NOTE

GENETIC PREDISPOSITIONS V. PRESENT DISABILITIES: WHY GENETICALLY PREDISPOSED ASYMPTOMATIC INDIVIDUALS ARE NOT PROTECTED BY THE AMENDED ADA

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Sitting in the medical office Mr. and Mrs. Freeman listened to the geneticist describe their unborn second child: "I have taken the liberty of eradicating any potentially prejudicial conditions: premature baldness, myopia, alcoholism and . . . obesity." In the movie Gattaca,[1] Vincent, the eldest Freeman child, was born with a genetic predisposition for a congenital heart condition. The likelihood of manifestation was one in one-hundred. At birth his occupational future was sealed; he was doomed to a life of menial jobs. The film's hero, however, defies his genetic destiny and becomes a Gattaca astronaut. This twist of fate was made possible by Jerome Morrow, a genetically engineered individual – one of the elite "valids." Nevertheless, chance is beyond the scope of genetic manipulation and Jerome fractured his spine, leaving him permanently disabled. While Vincent could fool society, Jerome could not. He was forced to "rent" his identity in order to make a living. Although individuals may be subject to both disability discrimination and genetic discrimination, the two forms of persecution are very distinct and deserve different protections under the eyes of the law.

I. INTRODUCTION

Genetic discrimination occurs when an individual is treated prejudicially based on "real or perceived differences from the 'normal' genotype."[2] Genetic testing can reveal genetic markers in asymptomatic individuals indicative of certain diseases.[3] These tests, however, do not necessarily reveal the severity of the diseases,[4] or if they will ever even manifest.[5] Asymptomatic individuals with genetic predispositions for certain illnesses are not protected from workplace discrimination according to the Americans with Disabilities Act ("ADA")[6] or the ADA Amendments Act of 2008 ("ADAAA").[7] This note will demonstrate that extending protection under the amended ADA to asymptomatic individuals with genetic predispositions to various illnesses would not only exceed the intended purpose of the federal statute, but also

[1] GATTACA (Columbia 1997).

[2] Paul R. Billings et al., *Discrimination as a Consequence of Genetic Testing*, 50 AM. J. HUM. GENETICS 476, 477 (1992).

[3] GEMOMICS.ENERGY.GOV, HUMAN GENOME PROJECT INFORMATION: GENE TESTING, http://www.ornl.gov/sci/techresources/Human_Genome/medicine/genetest.shtml (last visited Jan. 4, 2009).

[4] *See, e.g.*, Charles B. Gurd, *Whether a Genetic Defect Is a Disability Under the Americans with Disabilities Act: Preventing Genetic Discrimination by Employers*, 1 ANNALS HEALTH L. 107, 112-13 (1992).

[5] *See* Frances H. Miller & Philip A. Huvos, *Genetic Blueprints, Employer Cost-Cutting, and the Americans with Disabilities Act*, 46 ADMIN. L. REV. 369, 371-72 (1994).

[6] Americans with Disabilities Act, 42 U.S.C. § 12111-17 (2006) (amended 2008).

[7] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

curtail the law's intended effect.

The ADA calls for special treatment towards qualified disabled individuals.[8] Under this law, employers must make reasonable accommodations to enable disabled individuals to minimize their handicap.[9] Employing multiple individuals who currently, or may in the future, require special accommodations could result in accumulating additional financial expenses that employers prefer to avoid.[10] Theoretically, these potential expenses and accommodations are manageable for employers on a small scale. If ADA protections were expanded to include predisposed asymptomatic individuals, presently disabled persons would be forced to compete with these asymptomatic individuals for limited resources. Including predisposed asymptomatic individuals under the protections of the ADA would also create new public policy problems and place employers at risk of unprecedented tort liabilities. It is arguable that genetic discrimination in the workplace was not an impending concern when the ADA was enacted. Although genetic testing has since grown in popularity, the new 2008 ADAAA still does not specifically include asymptomatic individuals in its definition of a disabled person.[11]

This note argues that including these individuals under the umbrella of protections expressed in the amended ADA would substantially alter Congress' intended goal of antidiscrimination for functionally disabled persons in the workplace. Part II of this note describes the use and impact of genetic testing in the employment arena. Part III outlines the statutory language of the Americans with Disabilities Act of 1990 and the subsequent statutory interpretations by the Equal Employment Opportunity Commission ("EEOC") and Supreme Court. Part III further discusses the ADA Amendments Act of 2008, which restored the statutory standard initially designed by Congress after the Supreme Court issued a series of decisions that undercut the legal protections intended under the ADA. This section also purports that, despite the arguments made for the inclusion of predisposed asymptomatic individuals as a protected class under both of these pieces of legislation, they were never, nor should they be afforded the protections of the statute. Finally, Part IV explains the potential consequences of interpreting the Amended ADA to include predisposed asymptomatic individuals.

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[8] *ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the H. Comm. on Ed. and Labor*, 110th Cong. (2008) (statement of David K. Fram, Esq., Director, ADA & EEO Services, National Employment Law Institute).

[9] 42 U.S.C. § 12111.

[10] *See* Mark A. Rothstein, *Genetics and the Work Force of the Next Hundred Years*, 2000 COLUM. BUS. L. REV. 371, 390 (2000) (arguing employers have "a strong economic incentive to screen out perceived future high cost users of health care").

[11] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

II. GENETIC TESTING IN THE EMPLOYMENT ARENA

A. The Science of Genetic Testing

Deoxyribonucleic acid ("DNA") is a chemical that contains biological instructions for a living organism.[12] Three percent of human DNA is made up of genes.[13] These genes contain blueprints for building specific proteins that "provide the structural components of all cells and tissues as well as specialized enzymes for all essential chemical reactions."[14] The directions stored in DNA are mapped through combinations of different base pairs,[15] a misordering of which may result in a mutation.[16] Sometimes a mutation can be harmless, but other times it will result in the production of faulty proteins, causing certain diseases.[17] To date, at least 4,000 diseases are traced to a single genetic mutation, including cystic fibrosis, sickle cell anemia, and Tay Sachs disease.[18] Other diseases are caused by multiple mutations, sometimes in conjunction with external factors such as diet and other lifestyle choices.[19]

Genetic testing requires examination of an individual's DNA,[20] which may be taken from a blood cell, bodily fluid, or tissue.[21] Diseases can be identified through specific genetic abnormalities associated with the condition.[22] Genetic tests can also identify markers revealing a predisposition to a disease that has yet to manifest itself.[23] These identifiable markers contained in the medical records of presently healthy individuals' can brand them with a diagnosis that follows them throughout their lives.

B. Benefits of Genetic Testing

Genetic tests enable doctors to predict an individual's susceptibility to developing certain illnesses. Genetic tests are also used for carrier screening, preimplantation genetic diagnosis, prenatal diagnostic testing, newborn screening, presymptomatic tests for eliminating the risk of developing adult-

[12] *See* Denise K. Casey, *Genes, Dreams and Reality: The Promises and Risks of the New Genetics*, 83 JUDICATURE 105, 107 (1999).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See id.*

[17] *Id.*

[18] *Id.*

[19] *See id.*

[20] *See id.* at 108.

[21] *See id.*

[22] *Id.*

[23] *See id.*

onset cancers and Alzheimer's disease, and forensic/identity testing.[24] For the purposes of this note, only the use of genetic testing to provide warning for asymptomatic predisposed individuals is addressed. Testing of this kind entails identifying a genetic marker, which provides information about the risk of developing a specific disease.[25] The genetic marker for Huntington's disease, for instance, ensures its eventual manifestation, although it does not reveal when and how rapidly symptoms will progress.[26] Alternatively, the markers for hereditary breast cancer identify a risk, which may or may not result in the development of breast cancer.[27] The onset of breast cancer depends on additional risk factors such as family history, lifestyle, and age at first pregnancy.[28]

The discovery of certain disease markers through genetic testing is beneficial because individuals may have the opportunity to take preventative action. Awareness of predisposition enables individuals to obtain necessary medical screening tests.[29] Frequent screening results in early detection, preventing severe or even fatal consequences.[30] In one study targeting women with a breast cancer-related genetic mutation, 27.3 percent chose to undergo a contralateral prophylactic mastectomy after being diagnosed with unilateral breast cancer.[31] Awareness of certain predispositions might also lead individuals to make healthier lifestyle choices to prevent onset or manifestation of an illness, including dietary modifications and regular exercise.[32] There are also specific treatments to prevent the onset of certain diseases. For example,

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[24] *See* HUMAN GENOME PROJECT INFORMATION: GENE TESTING, *supra* note 3.

[25] Paul S. Miller, *Genetic Discrimination in the Workplace*, 26 J.L. MED. & ETHICS 189, 189 (1998).

[26] *See* Susannah Carr, *Invisible Actors: Genetic Testing and Genetic Discrimination in the Workplace*, 30 U. ARK. LITTLE ROCK L. REV. 1, 3-4 (2007) (citing Sky Dawson et al., *Living with Huntington's Disease: Need for Supportive Care*, NURSING & HEALTH SCI., June 2004 at 123-30).

[27] *Id.* at 4 (citing Thomas C. Rosenthal & Stirling M. Puck, *Screening for Genetic Risk of Breast Cancer*, 59 AM. FAM. PHYSICIAN 99, 100 (1999)).

[28] *See id*.

[29] Casey, *supra* note 12, at 108.

[30] *See, e.g, id.* ("[L]ives have been saved through testing for the mutated gene linked to FAP and aggressive monitoring for early removal of colon growths or even the entire colon.").

[31] Kelly A. Metcalfe et al., *Predictors of Contralateral Prophylactic Mastectomy in Women with BRCA1 or BRCA2 Mutation: The Hereditary Breast Cancer Study Group*, 26 J. OF CLINICAL ONCOLOGY 1093, 1093-97 (2008).

[32] *See, e.g.*, Deborah Gridley, *Genetic Testing Under the ADA: A Case for the Protection from Employment Discrimination*, 89 GEO. L.J. 973, 977 (2001) ("Knowledge of a predisposition toward heart disease may prompt a person to modify her diet and lifestyle.").

pituitary dwarfism is preventable through the use of human growth factor.[33] While there are several benefits to genetic testing, there are also negative ramifications.

C. Concerns Regarding Genetic Testing in the Employment Arena

Though little data is available proving the true frequency of genetic discrimination, the possibility is a major concern for employees.[34] According to a 2004 survey conducted by Cogent Research, eighty-five percent of the participants believed employers would engage in genetic discrimination absent government legislation protecting genetic information.[35] Employers are entitled to genetic information in an employee's medical file for health insurance claims if the company self-insures or for voluntary health and wellness programs.[36] Thus, if a worker chooses to seek genetic counseling independently, employers may legally have access to these non-employment related test results.[37] Some workers fear genetic test results will prompt employers to either fire or refuse to hire them in order to lower insurance and sick leave expenses.[38] Employees also worry employers will impose restraints such as limiting employees to certain positions with little room for promotion on the basis of genetic data.[39] These uncertainties may even prevent individuals from seeking genetic testing to avoid employers obtaining the results, regardless of the possibility that the test might be life prolonging or saving.[40]

Alternatively, employers may directly require genetic testing for potential employees. Under the ADA, an employer cannot conduct any medical inquiries or medical exams *before* making an employment offer,[41] with the exception of questions directly linked to the individual's ability to perform job-related functions.[42] This limits employers from directly inquiring about the existence of a disability or its severity.[43] Congress designed this protection to prevent the historical employment practice of unjustly excluding applicants

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[33] Gurd, *supra* note 4, at 112.

[34] Miller, *supra* note 25, at 189.

[35] *Protecting Workers from Genetic Discrimination*: *Hearing Before the Comm. on Ed. and Labor*, 110th Cong. (2007).

[36] *Id.*

[37] Miller & Huvos, *supra* note 5, at 381.

[38] *See* Carr, *supra* note 26, at 4.

[39] *Id.*

[40] Miller, *supra* note 25, at 190.

[41] 42 U.S.C. § 12112(d)(2)(A) (2006).

[42] 42 U.S.C. § 12112(d)(2)(B).

[43] 42 U.S.C. § 12112(d)(2)(A).

from consideration based on medical information discovered during initial interviews, regardless of the applicant's relevant qualifications for the position.[44] Yet, the ADA permits a conditional job offer pending satisfactory results of medical examinations.[45] These examinations "need not be job-related and may be as comprehensive as the employer wants, regardless of the job in question or the individual's medical history."[46] Despite unfavorable examination results, however, an employer still may not rescind a job offer based on disability alone, unless "the disability impairs job fitness and reasonable accommodation would create undue hardship for the business . . . ."[47] Once an individual is officially hired, any additional required medical investigations must be work related.[48] Nonetheless, employers "may conduct [non-work related] voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at their work site."[49]

Employer review of medical history and medical testing is not an uncommon practice. A 2004 American Management Association survey revealed that certain companies were running genetic tests on their employees for "risk of breast and colon cancer, Huntington's disease and susceptibility to workplace hazards."[50] Additionally, of the companies surveyed, one out of every six employers examined the family medical histories of its employees.[51] This survey also revealed that genetic test results for susceptibility to workplace hazards were a factor in over half of the companies' employment decisions.[52]

The law affords employers a multitude of opportunities to obtain employees' medical records creating a legitimate risk of discrimination. The risk of workplace discrimination is further heightened by the stereotypes surrounding disabled individuals. Disabled persons are often denied the most coveted employment positions – those "with substantial responsibility, income, and benefits."[53] To foster equal opportunity for individuals with presently manifested disabilities, Congress enacted the ADA.

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[44] S. REP. NO. 116, 101st Cong., 2d Sess. 2, 39 (1989).

[45] 42 U.S.C. § 12112(d)(2).

[46] Rothstein, *supra* note 10, at 386.

[47] Miller & Huvos, *supra* note 5, at 379.

[48] 42 U.S.C. § 12112(d)(4)(B) (2006).

[49] *Id.*

[50] Carr, *supra* note 26, at 2 (citing American Management Association, *AMA 2004 Workplace Testing Survey: Medical Testing* (2004)).

[51] *Id.*

[52] *Id.* at 3.

[53] Peter Blanck et al., *Employment of People with Disabilities: Twenty-Five Years Back and Ahead*, 25 LAW & INEQ. 323, 330 (2007).

III. ANTI-DISCRIMINATION LAW

A. The Americans with Disabilities Act

The employment antidiscrimination movement took legal shape in 1963 with the Equal Pay Act.[54] Its purpose was to protect men and women performing equal work from receiving unequal pay.[55] Shortly thereafter, Congress enacted Title VII of the Civil Rights Act of 1964, prohibiting employment discrimination based on race, color, religion, sex or national origin.[56] Three years later the Age Discrimination in Employment Act passed, protecting individuals age forty and older from workplace discrimination.[57] Still, it was not until 1990 that Congress acknowledged the legal right of employment free from discrimination for the forty-three million Americans suffering from physical or mental disabilities through the passage of the ADA.[58] Prior to the ADA, disabled individuals faced substantial challenges when integrating into the employment arena. Employers had the right to make hiring and other employment decisions on the basis of potential employees' physical or psychological disabilities.[59]

With the enactment of the ADA, Congress recognized that "unnecessary discrimination denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous."[60] Under the ADA, disability discrimination may not occur in employment arenas, including the job application process, hiring, promotion, termination of employment, compensation or training.[61] Discriminatory behaviors also include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless . . . the accommodation would impose an undue hardship on the operation of the business . . . ."[62] The statutory regulations are heavily based

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[54] Equal Pay Act, 29 U.S.C. § 206(d) (2006).

[55] 29 U.S.C. § 206(d)(1).

[56] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (2006).

[57] Age Discrimination in Employment Act, 29 U.S.C. § 621 (2006).

[58] 42 U.S.C. § 12101(a)(1) (2000) ("[S]ome 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.").

[59] *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 (2008).

[60] 42 U.S.C. § 12101(a)(9).

[61] 42 U.S.C. § 12112(a) (2006).

[62] 42 U.S.C. § 12112(b)(5)(A).

on the language of the Rehabilitation Act of 1973,[63] which prohibited federally funded programs from practicing disability discrimination.[64]

The ADA applies to employers who daily have at least fifteen employees working a minimum of twenty weeks a year.[65] A prima facie discrimination case under the ADA requires that a plaintiff prove: "(1) she has a disability; (2) she is otherwise qualified for employment or the benefit in question; and (3) she was excluded from employment or benefit due to discrimination solely on the basis of the disability."[66] The ADA is a unique antidiscrimination statute because unlike the clearly defined protected categories of race, sex or age, to meet the criteria for its protections an individual must demonstrate that they "qualif[y] as disabled."[67] The statute defines disability by using three prongs. A disabled person must have:

(1) a physical or mental impairment that *substantially* limits one or more of the major life activities of the individual;
(2) a record of such an impairment; or
(3) is regarded as having such an impairment.[68]

To fall under the umbrella of protections the ADA affords, an individual only needs to satisfy one of the requirements.[69] Predisposed asymptomatic individuals do not fall under any of these prongs.

1. Prong One: Physical or Mental Impairment Substantially Limiting a Major Life Activity

Conceptually, the design of prong one emphasizes the limitations of impaired individuals whose performance of a major life activity is restricted in comparison to healthy individuals.[70] The "major life activity" standard supports Congress' intent to exclude individuals with minor impairments from protection under the ADA.[71] The term "physical or mental impairment," borrowed from the Rehabilitation Act, is defined as "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of [several] body systems, . . . or (B) any mental or psychological

[63] Selmi, *supra* note 59, at 526.

[64] 29 U.S.C. § 705(20)(B) (2000).

[65] 42 U.S.C. § 12111(5)(A) (2006).

[66] Gridley, *supra* note 32, at 982 (citing 42 U.S.C. § 12132 (2000)).

[67] *See* Selmi, *supra* note 59, at 529.

[68] *See* 42 U.S.C. § 12102(2) (2006).

[69] *See id.*

[70] *See* S. REP. NO. 101-116, at 23 (1989); H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 334.

[71] *See id.* ("Persons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity.").

disorder . . . ."[72] The appendix to the regulations excludes normal physical characteristics such as eye color or height.[73] Also absent from the statute are predispositions to illness or disease.[74]

According to the Senate and House Education and Labor Committee Reports, "major life activities [include] functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[75] The Supreme Court supported and expanded this list to include reproduction[76] and other "activities that are of central importance to most people's daily lives."[77] Under prong one, it is not enough only to have an impairment hindering normal performance of major life activities; an individual's limitation must be *substantial*. Three factors used in making this 'substantial' determination are: (1) "the nature and severity of the impairment;" (2) "the duration or expected duration of the impairment;" and (3) "the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[78]

A genetically predisposed asymptomatic individual would not satisfy the requirements of prong one to receive ADA protections. One could argue that major life activities may be limited when asymptomatic individuals implement preventative measures to prolong the potential onset of disease. If measures do exist to prevent the onset of a disease, however, they are usually unlikely to be so involved as to interfere with major life activities. For example, if an individual is predisposed to skin cancer, preventative measures would include limiting sun exposure. Even more severe measures such as prophylactic mastectomies would only temporarily interfere with an individual's activities of daily living. Often, preventative measures include frequent medical screening and adopting a healthy lifestyle – none of which satisfy the requirements of prong one. Should a preventative measure be so invasive as to permanently impair a major life activity, the individual essentially chooses to disable him or herself and should not be afforded the same protections as individuals with disabilities beyond their control.

Moreover, under a strict interpretation of the statutory language, the federal code does not include characteristic predispositions to illness in the definition

[72] 34 C.F.R. § 104.3(j)(2)(i) (2008).

[73] *See id.;* S. REP. NO. 101-116, at 22; H.R. REP. NO. 101-485, pt. 2, at 52.

[74] *See* 29 C.F.R. § 1630.2(h) (2008).

[75] S. REP. NO. 101-116, at 22; H.R. REP. NO. 101-485, pt. 2, at 52.

[76] Bragdon v. Abbott, 524 U.S. 624, 624 (1998) (holding that a presymptomatic HIV infection substantially limits the major life activity of reproduction).

[77] Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002); *see*, e.g., Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563 (1999), PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

[78] 29 C.F.R. § 1630.2(j)(2).

of impairment.[79] Even assuming, *arguendo*, a genetic abnormality does constitute a physiological impairment, the classification of disabled is based on the *effect* the disability has on the individual's everyday life.[80] By definition, asymptomatic individuals exhibit no physical symptoms of the disease. A physiological mutation with no manifesting symptoms cannot interfere with one's activities of daily living. Normal functioning would only be problematic if the disease manifested, in which case the individual would be presently disabled, and the traditional prong one analysis would apply.

Furthermore, the congressional reports addressing the protections afforded under prong one do not even discuss including asymptomatic individuals under the provision. One House Committee report mentions that the ADA extends protection to individuals with HIV, including asymptomatic infections.[81] Yet, this inclusion cannot be superimposed on genetically predisposed asymptomatic individuals because a genetic mutation only represents a possibility of manifestation, whereas individuals infected with HIV undoubtedly have the disease. When a person becomes infected with HIV, he or she often develops acute retroviral syndrome within weeks of infection.[82] Symptoms include abdominal pain, fever, headache, skin rash, muscle aches, joint pain, and weight loss.[83] Though these symptoms subside within two to three weeks of infection, the HIV virus is still multiplying within the individual's body.[84] Therefore, although an infected person may appear to be "asymptomatic," the infection is still spreading and cannot be compared to a genetic mutation that has yet to create any internal or external abnormalities. Additionally, some argue that certain members of Congress referenced protecting individuals discriminated against on the basis of sickle cell genetic testing popular during the 1970s.[85] Few congressmen, however, expressed this concern about protecting carriers of sickle cell anemia.[86] Moreover, Congress only votes on bills in their proposed form, and nowhere in the ADA is there a single mention of protection from discrimination based on genetic testing. If extending the protections of the ADA to prevent genetic discrimination was in line with the goals of the ADA, Congress would have added such a provision

[79] *See* 29 C.F.R § 1630.2(h).

[80] *See* 29 C.F.R. § 1630.2(j).

[81] 136 CONG. REC. 17,289 (1990) (Rep. Owens stating that protections of ADA should be made applicable to individuals discriminated against due to results of genetic testing).

[82] WebMD.com, Human Immunodeficiency Virus (HIV) Infection – Symptoms, http://www.webmd.com/hiv-aids/tc/human-immunodeficiency-virus-hiv-infection-symptoms (last visited October 17, 2009).

[83] *Id.*

[84] *Id.*

[85] *See* 136 CONG. REC. 17, 290.

[86] *Id.*

to the statute.

2. Prong Two: Has a Record of Such Impairment

While prong one protects individuals substantially limited in their activities of daily living, prong two protects individuals who have "a history of, or ha[ve] been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."[87] Usually, individuals qualifying for ADA protection under the second prong are those who are misdiagnosed or recovered from a disease or illness. Some argue asymptomatic individuals could qualify on the grounds that they have a record of future impairment,[88] but this argument holds little weight considering the statutory language uses the word "history," which is commonly defined as "events of the past."[89] Additionally, being genetically predisposed to an illness does not necessarily lead to definite manifestation and such an individual would never have any record of impairment. For these reasons, asymptomatic individuals are not protected under prong two of the ADA.

3. Prong Three: Is Regarded as Having Such an Impairment

Of all the prongs, prong three would be the most likely to include predisposed asymptomatic individuals. Prong three, deemed a "catch-all provision," protects individuals who are only regarded as disabled.[90] Under the ADA, an individual is "regarded as having a physical or mental impairment" if they have:

> (1) a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) 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) none of the [previously listed] impairments . . . but [are] treated by a covered entity as having a substantially limiting impairment.[91]

According to this language, individuals who are considered disabled, regardless of their actual physical or mental condition, are protected by the ADA. The validity behind the perception is irrelevant.[92] Essentially, this

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[87] 29 C.F.R. § 1630.2(k) (2006).

[88] *See* Gridley, *supra* note 32, at 988.

[89] *See* Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/history (last visited Jan. 10, 2008).

[90] Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 609-11 (1997).

[91] 29 C.F.R. § 1630.2(1) (2006).

[92] *See* Nat'l Council on Disability, Policy Brief Series: Righting the ADA, No. 13, *The*

prong also shields individuals from discrimination who suffer from a manageable condition excluded under prong one.[93] Such manageable diseases include diabetes or epilepsy.

This is the prong asymptomatic individuals would most likely be included under because the targeted person does not actually have to be disabled; just considered disabled. Even here, however, individuals with genetic predispositions will not meet the requirements necessary to be covered under the ADA. It has been argued that "an employer who denies a person a job based on that person's genetic marker does regard that person as disabled, because the employer regards the individual as unemployable in general . . . due to the increased cost that such employment would entail."[94] Employers discriminate against asymptomatic individuals with genetic predispositions to protect themselves from possible financial burdens in the future.[95] If the employee is asymptomatic, the employee would likely not create any immediate additional financial expenses. Therefore, employers do not actually believe the employees are *currently* limited in their ability to perform their jobs.[96] Rather, they are acting out of concern for future expenses.[97] To satisfy the requirements of prong three, the individual must be regarded as *presently* disabled.[98] If an individual was presently impaired and no reasonable accommodation was possible, an employer could simply argue the employee was unfit to perform their job and terminate his or her employment without legal consequence.[99] Hence, it does not seem prong three offers any real protection to individuals on the basis of genetic discrimination.

Supreme Court's ADA Decisions Regarding Substantial Limitation of Major Life Activities, (Apr. 29, 2003), *available at* http://www.ncd.gov/newsroom/publications/2003/limitation.htm.

[93] *See* S. REP. NO. 101-116, at 24 (1989).

[94] Gridley, *supra* note 32, at 992.

[95] Rothstein, *supra* note 10, at 389-90.

[96] Mark S. Dichter & Sarah E. Sutor, *The New Genetic Age: Do Our Genes Make Us Disabled Individuals Under the Americans with Disabilities Act?* 42 VILL. L. REV. 613, 627 (1997).

[97] *See id.*

[98] *Id.* at 627-28 ("It is not enough that an employer knows, or even acts, on the basis of an individual's impairment if the employer believes that the employee is presently able to perform major life activities. The reasoning employed in these decisions may be extended to encompass situations where the employer knows about a person's genetic abnormality, but perceives the individual as presently capable of performing his or her job.").

[99] 42 U.S.C. § 12112(5)(a) (2006) (under the ADA, an employer is not required to hire an unqualified individual or make accommodations for disabled individuals if "the accommodation would impose an undue hardship").

B. The Equal Employment Opportunity Commission Interpretation

The Equal Employment Opportunity Commission, which is the federal agency that interprets and enforces the provisions of the ADA, insists the statute should be interpreted to include protections against genetic discrimination.[100] As part of its responsibility to enforce the ADA's provisions, the EEOC adopted certain policies designed to clarify statutory ambiguities. While EEOC policy does not mention the possibility of including asymptomatic individuals under prong two of the ADA,[101] individuals with certain genetic conditions can be covered, according to its interpretation, under prongs one and three.[102]

The EEOC guidelines addressing prong one of the ADA specify that, because some genetic mutations can be passed from parent to child, the life activity of reproduction is substantially restricted.[103] Other major life activities under the EEOC policy include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[104] These guidelines exclude individuals predisposed to developing illnesses or diseases resulting from "environmental, economic, cultural or social conditions."[105] As mentioned earlier, a predisposed asymptomatic individual has no manifesting symptoms and therefore no physical interference with major life activities.

Prong three is interpreted by the EEOC to be the most inclusive prong in terms of genetic discrimination. It asserts that, because an employer discriminates against someone with a genetic mutation, they are "regarded as" having a disability that substantially limits the major life activity of working.[106] This argument is based on a circular line of reasoning and is consequently flawed.

In addition, the EEOC guidelines are not legally binding.[107] The Supreme Court failed to enforce the ADA in accordance with these guidelines and produced a line of cases that significantly narrowed the scope of protections intended under the ADA.

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[100] Regarded as Having a Substantially Limiting Impairment, 2 EEOC Compliance Manual § 902.8(a) (2000).

[101] Gridley, *supra* note 32, at 988.

[102] *See* Exec. Order Prohibiting Genetic Discrimination in Federal Employment, 3 EEOC Compliance Manual (BNA) No. 262, at N:2381-90 (July 26, 2000).

[103] *Id.*

[104] Gridley, *supra* note 32, at 983 (quoting 29 C.F.R. § 1630.2(i)).

[105] EEOC Definition of the Term "Disability," 2 EEOC Compliance Manual (BNA) No. 198, at 902.2(c)(2) (Mar. 1995).

[106] Miller, *supra* note 25, at 191.

[107] *Id.* at 191.

C. Case Law

A chain of Supreme Court decisions severely curtailed the scope of the ADA by narrowly interpreting the statutory language. These stringent interpretations of the ADA contribute to the low federal court success rate of disability discrimination complaints.[108] The Supreme Court failed to interpret the statute in the manner Congress intended. According to the law of statutory interpretation, a court must interpret a statute in such a way that "effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[109] Courts are also required to "give effect to the text Congress enacted" and not "rewrite [a] statute to reflect a meaning [judges] deem more desirable."[110] To accomplish this, courts may look to legislative history when faced with ambiguous statutory text.[111] A court may not look to legislative history when "the meaning of [the statutory] text is plain and unambiguous."[112] In *Sutton v. United Air Lines* and *Toyota Motor Manufacturing, Inc. v. Williams*, the Supreme Court disregarded the collective statutory text, legislative history and EEOC policy, imposing instead a narrower interpretation of the ADA not intended by Congress.[113]

In *Sutton v. United Air Lines*, twin sisters seeking employment at United Air Lines as commuter pilots brought a case against the airline under the ADA after both sisters were denied promotions.[114] The sisters failed to meet the airline's required uncorrected vision standard due to severe myopia.[115] They claimed that regardless of whether they qualified as disabled under ADA language, United Air Lines regarded them as disabled because the airline behaved as though their eyesight created a substantial limitation.[116] The sisters insisted that, as a reasonable accommodation, United Air Lines should permit them to wear corrective lenses.[117]

Taking a step back from the sisters' specific predicament, the Supreme

[108] Selmi, *supra* note 59, at 523 (citing Ruth Colker, The American with Disabilities Act: A Windfall for Defendants, 34 HARV. C.R.-C.L. L. REV. 99, 99-103 (1999) and The Disability Pendulum: The First Decade of the Americans with Disabilities Act, 69-95 (2005)).

[109] Hibbs v. Winn, 542 U.S. 88, 101 (2004) (quoting Norman J. Singer, Sutherland Statutes and Statutory Construction § 46:06 (rev. 6th ed. 2000)).

[110] Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 228 (2008).

[111] Negonsott v. Samuels, 507 U.S. 99, 106-09 (1993); United States v. R.L.C., 503 U.S. 291, 298-305 (1992).

[112] Whitfield v. United States, 543 U.S 209, 215 (2005).

[113] Selmi, *supra* note 59, at 554-55.

[114] Sutton v. United Air Lines, Inc., 527 U.S. 471, 475-76 (1999).

[115] *Id.* at 476.

[116] *Id.*

[117] *Id.*

Court emphasized that, based on verb tense in the statute, to demonstrate a disability an individual must be "presently – not potentially or hypothetically – substantially limited in a major life activity."[118] Focusing on the factual circumstances of the case, the Court rejected the notion that an employer's belief an individual is incapable of performing a specific job is "regard[ing them] as substantially limited in the major life activity of working."[119] Concerned with over-expanding the argument, the Court asserted:

> It is not enough to say that if the physical criteria of a single employer were *imputed* to all similar employers one would be regarded as substantially limited in the major life activity of working *only as a result of this imputation*. An otherwise valid job requirement, such as a height requirement, does not become invalid simply because it *would* limit a person's employment opportunities in a substantial way *if* it were adopted by a substantial number of employers.[120]

The Court claimed that it is perfectly acceptable for employers to "prefer some physical attributes over others, so long as those attributes do not rise to the level of substantially limiting impairments."[121] Additionally, the Court concluded that prong three claims will "arise when an employer *mistakenly* believes that an individual has a substantially limiting impairment."[122] The holding in this case blatantly contradicts Congress' intention of increasing employment opportunities for disabled individuals by allowing employers to "prefer some physical attributes over others."[123] Moreover, the Court wrongly interpreted prong three to only apply to mistaken employer beliefs concerning an employee. Under the original ADA, the validity behind an employer's decision to regard an employee as disabled was irrelevant.[124]

The Supreme Court continued to narrowly interpret the scope of the ADA in *Toyota Motor Manufacturing, Inc. v. Williams*.[125] Respondent Ella Williams suffered several injuries to her hands, arms and wrists including carpal tunnel syndrome and bilateral tendinitis working on an engine assembly line at a Toyota factory.[126] Williams' independent medical provider placed her on permanent work restrictions and Toyota reassigned her to less physically

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[118] *Id*. at 482.

[119] *Id.*

[120] *Id.* at 493-94.

[121] *Id.* at 473.

[122] *Id*.

[123] *Id.* at 490.

[124] *See* Nat'l Council on Disability, *supra* note 92.

[125] 534 U.S. 184 (2002).

[126] *Id.* at 187.

demanding tasks. [127] Williams continued to work without a problem until eventually assigned to a different job.[128] Her new responsibilities included rotating through different tasks in a quality control line.[129] Some of these tasks required physical performance that she was unable to execute without severe pain.[130] This pain led to absences from work and her ultimate termination.[131]

Williams' primary argument was an ADA prong one disability claim because her "physical impairments substantially limited her in [the major life activities of] (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working."[132] The Court manipulated the text to conclude the terms "substantially" and "major" must "be interpreted strictly to create a demanding standard for qualifying as disabled."[133] The Court validated this standard by relying on the ADA statutory introduction stating "some 43,000,000 Americans have one or more physical or mental disabilities."[134] The Court argued that "[i]f Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher."[135] The Court thus concluded that an individual qualifies as disabled under prong one only if the substantial limitation "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[136] The Court also stated the impairment must be "permanent or long term."[137] Based on these judicial standards, the Court held Williams' carpal tunnel syndrome did not necessarily render her disabled when it came to performing manual tasks because her impairment only restricted her from certain activities her specific job required.[138] The Court insisted, "medical conditions that caused employees to restrict certain activities did not constitute manual-task disability under the ADA."[139]

These narrowing Supreme Court statutory interpretations failed to

[127] *Id.* at 187-88.
[128] *Id.* at 188-89.
[129] *Id.*
[130] *Id.* at 189.
[131] *Id.* at 189-90.
[132] *Id.* at 190.
[133] *Id.* at 197.
[134] 42 U.S.C. § 12101(a)(1) (2006).
[135] *Toyota Motor Mfg.*, 534 U.S. at 197.
[136] *Id.* at 198.
[137] *Id.*
[138] *Id.* at 200.
[139] *Id.* at 184.

implement the American's with Disabilities Act as intended by Congress. This is evidenced by the Americans with Disabilities Act Amendments Act of 2008, which explicitly rejects the standards articulated in the holdings of *Sutton v. United Air Lines, Inc.* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.

D. The Americans with Disabilities Act Amendments Act of 2008

Congress passed the ADA Amendments Act of 2008 to reinstate the expansive scope of protections provided under the original ADA.[140] The Amendments Act specifies that "the standard created by the Supreme Court . . . has created an inappropriately high level of limitation necessary to obtain coverage under the ADA."[141] To avoid additional curbing of ADA protections, the Amendments Act directly states "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[142] The ADAAA is significant within the scope of this note because it substantially amends the provisions of prong one and prong three of the original ADA with regards to genetically predisposed asymptomatic individuals.

1. Amended Prong One

The ADAAA did not modify the existing language of prong one of the ADA, but it did add specific definitions previously absent from the legislation. Under the Amendments Act, "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." [143] The Amendments Act states that "a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[144] As for the "substantial" component of prong one, the Amendments Act outright rejects the standard the Supreme Court established in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*. In *Williams*, "substantially limits" meant "an impairment that prevents or severely restricts the individual from

[140] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[141] *Id.* at 3554.

[142] *Id.*

[143] *Id.* at 3555.

[144] *Id.*

doing activities that are of central importance to most people's daily lives."[145] Additionally, contrary to the Court in *Sutton*, the determination of the applicability of prong one must be made without considering mitigating measures.[146] Mitigating measures include medical equipment and medication.[147] The ADAAA even goes so far as to say "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[148]

The new definition of prong one opens the door for several new arguments for the inclusion of asymptomatic individuals with genetic predispositions. Firstly, genetic testing is implemented through the identification of abnormal genome structures. It is arguable this genetic abnormality is not normal cell growth, thus constituting an impairment of the major life activity of "normal cell growth." But, genetic mutations are just abnormal genetic instructions, which may or may not lead to the production of abnormal proteins. Therefore, the major life activity of cell growth is not necessarily impaired in asymptomatic predisposed individuals.

Additionally, a commonly cited negative consequence of genetic testing is that individuals who discover they have predispositions for certain illnesses may suffer substantial psychological consequences.[149] If legitimate, these psychological consequences could interfere with the major life activities of thinking, concentrating or working. Though, if this were the case, it would be the mental consequence of the information gathered from the genetic test, not the marker itself, which caused the impairment. Furthermore, studies indicate individuals undergoing genetic testing do not experience any negative psychological ramifications.[150] Even if this argument was valid, an individual suffering moderate anxiety or depression would unlikely satisfy the substantial limitation requirement. No impairment exists as a result of the genetic

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[145] *Toyota Motor Mfg.*, 534 U.S. at 198.

[146] *See* 122 Stat. at 3556 (Note: The mitigating measures provision protects the statutory protections from erosion resulting from technological advances. For example, in *Bragdon v. Abbott* the Supreme Court determined that HIV positive individuals were substantially limited in the major life activity of reproduction. Today, HIV positive individuals have a high success rate of successful pregnancy without risking infection. Because mitigating measures are not considered, an HIV positive individual still qualifies for protection under prong one of the ADAAA.).

[147] *Id.* (examples include prosthetic limbs and hearing devices).

[148] *Id.*

[149] NATIONAL CANCER INSTITUTE, UNDERSTANDING CANCER SERIES: GENE TESTING, http://www.cancer.gov/cancertopics/understandingcancer/genetesting/Slide32 (last visited Oct. 23, 2009).

[150] *See, e.g.*, Marita Broadstock et al., *Psychological Consequences of Predictive Genetic Testing: a Systematic Review*, 8 EURO. J. OF HUMAN GENETICS 731, 735, no. 10 (2000).

mutation because the disease the individual is predisposed to remains dormant and has no physical impact.

The most significant addition under the ADAAA is section 3(4)(D) of 42 U.S.C. § 12102, which extends the statute's protections to individuals suffering from "episodic" or "in remission" impairments, if the impairments would "substantially limit a major life activity when active."[151] An asymptomatic individual could never satisfy the episodic inclusion because, to be considered, symptoms must be occasional or sporadic and being asymptomatic means the individual *never* had any outward manifestations of the illness. The absence of any manifesting symptoms also precludes asymptomatic individuals from being in remission because no symptoms ever manifested. Therefore, despite the expansion by the ADAAA, predisposed asymptomatic individuals remain excluded from prong one protections.

2. Amended Prong Three

Under the amended prong three, an individual will qualify "if the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[152] One of the stated purposes of the ADAAA is to reject the Supreme Court's holding in *Sutton v. United Air Lines, Inc*, which truncated coverage under prong three by restoring the holding in *School Board of Nassau County v. Arline*.[153] In *Sutton*, the Court held that prong three claims "arise when an employer *mistakenly* believes that an individual has a substantially limiting impairment."[154] The Court insisted it is perfectly acceptable for employers to "prefer some physical attributes over others, so long as those attributes do not rise to the level of substantially limiting impairments."[155] Additionally, the Court rejected the notion that an employer's belief that an individual is incapable of performing a specific job, such as a global airline pilot, is "regard[ing the employee] as being substantially limited in the major life activity of working."[156]

Earlier, in *School Board of Nassau County v. Arline*,[157] the Court reinforced

[151] 122 Stat. at 3556.

[152] *Id.* at 3555.

[153] *Id.* at 3554; Sch. Bd. Of Nassau County v. Arline, 480 U.S. 273 (1987) (holding that "a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of § 504 of the Rehabilitation Act of 1973").

[154] *Sutton*, 527 U.S. at 473.

[155] *Id.*

[156] *Id.*

[157] *Sch. Board of Nassau County*, 480 U.S. at 273.

the Rehabilitation Act's definition of "handicapped" when addressing the wrongful termination of a teacher suffering from frequent relapses of tuberculosis.[158] The Court emphasized that the inclusion of individuals regarded as having an impairment substantially limiting a major life activity under the Rehabilitation Act was Congress' way of "acknowledg[ing] that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[159] While the case occurred before the enactment of the ADA, it is important because the language of the ADA is "modeled" after the Rehabilitation Act.[160] The ADAAA also modifies prong three to exclude "impairments that are transitory and minor."[161] The statute, for the first time, specifies a time requirement by defining a transitory impairment as "impairment with an actual or expected duration of 6 months or less."[162]

The amended prong three still fails to define a standard broad enough in scope to include predisposed asymptomatic individuals. The holding in *School Board of Nassau County* would not extend ADA protections to genetically predisposed individuals for several reasons. First, tuberculosis is a chronic disease caused by a bacterial infection having nothing to do with an individual's genetic composition. The Court held prong two protected the respondent, not prong three, because she had *a record of* impairment.[163] The respondent's termination was a result of her "continued recurrence of tuberculosis."[164]

Second, although the Court's discussion of prong three mentions that individuals suffering from noninfectious diseases such as epilepsy or cancer "have faced discrimination based on the irrational fear that they might be contagious,"[165] this argument cannot be extended to include asymptomatic individuals under prong three of the amended ADA.

Third, even if the argument were made that employer concerns for future financial burdens resulting from employing asymptomatic predisposed individuals were irrationally based fears, they are still rooted in future financial burdens, not current ones. Just as under the original prong three, asymptomatic individuals are excluded from coverage if they are not presently regarded as disabled, so too are they excluded under the amended statute. The exclusion of

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158 *See id.* at 284.

159 *Id.*

160 Selmi, *supra* note 59, at 526.

161 42 U.S.C. § 121202(3)(B) (2006).

162 *Id.*

163 *See Sch. Board of Nassau County*, 480 U.S. at 273.

164 *Id.*

165 *Id.* at 284.

transitory and minor impairments also has no bearing on asymptomatic individuals because most genetic tests do not provide time lines for manifestations of illness. Therefore, despite the expansion of protections for the disabled under the Amendments Act, the modifications still do not bring predisposed asymptomatic individuals under the ADAAA's scope of protections.

E. The Rehabilitation Act and the ADA

If the ADA protected genetically predisposed individuals there would be no need to repeat the same protections in alternative federal laws. In 2000, President Clinton signed an executive order prohibiting genetic discrimination in any form of federal employment.[166] The order corresponds with the Rehabilitation Act, which prohibits disability discrimination against federal employees.[167] By adding this executive order to the already existing Rehabilitation Act, the President demonstrated that the language of the Rehabilitation Act alone did not extend to predisposed asymptomatic individuals. If the Act itself prohibited genetic discrimination, there would be no need for the separate order. As mentioned earlier, Congress borrowed the language of the Rehabilitation Act when drafting the ADA. Thus, the original ADA does not protect against genetic discrimination in the workplace.

Following this same line of reasoning, in 2008 Congress passed both the ADA Amendments Act and the Genetic Information Nondiscrimination Act of 2008 ("GINA").[168] Title II of GINA prohibits workplace discrimination based on genetic information.[169] This protection prohibits an employer, employment agency or labor organization from:

> fail[ing] or refus[ing] to hire, or to discharge . . . or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information . . . or limit[ing] . . . the employees . . . in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.[170]

Furthermore, the Health Insurance Portability and Accountability Act ("HIPAA") prohibits considering asymptomatic predisposed individuals as

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[166] Exec. Order No. 13,145, 65 Fed. Reg. 6877 (Feb. 10, 2000).

[167] *See id.* at 6877, 6880.

[168] Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008).

[169] *See id.* at 905-20.

[170] *Id.* at 907.

having a preexisting condition.[171] Additionally, the Employee Retirement Income Security Act ("ERISA") protects individuals from genetic discrimination by prohibiting insurers and employers from "discriminat[ing] against a participant or beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."[172] If the amended ADA protected genetically predisposed individuals there would be no need to repeat the same protections in alternative federal laws.[173]

IV. POSSIBLE CONSEQUENCES OF EXPANDING THE SCOPE OF THE AMENDED ADA TO INCLUDE PREDISPOSED ASYMPTOMATIC INDIVIDUALS

To date, no court, either federal or state, has ever ruled on a genetic employment discrimination case. The closest any court ever came to making such a decision was *EEOC v. Burlington Northern Santa Fe Railway Co.*[174] This case was brought by the EEOC on behalf of the employees of Burlington Northern Santa Fe Railroad. The railroad company was conducting genetic tests on employee blood samples, without consent, for a known marker related to carpal tunnel syndrome.[175] Those who refused to provide blood samples were threatened with disciplinary action.[176] Railroad employees are prone to repetitive stress injuries, and the consequential compensation pay-outs are very costly.[177] The EEOC argued that conducting the genetic tests was a violation of the ADA because they were not "job-related and consistent with business

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[171] NATIONAL INSTITUTES OF HEALTH NATIONAL HUMAN GENOME RESEARCH INSTITUTE, EXISTING FEDERAL ANTI-DISCRIMINATION LAWS AND HOW THEY APPLY TO GENETICS, http://genome.gov/12513979 (lat visited October 16, 2008).

[172] Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1994).

[173] Note: The enactment of GINA does not preempt predisposed asymptomatic individuals from bringing causes of action under the amended ADA. GINA took effect Nov. 21, 2009. It is arguable individuals in a genetic discrimination case will still bring a cause of action under the ADA, a statute which has been tested and proved widely acceptable. GINA, on the other hand, is a brand new statute with no judicial application or interpretation.

[174] Andrew E. Rice, *Eddy Curry and the Case for Genetic Privacy in Professional Sports*, 6 Va. Sports & Ent. L.J. 1, 9 (2006).

[175] Tamar Lewin, *Commission Sues Railroad To End Genetic Testing In Work Injury Cases*, N.Y. TIMES, Feb. 10, 2001, at A10.

[176] *Id.*

[177] Paul S. Miller, *Equal Employment Opportunity in the USA*, Screening the Gene: Genetic Testing in the Workplace, (Feb. 2002), *available at* http://www.ncl.ac.uk/peals/Screening/sgdata/PaulSMiller.htm.

necessity."[178] Additionally, "[t]o condition any employment action on the results of such tests would be to engage in unlawful discrimination based on disability."[179] The law suit settled within two months of its filing.[180]

Had this case been decided, the law would be clear with regards to whether or not predisposed asymptomatic individuals are protected from genetic discrimination under the ADA. According to the arguments purported in this note, the court would have concluded the employees were not protected. Diagnosed with only predispositions, the workers would not be covered under prong one. The carpal tunnel syndrome marker did not guarantee symptom onset and the workers suffered no physical manifestations. Even with the expansion of prong one to include episodic impairments, the workers would fail to qualify for coverage because they never had any manifestations. The employees would also fall short of the prong three requirements because they were not perceived as having any impairment. Burlington Northern Santa Fe Railroad administered the genetic tests to avoid future expensive workers compensation payments, not because of a perceived present disability. Based on this analysis, asymptomatic individuals with genetic predispositions would not be entitled to ADA security and affording them these protections would be a significant expansion of the statute's intended purpose. The extension would create unintended competition for resources and expose employers to new tort liabilities.

A. Competition for Resources

Though not the planned purpose, a consequence of the provisions under the ADA and the ADAAA is preferential treatment of disabled individuals.[181] Employers must provide reasonable accommodations to disabled employees at their own expense.[182] The end result of this treatment is the imposition of additional financial burdens on employers. Decreased productivity is a major risk factor of a disabled employee.[183] In conjunction with these risks, the price of retaining adequate replacements can be high.[184] Additionally, the cost of medical insurance and workers' compensation is often expensive, especially if

[178] Lewin, *supra* note 175.

[179] Miller, *supra* note 177.

[180] *See* EEOC Press Release, *EEOC Settles ADA Suit Against BNSF for Genetic Bias*, Apr. 18, 2001, *available at* http://www.eeoc.gov/press/4-18-01.html.

[181] *ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the Comm. on Educ. and Labor*, 110th Cong. (2008) (statement of David K. Fram, Esq., Director, ADA & EEO Services, National Employment Law Institute).

[182] 42 U.S.C. § 12111 (2009) (examples include "acquisition or modification of equipment or devices").

[183] Miller & Huvos, *supra* note 5, at 370.

[184] *Id*.

the illness is hereditary and family medical insurance coverage is provided.[185] These potential outlays are not the only expenses related to employing a disabled individual. Simply determining what an employer's legal obligations are can be costly in and of itself. Often, larger organizations have staff, whether in the form of general counsel or disability consultants, to not only establish what an employer's legal obligations are, but also how to abide by those obligations in the most cost effective manner.[186] Smaller organizations, on the other hand, suffer a greater burden because they may need to seek outside help and, unlike the larger organizations that already employ such individuals, may have a difficult time bearing the financial burden.[187]

Further, the concept of at-will employment for disabled individuals places employers at an additional financial risk.[188] At-will employment permits an employer to fire an employee regardless of the reasoning, if any. Employers are only restricted from firing an employee for discriminatory reasons. A disabled at-will employee could sue his or her employer for wrongful termination on the grounds of disability discrimination. If genetic discrimination was included in the ADAAA then the number of individuals capable of making this claim would significantly increase. Employers would be opening themselves up to the possibility of a multitude of discrimination suits and legal expenses. Even if the employer's actions were not discriminatory, an employer "would still face expensive litigation and be far less likely . . . to prevail on a motion for summary judgment relatively early in the litigation."[189] Thus, there would be an increased incentive for employers to find 'legitimate' excuses not to hire disabled individuals.[190]

If asymptomatic individuals were a protected class under the ADAAA, the statute would potentially protect millions more individuals from employment

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[185] *See id.*

[186] *See Defining Disability Down: The ADA Amendments Act's Dangerous Details Testimony Before the Comm. on Health, Ed., Labor, and Pensions*, United States Senate (July 15, 2008) (testimony by Andrew M. Grossman, Senior Legal Policy Analyst, Center for Legal & Judicial Studies, The Heritage Foundation).

[187] *See id.*

[188] *Id.* (Criticizing the ADAAA for defining "substantially limits" to mean "materially restricts" because then "most employees could claim they have an impairment, such as asthma or chronic stress." He argues that this overbroad definition would "undermine the doctrine of at-will employment.").

[189] *Id.*

[190] *See id.* (citing Hugo Hopenhayn & Richard Rogerson, *Job Turnover and Policy Evaluation: A General Equilibrium Analysis*, 101 J. POL. ECON. 915, 938 (1993); Adriana D. Kugler & Gilles Saint-Paul, Inst. for the Stud. of Labor, Hiring and Firing Costs, *Adverse Selection and Long-term Unemployment*, IZA Discussion Paper 134 (2000)).

discrimination.[191] The end result would be asymptomatic individuals competing with presently disabled persons for limited resources. Currently, employers try to hire healthy individuals to avoid financial burdens.[192] If given the choice, employers would more likely hire asymptomatic individuals than presently physically disabled individuals because the possibility exists that the asymptomatic individuals will never manifest symptoms requiring expensive accommodations. For example, an employer could be required to provide special disability parking for a cardiac employee. Alternatively, an employee predisposed to heart disease, without any manifestations of the illness, would not presently need disability parking and it is possible the employee may never require the accommodation because the genetic marker for heart disease does not guarantee eventual manifestation. This would reduce the likelihood of the employer bearing additional financial costs and usurp the entire goal behind enacting the ADA, which is to help presently disabled individuals better immerse themselves into the workforce.

B. New Tort Liabilities for Employers

An issue coinciding with employing asymptomatic individuals is that the individuals have the right to decide whether or not to expose themselves to additional risk factors that might increase the likelihood of illness manifestation. As previously mentioned, no case has been decided regarding genetic discrimination in the employment arena. The Supreme Court decision most indicative of which legal problems would arise if predisposed asymptomatic individuals were included in the ADA's protected class is *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, et. al. v. Johnson Controls, Inc.*[193] Though the cause of action in this case was a violation of Title VII and not the ADA,[194] it parallels a primary issue of genetic discrimination. Employers could not protect themselves against medical claims brought by predisposed asymptomatic individuals who ultimately manifest symptoms because, like women under Title VII, they would be a protected class.

In *Johnson Controls*, the Supreme Court determined that the exclusion of all fertile women[195] from employment positions that entail inorganic lead exposure violated Title VII.[196] The premise of the hiring practice was that if a

[191] *See* Dichter, *supra* note 96, at 626.

[192] *See* Rothstein, *supra* note 10, at 390.

[193] *Int'l Union, United Auto, Aerospace & Agric. Implement Workers of Am., UAW, et. al. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

[194] *Id.* at 192.

[195] *Id.*

[196] *Id.* at 187-88.

woman holding this position were or became pregnant, the fetus would be highly vulnerable to damage from the mother's lead exposure.[197] *Johnson Controls* defended its policies under a business necessity defense, and on the grounds that infertility is a "bona fide occupational qualification." The Supreme Court rejected the business necessity defense outright, because the "policy involve[d] disparate treatment through explicit facial discrimination,"[198] and the bona fide occupational qualification argument on the grounds that fertile women could perform the employment tasks at issue just as well as other employees.[199] The Court explained:

> The so-called safety exception to the [bona fide occupational qualification] is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform, and the employer must direct its concerns in this regard to those aspects of the woman's job-related activities that fall within the "essence" of the particular business.[200]

Further, the Court insisted that "professed concerns about the welfare of the next generation do not suffice to establish a [bona fide occupational qualification] of female sterility."[201]

The Supreme Court struck down the paternalistic employment policy of *Johnson Controls* regardless of the individuals' medical safety and well-being.[202] If asymptomatic individuals were included in the protected class of disabled persons under the ADA, the Supreme Court might have to afford asymptomatic individuals the same autonomous choice whether or not to risk potential health problems. Genetic discrimination against asymptomatic individuals, technically, could constitute similar facial discrimination rejected in *Johnson Controls* and exclude employers from using the business necessity defense. A bona fide occupational qualification would also likely be struck down by a court in a case of genetic discrimination against an asymptomatic individual because, like fertile women, predisposed individuals have no physical or mental impairments to prevent them from satisfactorily performing their employment duties. The tension between shielding presently disabled individuals, employer protection and survival techniques is already a problem both legislators and courts must manage. Extending the protected class of the ADA to include predisposed asymptomatic individuals would only exacerbate the problem as it currently stands.

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[197] *Id.* at 193.

[198] *Id.* at 188.

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.* at 203-04.

The holding in *Johnson Controls* leaves employers vulnerable to expensive tort liability claims similar to those predisposed asymptomatic individuals might bring if protected by the ADA. If both an employer and employee are aware of an increased likelihood of the onset of a predisposed disease due to a hazardous work environment, who is responsible for the manifesting illness at a later date? The argument that an employee assumes the risk of increasing the likelihood of disease manifestation has never been an acceptable employer defense.[203] Allowing such an argument would violate several public policies:

> (1) "it would permit the employer to shift the social costs of working with hazardous substances from customers and shareholders to employees and taxpayers;" (2) "encourage employers to contest occupational illness claims and seek to discover a genetic predisposition that would allow them to escape liability;" and (3) "allow employers, indirectly through self-exclusion of workers afraid to encounter risks without possible compensation, to eliminate workers on the basis of genetic predisposition to disease in violation of the intent of genetic nondiscrimination laws enacted in nearly half the states."[204]

Employers would have no way of avoiding foreseeable liability. This new tort liability that would result from the inclusion of asymptomatic predisposed individuals under the ADA has the potential to monopolize additional employer resources and place further employment roadblocks in the path of presently disabled individuals – the class the statute intended to protect.

V. CONCLUSION

It is evident that Congress made a substantial omission by failing to address genetic discrimination in the statutory provisions of the Americans with Disabilities Act.[205] Congress should have specifically addressed its inclusion or exclusion in the ADA and its subsequent amendment. As a result of this oversight, the issue of genetic discrimination is plagued with confusion and ambiguity. This note demonstrates that both the ADA and the ADAAA are designed to exclude predisposed asymptomatic individuals from coverage. Despite the legal protections the current ADA affords, employment rates for presently disabled individuals are substantially lower than employment rates of nondisabled persons.[206] Expanding the umbrella of statutory protections to

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[203] Rothstein, *supra* note 10, at 401.

[204] *Id.* at 401-02.

[205] *See, e.g.*, Dichter, *supra* note 96, at 626 ("In fact, Congress's limited discussion of the subject has led more than one commentator to remark that Congress overlooked or disregarded the issue of genetic information discrimination in its drafting of the ADA.").

[206] Peter Blanck et al., *Employment of People with Disabilities: Twenty-Five Years Back and Ahead*, 25 LAW & INEQ. 323, 325 (2007).

include asymptomatic individuals with predispositions to various illnesses would make it even more difficult for presently disabled individuals to enter and remain in the workforce. In fact, the inclusion of asymptomatic individuals would so substantially expand the desired scope of the statute that it would actually hinder its original purpose as presently disabled individuals would be forced to compete with potentially disabled individuals for limited employer resources. This note does not argue that predisposed individuals should have no legal protections; it simply asserts that other alternative available protections, outside the ADA and ADAAA, are clearly and specifically designed to prevent genetic discrimination in the employment arena.