer screens. CP, therefore, is not substantially limited in working. Her impairment prevents her from being a computer programmer for one particular employer (R), but it does not prevent her from performing similar jobs for other employers.

Impairments that preclude an individual from performing a broad range of jobs in various classes also may substantially limit the major life activity of working. For example, an individual could be substantially limited in working if (s)he has a severe allergy to a substance found in many high-rise office buildings. If the allergy prevents the individual from working in many of the high-rise office buildings in the geographical area to which the individual has reasonable access, then the individual is substantially limited in working. This is so because a great number of positions within many classes of jobs would be performed in those buildings. 29 C.F.R. pt. 1630 app. § 1630.2(j).

By contrast, a severe allergy to the peculiar type or amount of dust found within one office is not an impairment that

substantially limits the ability to work. *Wright v. Tisch*, 45 Fair Empl. Prac. Cas. (BNA) 151, 1 AD Cas. (BNA) 1157 (E.D. Va. 1987). In *Wright*, the court determined that a complainant's inability to tolerate the dusty environment in the unit where she worked did not constitute a disability. 45 Fair Empl. Prac. Cas. at 152-53, 1 AD Cas. at 1158. The court noted that none of the complainant's other work activities was affected by her allergy. 45 Fair Empl. Prac. Cas. at 152, 1 AD Cas. at 1158. It also noted that the complainant's allergy did not restrict her from working in other offices with dust and that she had, in fact, worked in the presence of dust in other offices within the agency. *Id.*

Example 1 -- CP has a hearing impairment that only mildly affects his ability to hear. The impairment, however, makes CP extremely sensitive to very loud noises. CP experiences severe pain when he is exposed to loud noises for more than a brief period. Because of this sensitivity, CP cannot work in environments where noise levels routinely exceed a certain decibel level. As a result, R refused to hire CP for a welder's position. Further, CP could not work in carpentry or auto repair shops and could not be a heavy equipment operator, a demolitions expert, or a member of an airport ground crew. CP's impairment, therefore, prevents CP from working in a broad range of jobs in various classes. Accordingly, CP has an impairment that substantially limits his ability to work.

Example 2 -- CP has a hearing impairment that does not significantly restrict his ability to hear but does make him very sensitive to sound at one particular pitch. CP works on an assembly line at an automobile plant in an area that has several such plants. His employer has installed a new conveyor belt that has a unique whistle that sounds approximately every ten minutes, every time the conveyor belt stops and starts. CP experiences severe pain in his ears whenever the whistle sounds. As a result, CP can no longer work at that plant. CP's impairment, however, does not substantially limit his ability to work. Although the impairment prevents him from performing this particular job for this particular employer, it does not prevent him from performing similar jobs for other employers in his geographical area.

Example 3 -- CP has an impairment that requires radiation therapy, which results in an abnormal rate or degree of exhaustion. CP becomes very tired very easily and cannot engage in continuous activity for long periods. Assume that CP's impairment does not substantially limit her ability to perform any major life activity other than working. As a result of the impairment, however, CP cannot work more than four hours per day. This prevents CP from working in all jobs requiring full-time work. Since those jobs constitute a wide range of jobs in various classes, CP is substantially limited in working. (A reasonable accommodation of a part-time or modified work schedule might enable CP to work in a number of jobs from which she otherwise would be excluded. When determining whether an impairment is substantially limiting, however, one does not consider the ameliorative effects of reasonable accommodation or other mitigating measures. See § 902.5, *infra.*)

As the Commission's regulation notes, a number of factors may help to determine whether an individual is substantially limited in working. 29 C.F.R. § 1630.2(j)(3)(ii). Although a showing with respect to each factor is not a required element of proof, information relating to the factors is relevant to whether an individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes. Thus, information about the geographical area to which an individual has access and the number and types of jobs from which an individual is disqualified because of his/her impairment may be considered when determining whether an impairment substantially limits the individual's ability to work. See *id.*

The reference to the "number and types" of jobs is not meant to require an onerous evidentiary showing. 29 C.F.R. pt. 1630 app. § 1630.2(j). The reference does not mean that an individual must identify the exact number of jobs using similar or dissimilar skills in a certain geographic area. Further, the reference does not mean that an individual must count positions or otherwise present a precise number of jobs from which (s)he is disqualified because of an impairment. Instead, the reference to the "number and types" of jobs "only require[s] the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment." *Id.* Furthermore, in cases where it is clear that an individual is excluded from a class of jobs or a broad range of jobs in various classes, only minimal evidence will be required.

An assessment of whether an impairment substantially limits an individual's ability to work focuses on whether the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. 29 C.F.R. § 1630.2(j)(3)(i). For example, suppose that an individual has an impairment that interferes with his/her ability to work in the class of clerical jobs. The individual is substantially limited in working if (s)he is significantly restricted in performing clerical work as compared to the average person having comparable clerical skills. Thus, if the individual has clerical skills and training and the impairment prevents him/her from performing many of the clerical jobs that the average person with comparable clerical skills can perform, then the individual is substantially limited in working. On the other hand, if the individual wants to work as a clerk but has no clerical skills or training, then (s)he is substantially limited in working only if the impairment significantly restricts his/her ability to work in the clerical class as compared to the ability of the average person with a similar lack of clerical skills. (It is likely in that case that the average person with a lack of clerical skills can perform only a limited number of clerical jobs and that the individual is not significantly restricted when compared to the average person.)

The investigator often can begin to obtain information relevant to a determination of whether the charging party's impairment significantly restricts his/her ability to perform either a class of jobs or a broad range of jobs in various classes from: a position description of the job at issue, the respondent's explanation of the requirements of the job, and the charging party's description of his/her qualifications and his/her experience in similar positions. This information, which helps to identify the skills relevant to the job, may be useful in identifying other jobs using similar or dissimilar skills. In addition, the investigator should attempt to determine the number and types of jobs in the geographical area from which the charging party is disqualified because of the impairment. Information about other jobs where the charging party has worked, or for which the charging party has or has not applied, may be relevant to this inquiry. For example, other employers may have refused to employ the charging party because of his/her impairment, or the charging party may not have applied for certain jobs because the impairment disqualified him/her from those jobs. Similarly, an employment agency or an employment counselor may have told the charging party that the impairment prevents him/her from working in certain jobs. On the other hand, the fact that the charging party performed certain jobs successfully may indicate that the impairment -- if it existed at the time that the charging party performed those jobs -- does not disqualify him/her from that type of work.²¹

(d) Duration and Impact of Impairment -- One of the factors that may be relevant to whether an impairment is substantially limiting is the duration of the impairment. The length of time that an impairment affects major life activities may help to determine whether the impairment substantially limits those activities. As with all other matters, the determination must be made on a case-by-case basis. There are no set time limits for determining whether an impairment is of sufficient duration to be considered substantially limiting. There are, however, a few basic guidelines.

Generally, conditions that last for only a few days or weeks and have no permanent or long-term effects on an individual's health are not substantially limiting impairments. Examples of such transitory conditions are common colds, influenza, and most broken bones and sprains. The mere fact that an individual may have required absolute bed rest or hospitalization for such a condition does not alter the transitory nature of the condition. Even the necessity of surgery, without more, is not sufficient to raise a short-term condition to the level of a disability. Thus, for example, an employee who had an undisclosed temporary illness that required exploratory surgery but who was expected to recover completely in six to eight weeks did not have an impairment that substantially limited major life activities. *Stevens v. Stubbs*, 576 F. Supp.

1409, 1 AD Cas. (BNA) 546 (N.D. Ga. 1983). In that case, a temporary illness with no permanent effects on the individual's health was not a substantially limiting impairment. 576 F. Supp. at 1414, 1 AD Cas. at 549-50. Similarly, an employee who incurred a knee injury that required surgery was not an individual with a disability. *Evans v. City of Dallas*, 861 F.2d 846, 49 EPD Par. 38,674, 1 AD Cas. (BNA) 1394 (5th Cir. 1988). Although the injury may have limited the employee's major life activities during his recuperation, it did not continue to do so after his recuperation. See 861 F.2d at 852-53, 49 EPD at 55,700, 1 AD Cas. at 1398-99 (quoting district court opinion). For the same reason, an attack of appendicitis accompanied by a "routine" appendectomy would not constitute a disability. The condition might restrict an individual's activities for a few days or weeks, but the restrictions would be only temporary.

Example 1 -- CP has laryngitis. It is very painful for her to speak, and she cannot talk above a whisper when she does speak. Her physician has prescribed medication for her, has instructed her to drink plenty of fluids, and has advised her to stay home from work. She should be fully recovered within seven to ten days. CP does not have a disability. Although the laryngitis significantly restricts her ability to speak, it does so only on a very short-term basis and has no long-lasting or permanent effects on CP.

Example 2 -- CP sustains a compound fracture of her arm and must undergo surgery to set the bone. She is hospitalized for one week and will have a cast on her arm for five additional weeks. During these six weeks, CP must wear a sling and must keep her arm immobilized. She will have full use of her arm after the cast is removed. CP's broken arm is not a disability. Instead, it is a short-term, temporary impairment with no long-lasting or permanent effects.

Although short-term, temporary restrictions generally are not substantially limiting, an impairment does not necessarily have to be permanent to rise to the level of a disability. Some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities. Thus, a person who has been blinded or paralyzed but is expected to recover fully "eventually" is an individual with a disability, despite the prognosis for full recovery at some indeterminable time in the future.

Example 1 -- CP has nodes on his vocal chords. His doctor has told CP that he must rest his vocal chords and that he will lose his ability to speak unless he refrains from talking for more than one hour per day for the next one-and-one-half years. If CP follows his doctor's advice, his vocal chords will heal and he will have full use of his voice. CP, whose

impairment will last for many months and will significantly restrict his ability to speak during that time, has a disability.

Example 2 -- CP recently was released from the hospital following a ten-month stay for treatment for a mood disorder. The disorder significantly restricted CP's ability to interact with people and to care for herself. She will require two months of daily treatment, on an out-patient basis, to ensure that she can deal with people on a day-to-day basis and then four to six months of less intensive out-patient treatment. Her doctor anticipates that CP will be fully recovered when she completes her treatment. CP has a disability. Although her impairment (a mood disorder) is not permanent, it is long lasting and has significantly restricted her major life activities for an extended period (at least ten months during her hospitalization and possibly for the two months of intensive out-patient treatment).

Example 3 -- CP recently was diagnosed as having Guillain-Barre syndrome, a neurological disorder of unknown origin. As a result of the condition, she cannot walk. Her doctor has told her that she must undergo extensive rehabilitation and that the rehabilitation period will last for several months. The doctor tells CP that there is a good chance that she will regain total use of her legs after she completes her rehabilitation. CP has a disability because she has an impairment (Guillain-Barre syndrome) that substantially limits her ability to walk. The impairment prevents CP from walking, and it will be at least several months before she will be able to walk again. Although CP is expected to recover at some point in the future, her restrictions are significant and long-lasting.

Example 4 -- CP fractured her left ankle as the result of a skiing accident. Immediately after the accident, she underwent surgery on her ankle. She was hospitalized for one week and has been using crutches for two weeks. Her physician has directed her to use crutches for another two weeks, after which time she should be able to walk unaided. Her prognosis for a full recovery is excellent. CP does not have an impairment that substantially limits her major life activities. Although her ankle injury has restricted her ability to walk, it has done so for only a relatively short time (five weeks). The injury is a transitory impairment that has no long-term effects on CP.

Example 5 -- Same as Example 4, above, except the surgery was not successful. Although CP can now walk unaided, she can do so only for three to five minutes without experiencing excruciating pain. Her physician predicts that CP's condition, which may improve at some point in the future, will remain like this indefinitely. CP has an ankle impairment that substantially limits her ability to walk. Most people can walk for three to five minutes without pain.

Although the condition may not be permanent, it is long-term. CP is an individual with a disability.

Sometimes a temporary impairment that usually is not substantially limiting because it generally heals within a few weeks will take longer than the normal healing period to heal. In that case, the impairment may be substantially limiting if it goes on for a long period and significantly restricts the performance of a major life activity during that time. Thus, an impairment that takes significantly longer than the normal healing period to heal and prevents or significantly restricts the performance of a major life activity for an extended time during the healing process is a disability.

Example -- CP sustains a broken leg. Although broken legs generally heal within a few months, CP's leg will require eleven months to heal. CP will be unable to walk without the use of crutches during the eleven-month healing period. CP, whose impairment will take significantly longer than the normal healing period to heal and will significantly restrict CP's ability to perform a major life activity (walking) during the healing period, has a disability.

In some cases, an impairment that appears to be temporary may have residual effects. That is, the impairment may have a long-term impact on an individual's ability to perform one or more major life activities. For example, a person may sustain an injury that heals but nonetheless leaves a permanent or long-term residual effect. Although a short-term impairment that does not have a long-lasting impact is not a disability, an impairment that results in a long-term, substantial limitation is a disability.

Example 1 -- CP sustained a head injury in an automobile accident. He felt dizzy and disoriented immediately after the accident and was hospitalized overnight for observation. His doctor told him that x-rays revealed a slight concussion but no permanent injury. He was released from the hospital the next day, and he has experienced no side effects from the injury. CP's head injury was not substantially limiting. The impairment lasted for only a brief time and had no permanent or long-term impact on CP's major life activities. CP, therefore, does not have a disability.

Example 2 -- Same as Example 1, above, except CP sustained a serious concussion that resulted in permanent brain damage. Because of this, CP has a short-term memory deficit, has trouble processing information, cannot concentrate, and has great difficulty learning. CP's concussion resulted in long-term, significant restrictions on his major life activities. CP, therefore, has a disability.

Further, some chronic conditions may constitute substantially limiting impairments. Such conditions may be substantially limiting when active or may have a high likelihood of recurrence in substantially limiting forms. In addition, such conditions may require a substantial limitation of a major life activity to prevent or to lessen the likelihood or severity of recurrence. Some severe back problems and most forms of heart disease and cancer fall into this category. This category also includes illnesses, such as tuberculosis, that may lay dormant for long periods but can reemerge at any time in a substantially limiting manner. Similarly, episodic disorders, such as bipolar disorder, which remit and then intensify also fall into this category.

Finally, the duration of an impairment does not, by itself, determine whether the impairment substantially limits an individual's major life activities. It is just one factor to be considered with all of the other relevant information. An impairment may be long lasting or permanent but still not constitute a substantial limitation to major life activities. For example, a permanently injured finger is not substantially limiting if it does not significantly restrict an individual's ability to perform a major life activity such as performing manual tasks or caring for oneself. Thus, when determining whether an impairment substantially limits a major life activity, one must consider the severity of the limitation caused by the impairment as well as the duration of the limitation. An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time. It is not substantially limiting if it lasts for only a brief time or does not significantly restrict an individual's ability to perform a major life activity.

In sum, relatively brief and transitory illnesses or injuries that have no permanent or long-term effects on an individual's major life activities are not disabilities. Temporary impairments may be disabilities if they take significantly longer than normal to heal and significantly restrict the performance of major life activities during the healing period. Similarly, long-term impairments, or potentially long-term impairments of indefinite duration, may be disabilities if they are severe. Chronic conditions that are substantially limiting when active, and conditions with a high likelihood of recurrence in substantially limiting form, also are disabilities.

Because the duration of an impairment may be relevant to determining whether the impairment is a disability, the investigator should ask the charging party how long (s)he has had the impairment at issue. In addition, the investigator should obtain copies of any available medical documentation that indicates the length of time the charging party has had the

impairment, describes the long-term effects of the impairment, or gives a prognosis for recovery.

(e) Multiple Impairments -- An individual may have two or more impairments that are not substantially limiting by themselves but that together substantially limit one or more major life activities. In that situation, the individual has a disability. "Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability." 29 C.F.R. pt. 1630 app. § 1630.2(j).

Example -- CP has a mild form of arthritis in her wrists and hands and a mild form of osteoporosis (a reduction in bone quantity). Neither impairment, by itself, would significantly restrict any of CP's major life activities. Together, however, the two impairments affect CP's manual dexterity to such an extent that they significantly restrict her ability to perform manual tasks. Thus, the combination of the two impairments substantially limits one or more of CP's major life activities. CP, therefore, has a disability.

902.5 Mitigating Measures -- The determination of whether a condition constitutes an impairment must be made without regard to mitigating measures. 29 C.F.R. pt. 1630 app. § 1630.2(h). The availability of reasonable accommodation or auxiliary aids such as hearing aids to alleviate the effects of a condition has no bearing on whether the condition is an impairment. It is the scope or perceived scope of the condition itself, not its origin or capacity for being corrected, that determines whether a particular condition is an impairment.

Further, the extent to which the impairment limits the individual's major life activities should be assessed without regard to the availability of mitigating measures. 29 C.F.R. pt. 1630 app. § 1630.2(j); see also Senate Report at 23; House Education and Labor Report at 52; House Judiciary Report at 28. Thus, an individual who has experienced a significant loss of hearing is substantially limited in his/her ability to hear, even if the use of a hearing aid would improve the individual's level of hearing. House Education and Labor Report at 52; see also House Judiciary Report at 28-29. Similarly, individuals with impairments (such as epilepsy or diabetes) that substantially limit major life activities are individuals with disabilities, even if medication controls the effects of the impairments. House Education and Labor Report at 52; see also House Judiciary Report at 28-29. Accordingly, an individual who received dialysis treatments for polycystic kidney disease had a substantially limiting impairment, even though the disease was adequately treated through dialysis. *Gilbert v. Frank*, 949 F.2d 637, 641, 57 EPD Par. 41,106 at 68,909, 2 AD Cas. (BNA) 60, 63 (2d Cir. 1991) ("We are inclined to view persons whose kidneys

would cease to function without mechanical assistance, or whose kidneys do not function sufficiently to rid their bodies of waste matter without regular dialysis, as substantially limited in their ability to care for themselves.")

Example 1 -- CP, who has schizophrenia, takes medication to control the disorder. With medication, CP can function well in his everyday life. Without medication, however, CP cannot care for himself. CP has an impairment, schizophrenia, that substantially limits his major life activities. Although CP can function well with medication, he cannot care for himself without medication.

Example 2 -- CP has systemic lupus, which often results in acute anemia and arthritis-like symptoms. CP's physician has prescribed medication to control the effects of the disease. Without medication, CP is very lethargic, develops a skin rash, and experiences severe swelling and stiffness in her joints. With medication, CP experiences none of these symptoms. CP has a disability. Her impairment, when evaluated without regard to the effects of medication, substantially limits her major life activities.

Example 3 -- CP's right leg was amputated below the knee. Using a prosthesis, he can walk for a long distance without discomfort. CP has an impairment that substantially limits his ability to walk, even though he can walk with the use of a prosthesis. CP is an individual with a disability.

Note, finally, that the mere use of a mitigating measure does not automatically indicate the presence of a disability. Some individuals may use medication, prosthetic devices, or auxiliary aids to alleviate impairments that are not substantially limiting. For example, an individual who uses a hearing aid to correct a slight hearing impairment may not have a disability under the first part of the definition of the term "disability." The individual's impairment may only mildly affect his/her hearing and may not substantially limit the individual's ability to hear.

902.6 Statutory Exceptions to the Definition of "Disability" -- The statute specifies that certain conditions are not disabilities covered by the ADA. Since homosexuality and bisexuality are not impairments, those conditions are not disabilities. 42 U.S.C. § 12211(a); see also 29 C.F.R. § 1630.3(e). In addition, "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12210(a); see also 29 C.F.R. § 1630.3(a). Further, the term "disability" does not include

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

42 U.S.C. § 12211(b); see also 29 C.F.R. § 1630.3(d).

The term "illegal use of drugs" refers to drugs whose possession or distribution is unlawful under the Controlled Substances Act, 21 U.S.C. § 812.22 It "does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal law." 42 U.S.C. §§ 12111(6)(A), 12110(d)(1); see also 29 C.F.R. § 1630.3(a)(2). The term does include, however, the unlawful use of prescription controlled substances. 29 C.F.R. pt. 1630 app. § 1630.3(a)-(c).

The reference to a person "currently engaging" in the illegal use of drugs does not mean that this exclusion is limited to a person who illegally used drugs "on the day of, or within a matter of days or weeks before, the employment action in question." *Id.* Rather, the exclusion applies to any individual whose "illegal use of drugs . . . has occurred recently enough to indicate that the individual is actively engaged in such conduct." *Id.* If an individual tests positive on a test for the illegal use of drugs, the individual will be considered a current drug user under the ADA where the test correctly indicates that the individual is engaging in the current illegal use of a controlled substance.

Although the ADA excludes individuals currently engaging in the illegal use of drugs, it does not exclude individuals who have a record of such use or who are erroneously regarded as engaging in such use. 42 U.S.C. § 12110(b); see also 29 C.F.R. § 1630.3(b). It is important to remember, however, that an individual who has a record of the illegal use of drugs or who is erroneously regarded as engaging in such use is not automatically an individual with a disability. One still must evaluate whether the record or erroneous perception pertains to a substantially limiting impairment. Only addiction or perceived addiction to a controlled substance meets this standard. Occasional, casual illegal use of drugs does not constitute a disability. Similarly, a record or perception of such casual use does not constitute a disability. See *Hartman v. City of Petaluma*, 841 F. Supp. 946, 949, 2 AD Cas. (BNA) 1860, 1862-63 (N.D. Cal. 1994) (ADA provisions "require some indicia of dependence sufficient to substantially limit a major life activity").

Example 1 -- Several years ago, CP was hospitalized for treatment for a cocaine addiction. He has been

rehabilitated successfully and has not engaged in the illegal use of drugs since receiving treatment. CP, who has a record of an impairment that substantially limited his major life activities, is covered by the ADA.

Example 2 -- Three years ago, CP was arrested and convicted of the possession of cocaine. He had used the substance occasionally, perhaps three or four times over a sixteen-month period. CP has not used cocaine or any other illegal drug since his arrest. CP is not covered by the ADA. Although CP has a record of cocaine use, the use was not an addiction and did not substantially limit any of CP's major life activities.

Example 3 -- CP applies for a job with R, which requires job applicants to undergo a test to determine the current illegal use of drugs. CP's drug test falsely indicates that CP is using cocaine. R's personnel manager informs CP that the test came back positive for cocaine use and that R will not hire CP because "we don't want drug addicts working here." CP is not currently using cocaine and does not use any other drug illegally. R, which erroneously regards CP as being addicted to cocaine, erroneously regards CP as having a substantially limiting impairment. CP, therefore, meets the definition of "disability."

Example 4 -- Same as Example 3, above, except the personnel manager tells CP that the test came back showing marijuana use and that R will not hire CP because "we don't hire anybody who uses drugs illegally." The personnel manager tells the EEOC investigator that she did not hire CP because of R's strict policy against hiring anyone who tests positive for the illegal use of drugs and that she had not considered or been concerned about the extent of CP's use. "All I know is that his test showed marijuana use. I didn't think about anything beyond that." Since there is no evidence that R regarded CP as being addicted to marijuana, there is no evidence that R erroneously regarded CP as having a substantially limiting impairment. CP, therefore, does not meet the definition of disability.

A person who alleges disability based on one of the excluded conditions is not an individual with a disability under the ADA. Note, however, that a person who has one of these conditions is an individual with a disability if (s)he has another condition that rises to the level of a disability. See House Education and Labor Report at 142. Thus, a compulsive gambler who has a heart impairment that substantially limits his/her major life activities is an individual with a disability. Although compulsive gambling is not a disability, the individual's heart impairment is a disability.

902.7 Record of an Impairment that Substantially Limits Major Life Activities

(a) General -- The second part of the statutory definition of the term "disability" applies to persons who have a record of a substantially limiting impairment. This part covers persons who have a history of, or have been classified or misclassified as having, a physical or mental impairment that substantially limits one or more major life activities. It includes persons who have had a disabling impairment but have recovered in whole or in part and are not now substantially limited. It also includes persons who have been incorrectly classified as having a disability. See 29 C.F.R. § 1630.2(k).

The legislative history of the ADA emphasizes that this part of the definition is intended to prevent discrimination against individuals who have been classified or labeled, correctly or incorrectly, as having a disability. It also makes clear that the coverage of the Act extends to persons who have recovered, in whole or in part, from a disability but are subjected to discrimination because of their history of a substantially limiting impairment. Senate Report at 23; House Education and Labor Report at 52-53; House Judiciary Report at 29.

When determining whether an individual is covered by this part of the definition of the term "disability," one must remember that the record at issue must be a record of an impairment that substantially limited a major life activity. A record of a condition that is not an impairment, or of an impairment that was not substantially limiting, does not satisfy this part of the definition. See *Byrne v. Board of Educ.*, 979 F.2d 560, 566-67, 60 EPD Par. 41,862 at 73,020-21, 2 AD Cas. (BNA) 284, 289-90 (7th Cir. 1992) (single hospital stay for administration of allergy tests is not a record of a such an impairment). Further, a record of a condition, such as transvestism or compulsive gambling, that is specifically excluded from ADA coverage also does not satisfy this part of the definition. (Note, however, that a record of addiction to the illegal use of drugs is a disability, even though current illegal use of drugs is specifically excluded from ADA coverage. See § 902.6, *supra*.)

Example 1 -- For several years, CP was twenty- to-thirty pounds beyond the target weight for men of his height and bone structure. His condition did not rise to the level of morbid obesity and did not cause or result from a physiological disorder. Further, his condition did not restrict any of his activities. CP recently completed a weight-loss program and is now at his target weight. CP does not have a record of a disability. He has a history of obesity, but his obesity was not an impairment and did not substantially limit any of his major life activities.

Example 2 -- CP was recently hospitalized for appendicitis. She underwent a routine appendectomy, was hospitalized for one week, and recovered fully within the normal healing period. Although CP has a hospital record of treatment for appendicitis, she does not have a record of a disability. The appendicitis restricted CP's activities for only a brief period and had no long-term or permanent effects on CP. The impairment, therefore, did not substantially limit any of CP's major life activities. As a result, CP does not have a history of a disability and the hospital record does not constitute a record of a disability.

Example 3 -- CP was convicted several times of shoplifting. He received treatment for kleptomania and has recovered from the condition. CP has a record of kleptomania, but he does not have a record of a disability. Kleptomania is specifically excluded from the statutory definition of the term "disability."

An individual who has a record of a disability under other laws or regulations does not necessarily have a record of a disability for purposes of the ADA. Other laws may define the term "disability" differently from the way the ADA defines the term. See § 902.1(a), supra. The investigator, therefore, should not assume that an individual who has been certified as having a disability or a handicap for other purposes, such as veterans programs, state vocational rehabilitation programs, or disability retirement programs, also has a disability under the ADA. The investigator, however, should obtain a copy of the certification and other similar available documents. Such certification is not dispositive for the purposes of the ADA, but it may provide relevant information. For example, medical information supporting the certification may be relevant to whether the charging party has a "disability" under the ADA. Further, the respondent's knowledge of and attitude toward the certification may be relevant to whether the respondent regarded the charging party as having a substantially limiting impairment. See § 902.8, infra.

(b) History of Such an Impairment -- The term "disability" covers persons who have recovered from substantially limiting physical or mental impairments. Examples of persons who would fall under this part of the definition of the term "disability" include individuals who have histories of substantially limiting forms of heart disease or mental or emotional illness. Senate Report at 23; House Education and Labor Report at 52-53.

In *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 281, 42 EPD Par. 36,791 at 45,635, 1 AD Cas. (BNA) 1026, 1029 (1987), the United States Supreme Court stated

that the plaintiff's hospitalization for an acute form of tuberculosis, an illness that had substantially limited one or more of the plaintiff's major life activities, sufficed to establish a record of a substantially limiting impairment.²³ Similarly, a district court found that an individual who had incurred four or five shoulder dislocations prior to undergoing corrective surgery had a "history" of a substantially limiting impairment. *Mahoney v. Ortiz*, 645 F. Supp. 22, 24, 1 AD Cas. (BNA) 924, 925 (S.D.N.Y. 1986).

Example -- CP, who is thirty, had a severe form of depression when he was in his early twenties. He lost his appetite, could not sleep, was always tired, and rarely left his home. The depression became so serious that he could not function in day-to-day life. CP was hospitalized for four months and then received therapy on an out-patient basis for six months. The treatment was successful, and CP has had no recurrence of the depression. Although CP does not currently have an impairment that substantially limits a major life activity, he has a history of such an impairment. CP, therefore, falls under the second part of the definition of the term "disability."

(c) Misclassified as Having Such an Impairment -- The term "disability" covers persons who are not, and may have never actually been, impaired but nonetheless have been misclassified as having a disability. Thus, school or other institutional documents labeling or classifying an individual as having a substantially limiting impairment would establish a "record" of a disability. Individuals who have been misclassified by a school or a hospital as having mental retardation or a substantially limiting learning disability would be covered by this part of the definition of the term "disability." See Senate Report at 23; House Education and Labor Report at 52-53; House Judiciary Report at 29.

902.8 Regarded as Having a Substantially Limiting Impairment

(a) General -- The third part of the statutory definition of the term "disability" applies to individuals who are regarded as having impairments that substantially limit one or more major life activities. This part covers persons who have impairments that do not substantially limit major life activities but are treated by covered entities as constituting substantially limiting impairments. It also covers persons whose impairments are substantially limiting only as the result of the attitudes of others toward the impairment and persons who have no impairments but nonetheless are treated as having substantially limiting impairments. 29 C.F.R. pt. 1630 app. § 1630.2(1); see also Senate Report at 23; House Education and Labor Report at 53.

The inclusion of persons regarded as having a substantially limiting impairment reflects Congressional intent to protect all persons who are subjected to discrimination based on disability, even if they do not in fact have a disability. It

also reflects a recognition by Congress that the reactions of others to an impairment or a perceived impairment can be just as disabling as the limitations caused by an actual impairment. See House Judiciary Report at 30. As noted in the legislative history of the ADA (see Senate Report at 23-24; House Education and Labor Report at 53; House Judiciary Report at 30), the United States Supreme Court effectively explained the rationale for this aspect of the definition of the term "disability" in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 42 EPD Par. 36,791, 1 AD Cas. (BNA) 1026 (1987). The Court stated,

By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

480 U.S. at 284, 42 EPD at 45,637, 1 AD Cas. at 1030 (footnote omitted).

This aspect of the definition of the term "disability," therefore, is designed to protect against myths, fears, stereotypes, and other attitudinal barriers about disability. Common attitudinal barriers include, but are not limited to, "concerns about productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers." House Judiciary Report at 30. Quite often, employers will assume, without any objective evidence, that a person's physical or mental condition will cause problems in these areas. The ADA is designed to prevent employment discrimination based on mere speculation and unfounded fears about disability. Thus, the third part of the definition is designed to protect individuals who experience employment discrimination because of myths, fears, and stereotypes associated with disabilities, even if the individuals' physical or mental conditions do not meet the criteria of the first or second part of the definition. *Id.*

In contrast to the first two parts of the statutory definition of the term "disability," this part of the definition is directed at the employer rather than at the individual alleging discrimination. The issue is whether the employer treats the individual as having an impairment that substantially limits major life activities. Thus, as the legislative history to the ADA notes, "[t]he perception of the covered entity is a key element of this test." House Judiciary Report at 30. Because it is the employer's perception that is at issue, it is not necessary that the individual alleging discrimination actually have a disability or an impairment. It also is not necessary that the employer's perception of the individual be shared by other employers. The individual is covered by this part of the definition if (s)he can show that the employer "made an employment decision because of a perception of disability based on 'myth, fear or stereotype'. . . . If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is

acting on the basis of 'myth, fear or stereotype' can be drawn." 29 C.F.R. pt. 1630 app. § 1630.2(l); see also House Judiciary Report at 30-31.

The legislative history to the Act makes clear that the individual does not have to demonstrate that the employer's perception is wrong. As the legislative history notes,

A person who is covered because of being regarded as having an impairment is not required to show that the employer's perception is inaccurate, e.g., that he will be accepted by others, or that insurance rates will not increase, in order to be qualified for the job.

For example, many people are rejected from jobs because a back x-ray reveals some anomaly, even though the person has no symptoms of a back impairment. The reasons for the rejection are often the fear of injury, as well as increased insurance or worker's compensation costs. These reasons for rejection rely on common barriers to employment for persons with disabilities and therefore, the person is perceived to be disabled under the third test. House Judiciary Report at 31.

This part of the definition of "disability" applies to individuals who are subjected to discrimination on the basis of genetic information relating to illness, disease, or other disorders. Covered entities that discriminate against individuals on the basis of such genetic information are regarding the individuals as having impairments that substantially limit a major life activity. Those individuals, therefore, are covered by the third part of the definition of "disability." See 136 Cong. Rec. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); *id.* at H4624-25 (statement of Rep. Edwards); *id.* at H4627 (statement of Rep. Waxman).

Example -- CP's genetic profile reveals an increased susceptibility to colon cancer. CP is currently asymptomatic and may never in fact develop colon cancer. After making CP a conditional offer of employment, R learns about CP's increased susceptibility to colon cancer. R then withdraws the job offer because of concerns about matters such as CP's productivity, insurance costs, and attendance. R is treating CP as having an impairment that substantially limits a major life activity. Accordingly, CP is covered by the third part of the definition of "disability."

To determine whether an employer regards an individual as having an impairment that substantially limits major life activities, one must examine the employer's perception and treatment of the charging party. Toward that end, the investigator may obtain a statement in which the respondent explains his/her perceptions of the charging party's physical or mental condition. The statement should describe the type of condition that the respondent perceives the charging party to

have and the extent to which the respondent believes the condition to limit the charging party's major life activities.

Further, if the charging party has been classified as having a disability or handicap under another law or benefit program, then the investigator may determine if the respondent was aware of the classification and, if so, how the respondent interpreted the classification. For example, if the charging party has a veterans' disability rating, then the investigator may determine whether the respondent was aware of that rating. The investigator also may determine whether the respondent viewed the rating as indicative of an impairment that substantially limited a major life activity. A respondent might, for example, believe that all individuals who have ten-percent veterans' disability ratings are substantially limited in a major life activity. In addition, the investigator may ascertain the information that the employer had about the charging party's condition at the time of the employment action at issue. Other information, such as statements from other individuals in the work place or evidence that the employer has a pattern of not hiring individuals with the same or similar impairment, also may help to determine how the employer perceived the charging party.

Further, the investigator should examine carefully the employer's treatment of the charging party. An employer may claim that it does not perceive an individual as having an impairment that substantially limits a major life activity but nonetheless may treat the individual as having such an impairment. In such a case, actions may speak louder than words. For example, an employer may assert that it does not regard an individual as substantially limited in working but nonetheless may treat an individual as having an impairment that disqualifies him or her from a class of jobs or a broad range of jobs in various classes. The employer in that case regards the individual as substantially limited in the major life activity of working. See § 902.8(f), *infra*.

The investigator should remember that a determination that an employer regarded a charging party as having an impairment that substantially limits a major life activity does not automatically require a finding of discrimination. The determination of whether the charging party is covered by the third part of the definition of "disability" and the determination of whether the respondent discriminated against the charging party are two separate determinations. In each charge involving the third part of the definition of "disability," the investigator should engage in a careful evidentiary analysis to determine whether the respondent (1) regarded the individual as having a substantially limiting impairment and (2) acted on that basis in violation of the ADA. Although the same facts may be relevant to both determinations, a finding of coverage does not necessarily lead to a finding of liability. An employer that erroneously regards an individual as having a substantially

limiting impairment may nonetheless take an employment action for a legitimate reason. For example, evidence may show that an employer that gave an employee a low performance rating erroneously regarded the employee as having AIDS. The evidence also may show, however, that the employee's work objectively warranted the rating, that other employees with comparable performances received comparable ratings, and that the employer has had employees who actually had AIDS and has never discriminated against them on that basis. In that situation, there is coverage but no liability.

(b) Regulatory Definition -- An individual is covered by this part of the definition if (s)he

(1) [h]as a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) [h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) [h]as none of the impairments defined in [the definition of the term "impairment"] but is treated by the covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l). Each of these three subparts of the third part of the definition of the term "disability" is discussed below in detail.

(c) Persons with Impairments Regarded as Substantially Limiting -- This subpart of the regulatory definition covers individuals who have impairments that do not substantially limit major life activities but who are perceived as being substantially limited. For example, an individual who has a slight limp that does not substantially limit any major life activities but who is rejected for employment because the employer believes that the limp significantly restricts the individual's ability to walk is covered by this part of the definition. Although the individual's limp does not in fact substantially limit major life activities, the employer perceives the limp as substantially limiting the individual's ability to walk. The individual meets the definition of an individual with a disability because (s)he is regarded as having an impairment that substantially limits his/her major life activity of walking.

Example -- CP has a mild form of strabismus (crossed eyes). The impairment only slightly affects CP's ability to see. CP's employer, however, thinks that the impairment prevents CP from seeing all printed material. As a result, the employer refuses to promote CP to a supervisory position that would require CP to review the written work of

others. Although CP does not actually have a disability, she is regarded as having an impairment that substantially limits her ability to see. CP, therefore, is covered by the third part of the definition of "disability."

(d) **Persons Who Are Substantially Limited as a Result of Others' Attitudes** -- This subpart covers individuals who have stigmatic conditions that constitute physical or mental impairments but that do not by themselves substantially limit a major life activity. The impairments become substantially limiting only because of the negative reactions of others toward the impairments. For example, a person who has experienced severe burns may have an impairment that is substantially limiting solely because of the attitudes of others. Similarly, a person who has a cosmetic disfigurement may be continuously refused employment because of employers' fears about the negative reactions of co-workers or clients. These persons would be covered under the third part of the definition of the term "disability." See Senate Report at 24; House Education and Labor Report at 53; House Judiciary Report at 30-31.

Example -- CP, who has a facial scar that runs from the base of his left ear to his chin, applies for a job as a sales representative in a home appliance store. The sales manager of the store refuses to consider CP for the position because she fears that CP's presence on the showroom floor will dissuade customers from shopping at the store. CP is covered by the third part of the definition of the term "disability." He has an impairment, a facial scar, that is substantially limiting only as a result of the negative attitudes of others.

(e) **Unimpaired Persons Regarded as Having Substantially Limiting Impairments** -- This subpart covers persons who have no actual physical or mental impairments but nonetheless are treated as having substantially limiting impairments. For example, an individual who is rejected for employment because the employer erroneously believes that the individual is infected with the Human Immunodeficiency Virus is an individual with a disability. Even though the individual has no impairment, (s)he is regarded as having a substantially limiting impairment.

Similarly, in a nonemployment case under the Rehabilitation Act, a court ruled that a parent whose children had been erroneously placed in a class for mentally retarded students had standing to sue. Although the children had no actual impairments, they were regarded as having disabilities. *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261, 262-63 (5th Cir. 1984).

Example 1 -- R refuses to consider CP for a position as a lifeguard because R believes that CP has a serious heart condition that significantly restricts her ability to engage in physical activity. CP, in fact, has no heart condition. Although CP does not have an impairment, CP is regarded

as having an impairment that substantially limits her major life activities. CP, therefore, is covered by this part of the definition of the term "disability."

Example 2 -- CP and her spouse have recently completed couples counseling by a clinical psychologist in an effort to remedy problems in their marriage. Neither CP nor her spouse has any psychological disabilities. CP's employer, however, believes that anyone who sees or has seen a psychologist "must be crazy." He finds a pretext under which to fire her. CP, therefore, is covered by the third part of the definition of "disability," because she is being treated by her employer as though she has a substantially limiting impairment although, in fact, she does not.

Example 3 -- CP has high normal blood pressure. Her blood pressure is within "normal" range, and she does not have hypertension. Nonetheless, R fires CP because R thinks this means that CP cannot perform everyday activities without risking a massive stroke. Although CP does not have an impairment, she is regarded as having an impairment that substantially limits major life activities. CP, therefore, is covered by the third part of the definition of "disability."

Example 4 -- CP had abdominal surgery a few years ago to treat a hernia. The hernia was fully corrected, and CP has no residual effects. R, however, thinks that this means that CP cannot lift anything weighing more than a few pounds and refuses to hire CP. R regards CP as having an impairment that substantially limits the major life activity of lifting. CP, therefore, is covered by this part of the definition of the term "disability."

(f) Regarded as Substantially Limited in the Major Life Activity of Working -- If an individual is not regarded as having an impairment that substantially limits any other major life activities (and does not fall under either of the first two parts of the definition of "disability"), then the investigator should consider whether (s)he is regarded as having an impairment that substantially limits the major life activity of working. An employer regards an individual as substantially limited in the ability to work if, as the result of myths, fears, stereotypes, or other attitudinal barriers commonly associated with disability, it treats the individual as having an impairment that disqualifies or significantly restricts him or her from working in a class of jobs or in a broad range of jobs in various classes. An employer does not regard an individual as substantially limited in the ability to work simply because it finds the individual unsuitable for one particular job. *Forrisi v. Bowen*, 794 F.2d 931, 934, 40 EPD Par. 36,307 at 43,277-78, 1 AD Cas. (BNA) 921, 923 (9th Cir. 1986); see also *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 24 EPD Par. 31,260, 1 AD Cas. (BNA) 220 (D. Hawaii 1980). Rather, an employer regards an individual as substantially limited in working if it perceives the individual to have an impairment that "foreclose[s] generally the type of employment involved." *Forrisi*, 794 F.2d at 935, 40 EPD Par. at 43,278, 1 AD Cas. at 923.

In *Forrisi*, an employer discharged a newly hired utility systems repairer who had acrophobia (fear of heights). The condition had not previously interfered with the individual's employability. It did, however, prevent the individual from performing the

job at issue, a utility systems repairer position at the employer's plant, which required work at high elevations.

The employer viewed the individual as qualified for and generally capable of doing utility systems repair work but as unable to perform one particular job. Noting that the individual "was seen as unsuited for one position in one plant--and nothing more," the court found that he was not regarded as substantially limited in working. *Id.*

To determine whether an employer regards an individual as substantially limited in working, one must determine whether the employer (1) perceives the individual as having an impairment that precludes or significantly restricts work only in a particular job or a narrow range of jobs or (2) perceives the individual as having an impairment that disqualifies or significantly restricts the individual from a class of jobs or a broad range of jobs. This means that one must determine what the employer thinks about the impairment and how the employer believes the impairment affects the individual's ability to work. That is, one must identify the work limitations that the employer believes result from the impairment.

To do this, one first should identify the qualification standard or other criterion that the employer has used to disqualify or restrict the individual from employment. For example, the Forrissi employer disqualified the plaintiff because he could not perform utility systems repair work at certain heights, 794 F. 2d at 933, 40 EPD at 43,276, 1 AD Cas. at 922, and the E.E. Black employer disqualified the plaintiff because he had a congenital back anomaly that the employer thought made him "a poor risk for heavy labor," 497 F. Supp. at 1091, 24 EPD at 17,644, 1 AD Cas. at 222. Other disqualifying criteria include such requirements as a certain level of hearing or vision, an ability to carry objects for a certain distance, an ability to lift a certain amount of weight, an ability to work with a certain substance, and an ability to handle particularly stressful situations.

Next, one should determine whether the criterion pertains uniquely to the peculiar job or work site of one particular employer. If the criterion pertains only to the peculiar job or work site, then an employer who refuses to employ an individual who does not meet the criterion regards the individual as disqualified only from work in that particular job or at that particular work site. The employer, who perceives the individual to be unsuited for one particular job, does not regard the individual as substantially limited in working.

For example, the Forrissi criterion, an ability to perform utility systems repair work at certain heights, was unique to that employer's job. The criterion did not measure the employee's ability to perform a class of jobs; rather, the criterion measured the employee's ability to perform utility repair work at the employer's plant, which exposed the employee to certain heights. See 794 F.2d at 935, 40 EPD at 43,278, 1 AD Cas. at 923 (employer doubted plaintiff's ability to perform utility repair work above certain heights in

employer's plant, not plaintiff's ability to perform such work in general). The Forrissi employer did not regard the plaintiff as substantially limited in the ability to work. Instead, the employer regarded the plaintiff as unable to meet a unique criterion that pertained to the location of one specific job for one specific employer.

If the criterion does not pertain to the peculiar job or work site of one particular employer, then the investigator should determine whether the criterion pertains to a class of jobs or a broad range of jobs in various classes. To do this, the investigator should look at the number and types of jobs, in the geographical area to which the individual has reasonable access, that use similar training, knowledge, skills, and abilities (a class of jobs) and that do not use similar training, knowledge, skills, and abilities (a broad range of jobs). 29 C.F.R. § 1630.2(j)(3)(ii). If the criterion pertains to a class of jobs or to a broad range of jobs, then the employer that applied the criterion has treated the individual as having an impairment that disqualifies or restricts him or her from a class of jobs or from a broad range of jobs in various classes. The employer's actions, therefore, demonstrate that the employer regards the individual as having an impairment that precludes or significantly restricts work in a class of jobs or a broad range of jobs in various classes. Accordingly, the employer regards the individual as substantially limited in working.

For example, the E.E. Black criterion that the plaintiff could not meet because of a back anomaly did not pertain uniquely to the peculiar job or work site of one particular employer. Instead, the requirement that employees not be "a poor risk for heavy labor" pertained to the plaintiff's ability to perform all jobs involving heavy labor and not just to a particular job of the employer. See 497 F. Supp. at 1091, 24 EPD at 17,644, 1 AD Cas. at 222 (noting that plaintiff was disqualified from employment because he "was a poor risk for heavy labor"). The criterion, therefore, pertained to a class of jobs, heavy labor jobs. By applying the criterion to exclude the plaintiff from employment, the employer treated the plaintiff as having an impairment that disqualified him from a class of jobs. As a result, the employer demonstrated that it regarded the plaintiff as having an impairment that disqualified him from a class of jobs and, therefore, as substantially limited in the ability to work.

On the other hand, an employer that disqualifies an individual from employment on the basis of a criterion that does not pertain to a class of jobs or a broad range of jobs (for example, a criterion that pertains only to a narrow range of jobs) does not regard the individual as substantially limited in working. See 29 C.F.R. pt. 1630 app. § 1630.2(j). An employer that applies such a criterion to disqualify an individual because of an impairment is treating the individual as having an impairment that disqualifies him or her only from a narrow range of jobs. The employer, therefore, regards the individual as having an impairment that precludes work only in a narrow range of jobs (rather than in a class of jobs or a broad

range of jobs). Accordingly, the employer, which does not regard the individual as disqualified from a class of jobs or a broad range of jobs, does not regard the individual as substantially limited in working.

In summary, an employer that disqualifies an individual from a job on the basis of a criterion that pertains to a unique aspect of the job at issue does not regard the individual as substantially limited in the ability to work. Instead, the employer merely regards the individual as unsuitable for one particular job. The individual, therefore, does not meet the third, "regarded as" part of the definition of the term "disability" with respect to the major life activity of working. On the other hand, an employer that disqualifies an individual on the basis of a criterion that does not pertain to a unique aspect of one particular job does regard the individual as substantially limited in working if the criterion pertains to a class of jobs or to a broad range of jobs. In that case, the individual is covered by the third part of the definition of "disability."

Example 1 -- CP is an industrial painter who has extensive experience painting factories, warehouses, aircraft hangars, and other large structures. He applies for a position with R, a company with a contract to paint all of the buildings at a nuclear power facility. R plans to paint the buildings with a unique type of paint that contains a substance designed to help insulate buildings from radiation. R erroneously believes that CP is allergic to that substance and cannot use paint that contains it. As a result, R does not hire CP. In this case, the exclusionary criterion -- the requirement that employees be able to work with paint that contains a certain substance -- is unique to this job. The criterion pertains specifically to R's work site. By disqualifying CP from employment on the basis of a criterion that pertains to a unique aspect of R's job, R has shown that it finds CP to be unsuitable only for one particular job for one particular employer. R, therefore, does not regard CP as substantially limited in working.

Example 2 -- CP is a warehouse worker whose duties include loading and unloading vehicles, moving heavy boxes from one part of the warehouse to another, and keeping an inventory of the items stored in one section of the warehouse. R requires its warehouse workers to be able to lift packages weighing up to seventy pounds, to carry those packages for up to one hundred yards, to bend repeatedly, and to climb up and down ladders several times each day. CP recently learned that she has arthritis in her left knee. The arthritis does not significantly restrict her in any way, and her physician has placed no limitations on her activities. Nevertheless, R believes that the arthritis prevents CP from meeting the lifting, carrying, bending, and climbing requirements of the warehouse position. R has no objective evidence about any limitations that CP might have but instead bases its belief on its views about arthritis in general. R fires CP on the grounds that she can no longer meet the climbing, lifting, bending, and carrying requirements of her warehouse job. The exclusionary criteria -- R's climbing, lifting, bending, and carrying requirements -- do not apply to some unique aspect of R's warehouse. Instead, the criteria apply to the class of jobs that involve manual labor. By

disqualifying CP from employment on the basis of criteria that apply to manual labor jobs, R has shown that it finds CP to be unsuitable for work in a class of jobs. R, therefore, regards CP as substantially limited in the ability to work.

Example 3 -- CP, a bank teller, has a mild form of clinically diagnosed depression. The depression does not substantially limit any of CP's major life activities. R, CP's employer, learns of CP's clinically diagnosed depression and assumes that the depression will prevent CP from working well with customers and other members of the public. There is no factual basis to R's assumption. Nevertheless, R reassigns CP to a clerical position in a back office. In this case, the exclusionary criterion -- the requirement that employees be able to work well with members of the public -- does not pertain to a unique aspect of the job or work site. Rather, since a wide variety of jobs involves working with the public, the exclusionary criterion applies to a broad range of jobs. By disqualifying CP from the teller position on the basis of a criterion that applies to a broad range of jobs in various classes, R has demonstrated that it finds CP to be unsuitable for work in a broad range of jobs. Accordingly, R regards CP as substantially limited in the ability to work.

Example 4 -- CP applies for a job as a laborer at R's construction site. A post-offer medical examination reveals that CP has a congenital back anomaly. CP is asymptomatic; the back anomaly does not limit any of her activities. Nonetheless, R withdraws the job offer because it believes that the back anomaly makes CP a poor risk for heavy labor jobs. That is, R thinks that CP will injure her back on the job and will increase R's workers' compensation costs. The criterion -- a requirement that employees not pose a risk of injury in heavy labor jobs -- does not apply to a unique aspect of R's job or work site. Instead, the criterion applies to a class of jobs -- heavy labor jobs. By disqualifying CP from employment on the basis of a criterion that applies to all heavy labor jobs, R has shown that it finds CP to be unsuitable for work in a class of jobs. R, therefore, regards CP as substantially limited in working.

To determine whether a respondent regards a charging party as having an impairment that substantially limits the major life activity of working, the investigator should take the following steps:

- (1) identify the impairment that CP has or is regarded as having;
- (2) identify the criterion that disqualifies or significantly restricts CP because of the impairment;
- (3) determine whether the criterion pertains uniquely to the peculiar job or work site of R;

(a) if the criterion pertains uniquely to the peculiar job or work site of R, then R does not regard CP as substantially limited in working; instead, R regards CP as unsuitable for one particular job for one particular employer;

(b) if the criterion does not pertain uniquely to the peculiar job or work site of R, then

(4) determine whether the criterion pertains to a class of jobs or a broad range of jobs in various classes;

(a) if the criterion pertains to a class of jobs or a broad range of jobs in various classes, then R regards CP as substantially limited in working;

(b) if the criterion does not pertain to a class of jobs or a broad range of jobs in various classes, then R does not regard CP as substantially limited in working.

902.9 Cross References

(a) How to Investigate, § 602

(b) Definition of the Term "Qualified Individual with a Disability," § ____

INDEX (removed in ASCII version)

1.The ADA uses the terms "disability" and "individual with a disability" rather than the terms "handicap" and "handicapped person" or "individual with handicaps." The use of these terms "represents an effort by [Congress] to make use of up-to-date, currently accepted terminology." The change in phraseology does not reflect a change in definition or substance. S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) [hereinafter Senate Report]; H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 50-51 (1990) [hereinafter House Education and Labor Report].

2.The ADA also protects individuals from discrimination on the basis of their relationship or association with a person with a disability. 42 U.S.C. § 12112(b)(4); 29 C.F.R. § 1630.8; see also Senate Report at 30; House Education and Labor Report at 61-62; H.R. Rep. No. 485 pt. 3, 101st Cong., 2d Sess.38-39 (1990) [hereinafter House Judiciary Report]. Further, the Act prohibits retaliation or coercion against individuals because they have opposed any act that the ADA makes unlawful, have participated in the enforcement process, or have encouraged others to exercise their rights secured by the ADA. 42 U.S.C. § 12203; 29 C.F.R. § 1630.12; see also Senate Report at 86; House Education and Labor Report at 138; House Judiciary Report at 72.

3. The Rehabilitation Act Amendments of 1992 amended the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-97 (1988 & Supp. IV 1992), to apply the substantive standards of Title I of the ADA to sections 501, 503, and 504 of the Rehabilitation Act for non-affirmative action employment discrimination cases. Pub. L. No. 102-569, 106 Stat. 4344 at 4424, 4428 (1992) (codified at 29 U.S.C. §§ 791(g), 793(d), 794(d) (Supp. IV 1992)). (Sections 501, 503, and 504 of the Rehabilitation Act prohibit federal agencies, federal contractors, and programs receiving federal financial assistance from discriminating on the basis of disability.) The ADA definition of the term "disability," therefore, also applies to those sections of the Rehabilitation Act.

4. The Vietnam Era Veterans Readjustment Assistance Act of 1974 defines a disabled veteran as

(A) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary, or (B) a person who was discharged or released from active duty because of a service-connected disability.

38 U.S.C. § 4211(3) (Supp. III 1991).

5. This section frequently refers to the term "impairment" in the present tense. These references are not meant to imply that the determination of whether a condition is an impairment is relevant only to whether an individual meets the first part of the definition of "disability," i.e., actually has a physical or mental impairment that substantially limits a major life activity. This determination also is relevant to whether an individual has a record of such an impairment or is regarded as having such an impairment. The determination of whether a condition constitutes an impairment should be made without regard to mitigating measures. See § 902.5, *infra*.

6. 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 determine if the charging party has a disability. An impairment rises to the level of a disability when it substantially limits one or more major life activities. The investigator, therefore, also should obtain available medical or other documentation that describes the extent to which the impairment limits the charging party's major life activities. See §§ 902.3, 902.4, *infra*.

7. The statute also specifies that certain conditions, even though they may be impairments, are not disabilities covered by the ADA. See § 902.6, *infra*.

8. Osteoporosis is a "[r]eduction in the quantity of bone or atrophy of skeletal tissue." Stedman's Medical Dictionary 1110 (25th ed. 1990).

9. The ADA definition of "disability" is similar to the definition of "individual with a disability" that has been applied to Title V of the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B), (C) (Supp. IV 1992). See Senate Report at 21; House Education and Labor Report at 50; House Judiciary Report at 27. Since both Acts use the same three-part definition, this manual section draws on case law applying the Rehabilitation Act where appropriate.

10. Although other statutes may use the term "disability" when referring to pregnancy, pregnancy is not a "disability" for purposes of the ADA. Note, however, that allegations of employment discrimination based on pregnancy are covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The appropriate analysis for assessing a charge of pregnancy-based employment discrimination is discussed in a separate Compliance Manual section. See § 626, *supra*.

11. Note, however, that CP's employer does not have to excuse CP's misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees. See 56 Fed. Reg. 35,733 (1990) (referring to revisions that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards").

12. As in Example 2, CP's employer does not have to excuse CP's misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees. See 56 Fed. Reg. 35,733 (1990) (referring to revisions that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards").

13. Note, however, that persons who have normal deviations in height or weight may allege that height or weight standards violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. See *Dothard v. Rawlinson*, 433 U.S. 321, 14 EPD Par. 7,632 (1977) (minimum height/weight requirement for correctional counselor position had adverse impact on women and was not job related and consistent with business necessity); *Gedrom v. Continental Airlines*, 692 F.2d 602, 30 EPD Par. 33,156 (9th Cir. 1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983) (maximum weight standards that were applied to exclusively female position of flight hostess constituted disparate treatment based on sex where no such weight policy was applied to similar but exclusively male position of director of passenger service).

14. "Achondroplastic dwarfism is a growth disorder that affects all four extremities and results in short limbs and short stature." *Dexler v. Tisch*, 660 F. Supp. 1418, 1419, 43 EPD Par. 37,280 at 48,202, 1 AD Cas. (BNA) at 1086 (D. Conn. 1987).

15. Investigators should be aware that medical experts sometimes use the term "morbid obesity" or "gross obesity" to mean the same thing as "severe obesity," i.e., body weight more than 100% over the norm. The term "obesity" has been defined as "[t]he excessive accumulation of body fat. Except for heavily muscled persons, a body weight 20% over that in standard height-weight tables is arbitrarily considered obesity." The Merck Manual of Diagnosis and Therapy 981 (Robert Berkow ed., 16th ed. 1992).

16. The mere presence of an impairment does not automatically mean that an individual has a disability. Whether severe obesity rises to the level of a disability will turn on whether the obesity substantially limits, has substantially limited, or is regarded as substantially limiting, a major life activity. "[E]xcept in rare circumstances, obesity is not considered a disabling impairment." 29 C.F.R. pt. 1630 app. § 1630.2(j).

17. The fact that a contagious disease is an impairment does not automatically mean that it is a disability. To be a disability, an impairment must substantially limit (or have substantially limited or be regarded as substantially limiting) one or more major life activities. See 29 U.S.C. § 12102(2); see also 29 C.F.R. § 1630.2(g).

18. An individual who has HIV infection, including asymptomatic HIV infection, has a disability covered under the ADA. See § 902.4(c)(1), *infra*; see also *Doe v. Kohn Nast & Graf*, 862 F. Supp. 1310, 1321, 3 AD Cas. (BNA) 879, 885 (E.D. Pa. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559, 59 EPD Par. 41,656, 2 AD Cas. (BNA) 197 (D.D.C. 1992); Senate Report at 22; House Education and Labor Report at 52; House Judiciary Report at 28 n.18; Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, to Arthur B. Culvahouse, Jr., Counsel to President Reagan, 8 Fair Empl. Prac. Manual (BNA) No. 641, at 405:1 (Sept. 27, 1988); Federal Contract Compliance Manual App. 6D, 8 Fair Empl. Prac. Manual (BNA) No. 694, at 405:352 (Dec. 23, 1988).

19. Note, however, that an individual is not substantially limited in a major life activity unless (s)he is unable to perform the activity or is significantly restricted in performing the activity as compared to the average person in the general population. See 29 C.F.R. § 1630.2(j); see also § 902.4, *infra*.

20. This section frequently refers to the term "substantially limits" in the present tense. These references are not meant to imply that the determination of whether an impairment is substantially limiting is relevant only to whether an individual meets the first part of the definition of "disability," i.e., actually has a physical or mental impairment that substantially limits a major life activity. This determination also is relevant to whether an individual has a record of such an impairment or is regarded as having such an impairment. The determination of whether an impairment is substantially limiting should be made without regard to mitigating measures. See § 902.5, *infra*.

21.If the charging party does not have an impairment that substantially limits his or her ability to work (or to perform any other major life activity), then the investigator should determine whether the charging party has a record of such an impairment (see § 902.7, *infra*) or is regarded as having such an impairment (see § 902.8, *infra*). An individual who in fact does not have an impairment that substantially limits the major life activity of working nonetheless may be regarded as having such an impairment (see § 902.8(f), *infra*).

22.Medications required by law to be prescribed by licensed health care professionals are not necessarily "controlled substances." "Controlled substances" are those which are addictive or have potential for abuse and which are listed on Schedules I-V of the Controlled Substances Act. Many prescription medications, therefore, are not "controlled substances."

23.The plaintiff had been hospitalized for tuberculosis from May 1957 until August 1958. *Arline v. School Board of Nassau County*, 692 F. Supp. 1286, 1289, 48 EPD Par. 38,397 at 54,248, 1 AD Cas. (BNA) 1345, 1348 (M.D. Fla. 1988). The plaintiff's tuberculosis, which required lengthy hospitalization, was a substantially limiting impairment. See § 902.4(d), *supra*.
