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NOTES

Evaluating Purely Reproductive Disorders Under the Americans with Disabilities Act

Todd Lebowitz

Approximately 2.8 million American couples suffer from infertility,¹ a condition generally defined by the medical community as the failure to conceive after one year of unprotected intercourse.² During the past thirty years, diagnostic and therapeutic techniques for treating infertility have improved drastically, enabling many previously infertile couples to bear children.³ These techniques, however, involve considerable expense and inconvenience, frequently requiring patients to take time off from work.⁴ Disputes with employers may follow, sometimes resulting in the infertile employee's termination.⁵ Some terminated employees, claiming that infertility constitutes a disability, then sue their former employers⁶ under the Americans with Disabilities Act of 1990 ("the ADA" or "the Act").⁷

In enacting the ADA, Congress specifically stated the Act's purpose: "[T]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."⁸ The ADA's prohibition on disability-based discrimina-

1. See Luther M. Talbert, *Overview of the Diagnostic Evaluation, in* INFERTILITY: A PRACTICAL GUIDE FOR THE PHYSICIAN 2 (Mary G. Hammond & Luther M. Talbert eds., 3d ed. 1992).

2. See *id.*; MELVIN L. TAYMOR, *INFERTILITY: A CLINICIAN'S GUIDE TO DIAGNOSIS AND TREATMENT* 11 (1990).

3. See TAYMOR, *supra* note 2, at 4-5.

4. See *id.* at 107.

5. See, e.g., *Erickson v. Board of Governors*, 911 F. Supp. 316, 317-18 (N.D. Ill. 1995) (hearing the case of a plaintiff who was terminated after missing work to obtain infertility treatment); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240 (E.D. La. 1995) (deciding the applicability of the ADA to a dispute involving the nonrenewal of a news anchor's contract after she asked for reduced work hours to accommodate her infertility treatment program), *aff'd*, 79 F.3d 1143 (5th Cir. 1996); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1396 (N.D. Ill. 1994) (hearing the case of a plaintiff who was terminated after missing work to obtain infertility treatment).

6. See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 676-77 (8th Cir. 1996); *Erickson*, 911 F. Supp. at 316; *Zatarain*, 881 F. Supp. at 240; *Pacourek*, 858 F. Supp. at 1393.

7. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990), codified as amended at 42 U.S.C. §§ 12101-12213 (1994).

8. 42 U.S.C. § 12101(b) In addition, the Act recognizes as a national goal the assurance of "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities. 42 U.S.C. § 12101(a)(8).

tion in employment specifically provides: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."⁹ The ADA also specifies, in a seven-part description, the types of behavior that constitute discrimination against an individual with a disability.¹⁰

Congress failed, however, to state with the same specificity what constitutes a disability in the first place; instead, the Act broadly defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."¹¹ Infertile individuals seeking ADA protection have argued that their impairments constitute ADA-protected disabilities because they "substantially limit" the "major life activity" of reproduction.¹²

The question of whether infertility fits within this broad definition of disability is complicated by the fact that infertility is not al-

9. 42 U.S.C. § 12112(a).

10. See 42 U.S.C. § 12112(b). Some examples of discriminatory behavior include: segregating job applicants in a way that adversely affects individuals with disabilities; denying equal employment or benefits to an individual because of a disability; failing to accommodate reasonably an individual's disability; and using selection criteria that tend to screen out otherwise qualified individuals with disabilities. See 42 U.S.C. § 12112(b).

11. 42 U.S.C. § 12102(2)(A). Congress adopted for the ADA the same definition of disability that it used in the Rehabilitation Act of 1973 and the Fair Housing Act. See Rehabilitation Act of 1973, Pub. L. No. 103-73, 107 Stat. 718, codified as amended at 29 U.S.C. § 706(8)(B) (1993) (defining "individual with handicaps" with language identical to the ADA definition of disability), amended by Pub. L. No. 102-569, 106 Stat. 4348 (1992) (changing the phrase "individuals with handicaps" to "individual with a disability"); Fair Housing Act, Pub. L. No. 100-430, 102 Stat. 1619, codified as amended at 42 U.S.C. § 3602(h) (1994) (defining "handicap"); see also H.R. REP. NO. 101-485, pt. 2, at 50 (1990) (indicating an intent that the ADA definition of disability be interpreted consistently with the definition of "individual with handicaps" in the Rehabilitation Act and "handicap" in the Fair Housing Act); H.R. REP. NO. 101-485, pt. 3, at 26-27 (1990) (same); S. REP. NO. 101-116, at 21 (1989) (same). As a result, courts and commentators alike consistently rely on Rehabilitation Act and Fair Housing Act cases for guidance in determining what constitutes a disability under the ADA. See, e.g., *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 725 n.4, 726 (5th Cir. 1995) (stating that the ADA "definition of 'disability' is substantially equivalent to that in the Rehabilitation Act" and that the Equal Employment Opportunity Commission's ADA "regulations adopt the same definition of major life activities as used in the Rehabilitation Act"); *Ennis v. National Assn. of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 60 (4th Cir. 1995) (using case law developed under the Rehabilitation and Fair Housing Acts to interpret the term "disability" as used in the ADA); William G. Buss, *Human Immunodeficiency Virus, the Legal Meaning of "Handicap," and Implications for Public Education Under Federal Law at the Dawn of the Age of the ADA*, 77 IOWA L. REV. 1389, 1405-06 (1992); Jack P. DeSario & James D. Slack, *The Americans with Disabilities Act and Refusals to Provide Medical Care to Persons with HIV/AIDS*, 27 J. MARSHALL L. REV. 347, 353 (1994).

12. See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 676-77 (8th Cir. 1996); *Erickson v. Board of Governors*, 911 F. Supp. 316, 321 (N.D. Ill. 1995); *Zatarain v. WDSU-TV, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1397 (N.D. Ill. 1994).

ways a medically distinct impairment. Rather, a variety of disorders may cause infertility, and many of these disorders affect activities other than reproduction.¹³ An ovarian tumor or a sexually transmitted disease, for example, can cause infertility, but these conditions can also limit participation in other activities. An ovarian tumor may limit a woman's ability to walk, and gonorrhea can cause blindness.¹⁴ For purposes of this Note, disorders affecting previously recognized "major life activities"¹⁵ and reproduction must be distinguished from disorders that affect *only* reproduction. This Note terms disorders that affect reproduction, but no other previously recognized major life activities, as *purely reproductive disorders*. This Note focuses only on the applicability of the ADA to purely reproductive disorders.¹⁶

Courts are divided as to whether purely reproductive disorders may constitute disabilities. Litigants generally agree that purely reproductive disorders are "impairments" that "substantially limit" the activity of reproduction.¹⁷ The crux of the legal dispute, therefore, is whether reproduction itself constitutes a "major life activity" under the ADA. The Seventh Circuit has held that sterile individuals may be handicapped under the Rehabilitation Act of 1973,¹⁸ a statute upon which the ADA based its definition of disability.¹⁹ Following this holding, district courts within that circuit have held that infertile individuals and those with reproductive disorders that jeopardize a pregnancy are disabled under the ADA. These courts have based their holdings on a finding that reproduction is a major life activity.²⁰ Other courts, in an effort to justify

13. See generally TAYMOR, *supra* note 2, at 21-41 (discussing various factors that contribute to infertility in men and women).

14. See TOMASZ F. MROCKOWSKI, SEXUALLY TRANSMITTED DISEASES 41 (1990); Cheryl L. Ivey, *When Your Patient Has Ovarian Cancer*, RN, Nov. 1994, at 26, 27.

15. The major life activities explicitly recognized by Congress or the Equal Opportunity Employment Commission, or both, are as follows: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, reaching, thinking, concentrating, and interacting with others. For a discussion and brief legal history of the recognition of these activities as major life activities under the Act, see *infra* text accompanying notes 88-92.

16. This Note declines to consider reproductive disorders that affect other major life activities because these reproductive disorders are clearly covered by the ADA and are therefore uncontroversial.

17. See *infra* note 27.

18. See *McWright v. Alexander*, 982 F.2d 222, 228-29 (7th Cir. 1992) (holding that plaintiff stated a cognizable claim under the Rehabilitation Act of 1973, 29 U.S.C. § 701-797).

19. See *supra* note 11.

20. See *Soodman v. Wildman, Harrold, Allen & Dixon*, No. 95-C3834, 1997 U.S. Dist. LEXIS 1495, at *12 (N.D. Ill. Feb. 7, 1997); *Erickson v. Board of Governors*, 911 F. Supp. 316, 323 (N.D. Ill. 1995); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994).

ADA coverage of asymptomatic HIV-positive²¹ individuals, have also classified reproduction as a major life activity.²² Outside of the Seventh Circuit, however, no court evaluating ADA coverage of *purely* reproductive disorders has classified reproduction as a major life activity. The Fifth and Eighth Circuits have both held that infertile individuals are not protected by the ADA because reproduction is not a major life activity.²³

This Note argues that purely reproductive disorders do not constitute disabilities under the ADA. Part I examines the statutory language and interpretive guidelines²⁴ that determine whether an impairment qualifies as a disability and concludes that it would be improper to interpret such language as covering purely reproductive disorders. Part II analyzes the legislative history of the Act and maintains that Congress did not intend to include purely reproductive disorders within the definition of disability. Part III identifies three characteristics common to all of the major life activities already recognized under the ADA and argues that because reproduction lacks these characteristics, it should not be recognized as a major life activity.²⁵ Part IV contends that victims of discrimination may obtain relief through other, more appropriate legal avenues, making their reliance on the ADA unnecessary.

21. "HIV" is the abbreviation for the Human Immunodeficiency Virus, which causes Acquired Immune Deficiency Syndrome (AIDS).

22. See, e.g., *Abbott v. Bragdon*, 107 F.3d 934, 939-42 (1st Cir. 1997); *Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320-21 (E.D. Pa. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992).

23. See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996); *Zatarain v. WDSU-Television Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *affd.*, 79 F.3d 1143 (5th Cir. 1996).

24. The Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), pursuant to their Congressionally delegated authority, have issued guidelines for interpreting key terms and provisions of the ADA. See 29 C.F.R. pt. 1630 (1991) (EEOC); 28 C.F.R. pt. 36 (1991) (DOJ).

25. Although individuals with purely reproductive disorders do not suffer from an "impairment that substantially limits one or more . . . major life activities," they may nonetheless be eligible for ADA protection under the Act's "second definition" or "third definition." The ADA provides "second definition" and "third definition" ADA protection, respectively, to individuals who have a "record of" or are "regarded as" having a disability. Such coverage is available, however, only if the perceived disability includes, or is *perceived* to include, the components of a physical or mental impairment, substantial limitation, and major life activity. See 42 U.S.C. § 12102(2)(B), (C) (1994). As a result, an employee can be "disabled" under the ADA's third definition if her employer regards her to be substantially limited in a major life activity, even if, in reality, she is not limited at all. For a more complete discussion of third definition coverage, see *infra* note 141. This Note will limit its analysis to whether an individual with a purely reproductive disorder actually *has* a disability, that is, whether such an individual would qualify under the first definition. Nonetheless, because the concepts of "impairment," "substantially limits," and "major life activity" are relevant to all three definitions, the conclusions that follow may have the effect of limiting disability coverage under the second and third definitions as well.

I. PURELY REPRODUCTIVE DISORDERS FAIL TO MEET THE ADA'S THREE-PART DEFINITION OF DISABILITY

To qualify for coverage under the ADA, a disorder must satisfy the three necessary elements set out in the Act's definition of "disability": (a) a "physical or mental impairment" that (b) "substantially limits" (c) a "major life activit[y]."²⁶ Defendants in cases involving infertility often concede the presence of the first two components, admitting that the plaintiffs' reproductive disorder is an impairment that substantially limits the ability to reproduce.²⁷ Instead, they contest the applicability of the third component, arguing that reproduction is not a "major life activity" under the Act.²⁸ Some courts, however, have confused the debate by treating the first factor, impairment, as the sole determinant of disability status. This Part argues that courts following this approach misread the Act.

Despite the statute's three essential components, some courts wrongly have used the definition of "impairment" as their definition of "disability," thus ignoring the statutory requirement that the impairment "substantially limit" a "major life activity" in order to

26. See 42 U.S.C. § 12102(2)(A) (defining a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"); see also H.R. REP. NO. 101-485, pt. 2, at 51-52 (1990) (construing the statutory definition as containing these three components); H.R. REP. NO. 101-485, pt. 3, at 28 (1990) (same); S. REP. NO. 101-116, at 22 (1989) (same). The EEOC, to which Congress delegated authority to enforce Title I of the ADA, see 42 U.S.C. §§ 12116-12117 (1994); 28 C.F.R. § 1630.1, has also identified these three components as essential elements of a disability. See EEOC Compl. Man. (CCH) § 902.1 (1993); 29 C.F.R. app. § 1630.2(g). Title I of the ADA is the portion of the Act that specifically addresses discrimination in the employment context.

27. See, e.g., *Krauel*, 95 F.3d at 677; *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994).

Although the ADA does not define "impairment," Congress delegated the authority to define this component to the administrative agencies in charge of enforcing the Act. See 42 U.S.C. §§ 12116-12117 (granting the EEOC authority to enforce Title I: Employment); 42 U.S.C. §§ 12134, 12186(b) (1994) (granting the Department of Justice authority to enforce Title II: Public Services, part A, and Title III: Public Accommodations and Services Operated by Private Entities). These agencies have defined broadly the phrase "physical or mental impairment" in a manner that clearly includes physiological disorders or conditions affecting the reproductive system:

Physical or mental impairment means:

(1) Any 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) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. § 35.104 (1991) (DOJ); 28 C.F.R. § 36.104 (DOJ); 29 C.F.R. § 1630.2(h) (EEOC).

28. See, e.g., *Krauel*, 95 F.3d at 677; *Pacourek*, 858 F. Supp. at 1404.

qualify as a disability.²⁹ In *Pacourek v. Inland Steel Co.*,³⁰ one district court concluded that because reproductive disorders are included among impairments, it “logically follows” that reproduction qualifies as a major life activity. “Otherwise, it would have made no sense to include the reproductive system among the systems that can have an ADA impairment.”³¹

This analysis, however, is fatally flawed because it ignores critical statutory language, thereby subverting Congress’s intent to define the scope of ADA coverage based on the severity of an impairment rather than its type. The ADA’s mechanism for limiting the scope of its coverage lies in the “substantially limiting” and “major life activities” components — not in the list of examples of conditions that satisfy the “impairment” component. Congress and the Equal Employment Opportunity Commission (EEOC) have clearly stated that the presence of an impairment alone is not sufficient to merit protection under the Act.³² In recommending passage of the ADA, the Senate Labor and Human Resources Committee, the House Judiciary Committee, and the House Education and Labor Committee agreed that an impairment does not constitute a disability unless its severity is such that it substantially limits one or more “major life activities.”³³ For example, a person with a “minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity.”³⁴ Similarly, the EEOC devotes a full section of its ADA compliance manual to interpretation of the term “substantially limiting,” differentiating between impairments that substantially limit major life activities — and therefore constitute “disabilities” — and those that do not.³⁵

By recognizing a range of impairments broader than the range of major life activities that may be impaired, the ADA defines its scope of protection based on the severity of an impairment, not merely on its type.³⁶ Correspondingly, Congress and the EEOC in-

29. See, e.g., *McWright v. Alexander*, 982 F.2d 222, 226-27 (7th Cir. 1992) (“The regulations define the protected class of handicapped individuals [under the Rehabilitation Act] to include any person with a physiological disorder affecting the reproductive system.”); *Pacourek*, 858 F. Supp. at 1404-05 (applying *McWright* to the ADA).

30. 858 F. Supp. 1393 (N.D. Ill. 1994).

31. 858 F. Supp. at 1404.

32. See H.R. REP. NO. 101-485, pt. 2, at 52 (1990); H.R. REP. NO. 101-485, pt. 3, at 28 (1990); S. REP. NO. 101-116, at 22 (1989); EEOC Compl. Man. (CCH) § 902.4.

33. See H.R. REP. NO. 101-485, pt. 2, at 52; H.R. REP. NO. 101-485, pt. 3, at 28; S. REP. NO. 101-116, at 22.

34. H.R. REP. NO. 101-485, pt. 2, at 52; see also S. REP. NO. 101-116, at 23.

35. See EEOC Compl. Man. (CCH) § 902.4.

36. Compare *Heilweil v. Mount Sinai*, 32 F.3d 718 (2d Cir. 1994) (holding that an asthmatic hospital employee was not disabled when her condition only prevented her from working in one room) with *Carter v. Tisch*, 822 F.2d 465, 466-67 (4th Cir. 1987) (finding that an employee with asthma was handicapped under the Rehabilitation Act, but was not “otherwise qualified”) and *Huber v. Howard County*, 849 F. Supp. 407, 411 (D. Md. 1984) (finding

struct that the disability determination be made on an individualized basis.³⁷ Federal appellate courts agree that Congress intended for courts to follow this approach.³⁸ As a result, courts generally conduct the disability inquiry on an individualized basis, determining the extent to which a particular plaintiff is limited in her major life activities.³⁹

The *Pacourek* court's approach, however, merges the first component, "impairment," with the third component, "major life activity." This approach ignores both Congress's intent and the statutory language itself, because it "would allow [plaintiffs] to bootstrap a finding of substantial limitation of a major life activity on to a finding of impairment."⁴⁰ By defining major life activities in terms of the plaintiff's impairment, the *Pacourek* court's approach entirely collapses the definition of disability into a single impairment component. In doing so, the *Pacourek* court's analysis disregards the purpose of the ADA's three-component definition — to limit the Act's protections to those whose lives are deeply affected by their impairments, rather than including in its scope every person with an impairment, regardless of that impairment's severity.⁴¹

that a firefighter with asthma qualified as disabled because of his limited ability to breathe, but was not "otherwise qualified"); *Pridemore v. Rural Legal Aid Socy.*, 625 F. Supp. 1180, 1183-84 (S.D. Ohio 1985) (holding that "borderline" cerebral palsy was not a disability in circumstances in which it interfered only slightly with the plaintiff's ability to read and speak) with *Coleman v. Zatechka*, 824 F. Supp. 1360, 1366-67 (D. Neb. 1993) (holding that a university student with cerebral palsy who needed a wheelchair and a personal assistant was disabled under the ADA).

37. See H.R. REP. NO. 101-485, pt. 2, at 52; H.R. REP. NO. 101-485, pt. 3, at 28; S. REP. NO. 101-116, at 22. Specifically, the EEOC instructs,

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. app. § 1630.2(j) (1991). The EEOC also notes, however, that "[o]ther impairments, such as HIV infection, are inherently substantially limiting." 29 C.F.R. app. § 1630.2(j).

38. See, e.g., *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) ("A physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA."); *Forrisi v. Bowen*, 794 F.2d 931, 933-34 (4th Cir. 1986) (stating that Congress deliberately chose not to offer Rehabilitation Act coverage to everyone with an impairment).

39. See *Rauenhorst v. United States Dept. of Transp.*, 95 F.3d 715, 716 (8th Cir. 1996); *Homeyer v. Stanley Turchin Assn.*, 91 F.3d 959 (7th Cir. 1996); *Ennis v. National Assn. of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir. 1995); see also *School Bd. v. Arline*, 480 U.S. 273, 287 (1987) (Rehabilitation Act). But see EEOC Compl. Man. (CCH) § 902.4 (explaining that some impairments are inherently substantially limiting); see also *infra* note 45 (discussing per se disabilities).

40. *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *affd.*, 79 F.3d 1143 (5th Cir. 1996); see also *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 107 (S.D. Iowa 1995), *affd.*, 95 F.3d 674 (8th Cir. 1996).

41. See 29 C.F.R. app. § 1630.2(j) ("Many impairments do not impact an individual's life to the degree that they constitute disabling impairments.").

The ADA establishes no automatic categorical relationship between recognized impairments and recognized major life activities. The *Pacourek* court reasons that because the EEOC lists reproductive disorders as a type of impairment, it must have intended reproduction to be considered a major life activity.⁴² Most of the categories of impairment on the Congressional and EEOC lists,⁴³ however, lack corresponding major life activities. Sick cell anemia, for example, is a hemic disorder constituting an impairment, but the ability to produce normal-shaped blood cells is not a major life activity. Rather, the determination as to whether an individual with sick cell anemia is disabled depends on the effect of that impairment on some other life activity, such as the ability to walk.⁴⁴

The inclusion of reproductive disorders in the list of example impairments signifies only a recognition that reproductive disorders may be serious enough to warrant ADA protection, not an acknowledgment that all reproductive disorders automatically substantially limit a major life activity.⁴⁵ Disorders of the reproductive system are similar to every other impairment on the EEOC list in terms of their relationship to major life activities. Like the other impairments, reproductive disorders may limit a whole host of major life activities.⁴⁶ The simultaneous recognition of reproductive disorders as impairments and exclusion of reproduction from every list of recognized major life activities⁴⁷ is therefore consistent with Congressional and EEOC treatment of other impairments on their lists and in no way suggests that Congress intended reproductive impairments to constitute disabilities per se.

42. See *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994).

43. See H.R. REP. NO. 101-485, pt. 2, at 51 (1990); H.R. REP. NO. 101-485, pt. 3, at 28 (1990); S. REP. NO. 101-116, at 22 (1989); see also *supra* note 27.

44. See EEOC Compl. Man. (CCH) § 902.4(c) ex. 2.

45. The EEOC has recognized some impairments to be disabilities per se, but it rarely does so, reserving this classification for impairments that are so severe that they are assumed to substantially limit major life activities without additional proof. Examples include legal blindness, deafness, and HIV infection. See EEOC Compl. Man. (CCH) § 902.4. Absent these very rare circumstances, however, an individual's impairment must be evaluated on a case-by-case basis to determine the extent to which it limits major life activities. See EEOC Compl. Man. (CCH) § 902.4 (describing as "very rare instances" the impairments that are so severe that they may constitute per se disabilities).

46. For example, an ovarian tumor may limit a woman's ability to walk, see *Ivey*, *supra* note 14, at 28, menstrual disorders causing abnormal vaginal bleeding can interfere with work, see Robert E. Nesse, *Abnormal Vaginal Bleeding in Perimenopausal Women*, AM. FAM. PHYSICIAN, July 1989, at 185, 185, and advanced syphilis can cause brain deterioration, making it difficult for patients to concentrate, sleep, speak, or see, see *MROCKOWSKI*, *supra* note 14, at 197-200.

47. See *supra* note 15 (listing the major life activities previously recognized by Congress or the EEOC).

II. THE LEGISLATIVE HISTORY OF THE ADA FAILS TO SUPPORT COVERAGE FOR PURELY REPRODUCTIVE DISORDERS

The legislative history of the ADA does not indicate that Congress intended the ADA to include protection for individuals with purely reproductive disorders. Legislators did recognize that reproductive disorders generally — that is, not only purely reproductive disorders — were “impairments” that *could* substantially limit major life activities.⁴⁸ Yet in the entirety of hearings, floor debates, and committee reports, no legislator ever referred to any *purely* reproductive disorder as the type of condition that would substantially limit any major life activity and that therefore should qualify under the ADA as a disability.⁴⁹

Although nothing in the legislative history advocates recognizing purely reproductive disorders as disabilities, the legislative history does include explicit and universal recognition that all individuals infected with HIV qualify as disabled.⁵⁰ One legislative committee expressed a belief that substantial limitations on the ability of HIV-infected individuals to reproduce provide the basis for universal coverage of HIV, thereby implying that reproduction is a major life activity.⁵¹ The courts that have recognized infertility as a disability have relied heavily on these comments about HIV as support for their conclusion that reproduction constitutes a major life activity.⁵²

Section II.A asserts that it is improper to extrapolate from ADA coverage of HIV-positive individuals that the ADA also covers individuals with purely reproductive disorders. In fact, as section II.B points out, legislators consciously excluded reproduction from their

48. See H.R. REP. NO. 101-485, pt. 2, at 51; H.R. REP. NO. 101-485, pt. 3, at 28; S. REP. NO. 101-116, at 22.

49. On the contrary, the only legislator who even mentioned a purely reproductive disorder said that the ADA should not be construed to grant automatic disability status to people infected with sexually transmitted diseases. See 136 CONG. REC. E1774 (May 24, 1990) (statement of Rep. Craig) (noting with disapproval that anyone with a sexually transmitted disease would be disabled under the ADA if procreation and intimate sexual relations were major life activities).

50. See H.R. REP. NO. 101-485, pt. 2, at 52; H.R. REP. NO. 101-485, pt. 3, at 28 n.18; S. REP. NO. 101-116, at 22; see also *infra* notes 72-74 and accompanying text.

51. See H.R. REP. NO. 101-485, pt. 2, at 52 (“As noted by [a 1988 Department of Justice memorandum] . . . a person infected with the Human Immunodeficiency Virus is covered under the first . . . definition of the term ‘disability’ because of a substantial limitation to procreation and intimate sexual relationships.”); cf. H.R. REP. NO. 101-485, pt. 3, at 28 n.18 (citing the same memorandum for its conclusion that HIV-infected individuals are protected, but omitting the language about procreation and intimate sexual activity); S. REP. NO. 101-116, at 22 (“[A] person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term ‘disability.’”).

52. See *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 802-03 (N.D. Ill. 1996); *Erickson v. Board of Governors*, 911 F. Supp. 316, 323 (N.D. Ill. 1995).

lists of sample major life activities, an omission that provides strong support for the inference that Congress did not intend reproduction to be considered a major life activity.

A. *The Basis for ADA Protection of HIV-Positive Individuals Does Not Support ADA Coverage of Purely Reproductive Disorders*

Congress and the administrative agencies charged with enforcing the ADA have unanimously accepted that the ADA protects all HIV-positive individuals. Unambiguous statements in Senate and House Committee Reports,⁵³ as well as numerous statements made during debate on the floor,⁵⁴ demonstrate a widespread understanding throughout Congress that all HIV-positive individuals would be individuals with disabilities under the ADA. Based on this understanding, the administrative agencies charged with enforcing the ADA all consider HIV-infected individuals to be individuals with disabilities.⁵⁵

Despite the widespread agreement that the Act considers all HIV-infected individuals as individuals with disabilities, there is some dispute as to the proper basis for that conclusion. This section describes and evaluates two independent bases that have been offered to explain ADA coverage of all HIV-positive individuals. Section II.A.1 considers and rejects the view that the ADA covers HIV-positive individuals because HIV limits reproduction, which is

53. See H.R. REP. NO. 101-485, pt. 2, at 52 (concluding that HIV-positive individuals are disabled under first definition (citing Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, to Arthur B. Culverhouse, Jr., Counsel to the President (Sept. 27, 1988), 8 Fair Empl. Prac. Man. (BNA), No. 641, 405:1 [hereinafter Kmiec Memorandum])); H.R. REP. NO. 101-485, pt. 3, at 28 n.18 (same); S. REP. NO. 101-116, at 22 (same).

54. See, e.g., 136 CONG. REC. S9696 (July 13, 1990) (statement of Sen. Kennedy); 136 CONG. REC. H4621 (July 12, 1990) (statement of Rep. Dannemeyer) ("[W]ith the adoption of this act we are instantaneously going to bring within the definition of disabled person . . . every HIV carrier in America, every person with AIDS."); 136 CONG. REC. H2626 (May 22, 1990) (statement of Rep. McDermott); 136 CONG. REC. 10872 (statement of Rep. Weiss) (May 17, 1990) ("Once the ADA becomes law, all persons with HIV disease will finally be protected in private employment."); 135 CONG. REC. 19812-13 (Sept. 7, 1989) (statement of Sen. Cranston) ("[T]his bill covers individuals with AIDS and individuals who are infected with the HIV virus. . . . [P]eople with AIDS and those who are infected with the virus are covered under the first prong of the definition of disability as people with impairments that substantially limit major life activities.").

55. The EEOC instructs that disability status generally should be determined on a case-by-case basis. See EEOC Compl. Man. (CCH) § 902.4(c)(1) (1993). Some impairments, however, are so inherently disabling that they constitute *per se* disabilities. HIV infection, the EEOC concludes, is "inherently substantially limiting." EEOC Compl. Man. (CCH) § 902.4(c)(1); see also Federal Contract Compliance Manual App. 6D, 8 Fair Empl. Prac. Man. (BNA) No. 770, at 405:351, as amended Nov. 21, 1994 (Office of Federal Contract Compliance Programs); Letter from Louis W. Sullivan, Secretary of Health and Human Services, to Hon. Thomas S. Foley, Speaker of the House of Representatives (May 1, 1990), in 136 CONG. REC. S9539 (July 11, 1990) (Health and Human Services); 28 C.F.R. § 36.104 (1996) (DOJ).

a major life activity. Section II.A.2 argues that Congress instead adopted what can be called the one-disease view, which justifies ADA coverage on the basis that the full course of HIV, from infection to the onset and development of AIDS, is one disease that inevitably and invariably affects nonreproductive major life activities. This section concludes that ADA coverage of HIV fails to support the claim that reproduction is a major life activity.

1. *Limitations on Reproduction Fail to Explain ADA Coverage of All HIV-Positive Individuals*

HIV does not affect the reproductive capabilities of every infected individual. Therefore, the belief that the ADA covers HIV-positive individuals because HIV limits their reproductive capabilities is improper. This "substantially limits reproduction" view is based on a statement in a 1988 Department of Justice memorandum which offered the first authoritative legal opinion that HIV infection constituted a disability at all.⁵⁶ Written shortly after the Supreme Court's decision in *School Board v. Arline*,⁵⁷ the memorandum sought to answer a question left expressly unanswered by the Supreme Court: whether HIV-infected individuals meet the Rehabilitation Act's definition of an "individual with handicaps."⁵⁸ Acting Assistant Attorney General Douglas Kmiec concluded that all HIV-positive individuals, symptomatic and asymptomatic, qualify as "handicapped individuals."⁵⁹ In reaching his conclusion, Kmiec noted that HIV-positive individuals face substantial limitations on their ability to reproduce and to engage in intimate sexual relations.⁶⁰

Although Congress adopted the Kmiec Memorandum's conclusion that HIV-positive individuals are individuals with disabilities under the Rehabilitation Act,⁶¹ the legislative history of the ADA indicates that Congress did not support the memorandum's analysis as a proper explanation for extending ADA coverage to all HIV-positive individuals. First, only one Congressional committee report, that of the House Committee on Education and Labor, relied

56. See Kmiec Memorandum, *supra* note 53, at 405:1-2.

57. 480 U.S. 273 (1987).

58. See 480 U.S. at 282 n.7 ("[We] do not reach the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the [Rehabilitation] Act.").

59. See Kmiec Memorandum, *supra* note 53, at 405:11. The Americans with Disabilities Act uses as its definition of "disability" the Rehabilitation Act's definition of "handicapped." See *supra* note 11.

60. See Kmiec Memorandum, *supra* note 53, at 405:6-7. Kmiec also asserted that "[t]here is little doubt that procreation is a major life activity." *Id.* at 405:7. This additional assertion has not been universally accepted, however. See *infra* text accompanying notes 62-67, 72-75.

61. See *supra* notes 53-54.

on Kmiec's underlying analysis as support for universal coverage of HIV.⁶² Viewed in the context of the committee report as a whole, however, the manner in which the committee cited the Memorandum suggests support only for the concept of universal HIV coverage, and not for the idea that reproduction is a major life activity. Furthermore, a mere two sentences prior to the Kmiec reference, the committee provided a list of activities that qualify as major life activities.⁶³ Reproduction is absent from that list.⁶⁴ Had the committee truly intended to adopt Kmiec's analysis, it would have included reproduction as a major life activity. It simply does not make sense to conclude that the committee sincerely intended reproduction to be considered a major life activity when it failed to include reproduction in its list of illustrative major life activities just two sentences earlier.

Second, although the House Committee on the Judiciary and the Senate Committee on Labor and Human Resources both cite the Kmiec Memorandum, they do so only for its conclusion, making no reference to reproduction as a major life activity.⁶⁵ These committee reports also exclude reproduction from their lists of major life activities.

Third, if Congress intended universal HIV coverage to be based on limitations to reproduction, there likely would have been additional discussion on the floor or in committee reports on other reproductive disorders that the ADA would automatically classify as disabilities. In the entirety of legislative floor debates and committee reports, there was no discussion of the ADA's intended effect on any purely reproductive disorders. There is no evidence that Congress ever contemplated that the ADA would classify individuals with purely reproductive disorders as disabled.

The most compelling evidence, however, that Congress did not intend reproductive limitations to provide the justification for universal HIV coverage is that this justification cannot fully explain universal HIV coverage. HIV infection does not affect the activity of reproduction for every HIV-positive individual. Significant numbers of HIV-positive individuals are unable to reproduce regardless of their HIV status. For example, surgically sterilized individuals who later contract HIV incur no reproductive limitations as a result

62. See H.R. REP. NO. 101-485, pt. 2, at 52 (1990) ("As noted by [a 1988 DOJ memorandum] . . . a person infected with the Human Immunodeficiency Virus is covered under the first . . . definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships."); cf. H.R. REP. NO. 101-485, pt. 3, at 28 n.18 (citing the same memorandum for its conclusion that HIV-infected individuals are protected but omitting the language about procreation and intimate sexual activity); S. REP. NO. 101-116, at 22.

63. See H.R. REP. NO. 101-485, pt. 2, at 52.

64. See H.R. REP. NO. 101-485, pt. 2, at 52.

65. See H.R. REP. NO. 101-485, pt. 3, at 28 n.18 (1990); S. REP. NO. 101-116, at 22 (1989).

of the infection. Similarly, postmenopausal women who contract HIV face no additional reproductive limitations as a result of HIV infection.⁶⁶ Like those who have been surgically sterilized, they are unable to reproduce for reasons wholly unrelated to the disease. Nonetheless, Congress has expressed unambiguously its intent that all HIV-positive individuals be considered disabled under the Act.⁶⁷ Consequently, the dual assertions that HIV substantially limits reproduction and that reproduction is a major life activity cannot satisfactorily explain universal ADA coverage of HIV-infected individuals.

Another argument that should not be overlooked is that HIV is primarily a disorder of the immune system and does not necessarily limit the physical ability to reproduce at all. HIV-positive individuals often choose not to reproduce because of the risk that HIV will be transmitted to the child or that pregnancy may trigger or accelerate the onset of a more active stage of AIDS.⁶⁸ Nonetheless, many individuals with HIV can reproduce, and many who do reproduce will have children who are HIV-negative.⁶⁹ The fact that some HIV-positive individuals can and do reproduce indicates that HIV infection does not necessarily substantially limit its carriers' ability to reproduce. To the extent that HIV infection does not limit the reproductive capabilities, limitations on reproduction cannot be the reason why all HIV-positive individuals are considered disabled.

2. *Only the One-Disease Theory Adequately Explains Universal HIV Coverage*

Universal coverage of HIV-positive individuals, including those whose HIV status does not affect their reproductive capabilities, is better explained by what can be called the *one-disease theory*. According to the one-disease theory, HIV infection is the initial stage of a long-term disease that cannot be neatly compartmentalized into discrete periods but that clearly affects a broad spectrum of major life activities as it develops into full-blown AIDS. In a 1988 letter to the Department of Justice, Surgeon General C. Everett Koop called HIV infection "the starting point of a single disease

66. See, e.g., Robert W. Stock, *When Older Women Get HIV*, N.Y. TIMES, July 31, 1997, at C1 (observing that more than 2,500 cases of AIDS in women age sixty and older have been reported to the Centers for Disease Control).

67. See *supra* notes 53-55.

68. See Buss, *supra* note 11, at 1423-24, 1425 n.203.

69. See *id.* at 1423-24 (stating that only one in three babies born to HIV-positive women will be born with the virus). For further analysis of whether the psychological aversion to sexual activity resulting from fear of spreading the virus can be considered "substantially limiting," see *id.* at 1421-28.

which progresses through a variable range of stages.”⁷⁰ As it progresses toward full-blown AIDS, HIV invariably limits almost all of the explicitly recognized major life activities.⁷¹ The one-disease theory not only represents the prevailing view of the medical community,⁷² but also represents the approach of the Presidential Commission on HIV⁷³ as well as the predominant view among the legislators who passed the ADA.⁷⁴ Various courts have followed this lead and have adopted the one-disease explanation as well.⁷⁵

The one-disease theory is also more consistent with the ADA’s antidiscriminatory purpose. Because AIDS is a progressive disease, HIV infection will at some point substantially limit major life activities, even though it may not be known when that will occur — or, once it has occurred, when it began.⁷⁶ Because there is no clear demarcation indicating the onset of the inevitable substantially limiting stage of the disease, it is unrealistic to attempt to differentiate between the disabling and predisabling stages of the disease.⁷⁷ Indeed, any attempt to differentiate may actually permit discrimination against infected individuals before the onset of the substantially limiting stage. If the ADA did not protect all HIV-positive individuals at all stages of the disease, for example, an em-

70. Letter from C. Everett Koop, M.D., Surgeon General, to Douglas W. Kmiec, Acting Assistant Attorney General [hereinafter Koop Letter], in Kmiec Memorandum, *supra* note 53, at 405:19.

71. See Buss, *supra* note 11, at 1410, 1420-21, 1428.

72. See Buss, *supra* note 11, at 1398 (citing support from the Institute of Medicine and the Presidential Commission on HIV); Koop Letter, *supra* note 70, at 405:19.

73. See REPORT OF THE PRESIDENTIAL COMMISSION ON THE HIV EPIDEMIC at xvii (June 24, 1988) (calling for a “full course” focus not isolating any one stage of the disease); see also Buss, *supra* note 11, at 1401 n.68.

74. See 136 CONG. REC. S9696 (July 13, 1990) (statement of Sen. Kennedy) (“People with HIV disease are individuals who have any condition along the full spectrum of HIV infection — asymptomatic HIV infection, symptomatic HIV infection or full-blown AIDS. These individuals are covered under the first prong of the definition of disability in the ADA Although the major life activity that is affected at any point in the spectrum by the HIV infection may be different, there is a substantial limitation of some major life activity from the onset of HIV infection.”); 136 CONG. REC. H4626 (July 12, 1990) (statement of Rep. Waxman) (“As medical knowledge has increased, specialists in the field increasingly recognize that there exists a continuum of disease among those who are HIV infected. All such individuals are covered under the first prong of the definition of disability in the ADA.”); see also 136 CONG. REC. H4623 (July 12, 1990) (statement of Rep. Owens); 136 CONG. REC. 11,453-54 (May 22, 1990) (statement of Rep. McDermott).

75. See, e.g., *Harris v. Thigpen*, 941 F.2d 1495, 1502 (11th Cir. 1991) (stating that scientists consider AIDS to be a “continuum of disease”); cf. *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 107 n.3 (S.D. Iowa 1995) (noting that the reasons for granting disability status to HIV are distinguishable from the reasons for protecting purely reproductive disorders because HIV can limit many of the acknowledged major life activities), *affd.*, 95 F.3d 674 (8th Cir. 1996); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 132 (N.D.N.Y. 1992) (noting that prejudice against HIV-positive individuals curtails their ability to perform a variety of major life activities).

76. See Buss, *supra* note 11, at 1419-20.

77. See *id.*

ployer might be encouraged to discriminate against an HIV-positive employee in the early stages of the disease — before the HIV progressed to the point at which it would substantially limit major life activities.⁷⁸ By protecting all HIV-positive individuals at all stages of the disease, the ADA avoids creating such an incentive for employers to discriminate in the early stages of HIV, before it is “too late.” As a result, HIV-positive individuals at any stage of the disease should be treated as sharing the characteristics of those with more clinically advanced AIDS and, accordingly, as having an impairment that substantially limits major life activities.

The one-disease theory, therefore, provides the soundest and most well-supported explanation for Congress’s clear intent that the ADA cover as disabled all HIV-positive individuals. Only under the one-disease theory does every HIV-positive individual, symptomatic and asymptomatic, sterile and fertile, meet the Act’s definition of disability.⁷⁹

B. *Congress Excluded Reproduction from the List of Major Life Activities*

More conclusive evidence of legislative intent can be found in the lists of illustrative major life activities created by the House Committee on the Judiciary, the House Committee on Education and Labor, and the Senate Committee on Labor and Human Resources. Each of these three committees failed to include reproduction in its list of illustrative major life activities.⁸⁰ The interpretive guidelines of both the EEOC and the Department of Justice also omit reproduction from their lists of major life activities.⁸¹

Although none of these lists of major life activities purports to be exhaustive, the failure to include reproduction is not likely to have been mere oversight. First, legislative references to the Kniec memorandum at least raise the possibility that some members of Congress believed that the ADA’s coverage of HIV stemmed from limitations on reproduction.⁸² In light of these references in the

78. *See id.* at 1420.

79. Although asymptomatic sterilized or postmenopausal individuals with HIV might meet the ADA’s second or third definitions of disability, legislators agreed that all HIV-infected individuals are covered under the ADA’s first definition of disability. *See* H.R. REP. NO. 101-485, pt. 2, at 52 (1990); H.R. REP. NO. 101-485, pt. 3, at 28 n.18 (1990); S. REP. NO. 101-116, at 22 (1989); *supra* notes 53-55.

80. *See* H.R. REP. NO. 101-485, pt. 3, at 28; S. REP. NO. 101-116, at 22; *cf.* H.R. REP. NO. 101-485, pt. 2, at 52 (excluding reproduction from its list of major life activities but also citing the Kniec Memorandum’s statement that limitations on procreation qualify HIV as a disability).

81. *See* 28 C.F.R. § 36.104 (1996) (DOJ); 29 C.F.R. § 1630.2(i) (1996) (EEOC).

82. *See supra* note 51. At a minimum, legislative references to the Kniec Memorandum indicate that legislators were familiar with the Memorandum and its analysis, even if they chose to adopt only the Memorandum’s conclusion.

legislative history, the decisions of the various Congressional committees, the EEOC, and the Department of Justice to exclude reproduction from their lists of major life activities provide powerful evidence that any push to include reproduction as an acknowledged major life activity was a minority effort. Second, Congress, the EEOC, and the Department of Justice clearly contemplated the role of reproductive disorders in the Act's definitional scheme because reproductive disorders are included in every list of sample impairments.⁸³ Had Congress intended to include reproduction among major life activities, it certainly had the opportunity to do so. The inclusion of reproductive disorders among impairments and the simultaneous exclusion of reproduction as a named major life activity strongly suggest that Congress did not intend reproduction to constitute a major life activity. Finally, the only legislator even to address the role of purely reproductive disorders under the ADA concluded that such disorders should not constitute automatic disabilities.⁸⁴ The only conclusion that can be drawn from the part of the legislative history that suggests that some members of Congress believed reproduction to be a major life activity is that *some* members of Congress believed reproduction to be a major life activity.⁸⁵

III. REPRODUCTION LACKS THE DEFINING CHARACTERISTICS OF A MAJOR LIFE ACTIVITY

Neither the ADA itself nor the EEOC's interpretive guidelines define the phrase "major life activity." Instead, the EEOC merely offers examples of functions that constitute major life activities, further cautioning that this list is not exhaustive.⁸⁶ Additionally, the EEOC provides only vague guidelines for determining whether an unlisted activity should qualify.⁸⁷ This Part examines the statutory and administrative guidelines that define which types of activities constitute "major life activities" and concludes that reproduction falls outside these guidelines. Section III.A argues that three characteristics — microfrequency, macrofrequency, and universality — are common to all previously recognized major life activities and should be explicitly recognized as necessary elements of a major life activity. Section III.B concludes that in terms of microfrequency,

83. See H.R. REP. NO. 101-485, pt. 2, at 51; H.R. REP. NO. 101-485, pt. 3, at 28; S. REP. NO. 101-116, at 22; 28 C.F.R. § 36.104 (1996) (DOJ); 29 C.F.R. § 1630.2(h)(1) (EEOC).

84. See *supra* note 49.

85. See *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 107 (S.D. Iowa 1995), *affd.*, 95 F.3d 674 (8th Cir. 1996).

86. 29 C.F.R. app. § 1630.2(i).

87. See 29 C.F.R. app. § 1630.2(i) (describing "major life activities" in terms of "basic activities that the average person in the general population can perform with little or no difficulty").

macrofrequency, and universality, reproduction is qualitatively different from previously recognized major life activities. As a result, reproduction cannot be considered a major life activity under the ADA. Purely reproductive disorders, therefore, do not substantially limit a major life activity and are not disabilities under the ADA.

A. The Frequency-Universality Test Identifies Three Necessary Elements of a Major Life Activity

Although no clear statutory or administrative mandate defines the necessary components of a major life activity, the EEOC has provided some guidance by expressly recognizing sixteen activities as major life activities. Nine of these activities are codified in the federal regulations, four appear in the appendix to the codified regulations, and three appear in the EEOC Compliance Manual. According to federal regulations, major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁸⁸ This codified list matches the lists of major life activities promulgated in the House and Senate Committee Reports recommending passage of the bill.⁸⁹ In an appendix to this list, the EEOC also includes sitting, standing, lifting, and reaching among major life activities.⁹⁰ Although not codified with the other examples, the EEOC Compliance Manual lists "[m]ental and emotional processes such as thinking, concentrating, and interacting with others" as additional examples of major life activities.⁹¹ Courts have also recognized these additional activities as major life activities.⁹² The only other guidance offered by the EEOC is the general statement that major life activities are "those basic activities that the average per-

88. 29 C.F.R. § 1630.2(i).

89. See H.R. REP. NO. 101-485, pt. 2, at 52 (1990); H.R. REP. NO. 101-485, pt. 3, at 28 (1990); S. REP. NO. 101-116, at 22 (1989). The House Committee on Education and Labor also included "participation in community activities" in its list. H.R. REP. NO. 101-485, pt. 2, at 52 (1990). Although this specific language is not included in the EEOC Regulations codified in Title 29, the EEOC Compliance Manual does recognize "interacting with others" as a major life activity. EEOC Compl. Man. (CCH) § 902.3(b) (1993).

90. See 29 C.F.R. app. § 1630.2(i).

91. EEOC Compl. Man. (CCH) § 902.3(b).

92. See, e.g., *Pritchard v. Southern Co. Servs.*, No. CV-94-N-0475-S, 1995 U.S. Dist. LEXIS 6020, at *18 (N.D. Ala. Mar. 31, 1995) (declining to hold as a matter of law that concentrating is not a major life activity); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 132 (N.D.N.Y. 1992) (holding that interaction with others is a major life activity); *Baxter v. City of Belleville*, 720 F. Supp. 720, 730 (S.D. Ill. 1989) (same); *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 444 (N.D. Ill. 1988) (same).

son in the general population can perform with little or no difficulty.”⁹³

Although neither the EEOC nor Congress provides criteria necessary for identifying a major life activity, the major life activities they have already recognized share three common characteristics. Explicit recognition of these characteristics as necessary components of a major life activity would provide the courts with much-needed guidance, limiting conflicts among jurisdictions and providing increased predictability in ADA enforcement. As a result, this Note advocates the express recognition of the following three-element *Frequency-Universality Test*.⁹⁴ To merit consideration as a major life activity under this test, an activity must be performed:

(1) with *microfrequency*: repeatedly throughout the day, if the activity is brief in duration, or for a large portion of the day, if the activity is of longer duration;

(2) with *macrofrequency*: every day or nearly every day;⁹⁵ and

93. 29 C.F.R. app. § 1630.2(i). This Note will refer to this instruction as the *little difficulty* standard.

94. The elements of this test are adapted from the decisions in *Krauel v. Iowa Methodist Medical Center*, 915 F. Supp. 102, 106-07 (S.D. Iowa 1995), *affd.*, 95 F.3d 674 (8th Cir. 1996), and *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *affd.*, 79 F.3d 1143 (5th Cir. 1996). The test tightens the “throughout the day, day in and day out” language from these decisions and recasts them in terms of microfrequency and macrofrequency. The universality element is adapted from a footnote in *Krauel* that observes: “Some people choose not to have children, but all people care for themselves, perform manual tasks, walk, see, hear, breathe, learn, and work, unless a handicap or illness prevents them from doing so.” *Krauel*, 915 F. Supp. at 106 n.1.

95. “Nearly every day” means nearly every day, not three or four times a week. “Nearly” is used only to acknowledge that there may be unusual or rare circumstances in which someone without an impairment would not perform a major life activity for a day. For example, the fact that someone without an impairment might choose not to speak for one full day would not foreclose a showing of macrofrequency.

One commentator argued against the adoption of a frequency criterion, claiming, “Although it is certainly true that most people engage in the activities of walking and breathing more frequently than they engage in reproduction, the same cannot be said of other activities on the list, such as manual tasks or caring for others.” Katie Cook Morgan, Comment, *Should Infertility Be a Covered Disability Under the ADA? A Question for Congress, Not the Courts*, 65 *CIN. L. REV.* 963, 981 (1997). The argument that most people reproduce more frequently than they perform manual tasks or care for others may be true in some brothels but certainly nowhere else. “Manual tasks,” by definition, include any tasks performed with the hands. Without question, people not disabled use their hands many times throughout the day, every day. “Manual tasks,” by definition, include any tasks performed with the hands. Without question, people not disabled use their hands many times throughout the day, every day. “Caring for others” is not even an enumerated major life activity. The author apparently confuses this activity with the enumerated major life activities of “caring for oneself” and “interacting with others.” It would strain credibility to argue that people do not care for themselves or interact with others repeatedly throughout the day, every day or nearly every day.

(3) *universally*: by nearly all persons, except those who are prevented from performing the activity by an AD A-defined "impairment."⁹⁶

All of the sixteen previously recognized major life activities — with the exception of "working," which is discussed immediately below — satisfy these three threshold criteria. This Note does not address whether these three criteria are *sufficient* for qualification as a major life activity. This Note merely argues that the three elements of the Frequency-Universality Test are necessary prerequisites for qualification as a major life activity.

Working does not fit the Frequency-Universality Test, but Congress and the EEOC have clearly indicated their intent that working be treated differently from the other major life activities. Unlike their treatment of the other listed activities, Congress and the EEOC have established specific criteria for courts to consider in determining whether an impairment substantially limits the activity of working.⁹⁷ Congress and the EEOC specifically call for courts to evaluate separately limitations on working because these limitations are inherently more difficult to define.⁹⁸ Congress further

96. Again, "nearly" is used to acknowledge that there are rare and unusual circumstances in which some people would not participate in a major life activity on a certain day. For example, someone hiking alone in the mountains might not speak for a day, or a prisoner tied down might not stand for a day. However, these events are irrelevant in terms of the ADA's purpose of providing legal protection to disabled individuals who are denied equal participation in American society. See 42 U.S.C. § 12101(a)(2), (7), (8) (1994) (identifying as impediments to passage of the ADA Congress's findings that "society has tended to isolate and segregate individuals with disabilities," that discrimination against individuals with disabilities denies them the ability to "participate in, and contribute to, society," and that "the Nation's proper goals regarding individuals with disabilities" include the assurance of "full participation" in society); see also 136 CONG. REC. 10,872 (May 17, 1990) (remarks of Rep. Weiss) ("The ADA . . . is long overdue legislation remedying the separatism which now excludes 43 million disabled citizens from equal participation in American society."). This statutory purpose presupposes that the individuals the Act aims to protect engage in a certain minimal level of normal social interaction. The existence of a few extreme or unusual counterfactual examples of people isolated from society will not foreclose a showing of universality, precisely because neither the Act nor the universality element is meant to protect individuals isolated from the general population.

Interpretive guidance provided by the EEOC supports the use of a "nearly all people" standard instead of a standard purporting to account for "all people." The little difficulty standard advises, "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. app. § 1630.2(i) (1996) (emphasis added).

97. See 29 C.F.R. § 1630.2(j)(3); 29 C.F.R. app. § 1630.2(j); EEOC Compl. Man. (CCH) § 902.4(c) (1995); H.R. REP. NO. 101-485, pt. 3, at 29 (1990). The EEOC instructs that "the determination of whether a person's impairment is substantially limiting should first address major life activities other than working." EEOC Compl. Man. (CCH) § 902.4(c). For example, if an individual's arthritis substantially limits that person's ability to walk (as compared to the average person in the general population), then the person is substantially limited in the major life activity of walking. The court should consider whether the arthritis substantially limits the person's ability to work only if it is unclear whether the arthritis is severe enough to substantially limit walking or other major life activities. See EEOC Compl. Man. (CCH) § 902.4(c).

98. See EEOC Compl. Man. (CCH) § 902.4(c); H.R. REP. NO. 101-485, pt. 3, at 29.

evinced its intent to provide special protection to those who participate in the activity of working by enacting Title I of the ADA, which specifically targets discrimination in employment.⁹⁹ None of the other fifteen recognized major life activities is given such unique and explicit emphasis in the ADA, and each of these remaining fifteen recognized major life activities are performed microfrequently, macrofrequently, and universally.

Although no jurisdiction has explicitly adopted this Frequency-Universality Test, numerous courts have employed its elements in making determinations regarding ADA coverage.¹⁰⁰ These courts have refused to recognize as a major life activity any function that lacks any of the three components of the test. For example, courts have held that participation in recreational sports is not a major life activity.¹⁰¹ Participation in sports fails the test because not all people participate in sports. Although some people — professional athletes, for example — may participate in sports for a large portion of the day, every day, participation in sports must fail the universality test because unimpaired people commonly choose not to participate in sports.¹⁰² Similarly, air travel has been held not to constitute a major life activity because people do not engage in air travel with the same frequency or universality with which they engage in the expressly recognized major life activities.¹⁰³ Like participation in sports, air travel fails the test.

99. See H.R. REP. NO. 101-485, pt. 3, at 31 (stating that Title I provides a "critical protection" against job discrimination).

100. See *infra* notes 101-05.

101. See, e.g., *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996); *Scharff v. Frank*, 791 F. Supp. 182, 184-85 (S.D. Ohio 1991) (holding, without further analysis, that "[t]he plaintiff's inability to engage in competitive sporting events and other unusually demanding physical activities did not constitute a substantial impairment of the plaintiff's major life activities"). Some courts have held, however, that the inability to participate in interscholastic sports can limit substantially the major life activity of learning. See *Pahulu v. University of Kan.*, 897 F. Supp. 1387, 1393 (D. Kan. 1995) (holding that interscholastic sports can involve learning how to be part of a team, but that the plaintiff's inability to play on the team did not substantially limit his ability to learn because a myriad of educational opportunities remained available at the plaintiff's college); *Sandison v. Michigan High Sch. Athletic Assn.*, 863 F. Supp. 483 (E.D. Mich. 1994). The fact that interscholastic sports are not performed by everybody every day means only that interscholastic sports cannot constitute a major life activity *per se*; the courts that have considered the inability to participate in interscholastic sports a disability have done so only when they have also concluded that the inability to participate substantially limited the plaintiff's ability to learn in general. See, e.g., *Sandison*, 863 F. Supp. at 489 (finding that because participation on the track team helped the plaintiff retain the discipline he needed in order to study more effectively in school, the plaintiff's inability to participate substantially limited his ability to learn).

102. See *Knapp*, 101 F.3d 473, 480 (pointing out that universality is absent, as "[n]ot everyone gets to go to college, let alone play intercollegiate sports").

103. See *Schultz v. Spraylat Corp.*, 866 F. Supp. 1535, 1538 (C.D. Cal. 1994) (interpreting "major life activity" under California's Fair Employment and Housing Act to exclude air travel because of its infrequency in comparison with the commonness of breathing, which is a major life activity). California's Fair Employment and Housing Act defines disability and major life activity in substantially the same terms as the ADA. See CAL. GOVT. CODE

On the other hand, courts uniformly have accepted sleep as a major life activity.¹⁰⁴ Sleep satisfies all three elements. It satisfies the microfrequency element because it is performed for several hours a day; the macrofrequency element because it is performed every day — or at least nearly every day, if we acknowledge the occasional all-nighter; and the universality element because it is performed by all people. Similarly, courts have found eating to be a major life activity.¹⁰⁵ Eating satisfies the microfrequency element because it is performed repeatedly throughout the day; the macrofrequency element because it is performed every day or nearly every day; and the universality element because it is performed by all people.

B. *Reproduction Lacks the Necessary Characteristics of a Major Life Activity*

This section considers three approaches courts have taken in evaluating reproduction as a purported major life activity and examines how these approaches relate to the Frequency-Universality Test. As section III.B.1 elaborates, some courts implicitly have adopted all three components of the test as minimally necessary criteria for a major life activity and have concluded that reproduction does not satisfy these criteria. Other courts, described in section III.B.2, implicitly have adopted the frequency components¹⁰⁶ of the test and have attempted to redefine reproduction in terms of more frequent events like ovulation and sperm production so that it meets the microfrequency and macrofrequency criteria. Finally, section III.B.3 explains how some courts have rejected the frequency components as too narrowly drawn, instead holding that reproduction should be a major life activity because of its momentousness as a lifetime event. This section concludes that only the first of these three approaches preserves the proper meaning of the statute.

§ 12926(k)(1) (West 1994) (defining disability); CAL. CODE REGS. tit. 2, § 7293.6 (1994) (defining major life activity).

104. See *Mendez v. Gearan*, No. C 95-4075, 1997 U.S. Dist. LEXIS 1594, at *7 (N.D. Cal. Feb. 13, 1997) (considering frequency and universality by describing sleep as "integral to the average person's daily existence"); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 814 (N.D. Tex. 1994) (stating, in denying summary judgment for defendant, that "[p]laintiff's disease . . . affect[s] such major life activities as . . . sleeping"); see also *Pritchard v. Southern Co. Servs.*, No. CV-94-N-0475-S, 1995 U.S. Dist. LEXIS 6020, at *18 (N.D. Ala. Mar. 31, 1995) (holding that the ADA list does not preclude inclusion of sleep as a major life activity).

105. See, e.g., *Coghlan*, 851 F. Supp. at 814 (stating without explanation that eating and sleeping are major life activities); *Weiler v. Household Fin. Corp.*, No. 93 C 6454, 1994 U.S. Dist. LEXIS 7825, at *5 (N.D. Ill. June 7, 1994) (same).

106. The "frequency components" are microfrequency and macrofrequency. These courts were silent as to the universality element.

1. *Judicial Approach 1: Adopt the Frequency and Universality Criteria and Reject Reproduction as a Major Life Activity*

Courts in at least two jurisdictions implicitly have applied the criteria of the Frequency-Universality Test to reject reproduction as a major life activity.¹⁰⁷ Only this approach effectively preserves the language of the statute without judicially enlarging the scope of a "major life activity" as set forth by Congress and the EEOC. Like air travel or participation in sports, reproduction is an activity qualitatively different from the other activities on the EEOC list. In sharp contrast to the frequency with which people care for themselves, perform manual tasks, walk, see, hear, speak, breathe, and learn, reproduction does not occur every day or nearly every day, nor repeatedly throughout the day or for a large portion of the day.¹⁰⁸ Most individuals who reproduce do so only a few times in their lives; the human gestation period places physical restraints on the frequency with which people can reproduce. Absent a multiple birth, a person simply cannot reproduce on more than one or two occasions per year. A far cry from "nearly every day," a full nine months must pass between complete and successful reproductive ventures.¹⁰⁹ Noting the infrequency of reproduction relative to the previously recognized major life activities, the court in *Krauel v. Iowa Methodist Medical Center* observed that "a person is not called upon to reproduce throughout the day, every day."¹¹⁰ In fact, most courts that have found reproduction to be a major life activity have conceded that reproduction lacks the frequency elements that help comprise the test. They instead justify classification of reproduction as a major life activity by rejecting the test.¹¹¹

107. See *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 106-07 & n.1 (S.D. Iowa 1995) (applying the frequency components by pointing out that people do not reproduce "throughout the day, day in and day out"; also applying the universality component by contrasting reproduction, an activity in which some people choose not to engage, with walking, seeing, and other activities, which are performed by all unimpaired people), *affd.*, 95 F.3d 674 (8th Cir. 1996); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) (applying the frequency components by pointing out that, unlike the frequency with which people participate in previously recognized major life activities, people do not reproduce "throughout the day, day in and day out"), *affd.*, 79 F.3d 1143 (5th Cir. 1996).

108. See *Krauel*, 915 F. Supp. at 106-07 & n.1; *Zatarain*, 881 F. Supp. at 243.

109. A successful reproductive venture, of course, must include a birth. The length of the gestation period requires the passage of approximately nine months between births. Therefore, the activity of reproduction cannot be completed more frequently than once every nine months or so.

110. *Krauel*, 915 F. Supp. at 106 (quoting *Zatarain*, 881 F. Supp. at 243).

111. See *infra* section III.B.3 (describing the approach of courts that reject the frequency criteria and embrace reproduction as a major life activity). But cf. section III.B.2 (describing the approach of courts that adopt the frequency criteria but attempt to redefine reproduction in terms of more frequent events so that reproduction fits within the frequency criteria).

Reproduction also fails to satisfy the universality component of the test. Unlike every illustrative major life activity set forth by Congress and the EEOC,¹¹² reproduction is a lifestyle choice because many people consciously decline to participate in this activity, even though they have no impairment that prevents their participation. In contrast, activities that are performed universally are performed by nearly all people, unless an impairment prevents their participation.

Some courts that classify reproduction as a major life activity reject the notion that reproduction is a lifestyle choice. Instead, these courts call reproduction "an integral part of life," noting that without it, "none of us, nor any living thing, would exist."¹¹³ This argument, though it may have a certain sentimental appeal, ignores the common elements shared by previously recognized major life activities. All members of society care for themselves, perform manual tasks, walk, see, hear, speak, breathe, and learn unless an impairment prevents them from doing so.¹¹⁴ Many people, on the other hand, choose not to have children, despite having the capability to reproduce in a healthy manner.

Another court held that to call reproduction a lifestyle choice was nothing more than an exercise in semantics because certain other major life activities — speaking, for example — are choices as well.¹¹⁵ It is certainly true that some of the previously recognized major life activities have a volitional element, but it is also irrelevant. The argument that reproduction is a lifestyle choice does not fail merely because other recognized major life activities are volitional. There is still a universe of difference between the number of people that speak and the number that reproduce. Speaking is an activity engaged in by all or nearly all people, *unless an impairment prevents them from doing so*. Unlike the other previously recognized major life activities, many people capable of reproducing simply choose not to reproduce.¹¹⁶ The difference is qualitative, not merely quantitative. The previously recognized major life activities share the characteristic of being performed by nearly every unimpaired person on the planet. The activity of reproduction does not share that quality.

Not only is reproduction a lifestyle choice that many people consciously decline, but those who attempt or desire it often en-

112. Working, to which Congress gave special attention, is a unique, rather than an illustrative, example of a major life activity. See *supra* text accompanying notes 97-99.

113. *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 804 (N.D. Ill. 1996).

114. See *Krauel*, 915 F. Supp. at 106-07 & n.1.

115. See *Abbott v. Bragdon*, 107 F.3d 934, 941 (1st Cir. 1997).

116. See *Krauel*, 915 F. Supp. at 106 n.1 ("Some people choose not to have children, but all people [perform the other recognized major life activities].").

counter significant difficulties. According to the interpretive guidelines to the ADA, "major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty."¹¹⁷ It can hardly be said that the average person in the general population can reproduce with little or no difficulty; many people are too young to reproduce, and many women are too old. Age, however, is not an automatic physical impediment to performing any of the major life activities the EEOC has explicitly recognized. The fact that a significant number of people are physically incapable of reproducing makes reproduction different from every previously acknowledged major life activity. Further, many people are neither too young nor too old to reproduce, but lack a partner.¹¹⁸ Finally, many people who have a partner fail to reproduce when they have heterosexual intercourse simply because of the odds against conception, even by a male and female with no reproductive impairments.¹¹⁹ Because it fails both the Frequency-Universality Test and the little difficulty standard, reproduction lacks the characteristics common to the other major life activities, and judges therefore should not add it to the list.

2. *Judicial Approach 2: Adopt the Frequency Components, and Try to Make Reproduction Fit*

Some courts classifying reproduction as a major life activity have not rejected the frequency components embraced by the test; rather they have attempted to squeeze the square peg of reproduction into the round holes of micro- and macrofrequency by redefining reproduction in terms of more frequent events.¹²⁰ Courts in jurisdictions following this "redefining" approach have dealt with the frequency component by contending that reproduction should not be viewed in terms of conception and childbirth alone. Rather, they argue, reproduction should be evaluated in terms of "the processes that occur continually in both male and female reproduc-

117. 29 C.F.R. app. § 1630.2(i) (1991).

118. Artificial insemination may solve this problem, but this complicated and expensive ordeal can hardly be characterized as something the "average person in the general population" can do "with little or no difficulty."

119. The monthly fecundity (conception rate) in normal couples ranges from approximately 20 to 25 percent. See Talbert, *supra* note 1, at 2. The conception rate is even lower in the first several months after use of oral contraception ceases. See *id.*

One commentator argued that reproduction is an activity that "most persons in society can perform without difficulty" because "only 7.9% of the population of persons of reproductive age have difficulty reproducing." Morgan, *supra* note 95, at 981 & n. 123. Drawing such a conclusion from this statistic ignores the statistic's critical qualifier, "of reproductive age." Morgan's conclusion is unpersuasive because it fails to consider the fact that many people are either too young or too old to reproduce.

120. See *Erickson v. Board of Governors*, 911 F. Supp. 316, 322 (N.D. Ill. 1995).

tive systems in order to achieve conception."¹²¹ The continual processes which allow reproduction include sperm production, ovulation, and various hormonal changes.

This Note contends that reproduction begins with conception and culminates at birth. These are the defining elements of the activity, for unless both conception and birth occur, there can be no reproduction, and until the process of reproduction begins, there can be no conception and no birth. Several courts agree that this is the correct conceptualization.¹²² A broader notion of reproduction is inappropriate because instead of truly satisfying the test, it simply begs the question. Redefining reproduction in terms of sperm production, ovulation, and other related processes merely identifies potential areas of impairment, not major life activities. For example, in order for infrequent ovulation or impaired sperm production, which are undeniably "impairments" under the EEOC definition,¹²³ to qualify as disabilities, they must still limit a major life activity.¹²⁴ Infrequent ovulation and impaired sperm production limit no major life activities, however — unless either reproduction is a major life activity or sperm production and ovulation by themselves are major life activities.

Using such a broad definition, reproduction might indeed satisfy the frequency components. Sperm production does occur throughout the day, every day. The courts adopting this definition, however, ignore the equally important universality element, which undermines their position. Sperm production and ovulation fail the universality component of the test because all of these reproductive functions are unique to either males or females. Not one of the sixteen previously recognized major life activities are unique to one sex; on the contrary, every previously recognized major life activity is performed by everyone, or nearly everyone, regardless of sex.¹²⁵ It makes no sense to consider something a major life activity if half the population, or more, is precluded from ever performing it.¹²⁶

121. *Erickson*, 911 F. Supp. at 322.

122. See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 106 (S.D. Iowa 1995) (describing reproduction as a "lifestyle choice" and an activity not performed with significant frequency, descriptions inconsistent with the notion that reproduction consists of involuntary bodily processes), *affd.*, 95 F.3d 674 (8th Cir. 1996); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) (describing reproduction as less frequent than the recognized major life activities), *affd.*, 79 F.3d 1143 (5th Cir. 1996).

123. See 29 C.F.R. § 1630.2(h) (1991) (defining the impairment component of the three-component definition of disability).

124. See generally *supra* Part I; see also *supra* note 45 (explaining the infrequency with which impairments are labeled per se disabilities).

125. See *supra* note 15.

126. Critics may argue that sperm production and ovulation are parallel processes which might be labeled "gamete production." Grouping these processes under one label is not only inappropriate, but also does not change the fact that neither process passes the universality test.

Furthermore, a broad definition of reproduction is incompatible with the ADA's concept of a major life activity vis-à-vis its role in the ADA's three-part definition of disability. If the definition of reproduction were so broad as to include all the processes that lead to conception and childbirth, then to classify reproduction as a major life activity would be to classify ovulation and sperm production by themselves as major life activities. Such a result would mean that a finding of disability would follow from the existence of only the first component of the three-component disability test — a result that would destroy the distinction between impairments and major life activities that the statute clearly seeks to preserve.¹²⁷

It is true, of course, that some courts have found these processes to constitute major life activities.¹²⁸ Their analysis, however, lacks credibility because they have made this determination after considering only the "impairment" component of the definition of disability, rather than considering "impairment" as only one of three necessary components.¹²⁹

The fact that male and female reproductive processes require entirely different organs, yield different products (eggs or sperm), and are unique and exclusive to half the population makes them different from every other previously recognized major life activity. Major life activities such as seeing, breathing, and speaking are performed in exactly the same manner and through the use of the same body parts by each sex. Such a significant and obvious difference between gamete production and all other major life activities raises serious questions as to the validity of such a reclassification. No previously recognized major life activity attempts to group under one label activities with such significant distinctions.

Nonetheless, even if male and female reproductive processes were grouped together, gamete production would still fail the universality test. At best, males and females as a group only engage in gamete production for a limited part of their lives. Neither males nor females engage in such processes before puberty, and although men may produce sperm for the duration of their lives, women undergo menopause, leaving them unable to engage in these reproductive processes for half of their lives or more. Even if one were to accept the idea of "gamete production" as an activity not unique to either sex, a significant number of people will be unable to perform it (because of their age), despite the fact that no impairment prevents performance. As a result, even gamete production cannot be classified as an activity performed by nearly all people. No other major life activity is possible for only a limited period during an individual's lifetime.

127. See *supra* Part I.

128. See, e.g., *Erickson v. Board of Governors*, 911 F. Supp. 316, 322 (N.D. Ill. 1995).

129. For example, in *Erickson* the court purported to consider the components of "impairment" and "major life activity" separately. The *Erickson* court based its conclusion that reproduction is a major life activity on the fact that *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992), found infertility to be a "handicap" under the Rehabilitation Act. See *Erickson*, 911 F. Supp. at 322 (using the *McWright* court's analysis to support a claim that reproduction is a major life activity). The *McWright* court, however, adopted as its definition of "individual with handicaps" the definition of "impairment," failing to consider the "major life activity" prong at all. See *McWright*, 982 F.2d at 226-27. *Erickson* cites *McWright* for the proposition that "'the protected class of handicapped individuals . . . include[s] any person with a physiological disorder affecting the reproductive system.'" *Erickson*, 911 F. Supp. at 322 (quoting *McWright*, 982 F.2d at 226-27). The *Erickson* court even concedes that the *McWright* opinion failed to analyze explicitly the major life activity component, but the *Erickson* court then hypothesizes that *McWright* must have contemplated that component. See *Erickson*, 911 F. Supp. at 322. The *McWright* court should have contemplated the major life activity component, but it did not. *McWright* reduced the definition of a "handicap" to the single

3. *Judicial Approach 3: Reject the Frequency Criteria, Accept Reproduction as a Major Life Activity*

Some courts that have found reproduction to be a major life activity have rejected the frequency components offered in the Frequency-Universality Test, finding that neither the ADA nor its regulations overtly establish such criteria.¹³⁰ They hold that the frequency components too narrowly define "major life activity." Instead, they extend the definition of "major life activity" to include activities that are less frequent but "momentous" or a "fundamental aspect[] of human life."¹³¹ The criticism these courts direct toward the frequency components of the Frequency-Universality Test, however, is more effectively directed at their own notion of a major life activity. It is true that nowhere in the ADA or its interpretive guidelines did Congress or the EEOC explicitly instruct that microfrequency and macrofrequency are necessary elements of a major life activity. It is equally true, however, that nowhere in the ADA or its interpretive guidelines is there any hint that infrequent but "momentous" or "significant" events constitute major life activities either. In fact, the only guidance Congress and the EEOC have provided — the illustrative lists and the little-difficulty standard¹³² — suggests that infrequent but momentous events are *not* major life activities. Not a single one of the illustrative major life activities can be described as infrequent but momentous. On the other hand, every illustrative major life activity approved by Congress or the EEOC is performed microfrequently — repeatedly throughout the day or for a large portion of the day — and macrofrequently — every day or nearly every day. The inclusion of a "momentous-event" category in the notion of a "major life activity" is nothing more than a judicial expansion of the law. Not only is momentousness a criterion inconsistent with every major life ac-

component of an "impairment." See *McWright*, 983 F.2d at 226-27. The *McWright* decision is entirely devoid of any "major life activity" analysis; the opinion does not even contain the phrase "major life activity." As a result, the *Erickson* court's reliance on *McWright* to support the conclusion that reproductive processes are major life activities is unpersuasive.

130. See, e.g., *Abbott v. Bragdon*, 107 F.3d 934, 940-41 (1st Cir. 1997); *Soodman v. Wildman, Harrold, Allen & Dixon*, No. 95-C-3834, 1997 U.S. Dist. LEXIS 1495, at *16-*17 (N.D. Ill. Feb. 7, 1997).

131. E.g., *Lally v. Commonwealth Edison Co.*, No. 95-C-4220, 1996 U.S. Dist. LEXIS 19386, at *34-*35 (N.D. Ill. Dec. 19, 1996) ("The definition of major life activity should be construed broadly to include not only those activities necessary for daily existence, but also those actions which are momentous and fundamental aspects of human life."); *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 804 (N.D. Ill. 1996) (citing the "momentousness" of reproduction, calling it "one of life's most significant moments"); see also *Abbott*, 107 F.3d at 941 ("Reproduction . . . constitutes a major life activity because of its singular importance to those who engage in it.").

132. See *supra* text accompanying notes 88-93

tivity previously recognized by Congress or the EEOC, it is also hopelessly vague as a standard to apply to specific activities.¹³³

IV. OTHER STATUTES PROVIDE MORE APPROPRIATE MEANS OF RELIEF

Any attempt to classify reproduction as a major life activity under the ADA strains the language of the Act and distorts its meaning. Not only is such a strain inappropriate, but it is also unnecessary. Courts that have classified purely reproductive disorders as disabilities under the ADA undoubtedly were motivated by the laudable desire to allow relief for plaintiffs suffering discrimination relating to a reproductive disorder. As this Part elaborates, however, another means of relief for victims of reproductive discrimination already exists in the Pregnancy Discrimination Act (PDA).¹³⁴

The PDA, a 1978 amendment to Title VII of the Civil Rights Act of 1964, provides a more appropriate avenue for remedying discrimination against women with reproductive disorders. The PDA declares that discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" constitutes sex-based discrimination in violation of Title VII.¹³⁵ The Supreme Court has held that discrimination based on the potential for pregnancy also constitutes sex discrimination under the PDA.¹³⁶ Lower courts have followed the Supreme Court's lead, holding specifically that purely reproductive disorders constitute "related medical conditions" under the language of the PDA.¹³⁷

Moreover, interpreting the PDA to cover discrimination against women with reproductive disorders most clearly effectuates its purpose. In enacting the PDA, Congress sought to prohibit discrimina-

133. One commentator advances the similarly flawed argument that reproduction must be a major life activity because it has been deemed a fundamental right. *See Morgan, supra* note 95, at 982 ("Refusing to recognize reproduction as a major life activity is difficult to reconcile with the courts' long history of recognizing reproduction as a fundamental right."). The characterization of an activity as a fundamental right has no relationship whatsoever to whether the activity meets the ADA definition of a major life activity. Morgan's argument is unpersuasive for the same reasons that the "momentousness" argument is unpersuasive. *See supra* text accompanying notes 130-32.

134. Pub. L. No. 95-555, 92 stat. 2076, codified at 42 U.S.C. § 2000e (1994).

135. 42 U.S.C. § 2000e(k) (1994).

136. *See International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

137. *See, e.g., Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402-03 (N.D. Ill. 1994) (holding that infertility is a "medical condition related to pregnancy and childbirth for purposes of the Pregnancy Discrimination Act"); *Erickson v. Board of Governors*, 911 F. Supp. 316, 319 (N.D. Ill. 1995) (holding that infertility is a pregnancy-related condition afforded protection under the PDA). *But see Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679-80 (8th Cir. 1996) (holding that infertility is not a "related medical condition" because it prevents conception, unlike pregnancy and childbirth which occur after conception).

tion on the basis of a woman's ability to become pregnant.¹³⁸ One would expect claims of discrimination against infertile women to arise most often when infertile women seek treatment for their condition. Discriminating against a female employee for seeking to correct an infertility problem is discriminating against that employee for trying to become pregnant.¹³⁹ Courts are unlikely to interpret the PDA in a way that would allow this type of discrimination.¹⁴⁰

Finally, the remedies and procedures available under the PDA are the same as those available under the ADA.¹⁴¹ As a result, a plaintiff who chooses to pursue relief under the PDA rather than the ADA forfeits nothing in terms of potential remedies and instead bases her demand for relief upon a statute more appropriately tailored to remedying reproductive discrimination.

CONCLUSION

In defining disability, the ADA limits its scope to those impairments which substantially limit a major life activity. Congress and the administrative agencies charged with enforcing the Act have defined impairments expressly to include reproductive disorders. Reproduction, however, is conspicuously absent from the lists of illustrative major life activities. Although some members of Con-

138. See *Johnson Controls*, 499 U.S. at 211.

139. See *Erickson*, 911 F. Supp. at 320.

140. Another potential avenue of relief may be available under the ADA's third definition of disability. Under the third definition, if an individual with a reproductive disorder is "regarded as" unable to work or perform other major life activities as a result of the disorder, a court may find that individual entitled to relief, even if the individual seeking relief is not actually limited in any major life activities at all. See 42 U.S.C. § 12102(2)(C) (1994); see also EEOC Compl. Man. (CCH) § 902.8 (1993). The third definition protects persons whose impairments are substantially limiting only as the result of the attitudes of others toward their impairment. See H.R. REP. NO. 101-485, pt. 2, at 53 (1990); S. REP. NO. 101-116, at 23 (1989); 29 C.F.R. app. § 1630.2(f) (1991); EEOC Compl. Man. (CCH) § 902.8(a). The third definition of disability is purely subjective. The defendant employer need not even know whether the plaintiff actually has the condition, or whether the condition he regards the plaintiff as having would qualify as a disability under the ADA's first definition. So long as the employer "regards" the employee as disabled, the employee meets the ADA's third definition. According to EEOC regulations, an individual is "disabled" under the ADA's third definition of disability when that individual: "(1) Has a physical or mental impairment that does not substantially limit major life activities but is created by a covered entity [e.g., an employer] as constituting such limitation; (2) Has 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) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment." 29 C.F.R. § 1630.2(f). Qualification under the third definition, however, depends on the specific facts of the case. One employer may perceive infertility as substantially limiting certain major life activities while another employer may perceive no limitations at all. See EEOC Compl. Man. (CCH) § 902.8(a).

141. See 42 U.S.C. § 12117(a) (1994) (mandating that the powers, remedies, and procedures set forth in the Civil Rights Act of 1964 be the powers, remedies, and procedures provided under the ADA).

gress apparently believed ADA coverage of asymptomatic HIV-positive individuals to be based on limitations in reproduction, a more thorough analysis of the reasons why the ADA covers asymptomatic individuals with HIV reveals that limitations on reproductive capabilities do not form the basis for ADA coverage. Further, the legislative history of the ADA provides no support for the proposition that purely reproductive disorders should be covered under the ADA.

Without a clear statutory basis or other Congressional mandate to include reproduction as a major life activity, substantial consideration ought to be given to the reasons Congress may have excluded reproduction from the list of illustrative major life activities. First, Congress intended to limit the definition of disability rather than provide coverage to every individual with an impairment.¹⁴² Second, reproduction is qualitatively different from the major life activities expressly acknowledged by Congress and the administrative agencies in charge of enforcing the Act.¹⁴³

All of the major life activities previously recognized by Congress and the EEOC possess three characteristics: microfrequency, macrofrequency, and universality. These three characteristics should be recognized explicitly as necessary components of a major life activity under the ADA. Because reproduction lacks all three of these elements, it would distort the meaning of the ADA to classify reproduction as a major life activity. Expanding the scope of "major life activities" to include reproduction would be a conscious expansion of the law by the courts. Such a judicial expansion of the scope of major life activities would violate both the language of the ADA and congressional intent.

142. *See supra* Part I.

143. *See supra* Part III.