The Americans with Disabilities Act: Does the ADA Protect a Person With the Chronic Fatigue Syndrome from Employment Discrimination?

Matthew I. Kozinets
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If you simply cannot manage the climbing and exhaust yourself trying, fair enough. An honest failure never haunts you because the body knows no shame. But if you let your mind defeat you, if fear runs away with itself... it will nag you till your dying day — or until you return and set things straight.¹

John Long on rock climbing in Yosemite Valley, California

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¹ John Long, Cliffhanger, Los Angeles, July 1994, at 88, 100.

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A person with the chronic fatigue syndrome ("CFS")\(^2\) needs protection from employment discrimination. CFS is an immune disorder that causes debilitating and prolonged\(^3\) fatigue\(^4\) in thousands of Americans.\(^5\) The symptoms of CFS often interfere with a person's ability to work.\(^6\) As a result, a person with CFS is vulnerable to employment discrimination. An employer may discharge, fail to hire, or refuse to accommodate a person because she\(^7\) has CFS.\(^8\)
Title I of the Americans with Disabilities Act of 1990 ("ADA") may or may not protect a person with CFS from employment discrimination. Title I states that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual." Thus, two showings constitute a prima facie case under Title I: 1) a person must show that she is an individual with a disability; and 2) that she is "qualified" to do the job she seeks. A person with CFS may or may not succeed in proving these issues. A court may determine that she is not an "individual with a disability" or that she is disabled but not "qualified" for the job. If this occurs, the court may conclude that the ADA does not apply, and her Title I claim may fail. As a result, a person with CFS cannot be certain that the promise of the ADA reaches her.

Despite this uncertainty, an analysis of the ADA may provide practical tips on litigation and career planning to a person with CFS. In population are at risk but women under the age of 45 seem to be most susceptible to CFS. See, e.g., Walders v. Garrett, 765 F. Supp. 303 (E.D. Va. 1991).


10. Certain employers are not liable under the ADA. See 42 U.S.C. § 12111. "[T]he term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees . . . ." Id. Employment agencies, labor organizations, and joint labor-management committees are also covered. See generally U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BOOKLET NO. 17, THE ADA: YOUR RESPONSIBILITIES AS AN EMPLOYER (1991). At the time of publication, the California State Legislature was considering extending Title I of the ADA to employers with five to fourteen employees. See CAL. GOVT. CODE § 12940.3 (West Supp. 1994).
analyzing how a court may apply the ADA to a CFS case, a person with CFS may gain insight into the issues, obstacles, and key facts of an ADA claim. In addition, such a study may suggest precautions and choices that a person with CFS may want to consider in seeking a job. As John Long might say, if a person with CFS is too sick to work, then fair enough. But if she can work part- or full-time, she should not let the threat of discrimination discourage her. Instead, she should utilize the support and guidance of the ADA in her struggle to take her place in the American office or factory.

II. INDIVIDUAL WITH A DISABILITY

To state a claim under Title I of the ADA, a person with CFS must first prove that she is an “individual with a disability.” The ADA does not provide a laundry list of covered disabilities. Instead, courts determine the disability issue on a case-by-case basis. The ADA defines "disability" as a "physical or mental impairment that substantially limits one or more major life activity." Thus, a person is not necessarily

15. Treatment of CFS may allow a person to work part or full-time. Interview with Timothy J. Smith, M.D., in Berkeley, Cal. (June 11, 1993) [hereinafter Smith]. Treatment may include reduced stress, rest, exercise, and nutrition. Id. For a discussion on the latest treatments, see CFIDS Doctors Answer Treatment Surveys, CFIDS TREATMENT NEWS, Winter 1994-95, at 6-7. Another form of treatment is self-acceptance of one's reduced energy level and disciplining oneself to operate within those limits. The natural inclination is to push oneself beyond one's limits and thus trigger a set-back. This behavior results in a see-saw effect upon one's energy level, which undermines one's ability to maintain a consistent work schedule. Cheney, supra note 7, at 22.


17. 29 C.F.R. app. §§ 1630.2(g)-(h) (1994). However, a specific impairment may be so debilitating that a court will label it as a recognized disability. See Estate of Reynolds v. Dole, 57 Fair Empl. Pract. Cas. (BNA) 1848, 1865 (N.D. Cal. 1990) (holding that "both epileptics in general and specifically this plaintiff are individuals with handicaps."); Reynolds v. Brock, 815 F.2d 571, 573 (9th Cir. 1987) (holding that "epileptics are handicapped individuals.") (citations omitted).

18. 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(g)-(i). In addition, the ADA offers two alternative definitions of "disability" that apply to a person who presently suffers no impairment. A person may be disabled if she has a record of past physical or mental impairment. 42 U.S.C. § 12102(2)(B). For example, an employer may discover that a person previously suffered from CFS and decide, based on that history, not to hire the person for fear that she will experience a relapse on the job. See 29 C.F.R. app. § 1630.2(k). Also, a person may be disabled if she is regarded as having an impairment. 42 U.S.C. § 12102(2)(C). For example, an employer may erroneously believe that an employee has CFS because she demonstrates fatigue and discharge her based on this false belief. See 29 C.F.R. app. § 1630.2(l). The purpose of this definition of disability is to protect individuals whom others regard as disabled due to myths, fears, or stereotypes. Id. Overall, the ADA may protect a person with CFS if a court determines that she fulfills any one of the three definitions of disability. Id. Most likely, a person with CFS will utilize the first definition because she presently suffers from CFS. Yet the two alternative definitions may aid a person with CFS if she fails to prove that she is disabled under the first definition of disability. See Southeastern
disabled simply because she has an impairment. A particular impairment may disable one person but not another. As a result, a person with CFS need not prove that CFS constitutes a disability. Rather, she must prove that she has CFS and that it disables her. Or, as the ADA puts it, she must show that: 1) she has a physical or mental impairment (i.e., CFS); and 2) CFS substantially limits her major life activities. By proving both prongs of this standard, a person with CFS may establish that she is an “individual with a disability.”

A. Physical or Mental Impairment

A person must prove that she has a physical or mental impairment as the first step in establishing that she is an “individual with a disability.” This first step requires a person with CFS to show: 1) that she has CFS; and 2) that CFS constitutes an “impairment” within the scope of the ADA. While establishing the latter is relatively simple, proving a CFS diagnosis is the first major obstacle that faces a Title I claimant.

The reason CFS is difficult to prove is that a person with CFS will generally need to present expert testimony and medical records to establish her diagnosis. A court will not accept a person’s own testimony as sole proof of her illness. In Collins v. Sullivan, a person with CFS claimed disability benefits under Title II of the Social Security Act. However, the court in Collins held that while the plaintiff had a diagnosis of CFS, she had not shown that the CFS substantially limited her major life activities. The court noted that the plaintiff had not provided any evidence of her inability to perform major life activities due to CFS. The court also noted that the plaintiff had not provided any evidence of her ability to perform the essential functions of her job.

Community College v. Davis, 442 U.S. 397, 405-06 n.6 (1979) (holding that “a person who has a record of, or is regarded as having an impairment may, at present have no actual incapacity at all.”).

19. 29 C.F.R. app. § 1630.2(j).
20. Id.
21. Id.
22. 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(g)(1). The Equal Employment Opportunity Commission examines both a person’s impairment (established by medical records) and the person’s ability to handle the impairment (established by interviewing the person) to determine the presence of a disability. Telephone Interview with Sharon Hawley, Enforcement Manager, U.S. Equal Employment Opportunity Commission (July 19, 1994). “The determining factor is not what disorder you have but whether it impairs major life activities.” Id.
23. 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(g)(1).
24. Id.
27. Most cases on CFS involve social security benefits. See Michael Quint, New Ailments: Bane of Insurers, N.Y. TIMES, Nov. 28, 1994, at C1 (finding that disability claims for Epstein-Barr Syndrome grew 320% between 1989 and the first quarter of 1994). However, these cases may
The court refused to rely on the plaintiff’s undocumented complaints in determining the date of onset of her illness. Only upon a hearing pursuant to a reapplication for benefits did the plaintiff receive a partially favorable decision granting her benefits from the date that she began seeking medical treatment. She filed for review of that decision with the United States District Court for the Northern District of California. She claimed that her CFS symptoms began in 1985. However, the court concluded that February 22, 1990 — the date of the first blood test that indicated that she was ill — was the date of onset. The administrative law judge stated that “[w]here was no evidence of a consistently high Epstein-Barr titer rate that would indicate active infection preventing plaintiff from working prior to February 22, 1990.” The judge added that “[i]n the absence of any medical evidence . . . an onset date [prior to that date] would . . . be arbitrary.” The court’s disregard for the plaintiff’s undocumented symptoms illustrates that a person may not be able to prove that she had CFS prior to the date that her doctor diagnosed her and began compiling medical records of the illness.

The need to present expert testimony and medical records to establish a CFS diagnosis is also problematic because a person may be sick for years before she visits a physician who begins compiling these medical records. CFS is a fairly new disease, and many people suffer undiagnosed for years. Further, once a person realizes that she needs

provide limited precedential value because a court’s agenda in a social security case differs from the agenda in an employment discrimination case. In a social security case, a court is concerned with malingerers; healthy people who claim disability simply to receive financial benefits. Thus, the Department of Health and Human Services engages in a five-stage sequential evaluation process to determine whether a person is disabled. Collins, 1993 U.S. Dist. LEXIS 3898, at *4. By contrast, in an employment discrimination case, a disabled person generally wants to work and sues because her employer refuses to hire or accommodate her. Telephone Interview with Ellen R. Jordan, Professor of Law, U.C. Davis (Aug. 15, 1994) [hereinafter Jordan]. Thus, in the latter context, a court may be more willing to recognize a person’s disability and apply a less stringent standard of proof.

29. Id. at *12.
30. Id. at *1-2.
31. Id. at *2.
32. Id. at *2.
33. Id. at *11.
34. Id.
35. Id. at *12.
36. See Dan McGrath, She fights to put fatigue on medical chart, SACRAMENTO BEE, Jan. 13, 1993, at A2. One woman went nine years without being diagnosed. Id. “From the beginning, getting a diagnosis and any care for this disease has been an extraordinary struggle for most of us.”
treatment, she may not be able to afford it if her health insurance does not cover chronic fatigue.\textsuperscript{37} Finally, even after obtaining the necessary financial resources, she still may spend years trying to find a physician willing to treat her.\textsuperscript{38}

Many physicians are reluctant to treat CFS because they cannot diagnose it using traditional diagnostic methods.\textsuperscript{39} Typically, a physician uses a definitive lab test to diagnose a disease.\textsuperscript{40} Such a test shows the presence or absence of a known pathogen within a person's body.\textsuperscript{41} For instance, a diagnosis of strep throat is proper when infectious bacteria appear in a throat culture.\textsuperscript{42} However, a definitive lab test does not exist for CFS.\textsuperscript{43} CFS is an immune disorder in which the immune system works frantically but ineffectively at combatting common viruses.\textsuperscript{44} The cause of this disorder remains unknown.\textsuperscript{45} Physicians have not yet discovered a virus or bacteria to look for under the microscope. As Dr. Jesse Stoff notes, "CFS ranks among the greatest diagnostic dilemmas of our time. You can't take a simple, routine throat culture . . . . Where CFS is concerned, it's hard to see the beast. Given the limitations of our present medical technology, we can only follow its footprints."\textsuperscript{46}

Following footprints usually means the application of a symptomatic diagnosis, which is a nontraditional diagnostic method.\textsuperscript{47} A symptomatic diagnosis requires a physician to: 1) identify a number of symptoms; and 2) conclude that these symptoms constitute a disease.\textsuperscript{48} In 1994, the Centers for Disease Control & Prevention ("CDC") identified nine symptoms as diagnostic criteria for CFS: persistent or recurring severe

\textit{Chronic Fatigue, 261 JAMA 696, 697 (1989)} (letter to the editor).

37. See English, supra note 4, at 964 (discussing the financial dangers faced by CFS patients who seek treatment for the disease).

38. See English, supra note 4, at 964. "In one early report, the average CFS patient had previously consulted 16 different physicians. Most were told that they were in perfect health, that they were depressed . . . . The situation is better today, but not by much." English, supra note 4, at 964.

39. STOFF & PELLEGRINO, supra note 2, at 59-60.
40. STOFF & PELLEGRINO, supra note 2, at 59.
41. Smith, supra note 15.
42. STOFF & PELLEGRINO, supra note 2, at 60.
43. Price, supra note 2, at 515. However, recent studies have shown that "CFS can be clinically diagnosed with several advanced lab tests." Lembeck, supra note 3, at 57.
44. STOFF & PELLEGRINO, supra note 2, at 509; Lembeck, supra note 3, at 56.
45. Suspected causes include an unidentified virus, genetic predisposition, age, gender, prior illness, environment, and stress. Lembeck, supra note 3, at 56.
46. STOFF & PELLEGRINO, supra note 2, at 60.
47. See STOFF AND PELLEGRINO, supra note 2, at 61. Price, supra note 2, at 515.
48. STOFF & PELLEGRINO, supra note 2, at 61-86.
fatigue (which is unexplained, of recent onset, not improved by rest, and causes substantial reduction in activities); “substantial impairment in short-term memory or concentration; sore throat; tender lymph nodes; muscle pain; multi-joint pain without joint swelling or redness; headaches of a new type, pattern, or severity; unrefreshing sleep; and post-exertional malaise lasting more than 24 hours.”

Identification of these symptoms is difficult because many of them are subjective. A physician cannot prove their existence with objective, clinical data such as lab tests. Instead, a physician must be willing to believe a person’s subjective complaints of pain and fatigue. If a physician is skeptical of these complaints, he or she may not be willing to conclude that a person actually is suffering from CFS.

A physician may be skeptical of the subjective complaints of a person with CFS for several reasons. First, many physicians believe that subjective complaints are inherently unreliable because a person may invent or exaggerate them. Second, the subjective complaints of CFS are common. Everyone feels tired now and then, and a physician may wonder whether a person who complains of excessive fatigue has a devastating “syndrome” or is simply a kvetch. Finally, societal prejudices may fuel skepticism of subjective complaints. As noted, most victims of CFS are women.

49. Understanding CFIDS, supra note 5, at 74. Other common CFIDS symptoms include cognitive function problems such as word-finding difficulties; comprehension problems; speech impairment; psychological problems (depression, irritability, anxiety); chills and night sweats; shortness of breath; dizziness and balance problems; sensitivity to heat and/or cold; irritable bowel; low-grade fever or low body temperature; allergies; chemical sensitivities; and feeling “in a fog.” Understanding CFIDS, supra note 5, at 74-75.

50. STOFF & PELLEGRINO, supra note 2, at 59-60.

51. But see Issam Bou-Holaigah, M.D., et al., The Relationship Between Neurally Mediated Hypotension and the Chronic Fatigue Syndrome, 274 JAMA 961, 961-67 (1995) (explaining that people with CFS suffer abnormally reduced heart rate and blood pressure after spending 40 minutes in an upright position); see also STOFF & PELLEGRINO, supra note 2, at 74-84. Lab tests may document identification of CFS, such as low functioning natural killer cells, yeast infections, and chronic viral infections. STOFF & PELLEGRINO, supra note 2, at 74-84. The tests may also indicate some symptoms of CFS, such as low grade fever, sore throat, and swollen lymph nodes. STOFF & PELLEGRINO, supra note 2, at 74-84.


53. STOFF & PELLEGRINO, supra note 2, at 74-84. See also English, supra note 4, at 964.

54. Cf. STOFF & PELLEGRINO, supra note 2, at 60.

55. Price, supra note 2, at 514.

56. Price, supra note 2, at 514. A “kvetch” is a person who complains in a nagging or a whining way. WEBSTER’S NEW WORLD DICTIONARY 784 (2d ed. 1980).

57. Jordan, supra note 27.

58. Price, supra note 2, at 516.
of a woman's complaints than a man's complaints. Society expects men to be stoical. A physician may believe that a man would not complain unless he is quite ill. Yet societal stereotypes portray women as frequent complainers. As a result, a physician may be more willing to believe a man's symptoms than a woman's symptoms.

Even if a physician believes in the veracity of a person's symptoms, the physician must then conclude that these symptoms constitute a disease. The CDC explains that a CFS diagnosis is proper when a person suffers both severe fatigue and four or more of the other eight symptoms listed above for at least six consecutive months and her physician has eliminated other possible diseases. A physician may or may not be willing to apply this formula to diagnose CFS. Some physicians do not put any credence in the CDC formula because they do not believe in the existence of CFS. Other physicians believe CFS exists, but they refuse to base a medical diagnosis on subjective symptoms. As Dr. Stoff notes, western medicine relies "almost exclusively on objective, laboratory data." In *Walders v. Garrett*, a former civilian Navy employee with CFS claimed unlawful discharge under the Reha-

59. See Feiden, supra note 4, at 43.
60. Jordan, supra note 27.
62. STOFF & PELLEGRINO, supra note 2, at 61-86.
63. Understanding CFIDS, supra note 5, at 74.
64. Interview with Robert J. Bloomberg, M.D., in Tempe, Ariz. (Aug. 17, 1992); interview with Cynthia Whitcher, M.D., in Davis, Cal. (Oct. 24, 1994).
65. However, official recognition of CFS may discourage skepticism of the disease. For example, in a letter from Pete Wilson, Governor of the State of California, to the Chronic Fatigue Syndrome Association, the Governor said that "Chronic Fatigue Syndrome is a debilitating illness that ... can disrupt lives by interrupting both education and employment, leading to untold hardship ... .I am hopeful that greater understanding and increased coordination to combat this disease will be fostered in the near future ... ." Letter from Pete Wilson, Governor of the State of Cal. (Feb. 28, 1991). In addition, the California legislature, in declaring May 12, 1994 as CFIDS Awareness Day, stated:

WHEREAS, Patients living with chronic fatigue syndrome face great difficulty in receiving social services and public assistance despite suffering extreme debilitation; and
WHEREAS, There is a great need for education and training medical professionals regarding chronic fatigue syndrome ... and be it further Resolved, That this day be set aside to help strengthen the efforts to promote research and education into chronic fatigue syndrome . . . .

A. Con. Res. 130, 1993-94 Leg., Regular Session, Chapter 33; see also Living Hell: The Real World of Chronic Fatigue Syndrome (Authentic Pictures video documentary, 1993) (stating that funding for CFS research by the National Institute of Health rose from less than $500,000 in 1986 to over $3 million in 1992).
66. STOFF & PELLEGRINO, supra note 2, at 60.
bilitation Act of 1973\textsuperscript{68} (hereinafter "Rehabilitation Act").\textsuperscript{69} The defendant referred to one physician's comments in arguing that the plaintiff did not have CFS: "[T]he government referred to the fact that plaintiff was examined for this lawsuit by Dr. Gaetano Molinari, who concluded that he found insufficient objective criteria to support a CFIDS diagnosis, although he conceded that plaintiff may well have the disease."\textsuperscript{70} The physician's comment that the plaintiff "may well have the disease" indicates that the physician refused to base a diagnosis on subjective symptoms. \textit{Walders} is illustrative of the notion that proving a CFS diagnosis is difficult because the medical skepticism of subjective symptoms hinders one's effort to acquire the necessary evidence.\textsuperscript{71}

However, after a person begins receiving medical treatment and compiling records, she may succeed in proving that she has CFS.\textsuperscript{72} In \textit{Besade v. Interstate Security Services},\textsuperscript{73} a workers' compensation case, the Compensation Review Board acknowledged the plaintiff's CFS diagnosis after her treating physician testified on her behalf.\textsuperscript{74} Dr. Paul Cheney testified that the plaintiff had CFS because she suffered from all of the symptoms on the CDC list.\textsuperscript{75}

The defendant argued that Dr. Cheney's opinion was "unduly speculative and therefore not stated in terms of reasonable medical probability."\textsuperscript{76} In granting the disability benefits, the review board held

\begin{itemize}
  \item \textsuperscript{69} \textit{Walders}, 765 F. Supp. at 304.
  \item \textsuperscript{70} Id. at 305 n.4.
  \item \textsuperscript{71} By contrast, physicians and other health care providers who practice alternative medicine currently provide the bulk of available support to CFS sufferers. One reason for this is that mainstream medicine and alternative medicine have different philosophies of medical treatment. Mainstream physicians treat the cause of the disease. Since the cause of CFS is unknown, these physicians are at a loss as how to treat it. \textit{See English, supra} note 4, at 964. English "talked with scores of fellow patients who went to [the medical] profession for help, but who came away humiliated, angry, and afraid." \textit{English, supra} note 4, at 964. However, alternative health care providers such as acupuncturists, homeopathic or holistic practitioners, and herbalists seek to strengthen the body's natural healing abilities so that the body — not the practitioner — treats the cause of the disease. Since alternative medicine does not require knowledge of the cause of the disease, it may be helpful to a CFS victim. Timothy J. Smith, M.D., \textit{Are You Tired?}, \textsc{On Health & Longevity}, Fall-Winter 1993, at 2.
  \item \textsuperscript{73} \textit{Administrative Digests}, \textsc{CONN. L. TRIBUNE}, May 2, 1994, at 8A (citing \textit{Besade v. Interstate Sec. Serv.} (Comp. Review Bd. Worker's Comp. Comm'n 1383 CRB-2-92-2, Feb. 28, 1994)).
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} Id.; for the symptoms listed by the CDC, \textit{see supra} note 49 and accompanying text.
  \item \textsuperscript{76} \textit{Administrative Digests}, \textsc{CONN. L. TRIBUNE}, May 2, 1994, at 8A (citing \textit{Besade v. Interstate Sec. Serv.} (Comp. Review Bd. Worker's Comp. Comm'n 1383 CRB-2-92-2, Feb. 28, 1994)).
\end{itemize}
that utilizing the CDC symptom list to diagnose CFS is not an unduly speculative process. The Board stated that “Dr. Cheney confirmed that his opinions were expressed with reasonable medical probability.”

Similarly, in Walders, the court recognized expert testimony as proof of the plaintiff’s CFS diagnosis. The Walders court stated, “Dr. Hallowitz testified that he examined the plaintiff and performed a series of tests to rule out potential causes of her symptoms other than CFIDS [i.e., CFS] . . . [T]he Court concludes that he is knowledgeable about the condition and there is no reason to doubt his diagnosis in this case.” Thus, in both the Rehabilitation Act and workers’ compensation contexts, it is clear that a person may prove that she has CFS if her physician testifies on her behalf.

In addition to expert testimony, medical records may help prove the existence of CFS. In Ringle v. Shalala, the United States Court of Appeals for the Ninth Circuit recognized the plaintiff’s diagnosis because her physician documented her subjective complaints in medical records. In Ringle, a person with fibromyalgia was denied Title II disability benefits. In a prior hearing, an administrative law judge (“ALJ”) rejected a physician’s opinion that the plaintiff had fibromyalgia because the opinion was based “almost entirely on [the plaintiff’s] subjective complaints of pain, rather than any objective, clinical findings.” The court agreed that “[a] claimant’s subjective allegations of disabling pain must be supported by [medical] evidence.” Yet, in reversing the ALJ’s decision, the court concluded that the documentation of the plaintiff’s complaints in her medical records was sufficient to prove her diagnosis because her complaints were “consistent with a diagnosis of fibromyalgia, which is difficult to detect with medical testing.”

77. Id.
79. Id. at 305 n.4.
80. Id.
82. Id. at *4.
83. Fibromyalgia is a CFS-related disease. Interview with Donna Russell, Coordinator of the Davis Fibromyalgia Chronic Fatigue Syndrome Support Group, in Davis, Cal. (Dec. 5, 1994); see FIBROMYALGIA SYNDROME (FMS): A PATIENT’S GUIDE. For a copy of this document contact: Fibromyalgia Network, Bakersfield, Cal.
85. Id. at *2.
86. Id. at *3.
87. Id. at *4.
physician's testimony may persuade a court to recognize a CFS diagnosis.

The cases discussed above suggest several practical tips for people with CFS. Those suffering from CFS should seek medical treatment as soon as possible. They should find a physician who is familiar with CFS and make sure that the physician documents their subjective complaints and orders lab tests that could potentially establish the objective CFS symptoms. Taking these measures may increase a person's chance of proving that she has CFS.

Once a person with CFS has proven her diagnosis, she must show that CFS constitutes a physical or mental impairment within the scope of the ADA. This part of her case is far less problematic than the initial proof of illness. Indeed, the Equal Employment Opportunity Commission ("EEOC") defines a physical or mental impairment as any physiological disorder affecting one or more of the following body

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88. In addition to seeking treatment, a person with CFS should actively follow her physician's advice. See Walders v. Garrett, 765 F. Supp. 303, 306 n.9 (E.D. Va. 1991). Ignoring such advice may cut against her at trial. Id. The Navy claimed that some of plaintiff's absences were due as much to her own behavior as to CFIDS... Id. One of the plaintiff's co-workers testified that the plaintiff "routinely watched late night television, did not intend to follow medical advice... [and] voiced objections to medical advice..." Id.

89. See Walders, 765 F. Supp. at 305 n.4 (illustrating that a physician who is uninformed about CFS may undermine a person's claim by offering damaging testimony).

90. See 42 U.S.C. § 12102(2) (Supp. V 1994); 29 C.F.R. § 1630.2(g) (1994); see 29 C.F.R. app. § 1630.2(h)(1994). "It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments." Id.

91. The EEOC is a federal agency that was created by Congress to enforce Title VII of the Civil Rights Act of 1964. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INFORMATION FOR THE PRIVATE SECTOR AND STATE AND LOCAL GOVERNMENTS 3. Since 1979, the EEOC has also enforced the Age Discrimination in Employment Act of 1967, Pub. L. No. 104-12, 81 Stat. 602 (current version at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1994), the Equal Pay Act of 1963, Pub L. No. 88-38, 77 Stat. 56 (codified as amended in scattered sections of 29 U.S.C.), and Section 501 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 367 (codified as amended at 29 U.S.C. 501 (1988 & Supp V 1994). Id. On July 26, 1992, the EEOC began enforcing Title I of the ADA. Id. A person who believes that she has been discriminated against by an employer, labor union, or employment agency when applying for a job or on the job because of race, color, sex, religion, national origin, age, or disability, may file a complaint with the EEOC within 180 days of the alleged discriminatory act. Id. at 3-4. If a state or local agency is authorized to grant relief based on a state or local anti-discrimination law, the person must seek relief there first. Id. at 11. The EEOC may file a lawsuit on behalf of the injured person if it finds reasonable cause to believe that discrimination occurred and conciliation efforts have failed. Id. at 11-12. If the EEOC decides not to sue, the person may file a private suit within 90 days of receiving a notice of right-to-sue from the EEOC. Id. Since enforcement of the ADA began, individuals with disabilities have filed 27,000 complaints resulting in only 15 EEOC lawsuits nationwide (most were AIDS related). Telephone Interview with Sharon Hawley, Enforcement Manager, EEOC (July 19, 1994). The EEOC strives to resolve disputes with employers before suit. Id.
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systems: neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or any mental or psychological disorder. Since CFS covers both physical and mental symptoms, it is an “impairment” under the ADA.

B. Substantially Limits a Major Life Activity

Once a person proves that she has a physical or mental impairment, she must then show that this impairment rises to the level of a disability. An impairment may constitute a disability if it substantially limits one or more of a person’s “major life activities.” The EEOC defines “substantially limits” as “unable or significantly restricted” from performing a major life activity compared to the average person. Major life activities include working, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sitting, standing, lifting, and reading. The EEOC makes clear that “this list is not exhaustive.” Thus, CFS may rise to the level of a disability if it prevents or significantly restricts a person’s ability to perform basic life activities.

A person with CFS may prove that CFS substantially limits her ability to work, yet she must be careful to prove that CFS significantly restricts but does not prevent her from working at all. She must be mindful of the next element of her prima facie case: proving that she is qualified to work. Thus, if a person with CFS proves her disability

92. 29 C.F.R. § 1630.2(h)(I).
93. See Walders, 765 F. Supp. at 309 (holding that “CFIDS plainly fits [the] definition of a handicap.”).
94. See 29 C.F.R. app. § 1630.2(j). “Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual’s life to the degree that they constitute disabling impairments.” Id.
95. Id. § 1630.2(g).
96. Id. § 1630.2(j).
97. 29 C.F.R. § 1630.2(j); see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMERICANS WITH DISABILITIES ACT HANDBOOK I-27 (1992).
98. 29 C.F.R. app. § 1630.2(l).
99. 29 C.F.R. § 1630.2(i)-a).
101. Id. at 309. In Walders, “[p]laintiff’s handicap caused her to have a high level of unpredictable absenteeism and thus prevented her from performing the essential functions of her job at a satisfactory level of productivity.” Id. at 312.
by demonstrating that she is “unable” to work, her Title I claim may fail.\(^{102}\)

However, a CFS plaintiff may have difficulty proving that the disease limits but does not prevent her from working. The assertion may not logically flow from the evidence that she presents in proving a CFS diagnosis.\(^{103}\) After reviewing medical records and expert testimony on the debilitating effect of CFS, a court may not only be convinced that a person has CFS, but that she is too sick to work.\(^{104}\) In both Collins v. Sullivan\(^ {105}\) and Ringle v. Shalala,\(^ {106}\) the courts held that the plaintiffs were disabled because they could not work.\(^ {107}\) Similarly in Walders v. Garrett,\(^ {108}\) the court held that the plaintiff was disabled because “when CFIDS strikes plaintiff, she may be completely debilitated — e.g., she cannot come to work or even get out of bed.”\(^ {109}\) The court then relied on this evidence to declare that the plaintiff was unfit to work.\(^ {110}\) As a result, the plaintiff’s employment discrimination claim failed.\(^ {111}\) Clearly problematic for the CFS plaintiff is the fact that the evidence she uses to establish that she is an “individual with a disability”\(^ {112}\) may undermine her effort to prove that she is a “qualified individual with a disability.”\(^ {113}\)

One solution to this dilemma is that a person with CFS may prove that she is only unable to perform certain jobs.\(^ {114}\) The EEOC states: “[W]ith respect to the major life activity of ‘working’ . . . [t]he term ‘substantially limits’ means significantly restricted in the ability to perform a . . . broad range of jobs . . . compared to the average person having comparable training, skills, and abilities.”\(^ {115}\) Thus, in Reynolds v. Brock,\(^ {116}\) the court held that the plaintiff was disabled because her

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102. See id. at 314.
103. Id. at 314.
104. Id. at 312-14.
109. Id. at 309 n.17.
110. Id. at 312-13.
111. Id. at 314.
113. Id.
114. 29 C.F.R. app. § 1630.2(j) (1994).
116. 815 F.2d 571 (9th Cir. 1987).
impairment prevented her from doing certain jobs. In *Reynolds*, an epileptic clerk typist claimed unlawful discharge under the Rehabilitation Act. In reversing a summary judgment decision for the defendant, the court held that the plaintiff's epilepsy substantially limited her ability to work because government regulations restricted the types of jobs available to her. Thus, the plaintiff was disabled because she could only perform desk jobs. Similarly, a person with CFS may be able to perform a desk job but not manual labor because the disease makes her feel "sluggish and sore." Alternatively, a person with CFS may be able to perform manual labor functions but not a job requiring cognitive stress. Thus, a person with CFS may prove that she is both disabled and "qualified" to work by showing that CFS significantly restricts her from performing a broad range of jobs, but does not prevent her from working entirely.

However, a person with CFS may avoid the work issues by claiming that CFS substantially limits another major life activity. The EEOC states: "If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." Thus, a person may claim that CFS substantially limits her ability to walk or care for herself. In *Walders v. Garrett*, the court acknowledged that CFS impairs a person's major functions including walking and dressing. CFS may

117. *Id.* at 574.
118. *Id.* at 572.
119. *Id.* at 574. The plaintiff was unable to perform hazardous jobs, military jobs, or any job requiring her to drive to work. *Id.*
120. *Walders v. Garrett*, 765 F. Supp. 303, 313 (E.D. Va. 1991) (discussing how a Navy secretary with CFS "[was] able to meet deadlines and ... received positive evaluations.").
122. A medical research study on CFS concluded that subjects with CFS attribute their inability to remain at work to complaints of: difficulty concentrating; impaired memory; difficulty with word finding, problem solving, and abstract thinking. John DeLuca et al., *Information Processing Efficiency in Chronic Fatigue Syndrome and Multiple Sclerosis*, 50 ARCH. NEUROL. 301, 302 (1993); see also *McGrath*, *supra* note 36, at A2. People with CFS complain that the illness plays with their mind. *McGrath*, *supra* note 36, at A2. Yet, a person with CFS may be able to do physical tasks. A person with CFS decided not to practice law, but to take up construction work for this reason. Telephone Interview with a carpenter with CFS (Sept. 1994) (name withheld upon request).
123. For a list of the major life activities see *supra* text accompanying note 97.
124. 29 C.F.R. app. § 1630.2(j).
125. 29 C.F.R. § 1630.2(j); see 29 C.F.R. app. § 1630.2(j). "An individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking." *Id.*
127. *Id.* at 309 n.17.
also impair reading, yet another major life activity. One person with CFS noted that the disease renders it difficult to think clearly and even to read the newspaper. If a person can prove that CFS substantially restricts one of these activities, she may not need to discuss her ability to work. However, a person with CFS may have limited success in avoiding the work issue because employees often need to walk or read on the job. Thus, a person with CFS may have limited success in claiming that she is disabled because her disease substantially limits a non-work activity.

Finally, a person may prove that she is disabled because of hospitalization resulting from CFS. In Walders v. Garrett, the court cited School Board of Nassau County v. Arline to establish that the plaintiff was an “individual with a disability.” In Arline, a teacher with tuberculosis claimed unlawful discharge under the Rehabilitation Act. The United States Supreme Court held that “hospitalization [is] a fact more than sufficient to establish that one or more of [plaintiff’s] major life activities were substantially limited by her impairment.” As a result, the Walders court noted that the plaintiff was disabled because she was hospitalized for treatment of CFS. Thus, hospitalization may support a person’s claim that CFS substantially limits her life activities without discussing specific activities such as work.

III. QUALIFIED INDIVIDUAL WITH A DISABILITY

Once a person with CFS proves that she is an “individual with a disability,” she must next prove that she is “qualified” to do the job she seeks. The EEOC defines a “qualified individual with a disability [as] an individual with a disability who satisfies the requisite skill, experience, education, and other job related requirements” of the job she desires and who can perform the essential functions of the job with or

128. English, supra note 4, at 964.
129. English, supra note 4, at 964.
130. See Walders, 765 F. Supp. at 309 n.17 (explaining how the restrictions on the major life activities resulted in plaintiff’s absenteeism).
131. See id.
134. Arline, 480 U.S. at 275.
135. Id. at 281.
without reasonable accommodation. This definition covers two issues: 1) pre-employment credentials; and 2) on-the-job abilities. Similar to any other job applicant, a disabled person must have adequate credentials for the job. For instance, a person will not have much success in claiming employment discrimination under the ADA if an employer refuses to hire her because she lacks the necessary educational background, employment, skills, or licenses. In addition, a person with a disability must also be able to perform the job once she arrives at the factory or office. As the ADA states, a “qualified” individual with a disability must be able to perform the “essential functions” of the job with or without “reasonable accommodation.” Thus, to state a claim under Title I of the ADA, a person with CFS must delineate the functions of her job that are “essential” and the reasonable accommodations that may enable her to perform them.

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138. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(m).
139. 29 C.F.R. app. § 1630.2(m).
140. 29 C.F.R. app. § 1630.2(m); Lucero v. Hart, 915 F.2d 1367, 1371-72 (9th Cir. 1990).
141. Lucero, 915 F.2d at 1371-72. However, an employer may only impose limited inquiries regarding an applicant’s health status. See EEOC ENFORCEMENT GUIDANCE ON PRE-EMPLOYMENT INQUIRIES UNDER THE AMERICANS WITH DISABILITIES ACT, Daily Lab Rep. (BNA) No. 96, D-1 (May 20, 1994). Among the inquiries permitted are: whether the applicant can perform the essential functions of the job with or without reasonable accommodation; a description or demonstration of how the applicant would perform these functions; and whether the applicant meets the attendance requirements of the job? Employer’s are prohibited from such inquiries as: do you have AIDS?; have you ever filed for workers’ compensation?; have you ever been treated for mental illness?; how many sick days were you sick last year?; do you have a disability which would interfere with your ability to perform the job? Id. at D-2.
142. See 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).
143. 42 U.S.C. § 12111(8).
144. For example, a job applicant with CFS might want to work as a computer programmer. First, a court may determine that data input is an “essential function” of the job because it is a fundamental job task. Second, the court would examine how the applicant proposes to accomplish this task. Typically, a computer programmer may work two three-hour shifts with a lunch hour in between. Yet the applicant may not be able to work for three consecutive hours due to her CFS symptoms. She may need to modify her work schedule so that she takes a ten minute break every hour and works through lunch to compensate for her illness. This modified work schedule is a “reasonable accommodation” because it is a change in the traditional method of performing the job that enables the applicant to attain a level of productivity equal to other workers. See Gerald T. Holtzman et al., Reasonable Accommodation of the Disabled Worker-A Job for the Man or a Man for the Job, 44 BAYLOR L. REV. 279, 291 (1992). As a result, the court may conclude that the applicant is a “qualified individual with a disability” because she can perform the essential functions of the job with a reasonable accommodation. Id. at 290 (exploring the inter-relationship of the “qualified individual” criterion and the “reasonable accommodation” requirement).
A. Essential Functions

An "essential function" is a fundamental job duty of the employment position.\(^{145}\) Typically, a job requires an employee to do several different tasks. While some of these tasks may be fundamental to the job, others may be marginal.\(^{146}\) Thus, a person with CFS may ask herself: what is the point of my job?\(^{147}\) The EEOC requests courts to engage in a case-by-case analysis to determine whether a job function is "essential."\(^{148}\) Job functions that a person with CFS may have difficulty performing and that a court may determine to be essential are discussed below.

1. Regular, Predictable Attendance

A person with CFS may have difficulty maintaining a regular, predictable work schedule.\(^{149}\) The attendance of a person with CFS may be irregular because she may frequently be absent on sick days.\(^{150}\) In addition, her attendance may be unpredictable because she may not be able to predict when these sick days will occur. As was noted in *Walders*, CFS impairs a person's major activities "albeit not on a consistent basis."\(^{151}\) A person with CFS also commented, "[s]ymptoms come and go, wax and wane. What is true today may be partially true tomorrow or totally false next week."\(^{152}\) As a result, CFS may disrupt a person's work schedule.

Regular, predictable attendance may be an essential job function depending on the type of job a person holds.\(^{153}\) If a job requires one

\footnotesize{145. 29 C.F.R. § 1630.2(n)(1).}  
\footnotesize{146. 29 C.F.R. § 1630.2(n)(1); see Ackerman v. Western Elec. Co., 643 F. Supp. 836, 846 (N.D. Cal. 1986).}  
\footnotesize{147. Lainey Feingold, Co-Director of Disability Rights and Education Defense Fund Clinical Program, Address at U.C. Davis School of Law (Oct. 20, 1994) [hereinafter Feingold].}  
\footnotesize{148. 29 C.F.R. app. § 1630.2(m). Whether a job function is essential the court must determine: (1) if the individual satisfies the prerequisites for the position, such as educational background, employment experience, skills, licenses, etc.; and (2) if the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. *Id.*}  
\footnotesize{149. Telephone Interview with Kathy McClaire, Employee Rehabilitation Counselor, U.C. Davis (July 28, 1994); see Walders v. Garrett, 765 F. Supp. 305, 305-06 (E.D. Va. 1991).}  
\footnotesize{150. *Walders*, 765 F. Supp. at 306.}  
\footnotesize{151. *Id.* at 309 n.17.}  
\footnotesize{152. English, *supra* note 4, at 965.}  
\footnotesize{153. See 29 C.F.R. § 1630.2(n)(2)(i)-(iii). Courts may consider the following factors in determining an "essential function": (1) that the position exists to perform this specific function; (2)}
to meet frequent deadlines, and a small staff precludes the availability of others to compensate for one's absences, then regular, predictable attendance may be essential to that job.\textsuperscript{154} To determine whether a job function is essential, the EEOC suggests that a court examine "the consequences of not requiring the incumbent to perform the function."\textsuperscript{155} As two courts have noted, the consequences of not requiring a person to regularly attend work may be severe when a job entails frequent deadlines.\textsuperscript{156} In \textit{Carr v. Reno},\textsuperscript{157} a coding clerk with an ear disability claimed unlawful discharge under the Rehabilitation Act.\textsuperscript{158} The plaintiff's job involved coding papers related to recent arrests.\textsuperscript{159} Her papers were not ready for a daily 4:00 p.m. pickup because her disability caused attacks of dizziness and vomiting, and she was frequently absent from work "for prolonged periods of time without warning."\textsuperscript{160} The court noted that "[i]f the Office falls behind in this process, it must expend considerable resources to catch up."\textsuperscript{161} For this employer, added expense was a consequence of the plaintiff's irregular attendance.

Similarly in \textit{Walders v. Garrett}, the plaintiff's principle duty was to process government requests for information within a statutory deadline of ten days.\textsuperscript{162} The plaintiff fell behind in her workload because she was absent between sixty and ninety days per year due to CFS.\textsuperscript{163} "Moreover, plaintiff's absenteeism was essentially random [and] ... plaintiff's supervisors could not count on her attendance or predict her absences."\textsuperscript{164} The plaintiff's employers testified about the "need for rapid processing and closing of cases and the substantial pressure placed on the [office] by the Navy . . . and by the Department of Justice."\textsuperscript{165} Just as added expense resulted for the employer in \textit{Carr}, the \textit{Walders} case illustrates that client dissatisfaction may be another consequence of irregular attendance.

\begin{itemize}
  \item that a limited number of employees are available for the position; and
  \item that the skills required to perform the job may be highly specialized.
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\textit{Id.}\textsuperscript{155} 29 C.F.R. § 1630.2(n)(3)(iv).
\textit{Id.}\textsuperscript{157} \textit{Carr v. Reno}, 23 F.3d 525 (D.C. Cir. 1994).
\textit{Id.}\textsuperscript{158} at 527-28.
\textit{Id.}\textsuperscript{159} at 527.
\textit{Id.}\textsuperscript{160} at 527.
\textit{Id.}\textsuperscript{161} at 527.
\textit{Walders}, 765 F. Supp. at 305 n.2.
\textit{Id.}\textsuperscript{162} at 306.
\textit{Id.}\textsuperscript{163} at 310.
\textit{Id.}\textsuperscript{164} at 305.
\textit{Id.}\textsuperscript{165} at 305.
The employer and person with CFS may avoid these consequences if another employee in the office is able to "fill in" during absences.\textsuperscript{166} Yet this may not be possible if the office has a small staff.\textsuperscript{167} The EEOC suggests that a "function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed."\textsuperscript{168} In \textit{Carr} and \textit{Walders}, there were no other employees available to mitigate the consequences of plaintiff's irregular attendance.\textsuperscript{169} In \textit{Carr}, the court noted that "when [the plaintiff], without advance warning or prompt explanation, did not show up for work, the Office was forced to rely on a single clerk because it could not know when a replacement (assuming one could be found) would be needed."\textsuperscript{170} Similarly in \textit{Walders}, the plaintiff's office had only fifteen employees; they worked in teams of five.\textsuperscript{171} When the plaintiff was absent "no one else was willing or able to take her place."\textsuperscript{172} The court commented that each employee had to "pull his or her full weight."\textsuperscript{173} In determining the consequences of irregular attendance in jobs that combine small staffs with frequent deadlines, both \textit{Carr} and \textit{Walders} held that regular, predictable attendance was an essential job function.\textsuperscript{174}

However, regular, predictable attendance may not be essential if a person's job does not entail frequent deadlines or where other employees can compensate for another's absences.\textsuperscript{175} In \textit{Walders}, the court discussed another Navy employee with CFS, a secretary, who failed to maintain regular, predictable attendance.\textsuperscript{176} The court noted that the secretary's duties, typing and processing forms, did not entail substantial deadlines and that other secretaries assumed her responsibilities when she was absent.\textsuperscript{177} Unlike the \textit{Walders} plaintiff, the Navy did not contend that regular, predictable attendance was an essential function of the secretary's job.\textsuperscript{178} It is clear then that, in planning her career, a person

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\textsuperscript{166} See 29 C.F.R. § 1630.2(n)(2)(i)-(iii).
\textsuperscript{168} 29 C.F.R. § 1630.2(n)(2)(ii).
\textsuperscript{169} \textit{Walders}, 765 F. Supp. at 313-14; \textit{Carr}, 23 F.3d at 527.
\textsuperscript{170} \textit{Carr}, 23 F.3d at 527.
\textsuperscript{171} \textit{Walders}, 765 F. Supp. at 304-05.
\textsuperscript{172} \textit{Id.} at 313.
\textsuperscript{173} \textit{Id.} at 314.
\textsuperscript{174} \textit{Id.} at 309-10; \textit{Carr}, 23 F.3d at 530.
\textsuperscript{175} See \textit{Walders}, 765 F. Supp. at 313.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} See \textit{id.}
\end{flushleft}
with CFS should avoid a job with frequent deadlines and no support staff.


A person with CFS may not be able to perform manual labor functions because CFS often depletes one’s physical stamina. A manual task may be an essential function if a person spends a large part of her day performing it. To determine if a job function is essential, the EEOC suggests that courts examine both whether all employees with the same job perform the task, and the proportion of an employee’s day spent performing the task. Yet as Ackerman v. Western Electric Co., indicated, these two guidelines may conflict. While all employees may perform a certain task, a particular employee may spend less time on that task than other employees. In Ackerman, an “index 2” cable installer with a respiratory disability claimed unlawful discharge under California’s FEHA. The job required “index 2” installers to perform physically demanding work such as ironwork and cabling. Due to her disability, the plaintiff could not perform these tasks, and her employer discharged her upon a determination that this work was an essential job task. In holding for the plaintiff, the court decided that ironwork and cabling were not “essential functions” of the plaintiff’s job. The court explained that “[W]hile ironwork and cabling are essential functions for index 2 installers as a group, they are not essential to any particular individual’s performance of the job.” The court held that: “[t]he amount of that work . . . performed by [plaintiff] was proportionately so insignificant [11.5%] that it cannot be considered an essential function of her position.” Thus, while examining whether other employees perform a certain task may be helpful in determining the essential function issue, the analysis is not determinative. A person with CFS may pursue a position that entails a task that she lacks the physical

179. See supra note 4 and accompanying text.
181. Id. § 1630.2(p)(3)(iii), (vi), (vii).
183. See id. at 846.
184. Id.
185. Id. at 841 (citing Cal. Gov. Code § 12940 (West 1992)).
186. Id. at 844.
187. See id. at 842.
188. Id. at 846.
189. Id.
stamina to perform if that task comprises a minor portion of her day.

3. Productivity

A person with CFS may not be able to maintain a certain level of productivity because of the severity and inconsistency of her symptoms. A specific production standard may be an essential job function depending on when an employer sets this standard. The EEOC states:

[T]he inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards . . . . If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing of 65 words per minute, would not be adequate.

However, the EEOC also notes that a court may suspect an employer of discrimination if the employer selects a particular production standard that excludes an individual with a disability. Thus, a court may be more or less critical of an employer's production standard depending on whether the employer set it before or after a disabled person was hired.

If an employer sets a production standard before a person begins work, a court may defer to the employer's judgment that the standard is an essential job function. In Lucero v. Hart, a clerk typist who suffered from an emotional disability claimed unlawful discharge under the Rehabilitation Act. The job required the ability to type forty-five words per minute ("wpm"). The plaintiff was discharged after her employer found that she could only type forty-four wpm. In holding for the employer, the court stated:

[Plaintiff] was technically not 'otherwise qualified' for her job. . . . If

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190. See supra notes 150-53 and accompanying text.
192. 29 C.F.R. app. § 1630.2(n).
193. Id.
194. See 29 C.F.R. § 1630.2(n)(3)(i). "Evidence of whether a particular function is essential includes . . . [t]he employer's judgment as to which functions are essential . . . ." Id.
195. 915 F.2d 1367 (9th Cir. 1990).
196. Id. at 1369-70.
197. Id. at 1369.
198. Id.
44/wpm was sufficient, why is that not the minimum requirement? If 44/wpm is close enough, why not 43/wpm; or 40/wpm? While this seems a very technical distinction, the standard was set at 45/wpm for a reason, and it is not the court's job to establish minimum qualification standards for county employees in Sacramento. . . . [Plaintiff] was not fired because of her handicap. She was fired because she could not meet the minimum requirements of her job . . . .

The court was unwilling to challenge the employer's production standard even if the consequence was draconian in nature. Clearly pivotal is the fact that the employer set the standard prior to any awareness of the employee's disability. Thus, such a standard is lawful. As a result, a person with CFS should only pursue a job if she can meet the existing production standards that were established prior to her application.

However, if an employer sets a production standard after an individual begins work, a court may not defer to the employer's judgment that the standard is an essential job function. The EEOC explains: "[I]f it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate non-discriminatory reason for its selection." In American Federation of Government Employees Local 51 v. Baker, a coin checker with a learning disability, high blood pressure, and a skin allergy claimed unlawful discharge under the Rehabilitation Act. Her employer attempted to discharge her after she failed to inspect 500 sets per day. However, the plaintiff was granted a temporary injunction to stop the discharge. In holding for the plaintiff, the court concluded that inspecting 500 sets per day was not an essential function of plaintiff's job because the quota was imposed after plaintiff had been on the job for many years. Moreover, other employees had difficulty meeting the quota which was subsequently imposed after plaintiff had been on the job for many years.

199. Id. at 1371-72.
200. See C.F.R. § 1630.2(n)(1). "Evidence of whether a particular function is essential includes . . . [written job descriptions prepared before advertising or interviewing applicants for the job . . . .]" Id. § 1630.2(n)(3)(ii).
201. See 29 C.F.R. app. § 1630.2(n).
202. Id.
204. Id. at 71,216-17.
205. Id. at 71,218.
206. Id.
207. Id. at 71,220.
208. Id. at 71,223.
reduced to 450 sets per day.\textsuperscript{209} The court concluded that "[t]hese production standards were not the minimum requirements for the job, nor were they even "reasonable and attainable.""\textsuperscript{210} Similarly, in \textit{Reynolds} v. \textit{Broc},\textsuperscript{211} an employer told the plaintiff that in order to keep her job she had to process ten applications per day.\textsuperscript{212} The plaintiff failed to meet this standard and was discharged.\textsuperscript{213} The court held that a genuine issue of fact existed as to whether the employer set an unrealistically high production standard in order to impede the plaintiff's efforts.\textsuperscript{214} Here, the production standard was not considered an essential job function, as the employer set that standard after becoming aware of the employee's disability.

\textbf{B. Reasonable Accommodation}

Once a person with CFS determines her "essential" job duties, she must then prove that she can perform these duties with or without "reasonable accommodation."\textsuperscript{215} An "accommodation" is a modification in the traditional method of performing a job function.\textsuperscript{216} A court determines whether or not an accommodation is "reasonable" on a case-by-case basis.\textsuperscript{217} To be sure, a person with CFS need not prove that

\begin{itemize}
\item[209.] \textit{Id.} at 71,220.
\item[210.] \textit{Id.} at 71,223.
\item[211.] 815 F.2d 571 (9th Cir. 1987).
\item[212.] \textit{Id.} at 572. Plaintiff had already suffered three epileptic seizures at work. \textit{Id.}
\item[213.] \textit{Id.}
\item[214.] \textit{Id.} at 574.
\item[216.] \textit{See} 29 C.F.R. app. § 1630.2(o)(i)-(iii). The term "reasonable accommodation" means:
\begin{itemize}
\item[(i)] Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
\item[(ii)] Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
\item[(iii)] Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.
\end{itemize}
\item[217.] \textit{See} School Bd. of Nassau County v. \textit{Atlinc}, 480 U.S. 273, 287 (1987) (holding that courts must make an individualized inquiry into possible forms of reasonable accommodation); \textit{see also} U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BOOKLET 15, THE AMERICANS WITH DISABILITIES ACT: QUESTIONS & ANSWERS 6 (1992) (explaining that "[a]ccommodations must be made on an individual basis because the nature and extent of a disabling condition and the require-
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the accommodation that she requests is reasonable. Rather, she need only request the accommodation; her employer has the burden to prove that the accommodation is unreasonable. The employer’s burden of proof stems from its legal duty to provide the reasonable accommodation. Yet, if a court determines that a requested accommodation is unreasonable, a person may fail to prove that she can perform the essential functions of her job with or without the “reasonable accommodation.” Since this failure will undermine her claim that she is a “qualified individual with a disability,” a person with CFS should anticipate the possible arguments an employer may make against the accommodation she requests. By anticipating such arguments, a person with CFS may prepare to rebut her employer’s claim that her requested accommodation is unreasonable.

ments of a job will vary in each case.”); Cf. D’Amico v. N.Y. State Bd. of Law Examiners, 813 F. Supp. 217, 221-23 (W.D.N.Y. 1993) (holding that the court, not the employer, has the final say as to whether plaintiff’s requested accommodation is reasonable).


219. See 42 U.S.C. § 12112(b)(5)(A). “[T]he term “discriminate” includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . .” Id. Thus, since an employer is required to accommodate a disabled person, the employer must explain why it failed to do so. Walders, 765 F. Supp. at 308. But see 29 C.F.R. app. § 1630.9 (1994) (stating that employers are only obligated to accommodate known limitations and in general, it is the responsibility of the disabled individual to inform her employer that she needs an accommodation) (emphasis added).

220. For example, a computer programmer with CFS may not be able to perform the essential functions of her job unless she modifies her work schedule to allow rest breaks. If her employer proves that rest breaks impose an undue hardship because they significantly slow down production efficiency, a court may conclude that no reasonable accommodation exists that will enable the programmer to perform the essential functions of her job. As a result, the programmer may not be a “qualified individual with a disability” and her Title I claim may fail. See Lucero v. Hart, 915 F.2d 1367, 1372 (9th Cir. 1990).

221. In addition to the arguments of undue hardship and scope of an employer’s duty, an employer may also argue that ADA requirements of employers to reasonably accommodate may conflict with the National Labor Relations Act, which requires an employer to negotiate changes in work conditions with the union. Stephen M. Crow & Sandra J. Hartman, ADA Versus NLRA: Is a Showdown Imminent Over Reasonable Accommodation?, 44 LAB. L.J. 375, 376-77 (1993). Commentators have noted that the language, legislative history, and underlying purpose of the ADA suggests that the terms of a collective bargaining agreement should not automatically trump an employer’s duty of reasonable accommodation . . . . Instead, . . . [i]f the courts should balance the interests of the disabled employee against the expectational interests of the employees covered by the labor agreement.

One argument an employer may offer against a person's requested accommodation is that the accommodation constitutes an "undue hardship." An undue hardship is a significant difficulty or expense imposed on the employer. A court determines undue hardship on a case-by-case basis. Factors that a court may consider include the cost of the accommodation, an employer's financial resources, and the impact of the accommodation upon the employer's operation.

Anticipating how a court may rule on an employer's undue hardship claim is difficult because a person cannot be certain as to which legal standard a court will apply. In deciding a Title I claim, a court may rely on case law under the Rehabilitation Act and/or case law under the ADA. These two bodies of case law propose different legal standards for determining undue hardship. Case law under the Rehabilitation Act applies a standard first developed under Title VII of the Civil Rights Act. In Trans World Airlines v. Hardison, the Supreme Court held that an employer need not incur more than *de minimis* cost in accommodating an employee's religious beliefs. Thus, an accommodation may not be reasonable if it imposes more than a small cost on the employer. However, Congress specifically rejected this standard in the House Education and Labor Committee's report accompanying the ADA: "the Committee wishes to make it clear that

223. 42 U.S.C. § 12111(10)(A); 29 C.F.R. § 1630.2(p)(1).
225. 42 U.S.C. § 12111(10)(B)(i); 29 C.F.R. § 1630.2(p)(1)(i). Costs may include the purchase of new equipment or hiring additional staff. Feingold, supra note 147. Typically, the cost of a reasonable accommodation is not high. Feingold, supra note 147. For example, 50% of accommodations cost no money and 25% of them cost under $50. Feingold, supra note 147.
226. 42 U.S.C. § 12111(10)(B)(ii)-(iv); 29 C.F.R. § 1630.2(p)(2)(i)-(v). The impact may be a slow-down in production efficiency or even the breakdown of morale. See 29 C.F.R. app. § 1630.2(p). An employer is not required to sacrifice production efficiency to accommodate an employee. See id. In addition, since a disabled employee has the right to confidentiality regarding her disability, an employer may not be able to explain to other employees why one employee is entitled to receive an accommodation; jealousy may result. James G. Frierson, *An Employer's Dilemma: The ADA's Provisions on Reasonable Accommodation and Confidentiality*, 43 LAB. L.J. 308, 310 (1992).
227. Telephone Interview with Sharon Hawley, Enforcement Manager, EEOC (July 19, 1994).
229. Id.
231. Id. at 84.
principles enunciated by the Supreme Court in *TWA v. Hardison*... are not applicable to this legislation.... Under the ADA, reasonable accommodations must be provided unless they rise to the level of... a significantly higher standard than articulated in *Hardison*. Thus, under the ADA, an accommodation may be reasonable even if it imposes a large cost to the employer. Since a person with CFS cannot be certain which legal standard a court may apply, she must anticipate that a court may rule that the accommodation she requests imposes an undue hardship on her employer if the cost of the accommodation is moderate to high.

Another argument that an employer may offer against a person’s requested accommodation is that the employer is not required to provide the accommodation because the employer has already fulfilled its duty by providing a prior accommodation. Again, anticipating whether or not a court will agree with the employer is difficult because of the uncertainty of the legal standard. Both the ADA and the Rehabilitation Act require an employer to make a reasonable effort on behalf of a disabled person in order to fulfill the employer’s duty of reasonable accommodation. Yet the standard for determining reasonable effort may differ depending on the case law applied by the court. Under the Rehabilitation Act, an employer’s effort need only be minimal to fulfill its duty of reasonable accommodation. The problem with this legal standard is that an accommodation may be reasonable even if it imposes a large cost to the employer.

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233. See id. But see 29 C.F.R. app. § 1630.9. An accommodation must be adequate to enable the individual to perform the essential functions of the job. *Id.* The accommodation does not have to be the “best possible” accommodation. *Id.*

234. But see Lee, supra note 228, at 216-17 (suggesting that a court may tolerate the moderate-to-high cost of an accommodation due to the new, enlightened policy of the ADA).

235. See 29 C.F.R. app. § 1630.2(o). An employer is not required to reallocate essential functions or maintain a person’s salary level when the accommodation is a lower grade job. *Id.*

236. The test for reasonable effort is an objective one — an employer’s good faith effort in reasonably accommodating a disabled person is not determinative. See Mantulete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985). In *Mantulete*, a person with epilepsy claimed that, under the Rehabilitation Act, the U.S. Postal Service improperly denied her employment. *Id.* at 1417. The defendant claimed that the plaintiff’s disability made it unsafe for her to handle a letter sorting machine and that making the machine safe would be prohibitively expensive. *Id.* at 1420. In acknowledging expert testimony that the plaintiff would simply need a plexiglass guard and a pair of $30 tongs, the court held that “a good faith or rational belief on behalf of the employer will not be a sufficient defense to an act of discrimination.” *Id.* at 1423. The determination of whether the accommodations are reasonable must be made by the court *de novo.* *Id.* (emphasis added).

237. See Lucero v. Hart, 915 F.2d 1367, 1372 (9th Cir. 1990); Carr v. Reno, 23 F.3d 525, 528-29 (D.C. Cir. 1994). For an explanation of the reasons behind the legal standard regarding reasonable accommodation under the Rehabilitation Act see Rosalie K. Murphy, *Reasonable Accom-
standard is that the employer’s prior accommodation may be legally sufficient even though it is ineffective in enabling a disabled person to perform the essential functions of her job. In *Lucero v. Harr*\(^{239}\) and *Carr v. Reno*,\(^{239}\) both defendants provided certain accommodations which were ineffective, and yet both courts held that each defendant had nonetheless fulfilled its duty of reasonable accommodation.\(^{240}\) In noting that the plaintiff’s emotional and physical problems prevented her from responding to the accommodations, the *Lucero* court held that “[the defendant’s] attempts to accommodate [the plaintiff] were no less reasonable due to the fact that [plaintiff] was emotionally and physically debilitated at [the] time.”\(^{241}\) Similarly in *Carr*, the accommodations offered by the employer did not enable the plaintiff to perform her job.\(^{242}\) In refusing the plaintiff’s request that the court make an individualized inquiry into other possible accommodations, the court concluded that it is not required to go on a “wild goose chase every time a plaintiff invokes the Rehabilitation Act.”\(^{243}\) A court may conclude that a person’s requested accommodation is unreasonable because her employer already fulfilled its duty of reasonable accommodation.

By contrast, case law under the ADA holds that a disabled person has the right\(^{244}\) to an effective accommodation.\(^{245}\) Thus, an employer

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\(^{238}\) *Fitzgerald v. Green Valley Area Education Project*, 915 F.2d 1367 (9th Cir. 1990).

\(^{239}\) *Lucero*, 915 F.2d at 1372; *Carr*, 23 F.3d at 530.

\(^{240}\) *Lucero*, 915 F.2d at 1372.

\(^{241}\) *Lucero*, 915 F.2d at 1372.

\(^{242}\) *Carr*, 23 F.3d at 529-30.

\(^{243}\) *Carr*, 23 F.3d at 530.

\(^{244}\) The American's with Disabilities Act gives civil rights protection to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion.” U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTRODUCTION TO THE
has not fulfilled its duty of reasonable accommodation until it meets a
person's needs or proves undue hardship. The EEOC explains that an
employer must specifically tailor an accommodation to fit the needs of
a disabled person: "[I]t may be necessary for the [employer] to initiate
an informal, interactive process with the individual with a disabili-
ty... This process should identify the precise limitations resulting
from the disability and potential reasonable accommodations that could
overcome those limitations." Further, in *D'Amico v. N.Y. State
AMERICANS WITH DISABILITIES ACT: QUESTIONS & ANSWERS, BOOKLET 15 (1992). However,
ADA equality is not the same as Title VII equality. *See Lee, supra note 228, at 203-04. Disability
law advocates equal access as a means of non-discrimination, not equal treatment. Equal access
includes the notion of providing reasonable accommodation which, in a sense, is unequal treatment.
The ADA recognizes that equal treatment may preclude a disabled individual from succeeding in the
work place because she may not be able to perform a job the same way as others. *See Lee, supra
note 228, at 204. One court has held
Although employers can avoid other forms of discrimination, such as race and sex bias,
by becoming "color blind" or "sex neutral," they cannot always eliminate discrimination
against persons with handicaps merely by providing them equal treatment. Equal
treatment can itself result in discrimination because of barriers to the participation of
handicapped individuals in certain tasks. Thus, different treatment, called accommoda-
tion, may be needed to eliminate these unnecessary barriers... Estate of Reynolds v. Dole, 57 Fair Empl. Prac. Cas. (BNA) 1848, 1875 (N.D. Cal. 1990) (quoting
Kathryn W. Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable
Accommodation Or Affirmative Action Include Reassignment?, 67 TEX. L. REV. 781, 787 (1989)).
245. *See 29 C.F.R. § 1630.2(o)(i). "The term 'reasonable accommodation' means... [m]odifications or adjustments to the work environment... that enable a qualified individual with
a disability to perform the essential functions of that position..." *Id. (emphasis added); *see also
courts have held that reasonable accommodations must be effective. *See Sargent v. Litton Systems,
Inc., 841 F. Supp. 956 (N.D. Cal. 1994). In Sargent, the court held that under California's FEHA,
a reasonable accommodation must be effective and stated that
The real flaw in defendants' assertion that no reasonable accommodation was possible
for Ms. Sargent's back condition is that they apparently terminated her without exploring
any other options with her in a meaningful way. The hallmark of the FEHA is the flexi-
bility it requires of employers to work with its disabled employees to accommodate their
needs.
*Id. at 962.
246. 29 C.F.R. § 1630.2(o). The EEOC's interactive process raises the issue of when and how
an employer may elicit information concerning the physical or mental limitations of a disabled
person. An employer may receive such information from a person's physician, although limitations
may exist in what employers may ask health professionals and what these professionals should say.
*See generally David K. Fram, *Examining the Relationship Between Employers and Health
Professionals Under the ADA*, LAB. L.J., May 1993, at 307 (explaining that the ADA "dramatically
alters the way employers and occupational health professionals should work together."). In addition,
an employer may receive information directly from the disabled person. Interview with Lorraine
Beaman, Counselor, U.C. Davis Disability Resource Center, in Davis, Cal. (July 13, 1994). Yet a
disabled person may be reluctant to disclose such information in fear of discrimination. *Id. A
disabled person should disclose her limitations after she gets a job offer and before she starts work-
ing. *Id. This avoids the risk that an employer may fail to hire her because of her disability, and
Board of Law Examiners, the court implied that an accommodation is reasonable only if it succeeds in aiding a disabled person. In D'Amico, a law student with a visual disability charged the State Board of Law Examiners with failing to reasonably accommodate her under the ADA. The plaintiff needed four days to complete a state bar examination because her disability caused extreme fatigue and she could only work three to four hours per day. The defendant granted her rest breaks and extended test hours during the traditional two day period but refused to allow her four days to complete the exam. In requiring the defendant to grant the four day period in order to provide the plaintiff with a competitive chance to pass the exam, the court stated:

[T]here is no doubt in this case that [defendant] did make some accommodations for plaintiff. They are not insubstantial. The ADA, however, requires [defendant] to make 'reasonable accommodations' under the circumstances in light of plaintiff's disability. The purpose of the ADA is to guarantee that those with disabilities are not disadvantaged. The purpose of the ADA is to place those with disabilities on an equal footing. The most important fact that the Court must consider in determining the reasonableness of [defendant's] accommodations is the nature and extent of plaintiff's disability.

Thus, the defendant's effort to accommodate the plaintiff was not determinative. Instead, the court would only rule that the defendant fulfilled its duty of reasonable accommodation if the accommodation actually aided the plaintiff. Since the ADA requires an employer to provide an effective accommodation, a person with CFS has a greater chance that a court will conclude that her requested accommodation falls within the scope of her employer's duty of reasonable accommodation. As a result, also avoids the possibility that delaying the disclosure will create ill will with her employer. Id.

In addition, a disabled person should be honest about her limitations and explain in detail how they affect her life. Timothy Font, Attorney, Office of Legal Services, Cal. State Department of Health Services, Address at U.C. Davis (April 13, 1994). Communication is the key to developing successful employment relations. Id.

248. Id. at 221.
249. Id. at 218.
250. Id. at 222. See generally Don J. DeBenedictis, Bar Examiners Respond to the ADA: Spurred by Suits or the Law, Officials Grant More Test Time to Disabled Applicants, ABA J., Nov. 1992, at 20 (discussing other cases where ADA plaintiffs requested additional time to complete the bar exam).
252. Id. at 221.
253. Id. at 221-22.
she may be able to prove that she can perform the essential functions of her job with reasonable accommodation, and therefore, she is a "qualified individual with a disability."254

The shift in legal standards from the Rehabilitation Act to the ADA illustrates a change in social policy concerning individuals with disabilities.255 The Rehabilitation Act reflects an attitude that society must take pity on the disabled and provide them with services and financial assistance.256 The reasoning behind this attitude is the belief that disabled people are less competent than others because they cannot perform a job the same way as others.257 The ADA policy differs from the policy of the Rehabilitation Act in that the ADA distinguishes between an individual’s competence and the manner in which she performs a job.258 A disabled individual may be competent because she possesses skill and talent equal to other individuals.259 Her inability to perform a job the same way as others perform it does not signal a deficiency in her, but rather a deficiency in her work-place.260

256. See 42 U.S.C. § 12101. It is interesting to note the change in language from "handicapped individual" (used in Southeastern Comm. College v. Davis, 422 U.S. 397, 400 (1979)) which suggests a disadvantaged or substandard individual, to the ADA's "individual with a disability," which suggests a person with a unique characteristic. See 42 U.S.C. § 12101(a)(9). Congress has found that "[t]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis ... costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity ..." Id.
257. See 42 U.S.C. § 12101(2)(5) (Supp. V 1994). Congress has found that "individuals with disabilities are ... relegated to a position of political powerlessness in our society, based on characteristics ... resulting from stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society ...." Id. The Supreme Court demonstrates this characterization of incompetence by stating that "a person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs." Southeastern Comm. College v. Davis, 442 U.S. 397, 406 n.6 (1979) (emphasis added).
258. See Lee, supra note 228, at 204. The emphasis in the ADA is not on whether a person can do a job but on the method a person utilizes to do it. See Lee, supra note 228, at 204. A disabled individual "may not be able to do the job as it has been done in the past. Yet the simple fact that a job has always been performed in a certain way does not presuppose that alternative ways are unacceptable; they may even be superior." See Lee, supra note 228, at 204.
259. This was addressed at On the Job: Successful People with Disabilities, Panel Presentation at U.C. Davis (April 13, 1994). Speakers at the presentation included a manic-depressive nurse, a blind attorney, a paraplegic fire department dispatch officer, a deaf telephone company employee, and a teacher with a learning disability.
260. Dr. Paul Longmore, Professor of History, San Francisco State Univ., Address at U.C. Davis (April 14, 1994) (explaining that the ADA represents a revolution in social consciousness regarding the meaning of the term "disability."). The professor sketched out three analytical models which led up to this revolution: the monal model, in which society viewed a disabled person as the...
can office or factory is handicapped if it is not designed to benefit from the abilities of all. Once an employer modifies a job, a person with a disability may attain a level of productivity equal to others. Thus, the ADA symbolizes a new kind of civil rights for disabled individuals because it promotes equal access to the work-place. This new attitude may benefit a person with CFS who argues that her requested accommodation is reasonable.

The ADA provides a non-exhaustive list of reasonable accommodations that includes a modified work schedule. In addition, a person with CFS may benefit from reasonable accommodations such as the reassignment of nonessential duties to other employees and working at home.

embodiment of cosmic moral disorder and thus she must be separated from society to lessen the risk that she would disrupt the morals of society; the medical model, in which society viewed a disabled person as suffering from a biological deficiency that could be cured, but who should be separated from society until she is normalized; and the minority model, in which society viewed disabled people as belonging to a group with unique characteristics whose obstacles are not an inherent deficiency but prejudice in society. Thus, the ADA strives to celebrate plurality and promote a society of tolerance. See 42 U.S.C. § 12101(a)(8). Congress has found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . . ." Id.

261. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BOOKLET 15, Introduction to The Americans with Disability Act: Questions and Answers (1992). By breaking down barriers to employment, the ADA "will enable society to benefit from the skills and talents of individuals with disabilities, will allow us all to gain from their increased purchasing power and ability to use it, and will lead to fuller, more productive lives for all Americans." Id.

262. See 29 C.F.R. app. § 1630.9 (1994). The reasonable accommodation requirement is best understood as a means by which barriers [e.g., physical obstacles, rigid work schedules] to the equal employment opportunity of an individual with a disability are removed or alleviated . . . . Equal employment opportunity means an opportunity to attain the same level of performance . . . . as . . . the average similarly situated employee without a disability. Id.; see also D'Amico v. N.Y. State Bd. of Law Examiners, 813 F. Supp. 217, 221 (W.D.N.Y. 1993) (recognizing that "the ADA was not meant to give the disabled advantages over other applicants."). "The purpose of the ADA is to place those with disabilities on an equal footing and not give them an unfair advantage." D'Amico, 813 F. Supp. at 221. The purpose of reasonable accommodation is to enable disabled people "to perform as well as persons without limitations." Estate of Reynolds v. Dole, 57 Fair Empl. Prac. Cas. (BNA) 1848, 1871 (N.D. Cal. 1990) (quoting OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAM, AFFIRMATIVE ACTION FOR THE HANDICAPPED: A HANDBOOK FOR EMPLOYMENT OPPORTUNITY SPECIALISTS OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS 70-71 (1980)).

263. 29 C.F.R. app. § 1630.2(o). "[A]n accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." Id. (emphasis added).

264. 42 U.S.C. § 12111(9)(A)-(B); 29 C.F.R. § 1630.2(o).

265. Other common reasonable accommodations that people with CFS may require include limiting body movement (e.g., reducing walking or carrying; using a scooter or cart with wheels),
1. Modified Work Schedule

A person with CFS may be able to perform the essential functions of her job if her employer allows her to modify her work schedule. A modified work schedule may mean that a person does not work the traditional eight hour shift with a lunch break. Four variations of the traditional work schedule are possible: a modified full-time schedule, a part-time schedule, a flexible work-when-able schedule, and a schedule that allows for a leave of absence. The main advantage of a modified work schedule is that it allows a person with CFS to tailor her schedule to her CFS symptoms. Frequently asserted burdens of a modified work schedule include the costs of keeping an office open during non-traditional hours (e.g., utilities, safety risks, extra personnel, a slow down in frequent rest breaks (with the availability of a couch or mat on which one may lay down), flextime (e.g., working on weekends), and lateral job changes (to alleviate cognitive or other stresses).
production efficiency, and making existing facilities accessible to a disabled person. The outcome of this cost-benefit analysis depends on the specific circumstances of a person's job. As a result, a modified work schedule may or may not be a reasonable accommodation.

A modified full-time schedule is a consistent full-time schedule that utilizes non-traditional work hours. A person with CFS may benefit from this schedule if her symptoms are somewhat predictable. For instance, a person may build ten minute breaks into her work schedule and, if necessary, work either a longer day or on the weekend to compensate for the adjustment. Or if a person's symptoms are worse during a particular time of day, she may adjust her work schedule to avoid these difficult periods. Thus, if a person feels worse in the morning, she should be able to arrive at work late and leave late on a regular basis. As a result, a person with CFS may benefit from a modified full-time schedule.

Similar to a modified full-time schedule, a part-time schedule may enable a person with CFS to tailor a schedule to accommodate her

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Act. Id. at 1850. The court noted that "[The plaintiff] asked for a change in her work schedule so she would not have to walk home in the dark." Id. at 1874. "The request was denied because of a Department policy that there be a supervisor in the office at all hours." Id. at 1850. See supra text accompanying note 226. 274. 29 C.F.R. app. § 1630.2(o) (suggesting that an employer provide "accessible break rooms" as a reasonable accommodation). See Hendricks, supra note 265 (suggesting that a person with CFS may use these break rooms to lay down during her rest breaks or that the employer may furnish a mat or sofa on which a person with CFS may rest). 275. See 29 C.F.R. app. § 1630.2(o). In addition, the policy of the ADA may affect the outcome of a cost-benefit analysis. See supra notes 258-66 and accompanying text. Considering that the policy of the ADA is more enlightened than the policies of the older disability laws, a person with CFS may convince a court that hiring extra personnel is not an undue hardship under the ADA. See supra notes 255-63 and accompanying text. The EEOC includes "providing personal assistants" as a potential reasonable accommodation. 29 C.F.R. app. § 1630.2(o). A personal assistant may solve the safety problem created by working alone. However, a personal assistant may not solve the problem of needing the presence of a supervisor. Thus, a modified full-time schedule may or may not be a reasonable accommodation depending on the costs of allowing a person to work during non-traditional work hours.

276. Hendricks, supra note 265.

277. Many people with CFS experience inconsistent symptoms; they are bedridden on some days and feel fine on other days. Walders v. Garrett, 765 F. Supp. 303, 309 n.17 (E.D. Va. 1991). Yet other people can control their symptoms and thereby possess a consistent, albeit reduced, energy level. See supra note 15 and accompanying text. To these people, a consistent daily schedule may be possible if it is designed to accommodate their needs. See supra note 15 and accompanying text.

279. Hendricks, supra note 265. See McGrath, supra note 36, at A2 (suggesting that a person with CFS adjust her life around rest breaks).

280. 29 C.F.R. app. § 1630.2(o). "An essential function customarily performed in the early morning hours may be rescheduled until later in the day as a reasonable accommodation . . . ." Id. at 1850.
symptoms. A part-time schedule may benefit a person with CFS by reducing the stress in that person's life. Since CFS is a stress-sensitive disease, reducing stress may alleviate a person's symptoms and thus allow her to maintain a regular, predictable work schedule. In addition, a part-time schedule may not burden an employer with extra costs such as keeping the office open during nontraditional work hours or hiring extra personnel. However, a part-time schedule is not a cost-free work schedule modification. A person with CFS bears the burden of earning a part-time income, on which she may not be able to support herself. Thus, part-time work may not be a practical reasonable accommodation for a person with CFS.

A third variation on the traditional work schedule is a flexible, work-when-able schedule. The purpose of flexible hours is to accommodate the inconsistency and severity of CFS symptoms. Unfortunately, while this type of work schedule may be most beneficial to a person with CFS, it is also the most problematic for an employer. In Kimbro v. Atlantic Richfield Co., the court stated that, "ARCO's legitimate need to schedule all machinist projects in advance made it unreasonable to require ARCO to permit a disabled employee... to use unexhausted sick leave days intermittently on days or hours when his migraine condition precluded his ability to work." Similarly in Carr v. Reno and Walders v. Garrett, regular, predictable attendance was an essential function of jobs with frequent deadlines. Walders held that allowing the plaintiff to work merely when she was able was

282. See Robin Wilson, Portrait: Turning Debilitating Illness Into Opportunity, CHRON. OF HIGHER EDUC., June 22, 1994, at A5 (describing a psychologist with CFS who "now works five hours every morning.").

283. Interview with Timothy J. Smith, M.D., in Berkeley, Cal. (June 11, 1993).

284. If a person relies on traditional work hours in comprising her part-time schedule, her employer will not need to incur the costs of keeping the office or factory open during non-traditional work hours. For example, a person with CFS may be present in the office during the normal, eight-hour workday but only work six out of the eight hours and use the remaining two hours for rest breaks; or a person with CFS, whose symptoms are more severe in the morning, could simply arrive at the office or factory at noon and work half the day.

285. Langon v. Department of Health & Human Servs., 959 F.2d 1053, 1055 (D.C. Cir. 1992) (noting that a person may need to work full-time "to pay her rent and survive.").


287. See supra notes 151-52 and accompanying text.

288. 889 F.2d 869 (9th Cir. 1989).

289. Id. at 878 n.8.

290. 23 F.3d 525 (D.C. Cir. 1994).


292. Walders, 765 F. Supp. at 309; Carr, 23 F.3d at 530.
the kind of "extraordinary" accommodation not required by law.\textsuperscript{293} Carr noted that "to require an employer to accept an open-ended 'work when able' schedule for a time-sensitive job would stretch 'reasonable accommodation' to absurd proportions and imperil the effectiveness of the employer's public enterprise."\textsuperscript{294} Thus, an employer's need to maintain consistent productivity may render unreasonable a flexible, work-when-able schedule.

Finally, the fourth variation on a traditional work schedule is a leave of absence.\textsuperscript{295} A leave of absence may benefit a person with CFS because it provides a period of time to recover from the illness.\textsuperscript{296} The EEOC states that a reasonable accommodation may include "permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment . . . ."\textsuperscript{297} However, just as with a part-time schedule, a leave of absence may not be affordable. Thus, a court may hold that a leave of absence is not a reasonable accommodation if it deprives a person with CFS of a source of income.\textsuperscript{298}

Considering its enlightened social policies, a court may hold that a modified work schedule is a reasonable accommodation under the ADA.\textsuperscript{299} However, a person with CFS must take into account the impact of such a schedule on her employer's business operation. As the

\textsuperscript{293} Walders, 765 F. Supp. at 313 n.25.
\textsuperscript{294} Carr, 23 F.3d at 531.
\textsuperscript{295} See Sargent v. Litton Systems, Inc., 841 F. Supp. 956, 961 (N.D. Cal. 1994) (suggesting that a leave of absence was a reasonable accommodation). In Sargent, an office employee with spondylitis, a back disability, claimed unlawful discharge under California's FEHA. Id. at 957-59. The court denied the defendant's motion for summary judgment holding that the defendant did not fulfill its duty to reasonably accommodate the plaintiff. Id. at 962. Yet one accommodation that the defendant did offer the plaintiff was a leave of absence upon which the court looked favorably. "Such an accommodation is certainly within the realm of possibilities that are envisioned by FEHA." Id. at 961.
\textsuperscript{296} Walders, 765 F. Supp. at 306. In Walders, the "plaintiff applied for a transfer of leave for the purpose of entering a hospital for treatment of multiple viral infections related to her [CFS]. The Navy subsequently permitted [the] plaintiff to use a combination of donated leave, leave without pay, and accrued leave to cover her period of hospitalization . . . ." Id.
\textsuperscript{297} 29 C.F.R. app. § 1630.2(o) (1994).
\textsuperscript{298} See County of Fresno v. Fair Empl. and Hous. Comm'n, 226 Cal. App. 1541, 1555 (1991) (holding that a reasonable accommodation must preserve an employee's employment status). In County of Fresno, an office employee with respiratory disabilities claimed that the county failed to provide a reasonable accommodation under the FEHA. Id. at 1545. The plaintiff's fellow employees smoked heavily. Id. The county granted the plaintiff a leave of absence to escape the smoke-filled office. Id. at 1550. In holding for the plaintiff, the court stated, "'Permitting' [the plaintiff] to take an unpaid leave of absence succeeded in removing her from the smoke-filled environment, but violated state law since she was precluded from enjoying the privileges of employment because of her handicap." Id. at 1555.
\textsuperscript{299} See supra notes 255-63 and accompanying text.
EEOC states, “undue hardship” includes a fundamental alteration to business operation. Thus, a court may not require an employer to compromise production efficiency or change the nature of the job, as would occur by requiring the removal of frequent deadlines. As a result, a person with CFS may be better off not to request a modified work schedule unless she can safely and efficiently perform her job under such a schedule.

2. Reassign Duties

Reassignment of certain job duties may be a beneficial accommodation for a person with CFS. A person with CFS may not be able to perform all of her job duties due to her physical or mental symptoms. She may request that the duties she cannot perform be reassigned to another employee. This request may be a reasonable accommodation if the duties are non-essential, marginal functions of her job. An employer is not required to reassign primary job duties to reasonably accommodate a disabled person. In Ackerman v. Western Electric Co., the court held that under California’s FEHA, reassignment of ironwork and cabling to other employees was a reasonable accommodation because the plaintiff would still be able to perform her primary duty of wiring. The court stated that “[a]n accommodation is not required when its effect is . . . to supplant the need for [the plaintiff] . . . However, the mere fact that accommodation might involve the reassignment (even if preferential) of some duties to other employees does not alone establish undue hardship." The court added the language “even if preferential” because the duties that the plaintiff could

300. 29 C.F.R. app. § 1630.2(p) (indicating that “undue hardship’ refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.”).

301. See supra notes 121-22.


303. 29 C.F.R. app. § 1630.2(o). One reasonable accommodation is the restructuring of a job “by reallocating or redistributing nonessential, marginal job functions.” Id.

304. See id. The EEOC explains that an employer is not required to reassign the primary duties of a disabled employee because the employer would then have to pay two people to do one job. Id.; see also Walders v. Garrett, 765 F. Supp. 303, 314 (E.D. Va. 1991) (noting that “[p]laintiff cannot expect the Navy to require other employees to substitute for her during her frequent and unpredictable absence.”). Requiring a fellow employee to perform the essential functions of the plaintiff’s job, even on a temporary basis, is unreasonable because it would create an undue hardship by causing a loss of office efficiency.

305. 643 F. Supp. 836 (N.D. Cal. 1986).

306. Id. at 851.
not perform were the more strenuous functions of the job. Thus, the resentment of a fellow employee in having to assume the plaintiff’s less desirable duties is not determinative. As a result, a person with CFS may request that an employer reassign duties that are beyond the scope of a person’s physical or mental stamina unless these duties compromise the main functions of her job.

3. Work at Home

A person with CFS may be able to perform the essential functions of her job at home. This accommodation may enable a person with CFS to devote a greater percentage of her limited energy to her work by not having to dress for or commute to work. Working at home may also better facilitate rest breaks. In addition, working at home avoids the costs involved in keeping an office or factory open during non-traditional hours. In Sargent v. Litton Systems, Inc., the court suggested that under California’s FEHA, allowing a plaintiff to work at home was a reasonable accommodation. The plaintiff’s back disability prevented her from commuting to work because sitting in a car was extremely painful. The court noted that “[w]ith faxes and car phones and home offices, it is no longer the case that an employee must always be physically on site in order to perform her job.” As a result, the flexibility of this accommodation makes it highly beneficial to a person with CFS.

However, working at home may impose several costs to an employer. Working at home may be impractical for a job that involves turning in assignments under strict deadlines or face-to-face contact with fellow employees or customers. In addition, an employer may be

307. Id.
308. Id. at 852; see Frierson, supra note 226, at 310.
310. Id. at 1054-55. See Wilson, supra note 282, at A-5.
311. See supra text accompanying notes 271-75 (discussing the relevant burdens imposed on the employer).
313. Id. at 962.
314. Id. at 959.
315. Id. at 962.
316. See Langon, 959 F.2d at 1055. The defendant asserted that the plaintiff’s job as a computer programmer “does not lend itself to work at home” because “it requires a great deal of exactness,” and because her assignments “usually have specified short deadlines,” and “most often require face-
required to purchase a computer or other equipment to set up an at-home office for a person. Finally, working at home raises issues concerning workplace safety and overtime regulations. As a result, whether a person with CFS should claim that working at home is a reasonable accommodation depends on the needs of her job and the usefulness of technology in performing it.

IV. CONCLUSION

An analysis of Title I of the ADA provides helpful information regarding the issues, key facts, and obstacles of a CFS employment discrimination case. To state a claim under Title I, a person with CFS must prove that she is an individual with a disability and that she is also qualified to do the job she seeks. To prove that she is disabled, a person with CFS must establish that she has a physical or mental impairment that substantially limits a major life activity. Thus, she must establish two key facts: 1) a CFS diagnosis; and that 2) CFS substantially limits her major life activities.

In establishing these key facts, a person with CFS may face two obstacles. First, she must present expert testimony and medical records to prove her diagnosis. Unfortunately, finding a supportive physician who will treat her, compile medical records, and testify on her behalf, is difficult because the medical community is generally skeptical of CFS.

Second, a person with CFS may find herself in a difficult position; in presenting enough evidence to prove her diagnosis, she may unintentionally convince a court that she is too sick to work. This finding is problematic because Title I requires her to show that she is

to-face contact with report requestors." Id.; see also Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994). In Carr, "[The plaintiff] conceded[d] that she could not work as a coding clerk at home, as the job involve[d] tight 4:00 p.m. deadlines." Id.

317. See 29 C.F.R. app. § 1630.2(o) (suggesting that purchasing new equipment may be a reasonable accommodation and thus not constitute an undue hardship). "[A]s a reasonable accommodation, an employee with a disability that inhibits the ability to write, may be permitted to computerize records that were customarily maintained manually." Id.

318. Jerome A. Hoffman, ADA May Let Workers Do Some Jobs at Home, NAT'L LJ., Oct. 26, 1992, at 33 (explaining that "working at home also raises a host of interesting issues with respect to the applicability and enforceability of common workplace legislation—such as the Occupational Safety and Health Act and overtime regulation.").

319. See supra text accompanying note 13.


321. See supra text accompanying note 25.

322. See supra text accompanying notes 39-66.
both disabled and qualified to work. Thus, a person with CFS has the burdensome task of proving that she is sick enough to be considered disabled but not too sick to work.

In proving that she is qualified to work, a person with CFS must establish that she can perform the essential functions of her job with or without reasonable accommodation. This issue covers two key elements: 1) that CFS does not prevent her from doing her job and 2) that the accommodation she requests is reasonable. The major obstacle to proving these facts is that CFS often interferes with a person's ability to perform common essential job functions. A person's diminished physical and mental stamina may compromise her ability to keep a regular, predictable work schedule, perform difficult manual or cognitive tasks, or maintain a predetermined standard of productivity. If she cannot perform these functions, she must argue that they are not essential to her job. Convincing a court of this may be difficult, considering that many jobs require that these functions be satisfied.

Once a person proves that she can perform the essential functions of her job with a particular accommodation, the burden is on the employer to demonstrate that the accommodation is unreasonable. Fortunately, most accommodations do not impose a significant cost to employers. Moreover, a court may consider the ADA's enlightened policy of civil rights in determining reasonableness. Since the ADA seeks to move disabled people into the work place (and off public or other financial assistance), a court may strive to give a person the accommodation she needs to perform her job.

In addition to providing information regarding the issues, key facts, and obstacles of a Title I claim, an ADA analysis suggests precautions and choices a person with CFS may consider in seeking a job. One precaution is to find a supportive physician who will treat and record her illness. Without such evidence, she may fail to prove her diagnosis. Another precaution is that she should treat her illness. By reducing stress, taking rest breaks, and engaging in other helpful activities, she

323. See supra notes 99-102 and accompanying text.
324. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).
325. See supra text accompanying notes 136-44.
326. See supra notes 145-214 and accompanying text.
327. See supra text accompanying notes 215-17.
329. See supra text accompanying notes 255-63.
may maintain a consistent energy level which will increase her ability to perform her job.

Moreover, a person with CFS may make certain choices in seeking a job. She may look for a job that suits her symptoms — i.e. — one with flexible hours, infrequent deadlines, and independent tasks she can perform at her own pace. Further, she should not seek a job that requires extremely costly accommodations. Although the ADA encourages courts to find an accommodation reasonable, a person with CFS is probably not qualified to perform a job if she requires expensive modifications or a significant change in the nature of the job. Thus, a successful job search requires accepting one’s limitations and finding a suitable job.

Finally, analyzing a Title I claim may instill the ADA’s empowering attitude in a person with CFS. She should not be intimidated or discouraged by disability law, her employer, or her illness. Disability law is not an unchallengeable authority. It is a tool to promote one’s interests fairly. A person with CFS should argue that the ADA protects her even if precedent holds otherwise. In addition, a person with CFS should not passively accept discrimination or other forms of hostility from her employer. If her employer claims that she cannot satisfactorily perform her job, she should suggest new methods by which the job may be performed. CFS may sap a person’s energy, but it does not remove one’s skills, experience, and creativity in problem solving.

Lastly, a person with CFS may lessen the risk of unfair treatment in the workplace by taking control of her illness. She should not let CFS destroy her life. She should define her limitations and adjust her lifestyle to accommodate them. She may also participate in CFS support organizations, which are available nationwide. The confidence and self-worth she may feel in controlling her illness may endear her to her co-workers and employer. In addition, she may encourage these people to cooperate with her if she educates them about the disease and her legal rights in a friendly and calm manner. While CFS robs her of emotional and physical power, she may draw new power from the ADA.

The ADA is a relatively new law, and courts have only begun to interpret it. As a result, a person with CFS cannot be certain how a court may rule on a CFS employment discrimination case. However, if a person follows the ADA’s practical tips and adopts the ADA’s attitude

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330. The National CFS and Fibromyalgia Association with its main office in Kansas City, Missouri, has 600 support groups worldwide. Also contact the CFIDS Association of America, in Charlotte, North Carolina.
of empowerment, she may never need to test the scope of ADA protection in a courtroom.