

ESSAY

Amending the EEOC's Disability Discrimination Regulations to Protect Employees with Post-Traumatic Stress Disorder

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ABSTRACT

When the Equal Employment Opportunity Commission ("EEOC") issued its 2011 regulations implementing reforms to the Americans with Disabilities Act ("ADA"), the agency set the stage for a new litigation dilemma. Under the new regulations, employees diagnosed with post-traumatic stress disorder ("PTSD") are deemed afflicted with a physical ailment. Thus, employers will no longer waste time attempting to defeat discrimination suits based on lack of coverage under the definition of "disabled." Rather, because the disorder's symptoms directly implicate workplace conduct standards involving mood, punctuality, and reactions to stress, employers will assert that afflicted employees' symptomatic behaviors are a proper basis for dismissal under "business necessity" defenses.

Without further action by the EEOC to alter the defense standards available to employers, its interpretation of the term "disability" is subject to unpredictable judicial review under administrative law doctrine because more than

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one agency has been granted interpretive power. Were it to offer a distinct interpretation of “business necessity” defenses, however, such an interpretation would likely command substantial deference because the EEOC is the sole entity with rulemaking power over regulations governing ADA litigation. By creating a presumption that “business necessity” arguments are unavailable when an employee seeks treatment for PTSD, unless an employee’s conduct substantially interferes with a company’s internal operations, the EEOC can prevent the erosion of statutory protections for employees with the disorder. A disease cannot be separated from its symptoms, and unless the regulations reflect that reality the expansion of coverage to PTSD patients will prove a hollow victory.

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INTRODUCTION

On March 25, 2011, the Equal Employment Opportunity Commission ("EEOC") issued its regulations¹ to implement the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"),² and in doing so, the agency offered a legal conclusion that will have larger implications than its placement in the regulations suggests. Listing examples of how certain medical conditions will "substantially limit" certain "major life activities" and thus qualify as disabilities under the original Americans with Disabilities Act ("ADA"),³ the agency noted: "[I]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated," and that "major depressive disorder, bipolar disorder, *post-traumatic stress disorder*, [and] obsessive compulsive disorder . . . *substantially limit brain function*."⁴ That account of post-traumatic stress disorder ("PTSD") brings a well-known psychiatric condition under the rubric of physical impairment—and in the process guarantees ADA coverage to virtually every individual diagnosed with that condition. It also guarantees that employers will rationally develop new methods of defeating ADA claims by employees with PTSD to limit an expansion in potential liability.

The ADA was amended precisely to expand its coverage to more employees and types of ailments, and the EEOC's regulations further that goal. However, the new regulations also create a strange set of incentives for employers and employees. This result stems from the

¹ Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,999 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630).

² ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101, 12103, 12205a (Supp. II 2009)).

³ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)).

⁴ 29 C.F.R. § 1630.2(j)(3)(iii) (2011) (emphasis added).

nature of PTSD as a disabling condition that is not obvious to employers but which manifests itself through symptoms that directly implicate workplace conduct and standards. In the post-2011 litigation landscape, employers face powerful new incentives to minimize their liability for using standards or policies that tend to penalize PTSD patients. Employers could avoid ever learning of an employee's PTSD to absolve themselves from accommodating that employee's needs and insulate themselves from suits for discriminatory behavior. Alternatively, employers could justify terminating employees displaying PTSD symptoms by broadly relying on workplace conduct rules as a neutral, "business necessity" defense—a defense to liability under the ADA based on what the employer can reasonably demand of its employees.⁵

Compounding the problem is that many individuals afflicted with PTSD, particularly veterans, do not seek or continue treatment for the disorder, which may exacerbate conflicts with employers when symptoms continue unchecked. That concern is magnified by the increase in the number of citizens afflicted with PTSD—a byproduct of more than a decade of overseas military conflict.⁶ The new regulations provide no incentive to seek treatment: they emphasize that mitigating measures should play no role in the threshold question of whether an individual is disabled, but do not address whether treatment might inform the respective rights and responsibilities of employers and employees.

Although the deference courts owe to the EEOC's new regulations—as interpretations of the ADAAA—remains unsettled under administrative law doctrine, the agency will likely receive substantial deference for rules that speak directly to claims and defenses.⁷ This suggests a possible vehicle for a solution: a new interpretive or definitional rule that forecloses "business necessity" defenses when the plaintiff has sought treatment for his or her behavioral disorder (such as PTSD) and the employer cannot demonstrate that the symptomatic conduct substantially interferes with internal business operations. A possible alternative, namely the judicial expansion of "business necessity" theories to separate disability-caused misconduct from the disability itself, would undercut the purposes of the regulations by

⁵ For a deeper discussion of how the business necessity defense functioned prior to 2011, see *infra* Part I.D.

⁶ See *infra* Part I.B.1.

⁷ For a more detailed explanation of the doctrinal treatment of EEOC regulations by reviewing courts, see *infra* Parts I.C, III.A.1.

effectively writing PTSD out of the rules in practice, because a disability cannot be severed from its symptoms.

This Essay proceeds in three Parts. Part I describes the original law of disability discrimination and EEOC enforcement, PTSD as a medical condition, and how the pre-ADAAA regime tended to exclude PTSD patients from coverage while also considering disability-based misconduct to be part and parcel of the disability itself. Part II then examines the new regulations in greater detail and the problems that they will present in the new era of ADA litigation. Part III further explores how administrative law doctrine will apply to various elements of the new regulations and proposes a solution that will be insulated from limiting judicial review: a new standard for “business necessity” defenses that incentivizes treatment for plaintiffs with behavioral or psychological disorders while preserving employers’ ability to control the workplace environment, and rejects a possible alternative that would allow the courts to separate PTSD symptomatic behavior from PTSD itself.

I. PTSD AND THE ADA: THE PRE-2009 LITIGATION LANDSCAPE

Prior to the 2008 Amendments, the ADA protected employees suffering from PTSD, but it did so primarily in theory. In practice, reviewing courts concluded that the EEOC’s prior regulations did not command a clear form of deference. Beginning in 1999, judicial interpretations of the ADA narrowed the statute’s reach in a fashion that left most employees afflicted with mental health disorders unable to qualify as “disabled” under the Act. A distinct strand of caselaw developed during the same period, however, that considered many forms of non-criminal workplace misconduct to be impermissible bases for disciplining an employee if the behavior stemmed from his or her disability. Part III examines how these trends will collide after 2011, but this Essay first examines each of these strands of caselaw in turn.

A. *The EEOC and Disability Discrimination Law*

Employees with disabilities became a protected class under civil rights law in 1990 with the enactment of the ADA.⁸ Title I of the ADA vested in the EEOC the power to further expand on its provisions via regulation,⁹ but Congress structured the statute in a manner that has important implications for the EEOC’s regulatory authority,

⁸ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 102(a), 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)).

⁹ 42 U.S.C. § 12116.

a structure that has persisted through the 2008 Amendments: the Act's general provisions, which defined "disability," were not tied to the interpretive authority of any one federal agency.¹⁰

"Disability" was defined in the general provisions as an "impairment" which "substantially limits" an otherwise qualified employee's engagement in a "major life activit[y]." Title I of the Act in its original form identified two forms of proscribed employer conduct that are of particular salience for this Essay: First, it condemned discrimination through either employee-specific actions (such as termination) motivated by that worker's particular ailment, or employment criteria that tend to screen out the disabled that are not essentially job related.¹² Second, it proscribed failures to accommodate a particular employee's disability, provided that accommodation did not present "undue hardship" for the employer (such as onerous expense).¹³

An additional observation about the EEOC is necessary to explain the problems that will follow from its 2011 regulations and its treatment of PTSD: the agency's principal day-to-day function is not as the enforcer of civil rights laws, but as a facilitator of litigation. All claimants under the ADA, as with most other civil rights employment statutes, must first file an administrative charge against the employer and provide the EEOC an opportunity to investigate.¹⁴ Although the EEOC does civilly enforce the ADA through litigation,¹⁵ the default outcome is that the complaining employee or former employee will eventually receive a Notice of Right to Sue and proceed to press his or her ADA claim in federal court.¹⁶ Accordingly, the implications of the agency's rules will primarily play out in private lawsuits, rather than in administrative proceedings.

To understand how a PTSD plaintiff's claims and the employer's defenses will play out in litigation going forward, it is necessary to understand what characteristics define PTSD as a medical condition. Those characteristics both form the evidentiary foundation for coverage under the new regulations as well as explain how the disorder's symptoms will spark litigation.

¹⁰ The judicial cognizance of that fact, and the lingering ambiguity under administrative law doctrine, are discussed further in Parts I.C, III.A.1.

¹¹ 42 U.S.C. § 12102(1)(A).

¹² *See id.* § 12112(a), (b)(6).

¹³ *See id.* § 12112(b)(5)(A).

¹⁴ *See* 29 C.F.R. §§ 1601.6, 1601.15 (2011).

¹⁵ *See id.* § 1601.27.

¹⁶ *See id.* § 1601.28.

B. PTSD as a Medical Condition

Before one reaches the question of how PTSD should be viewed as a source of protected status under the federal law and EEOC regulations, it is necessary to briefly examine the nature of the disorder and why it poses special challenges for employer compliance measures and litigation. PTSD is a well-recognized mental disorder that presents real workplace challenges for those afflicted. As a mental disorder, the condition is less obvious to employers, and its symptoms are closely related to behaviors that would be widely perceived as contrary to employer expectations or evaluative practices, or even as contributing to workplace misconduct.

1. The Symptoms and Prevalence of PTSD

To understand this condition, a more detailed definition is in order. The authoritative document on the subject is the Diagnostic and Statistical Manual of Mental Disorders (“DSM”).¹⁷ Its current form is the revised text of the fourth edition, commonly known as DSM-IV-TR, which was issued by the American Psychiatric Association in 2000.¹⁸ The DSM-IV-TR defines PTSD as a set of symptoms that arise “following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity” or witnessing similar events.¹⁹ The second essential criterion for the disorder is a reaction to the stressor event of “intense fear, helplessness, or horror.”²⁰

The resulting symptoms specifically include recurring feelings; mental images or sensations from the stressful event, which the DSM-IV-TR terms “reexperiencing” the event; a constant effort to avoid any stimuli that relate to the traumatic event; and persistent “hypervigilance.”²¹ These symptoms can prevent the afflicted individ-

¹⁷ As one might expect, that assertion is subject to controversy; the Manual has its detractors. For a well-reasoned argument that PTSD has a more complex history than the DSM recognizes (or than this Essay can adequately summarize), see generally Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 *TEMPLE L. REV.* 1, 21–33, 51–65 (2011).

¹⁸ AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. text rev. 2000) [hereinafter DSM-IV-TR].

¹⁹ *Id.* at 463.

²⁰ *Id.*

²¹ *Id.* at 463–64.

ual from sleeping normally, result in difficulty concentrating, or cause angry outbursts.²²

The DSM-IV-TR's text identifies several commonly accepted stress events that have produced PTSD symptoms, notably witnessing or experiencing acts of violence, including war and sexual assault or even car accidents, or receiving news of the death of a close relative.²³ The symptoms, it notes, are particularly acute when the traumatic experience is of human design, such as acts of torture.²⁴

The symptoms and related mental health problems of PTSD, as outlined in the DSM-IV-TR, clearly implicate profound difficulties for an employee-employer relationship. The need to avoid any thought about the traumatic event corresponds closely with persistent feelings of isolation, diminished interest in previously enjoyed activities, or of "having markedly reduced ability to feel emotions."²⁵ One particularly complex symptom experienced by some PTSD patients is the "flashback"—a period during which the patient enters a disconnected state and experiences the traumatic event as though it is currently happening to him or her, often in response to some triggering event.²⁶ An employee suffering from these symptoms accordingly has difficulty interacting with coworkers and superiors, particularly given an overriding desire to avoid any stimuli associated with the original traumatic event.²⁷

The potential for conflict between employee needs and employer expectations becomes even more pronounced when one considers the DSM-IV-TR's list of disorders that correlate with PTSD. Particularly problematic for the workplace are the connections between PTSD and substance abuse disorders and phobias relating to social interaction,²⁸ traits which either lead to outright workplace misconduct through substance abuse, or present significant problems for an employee who is expected to frequently interact with coworkers or attend company social events and is evaluated accordingly.

Further, this condition is by no means rare. Based on the data available in 2000, the DSM-IV-TR estimated that eight percent of the

²² *See id.*

²³ *See id.*

²⁴ *See id.* at 464.

²⁵ *Id.*

²⁶ *See id.*

²⁷ These difficulties make themselves evident throughout reported court cases involving plaintiffs with PTSD suing under a disability discrimination theory. *See infra* Part II.C-D.

²⁸ *See* DSM-IV-TR, *supra* note 18, at 465.

adult population of the United States suffered from PTSD.²⁹ It notes that one group that experiences the highest rates of the disorder—one third to one half of all those exposed to the particular trauma—is military combat survivors.³⁰ This is an ominous figure for the post-EEOC regulation landscape because that was the conclusion reached *before* the wars in Afghanistan and Iraq began in 2001 and 2003, respectively.³¹ Current estimates place the number of military veterans from those wars at roughly 2.3 million.³² The Department of Veterans Affairs estimates that anywhere from eleven to twenty percent of veterans from those conflicts have PTSD.³³ Thus, more than a decade of overseas combat has likely brought the total number of PTSD cases in the United States to a figure above the eight percent baseline of 2000.

In addition to increased prevalence as a result of foreign wars, recent studies suggest that veterans of Iraq and Afghanistan tend to abandon treatment for their PTSD once they leave the military. An analysis of Veterans Affairs pharmacy records, presented to the American Psychiatric Association's Institute on Psychiatric Services, suggested that veterans from those conflicts, particularly younger servicemembers, are significantly less likely to complete an initial course of treatment for PTSD than older military personnel with the condition.³⁴

2. *PTSD as an Invisible, but Physical, Condition*

One characteristic of PTSD that is extremely relevant to both the discrimination-theory litigation governed by the EEOC and the text of the new regulations is that it is not necessarily apparent to employers whether an individual has the disorder. As discussed below, PTSD is now being described as a physical ailment in the brain itself, visible

²⁹ See *id.* at 466.

³⁰ See *id.*

³¹ See THOMAS H. KEAN ET AL., THE 9/11 COMMISSION REPORT 466, 513 (2011) (describing the course of the two wars).

³² See Jeremy Schwartz, *As Soldiers Leave War Behind, What Comes Next?*, DESERET NEWS, Nov. 8, 2011, <http://www.deseretnews.com/article/700195866/as-soldiers-leave-war-behind-what-comes-next.html>; Bill Torpy, *Veterans Regroup After Life Interrupted*, ATLANTA J.-CONST., Nov. 6, 2011, <http://www.ajc.com/news/veterans-regroup-after-life-1218725.html>; see also Lisa Chedekel, *GAO Report Shows VA's Mental Health Caseload Climbing*, THE DAY.COM CONN., Oct. 31, 2011, <http://www.theday.com/article/20111031/NWS09/310319984/1018>.

³³ See *National Center for PTSD*, U.S. DEPARTMENT VETERANS AFFAIRS, <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp> (last updated Dec. 20, 2011).

³⁴ See M. Alexander Otto, *Iraq and Afghanistan Veterans More Likely to Abandon PTSD Drugs*, CLINICAL PSYCHIATRY NEWS, Nov. 1, 2011, <http://www.clinicalpsychiatrynews.com/news/more-top-news/single-view/iraq-and-afghanistan-veterans-more-likely-to-abandon-ptsd-drugs/9c6ea7e36f.html>.

to cognitive scientists but not obvious outside of a laboratory. But unlike an employee who requires the use of a wheelchair to address mobility problems, or a blind employee who relies on a service animal, the employer does not have any intuitive way to identify a candidate for employment or a current employee as suffering from PTSD.³⁵

Beyond the definition provided by the DSM-IV-TR, researchers studying cognitive function, or the science of how the brain operates, have further identified physical traits that appear to correlate with the behavioral symptoms discussed above. Although any generalization from studies observing correlations between a psychiatric disorder and physical traits must necessarily be a tentative one, findings suggest that the traumatic events that give rise to PTSD as a psychiatric disorder also alter the way the brain handles memory and experiences prior events,³⁶ as well as how chemical receptors in the brain that control emotional reactions function in the wake of the traumatic experience.³⁷

This connection between PTSD and changes in brain function proves to be significant for the regulations at issue in this Essay because it suggests an alternative, physical definition of the disorder, which would necessarily defeat arguments premised solely on behavior.³⁸ Thus, the regulations' use of the expression "substantially limits *brain function*," as noted in the Introduction, has a special significance. Before PTSD was affirmatively recognized by the EEOC as a *physical* disability, employees afflicted by the disorder or similar conditions had a great deal of difficulty convincing courts that the ADA applied to their individual cases at all.

C. PTSD as a Disfavored Disability Under the Pre-2009 Regime

For the decade prior to the ADAAA of 2008, plaintiffs asserting that they were disabled because of a mental disorder, including those diagnosed with PTSD, faced an uphill battle in court. This was not

³⁵ Indeed, disability law explicitly proscribes evaluations or tests designed to identify whether an individual has physical or mental impairments. See *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 835–37 (7th Cir. 2005).

³⁶ See Bessel van der Kolk, *Posttraumatic Stress Disorder and Memory*, 14 PSYCHIATRIC TIMES, Mar. 1, 1997, at 1–3, available at <http://www.psychiatrictimes.com/ptsd/content/article/10168/1158311> (discussing research that shows areas of the brain related to emotion and visual images are much more active during PTSD flashbacks while areas needed for verbal articulation are suppressed).

³⁷ See generally Richard J. McNally, *Cognitive Abnormalities in Post-Traumatic Stress Disorder*, 10 TRENDS IN COGNITIVE SCI. 271 (2006).

³⁸ The significance of that distinction is explored further in Part II.

because they lacked evidence of discrimination by their employers, but because they did not qualify as “disabled.” Two seminal Supreme Court decisions rendered a broad class of mental-disorder plaintiffs extremely vulnerable to summary judgment on whether the statute applied to their cases at all, including those diagnosed with PTSD.

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,³⁹ the Court issued a major narrowing principle for ADA claims. This decision restricted the definition of a major life activity to “activities that are of central importance to most people’s daily lives.”⁴⁰

In an earlier case, *Sutton v. United Air Lines, Inc.*,⁴¹ the Court concluded that coverage under the ADA depended in part on a finding that the plaintiff is presently limited by his or her disability.⁴² That meant that treatments, such as medication or therapy, that alleviate a condition’s symptoms had to be taken into account in determining whether a condition was “substantially limiting.”⁴³ It also meant that an affliction had to be active, or ongoing in its effects, to qualify; a dormant impairment was no impairment at all for the purposes of the ADA.⁴⁴

Sutton is important for an additional reason, one that informs how courts will analyze the 2011 regulations. The Court noted that the EEOC’s analysis of the definition of “disability,” as expressed through its regulations at the time, did not necessarily demand deferential review because Congress had only delegated implementation of Title I of the ADA (governing employment discrimination) to the EEOC, not interpretation of the general provisions defining the term “disability.”⁴⁵ Although the Court declined to state what standard should govern the EEOC’s interpretations of the general provisions,⁴⁶ the observation that Congress did not explicitly vest interpretive authority with the EEOC plays a decisive role in determining whether an agency interpretation is entitled to controlling deference under

³⁹ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

⁴⁰ *Id.* at 198. Prior to the 2008 Amendments, a consensus had formed that the Supreme Court was essentially rewriting the ADA a section at a time, although the origins of that process were still open to debate. See Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 525–27 (2008).

⁴¹ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

⁴² See *id.* at 482.

⁴³ See *id.* at 482–83.

⁴⁴ See *id.*

⁴⁵ See *id.* at 478–80.

⁴⁶ See *id.* at 480 (noting that the Court had “no occasion to consider what deference [the regulations] are due, if any” because the parties accepted the regulations as valid).

*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴⁷ or if it merely has the “power to persuade” under the holding of *Skidmore v. Swift & Co.*⁴⁸ This hint from the Court will be examined further in Part IV.

Prior to 2008, reviewing courts accepted the general proposition that PTSD could constitute a disability under *Sutton* and *Toyota*.⁴⁹ The devil was in the details, however. One frequent subject of litigation was precisely what major life activity mental disorders like PTSD limited. The circuits developed various answers to that question, which often virtually set up the plaintiff to fail on the issue of whether the impairment “substantially limits” the identified activity.

For example, the Eighth Circuit expressed a willingness to consider that “interacting with others” was a major life activity, but it was substantially limited only when the mental disorder rendered the plaintiff a hermit.⁵⁰ Similar patterns played out with “sleeping” and “eating” as activities impaired by depression or emotional disorders.⁵¹ The selection of a particular major life activity as the basis for asserting a disability, assuming the court would even entertain the argument, still left in place the problem of treatment and episodic symptoms under the “substantially limits” standard of *Sutton*.⁵²

The *Sutton* precedent rendered a vast swath of employees with mental health disorders extremely vulnerable to motions for summary judgment if the plaintiff demonstrated control of his or her condition by taking medication, seeing a therapist, or performing adequately at

⁴⁷ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight . . .”).

⁴⁸ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁴⁹ *See, e.g., Hamilton v. Sw. Bell Tel. Co.*, 136 F.3d 1047, 1050 (5th Cir. 1998). The same could be said of the courts’ treatment of other mental disorders, such as depression. *See, e.g., Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir. 1998).

⁵⁰ *See Heisler v. Metro. Council*, 339 F.3d 622, 628–29 (8th Cir. 2003) (defeating appellant’s “interacting with others” theory in part by noting that despite severe, diagnosed depression, appellant still contacted a few close friends to talk on the phone occasionally and was able to perform her duties that required supervision of other people).

⁵¹ *See, e.g., Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 315–18 (6th Cir. 2001) (holding that “sleeping” activity was not substantially limited because with medication, depressed plaintiff slept roughly five hours per night and this was close to average amount); *McClinton El v. Potter*, Nos. 06 C 5329, 06 C 6839, 2008 WL 5111182, at *1, *5–6 (N.D. Ill. Dec. 4, 2008) (holding that plaintiff asserting that depression and anxiety affected his eating and sleeping habits survives summary judgment because of evidence of chronic, virtually uninterrupted symptoms over a period of more than three years).

⁵² *See, e.g., Horwitz v. L & J.G. Stickley, Inc.*, 122 F. Supp. 2d 350, 354 n.3 (N.D.N.Y. 2000) (“[T]he Court seriously doubts that socializing qualifies as a major life activity.”).

work.⁵³ As the United States District Court for the District of Wyoming explained in *McMullin v. Ashcroft*⁵⁴: “[T]he Court cannot assess Plaintiff’s ‘untreated’ impairment of clinical depression, because the Court must consider the effects of corrective measures.”⁵⁵

The Fourth Circuit’s analysis in *Rohan v. Networks Presentations LLC*⁵⁶ illustrates many of the doctrinal problems that plagued ADA claims premised on PTSD under *Toyota* and *Sutton*, and also why an improved regulatory scheme should incentivize rather than ignore or discourage treatment. Tess Rohan was an actress who suffered from PTSD, experiencing panic attacks whenever any external stimuli reminded her of her father, who had sexually abused her as a child.⁵⁷ These attacks typically consisted of Rohan’s inability to speak, hyperventilation, and staring blankly into space as she would, in the DSM-IV-TR’s terms, “reexperience” the original instances of abuse.⁵⁸ As the attacks occurred with greater and greater frequency while her theatre company was on tour, she began talking about suicide, cut herself with a cast member’s razor, and took tranquilizers.⁵⁹ The theatre company discharged her, and she brought suit under the ADA.⁶⁰

On appeal from the district court’s grant of summary judgment to the theatre company, the Fourth Circuit explained how Rohan did not suffer from a disability.⁶¹ First, Rohan identified a major life activity: “interacting with others.”⁶² The Fourth Circuit, accepting that activity as valid for the sake of argument, proceeded to explain that despite suffering from recurring panic attacks that rendered her incapable of communicating with other people, Rohan was not substantially limited in the major life activity of “interacting with others.”⁶³ The court noted that Rohan had made friends on the tour and that the recurring panic attacks were too brief in duration and sporadic to constitute a

⁵³ See, e.g., *Hewitt v. Alcan Aluminum Corp.*, 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001) (holding that because medication corrected the effects of plaintiff’s PTSD, he was not disabled under the ADA pursuant to the analysis in *Sutton*).

⁵⁴ *McMullin v. Ashcroft*, 337 F. Supp. 2d 1281 (D. Wyo. 2004).

⁵⁵ *Id.* at 1295.

⁵⁶ *Rohan v. Networks Presentations LLC*, 375 F.3d 266 (4th Cir. 2004).

⁵⁷ See *id.* at 268–69.

⁵⁸ See *id.* at 269; see also DSM-IV-TR, *supra* note 18, at 463 (describing “reexperiencing” of the event).

⁵⁹ See *Rohan*, 375 F.3d at 270–71.

⁶⁰ See *id.* at 271–72.

⁶¹ See *id.* at 268, 273–76.

⁶² See *id.* at 274.

⁶³ See *id.* at 274–76.

substantial impairment under the *Toyota* precedent.⁶⁴ Accordingly, Rohan was not disabled within the meaning of the ADA because she was only afflicted twice a week, on average, with debilitating panic attacks.⁶⁵

The combination of the narrow major life activity requirement and temporal approach put forth under *Toyota* combined to create an uphill battle for a plaintiff diagnosed with PTSD. The need for some specific “life activity” for identifying impairment immediately narrowed the analysis to how that physical activity took place—any evidence of performing it successfully counted against the plaintiff. Then the episodic nature of the symptoms took on decisive importance: if the plaintiff were only paralyzed with anxiety on occasion, in response to a particular set of circumstances that reminded him or her of the traumatic event, then the employer could terminate him or her for that reason and plausibly face no liability.

Although PTSD patients generally fared poorly prior to the amendment of the ADA, a distinct line of cases from the previous decade was somewhat more generous to the disabled. These concerned the problem of employee misconduct attributable to a disability.

D. Employee Misconduct Flowing from a Disability

One line of cases decided prior to 2009 will take on a renewed salience under the 2011 regulations. These decisions turn on a single theme: that disciplining an employee for conduct that flows directly from his or her disability is a form of discrimination by the employer.

This doctrine requires not only an inquiry into what relationship exists between the employee’s disability and the misconduct sanctioned by the employer, but also implicates defenses to liability, known as “direct threat”⁶⁶ and “business necessity,”⁶⁷ that will play an important role in post-2011 litigation.

The Ninth and Tenth Circuits explicitly held prior to 2009 that when misconduct is the product of the employee’s disability, it does not justify adverse action. The Ninth Circuit adopted this standard in *Humphrey v. Memorial Hospitals Ass’n*,⁶⁸ reasoning that “conduct resulting from a disability is considered to be part of the disability,

⁶⁴ See *id.* at 275–76.

⁶⁵ See *id.*

⁶⁶ See *infra* notes 75–76 and accompanying text.

⁶⁷ See *infra* notes 77–78 and accompanying text.

⁶⁸ *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128 (9th Cir. 2001).

rather than a separate basis for termination.”⁶⁹ The Tenth Circuit reached a comparable conclusion in 1997 in *Den Hartog v. Wasatch Academy*,⁷⁰ rejecting a “stark dichotomy” between misconduct caused by a disability and the disability itself.⁷¹ Under this strand of caselaw, when the employer’s justification for taking action against the employee closely aligns with behavior that is causally connected to the employee’s disability, the employer has not tendered a nondiscriminatory reason for the action.⁷² For employees suffering from PTSD, this would naturally encompass terminations premised on attitude, such as irritable outbursts in the presence of superiors or coworkers, or premised on tardiness or absences due to sleep deprivation.⁷³

The ADA’s text, both before and after the issuance of the new regulations, however, contemplates three clear exceptions to the above proposition. First, the text of the statute, even as amended, forecloses a theory of disability based on present addiction to alcohol or controlled substances, and also explicitly does not protect conduct flowing from that condition.⁷⁴ Second, even under the pre-2009 approach, employers could argue that singling out a disabled employee was proper because he or she posed a “direct threat” to the health and safety of others in the workplace, and therefore was not qualified for a position.⁷⁵ This term has been, and continues to be, defined by the statute as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”⁷⁶

Third, provided that the misconduct neither relates to substance abuse nor implicates “direct threats” to the health and safety of others

⁶⁹ *Id.* at 1139–40.

⁷⁰ *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076 (10th Cir. 1997).

⁷¹ *See id.* at 1088.

⁷² *See, e.g., Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1134 (10th Cir. 2003); *cf. Davila v. Qwest Corp.*, 113 F. App’x 849, 853–54 (10th Cir. 2004) (rejecting ADA claim when termination was for misstatements about accident involving company vehicle, which bore no connection to his depression or bipolar disorder, but accepting the principle of *Den Hartog*).

⁷³ The Northern District of Iowa even went so far as to consider incidents of petty theft by an employee who was developmentally disabled to be disability-related conduct. *See Walsted v. Woodbury Cnty.*, 113 F. Supp. 2d 1318, 1322–23, 1342 (N.D. Iowa 2000); *see also Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007) (following *Humphrey* as precedent and concluding that employee’s chronic tardiness at work was causally connected to her obsessive compulsive disorder, and thus could not serve as a neutral basis for firing her). *But see Harris v. Polk Cnty.*, 103 F.3d 696, 697 (8th Cir. 1996) (rejecting the argument that a refusal to rehire a clerk, on the basis of her criminal record, was discriminatory even if the underlying conviction was a result of mental illness).

⁷⁴ *See* 42 U.S.C. § 12114(c)(4) (Supp. II 2009).

⁷⁵ *See id.* § 12113(b).

⁷⁶ *Id.* § 12111(3).

in the workplace, the employer could defend the deliberate screening out of a PTSD plaintiff using evaluations and standards premised on “business necessity.” This standard varies somewhat, depending on the specific workplace at issue,⁷⁷ but generally the “business necessity” argument may be invoked to justify an employer’s selection criterion, such as intangible qualities like sociability or a particular required skill or qualification, even when the criterion has the effect of screening out disabled employees or applicants.⁷⁸ Applied to mental health disorders in occupations involving public safety, this standard has been low,⁷⁹ but in the absence of a compelling safety rationale, defining “business necessity” is a balance between what the employer claims to require from its employees and what those requirements are in practice.⁸⁰

The “business necessity” arena of ADA litigation had little opportunity to develop as applied to mental health plaintiffs prior to 2009, given the difficulties in establishing disability detailed above. But as the next Part explores, in the wake of the new regulations, “business necessity” arguments will take on a new salience as a means by which employers defend themselves in court and structure their ADA compliance efforts.

II. THE EEOC’S ADA AND ADAAA REGULATIONS AND PTSD AS A PRESUMPTIVE DISABILITY (AND THE PROBLEMS ON THE HORIZON)

The 2011 regulations simultaneously guaranteed that PTSD plaintiffs would fare better on summary judgment and that employers would face uncertainty as to how to comply with the rules. Although the EEOC’s interpretation of the ADAAA furthers Congress’s goal of expanding the protected class by rendering patients diagnosed with PTSD presumptively “disabled,” PTSD’s nature will complicate workplace conduct rules and create perverse incentives for employers looking to manage their litigation liability.

⁷⁷ See, e.g., *Coffman v. Indianapolis Fire Dep’t*, 578 F.3d 559, 566 (7th Cir. 2009).

⁷⁸ See 42 U.S.C. § 12112(b)(6) (2006) (delineating theories of discrimination under the ADA and discussing “business necessity”).

⁷⁹ See, e.g., *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999) (noting that even mildly erratic behavior in a law enforcement officer creates a business necessity for a psychological evaluation under the ADA).

⁸⁰ See, e.g., *Moore v. Computer Assocs. Int’l, Inc.*, 653 F. Supp. 2d 955, 963–65 (D. Ariz. 2009) (discussing whether requiring a depressed employee to interact with all of his customers face-to-face and travel was a business necessity within the meaning of the ADA).

A. *The EEOC's 2011 ADAAA Regulations*

The EEOC regulations, promulgated March 25, 2011, substantially affect the threshold determination of whether an employee is disabled and therefore covered by the Act, generally reducing the difficulty of establishing coverage.⁸¹ For PTSD patients, the most significant changes are (1) greatly expanding the list of formally recognized “major life activities” to render PTSD a per se disability in practice, even when symptoms are only episodic,⁸² and (2) the express rejection of mitigating treatments or therapies as a relevant factor in assessing whether an individual is disabled,⁸³ a reaction against the *Sutton* line of cases discussed in Part I.

1. *The Expanded List of “Major Life Activities” and PTSD as a Per Se Disability*

One of the most striking features of the new regulations is the expansion of the list of “major life activities” combined with a reduced standard for the degree of impairment required, an explicit rebuke to judicial interpretations of the original ADA of 1990.⁸⁴ The list of major life activities now includes, but is not limited to, “[c]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.”⁸⁵ Although many of these activities were originally within the list or added via statutory amendment of the ADA,⁸⁶ the EEOC has explicitly added others that were not previously recognized by reviewing courts or were debated, including “interacting with others” as an item distinct from communication and speech.⁸⁷

⁸¹ See *infra* notes 90–95 and accompanying text.

⁸² See 29 C.F.R. § 1630.2(i) (2011) (listing several major life activities and describing criteria for identifying others); see also *id.* § 1630.2(j)(3)(iii) (specifically listing PTSD as a disability that affects the major life activity of brain function).

⁸³ See *id.* § 1630.2(j)(1)(vi).

⁸⁴ Indeed, the EEOC identified *Toyota* and *Sutton* as the precedents it sought to further dismantle through the regulations, as explained in its Notice of Final Rules. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,978–79, 16,990–91 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630).

⁸⁵ 29 C.F.R. § 1630.2(i)(1)(i).

⁸⁶ See 42 U.S.C. § 12102(2) (Supp. II 2009).

⁸⁷ Compare *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999) (observing that interaction with other people may constitute a major life activity for purposes of disability analysis), amended by 201 F.3d 1211 (9th Cir. 1999), with *Soileau v. Guilford of Me., Inc.*, 105

The regulations also reject the standard put forth by the Supreme Court in *Toyota* by stating that recognized activities now extend beyond those that, in the Court's words, are of "central importance to most people's daily lives."⁸⁸ Further, and of particular salience for PTSD plaintiffs, the definition of major life activities now encompasses the healthy function of all bodily systems and processes, including each individual organ within the body.⁸⁹

The regulations further reject *Toyota* with respect to what constitutes a showing that a particular impairment "substantially limits" a major life activity. The regulations have abandoned the past approach, which looked to duration and severity of impairment,⁹⁰ and now feature a set of rules of construction for determining whether a given life activity is substantially limited by the mental or physical impairment. They emphasize, inter alia: (1) broad construction in favor of finding substantial limitation,⁹¹ (2) individualized assessment with the understanding that "the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis,"⁹² and (3) that an impairment need only limit one major life activity in order to qualify.⁹³

Most strikingly, the regulations also go on to identify examples of per se substantial limitations, linking specific disorders with bodily systems, the functioning of which now satisfies the "major life activity" standard. Section 1630.2 of the regulations notes that "it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated," and that "major depressive disorder, bipolar disorder, *post-traumatic stress disorder*, [and] obsessive compulsive disorder . . . *substantially limit brain function*."⁹⁴ The regulations thus extend beyond the text of the ADA by virtually guaranteeing that any patient with a diagnosis

F.3d 12, 15 (1st Cir. 1997) (rejecting the argument that interacting with other people is a major life activity). See also *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 274–75 (4th Cir. 2004) (noting the division among the circuits as to the validity of the "interaction with others" activity). Similar debates have arisen over other previously unenumerated life activities. See, e.g., *Desmond v. Mukasey*, 530 F.3d 944, 953–55 (D.C. Cir. 2008) (evaluating whether "sleep" is a major life activity).

⁸⁸ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002); see 29 C.F.R. § 1630.2(i)(2).

⁸⁹ 29 C.F.R. § 1630.2(i)(1)(ii).

⁹⁰ See *supra* Part I.C.

⁹¹ See 29 C.F.R. § 1630.2(j)(1)(i)–(ii).

⁹² *Id.* § 1630.2(j)(1)(iii); see also *id.* § 1630.2(j)(1)(iv).

⁹³ See *id.* § 1630.2(j)(1)(viii).

⁹⁴ *Id.* § 1630.2(j)(3)(iii) (emphasis added).

of PTSD is “disabled” within the meaning of the Act. Litigating the degree of impact on “brain function” necessary to qualify would be simply absurd.⁹⁵ By adopting this language, the EEOC appears to be relying on the cognitive science account of how PTSD affects the brain, rather than the purely behavioral definitions of the DSM-IV-TR. The regulations also guarantee coverage of PTSD patients implicitly, through their rejection of *Sutton*’s “mitigating measures” analysis, detailed below.

2. *The Rejection of Treatment and Therapy as Mitigating Factors in Defining Disability and the Recognition of Periodic or Recurring Illness*

The rules of construction that specifically reject temporal and treatment-based restrictions on whether a given condition substantially limits a given life activity are of additional importance for ADA plaintiffs diagnosed with PTSD. The new regulations expand coverage to a host of conditions that are commonly treated,⁹⁶ and thus reverse the strict standards of *Toyota*. They also reject the holding of *Sutton*: that an employee is only disabled when an impairment is currently afflicting him or her, and that treatment which alleviates debilitating symptoms must be part of the analysis.⁹⁷

First, the regulations state that the effects of “mitigating measures,” with the exception of eyeglasses or contact lenses, shall not be taken into account when assessing whether an impairment substantially limits a major life activity.⁹⁸ This results in barring any reference to medication or therapy as a basis for arguing that an individual is not disabled, a conclusion rooted in the text of the amended ADA.⁹⁹

Second, the regulations provide that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a ma-

⁹⁵ For an argument in support of per se disability categories generally under the ADAAA, published prior to the issuance of the regulations, see Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL’Y REV. 347, 380–83 (2011).

⁹⁶ These propositions are also found in the text of the statute itself, but the new regulations compile them as a form of “interpretive guide.” See 42 U.S.C. § 12102(4) (Supp. II 2009).

⁹⁷ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488–89 (1999). Extending that proposition, lower courts frequently rejected ADA claims over the decade that followed *Sutton* on the grounds that a given plaintiff had ameliorated his or her condition through medication, so the Act did not apply because there was no present impairment. See, e.g., *McMullin v. Ashcroft*, 337 F. Supp. 2d 1281, 1295–96 (D. Wyo. 2004) (holding that employee was not protected by Act because he had managed his depression for roughly fifteen years using medication).

⁹⁸ See 29 C.F.R. § 1630.2(j)(1)(vi).

⁹⁹ See 42 U.S.C. § 12102(4)(E)(i).

for life activity when active.”¹⁰⁰ This has a natural applicability to PTSD as a condition with symptoms that are not necessarily constant but may afflict an individual as “attacks,” such as when triggering events cause the employee to reexperience the original trauma.

3. *The Regulations' Use in Litigation*

Despite the open question in *Sutton* of what deference the EEOC's new regulations will receive,¹⁰¹ the first court opinions under the new regime are now being issued. One of those opinions, *Kinney v. Century Services Corp. II*,¹⁰² suggests that the regulations have cemented PTSD as a per se disability in practice.¹⁰³

An August 2011 decision from the Southern District of Indiana, *Kinney* concerned a security guard who suffered from episodic bouts of depression beginning in 2008.¹⁰⁴ Following her termination, she brought suit under the ADA.¹⁰⁵ In its motion for summary judgment, the employer naturally raised the argument that had prevailed so many times prior to 2009: occasional bouts of depression are not a disability.¹⁰⁶ Relying on both the amended text of the ADA, and also invoking the EEOC regulations as “guidance”—a move that suggests that *Skidmore* analysis will continue to be employed until the Supreme Court says otherwise—the trial court concluded that episodic conditions were now covered.¹⁰⁷ The court then assumed for the sake of argument that the plaintiff was disabled.¹⁰⁸ That in and of itself would not be unusual if the court were going to grant summary judgment to the employer on another basis, but in *Kinney* the motion for summary judgment on the ADA claim was denied.¹⁰⁹ That outcome is in stark contrast to the frequent use of the threshold issue of disability to eliminate claims prior to 2009.¹¹⁰

PTSD plaintiffs, now covered by the Act as interpreted through the regulations, will therefore be entitled to reasonable accommodation. The attribution of PTSD to an impairment of brain function,

¹⁰⁰ 29 C.F.R. § 1630.2(j)(1)(vii).

¹⁰¹ See *supra* Part I.C.

¹⁰² *Kinney v. Century Servs. Corp. II*, No. 1:10-cv-00787-JMS-DML, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011).

¹⁰³ See *id.* at *10.

¹⁰⁴ See *id.* at *4, 10.

¹⁰⁵ See *id.* at *1.

¹⁰⁶ See *id.* at *10.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at *11.

¹⁰⁹ See *id.* at *15.

¹¹⁰ See *supra* Part I.C.

rather than just a particular behavior like “interacting with others,” makes litigating the issue of coverage inefficient for employers; there is little sense in attempting to rebut a physical trait with behavioral evidence, especially one that requires advanced medical testing.¹¹¹ In addressing one set of problems, however, the EEOC has contributed to some new ones: the rational, self-interested, and problematic reactions of employers that the next Section addresses.

B. The Problems in Compliance and the Litigation that Will Result

Because employees suffering from PTSD will be entitled to reasonable accommodations, employers will have to provide assistance that allows those afflicted to function in the workplace. This could manifest itself in a variety of ways that employers did not have to contemplate prior to the new regulations, such as insulating an employee from stimuli that tend to trigger “flashbacks” to the traumatic event.¹¹² Perhaps even more difficult for employers to address will be the problem of disentangling behavioral problems that cannot serve as a basis for termination, because they flow from the PTSD symptoms, from legitimate justifications for firing a PTSD patient.

Muddying the waters further is that PTSD patients—particularly veterans—are not necessarily interested in seeking treatment for their condition or discussing it with other people.¹¹³ This presents the problem of disability disclosure. Given that it is less expensive to avoid accommodating a disability, particularly one that implicates problems with social interaction and triggering events that radically alter the employee’s behavior, employers have a rational interest in not wanting to know about an employee’s PTSD. So long as the disorder is not disclosed or otherwise made known to the employer, the plaintiff cannot prevail on an intentional discrimination theory,¹¹⁴ furthering the employer’s goal of controlling its potential liability.

¹¹¹ See *supra* notes 36–37 (discussing cognitive science research).

¹¹² A larger problem that underlies any analysis of the employer’s options and behavior is the observation, established in the literature, that cost-averse employers will always rationally seek to avoid accommodating disabled employees, and would do so in the first instance by not hiring the disabled at all. For an updated comment on the costs of accommodation and conflicting empirical claims on that subject, see Carol J. Miller, *EEOC Reinforces Broad Interpretation of ADA Disability Qualification: But What Does “Substantially Limited” Mean?*, 76 *Mo. L. Rev.* 43, 73–77 (2011).

¹¹³ See *supra* Part I.B.

¹¹⁴ See, e.g., *Kozisek v. Cnty. of Seward*, 539 F.3d 930, 936 (8th Cir. 2008) (rejecting former county official’s PTSD disability theory because of lack of evidence that county superiors had any knowledge of his condition before deciding to terminate him).

To understand how these issues could easily arise within a single case, consider the following hypothetical. After returning from his final tour of duty in Afghanistan, X leaves the military with an honorable discharge and takes a job with an insurance company. He suffers from the traditional symptoms of PTSD: he sleeps poorly, feels persistently tense or hypervigilant, and overreacts to stress, becoming irritable or verbally hostile to those around him, often with little provocation. Like many veterans from Afghanistan and Iraq, he has not maintained a regular treatment schedule after being initially diagnosed with PTSD while still in the military.¹¹⁵

Here, the insurance company has a difficult choice. It can either do its best to never find out about X's PTSD, to the point of willful ignorance, or it can attempt to accommodate him by granting him a certain amount of leeway when it comes to his attitude, the amount of social interaction he has with others, and excusing tardiness when he is suffering from a lack of sleep. The first option undercuts a basic goal of the ADA, because it leaves X without reasonable accommodations to which he is entitled and forces him to work as though he is healthy. The second leaves the employer in the awkward position of having to accommodate a certain degree of conduct that would normally be grounds for denying someone a promotion or even termination. Should the employer terminate X following an angry outburst, the logic of cases like *Humphrey* and *Den Hartog* would condemn the act as discriminatory.¹¹⁶ And through all of this, there is no meaningful external incentive for X to seek treatment for his PTSD that might reduce his problems at work and thus also reduce the conflict between the goals of the ADA and the employer's self-interest.

By removing mitigating measures from the equation, as the amended ADA requires,¹¹⁷ yet also converting PTSD into a per se disability, the new regulations made a potential conflict in the statute more likely to occur in practice. Employers will not waste time and resources in litigation attempting to argue that PTSD is not a disability; instead they will now look to "business necessity" theories to defeat claims by PTSD plaintiffs.¹¹⁸

¹¹⁵ See *supra* Part I.B.

¹¹⁶ See *supra* Part I.D.

¹¹⁷ See 42 U.S.C. § 12102(4)(E) (Supp. II 2009).

¹¹⁸ In the interests of comity, it should be noted that others are making similar predictions. See Miller, *supra* note 112, at 74 ("Accommodations and defenses will be the new battleground for ADA-qualified employees.").

III. AMENDING THE REGULATIONS TO INCENTIVIZE TREATMENT AND PROVIDE EX ANTE CLARITY TO EMPLOYEES AND EMPLOYERS

The EEOC should alter its regulations because the unclear standard for how “business necessity” standards should operate in light of the regulations will provoke continuous litigation about the line between a disability and the conduct that flows directly from its symptoms. This Essay argues that the agency should alter the “business necessity” defense in the regulations that govern litigation itself, rather than in the generally applicable sections that define disability. Such an approach avoids the lingering uncertainty over how much deference reviewing courts should give to the EEOC’s interpretive judgments. An alternative approach that relies on judicial doctrine to sort out permissible and impermissible business necessity arguments would allow employers to dramatically undercut the regulations’ protections, thereby defeating the purpose of the Act. Such an approach must be rejected in favor of formal reform.

A. *Reforming the Regulations to Provide a Presumption Against the “Business Necessity” Defense When PTSD Plaintiffs Seek Treatment During Employment*

The effort to resolve the future litigation problems with PTSD-based ADA cases must necessarily address two questions: first, what leeway does the EEOC have to craft a regulatory solution that will be insulated from limiting judicial review, and second, how would such a rule protect employees without undercutting employers’ ability to maintain an orderly workplace? The answer to the first question lies in placing a rule within the regulatory power expressly granted by Congress to the EEOC alone, and the answer to the second requires a limit on the “business necessity” defense that also incentivizes employees to seek treatment for PTSD.

1. *The EEOC’s Ability to Shape Litigation Outcomes and the Question of Deference*

The Supreme Court in *Sutton* alluded to a distinction between different provisions of the ADA and whether they did or did not vest interpretive power in the EEOC.¹¹⁹ Federal appellate courts have continued to note the uncertainty as to what degree of deference the

¹¹⁹ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479–80 (1999); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984) (reserving controlling weight for regulations promulgated pursuant to express congressional delegation).

EEOC's regulations command, but the agency's ability to conclusively fill gaps in the definition of "disability" with *Chevron*-esque authority was strongly doubted.¹²⁰ Congress may have cured that structural problem, and replaced it with a new one: § 12205a of the statute now provides that all of the agencies who operate under the amended ADA's mandate—the EEOC, the Attorney General, and the Secretary of Transportation—have authority to promulgate regulations on the definition of disability.¹²¹ This may still not entitle the EEOC's conclusion about PTSD as a presumptive disability to *Chevron* deference, however, because under the D.C. Circuit's rule in *Rapaport v. United States Department of the Treasury, Office of Thrift Supervision*,¹²² when a single statutory provision has been delegated to multiple agencies for interpretation, no one agency's view is entitled to *Chevron* deference.¹²³ By its express terms, § 12205a does not distinguish among the three entities and appears to list all three as having the power to further interpret the general provisions of the amended Act. This multiple delegation throws the EEOC's illustrative use of PTSD as a presumptive disability into question.

When the EEOC's regulations are rooted in the employment subchapter of the ADA rather than in its general definitional provisions, however, appellate courts have considered the relevant interpretations to merit *Chevron*'s coverage.¹²⁴ This result will remain unchanged even if the general provisions now have a *Rapaport* (e.g., multiple agencies interpreting a single provision) problem. Assuming that proves to be the case, the regulations expanding on the definition of "disability"—including the provision quoted above that makes PTSD a presumptive disability—would be analyzed under *Skidmore*.

The *Skidmore* standard, which looks to, inter alia, the thoroughness of an agency's reasoning and the consistency of its interpretations

¹²⁰ See *Kellogg v. Energy Safety Servs. Inc.*, 544 F.3d 1121, 1125 n.1 (10th Cir. 2008) (noting that lack of a single delegation to a particular agency for the general provisions of the ADA has left it unclear what standard of deference should attach); see also *Albra v. Advan, Inc.*, 490 F.3d 826, 833 n.6 (11th Cir. 2007) (similarly concluding that *Chevron* deference would only be available to the regulations rooted in Title I of the ADA, but not the general provisions); *Jarvis v. Potter*, 500 F.3d 1113, 1121 (10th Cir. 2007); *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 762 n.7 (3d Cir. 2004) (raising a similar question).

¹²¹ See 42 U.S.C. § 12205a.

¹²² *Rapaport v. U.S. Dep't of the Treasury, Office of Thrift Supervision*, 59 F.3d 212 (D.C. Cir. 1995).

¹²³ See *id.* at 216.

¹²⁴ See, e.g., *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399–402 (2008); *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1215 & n.9 (11th Cir. 2010).

over time,¹²⁵ would most likely still leave the new regulations as persuasive authority. The regulations' alignment with the purpose of the amended ADA, coupled with the statutory bar to *Sutton's* analysis of mitigating measures, would continue to produce deferential analyses like the result in *Kinney*, detailed above.¹²⁶

If *Chevron* deference does attach to the EEOC's regulations relating to employment litigation claims and defenses found in Title I of the Act, then the agency retains a source of interpretive regulatory power to address the problem that is insulated from potentially corrosive judicial review. By amending the regulations—as a formal interpretation of the Act that its purposes are better served with a clearer “business necessity” defense standard—the EEOC could prevent the approaching conflict between workplace conduct standards, the accommodation needs of PTSD-afflicted employees, and the overbroad use of the business necessity defense.

2. *Altering the Employer Defenses Landscape to Disfavor “Business Necessity” Arguments When PTSD Plaintiffs Seek Treatment*

The additional rule should be inserted in 29 C.F.R. § 1630.15,¹²⁷ a regulation that stems from Title I of the Act and would thus be entitled to *Chevron* deference unless a reviewing court considered “business necessity” to have a fixed, plain meaning contrary to the agency's rule. This heightened standard for “business necessity” should read as follows:

(1) When an employee has obtained or is undergoing treatment or other mitigating measures for his or her mental health impairment, conduct which is directly caused by the impairment or treatment cannot serve as a criterion justifying adverse action within the definition of the “business necessity” unless such conduct substantially interferes with the internal operations of the employer.

(2) This restriction on the “business necessity” defense shall not extend to conduct which would qualify under the “direct threat” standard, nor shall it extend to conduct which is criminal in nature.

This rule would necessarily be a legal fiction, but a socially beneficial one. Treatment for PTSD does not guarantee that an employee

¹²⁵ *E.g.*, *Fed. Express Corp.*, 552 U.S. at 399.

¹²⁶ *See supra* notes 102–10 and accompanying text.

¹²⁷ 29 C.F.R. § 1630.15 (2011) (governing the defenses to allegations of discrimination).

will not behave erratically, but it plausibly reduces the likelihood that the behavior will continue unchecked or deteriorate without preventive medical action.¹²⁸ It depends upon an EEOC construction of “necessity” as rising above what the employer would consider simply efficient or preferable and links that to a substantiality requirement. This is to insulate plaintiffs from company policies along the lines of “withdrawn, emotionally distant office employees should generally not be promoted to supervisory positions because enthusiastic, motivated managers increase productivity,” or “employees are expected to be on time and responsive to requests by managers.” This approach has the benefit of preventing employers from invoking “business necessity” broadly against plaintiffs with PTSD as a way to replace the “lack of disability” argument that the new regime has foreclosed.

Perhaps the best feature of this approach is that the regulation would help both employees with PTSD and employers, by incentivizing employees to seek treatment and by encouraging employers to make more of an effort to accommodate employees who seek treatment.¹²⁹ At the same time, it withholds the benefit of the limited defense from employees who do not attempt to control their condition and behave erratically at work as a result. This regulation would also leave in place “direct threat” as a valid defense when it is appropriate to the circumstances and would provide employers a natural safe harbor when employee conduct is plausibly criminal, such as theft or assault. Of course, there is a very real downside that prior scholarship has examined: the possibility that this solution, coupled with the expanded coverage of the regulations now in place, will give employers a strong incentive to simply avoid hiring PTSD-afflicted candidates at all.¹³⁰ Of course, with a condition that is not always apparent to employers, this drawback to the proposal may not appear as often in

¹²⁸ Courses of treatment for PTSD are estimated by the Department of Veterans Affairs to run for months, if not years, and the agency’s prescribed approach combines therapy as well as medication. See *Treatment of PTSD*, DEP’T OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/public/pages/treatment-ptsd.asp> (last visited July 1, 2012).

¹²⁹ Such an effort by employers could include, for example, helping an employee with PTSD avoid stimuli that tend to trigger flashbacks to the original traumatic event.

¹³⁰ See Selmi, *supra* note 40, at 523 & n.6 (surveying scholarship on the disincentives that the ADA may have given employers to hire the disabled, with declining employment rates for the afflicted as a result). But even as Professor Selmi observes that hiring may have been negatively affected, he concludes that the economic data is tentative. *Id.* See generally Peter Blanck et al., *Calibrating the Impact of the ADA’s Employment Provisions*, 14 STAN. L. & POL’Y REV. 267 (2003). Even accepting the possibility that robust protection for the disabled harms their employment prospects, this Essay follows the premise that clear rules for employers *ex ante* are nonetheless generally preferable to rules explained via *ad hoc* litigation.

practice as a regulation that applied to an obvious physical ailment would.

To mitigate that concern, the rule only applies to “internal” operations, because companies have a legitimate argument that erratic behavior in the presence of outside parties, such as prospective clients, would threaten a demonstrable business necessity in a way that demanding punctuality or a pleasant attitude would not. The use of the “business necessity” argument is more likely to be a general attempt at creating criteria that foreclose ADA claims when there is less of a clear operational need for the company’s standard.

B. An Expansive Construction of “Business Necessity” by the Courts Should Be Rejected as Contrary to the Purpose of the Amended ADA

A possible alternative, although ultimately an unsatisfactory one, would be to look to the federal judiciary to provide a new construction of “business necessity” that implicitly accepts that all employers have a business necessity in evaluating the attitudes and behaviors of their employees but then continues with limited exceptions for conduct directly caused by a disability, like those constructions developed by the Ninth and Tenth Circuits.¹³¹

A case-by-case vision of business necessity in mental health ADA litigation would cover forms of misconduct or poor performance that fall short of the “direct threat” standard, but judicially crafted distinctions between protected and unprotected conduct could prove unpredictable. A judicial solution would likely exacerbate the potential conflicts over PTSD-disability cases and provide incentives to employers to litigate in hopes of narrowing or eliminating an apparent exception for ADA claims rooted in PTSD. This would also reduce incentives for PTSD plaintiffs to seek reasonable accommodation, knowing that the employer, once made aware of their condition, could terminate them based on evaluations of attitude or mood and rely on a straightforward business necessity defense. Or plaintiffs could aggressively sue in hopes of achieving an outcome where a court found their conduct to be sufficiently intertwined with their condition. Either way, PTSD patients would have the same incentive, or lack thereof, to seek treatment as they do presently, but would find themselves losing in court on the basis of “business necessity” rather than a

¹³¹ See *supra* Part I.D.

lack of a cognizable disability, and the dockets of the federal judiciary would be that much more full while the courts sorted out a standard.

Though this approach would simplify employer-employee relations for obvious cases, the benefits come at the expense of the disabled employee, the intended beneficiary of the Act and the regulations,¹³² and ultimately impose added litigation costs on society. Accordingly, relying purely on the existing text and the interpretive assistance of the courts must be rejected as an insufficient approach. It is a more modest solution than the one proposed above, but it is also less just if one accepts the proposition that a PTSD patient has a reduced ability to control his or her emotions and behavior, a proposition inherent in the idea of a mental health disorder as a physical disability under the EEOC's ADA regulations. A direct regulatory solution is therefore preferable.

CONCLUSION

Ultimately, the EEOC will need to address the inherent conflict between deference to employer standards under a "business necessity" rubric and the difficulty inherent in separating a disability from its symptoms. In order to further the ADAAA's mandate, the agency will need to limit employers' ability to single out individuals with PTSD and similar disorders, and this will require protecting certain forms of non-dangerous, but nonetheless erratic, conduct. Linking that protection to the pursuit of treatment will both help employees with PTSD mitigate their symptoms and give employers the peaceful workplaces their policies aim to preserve.

¹³² See *supra* Part I.A.