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THE INTERNET—DISABILITY OR DISTRACTION? AN ANALYSIS OF WHETHER “INTERNET ADDICTION” CAN QUALIFY AS A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT

*By Blake R. Bertagna**

As the Internet emerged in the 1990s, the possibility for progress seemed boundless. However, it was merely a matter of time before certain adverse consequences of the Internet began to surface. Among these was an abnormal affinity for the Internet that many have since characterized as an addiction to the Internet. While different terms have been employed to describe this problem, a body of research has developed over the last decade that recognizes the legitimacy of a condition or disorder grounded in excessive Internet use.

The emergence and growth of Internet addiction has significant legal consequences for employers. While employers typically have Internet usage policies that allow them to regulate the manner in which their employees use the Internet at work, certain legal implications may be triggered when employees, who have been subject to adverse employment actions for their improper Internet use, claim that they are disabled on the basis of their Internet addiction.

The Americans with Disabilities Act prohibits an employer from “discriminat[ing] against a qualified individual with a disability because of the disability of such individual.” Certain addictions, such as drug addictions, have been recognized as disabilities under the Americans with Disabilities Act. Research and case studies are presenting considerable evidence that Internet addiction, like drug or other addictions, can have a similar debilitating impact on its subjects.

This Comment explores the viability of a plaintiff’s claim that he or

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she is disabled on the basis of Internet addiction and is therefore qualified for protection under the Americans with Disabilities Act. The author argues herein that while certain strides still need to be made before such a claim is available to a significant number of individuals, there is sufficient research to allow certain plaintiffs, who are substantially restricted by their Internet addictions, to present a colorable claim that they are disabled under the Americans with Disabilities Act.

I. INTRODUCTION

John Reilly was a well-regarded and successful headmaster of Sandilands Community Primary School in Manchester, England.¹ John was also a father of two young boys.² Robert Zellner worked as a school teacher at Cedarburg High School in Wisconsin for eleven years.³ He also served as chairman of the Science Department.⁴ Lee Seung Seop grew up in poor circumstances in the large South Korean city of Taegu, but was fortunate enough to attend a local vocational college.⁵ Following graduation, Lee worked as an industrial boiler repairman.⁶

Although oceans apart, these three individuals shared a particular human weakness—each suffered from a destructive, and even fatal, addiction to or compulsion with the Internet. John Reilly hanged himself in a park after accruing approximately \$200,000 of debt through Internet gambling.⁷ Robert Zellner lost his job after school authorities discovered that he had accessed pornography websites on his school computer, which contained nearly 1,500 pornographic images and one hundred adult-content Web pages.⁸ The 28-year old Lee Seung Seop played an online video game called Starcraft in an Internet café for fifty straight hours until he was so exhausted that his heart failed, and he died.⁹

1. Andy Russell, *Head's Gambling Tragedy*, MANCHESTER EVENING NEWS, Sept. 19, 2007, http://www.manchestereveningnews.co.uk/news/s/1016864_heads_gambling_tragedy.

2. *Id.*

3. Tom Kertscher, *Cedarburg Teacher Who Viewed Porn at School Fired*, MILWAUKEE J. SENTINEL, Jan. 17, 2006, <http://www.jsonline.com/story/index.aspx?id=385907>.

4. *Id.*

5. Barbara Demick, *Gamers Rack Up Losses*, L.A. TIMES, Aug. 29, 2005, at A1.

6. *Id.*

7. Matthew Hickley, *Head Driven to Suicide by Net Betting*, DAILY MAIL, Sept. 20, 2007, at 24 (original monetary value in British Pounds).

8. *Paper Says Teacher Had 1,434 Porn Pictures*, CAPITAL TIMES (Madison, WI), June 1, 2007, at A6.

9. *South Korean Dies After Games Session*, BBC NEWS, Aug. 10, 2005, <http://news.bbc.co.uk/2/hi/technology/4137782.stm>; *Korean Dies After Two Days of Computer*

While society frequently and deservedly touts the tremendous benefits and advances ushered in by the Internet, the terrible toll that the Internet has taken on countless lives can sometimes be overlooked. For many, of course, the Internet serves as an important professional tool and recreational outlet. For others, however, the Internet has become a harmful, even debilitating thing. They use the Internet excessively for a variety of purposes—from pornography to chat rooms to shopping to gambling to gaming.¹⁰ As recently stated by one Stanford University researcher, “[a]ccumulating data point to a growing number of individuals for whom the [Internet] becomes a consuming habit with significant negative consequences for their personal and professional lives.”¹¹ While the terminology and research associated with Internet addiction may still be in its infancy, an increasing number of researchers are recognizing that such a condition exists.¹²

Games, FOX NEWS, Aug. 10, 2005, http://www.foxnews.com/printer_friendly_story/0,3566,165296,00.html.

10. Brenda K. Adkisson, An Overview and Clinical Implications of Internet Use: What Every Psychologist Should Know 111 (June 7, 2005) (unpublished Ph.D. dissertation, Spalding University) (on file with author).

11. Elias Aboujaoude et al., *Potential Markers for Problematic Internet Use: A Telephone Survey of 2,513 Adults*, 11 INT’L J. NEUROPSYCHIATRIC MED. 750, 751 (2006). While “there is no standardized definition of Internet addiction, there is acknowledgement among researchers that this phenomenon does exist.” Chien Chou, Linda Condrón & John C. Belland, *A Review of the Research on Internet Addiction*, 17 EDUC. PSYCHOL. REV. 363, 365 (2005).

12. Chou, Condrón & Belland, *supra* note 11, at 365. In one study, over 80% of college counselors stated that they “strongly agree” or “agree” that Internet addiction is a “legitimate disorder.” Laura Venturini Kiralla, *Internet Addiction Disorder: A Descriptive Study of College Counselors in Four-Year Institutions* 103 (Feb. 2005) (unpublished Ed.D. dissertation, University of La Verne) (on file with author). See also Aboujaoude et al., *supra* note 11, at 751; Keith J. Anderson, *Internet Use Among College Students: An Exploratory Study*, 50 J. AM. C. HEALTH 21, 25-26 (2001) (analyzing research which indicates that college students majoring in hard sciences are more likely to be Internet dependent); Viktor Brenner, *Psychology of Computer Use: XLVII. Parameters of Internet Use, Abuse and Addiction: The First 90 Days of the Internet Usage Survey*, 80 PSYCHOL. REP. 879, 881-82 (1997) (recognizing Internet addiction and noting that it should be researched further as some users show symptoms of tolerance, craving and withdrawal); David N. Greenfield, *Psychological Characteristics of Compulsive Internet Use: A Preliminary Analysis*, 2 CYBERPSYCHOLOGY & BEHAV. 403, 403, 404, 412 (1999) (addressing the importance of continued research to identify subtypes of Internet addiction); Mark Griffiths, *Does Internet and Computer “Addiction” Exist? Some Case Study Evidence*, 3 CYBERPSYCHOLOGY & BEHAV. 211, 211 (2000) (discussing that factors typically associated with behavioral addiction support findings of Internet addiction); Mark Griffiths, *Psychology of Computer Use: XLIII. Some Comments on ‘Addictive Use of the Internet’ by Young*, 80 PSYCHOL. REP. 81, 82 (1997) (discussing the need for further research on the specific nature of Internet addiction); Mark Griffiths, *Sex on the Internet: Observations and Implications for Internet Sex Addiction*, 38 J. SEX RES. 333, 340 (2001) (discussing analytical findings regarding addiction to Internet sex); Louis Leung, *Net-Generation Attributes and Seductive Properties of the Internet as Predictors of Online Activities and Internet Addiction*, 7 CYBERPSYCHOLOGY & BEHAV. 333, 345-46 (2004) (focusing on Internet addiction among people

One place in particular where the growing problem of excessive Internet use is creating various complications is at the office. Over ninety percent of employed Americans spend some time accessing the Internet at work.¹³ More importantly, for purposes of this Comment, the majority of such employees spend some portion of their weekly time on the Internet at work visiting non-work related websites.¹⁴ In most cases, employers have Internet use policies that allow them to monitor and regulate their employees' improper use of the Internet.¹⁵ Violation of such policies is met with a variety of penalties including, in some instances, termination.¹⁶

When the employee, who is subject to an adverse employment action¹⁷ for inappropriate use of the Internet, claims, however, that such conduct was the result of an addiction, certain legal implications may potentially be triggered. These legal implications arise out of the Americans with Disabilities Act¹⁸ ("ADA"). Under the ADA, an employer cannot lawfully "discriminate against a qualified individual with a disability because of the disability of such individual."¹⁹

There is currently a federal case pending in the Southern District of

born between 1977 and 1997); Sunny S.J. Lin & Chin-Chung Tsai, *Sensation Seeking and Internet Dependence of Taiwanese High School Adolescents*, 18 COMPUTERS HUM. BEHAV. 411, 421 (2002) (discussing the prevalence of sensation seeking in Taiwanese youth and how this impulse perpetuates Internet dependence); Kimberly S. Young, *Internet Addiction: The Emergence of a New Clinical Disorder*, 1 CYBERPSYCHOLOGY & BEHAV. 237, 237 (1996), available at www.netaddiction.com/articles/newdisorder.htm (discussing the results from qualitative analyses which suggest that online users are becoming addicted to the Internet in the same manner that others become addicted to drugs or alcohol).

13. WEBSense, INC., WEB@WORK SURVEY 2006 3 (2006), http://www.websense.com/global/en/PressRoom/MediaCenter/Research/webatwork/Employee_Co_mputing.pdf.

14. See *id.*

15. See *infra* text accompanying note 303.

16. See *infra* text accompanying note 303.

17. "A plaintiff sustains an adverse employment action if he or she endures a 'materially adverse change' in the terms and conditions of employment." *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (citations omitted). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993).

18. 42 U.S.C. §§ 12101-12300 (2000). The ADA applies to private employers of fifteen or more employees and state and local governments; it does not apply to the federal government. *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 19 (1st Cir. 2004). For a disability discrimination claim against a federal government employer, the plaintiff must seek redress under the Rehabilitation Act of 1973. *Id.*

19. 42 U.S.C. § 12112(a).

New York, *Pacenza v. IBM Corporation*,²⁰ in which a former employee of IBM, James Pacenza, was fired after logging onto an adult-oriented chat room at work and is now suing IBM for \$5 million for disability discrimination under the ADA.²¹ His grounds for claiming qualification under the ADA consist of several psychological disabilities, namely "internet addiction."²² Indeed, Congress and the courts have recognized certain addictions, such as addictions to drugs and alcohol, as disabilities under the ADA.²³ The body of research legitimizing the incapacitating character of the Internet and its status as a distinct medical disorder is steadily growing.²⁴ As the science and research continue to trend toward validating Internet addiction, a plaintiff such as James Pacenza may find that he or she has a colorable claim for employment discrimination under the ADA.

This Comment explores the ability of a plaintiff to establish that he or she is disabled under the ADA on the basis of Internet addiction. For the plaintiff to show that he or she is actually disabled under the ADA, the plaintiff must demonstrate that his or her Internet addiction constitutes "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."²⁵ This Comment

20. Complaint, No. 04 Civ. 5831 (S.D.N.Y. July 27, 2004).

21. Complaint at 3-4, 15, *Pacenza v. IBM Corp.*, No. 04 Civ. 5831 (S.D.N.Y. July 27, 2004). Other parties have previously claimed to suffer from some form of Internet addiction, but they did not claim that their Internet addiction qualified them as "disabled" under the ADA. *See, e.g.*, *United States v. Tanasi*, No. 02 CR.0096(RWS), 2004 WL 406724, at *4 (S.D.N.Y. Mar. 3, 2004) (noting doctor's testimony, which maintained that the defendant's Internet addiction led him to download pornographic images).

22. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, and in Support of Plaintiff's Cross-Motion at 15, 17, *Pacenza v. IBM Corp.*, No. 04 Civ. 5831 (SCR) (S.D.N.Y. July 27, 2004).

23. *See, e.g.*, *Thompson v. Davis*, 295 F.3d 890, 896 (9th Cir. 2002). "Drug addiction that substantially limits one or more major life activities is a recognized disability under the ADA." *Id.* It should be noted, however, that the term "qualified individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs. *Id.* Rather, the ADA protects "individuals who have successfully completed or are participating in a supervised drug rehabilitation program and are no longer using illegal drugs, as well as individuals who are erroneously regarded as using drugs when they are not." *Id.* (citing 42 §§ U.S.C. 1210(a)-(b) (1994)).

24. *See supra* text and commentary accompanying note 12.

25. 42 U.S.C. § 12102(2) (1988 & Supp. 1994). In addition to showing one is disabled, one must show that he or she is a "qualified individual" and that the defendant discriminated against the plaintiff "because of" the plaintiff's disability to demonstrate a *prima facie* case of employment discrimination. *See infra* note 115 and accompanying text. Once the plaintiff has established a *prima facie* case of employment discrimination, the plaintiff may also have additional evidentiary burdens depending on the type of discrimination claim he or she brings and the evidence that the defendant is able to produce. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 776 (8th Cir. 1995); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 68, 92 (holding that direct evidence is not

argues that under the existing legal framework, some plaintiffs may successfully demonstrate that they are disabled under the ADA. The ADA does not currently exclude Internet addiction as an impairment. Furthermore, research increasingly shows that Internet addiction adversely affects major life activities.²⁶ The most significant obstacle that such plaintiffs face is to show that their Internet addiction *substantially limits* a major life activity. It is this last obstacle that will narrow, to a very small group, the class of individuals who will qualify as disabled. For those individuals who do not fall into the select group of substantially limited individuals, some may possibly qualify as disabled by showing that they have “a record of such an impairment”; or are “regarded as having such an impairment.”²⁷

Part II discusses the rise and nature of Internet addiction, as well as the prevalence of Internet abuse in the workplace. Part III provides a concise discussion of the history and structure of the ADA. Part IV examines the evidence that a plaintiff will have to produce to show that he or she is actually disabled. Employing a similar analysis as Part IV, Parts V and VI respectively examine the evidence that a plaintiff will have to produce to show that he or she has a record of a disability or is regarded as having a disability, in contrast to having an actual disability. Part VII provides a concise conclusion.

II. INTERNET ADDICTION—A GROWING AND COSTLY DISORDER

A. The Nature of Internet Addiction

It is not uncommon these days to hear casual talk of addiction to chocolate or football. The term “addiction” is thrown around so frivolously in modern society that most forget it is a defined medical term. As noted by Dr. Bertha Madras, a former professor of psychobiology in the department of psychiatry at Harvard Medical School, “[t]he word [addiction] is grossly overused. Addiction is a

required to prove a Title VII case); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246 (1989) (plurality opinion) (holding that in a Title VII disparate treatment mixed motive case, the plaintiff bears the burden of persuasion that the reason offered by the employer for the adverse decision is a pretext).

26. See Lori C. Soule, L. Wayne Shell & Betty A. Kleen, *Exploring Internet Addiction: Demographic Characteristics and Stereotypes of Heavy Internet Users*, 44 J. COMPUTER INFO. SYS. 64, 64, 71 (2003).

27. 42 U.S.C. § 12102(2).

neurobiological disorder. Clinically, it's a very clear syndrome."²⁸

The Gale Encyclopedia of Medicine defines addiction as "a dependence, on a behavior or substance that a person is powerless to stop."²⁹ According to *Mosby's Medical, Nursing & Allied Health Dictionary*, addiction is a "compulsive, uncontrollable dependence on a substance, habit, or practice to such a degree that cessation causes severe emotional, mental, or physiologic reactions."³⁰ While a large segment of society immediately associates an addiction with a substance, such as drugs like heroin, cocaine, or alcohol, the source of an addiction can also be a behavior or process, such as gambling, that does not involve "ingesting psychoactive substances."³¹ As explained by Dr. Howard J. Shaffer, an associate professor at Harvard Medical School, "addiction is not simply a property of drugs" but rather "[a]ddiction results from the relationship between a person and the object of their addiction."³² For Internet addicts, their "drug of choice" and object of their addiction is the Internet.³³

The notion of a disorder grounded in excessive Internet use has been receiving increasing consideration since the mid-1990s.³⁴ The terminology for this exact condition is problematic because "there is no standardized definition of Internet addiction."³⁵ Researchers have proposed a variety of titles for the condition: Internet addiction, Internet Addiction Disorder, Internet pathological use, Internet dependency,³⁶ and compulsive Internet use are just some of the terms that have been used.³⁷ For purposes of this Comment, the term "Internet addiction" will be used to embrace the overall phenomenon. A workable general definition for Internet addiction may be "a preoccupation with computer

28. Craig Lambert, *Deep Cravings: New Research on the Brain and Behavior Clarifies the Mysteries of Addiction*, HARV. MAG., Mar.-Apr. 2000, at 60, 60.

29. THE GALE ENCYCLOPEDIA OF MEDICINE 40 (1999).

30. MOSBY'S MEDICAL, NURSING, & ALLIED HEALTH DICTIONARY 32 (5th ed. 1998).

31. Howard J. Schaffer, *What is Addiction?: A Perspective*, HARV. MED. SCH. DIVISION ON ADDICTIONS, July 3, 2007, <http://www.divisiononaddictions.org/html/whatisaddiction.html>.

32. *Id.*

33. Jane E. Brody, *Cybersex Gives Birth to a Psychological Disorder*, N.Y. TIMES, May 16, 2000, at F7.

34. Soule, Shell & Kleen, *supra* note 26, at 65. Although the beginning of the Internet dates back to as far back as the early 1950s, the World Wide Web was not launched until 1991, after which it still took a few more years for consumers generally to be able to navigate the Internet. Adkisson, *supra* note 10, at 4-5.

35. Chou, Condrón & Belland, *supra* note 11, at 365.

36. *See id.*

37. Timothy Liu & Marc N. Potenza, *Problematic Internet Use: Clinical Implications*, 12 INT'L J. NEUROPSYCHIATRIC MED. 453 (2007) available at <http://www.cnsspectrums.com/aspx/articleDetail.aspx?articleid=1094>.

usage that is overly time-consuming, causes personal distress (mostly through one's sense of loss of control), and has the potential to cause interpersonal, occupational, financial, or legal consequences."³⁸

Two critical considerations for whether one suffers from Internet addiction seem to be (1) the amount of time spent online, as well as (2) the purpose for which one is using the Internet. According to Stanford's Dr. Aboujaoude, research has shown the standard subject of Internet addiction to be "a college-educated single white male in his fourth decade, with substantial psychiatric comorbidity, who spends ~30 hours/week on computer use that is not essential to his work or well being, resulting in significant subjective distress and functional impairment."³⁹ In one study performed by Dr. Kimberly Young, 396 Internet-dependent subjects reported spending an average of 38.5 hours a week on the Internet, in contrast to the 4.9 hour average of the nondependent Internet user subjects.⁴⁰ In a study performed by Chou and Hsiao, 6% of Internet addicts were found to spend twenty to twenty-five hours a week on the Internet, which was three times the amount of hours spent by the 856 non-addicts.⁴¹ This excessive time spent online involves activities that are unrelated or unessential to work or one's personal well-being: e-mail, chat rooms, gambling websites, pornography websites, blogs, and/or shopping websites like eBay.⁴²

It should be noted that Internet addiction is not a widespread phenomenon. Although the figure varies depending on the particular study, the percentage of the population that may qualify as being Internet addicts is thought to be as high as 14% of the population.⁴³ Nonetheless,

38. Donald W. Black, Geeta Belsare & Steven Schlosser, *Clinical Features, Psychiatric Comorbidity, and Health-Related Quality of Life in Persons Reporting Compulsive Computer Use Behavior*, 60 J. CLINICAL PSYCHIATRY 839, 839 (1999).

39. Aboujaoude et al., *supra* note 11, 751.

40. Chien Chou, *Internet Heavy Use and Addiction Among Taiwanese College Students: An Online Interview Study*, 4 CYBERPSYCHOLOGY & BEH. 573, 574 (2001) (discussing Young, *supra* note 12, at 239).

41. Chou, Condron & Belland, *supra* note 11, at 368 (citing Chien Chou & Ming-Chun Hsiao, *Internet Addiction, Usage, Gratification, and Pleasure Experience: The Taiwan College Students' Case*, 35 COMPUTERS & EDUC. 65, 73-74 (2000)).

42. Aboujaoude et al., *supra* note 11, 751.

43. See Black, Belsare & Schlosser, *supra* note 38, at 841 tbl.2; see also Chou, Condron & Belland, *supra* note 11, at 373 (discussing a study indentifying about 6% of respondents as Internet addicts) (citing Chou & Hsiao, *supra* note 41, at 73); Liu & Potenza, *supra* note 37 (citing studies that estimate 3-11% of respondents were Internet addicts); Nathan A. Shapira et al., *Problematic Internet Use: Proposed Classification and Diagnostic Criteria*, 17 DEPRESSION & ANXIETY 207, 212 (2003) (discussing research that 6-14% of individuals that use the Internet are susceptible to Internet Addiction) (citing Tori DeAngelis, *Is Internet Addiction Real?*, 31 MONITOR ON PSYCHOL., Apr. 2000, available at <http://www.apa.org/monitor/apr00/addiction.html>); Leo Sang-Min Whang et

if even 6% of the 175 million Internet users in the United States are struggling with Internet addiction, then roughly ten million Americans may have a basis for claiming protection under the ADA.⁴⁴

Several conceptual models have been proposed to understand and diagnose Internet addiction, but none have yet to be uniformly accepted by researchers. The *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") is considered "the bible of mental-health care" by some.⁴⁵ The DSM "summarizes some of the diagnostic criteria for mental disorders that are used by the psychiatric and mental health professions."⁴⁶ Initially, researchers treated Internet addiction similar to a substance-related disorder, as classified in the DSM.⁴⁷ According to Dr. Kimberly Young, if a patient satisfied more than three of the seven diagnostic criteria for a substance-related disorder, as articulated in the DSM, then that patient could be diagnosed with Internet addiction.⁴⁸ Eventually, some researchers, including Dr. Young, turned from the substance-related model and began conceptualizing Internet addiction as an impulse control disorder.⁴⁹ One behavioral addiction in particular, namely pathological gambling, has been deemed similar to Internet addiction.⁵⁰ Other researchers have proposed alternative models,

al., *Internet Over-Users' Psychological Profiles: A Behavior Sampling Analysis on Internet Addiction*, 6 CYBERPSYCHOLOGY & BEHAV. 143, 144 (2003) (discussing a study finding 5-10% of respondents to be Internet addicts). Coincidentally, this figure resembles the percentage of the population who gambles or drinks alcohol and is likewise susceptible to gambling or alcohol addictions. See Karyn Dayle Jones & Neresa B. Minatrea, *The Consequences of Internet Addiction: Implications for Counseling Practice*, 2 J. TECH COUNSELING, July 2001, available at http://jtc.colstate.edu/vol2_1/Addiction.htm.

44. Bob Tedeschi, *From Clipouts to the Web, Coupons Transition Slowly*, N.Y. TIMES, Feb. 19, 2007, at C5.

45. Nancy Shute, *Paying a High Price for Mental Health*, U.S. NEWS & WORLD REP., Nov. 5, 2007, at 60, 61. The DSM is currently in its fourth edition. *Id.*

46. 135 CONG. REC. 20572 (1989).

47. Liu & Potenza, *supra* note 37.

48. See *id.*

49. An impulse control disorder is "a disorder in which individuals usually experience rising tension or arousal before an action(s) and subsequently experience a sense of relief or pleasure after completion of the behavior(s)." Shapira et al., *supra* note 43, at 212. Young articulated the following eight criteria to diagnose those with Internet addiction, which is based on the DSM's criteria for pathological gambling: (1) preoccupation with the Internet; (2) need for longer amounts of time online; (3) repeated attempts to reduce Internet use; (4) withdrawal when reducing Internet use; (5) time management issues; (6) environmental distress (family, school, work, friends); (7) deception around time spent online; (8) mood modification through Internet use. Kiralla, *supra* note 12, at 39. Young considered a patient addicted if he or she answered "Yes" to five or more of the criteria listed above. *Id.* (citing Kimberly S. Young, *Internet Addiction: Symptoms, Evaluation, and Treatment*, 17 INNOVATIONS IN CLINICAL PRACTICE (L. VandeCreek & T.L. Jackson eds., 1999), available at <http://www.netaddiction.com/articles/symptoms.htm>).

50. See Kiralla, *supra* note 12, at 39.

ultimately based on a type of impulse control disorder.⁵¹

The Internet has certain unique characteristics that make it particularly prone to creating dependencies. First, there is the speed with which the Internet can deliver content.⁵² The number of Americans getting access to broadband Internet is increasing by thirty percent a year.⁵³ For example, from February 2005 to February 2006, the number of Americans receiving broadband leaped from 74.3 million to 95.5 million.⁵⁴ As a result, Internet users can have instant gratification. While one might assume that the quicker access would result in less time on the computer, research shows the opposite—“[w]ith fast connection to Web sites for online photos, audio and video files, online visitors are devoting more time to their computers.”⁵⁵

Second, there is the accessibility that the Internet provides to the desired content.⁵⁶ Today, the Internet is reaching nearly seventy-five percent of American homes⁵⁷ and approximately eighty million Americans have Internet access at work,⁵⁸ granting almost any American access to the Internet.

Third, with increased accessibility comes decreased cost.⁵⁹ Users can access the information they want for little or no cost.

Fourth, there is the breadth and potency of the content that the Internet delivers.⁶⁰ As the Internet develops and bandwidth increases,

51. See, e.g., Shapira et al., *supra* note 43, at 212. Shapira and colleagues articulated three criteria to diagnose a subject with Internet addiction:

A. Maladaptive preoccupation with Internet use, as initiated by at least one of the following.

1. Preoccupations with use of the Internet that are experienced as irresistible.

2. Excessive use of the Internet for periods of time longer than planned.

B. The use of the Internet or the preoccupation with its use causes clinically significant distress or impairment in social, occupational, or other important areas of functioning;

C. The excessive Internet use does not occur exclusively during periods of hypomania or mania and is not better accounted for by other Axis I disorders.

Id. at 213.

52. Chou, Condrón & Belland, *supra* note 11, at 375.

53. Press Release, Nielsen/NetRatings, Two-Thirds of Active U.S. Web Population Using Broadband, Up 28 Percent Year-Over-Year to An All-Time High (Mar. 14, 2006), http://www.netratings.com/pr/pr_060314.pdf.

54. *Id.*

55. *Id.*

56. Chou, Condrón & Belland, *supra* note 11, at 375-77.

57. Nielsen/NetRatings, *supra* note 53.

58. MRI CYBERSTATS, INTERNET ACCESS AND USAGE, PERCENT OF ADULTS 18+ (2006), http://www.siiia.net/software/pubs/usage_06.pdf.

59. Chou, Condrón & Belland, *supra* note 11, at 377.

60. *Id.* at 375-77.

the Internet can deliver “multimedia resources in greater amounts and higher quality,” which in turn delivers greater stimulation and satisfaction.⁶¹

Fifth, there is anonymity.⁶² Most individuals do not wish to publicize their involvement in certain activities, especially gambling, pornography, or adult-oriented chat rooms.

Finally, many find the interactivity of the Internet appealing.⁶³ The Internet provides users the opportunity to meet new people and to do so in a “socially safe and secure environment.”⁶⁴

Studies are increasingly giving credence to the formal recognition of Internet addiction. In 2006, Mount Sinai School of Medicine researchers conducted a study on compulsive Internet use.⁶⁵ The researchers concluded that between 3.7% to 13.7% of the Americans tested exhibited one or more signs of compulsive Internet use.⁶⁶ The Mount Sinai study revealed that approximately 14% of the subjects said it was difficult to abstain from the Internet for a period of a few days; nearly 9% admitted to concealing their Internet use from loved ones; and roughly 6% reported that their relationships had suffered due to their excessive Internet use.⁶⁷ Dr. Elias Aboujaoude, director of Stanford’s Impulse Control Disorders Clinic, stated the following:

a small but growing number of Internet users are starting to visit their doctors for help with unhealthy attachments to cyberspace . . . [and that] these patients’ strong drive to compulsively use the Internet to check e-mail, make blog entries or visit Web sites or chat rooms, is not unlike what sufferers of substance abuse or impulse-control disorders experience: a repetitive, intrusive and irresistible urge to perform an act that may be pleasurable in the moment but that can lead to significant problems on the personal and professional levels.⁶⁸

Increasingly, professionals are recognizing that a problematic use

61. *Id.* at 377.

62. *Id.* at 381.

63. *Id.*

64. *Id.*

65. Aboujaoude et al., *supra* note 11, at 751.

66. *Id.* at 753.

67. *Id.*

68. *Recent studies from Stanford University*, HEALTH & MED. WEEK, Aug. 27, 2007, at 4940. In addition, Dr. Aboujaoude states, “people will tell me that they feel restless when they go for a whole afternoon without checking e-mail, there is mounting anxiety when they try to cut back on their online use.” Catherine Holahan, *Virtually Addicted*, BUS. WEEK ONLINE, Dec. 14, 2006, http://www.businessweek.com/technology/content/dec2006/tc20061214_422859.htm?chan=search.

of the Internet is developing in a certain segment of the population.⁶⁹ Studies have shown that pathological Internet use has consequences that are “far reaching, with many subjects going without sleep, being late for work, ignoring family obligations, and suffering financial and legal consequences.”⁷⁰

B. Internet in the Workplace

Although the Internet was originally envisioned as a means to increasing employee productivity, and no doubt fills that need, it has also produced an appealing distraction for employees.⁷¹ In describing the nature of this temptation, one Johns Hopkins University professor states, “[t]he issue is now you have something that seems to be genuinely irresistible because it’s such a gateway to the whole planet that’s right there on your desk and easily concealed to people passing by.”⁷² Wasting time at work gazing into the world of the Internet, or “cyberslacking,” has become a costly epidemic for employers worldwide.⁷³

One cost of employee Internet abuse for employers is the loss of employee efficiency. As of 2002, one study estimated that Internet misuse was costing American businesses over \$85 billion a year in loss of productivity.⁷⁴ According to a 2005 Gallup Organization report, employees were spending nearly seventy-five minutes a day at work using their computers for non-work related purposes.⁷⁵ At \$20 an hour, such conduct was costing employers about \$6,250 per employee per year in loss of work productivity.⁷⁶ According to one state government analyst, who has a master’s degree and is considered a valuable

69. See Aboujaoude et al., *supra* note 11, at 751.

70. Dan J. Stein et al., *Hypersexual Disorder and Preoccupation With Internet Pornography*, 158 AM. J. PSYCHIATRY 1590, 1593 (2001).

71. Juline E. Mills et al., *Cyberslacking! A Liability Issue for Wired Workplaces*, 42 CORNELL HOTEL & RESTAURANT ADMIN. Q. 34, 36 (2001).

72. Corinne Heller, *Don't let your boss catch you reading this*, REUTERS, Aug. 29, 2007, <http://www.reuters.com/article/newsOne/idUSL2067072120070829>.

73. See *id.*

74. *Workplace Web Abuse Costs Corporate America \$85 Billion This Year, Reports Websense Inc.; Internet Abuse Continues to Increase, Jumps 35 Percent Year Over Year*, BUS. WIRE, Nov. 12, 2002, [http://www.thefreelibrary.com/Workplace+Web+Abuse+Costs+Corporate+America+\\$85+Billion+This+Year,...+a094155338](http://www.thefreelibrary.com/Workplace+Web+Abuse+Costs+Corporate+America+$85+Billion+This+Year,...+a094155338).

75. Adrienne Fox, *Caught in the Web*, 52 HR MAG. 35, 36 (2007), available at http://www.shrm.org/hrmagazine/articles/1207/1207Fox2_cover.asp.

76. *Id.*

employee within her department, she has become addicted to the Internet.⁷⁷ She describes her problem by stating the following:

I spend five to six hours a day surfing the Internet at work . . . I know I can get my work done in the last two hours a day, so I cram at the last minute and spend the rest of the time reading newspapers online, checking e-mail every five minutes and looking at my bank statements.⁷⁸

Another cost of employee Internet abuse for employers is the legal liability that the employer may incur. In the last few years, the Equal Employment Opportunity Commission ("EEOC") has filed multiple causes of action against employers based on complaints lodged by current or former employees "who claimed they saw co-workers viewing or distributing adult-oriented material at work."⁷⁹ For example, Sierra Aluminum recently settled a lawsuit for \$200,000, resulting from its termination of an employee who had complained that she saw an assistant manager viewing pornography on his work computer.⁸⁰ Also, an employer could possibly be held liable for defamation if an employee sends defamatory statements via a work e-mail or posts such comments on an employer-related website.⁸¹ Another cost may be criminal liability. Once an employee begins using his or her work computer to store or distribute child pornography, or solicit minors for sexual encounters via e-mail or chat rooms, the employee is breaking the law, which may trigger certain duties on the part of the employer to know what its employees are doing.⁸² In a recent case, a New Jersey appellate court held that if an employer has actual or constructive knowledge that an employee is viewing child pornography at his or her workstation, the employer has a duty to take certain steps to prevent the employee from engaging in such conduct.⁸³ If the employer fails to exercise this duty, the employer may be held responsible for the foreseeable harm to an innocent third party.⁸⁴

77. *Id.* at 35.

78. *Id.*

79. Stephanie Armour, *Technology makes porn easier to access at work*, USA TODAY, Oct. 18, 2007, at 1A.

80. *Id.*

81. *Words of warning on employee comments on 'blogs,'* BIRMINGHAM POST (UK), Sept. 5, 2006, at 22.

82. *See, e.g., Doe v. XYZ Corp.*, 887 A.2d 1156, 1167-68 (N.J. Super. Ct. App. Div. 2005).

83. *Id.*

84. *Id.*

Furthermore, the websites visited and material downloaded by employees while at work may jeopardize the security of the employer's network, through such threats as viruses and hackers, incurring more costs for the employer.⁸⁵ A 2005 study analyzing the Internet activity of over ten thousand employees found that "more than nineteen percent of personal use involved Web sites that posed a potential security threat to the network, and eight percent involved sites that posed legal liability risks for the employer."⁸⁶ According to one 2004 study, computer viruses cost business and individuals between \$13.5 to \$82 billion a year.⁸⁷ Although employee Internet misuse may not be at the top of most companies' lists of costs, this online behavior is a "silent epidemic" that is insidiously taking a toll on employers nationwide.⁸⁸

III. THE AMERICANS WITH DISABILITIES ACT

In 1988, although many significant strides had been made in establishing equal treatment of previously disenfranchised segments of society, America's disabled population still suffered severe inequities. With reference to the legislative landscape for the disabled at this time, U.S. Attorney General Richard Thornburgh testified before a House Subcommittee that "civil rights laws protecting disabled persons [had] been enacted in piecemeal fashion" and that "serious gaps" existed in the law.⁸⁹ As a result, disabled Americans experienced "lower graduation rates, lower employment rates, higher poverty rates, and less personal freedom and independence."⁹⁰

In 1988, presidential hopeful Vice-President George H.W. Bush urged Congress to enact the Americans with Disabilities Act.⁹¹ Upon his inauguration as president, President Bush made Attorney General

85. Corey E. Stephenson, *Employer concerns grow with increased employee Internet use*, MICH. LAW. WKLY., May 22, 2006, available at http://www.accessmylibrary.com/coms2/summary_0286-15532354_ITM.

86. *Id.*

87. Adkisson, *supra* note 10, at 12.

88. Lawrence Budd, *Watching porn at work a 'silent epidemic'*, DAYTON DAILY NEWS (OH), Sept. 30, 2007, at A9. Websense, Inc. estimates that over 50% of employees spend between one and five hours per week on the Internet at work for personal reasons. Aaron Latto, *Managing Risk from Within: Monitoring Employees the Right Way*, RISK MGM'T MAG., Apr. 2007, at 32. According to Websense, "American business lose \$85 billion a year from the misuse of the Internet in the workplace." *Id.*

89. H.R. REP. NO. 472-490, pt. 2, at 48 (1990).

90. H.R. REP. NO. 109-196, pt. 1, 2 (2005).

91. RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 5 (2005).

Thornburgh responsible for working with Congress to pass disability discrimination legislation.⁹² A year and a half later, on July 26, 1990, President Bush signed the Americans with Disabilities Act into law.⁹³ At the signing the Americans with Disabilities Act, President Bush declared the new piece of legislation to be “an historic opportunity . . . signal[ing] the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.”⁹⁴

In drafting the ADA, Congress looked in large part to the Rehabilitation Act of 1973 for a model.⁹⁵ Wishing to create broader protection for the disabled community than existed in the early 1970s, Congress enacted the Rehabilitation Act of 1973 to protect disabled Americans from disability discrimination by entities receiving federal financial assistance.⁹⁶ Modeling the language of the act on Title VI of the Civil Rights Act of 1964 (which prohibited race discrimination by federally funded entities), the Rehabilitation Act provided the following:

No otherwise qualified handicapped individual in the United States, as defined in section 7 (6), shall, solely by reason of his handicap, be excluded from the participation in, be denied of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁹⁷

Section 7 (6), which was codified and generally referred to as Section 504, eventually defined a “handicapped individual” as, “[a]ny person who (a) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment.”⁹⁸

However, the Rehabilitation Act’s protection was limited to disability discrimination by federally funded entities⁹⁹—a gap that spawned the need for more expansive legislation in the form of what became the ADA. In light of the extensive regulations and case law interpreting the Rehabilitation Act that had accumulated by the time

92. *Id.*

93. *Id.*

94. Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1070, 1071 (July 26, 1990).

95. COLKER, *supra* note 91, at 9-12.

96. *Id.* at 11.

97. *Id.* (quoting 29 U.S.C. § 794(a) (2000)).

98. *Id.* at 12 (quoting 29 U.S.C. § 706(7)(B) (2000)).

99. *Id.* at 11.

Congress began drafting the ADA, Congress looked to and imported much of the Rehabilitation Act's language in drafting the ADA.¹⁰⁰ Like those legislators who drafted the Rehabilitation Act, Congress similarly modeled the ADA on several titles of the Civil Rights Act of 1964, which treated various forms of racial discrimination.¹⁰¹

The pervasive influence of the Rehabilitation Act on the ADA is evident from the fact that "Congress drew the ADA's definition of disability almost verbatim from the definition of 'handicapped individual' in the Rehabilitation Act."¹⁰² The ADA defines "disabled individual" as one with:

a physical or mental impairment that substantially limits one or more of the major life activities of the individual;

a record of such an impairment; or

being regarded as having such an impairment.¹⁰³

The ADA is comprised of five titles, three of which are directed at preventing three distinct forms of disability discrimination.¹⁰⁴ Title I prohibits employment discrimination.¹⁰⁵ Title II prohibits disability discrimination by any "public entity,"¹⁰⁶ which largely includes "any State or local government."¹⁰⁷ Title III prohibits disability discrimination in the equal enjoyment of "public accommodations"¹⁰⁸ and "public transportation services."¹⁰⁹ Upon the ADA's enactment, Senator Orrin Hatch (R-Utah) declared the ADA to be "the most sweeping piece of civil rights legislation since the Civil War era."¹¹⁰

100. *Id.* at 16.

101. *Id.* at 17.

102. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193 (2002).

103. 42 U.S.C. § 12102(2)(A)-(C) (1991).

104. *Buchanan v. Maine*, 469 F.3d 158, 170 (1st Cir. 2006).

105. 42 U.S.C. § 12112(a).

106. *Id.* § 12132.

107. *Id.* § 12131(1)(A).

108. *Id.* § 12182(a).

109. *Id.* § 12184(a).

110. 135 CONG. REC. 19,804 (1989) (statement of Sen. Hatch). Although there were high hopes for the impact that the ADA would have for the disabled community, evidence suggests that the hopes of legislators and politicians may have been too high, for instance, only a mere third of disabled individuals have employment. COLKER, *supra* note 91, at 69. Of the unemployed disabled population, two-thirds would prefer to be employed. *Id.* Roughly one-third of disabled individuals are impoverished (compared to ten percent of non-disabled individuals). *Id.* Also, "[t]wenty-two

Although lawmakers clearly intended the ADA to be “sweeping” in its protection of disabled employees, parties seeking relief under the ADA soon faced considerable opposition from the judiciary. The U.S. Supreme Court issued several decisions that narrowly construed the meaning of “disability” and read into the ADA certain limitations that severely limited petitioners in showing that they were “disabled” for purposes of the ADA. Believing that the courts ultimately strayed from the path that Congress had paved for them in enacting the ADA, in September 2008, Congress enacted the Americans with Disabilities Amendments Act (“ADAAA”) to restore protection for the broad range of individuals with disabilities as originally envisioned by Congress.¹¹¹ President Bush signed the ADAAA into law on September 25, 2008.¹¹² The ADAAA’s purpose is to “clarify the intention and enhance the protections of the [ADA] of 1990, landmark civil rights legislation that provided ‘a clear and comprehensive national mandate for the elimination of discrimination on the basis of disability.’”¹¹³

The remainder of this Comment will evaluate whether the ADA is sufficiently “sweeping” to protect those suffering from a condition that could not possibly have been envisioned by legislators when Senator Hatch made this statement in 1989—namely, addiction to the Internet.

IV. INTERNET ADDICTION—DISABILITY?

The ADA makes it unlawful for an employer to discriminate against “a qualified individual with a disability because of the disability . . . in regard to . . . [the] terms, conditions, and privileges of employment.”¹¹⁴ To prevail under an ADA claim, the plaintiff must first

percent of individuals with disabilities fail to complete high school, compared with [nine] percent of the nondisabled population . . . [p]eople with disabilities are more than twice as likely to postpone needed health care because they cannot afford it ([twenty-eight] percent compared with [twelve] percent).” *Id.*

111. ADA Amendments Act of 2008, S. 3406, 110th Cong. § 2(b)(1) (2008).

112. WhiteHouse.gov, Presidential News & Speeches, President Bush Signs S. 3406 Into Law (Sept. 25, 2008), <http://www.whitehouse.gov/news/releases/2008/09/20080925-8.html>.

113. 154 CONG. REC. S8840-01, Statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008 (daily ed. Sept. 16, 2008) (statement of Sen. Harkin).

114. 42 U.S.C. § 12112(a) (1991). Prior to filing a lawsuit under the ADA, a plaintiff must first exhaust his or her administrative remedies. *Jones v. United Parcel Serv., Inc.*, 502 F.3d 1176, 1183 (10th Cir. 2007) (citing *MacKenzie v. Denver*, 414 F.3d 1266, 1274 (10th Cir. 2005)). First, the plaintiff must file a charge of discrimination with the EEOC. *Id.* (citing *Jones v. Runyon*, 91 F.3d 1398, 1399 n.1 (10th Cir. 1996)). The purpose of the exhaustion requirement is to put the employer on notice of the complaint and assist in the amicable resolution of the dispute. *Rodriguez*

and foremost establish a *prima facie* case of discrimination, which will require the plaintiff to demonstrate that (1) he or she is “disabled” according to the ADA’s definition of the term; (2) that he or she is qualified to perform the essential functions of his or her prior job, with or without reasonable accommodation; and (3) that his or her employer discriminated against the plaintiff because of the plaintiff’s disability.¹¹⁵

A plaintiff seeking redress for employment discrimination based on Internet addiction will likely learn that the establishment of his or her *prima facie* case generally is no easy task. Although the ADA was

Velazquez v. Autoridad Metropolitana de Autobuses, 502 F. Supp. 2d 200, 208 (D.P.R. 2007). The plaintiff’s submission has to satisfy certain minimum requirements to satisfy his or her duty. *United Parcel Serv., Inc.*, 502 F.3d at 1184 (citing 29 C.F.R. § 1601.9). In brief, the charge has to be written, signed, and verified, as well as contain information “sufficiently precise to identify the parties, and to describe generally the action or practices complained of.” *Id.* (citing 29 C.F.R. § 1601.12(b)). Some circuits would also inquire into whether a plaintiff manifested “an intent to activate the administrative process.” *Id.* (citing *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1319-20 (11th Cir.2001)). Next, the plaintiff must make sure that he or she includes all of the facts in the charge that may subsequently serve as a basis for his federal lawsuit. With respect to the plaintiff’s ADA lawsuit, a federal court would have subject matter jurisdiction only “over all allegations of discrimination that either ‘fell within the scope of the EEOC’s actual investigation or an EEOC investigation which *can reasonably be expected* to grow out of the charge of discrimination.” *Josephs v. Pacific Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006) (quoting *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1100 (9th Cir. 2002) (citation omitted). The court will inquire into whether the plaintiff’s disability claim was encompassed in the plaintiff’s EEOC charge, specifically confirming whether the ADA claim is “unquestionably ‘like or reasonably related to’” the allegations of discrimination in the EEOC charge. *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1082 (9th Cir. 2000). Third, the plaintiff must make sure he or she files the appropriate notice in a timely manner. The plaintiff would be required to file a charge with the EEOC within 180 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(1). However, if the plaintiff chose to originally file with a state or local agency, which also has the authority to grant relief, then he or she may file his claim with the EEOC within 300 days of the alleged unlawful practice. *Id.* For ADA claims, as soon as a plaintiff knows of his or her injury, or should reasonably know, the statute of limitations begins to run the cause of action. *Gupta v. Northrop Grumman Corp.*, 462 F. Supp. 2d 56, 58 (D.C. Cir. 2006) (citing *Stewart v. District of Columbia, No. Civ.A. 04-1444 CKK*, 2006 WL 626921, at **3-4 (D.D.C. 2006)). If the plaintiff does not receive relief from the EEOC, the EEOC will issue a right-to-sue letter, at which time he or she would have 90 days to file a civil action. 42 U.S.C. § 2000e-5(f)(1).

115. See, e.g., *McPherson v. O’Reilly Auto., Inc.*, 491 F.3d 726, 730 (8th Cir. 2007); *Jenkins v. Cleco Power, LLC*, 487 F.3d 309, 315 (5th Cir. 2007); *Thompson v. Henderson*, 226 F. App’x 466, 471 (6th Cir. 2007); *Boone v. Rumsfeld*, 172 F. App’x 268, 271 (11th Cir. 2006); *MacKenzie*, 414 F.3d at 1274; *Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100, 104 (1st Cir. 2005); *Burke v. Niagara Mohawk Power Corp.*, 142 F. App’x 527, 528 (2d Cir. 2005); *Gaul v. Lucent Tech., Inc.*, 134 F.3d 576, 580 (3d Cir. 1998). An additional preliminary requirement of a plaintiff’s claim is that the employer is a “covered entity” under the terms of the ADA. “The term ‘covered entity’ means an employer, employment agency, labor organization, or joint labor-management committee.” 42 U.S.C. § 12111(2). The term “employer” is in turn defined as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” *Id.* § 12111(5)(A).

ushered in as the dawn of a new era for the disabled, disabled employees have consistently been disappointed by the courts' administration of relief under the ADA. One study that reviewed all ADA decisions between the date on which the ADA became effective in 1992 through July 1998 found that the defendant-employer prevailed in approximately ninety-three percent of cases at the trial court level and in ninety-four percent of decisions at the appellate court stage.¹¹⁶ And the ADA's protection of disabled employees is not improving with time. On the contrary, a survey of ADA decisions taken in 2003 determined that the defendant-employer prevailed in approximately ninety-seven percent of ADA decisions.¹¹⁷

The majority of employer victories are won on summary judgment.¹¹⁸ According to the Commission on Mental and Physical Disability Law, "employees are treated unfairly under the Act due to myriad legal technicalities that more often than not prevent the issue of employment discrimination from ever being considered on the merits by an administrative or judicial tribunal."¹¹⁹ One aspect of the legal technicalities contributing to the overwhelming rate of failure for ADA plaintiffs is grounded in the conceptual difficulties inherent in the dual requirement that a plaintiff be "disabled" and "qualified."¹²⁰ These conceptual difficulties create an unenviable "Catch-22" dilemma for many ADA plaintiffs.¹²¹ On one hand, the plaintiff must demonstrate that he or she is a "qualified individual," or capable of performing the

116. Ruth Colker, *The Americans With Disabilities Act: A Windfall For Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999).

117. Amy L. Allbright, *2003 Employment Decisions Under the ADA Title I – Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 319 (2004).

118. Commission on Mental and Physical Disability Law, *Study Finds Employers Win Most ADA Title I Judicial Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 403 tbl.1 (1998).

119. *Id.* at 404.

120. *Id.* at 407.

121. See, e.g., *Sullivan v. Neiman Marcus Group, Inc.*, 358 F.3d 110, 115 (1st Cir. 2004); *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 24 (1st Cir. 2002). See also, *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustess*, 354 F. Supp. 2d 1244, 1250 (N.D. Ala. 2005), *aff'd*, 507 F.3d 1306 (11th Cir. 2007). One author concluded that the dilemma rests not in Congress's choice of words, but rather in the courts' restrictive construction of the ADA's language. Judith J. Johnson, *Rescue the Americans with Disabilities Act from Restrictive Interpretations: Alcoholism as an Illustration*, 27 N. ILL. U. L. REV. 169, 174 (2007). Specifically, the author argues that courts have interpreted "substantially limited" so restrictively that it is virtually impossible to still perform one's job and also be disabled. *Id.* Due to the excessively restrictive interpretation, "[t]he class of disabled people today is virtually limited to people who are completely blind, deaf, or in a wheelchair because, in essence, they are totally limited in a major life activity." *Id.*

essential functions of his job.¹²² On the other hand, the claimant must demonstrate that he or she is disabled, or substantially limited in performing a major life activity.¹²³ If the claimant succeeds in showing that he or she is substantially limited in performing a major life activity (especially if that activity is working), the claimant may not be able to simultaneously show that he or she is not a “qualified individual,” thereby excluding the plaintiff from coverage under the ADA.¹²⁴ As one author noted, “[e]mployers are more frequently using this dilemma to their advantage, arguing both that a plaintiff is not disabled, and that she is so disabled that she is not qualified.”¹²⁵

Another important piece of the tremendous burden on ADA plaintiffs is the excessively restrictive definition of the term “disability.” According to the Commission on Mental and Physical Disability Law, the driving reason why very few employee-plaintiffs ever have the opportunity to argue their cases before a jury of their peers is that the definition of “disability” is too restrictive.¹²⁶ The Supreme Court has repeatedly endorsed a stringent interpretation of the term “disability,” which has further raised the bar for ADA claimants to prevail.¹²⁷ Even certain states seem to disagree with the stringent approach adopted by many of the federal courts under the ADA, enacting their own disability discrimination laws that provide broader protection.¹²⁸ The statistics

122. Commission on Mental and Physical Disability Law, *supra* note 118, at 405.

123. *Id.*

124. *Id.*

125. Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 127 (1997).

126. Commission on Mental and Physical Disability Law, *supra* note 118, at 405.

127. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193 (2002) (stating that the terms of the ADA, such as “major life activities,” “need to be interpreted strictly to create a demanding standard for qualifying as disabled”); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483-87 (1999) (noting that because Congress cited to 43 million disabled individuals in the United States when there were in fact many more than that is evidence that Congress intended to limit the number of individuals who could qualify as disabled under the ADA).

128. *E.g.*, *EEOC v. United Parcel Serv., Inc.*, 424 F.3d 1060, 1068-69 (9th Cir. 2005) (citations omitted) (recognizing the notable distinction between the definition of disability under California’s disability statute and that of the ADA). Most notably, California’s statute requires that one’s impairment must only “limit” a major life activity rather than “substantially limit” a major life activity, as required under the ADA. *Id.* (citations omitted). The California legislature expressly stated that it distinguished its legislation from that of the ADA “to result in broader coverage under the law of this state than under that federal act.” CAL. GOV’T CODE § 12926.1(c) (West 2005). State legislators recognized that California’s legislation “contains broad definitions of physical disability, mental disability, and medical condition.” *Id.* § 12926.1(b). Although the federal statute’s definition of disability is the focus of this Comment, individuals suffering with Internet addiction may be more likely to show that they are disabled with a state law cause of action.

alone, as cited above,¹²⁹ speak for themselves; individuals have an excruciatingly difficult burden in showing a court that they are disabled under the ADA. It was this burden that prompted Congress to enact the ADAAA, as Congress concluded that such a high standard for proving that one is disabled was “inconsistent with [the] congressional intent” embodied in the ADA.¹³⁰ Of course, years may pass before the impact of the ADAAA actually manifests itself in the courts.

The requirement to show that one is disabled under the ADA highlights one notable distinction between the ADA and other civil rights statutes. Under other civil rights statutes, the plaintiff need not prove that he or she is a member of a protected class in order to proceed with his or her cause of action.¹³¹ For example, under Title VII of the Civil Rights Act of 1964, both male and female plaintiffs are qualified to sue for gender discrimination.¹³² Also, both black and white plaintiffs are qualified to sue for racial discrimination.¹³³ In such lawsuits, therefore, the trier of fact can focus on the employer’s discriminatory motives and conduct.¹³⁴ However, under the ADA, the plaintiff’s obligation to satisfy the court that he or she is a member of the relevant protected class is in itself such a heavy burden that the courts rarely reach the stage of examining the employer’s discriminatory conduct.¹³⁵ The purpose of this Comment is to solely examine this showing that the ADA plaintiff must make, which constitutes only one of three elements of the plaintiff’s *prima facie* case. Despite this arguably insurmountable threshold laid out by the ADA and the courts, this Section will seek to navigate through this definition and evaluate how a plaintiff with an Internet addiction may qualify as “disabled” under the ADA.

A. Internet Addiction—Impairment

Under the ADA, there are three ways in which a plaintiff can

129. See *supra* notes 116-14 and accompanying text.

130. ADA Amendments Act of 2008, S. 3406, 110th Cong. § 2(a)(8) (2008).

131. Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 221 (1997) (comparing the class of people protected under the ADA to those protected under federal race and sex antidiscrimination law).

132. See *id.*

133. See *id.* (citing *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 280 (1976) (allowing two white men claiming “reverse” discrimination after being fired for an offense that a black co-worker was not similarly disciplined for to sue under Title VII)).

134. E.g., *McDonald*, 427 U.S. at 278-86.

135. See Colker, *supra* note 116, at 103 n.24.

qualify as “disabled” on the basis of an Internet addiction: The ADA defines the term “disability” as: (1) “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”; (2) “a record of such an impairment”; or (3) “being regarded as having such an impairment.”¹³⁶ In order for the plaintiff to qualify as disabled under any one of these three definitions, the plaintiff must first show that his or her Internet addiction constitutes an “impairment.”¹³⁷ This threshold showing is crucial in order for the plaintiff to avoid summary judgment since the question of whether his or her Internet addiction constitutes an impairment is a question of law for the court.¹³⁸

The good news for a plaintiff is that Internet addiction is not expressly excluded under the current statutory framework of the ADA. Demonstrating that the plaintiff’s Internet addiction is an impairment will require the plaintiff to show that his or her condition “satisfies the statutory and regulatory definition of a[n] . . . impairment.”¹³⁹ The ADA does not directly define the term mental or physical impairment.¹⁴⁰ However, the Supreme Court has observed that Congress adopted “a specific statutory provision in the ADA” for the term “impairment,” which states the following: “[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser

136. 42 U.S.C. § 12102(2) (2000).

137. *See id.*

138. *Poindexter v. Atchison, Topeka & Santa Fe Ry. Co.*, 168 F.3d 1228, 1230 (10th Cir. 1999) (“[W]hether a claimed affliction constitutes an impairment under the ADA and whether the identified endeavor constitutes a major life activity are determinations of law for the court to decide.” (citing *Bragdon v. Abbot*, 524 U.S. 624, 631 (1998))).

139. *Bragdon*, 524 U.S. at 631, 637 (requiring and holding that the plaintiff-employee’s HIV infection constituted an impairment).

140. *Josephs v. Pacific Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006) (“The term ‘mental impairment’ is not defined in the ADA.” (citing 42 U.S.C. § 12101 (2000))); *Betts v. Rector & Visitors of Univ. of Va.*, No. 97-1850, 1999 WL 739415, at *6 (4th Cir. Sept. 22, 1999) (unpublished table decision) (“[T]he term ‘impairment’ is not defined in the ADA.”), *aff’d*, 145 F. App’x 7 (4th Cir. 2005). The Supreme Court has identified two sources of guidance in interpreting the ADA’s definition of “disability”—the regulations issued by the Department of Health, Education, and Welfare (“HEW”) under the Rehabilitation Act of 1973 and the regulations issued by the EEOC under the ADA. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193 (2001). The Supreme Court gives significant deference to HEW’s regulations because “Congress drew the ADA’s definition of disability almost verbatim from the definition of ‘handicapped individual’ in the Rehabilitation Act.” *Id.* The Supreme Court stated that “[t]he HEW regulations are of particular significance because at the time they were issued, HEW was the agency responsible for coordinating the implementation and enforcement of § 504 of the Rehabilitation Act . . . prohibit[ing] discrimination against individuals with disabilities by recipients of federal financial assistance.” *Id.* at 195 (citing *Bragdon*, 524 U.S. at 632). Although no one agency has the singular authority to issue regulations interpreting the term “disability” under the ADA, the EEOC has done so and courts routinely defer to those regulations. *See id.* at 194 (citations omitted).

standard than the standards applied under title V of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to such title.”¹⁴¹

In other words, the ADA’s statutory definition of “impairment” essentially incorporates the regulations issued by the Department of Health, Education, and Welfare¹⁴² (“HEW”) in interpreting the Rehabilitation Act, as ultimately does the EEOC, which has adopted verbatim HEW’s definition of “impairment.”¹⁴³ Federal courts routinely defer to the definition of the term “impairment” as articulated in the EEOC’s regulations.¹⁴⁴ Therefore, to expressly fall within the scope of the ADA’s “statutory and regulatory definition” of “impairment,” a plaintiff’s Internet addiction would have to qualify as one of the following:

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

(2) Any mental or psychological disorder, such as mental retardation,

141. *Bragdon*, 524 U.S. at 631-32 (quoting 42 U.S.C. § 12201(a) (2000)).

142. The Department of Health, Education, and Welfare was created in 1953, but when the Department of Education was created in 1980, HEW was redesignated as the U.S. Department of Health and Human Services. 1 STEVEN W. FELDMAN, WEST’S FEDERAL ADMINISTRATIVE PRACTICE § 150 (4th ed. 2002).

143. *Walker v. City of Vicksburg*, Miss., No. 5:06cv60-DCB-JMR, 2007 WL 3245169, at *6 n.6 (S.D. Miss. Nov. 1, 2007) (“[T]his Court . . . takes notice of the fact that the EEOC regulation defining ‘physical or mental impairment’ reads verbatim with the HEW regulation defining the same terms under the Rehabilitation Act of 1973.”).

144. See *Delgado v. Triborough Bridge & Tunnel Auth.*, 485 F. Supp. 2d 453, 459 (S.D.N.Y. 2007) (citing *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870 (2d Cir. 1998); *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 151 (2d Cir. 2000) (“Under the law of this Circuit, the EEOC’s regulations are entitled to ‘great deference’ in interpreting the ADA.”) (quoting *Muller v. Costello*, 187 F.3d 298, 312 (2d Cir. 1999)). The Supreme Court has noted that the EEOC regulations “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)). However, the Supreme Court has questioned the level of deference owed to the EEOC’s regulations regarding definitions in the ADA; nonetheless, courts routinely defer to those regulations. See, e.g., *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 762 n.7 (3d Cir. 2004) (citations omitted). The Ninth Circuit has noted that “[t]he Supreme Court has not decided whether the EEOC regulations are reasonable or are entitled to deference, although in several cases it has assumed that they are.” *EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794, 801 n.4 (9th Cir. 2002) (citing *Toyota Motor Mfg.*, 534 U.S. at 194).

organic brain syndrome, emotional or mental illness, and specific learning disabilities.¹⁴⁵

The ADA regulations clearly do not explicitly specify Internet addiction as an impairment. Nonetheless, the regulations' list of impairments was "not meant as a comprehensive enumeration" of impairments, but merely as a "representative list of disorders of conditions" that may qualify as mental or physical impairments.¹⁴⁶

In other words, the definition of the term "impairment" can be construed broadly.¹⁴⁷ Consequently, a plaintiff's Internet addiction could arguably fall under the broad definition of "impairment." In many instances, courts have recognized conditions as impairments even though they clearly fall outside the express language of the regulations. For example, in *Coons v. Secretary of the U.S. Department of Treasury*,¹⁴⁸ the Ninth Circuit recognized a variety of mental and physical impairments as cognizable under the ADA, including "abdominal distress, palpitations, heart pounding, chest pain, depression and panic disorder."¹⁴⁹ Also, in *Williams v. Stark County Board of County Commissioners*,¹⁵⁰ the Sixth Circuit recognized hypertension and migraine headaches as impairments.¹⁵¹ A plaintiff's Internet addiction could arguably fall within the scope of the broad designation "[a]ny mental or psychological disorder."¹⁵² One suffering from bipolar disorder,¹⁵³ depression,¹⁵⁴ Attention Deficit Disorder,¹⁵⁵ or post-traumatic stress disorder¹⁵⁶ would similarly be unable to point to the language of the ADA or its regulations to support an argument that such conditions constitute impairments under the ADA, yet federal courts

145. 29 C.F.R. § 1630.2(h)(1)-(2) (2007). See also 28 C.F.R. § 35.104(1)(i)(A)-(B).

146. *Poindexter v. Atchison, Topeka & Santa Fe Ry. Co.*, 168 F.3d 1228, 1231 (10th Cir. 1999) (citing *Bragdon*, 524 U.S. at 633); see also 45 C.F.R. pt. 84, app. A, § 84.61(3) at 345 (2007).

147. *Constance v. Pepsi Bottling Co. of N.Y.*, No. 03-CV-5009, 2007 WL 2460688, at *29 (E.D.N.Y. Aug. 24, 2007); *Bourbeau v. City of Chicopee*, 445 F. Supp. 2d 106, 120 (D. Mass. 2006) (citing 29 C.F.R. § 1630.2(h)(1) (2006)); *Cella v. Villanova Univ.*, No. CIV.A. 01-7181, 2003 WL 329147, at *9 (E.D. Pa. Feb. 12, 2003) (citing 45 C.F.R. § 84.3(j)(2)(i) (2001)).

148. 383 F.3d 879 (9th Cir. 2004).

149. *Id.* at 885.

150. 7 F. App'x. 441 (6th Cir. 2001).

151. *Id.* at 446-47.

152. 29 C.F.R. § 1630.2(h)(i).

153. *Taylor v. Phoenixville School Dist.*, 174 F.3d 142, 152 (3d Cir. 1999).

154. *Hatzakos v. Acme Am. Refrigeration, Inc.*, No. 03-CV-5428, 2007 WL 2020182, at *5 (E.D.N.Y. July 6, 2007).

155. *Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm.*, 370 F.3d 763, 769 (8th Cir. 2004).

156. *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 283 (4th Cir. 2004).

have held that each one of these conditions can constitute an impairment.¹⁵⁷

The EEOC has additionally acted at times to prevent the term "impairment" from being stretched beyond its intended boundaries. For example, the EEOC has taken precautions to ensure that certain conditions, although limiting in some manner, cannot qualify as impairments under the ADA.¹⁵⁸ The EEOC has taken the position that the following conditions or characteristics are not impairments: (1) "environmental, cultural, and economic disadvantages" (e.g., poverty, lack of education); (2) "homosexuality and bisexuality"; (3) "pregnancy"; (4) "physical characteristics" (e.g., eye color, hair color, left-handedness); (5) "common personality traits" (e.g., poor judgment, a quick temper); and (6) "normal deviations in height, weight, or strength."¹⁵⁹ For example, in *Brunke v. Goodyear Tire & Rubber Co.*,¹⁶⁰ the Eighth Circuit denied a plaintiff's claim that he was disabled on the basis of his emotional instability.¹⁶¹ In *Watson v. City of Miami Beach*,¹⁶² the Eleventh Circuit held that a plaintiff's "serious personality conflicts" with co-workers did not rise to the level of an impairment.¹⁶³

Furthermore, the ADA itself explicitly excludes certain conditions from qualifying as impairments.¹⁶⁴ Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, many gender-identity disorders not resulting from physical impairments, other sexual behavioral disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal drug use cannot constitute impairments under the ADA.¹⁶⁵

157. See *Taylor*, 174 F.3d at 152; *Jacques v. Dimarzio*, 386 F.3d 192, 201 (2d Cir. 2004); *Hatzakos*, 2007 WL 2020182, at *5.

158. 29 C.F.R. pt. 1630, app. § 1630.2(h) ("It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments.").

159. *Id.*; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EXECUTIVE SUMMARY: COMPLIANCE MANUAL SECTION 902, DEFINITION OF THE TERM "DISABILITY," available at <http://www.eeoc.gov/policy/docs/902sum.html> (last visited May 14, 2008).

160. 344 F.3d 819 (8th Cir. 2003).

161. *Id.* at 822 (citing 29 C.F.R. app. § 1630.2(h)).

162. 177 F.3d 932 (11th Cir. 1999).

163. *Id.* at 935.

164. 42 U.S.C. § 12211(b) (2000).

165. *Id.* Like Internet addiction, compulsive gambling is a process addiction. Although the APA has recognized compulsive gambling as a disorder, plaintiffs are automatically precluded from seeking relief for employment discrimination under the ADA where the underlying disability is an addiction to gambling as a result of the ADA's exclusions. See, e.g., *Labit v. Akzo-Nobel Salt, Inc.*, No. 99-30047, 2000 WL 284015, at *2 (5th Cir. Feb. 7, 2000) (per curiam) (denying plaintiff's compulsive gambling disorder as a disability in light of Congress's express exclusion of compulsive

The bad news for plaintiffs is the lack of authority affirmatively recognizing Internet addiction as a distinct impairment. As a mental impairment, the ultimate recognition would ideally come from the APA in the DSM.¹⁶⁶ The DSM “is cited regularly by judges in various contexts,” including in evaluating whether a condition constitutes an impairment under the ADA.¹⁶⁷ As noted by legislators in discussing the appropriate scope of the definition of “disability” under the ADA, “[w]hen psychiatrists talk of mental disorders they mean the kinds of disorders categorized [in the DSM]. And when psychiatrists testify about the disorders categorized here, judges—who are charged by law with determining what is or is not a ‘mental impairment’—listen to the psychiatrists.”¹⁶⁸ Therefore, the DSM’s current failure to recognize Internet addiction as a distinct disorder is likely to give judges pause in ruling that a plaintiff’s Internet addiction is an impairment under the ADA.

Nonetheless, the DSM’s omission of Internet addiction is not conclusive. In enacting the ADA, Congress recognized that “[t]he fact that a ‘condition’ does not appear in DSM does not mean that such condition is not a mental disorder.”¹⁶⁹ The DSM itself notes that its “diagnostic criteria” and “classification of mental disorders reflect a consensus of current formulations of evolving knowledge in our field but do not encompass all the conditions that may be legitimate objects of treatment or research efforts.”¹⁷⁰ Furthermore, the DSM’s omission of Internet addiction is not surprising given that the current version was issued in 2000.¹⁷¹ Therefore, at the time the APA was conducting the research in preparation for the 2000 edition, the Internet was still in its nascent stages and problems associated with excessive Internet use were barely beginning to manifest themselves. Also, “[p]sychiatrists are not the only persons who can define a mental disorder; judges do it all the

gambling in the ADA (citing § 12211(b)(2)).

166. See 135 CONG. REC. 20,572 (1989) (Statement of Sen. Armstrong) (“A private entity that wishes to know what [the ADA] might mean with respect to mental impairments would do well to turn to [the DSM]”); Shute, *supra* note 45, at 61 (referring to the fourth edition of the DSM as “the bible of mental health care”).

167. 135 CONG. REC. 20,572 (1989) (Statement of Senator Armstrong) (citations omitted).

168. *Id.*

169. *Id.*

170. *Id.* (quoting AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R xxix (3d ed., rev. 1987)).

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

time.”¹⁷² While Internet addiction research may be incomplete, a plaintiff likely has numerous experts available who would testify and present evidence of Internet addiction’s qualification as a distinct disorder and an impairment, at least in the case of that particular individual. Nonetheless, the lack of recognition of Internet addiction by the APA and the courts creates additional work for plaintiffs. Of course, there is growing speculation that the APA will include some form of Internet addiction in its next addition to be released in 2012, which would considerably bolster the plaintiff’s case.

Another possibly ominous fact for a plaintiff is Congress’ exclusion of compulsive gambling as a disability. As discussed above, many researchers view compulsive gambling as the most analogous behavioral addiction to Internet addiction.¹⁷³ Therefore, Congress’ treatment of compulsive gambling under the ADA may be a portent of Congress’ treatment of Internet addiction in the future. At the same time, the ADA’s legislative history fails to reveal the basis on which Congress excluded compulsive gambling as a disability. According to Senator Armstrong, who promoted the explicit exclusions mentioned above, the exclusions were based on the fear that the private sector of the courts would be “swamped with mental disability litigation,” and by excluding compulsive gambling and others, Congress would remove “some of the mental disorders that would have created the more egregious lawsuits.”¹⁷⁴ Beyond this concern, it is not entirely clear the exact nature of compulsive gambling that prompted Congress to exclude that condition and how and if that would carry over to an exclusion of Internet addiction. Moreover, Senator Armstrong’s amendment was intended to be “narrow” and it is uncertain if Congress would expand the current exclusions to incorporate Internet addiction.¹⁷⁵ Furthermore, other researchers have decided to not use compulsive gambling as the model for Internet addiction, but rather other variations of an impulse control disorder.¹⁷⁶ The DSM contains other impulse control disorders that are not excluded by Congress (e.g., intermittent explosive disorder,¹⁷⁷ trichotillomania,¹⁷⁸ and impulse-control disorder not

172. 135 CONG. REC. 20,572 (1989).

173. See *supra* text accompanying notes 49-50.

174. 135 CONG. REC. 20,574 (1989).

175. *Id.*

176. See *supra* note 51 and accompanying text.

177. DSM-IV, *supra* note 171 § 312.34, at 667.

178. *Id.* Trichotillomania is an impulse control disorder that is primarily characterized by “the recurrent pulling out of one’s own hair that results in noticeable hair loss.” *Id.* § 312.39, at 674, §

otherwise specified).¹⁷⁹ Nonetheless, the possibility is there that a court could rule against Internet addiction as an impairment on the basis of the compulsive gambling exclusion.

A plaintiff could attempt to bolster his or her case by drawing the court's attention to the ordinary meaning of the term impairment. For instance, in light of Webster's dictionary's definition of "impairment" as a "decrease in strength, value, amount, or quality,"¹⁸⁰ the Fourth Circuit held that an employee's deficiencies in his short-term memory and reading skills constituted a mental impairment.¹⁸¹ Likewise, a plaintiff could show that studies have found those suffering from various forms of Internet addiction experience numerous symptoms that adversely impact their strength, value, amount, or quality of their work and other activities.¹⁸² For example, Internet addicts spend an inordinate amount of time on the Internet, in many cases at a great cost. In one case, for example, a stay-at-home mother who described herself as being "computer illiterate" when she first started learning about Internet chat rooms developed such a compulsion for the Internet that "within only three months, she was spending between fifty and sixty hours a week [on the Internet,] sacrificing household chores, family time and social activities."¹⁸³ Such behavior certainly falls within the scope of the ordinary, dictionary meaning of "impairment."

In sum, under the ADA's current form, a plaintiff is not excluded from submitting Internet addiction as an impairment. There is some uncertainty disfavoring the plaintiff with the DSM's omission of Internet addiction and Congress' exclusion of the similar disorder of compulsive gambling. Nonetheless, when a judge weighs the ever-growing body of evidence that Internet addiction is a serious disorder and does so in connection with complying with the ADAAA's mandate to construe the term "disability" "in favor of broad coverage of individuals under [the

312.30, at 677.

179. *Id.* § 312.39, at 674-677, § 312.30, at 677. An impulse control disorder not otherwise specified refers to "disorders of impulse control (e.g., skin picking) that do not meet the criteria for any specific Impulse-Control Disorder or for another mental disorder having features involving impulse control described elsewhere in the manual (e.g., Substance Dependence, a Paraphilia)." *Id.* § 312.30, at 677.

180. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 612 (1988).

181. *Betts v. Rector & Visitors of Univ. of Va.*, No. 97-1850, 1999 WL 739415, at *1, *6 (4th Cir. Sept. 22, 1999) (unpublished table decision) (citations omitted), *aff'd*, 145 F. App'x 7 (4th Cir. 2005).

182. See Chou, Condrón, & Belland, *supra* note 11, at 369 (listing "failure to manage time, missed sleep, [and] missed meals" as some of the problems associated with compulsive Internet use according to one study) (referencing Brenner, *supra* note 12, at 881.).

183. Liu & Potenza, *supra* note 37.

ADA], to the maximum extent permitted by the terms of [the ADA],”¹⁸⁴ a judge may very well be persuaded that a plaintiff’s Internet addiction constitutes an “impairment.”

B. Major Life Activity

Even if a court accepts Internet addiction as an impairment, “[m]erely having an impairment does not make one disabled for purposes of the ADA.”¹⁸⁵ A plaintiff must further show that this impairment adversely impacts a “major life activity.”¹⁸⁶ In this context, the term “[m]ajor” . . . means important;” in other words, Internet addiction must adversely affect an activity “that [is] of central importance to [the plaintiff’s] daily life.”¹⁸⁷

The EEOC has enumerated a number of life activities that it considers to be “major” for purposes of the ADA. The ADA regulations expressly define “major life activities” as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹⁸⁸ The EEOC has also noted that “[t]his list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.”¹⁸⁹ Also, the EEOC’s Compliance Manual identifies “learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks . . . working [, and s]leeping” as major life activities.¹⁹⁰ The EEOC and many federal courts have deemed these activities to constitute “basic activit[ies] that the average person in the general population can perform with little or no difficulty.”¹⁹¹ In the ADAAA, Congress also provided an illustrative list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.¹⁹²

184. ADA Amendments Act of 2008, S. 3406, 110th Cong. § 4(a)(4)(A) (2008).

185. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195 (2002).

186. *Id.* (citing 42 U.S.C. § 12102(2)(A) (1994)).

187. *Id.* at 197 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1363 (1976)).

188. 29 C.F.R. § 1630.2(i) (2007).

189. *Id.* pt. 1630, app. § 1630.2(i).

190. EEOC, EEOC Notice No. 915.002, EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities pt. 3 (1997), available at <http://www.eeoc.gov/policy/docs/psych.html> [hereinafter EEOC Enforcement Guidance].

191. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999).

192. See ADA Amendments Act of 2008, S. 3406, 110th Cong. § 4(a)(2)(A) (2008).

Fortunately, for a plaintiff suffering from Internet addiction, research shows that “[p]roblematic Internet use not only consumes time, but also disrupts *major areas of life functioning*.”¹⁹³ While Internet addiction is unlikely to impact activities such as seeing, hearing, or reaching, such a condition, if serious enough, might impact a plaintiff’s ability to sleep, to interact with others, to concentrate/think, or to work.¹⁹⁴

1. Major Life Activities Unrelated to Work Generally

It should be noted that although a plaintiff’s employment is terminated for his or her Internet activities at work, the major life activity that is the basis of the plaintiff’s claim need not be related to work or working itself. While working itself can be a major life activity, there are numerous other major life activities, and there is no “requirement that limitations on other life activities—walking, for example—be shown to manifest specifically in the workplace before the plaintiff may be accorded disabled status under the statute.”¹⁹⁵ For example, a plaintiff may allege that his or her addiction adversely affects his or her ability to interact with others, but that difficulty need not necessarily manifest itself in the form of the plaintiff’s inability to successfully interact with co-workers. In fact, it is in the plaintiff’s best interest to rely upon major life activities other than working to support a disability claim. The Supreme Court has embraced the EEOC’s own reluctance to characterize working as a major life activity, agreeing that “working [is to] be viewed as a residual life activity, considered, as a last resort, *only* ‘[i]f an individual is not substantially limited with respect to *any other* major life activity.’”¹⁹⁶

2. Sleeping

Research demonstrates that sleep deprivation is a common

193. Liu & Potenza, *supra* note 37 (emphasis added).

194. *Id.*

195. Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 508 (7th Cir. 1998) (citations omitted). In Davidson, the Seventh Circuit reversed the district court’s holding that the plaintiff was not disabled since she failed to show how her learning impairment “interfere[d] with her ability to learn in the workplace,” even though the plaintiff had produced evidence of her learning impairment through her secondary and post-secondary education. *Id.* at 502, 508.

196. Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999) (quoting 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998)).

symptom of Internet addiction.¹⁹⁷ In one study, which was based upon 563 responses to an online study conducted across twenty-five countries, forty percent of respondents reported that on more than one occasion, they had obtained less than four hours of sleep in a night because of "non-essential Internet use."¹⁹⁸ In another study, many of the subjects reported staying up until one, two, three, or four o'clock in the morning to engage in their Internet activities.¹⁹⁹ As one subject described his preference for late-nights on the Internet, "I believe that the Internet belongs to the night. The deeper the night, the prettier the Internet . . . I enjoy the quietness of the surroundings, while the hustles and bustles on the net are about to start"²⁰⁰ The fatigue that Internet addicts experience due to sleeplessness may in turn contribute to employee errors, mishaps, and injuries in the workplace.²⁰¹

3. Interacting with Others

Internet addiction may adversely influence a plaintiff's ability to interact with others. Research has shown that increased Internet use can result in "statistically significant declines in social involvement . . . and with increases in loneliness."²⁰² As people use the Internet excessively, whether for viewing pornography or talking in chat rooms, they displace time that would otherwise be available for social interaction and spend increasing amounts of time alone.²⁰³ The time spent on the Internet can result in the erosion or complete loss of "strong ties," or those "relationships [characterized by] frequent contact, deep feelings of affection and obligation, and application to a broad content domain."²⁰⁴ Case studies have demonstrated the destructive impact that Internet addictions can have on all forms of intimate relationships—"marriages, dating relationships, parent-child relationships, and close friendships."²⁰⁵ Dr. Kimberly Young concluded from one study on Internet use that those exhibiting symptoms of Internet addiction progressively spent more time alone in front of a computer, sacrificing time with their

197. Liu & Potenza, *supra* note 37.

198. *Id.*

199. Chou, *supra* note 40, at 581.

200. *Id.*

201. Adkisson, *supra* note 10, at 111.

202. Robert Kraut et al., *Internet Paradox: A Social Technology That Reduces Social Involvement and Psychological Well-Being?* 53 AM. PSYCHOLOGIST 1017, 1028 (1998).

203. *See id.* at 1019.

204. *See id.* at 1019, 1029-30.

205. Young, *supra* note 12, at 241.

relatives and friends.²⁰⁶ Those individuals further alienate loved ones by reacting angrily or resentfully towards anyone who questions their Internet use or tries to take them away from the Internet.²⁰⁷

4. Concentrating/Thinking

Internet addiction may inhibit a plaintiff's ability to concentrate or think. Studies of individuals suffering from forms of Internet addiction have shown that Internet addiction is "associated with significant distress and functional impairment,"²⁰⁸ including adverse effects on concentration.²⁰⁹ A combination of physical and psychological consequences of an Internet addiction, such as fatigue, sleep deprivation, blurred vision, and body pain or discomfort have been determined to make "disruptions of daily routines" common occurrences for people afflicted with Internet addictions.²¹⁰ After one young female student's GPA dropped from 3.5 to 1.8, she decided to give up the Internet, but described her efforts by stating the following:

After three days off-line, I couldn't stop thinking about all my Net friends . . . I couldn't concentrate on reading, studying for tests, doing homework. I felt terrible, just like a smoker who has gone all day without smoking. I needed my Internet fix. That's when I knew I had a problem. I learned how powerful this addiction is and that I needed help with it.²¹¹

5. Working

Case studies have also demonstrated the adverse impact that Internet addiction may have on the ability to work.²¹² In one case study, a married forty-seven year-old computer consultant claimed to spend

206. *Id.*

207. *Id.*

208. Shapira et al., *supra* note 43, at 208.

209. Adkisson, *supra* note 10, at 111.

210. Liu & Potenza, *supra* note 37.

211. KIMBERLY S. YOUNG, CAUGHT IN THE NET: HOW TO RECOGNIZE THE SIGNS OF INTERNET ADDICTION—AND A WINNING STRATEGY FOR RECOVERY 55 (1998) (internal quotation marks omitted).

212. Dan J. Stein et al., *Hypersexual Disorder and Preoccupation with Internet Pornography*, 158 AM. J. PSYCHIATRY 1590, 1593 (2001) ("[T]he consequences of [excessive Internet use are] far reaching, with many subjects going without sleep, being late for work, ignoring family obligations, and suffering financial and legal consequences.").

twelve “recreational” hours a day on the Internet during the work week and as many as eighteen hours a day on the weekend.²¹³ He lost many jobs due to his inappropriate computer use.²¹⁴ A study conducted over a three-year period of students in Taiwan also found that the subjects reported poor grades, failed courses, and job losses as consequences.²¹⁵ For example, one subject stated,

I was addicted to MUDs at that time [an online interactive game]. I knew I had to take [a] final exam the next morning, but I could not stop playing MUD until 6 o'clock. Then I decided not to take the exam. I announced this decision in the MUD; all players in it applauded me . . . [a]t that time, I thought I was a tragic hero . . .²¹⁶

In line with the core indices of an addiction or impulse control disorder,²¹⁷ Internet addicts persist in their Internet use despite negative consequences in their life, such as problems with studies and employment.

6. Non-statutory or Regulatory-defined Major Life Activities

Furthermore, a plaintiff is not entirely constrained by the ADA or the accompanying regulations in the proposal of what constitutes “major life activities” that are negatively impacted by Internet addiction.²¹⁸ If a plaintiff alleges that one of the plaintiff’s life activities is adversely affected by his or her condition, and such activity has not been designated as a “major life activity” by the EEOC or the specific circuit in which the plaintiff is bringing the cause of action, then the court will begin its analysis with the EEOC’s illustrative list of “major life activities.”²¹⁹ The court will then employ a “comparative importance” standard” by which the court will evaluate whether the activity proposed by the plaintiff is “of comparable significance as an enumerated major

213. Black, Belsare, & Schlosser, *supra* note 38, at 842.

214. *Id.*

215. Chou, *supra* note 40, at 575, 581.

216. *Id.* at 581 (internal quotation marks omitted).

217. Shapira et al., *supra* note 43, at 209-10 (describing the efforts of several studies to classify problematic Internet usage through models based on DSM-IV criteria for substance dependence and impulse control disorders).

218. See *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1001-03 (9th Cir. 2007) *cert. denied*, 128 S. Ct. 879 (2008) (citations omitted) (noting that the enumerated major life activities in the regulations comprise an “illustrative list” while examining a limitation to a non-enumerated activity claimed as a protected disability by the plaintiff).

219. *Id.* at 1002 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 638-39 (1998)).

life activity.”²²⁰

A plaintiff might allege that driving is a major life activity that is adversely affected by the plaintiff’s Internet addiction. The court would ask whether driving is just as significant to one’s life as is learning or walking.²²¹ The court may note, however, that millions of Americans do not drive, yet they live healthy, normal lives.²²² As such, it is highly unlikely that being deprived of the ability to drive oneself to work or some other destination can “sensibly be compared to inability to see or to learn.”²²³ This was part of the Eleventh Circuit’s reasoning in rejecting driving as a major life activity, noting that driving is “conspicuously different in character from the activities that are listed” in the EEOC’s regulations.²²⁴

In light of the foregoing research and case studies, a plaintiff certainly may be able to point to one or more major life activities that are adversely affected by his or her Internet addiction.

C. Substantial Limitation

Upon showing that the plaintiff’s Internet addiction adversely affects one or more major life activities, a plaintiff must still show that the limiting effect of his or her condition is of a sufficient degree to constitute a disability.²²⁵ If the plaintiff’s Internet addiction only mildly limits a major life activity, or if the limiting effects of the Internet addiction are otherwise temporary or sporadic, the plaintiff will not succeed in showing that he or she is disabled.²²⁶ The “linchpin” of the

220. *Id.* (quoting *Bragdon*, 524 U.S. at 638).

221. *See* *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329 (11th Cir. 2001) (quoting 29 C.F.R. § 1630.2(i) (1998)) (comparing driving to major life activities listed in the quoted EEOC regulation, including walking and learning).

222. *See id.* at 1329-30 (“[M]illions of Americans do not drive . . . and deprivation of being self-driven to work cannot be sensibly compared to inability to see or learn.” (citing *Anderson v. N.D. State Hosp.*, 232 F.3d 634, 636 (8th Cir. 2000); *Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635, 643 (2d Cir. 1998))).

223. *Id.* at 1330 (citing *Anderson*, 232 F.2d at 636; *Colwell*, 158 F.3d at 643).

224. *Id.* at 1329-30 (citations omitted).

225. *See* Section 902 *Definition of the Term Disability*, 2 EEOC Compl. Man. (CCH) § 902.4(c)(1) (1995), available at <http://www.eeoc.gov/policy/docs/902cm.html> [hereinafter *EEOC Definition of Disability*] (“To rise to the level of a [protected] disability, an impairment must significantly restrict an individual’s major life activities. Impairments that result in only mild limitations are not disabilities.”).

226. *See* *Heiko v. Colombo Sav. Bank*, 434 F.3d 249, 257 (4th Cir. 2006) (citations omitted) (“Sporadic or otherwise temporary impairments do not qualify as substantial limitations.”); *Kelly v. Drexel Univ.*, 94 F.3d 102, 106-08 (3d Cir. 1996) (citations omitted) (concluding plaintiff’s impairment limiting his ability to walk did not rise to the level of a protected disability, analogizing

plaintiff's *prima facie* case will be that his or her addiction "substantially limits" a major life activity.²²⁷ Important policy considerations underlie this substantial limitation requirement, as "[w]ithout it, the ADA would cover any minor impairment that might tangentially affect major life activities such as breathing, eating, and walking."²²⁸

Under the ADA, Internet addiction must "substantially limit" a major life activity. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,²²⁹ the Supreme Court concluded that to be substantially limited in a major life activity, an "individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."²³⁰ Similarly, the EEOC's current regulations define the term "substantially limits" as "significantly restricted."²³¹ By enacting the ADAAA, Congress rejected the high standard that the Supreme Court and EEOC had created for plaintiffs to successfully show that their impairment "substantially limits" a major life activity.²³² Congress determined that the Supreme Court and EEOC's definition of "substantially limits" was "inconsistent with congressional intent, by expressing too high a standard."²³³ Although Congress declared that an impairment need not "severely" or "significantly" restrict a major life activity, Congress failed to clarify in the ADAAA how restrictive an impairment must be to substantially limit a major life activity. Congress simply concluded that the EEOC must revise its regulations to define "substantially limits" in a manner consistent with the findings and purposes of the ADA.²³⁴

Despite the ambiguity recently created by the ADAAA over the meaning of "substantially limits," the EEOC and the courts will undoubtedly still require a considerable or material restriction in the condition, manner, or duration in which the plaintiff can perform that major life activity when compared to the condition, manner, or duration in which the average member of the general population could perform

it to similar 'mild limitation' case law).

227. *Waldrip*, 325 F.3d at 655 (citing 42 U.S.C. § 12102(2)(A) (2000)); *see also* § 12102(2)(A) (requiring a *substantial* limitation of one or more major life activities within the definition of "disability").

228. *Waldrip*, 325 F.3d at 655.

229. 534 U.S. 184 (2002).

230. *Id.* at 198.

231. 29 C.F.R. § 1630.2(j)(1).

232. ADA Amendments Act of 2008, S. 3406, 110th Cong. § 2(b)(2)-(5) (2008).

233. *Id.* § 2(a)(8).

234. *Id.* § 2(b)(6), 4.

that same activity.²³⁵ The court, in particular, is likely to examine three aspects of a plaintiff's Internet addiction: "(i)[t]he nature and severity of [the Internet addiction]; (ii) [t]he duration or expected duration of [the Internet addiction]; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from [the Internet addiction]."²³⁶ All of the evidence must ultimately show that the plaintiff's Internet addiction restricts a major life activity in a "considerable" manner or "to a large degree."²³⁷

1. Severity of the Internet Addiction

The court will examine the nature and severity of the addiction.²³⁸ A plaintiff's claim will likely fail if his or her Internet addiction rendered it only a little more difficult than average to perform any of the major life activities described above.²³⁹

a. Sleeping

It would be rather difficult to show that one's Internet addiction substantially impairs one's ability to sleep. Though research shows that Internet addiction adversely affects the ability to sleep,²⁴⁰ getting only a few hours of sleep a night because one was up all night shopping or visiting chat rooms will likely fail to meet the necessary standard. Courts recognize that "difficulty sleeping is extremely widespread."²⁴¹ Merely

235. 29 C.F.R. § 1630.2(j)(1). The House Bill defined "substantially limits" as "materially restricts." ADA Amendments Act of 2008, H.R. 3195, 110th Cong. § 4(a)(2) (2d Sess. 2008). By "materially restricted," representatives intended that an impairment "less than 'severely restricts,' and less than 'significantly restricts,' but more serious than a moderate impairment which would be in the middle of the spectrum." H.R. REP. NO. 110-730, pt. 2, at 16 (2008). The House Committee also decided that under this definition, courts would still examine the condition, manner, and duration of the limitation on a major life activity. *See id.*; H.R. REP. NO. 110-730, pt. 1, at 10 (2008). However, the House's definition and observations did not make their way into the final bill.

236. § 1630.2(j)(2) (listing the factors that "should be considered in determining whether an individual is substantially limited in a major life activity").

237. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196-97 (2002) ("['S]ubstantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.'" (citations omitted)).

238. § 1630.2(j)(2)(i).

239. *See, e.g., Kelly v. Drexel Univ.*, 94 F.3d 102, 105-08 (3d Cir. 1996) (citations omitted) (concluding plaintiff's impairment limiting his ability to walk did not present a sufficiently difficult barrier to rise to the level of a protected disability, discussing similar 'mild limitation' case law).

240. *See supra* text and commentary accompanying notes 194-98.

241. *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 644 (2d Cir. 1998).

getting a “tough night’s sleep” does not suffice.²⁴² Merely claiming to get three to four hours of sleep a night, without medical or other supporting evidence and without a claim that the alleged sleep deficiency affects one’s ability to function throughout the working day will not suffice.²⁴³ The Tenth Circuit has refused to treat a plaintiff as being substantially limited in sleeping who was getting two to three hours of sleep a night due to his impairment.²⁴⁴ Even if a plaintiff were to testify that he or she receives no sleep on some nights, without producing medical evidence on the impact of such sleep deprivation on his or her ability to function daily and without showing that such sleep deprivation is long-term, the plaintiff may still fail to show that his or her addiction substantially limits his ability to sleep.²⁴⁵ Basically, for a plaintiff to succeed, he or she would have to present evidence that he or she had virtually gone without any sleep over a significant, sustained period of time, or at the very least medical evidence that the few hours that the plaintiff did receive significantly affected his or her ability to function during the day.²⁴⁶

b. Interacting with Others

A plaintiff will also have challenges showing that his or her Internet addiction substantially limits the plaintiff’s ability to interact with others. The “mere trouble getting along with co-workers is not sufficient to show a substantial limitation.”²⁴⁷ While research demonstrates

242. *See id.*

243. *Squibb v. Mem’l Med. Ctr.*, 497 F.3d 775, 784 (7th Cir. 2007) (citing *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1060 (9th Cir. 2005) (denying summary judgment where the plaintiff was able to sleep five to six hours per night with the help of medication that also made him drowsy during the day); *Nuzum v. Ozark Auto. Distribs.*, 432 F.3d 839, 848 (8th Cir. 2005) (“[I]nability to sleep for more than five hours per night is not a substantial limitation on the major life activity of sleeping.”); *Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 316 (6th Cir. 2001) (“While less than five hours sleep is not optimal, it is not significantly restricted in comparison to the average person in the general population.”)).

244. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1306 (10th Cir. 1999).

245. *See Taylor v. W. Penn Allegheny Gen. Hosp.*, No. Civ.A. 04-1564, 2005 WL 311387, at *5 (W.D. Pa. Nov. 21, 2005) (citing 29 C.F.R. § 1630.2(j)(2) (2007)) (holding that plaintiff’s affidavit that she had sleepless nights due to her impairment, without any other evidence that the problem was “severe, long term, or [had] a permanent impact” failed to meet the ADA’s standards to qualify as a substantial limitation to the major life activity of sleeping).

246. *See Pack*, 166 F.3d at 1306 (citations omitted) (suggesting that showing oneself to be “completely unable to sleep” may suffice, but concluding that only having episodic challenges of sleeping two or three hours a night does not meet the ADA’s standards).

247. *Lanman v. Johnson County, Kan.*, 393 F.3d 1151, 1158 (10th Cir. 2004) (quoting *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir. 2001)).

decreased levels of social interaction and increased levels of social withdrawal often result from excessive usage of the Internet,²⁴⁸ a plaintiff would have to essentially show that his or her Internet addiction had driven the plaintiff to become an utter social recluse. A few isolated incidents of unusual confrontations with co-workers will not suffice.²⁴⁹ If the Internet addiction caused him or her to have “severe problems” interacting with his or her co-workers and others outside of work on a “regular basis,” such as “consistently *high levels* of hostility, social withdrawal, or failure to communicate when necessary,” a plaintiff may win at least at the summary judgment stage.²⁵⁰ For example, in *Head v. Glacier Northwest Inc.*,²⁵¹ the Ninth Circuit held that the plaintiff had shown that his impairment substantially limited his ability to interact with others.²⁵² As a result of his impairment, the plaintiff (1) “avoid[ed] crowds, stores, large family gatherings, and even doctor’s appointments”; (2) “would not leave the house most weekends before he was fired, and after he was fired he would not leave the house for weeks on end”; and (3) “avoided telephone interaction unless ‘there were serious consequences’ for not responding to phone calls.”²⁵³ It would be a rare case to find one’s addiction to Internet pornography or gaming to have driven one into a pattern of such extreme anti-social conduct that one cannot interact with other humans “at the most basic level of these activities” (“*i.e.*, to initiate contact with other people and respond to them, or to go among other people”).²⁵⁴

c. Thinking/Concentrating

In order to show that his or her Internet addiction substantially restricts the plaintiff’s ability to think or concentrate, a plaintiff would need to produce evidence that his or her addiction prevents the plaintiff from functioning not just in his or her daily work tasks, but in life

248. See Kraut et al., *supra* note 202, at 1028.

249. See Lanman, 393 F.3d at 1153-54, 1158 (finding that plaintiff’s failure to interact with co-workers appropriately on numerous occasions during the spring of 2001 failed to show “a pattern of failure to interact on a regular basis”).

250. *Head v. Glacier Nw. Inc.*, 413 F.3d 1053, 1060-61 (9th Cir. 2005) (emphasis added) (quoting *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235-36 (9th Cir. 1999)) (citations) (denying summary judgment where the plaintiff actively avoided social contact “‘most’ of the time” though not “‘all the time’”) (citing *Fraser v. Goodale*, 342 F.3d 1032, 1043 (9th Cir. 2003)).

251. *Head v. Glacier Nw. Inc.*, 413 F.3d 1053 (9th Cir. 2005)

252. *Id.* at 1061.

253. *Id.* at 1060-61.

254. *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2d Cir. 2004).

generally.²⁵⁵ Even if a plaintiff can show that he or she cannot perform at work effectively because of his or her failure to concentrate or think, if the court sees that the plaintiff can otherwise regularly drive a car,²⁵⁶ apply average intellect in other aspects of his or her life,²⁵⁷ or is "moderately limited only in the ability think and concentrate" generally,²⁵⁸ the court will deny the plaintiff's claim.

For example, in *Collins v. Prudential Investment & Retirement Services*,²⁵⁹ in denying the plaintiff's allegation that she was substantially impaired in her ability to think, the court held that the plaintiff's achievements in various aspects of her life (e.g., holding multiple jobs, earning academic degrees, performing family, and civic responsibilities) demonstrated that she was not substantially limited as alleged.²⁶⁰ By contrast, in *Head*, the plaintiff succeeded in showing that his mental impairment substantially limited his ability to think because the plaintiff showed that he

could not stay focused on something for more than brief periods. [That he] did not have much of a short-term memory at all. [That he] had to be repeatedly reminded of appointments, or tasks [he] had to do. [That i]f [he] looked at written material for too long things just got jumbled in [his] mind and [he] would have to stop. [That he] could not sit and focus on an entire television show. [And finally, showed that he] quit school because of [his] inability to focus or concentrate adequately.²⁶¹

Therefore, the fact that a plaintiff is so consumed by his or her thoughts to get on the Internet to shop or look at pornography that he or she merely has to think harder than usual, or take more time than normal to perform certain tasks,²⁶² or that it makes him or her forget to take care

255. See *infra* text and commentary accompanying notes 256-61.

256. *Littleton v. Wal-Mart Stores*, 231 F. App'x 874, 877 (11th Cir. 2007) (finding that the plaintiff's ability to drive a car could be determined to conflict with his position that he was significantly restricted in his ability to think and learn).

257. *Weisberg v. Riverside Tp. Bd. of Educ.*, 180 F. App'x 357, 362-63 (3d Cir. 2006) (citing 29 C.F.R. § 1630.2(j)(2) (2007)) (finding the fact that the plaintiff ranked in the average or high range of intellectual ability in cognitive functions other than those claimed to effect his job precluded finding substantial limitation of ability to learn or think).

258. *Battle v. United Parcel Serv., Inc.*, 438 F.3d 856, 862 (8th Cir. 2006) (dictum) ("[Being] 'moderately limited' in . . . ability to think and concentrate . . . is insufficient to establish an ADA-qualifying disability." (citations omitted)).

259. 119 F. App'x 371 (3d Cir. 2005).

260. *Id.* at 376.

261. *Head v. Glacier Nw. Inc.*, 413 F.3d 1053, 1061 (9th Cir. 2005).

262. See *Heisler v. Metro. Council*, 339 F.3d 622, 629 (8th Cir. 2003) (denying plaintiff's claim that her depression substantially limited her ability to think or concentrate because she took

of important responsibilities²⁶³ will not be sufficient. The plaintiff would have to show a significant increase in the difficulty of performing normal tasks as well as the inability to perform a range of basic activities in his or her life.²⁶⁴

d. Working

Although the major life activity of working is to be considered only as a last resort, a plaintiff may try to show that his or her Internet addiction substantially limits his or her ability to work. To succeed, however, the plaintiff will have to show that his or her impairment restricts more than a “single, particular job,” but rather that it “significantly restrict[s the plaintiff] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.”²⁶⁵

A plaintiff could allege that he or she is unable to work in a class of jobs. This would require the plaintiff to show that his or her Internet addiction precludes her from not only performing in his or her current job position, but also all “jobs utilizing similar training, knowledge, skills or abilities, within that geographical area.”²⁶⁶

However, “class of jobs” itself is defined broadly. In *Murphy v. United Parcel Service, Inc.*,²⁶⁷ the relevant “class of jobs” was mechanic positions, and not merely mechanic positions that involved operating a commercial motor vehicle.²⁶⁸ For example, if a plaintiff were a patient care nurse who alleged that her back injury substantially limited her ability to work since she could not lift anything above ten pounds, she would have to show that her own employer, as well as other employers in the same geographic area, had no available nursing positions generally in which she would be able to work with her back injury.²⁶⁹ It

twice the amount of time to perform tasks or had difficulty making decisions).

263. See *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 353 (4th Cir. 2001) (holding that plaintiff’s repeated incidents of forgetfulness, which included regular “trouble remembering to take a second daily dosage of anti-seizure medication,” did not rise to the level of a substantial limitation).

264. See *Battle v. United Parcel Serv., Inc.*, 438 F.3d 856, 862 (8th Cir. 2006) (affirming a finding of disability where plaintiff showed that he had to “think[] and concentrate[] at a laborious rate” to complete his job-related tasks and that he was completely unable to make household or financial decisions or discipline his children).

265. 29 C.F.R. § 1630.2(j)(3)(i) (2007).

266. § 1630.2(j)(3)(ii)(B).

267. 527 U.S. 516 (1999).

268. *Id.* at 524-25 (citations omitted).

269. See *Squibb v. Mem’l Med. Ctr.*, 497 F.3d 775, 782-83 (7th Cir. 2007) (citations omitted) (declining to find substantial limitation in the major life activity of working where the plaintiff

would not be sufficient that there were no other patient care nursing positions in that geographic area.²⁷⁰ Since she had a nursing license, she would also be able to work in nursing positions that did not require her to move or directly care for patients.²⁷¹

If a plaintiff were in a position, for example, such as a website designer, which required the plaintiff to always be on the Internet, then the plaintiff's Internet addiction may arguably prevent the plaintiff from performing his or her job responsibilities as a website designer. However, the plaintiff would have to show that the skills or training that he or she applies to perform his or her website designer position could not carry over to any job in the same geographic area.²⁷² Although obstructed from performing his or her current or preferred website designer position, a website designer may still be able to perform a job using the same technical skills, but which would not require him or her to be on the Internet, or perhaps not even be directly involved with working on computers.

One can see how challenging it may be for an Internet addict to show that his or her addiction prevents him or her from working in a class of jobs. A showing that a plaintiff is significantly restricted in a "broad range of jobs" would be an even more sweeping endeavor, requiring the plaintiff to show that the Internet addiction impairment prevented him or her from performing in "jobs *not* utilizing similar training, knowledge, skills or abilities within [his or her] geographical area."²⁷³ Needless to say, showing that one's Internet addiction substantially limits the ability to work is a challenging burden to satisfy.

2. Duration of the Internet Addiction

For Internet addiction to qualify as a disability, it will be crucial for the plaintiff to show that his or her addiction is more than a temporary condition.²⁷⁴ Even if a plaintiff's impairment is severe, it will fall short of a disability if it is a mere momentary malady.²⁷⁵ However, judges and

failed, *inter alia*, to "submit[] [any] evidence of the range of jobs available in her geographic area that would fall within her physical restrictions").

270. See *id.* at 783.

271. See *id.* at 783 & n.5.

272. See *id.* at 782.

273. 29 C.F.R. § 1630.2(j)(3)(i), (ii)(C) (2007) (emphasis added).

274. See 29 C.F.R. § 1630.2(j)(2)(ii)-(iii).

275. See *Garrett v. Univ. of Alabama at Birmingham Bd. of Trs.*, 507 F.3d 1306, 1315 (11th Cir. 2007).

juries alike have virtually no authoritative guidance as to what period of time a condition must last to constitute a substantial limitation.²⁷⁶ The ADA does not speak on the issue nor has the Supreme Court taken a position on the proper duration of a disability beyond generally holding that the impairment's limitation must be permanent or long-term.²⁷⁷ Therefore, until the Court "fine-tunes its interpretation, it will be unclear how lower courts should deal with periods between, say, [six] and [twenty-four] months."²⁷⁸

It is virtually impossible to articulate a rule as to what length of time will qualify an impairment as a disability. According to the EEOC, an impairment that lasts "at least several months" is not short-term.²⁷⁹ Some courts agree with the EEOC.²⁸⁰ For example, the Sixth Circuit has held that an employee's hypertension that caused the employee to miss nearly three months of work could be a substantial limitation.²⁸¹ Some courts do not agree with the EEOC.²⁸² In *Huckans v. U.S. Postal Service*,²⁸³ the Tenth Circuit held that the plaintiff could not claim a

276. See *Guzman-Rosario v. United Parcel Serv., Inc.*, 397 F.3d 6, 10 (1st Cir. 2005).

277. See *id.* See *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. at 198.

278. *Guzman-Rosario*, 397 F.3d at 10. The ADAAA clarifies that for purposes of "regarded as" disability discrimination, impairments "that are transitory and minor," meaning impairments "with an actual or expected duration of 6 months or less" cannot be the basis of a disability claim. ADA Amendments Act of 2008, S. 3406, 110th Cong. § 4(a)(3)(B) (2008). According to the ADAAA's express language, this limitation applies only to a "regarded as" disability claim, not an actual disability claim. See *id.* at § 4(a)(1).

279. *EEOC Definition of Disability*, *supra* note 225, at § 902.04(d).

280. See, e.g., *Huckans v. U.S. Postal Serv.*, No. 99-5020, 1999 WL 1079619, at *3 (10th Cir. Nov. 30, 1999) (unpublished table decision); *Williams v. Stark County Bd. of County Comm'rs*, 7 F. App'x 441, 446 (6th Cir. 2001) (finding impairment causing an employee to miss almost three months of work could be substantial under the ADA); *Wood v. County of Alameda*, No. C94 1554 TEH, 1995 WL 705139, at *6, 9 (N.D. Cal. Nov. 17, 1995) (finding impairment causing an employee to miss over a year of work was substantial); *Pinson v. Berkely Med. Res., Inc.*, No. 03-1255, 2005 WL 3210950, at * 8-9 (W.D. Pa. June 25, 2005) (finding episodic impairment where an employee missed ten days of work in seventeen months could be considered a disability under the ADA).

281. *Williams*, F. App'x at 446.

282. See, e.g., *Huckans*, 1999 WL 1079619, at *3 (finding impairment lasting only three months of too short duration to be a disability under the ADA); *Rousch v. Weastec, Inc.*, 96 F.3d 840, 842, 844 (6th Cir. 1996) (finding an impairment lasting almost two years of too short duration to be a disability under the ADA); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d Cir. 1998), *cert. denied*, 536 U.S. 1018, 119 S. Ct. 1253, 143 L. Ed. 2d 350 (1999) (finding impairment lasting seven months of too short duration to be disability under ADA) (citing *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) (finding impairment lasting less than four months of too short duration to be a disability under ADA)).

283. *Huckans v. U.S. Postal Serv.*, No. 99-5020, 1999 WL 1079619, at *3 (10th Cir. Nov. 30, 1999) (unpublished table decision).

condition as a disability that only lasted three months.²⁸⁴ While one federal court has held that a plaintiff's inability to work for a year demonstrated that the plaintiff was substantially limited,²⁸⁵ another federal court ruled that a kidney condition that required the plaintiff to undergo multiple operations that prevented her from working for almost two years was not disabled under the ADA.²⁸⁶ Needless to say, there is no bright-line rule for the duration of a qualifying impairment other than the longer a plaintiff has suffered from Internet addiction, the better chances he or she has to prevail.

3. Permanent or Long-term Impact of the Internet Addiction

Finally, the court will also consider the long-term impact, if any, of the Internet addiction.²⁸⁷ Whereas the second factor focuses on the length of time that a plaintiff's Internet addiction actually lasts, this third factor refers to the "residual effects" of the plaintiff's Internet addiction.²⁸⁸ Courts tend to focus on the first two factors, perhaps because it is more relevant to analyze "an individual's present, actual state," as opposed to an individual's "hypothetical, projected state" that "may require the factfinder to hypothesize as to the future course of the impairment."²⁸⁹

Nonetheless, while a plaintiff's Internet addiction may be far from permanent, the plaintiff could foreseeably experience certain relapses into his or her condition and symptoms thereof. As the Third Circuit has noted:

Chronic, episodic conditions can easily limit how well a person performs an activity as compared to the rest of the population: repeated flare-ups of poor health can have a cumulative weight that wears down a person's resolve and continually breaks apart longer-term projects.²⁹⁰

A condition such as alcoholism, if left untreated, "is likely to have a permanent long-term impact on [the user's] life."²⁹¹ Likewise, even if a plaintiff seeks treatment or takes medication to ameliorate his or her

284. *Id.*

285. *Wood*, 1995 WL 705139, at *8.

286. *Roush*, 96 F.3d at 842, 844.

287. *See* 29 C.F.R. § 1630.2(j)(2)(iii).

288. *Navarro v. Pfizer Corp.*, 261 F.3d 90, 98 n.5 (1st Cir. 2001).

289. *Id.* at 100-01.

290. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 309 (3d Cir. 1999).

291. *Bilodeau v. Mega Indus.*, 50 F. Supp. 2d 27, 35 (D. Me. 1999).

Internet addiction, the plaintiff may possibly still have a relapse of the prior urges that controlled his or her impulses for so long, or suffer new symptoms related to treatment, requiring him or her to persist in seeking medical professionals or medication.²⁹² The persistence of such recurrences could, over time, wear on a plaintiff's health and further restrict the plaintiff's ability to function regularly.²⁹³ While it is unclear at this stage of Internet addiction research and treatment how prevalent such types of residual effects may be in connection with Internet addiction, if there were such evidence, the court would consider it in evaluating whether his Internet addiction substantially limits a major life activity.²⁹⁴

4. Conclusion

To succeed, a plaintiff need not necessarily present evidence on

292. See *Taylor*, 184 F.3d at 308-09 (citations omitted) (finding that even after initial hospitalization and treatment, the plaintiff continued to be substantially limited by both her disability and side effects from medication).

293. *Id.* at 309.

294. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999) (explaining that the totality of limitations must be considered in determining whether or not an individual is substantially impaired, regardless of treatment or corrective measures taken). In evaluating whether an impairment is substantially limiting, the Supreme Court, in *Sutton*, added an additional requirement that heightened the difficulty of satisfying this criteria of the *prima facie* case, where applicable. The Supreme Court held that "[a] person whose physical or mental impairment is *corrected* by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity." *Id.* at 482-83 (emphasis added). In *Sutton*, twin sisters claimed that their vision impairment constituted a disability under the ADA; however, the Court denied their claim, holding that since the sisters had 20/20 vision with corrective lenses, their impairment did not substantially limit the major life activity of seeing. *Id.* at 475-76, 488-89. Therefore, if a plaintiff were seeking counseling or taking medication to control or ameliorate his addiction, a plaintiff would have to show that notwithstanding such mitigating measures on his part, he is still substantially limited in a major life activity. See *id.* at 488. With the ADAAA, Congress rejected *Sutton's* holding, stating that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." ADA Amendments Act of 2008, S. 3406, 110th Cong. § 4(a)(4)(E)(i) (2008). Despite the ADAAA's reversal of *Sutton*, it is hard to see how this factor might apply to Internet addiction. Although practitioners are still evaluating the proper and most effective method of treating Internet addiction, it is unclear that medicine or rigorous daily regimens would be part of the treatment. Counseling and psychiatric treatment appear to be the primary focus of treating Internet addicts, and it seems unlikely that Internet addicts would be taking certain corrective measures that would make an impact on the analysis of their disability. See, e.g., Kiralla, *supra* note 12, at 50-51 (explaining the treatment strategies advanced by Dr. Kimberly Young, a leading researcher in the field of Internet Addiction). Dr. Young has suggested the following techniques to treat Internet addiction: "(1) practice the opposite time in Internet use, (2) use external stoppers, (3) set goals, (4) abstain from a particular application, (5) use reminder cards, (6) develop a personal inventory, (7) enter a support group, and (8) engage in family therapy." *Id.* at 51.

each of the three factors described above—"the three listed factors can combine in a number of different ways, even to the exclusion of one or more of them."²⁹⁵ The existence of a disability is evaluated on a case-by-case basis.²⁹⁶ The three factors constitute a balancing test, which will be weighed differently in each case, which may result in one factor being less important or completely irrelevant in a case.²⁹⁷ Nonetheless, if a plaintiff "present[s] sufficient evidence as to all three factors the case is no longer 'so one-sided that the movant is plainly entitled to judgment, for reasonable minds could not differ as to the outcome.'"²⁹⁸

In sum, it seems unlikely that most Internet addicts could satisfy the high threshold of a substantially limiting impairment. While many studies acknowledge that excessive Internet use is indeed a growing problem and clearly one that has adverse effects on those suffering from it, those studies seem to fail to show that those negative consequences are so pronounced that they "substantially limit" a major life activity.²⁹⁹ However, there could, of course, conceivably be cases of excessive Internet use that meet that threshold; the example cited in the Introduction about the young South Korean man who played an online video game until he died³⁰⁰ may have had a case that his addiction substantially limited one or more major life activities. Certainly some plaintiffs, who have severe cases, such as some cited in this Comment, would have enough evidence to avoid summary judgment, in which the court must resolve "all doubts and inferences in favor of the non-moving party."³⁰¹ Moreover, now that Congress has rolled back the tide of narrowly construing the term "disability," including the term "substantially limits," and has mandated that such terms be "construed in

295. *Navarro v. Pfizer Corp.*, 261 F.3d 90, 100 n.6 (1st Cir. 2001).

296. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2001) (citations omitted).

297. *Navarro*, 261 F.3d at 100 ("The Supreme Court has cautioned that 'in the context of a rule based on a multifactor weighing process[,] every consideration need not be equally applicable to each individual case.'" (quoting *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 809-10 n.29 (1978) (alteration in original))).

298. *Calef v. Gillette Co.*, 322 F.3d 75, 95 (1st Cir. 2003) (Bownes, J., concurring in part, dissenting in part) (quoting *FHS Props. Ltd. P'ship v. BC Assocs.*, 175 F.3d 81, 85 (1st Cir. 1999)).

299. See, e.g., *Kraut et al.*, *supra* note 202, at 1028 (noting that the study showed increased Internet use produced "small, but statistically significant declines in social involvement.").

300. See *supra* note 9 and accompanying text.

301. *Bacon v. City of Richmond, Va.*, 475 F.3d 633, 637 (4th Cir. 2007) (citing *Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 354 (4th Cir. 2003)). Whereas the determination of what constitutes an impairment or a major life activity is a question of law, whether a plaintiff's impairment is substantially limiting is a question of fact. *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1216 (10th Cir. 2007) (quoting *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 765 n.1 (10th Cir. 2006)).

favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act,”³⁰² the class of Internet addiction plaintiffs whose addictions substantially limit them is likely to grow.

Thus, those plaintiffs would be able to get their cases to a trial. Nevertheless, the threshold considerations for any would-be plaintiff to ultimately prevail are daunting.

D. Discharge for Misconduct v. Discharge for Disability

Although Internet addiction may constitute an impairment and potentially entitle a plaintiff to redress under the ADA, his or her right to redress is problematic due to the fact that the plaintiff's impairment resulted in conduct that violated his or her employer's Internet use policy. Employers routinely establish and enforce workplace policies that govern their employees' rights to use the Internet and e-mail, as well as the employer's right to monitor the content of their employees' Internet usage and e-mails.³⁰³ On one hand, an employer should have the right to terminate an employee for violating the employer's policy. On the other hand, the employee arguably has a disability that inevitably led to the offending conduct.

This conflict highlights an important distinction “between termination of employment because of misconduct and termination of employment because of a disability.”³⁰⁴ The first part of this conflict is that an employer must be allowed to terminate its employees who are engaging in misconduct, regardless of whether such employees are

302. ADA Amendments Act of 2008, S. 3406, 110th Cong. § 4(a)(4)(A) (2008).

303. According to one recent study, over one-third of U.S. companies have employees whose responsibility it is to review the company's employees' outbound e-mails. Rosemary Winters, *E-mailing on the job is risky business*, CHARLESTON GAZETTE, July 5, 2006, at 2C. According to the same study, about eighty percent of employers have a written e-mail policy. *Id.* Another study from 2005 reported that nearly eighty percent of U.S. companies monitor their employees' Internet activities and that over half of U.S. companies are actually reading their employees' e-mails. Jennifer Robison, *Don't Go There*, LAS VEGAS REV.-J., June 19, 2006, at 1D. With increased employee Internet use, employers have become increasingly concerned about the cost in loss of productivity as well as the threat of legal liability and consequently, have implemented Internet usage and e-mail policies to protect themselves. As one employment attorney remarked: “There's a simple question of productivity when employees are watching a baseball game or shopping online, but there are also pretty serious questions of liability for employers as a result of employees using the Internet to gamble or look at pornography.” Correy E. Stephenson, *Employer Concerns Grow With Increased Employee Internet Use*, MICH. LAW. WKLY., May 22, 2006.

304. *Dark v. Curry County*, 451 F.3d 1078, 1084 (9th Cir. 2006) (quoting *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 (9th Cir. 1995)).

suffering from a disability.³⁰⁵ Anti-discrimination legislation, such as the ADA, was intended to place disabled employees on equal footing with non-disabled employees, but it was “not designed to insulate them from disciplinary actions which would be taken against any employee regardless of his status.”³⁰⁶ If any “normal” employee were caught abusing the Internet at work, an employer would be justified in holding that employee to be in direct violation of its workplace Internet usage policies and subject to termination.

The first principle comprising this conflict is clearly applicable in the case of employees with drug addictions. Under the ADA, drug addiction is recognized as a disability.³⁰⁷ However, “[t]he ADA specifically provides that employers have the right to prohibit drug-related misconduct at the workplace.”³⁰⁸ Therefore, if an employee’s misconduct at work was entirely caused by a drug addiction, the employer would be entitled to terminate the employee for his or her misconduct even though the misconduct was caused by the employee’s disability.³⁰⁹ For example, in *Collings v. Longview Fibre Co.*,³¹⁰ several plaintiffs sued their employer after being terminated for having violated company rules by buying, selling, or using marijuana at the workplace or by working under its influence.³¹¹ The court noted that “the ADA specifically states that individuals who are ‘currently engaging in the illegal use of drugs’ are not protected under the statute” and that the employer was justified in discharging its employees for their

305. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 (9th Cir. 1995) (“[E]mployers must be allowed to terminate their employees on account of misconduct, ‘irrespective of whether the employee is handicapped.’” (quoting *Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993))).

306. *Wilber v. Brady*, 780 F. Supp. 837, 840 (D.D.C. 1992); see also *Sever v. Henderson*, 220 F. App’x 159, 161-62 (3d Cir. 2007) (per curiam) (“Though an employer is prohibited from discharging an employee based on his disability, the employer is not prohibited from discharging an employee for misconduct, even if that misconduct is related to his disability.” (citing *Jones v. Am. Postal Workers Union, Nat’l*, 192 F.3d 417, 429 (4th Cir. 1999); *Fullman v. Henderson*, 146 F. Supp. 2d 688, 699 (E.D. Pa. 2001), *aff’d*, 29 F. App’x 100 (3d Cir. 2002) (unpublished table decision))).

307. 42 U.S.C. § 12114(b) (2000) (covering individuals who have recovered from drug addiction, those who are presently seeking treatment for drug addiction but are no longer using, and those who have been mistakenly regarded as having a drug addiction).

308. *Collings*, 63 F.3d at 832.

309. See § 12114(c)(4) (“[A covered entity] . . . may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.”).

310. 63 F.3d 828 (9th Cir. 1995).

311. *Collings*, 63 F.3d at 832-33 (citations omitted).

misconduct.³¹²

The second principle that ultimately conflicts with this first principle is that “conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.”³¹³ Even though an employee’s Internet misuse violated his or her employer’s Internet use policy, a jury could reasonably find a sufficient causal link between the employee’s disability and the employee’s inappropriate workplace Internet activities to conclude that the employee was ultimately fired because of circumstances directly related to his or her disability.³¹⁴ Since the ADA would not permit the employer to discriminate against its employee on the basis of the employee’s disability of Internet addiction, the employer would similarly be prohibited from discriminating against the employee on the basis of the employee’s conduct that was directly related to his Internet addiction.³¹⁵ The conduct that violated the employer’s workplace policy would be considered part of the employee’s disability and also protected under the ADA.³¹⁶

While it is indisputable that this “disability v. disability-caused misconduct dichotomy” applies to employees suffering from an addiction to drugs or alcohol,³¹⁷ it is far from clear how broadly this dichotomy spans across the range of disabilities recognized, or that may be recognized, under the ADA. According to the Tenth Circuit, “the ADA’s anti-discrimination provision ‘does not contemplate a stark dichotomy between ‘disability’ and ‘disability-caused misconduct,’ but rather protects both.’”³¹⁸ In other words, this dichotomy is pertinent in a narrow set of circumstances, such as with drug or alcohol addictions.

This position seems reasonable in light of the Supreme Court’s statement that when “Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in

312. *Id.* at 833, 835-36 (quoting § 12114(a)).

313. *Dark v. Curry County*, 451 F.3d 1078, 1084 (9th Cir. 2006) (quoting *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001)).

314. *See Humphrey*, 239 F.3d at 1140 (finding that a jury may be able to find a strong enough link between plaintiff’s obsessive compulsive disorder and her absenteeism to conclude that she was fired because of her disability).

315. *See McKenzie v. Dovala*, 242 F.3d 967, 974 (10th Cir. 2001) (citations omitted).

316. *E.g., id.* (finding that a plaintiff’s cutting her wrists and firing a gun at her father’s grave reflected her illness and not an absence of ‘good moral character’ required by a background check and used as a basis for an adverse employment action (citing WYO. STAT. ANN. § 9-1-704(b)(vi) (2004))).

317. *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1086 (10th Cir. 1997).

318. *Id.* (quoting *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 (10th Cir. 1998)).

the absence of evidence of a contrary legislative intent.”³¹⁹ Congress has explicitly enumerated certain exceptions that would appear to argue against importing this dichotomy to Internet addiction. First, as previously explained, Congress and the EEOC have explicitly delineated certain conditions or impairments that can never serve as the basis of an ADA claim (e.g., transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, compulsive gambling, homosexuality, kleptomania, pyromania).³²⁰ Therefore, if an employee has a condition that falls within one of these exclusions and engages in conduct related to these conditions at work, an adverse employment action based on such conduct is not actionable.

Second, Congress has explicitly excluded employees suffering with addictions to alcohol and drugs from being able to seek redress for conduct related to their addictions.³²¹ In fact, some circuits have expressly recognized this “disability v. disability-caused conduct dichotomy” as being unique to alcohol and drug addictions.³²² The Third Circuit has recognized that the application of this dichotomy is unique to drug/alcohol disabilities.³²³ For example, in *Salley v. Circuit City Stores, Inc.*,³²⁴ Circuit City hired the plaintiff, who had suffered with drug addiction throughout his adult life, but had been abstinent for approximately five years at the time he was hired.³²⁵ While working as a manager for Circuit City, the plaintiff experienced a relapse and violated Circuit City’s drug policy by, among other things, coming to work while under the influence of heroin.³²⁶ As a result, Circuit City fired the plaintiff.³²⁷ The Third Circuit upheld Circuit City’s action, noting that the ADA “operates to allow employers to respond to addiction-related misconduct in a way that they cannot respond to other disability-related misconduct.”³²⁸

Third, the ADA exempts employers from the duty to provide a reasonable accommodation where the employer can demonstrate that the

319. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (citing *Cont’l Cas. Co. v. United States*, 314 U.S. 527, 533 (1942)).

320. 42 U.S.C. § 12211 (2000).

321. 42 U.S.C. § 12114 (2000).

322. *Den Hartog*, 129 F.3d at 1086.

323. *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998) (citing § 12114(c)).

324. 160 F.3d 977, 981 (3d Cir. 1998).

325. *Id.* at 978-79.

326. *See id.* at 979.

327. *Id.*

328. *Id.* at 981-82 (citing § 12114(c)).

accommodation would impose an “undue hardship” on the employer.³²⁹

Fourth, an employee’s misconduct is not protected if he or she constitutes a “direct threat” to the health or safety of other individuals in the workplace.³³⁰ In *Jones v. American Postal Workers Union, National*,³³¹ a U.S. Postal Service employee told his employer that he intended to kill his supervisor that same day.³³² Following an investigation into the incident, the plaintiff-employee was terminated.³³³ The Fourth Circuit upheld the termination, stating that “the ADA does not require an employer to ignore such egregious misconduct by one of its employees, even if the misconduct was caused by the employee’s disability.”³³⁴

In sum, because Congress has explicitly enumerated certain exceptions to a general prohibition throughout the provisions of the ADA, it may be that an additional exception for Internet addiction should not be implied. In other words, importing the “disability v. disability-caused misconduct” dichotomy to the disability of Internet addiction “would make no sense when considering other provisions of the ADA.”³³⁵ With these express exceptions in mind, the Tenth Circuit stated the following:

The availability of these affirmative defenses establishes that there are certain levels of disability-caused conduct that need not be tolerated or accommodated by employers. However, the necessary corollary is that there must be certain levels of disability-caused conduct that have to be tolerated or accommodated. Thus, appellees’ effort to put all disability-caused conduct beyond the pale of ADA protection cannot be correct.³³⁶

Therefore, since Internet addiction is manifest by the viewing of the Internet excessively and would in large part be diagnosed on the basis of such conduct, to allow an employer unrestrained freedom to terminate an employee with this disability on the basis of the employee’s viewing of non-work-related materials on the Internet may arguably negate the

329. 42 U.S.C. § 12112(b)(5)(A) (2000).

330. *Id.* § 12113(a)-(b).

331. 192 F.3d 417 (4th Cir. 1999).

332. *Id.* at 420.

333. *Id.* at 421.

334. *Id.* at 429.

335. *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1087 (10th Cir. 1997).

336. *Id.*

protection afforded by the ADA to the disabled.³³⁷ It is for this reason that even though an employee's impairment resulted in conduct that violated his employer's policies, the plaintiff-employee may still merit protection under the ADA.

V. RECORD OF OR REGARDED AS HAVING A DISABILITY

A. A Record of a Disability

Internet addiction may constitute a basis for a discrimination claim even when the plaintiff no longer suffers from such an addiction. A second way to qualify as disabled is to have a "record of" a disability.³³⁸ The rationale underlying this form of disability is to protect "people who have recovered from previously disabling conditions . . . but who remain vulnerable to the fears and stereotypes of their employers."³³⁹ To qualify as disabled under this definition, a plaintiff must have "a history of. . . a mental or physical impairment that substantially limits one or more major life activities."³⁴⁰ Therefore, an employer could not base its employment decision on the employee's history of Internet addiction.

For example, an employee may be terminated for Internet abuse, but then immediately enter a treatment center. After receiving the necessary help and having recovered, the plaintiff then applies to be re-hired. Being familiar with that employee's experience at the company and having access to the employee's employment file, the company may fear that the employee will fall back into the same problem that resulted in his or her termination and refuse to re-hire the employee. Even though that former employee is no longer suffering from Internet addiction, the employee has been denied employment solely on the basis of having struggled with such a condition in the past. In this case, the employer has discriminated against that employee not because he or she is presently disabled, but the employee has a record of having suffered from such disability.³⁴¹

337. *See id.*

338. *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 509 (7th Cir. 1998) (citing 29 C.F.R. § 1630.2(k)(2007)).

339. *Id.* (citing 29 C.F.R. § 1630.2(k)).

340. 29 C.F.R. § 1630.2(k).

341. *See generally Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030, 1032 (9th Cir. 2002) (employee alleged he was denied reemployment because of his past addiction to drugs), *rev'd on other grounds*, *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

A plaintiff must ultimately show three things to succeed on such a claim.³⁴² First, the plaintiff's prior Internet addiction constituted an impairment that "substantially limited a major life activity."³⁴³ Second, there is a record of the plaintiff's disability that would inform his or her employer of the extent or severity of that disability.³⁴⁴ Third, the plaintiff's employer had knowledge of and ultimately relied upon that record in making an adverse employment decisions.³⁴⁵

1. Internet Addiction Was an Actual Disability

Although the plaintiff may no longer be disabled by an Internet addiction, he or she must show that he or she was in fact disabled by Internet addiction "at some point in the past."³⁴⁶ In *Linser v. Ohio*,³⁴⁷ the plaintiff suffered from multiple mental impairments, however, the court held that these impairments never substantially limited any major life functions.³⁴⁸ Since the plaintiff failed to show that she was ever substantially limited in a major life activity, she could not show that she has a record of such disability.³⁴⁹ In *Heisler v. Metropolitan Council*,³⁵⁰ the plaintiff's employer knew that the plaintiff had been hospitalized on numerous occasions and was on medication due to her depression, yet she still failed to show that her depression ever substantially limited any of her major life activities, and therefore failed to establish that there was a record of her disability.³⁵¹ To satisfy this element, the plaintiff must ultimately satisfy the elements explained in the prior section and show that at one point in time, the plaintiff was actually disabled by Internet addiction.

342. See *Sorenson v. Univ. of Utah Hops.*, 194 F.3d 1084, 1086-87 (10th Cir. 1999); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 645 (2d Cir. 1998).

343. See *Sorenson*, 194 F.3d at 1086-87; C.F.R. pt. 1630, app. § 1630.2(k) (1997) ("The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.").

344. See *Colwell*, 158 F.3d at 645 ("The record must be one that shows an impairment that satisfies the ADA; a record reflecting a plaintiff's classification as disabled for other purposes or under other standards is not enough.").

345. See *id.* ("This part of the definition is satisfied if a record *relied on* by an employer indicates that the individual has or has had a substantially limiting impairment.") (emphasis added)).

346. *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1120-21 (5th Cir. 1998).

347. No. 99-3887, 2000 WL 1529809, at *1 (6th Cir. Oct. 6, 2000).

348. *Id.* at *1, *3.

349. *Id.* at *4.

350. 339 F.3d 622 (8th Cir. 2003).

351. *Id.* at 630.

2. The Record

The plaintiff would also have to point to a record that divulged sufficient information regarding the impairment.³⁵² That record must not only indicate that the plaintiff had an impairment, but that the plaintiff's specific impairment substantially limited one or more major life activities.³⁵³ A literal record will not work. In *Dotson v. Electro-Wire Products, Inc.*,³⁵⁴ for example, a medical note in the employee's personnel file discussed an impairment of the employee, however the note failed to disclose whether the condition was permanent or temporary or the severity of the condition.³⁵⁵ In *Coons v. Secretary of U.S. Dept. of Treasury*,³⁵⁶ the Ninth Circuit refused to accept that an employee had a record of disability simply because the employee's doctor wrote a letter stating that he suffered from various impairments and received treatment for such impairments.³⁵⁷ In *EEOC v. DaimlerChrysler Corp.*,³⁵⁸ the Sixth Circuit refused to accept a medical form stating that the plaintiff had hip "trouble" as a sufficient record that informed the plaintiff's employer that he was substantially limited by his hip injury.³⁵⁹ Therefore, a letter or note from a plaintiff's psychiatrist that he or she was treating the plaintiff for a condition characterized by excessive Internet use would not suffice. It would need to explain in some detail how that condition actually impacted the plaintiff's ability to sleep, eat, think, or work.

A plaintiff's time in a treatment center or hospital would not necessarily inform anyone of the nature or severity of his or her Internet addiction. "[S]imply being hospitalized [does not] establish[] a record of an impairment under the ADA."³⁶⁰ In *Winters v. Pasadena Independent School District*,³⁶¹ the plaintiff took four months medical leave and entered a facility to treat her depression.³⁶² Her teaching contract was not renewed upon her return, and she alleged that her employer

352. See *Vandever v. Fort James Corp.*, 192 F. Supp. 2d 918, 936 (E.D. Wis. 2002).

353. *Id.*; *Hilburn v. Murata Elec. N. Am., Inc.*, 181 F.3d 1220, 1229 (11th Cir. 1999).

354. 890 F. Supp. 982 (D. Kan. 1995).

355. *Id.* at 990 n.2.

356. 383 F.3d 879 (9th Cir. 2004).

357. *Id.* at 886.

358. 111 F. App'x 394 (6th Cir. 2004).

359. *Id.* at 405 n.11.

360. *Gutridge v. Clure*, 153 F.3d 898, 901 (8th Cir. 1998) (citing *Demming v. Hous. & Redev. Auth.*, 66 F.3d 950, 955 (8th Cir. 1995)).

361. 124 Fed. App'x 822 (5th Cir. 2005).

362. *Id.* at 823.

discriminated against her on the basis of her record.³⁶³ However, the Fifth Circuit held that mere hospitalization, even for a period off four months, did not constitute a record of an impairment.³⁶⁴ Therefore, a plaintiff would have to produce a record with the required substance to satisfy this element.

3. Reliance by the Employer

A plaintiff will have to show that his or her employer relied upon that record in implementing the adverse employment decision.³⁶⁵ Even if there is a record showing that the plaintiff previously suffered a substantially limiting impairment, if the employer has no knowledge of that record, the employer cannot be held liable.³⁶⁶ Ideally, the plaintiff has direct evidence of the employer's reliance. In *Norden v. Samper*,³⁶⁷ for example, the employer informed the employee that her "medical limitations" were the exclusive reason for her termination.³⁶⁸ Nonetheless, absent direct evidence, once the courts have determined that the employer had knowledge of a record showing that the employee has suffered an actual disability in the past, the courts seem to treat such a showing as circumstantial evidence of the employer's reliance upon that record.³⁶⁹ In *Snead v. Metropolitan Property & Casualty Insurance*

363. *Id.*

364. *See id.* at 823-24 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999)).

365. *See Thompson v. Rice*, 422 F. Supp. 2d 158, 174-75 (D.D.C. 2006) (noting that not only must the record be one that shows the impairment to be substantially limiting, but it must be a "record relied on by an employer [indicating] that the individual has or has had a substantially limiting impairment." (alteration in original) (quoting *Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1229 (11th Cir. 1999))) (citing *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d Cir. 1998)).

366. *EEOC v. DaimlerChrysler Corp.*, 111 Fed. App'x 394, 404-05 (6th Cir. 2004) (denying plaintiff relief since there was no evidence that the employer never saw any of the alleged documents or records of the plaintiff's impairment); *Wilson v. Comfort Sys.*, No. 05-1154-DWB, 2006 WL 3087132, at *8 (D. Kan. Oct. 26, 2006) ("even if Plaintiff [employee] had a record of being disabled, the Court is at a loss to see the relevance of such a record if Defendant [employer] had no knowledge of it." (citing *Couts v. Beaulieu Group, LLC*, 288 F. Supp. 2d 1292, 1305 (N.D. Ga. 2003))); *Butt v. Greenbelt Home Care Agency*, C01-0152-LRR, 2003 WL 685026, at *16 (N.D. Iowa Feb. 28, 2003) (holding that defendant did not discriminate against the plaintiff based on a record of the plaintiff's disability since the defendant did not have the requisite knowledge of the record and plaintiff's failure to produce evidence showing otherwise).

367. 503 F. Supp. 130 (D.D.C. 2007).

368. *Id.* at 152.

369. *See, e.g., Eshelman v. Agere Sys., Inc.*, No. Civ. A. 03-1814, 2004 WL 2922074, at *4 (E.D. Pa. Dec. 16, 2004) (holding that there was a genuine issue of material fact that employer discriminated on a record of employee's disability due to multiple documents of employee's cancer).

Co.,³⁷⁰ the plaintiff missed nearly two years of work due to receiving treatment for depression and stress.³⁷¹ Upon her return, her former manager position was deemed “excessive” and eliminated, and she was terminated.³⁷² The Ninth Circuit held that the combination of letters from the employee’s treating physicians and her prolonged leave created a genuine issue of fact of whether she had a record of a disability.³⁷³ The court did not discuss evidence of the employer’s actual reliance upon such a record for its decision to terminate the plaintiff’s employment.³⁷⁴ In *Kim v. Potter*,³⁷⁵ the court did not discuss evidence of the employer’s reliance on a record, but merely held that the plaintiff had created a genuine issue of fact that his employer had discriminated against him based on the employer’s knowledge of the plaintiff’s accident and resulting hospitalization.³⁷⁶

The type of evidence that a plaintiff needs to produce will depend on the applicable scenario, however, if the court determined that Internet addiction substantially limited a major life activity and the employer had knowledge of a sufficient record, a court may determine that the plaintiff’s employer discriminated on the basis of the plaintiff’s disability.

B. Misclassified as Disabled

Additionally, a plaintiff could possibly qualify as having a record of a disability even though he or she did not in fact ever have a chronic Internet addiction. The ADA not only considers one disabled if one has a record of a disability, but also if one is misclassified as having a disability.³⁷⁷ The EEOC provides the example that “[i]ndividuals who have been misclassified by a school or a hospital as having mental retardation or a substantially limiting learning disability” would establish a ‘record’ of a disability.³⁷⁸ For example, in *Anderson v. Banks*,³⁷⁹ a school was found to have discriminated against a group of students who

370. 237 F.3d 1080 (9th Cir. 2001).

371. *Id.* at 1089.

372. *Id.* at 1085-87.

373. *Id.* at 1089.

374. *See id.* at 1087-90.

375. 460 F. Supp. 2d 1194 (D. Haw. 2006).

376. *Id.* at 1201-02.

377. 29 C.F.R. § 1630.2(k) (2007).

378. *EEOC Definition of Disability*, *supra* note 225, at § 902.7(c).

379. 520 F. Supp. 472 (S.D. Ga. 1981).

had been misclassified as mentally disabled.³⁸⁰ Therefore, if a plaintiff visited a physician or therapist about his or her obsession with Internet pornography or chat rooms and the health professional incorrectly classified the plaintiff as suffering from a chronic Internet addiction, the plaintiff's employer could possibly learn of the diagnosis and base an adverse employment action on that knowledge. In reality, the likelihood of this kind of misclassification is unlikely—misclassification cases are extremely rare. Since the passage of the ADA, one can probably count on one hand the number of successful misclassification cases.

VI. REGARDED AS HAVING A DISABILITY

Another way in which a plaintiff can qualify as being disabled even though he or she is not *actually* disabled is that the employer “regards” the plaintiff as being disabled.³⁸¹ In other words, the plaintiff is “regarded as” having “a physical or mental impairment that substantially limits one or more of the major life activities.”³⁸² In creating this definition of a disability, Congress recognized that people can harbor “myths, fears, and stereotypes” about certain disabilities that are just as disabling as the limitations that ensue from an actual impairment.³⁸³ In this way, the “regarded” as claim is “a close sibling” to the “record” of claim in that they both seek to protect those who have no actual disability, yet “who may remain vulnerable to the fears and stereotypes of their employers.”³⁸⁴ Thus, a plaintiff does not need to prove that he or she suffers from an impairment that substantially limits a major life activity—proof that has been the reason why very few plaintiff have succeeded as qualifying as disabled under the ADA. The plaintiff need only show 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.”³⁸⁵

The actionable perception may take different forms: an employer could mistakenly believe that the employee has a mental or physical impairment that substantially limits one or more major life activities, or the employer “mistakenly believes that an actual, nonlimiting

380. See *id.* at 511-12.

381. 42 U.S.C. § 12102(2)(C) (2000).

382. *Id.* at § 12102(2)(A).

383. See *id.*

384. Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509 (7th Cir. 1998).

385. ADA Amendments Act of 2008, S. 3406, 110th Cong. § 4(a)(3)(A) (2008).

impairment substantially limits one or more major life activities.”³⁸⁶ In short, the plaintiff must produce evidence that his or her employer “entertain[ed] misperceptions” about its employee.³⁸⁷

A. Actual, Nonlimiting Impairment

It may be that an employee visits adult chat rooms everyday for a half-hour. The employer finds out through one of the employee’s co-workers that this employee engages in this daily activity and the employer consequently fears that it limits the employee.

As an example of an actual, nonlimiting impairment, the EEOC provides the example of “an individual who has a slight limp that does not substantially limit any major life activities but who is rejected for employment because the employer believes that the limp significantly restricts the individual’s ability to walk.”³⁸⁸ The limp clearly limits the individual in some manner, however, it is unlikely that a court would ever determine that a mild limp would substantially limit any major life activity under the ADA.³⁸⁹ However, the employer may erroneously believe that the slight limp in fact substantially limits a major life activity of the employee.³⁹⁰ Perhaps motivated, in part, by “concerns about productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers”³⁹¹ that may result from the perceived limping disability, the employer subjects the employee to an adverse employment action. In *Chalfant v. Titan Distribution, Inc.*,³⁹² the defendant failed to hire the plaintiff for a position that would have required him to load trucks with a forklift, after learning that the plaintiff had numerous physical ailments.³⁹³ The plaintiff could have performed all of the job duties despite his physical limitations.³⁹⁴ The court held that the defendant refused to hire him and regarded the plaintiff as disabled “because it *mistakenly believed* that his physical ailments substantially limited his ability to work in a broad range of jobs.”³⁹⁵

386. Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999).

387. *Id.*

388. EEOC Definition of Disability, *supra* note 225, at § 902.8(c).

389. *See id.*

390. *See id.*

391. *Id.* § 902.8(a) (citation omitted).

392. 475 F.3d 982 (8th Cir. 2007).

393. *Id.* at 986, 989.

394. *See id.* at 990.

395. *Id.* at 989 (emphasis added).

Similarly, the employee's pattern of visiting chat rooms each night may literally limit him or her in some way, but it would unlikely qualify as a substantially limiting impairment under the ADA. Nonetheless, if an employer believes that the employee's daily adult chat room activities impair his or her ability to work or perform some other major life activity, and upon that belief, subjects the employee to an adverse employment action, then the employee could make a claim that he or she was regarded as disabled.

B. Substantially Limiting Impairment that Does Not Exist

Under the other form of a "regarded as" disability, the plaintiff's employer falsely believes that the plaintiff has a substantially limiting impairment.³⁹⁶ For example, if an employer incorrectly thought that one of its employees was HIV-positive and, on that basis, terminated that employee, the employee could have an ADA claim, even though the employee in fact does not have HIV.³⁹⁷

If an employee occasionally looks at pornography while at home on the weekend, the employee might start attending group counseling to prevent his or her conduct from becoming a bigger problem. At one of the meetings, the spouse of one of the employee's co-workers might attend the same group and mention to his spouse that he saw the employee at the meeting. If the employee's co-worker then told their mutual supervisor that the employee had an Internet pornography problem, which then led the supervisor to subject the employee to an adverse employment action, the employee would have an ADA claim, even though his occasional interaction with Internet pornography would not qualify as a disability under the ADA. In *Moorer v. Baptist Memorial Health Care System*,³⁹⁸ the plaintiff's co-worker smelled alcohol on his breath at a work meeting and informed the plaintiff's supervisor about the plaintiff's drunkenness problems, which ultimately resulted in the plaintiff being terminated.³⁹⁹ The court upheld that plaintiff's ADA claim that his employer regarded the plaintiff as

396. 29 C.F.R. 1630.2(l)(3) (2007); see also *EEOC Definition of Disability*, *supra* note 225, at § 902.8(e). This definition of "regarded as" disability would require the plaintiff to show that the perceived disability could constitute an actual disability under the requirements discussed in Section IV of this Comment.

397. *EEOC Definition of Disability*, *supra* note 225, at § 902.8(e); *Dollinger v. State Ins. Fund*, 44 F. Supp. 2d 467, 479 (N.D.N.Y. 1999).

398. 398 F.3d 469 (6th Cir. 2005).

399. *Id.* at 480.

disabled when it terminated his employment.⁴⁰⁰

C. A Challenging Burden

Regardless of the category in which a plaintiff's situation falls, the plaintiff will find that successfully meeting the "regarded as" standard to be no easy task. To succeed, the plaintiff must produce evidence of his or her employer's misperceptions, or "employer's subjective belief that the plaintiff is substantially" impaired by the plaintiff's addiction to the Internet.⁴⁰¹ The "regarded as" claim is distinct from an actual disability or record of disability claim in that it "'turns on the employer's perception of the employee' and is therefore 'a question of intent, not whether the employee has a disability.'"⁴⁰² The EEOC has noted that this particular definition of disability "is directed at the employer rather than at the individual alleging discrimination."⁴⁰³ For this very reason, it will be very difficult for the plaintiff to succeed on a "regarded as" claim. Since the inquiry is "embedded almost entirely in the employer's subjective state of mind," "[p]roving that an employee is regarded as disabled in [a major life activity] takes a plaintiff to the farthest reaches of the ADA."⁴⁰⁴ The subjective focus of this definition of disability creates an "extraordinarily difficult" challenge for the plaintiff.⁴⁰⁵

The nature of the employer's subjective belief is very specific. "A plaintiff claiming that he is 'regarded' as disabled cannot merely show that his employer perceived him as *somehow* disabled; rather, he must prove that the employer regarded him as disabled *within the meaning of the ADA*."⁴⁰⁶ In other words, the plaintiff would have to show that his or her employer subjectively regarded the plaintiff's Internet addiction as an impairment that substantially limited one of the plaintiff's major life activities.⁴⁰⁷ It would not be sufficient for the plaintiff to merely show that the employer was aware of the plaintiff's Internet problem or that the plaintiff's Internet addiction rendered the plaintiff unable to meet the

400. See *id.* at 484.

401. See *Walton v. U.S. Marshals Service*, 492 F.3d 998, 1006 (9th Cir. 2007), *cert. denied* 128 S.Ct. 879 (2008).

402. *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d Cir. 1998) (quoting *Francis v. City of Meriden*, 129 F.3d 281, 284 (2d Cir. 1997)).

403. *EEOC Definition of Disability*, *supra* note 225, at § 902.8(a).

404. *Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2001).

405. *Id.*

406. *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1169 (1st Cir. 2002) (emphasis in original).

407. See *id.* at 1169-70.

employer's performance expectations at work.⁴⁰⁸

The surest way for the plaintiff to prevail on a "regarded as" claim would be to produce direct evidence of the employer's subjective misperceptions. For example, in *Ross v. Campbell Soup Co.*,⁴⁰⁹ the plaintiff suffered multiple back injuries, causing him to take leave from work for several periods of time.⁴¹⁰ After his fifth back injury, the plaintiff began to receive negative work reviews and was eventually terminated.⁴¹¹ As evidence that his employer regarded him as disabled, the plaintiff produced a memo that was distributed among company management, suggesting that the plaintiff not receive a bonus.⁴¹² The memo stated, "Maureen—When can we bring this problem person to a termination status. P.S. – Back case."⁴¹³ This memo, combined with other incidents, such as the employer recommending the plaintiff to retire, the employer producing a memo tracking the plaintiff's injury history, and a supervisor telling the plaintiff that "[w]e can't have anymore of this back thing," combined to create a genuine issue of fact that the employer regarded the plaintiff as disabled.⁴¹⁴

Absent direct, express statements by the plaintiff's employer, however, the plaintiff may have great difficulty trying to produce circumstantial evidence of the employer's misperception. Simply because the plaintiff's employer has knowledge or is aware of the plaintiff's addiction, that the plaintiff's work is suffering as a result of his or her addiction, or that the plaintiff is seeking treatment for his or her addiction does not mean that the plaintiff's employer regards the plaintiff as being disabled.⁴¹⁵

In *Kocsis v. Multi-Care Management, Inc.*,⁴¹⁶ the court conceded that the employer "was aware of [the employee's] health problems, lack of energy, and mood swings," and that the employer regarded these problems as negatively affecting the employee's ability to perform in her job.⁴¹⁷ However, such knowledge did not raise an inference that the

408. See *Walton*, 492 F.3d at 1006 (citations omitted).

409. 237 F.3d 701, 709 (6th Cir. 2001).

410. *Ross*, 237 F.3d at 702-03.

411. See *id.* at 703-05.

412. *Id.* at 704.

413. *Id.*

414. See *id.* at 703.

415. *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996) ("the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action.").

416. 97 F.3d 876 (6th Cir. 1996).

417. *Id.* at 885.

employer regarded the employee as being substantially limited in a major life activity.⁴¹⁸ In *Gorbitz v. Corvill, Inc.*,⁴¹⁹ the defendant-employer was aware of its employee's "numerous medical appointments" that its employee had as a result of an accident, however, the court would not infer that an employer's knowledge of medical appointments to treat a condition means that the employer views the employee as having an impairment that substantially limited a major life activity.⁴²⁰ In *Cody v. CIGNA Healthcare of St. Louis, Inc.*,⁴²¹ the plaintiff-employee was a nurse who began to suffer from depression and anxiety, and as a result, began exhibiting bizarre behavior at work, such as "sprinkling salt in front of her [work] cubicle 'to keep away evil spirits.'"⁴²² Even though her employer was aware of her abnormal behavior at work, offered her paid medical leave, and mandated that she see a psychologist for her depression and anxiety prior to returning to the workplace, the court held that such knowledge did not show that the employer regarded its employee as disabled.⁴²³ In *Wright v. Illinois Department of Corrections*,⁴²⁴ upon learning that the plaintiff had a military service-related physical disability, the employer required him to undergo an additional medical exam.⁴²⁵ When he was late for the exam, the employer refused to hire him.⁴²⁶ Even though the employer affirmatively answered an interrogatory asking it whether it considered the plaintiff to be disabled, there was no evidence that the employer regarded the plaintiff as disabled since there was nothing demonstrating that the employer treated him as being substantially limited in a major life activity.⁴²⁷ In *Carruthers v. BSA Advertising Inc.*,⁴²⁸ the Eleventh Circuit held that an employer's knowledge that an employee has been diagnosed with a bilateral hand sprain/strain and her resulting work limitations, its notifying the employee that she would be fired if she was unable to continue working full-time, and its "advertisement for [a] replacement shortly after learning of her inability to perform the basic tasks of her position" did not show sufficient knowledge of a

418. *See id.*

419. 196 F.3d 879 (7th Cir. 1999).

420. *Id.* at 882.

421. 139 F.3d 595 (8th Cir. 1998).

422. *Id.* at 596-97.

423. *Id.* at 599.

424. 204 F.3d 727 (7th Cir. 2000).

425. *See id.* at 728-29.

426. *See id.*

427. *See id.* at 732.

428. 357 F.3d 1213 (11th Cir. 2004).

disability.⁴²⁹

In short, cases such as the foregoing create a strong presumption working against a plaintiff and his or her ability to show that the employer regards his or her Internet addiction as a disability. Absent direct evidence, the plaintiff would need a great deal of compelling circumstantial evidence demonstrating not only that the employer believed that the plaintiff's abilities were impaired by his or her condition, but also that one or more major life activities were *substantially limited* by such impairment.

VII. CONCLUSION

Although formal recognition of Internet addiction as a distinct disorder is still in the future, the research continues to grow and demonstrate a serious condition occurring with excessive Internet use. Dr. David Greenfield, a psychiatry professor at the University of Connecticut School of Medicine has stated the following:

It's not surprising that it is not defined yet, because these things change very slowly But when you are in clinical practice and you are dealing with people's lives, you can't wait for those issues to be addressed. There is a huge problem with Internet abuse in the workplace, and you can't pretend that they don't exist because there isn't a label.⁴³⁰

Only a small segment of the population may qualify as suffering from Internet addiction. Some from that class might conceivably be able to show that their Internet addiction is an impairment that adversely impacts one or more major life activities. However, an even smaller fraction of that class will be able to succeed in showing that their Internet addiction constitutes a substantial limitation, thus showing that one is disabled under the ADA. Nonetheless, some plaintiffs may have viable claims, and the strength of those claims and number of plaintiffs suffering from Internet addiction will only grow as the Internet—as well as the research validating Internet addiction as a distinct disorder—continues to advance and as courts construe the definition of “disability” “in favor of broad coverage of individuals under [the ADA], to the

429. *Id.* at 1217.

430. Catherine Holahan, *Virtually Addicted*, BUS. WK. Dec. 14, 2006, http://www.businessweek.com/technology/content/dec2006/tc20061214_422859.htm.

maximum extent permitted by [the ADA].”⁴³¹

431. ADA Amendments Act of 2008, S. 3406, 110th Cong. § 4(a)(4)(A) (2008).

