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## The Lay View of What "Disability" Means Must Give Way to What Congress Says It Means: Infertility As a "Disability" Under the Americans with Disabilities Act

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THE LAY VIEW OF WHAT "DISABILITY" MEANS MUST  
GIVE WAY TO WHAT CONGRESS SAYS IT MEANS:  
INFERTILITY AS A "DISABILITY" UNDER THE  
AMERICANS WITH DISABILITIES ACT

"To the lay eye, they hardly seem disabled, yet they have a 'disability' within the statutory definition."<sup>1</sup>

On July 26, 1990, President George Bush signed into law the Americans with Disabilities Act of 1990 (ADA).<sup>2</sup> Finding that "individuals with disabilities continually encounter various forms of discrimination,"<sup>3</sup> Congress enacted the ADA to "assure equality of opportunity" for the disabled.<sup>4</sup> The ADA has been heralded as the "20th century emancipation proclamation"<sup>5</sup> for an estimated forty-three million disabled Americans,<sup>6</sup> prohibiting discrimination in employment,<sup>7</sup> public services, transportation,<sup>8</sup> and public accommodations.<sup>9</sup> The ADA further mandates the provision of certain telecommunications services and televi-

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1. Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1319 (E.D. Pa. 1994) (describing individuals with high blood pressure).

2. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.). For an excellent treatment of the history of the ADA, see BUREAU OF NATIONAL AFFAIRS, INC., THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 9-62 (1990) [hereinafter A PRACTICAL AND LEGAL GUIDE].

3. 42 U.S.C. § 12101(a)(5) (1994).

4. *Id.* § 12101(a)(8).

5. 136 CONG. REC. S9529 (daily ed. July 11, 1990) (statement of Sen. Harkin). For a historical perspective of discrimination against the disabled, see Elizabeth C. Morin, Note, *Americans with Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189, 192-95 (1990).

6. See DON FERSH & PETER W. THOMAS, COMPLYING WITH THE AMERICANS WITH DISABILITIES ACT, A GUIDEBOOK FOR MANAGEMENT AND PEOPLE WITH DISABILITIES 7 (1993) (citing NATIONAL INSTITUTES OF HEALTH, REPORT OF THE TASK FORCE ON MEDICAL REHABILITATION RESEARCH (1990)). Fersh and Thomas reveal some surprising statistics: one in seven Americans has a disability; 22 million are hearing impaired; 16.4 million have heart disease; 13 to 14 million have diabetes; and 5.7 million are mentally retarded. *Id.* at 8.

7. 42 U.S.C. §§ 12111-12117 (1994).

8. *Id.* §§ 12131-12134, 12141-12150, 12161-12165.

9. *Id.* §§ 12181-12189.

sion advertisements.<sup>10</sup>

Despite its laudable goals, the ADA has received much criticism.<sup>11</sup> Business organizations view the ADA as "another governmental intrusion into their workplace"<sup>12</sup> and fear "an onslaught of costly litigation."<sup>13</sup> Critics also argue that inherent vagueness lies in the ADA's definition of the term "disability,"<sup>14</sup> allowing a "parade of absurdities"<sup>15</sup> to come before the courts.

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10. See 47 U.S.C. §§ 225, 611 (Supp. V 1993).

11. Consider this excerpt from an article added to the House record by Rep. DeLay before Congress passed the ADA:

With its loose construction, [and] vague language the ADA bill openly invites a massive wave of litigation, thus establishing the "Lawyers [sic] Full Employment Act." . . .

Congress still hasn't learned that you cannot mandate equality. If Congress passes [the ADA], it will impose economic hardships on business and industry and their employees which they can ill afford and will put truly disabled individuals in a disadvantaged and adversarial position. ADA hurts, not helps, the most vulnerable elements of society.

. . . [P]lacing stifling requirements on businesses could foster severe hostility and resentment against the truly disabled.

136 CONG. REC. H2322 (daily ed. May 15, 1990) (statement of Rep. DeLay) (quoting Maiselle D. Shortley, *Disabling the Disabled*); see also 135 CONG. REC. E3064 (daily ed. Sept. 18, 1989) (statement of Rep. Shumway) ("[T]he bill is a swamp of imprecise language; it will mostly benefit lawyers who will cash in on the litigation that will force judges to, in effect, write the real law.").

Just five years after its enactment, the ADA came under criticism for not meeting its goal of increasing employment opportunities for the disabled. See Jay Matthews, *A Disappointing Disabilities Law: Goal of Helping Severely Disabled Find Jobs 'Has Not Been Met at All,'* STAR-TRIB., (Minneapolis) Apr. 29, 1995, at 4A. The Equal Employment Opportunity Commission's statistics show that of 39,927 complaints filed through December 1994, just 12.1% of the complaints were made by people suffering from such conditions as spinal cord injuries and neurological problems, the conditions frequently mentioned during the ADA's initial consideration. *Id.* See also Bob Dole, *Are We Keeping America's Promises to People With Disabilities?*, 79 IOWA L. REV. 925, 928 (1994) (citing statistics showing that employment of the disabled following the passage of the ADA has actually decreased from 33% in 1986 to 31% in 1994).

12. THOMAS D. SCHNEID, *THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL GUIDE FOR MANAGERS* v (1992).

13. *Id.*

14. See Larry M. Schumaker, *The Top Ten Issues Under the ADA*, 50 J. MO. B. 283 (1994) (describing the ADA's definition of disability as inherently vague and stating that "[b]y design, the statute and the EEOC's implementing regulations permit the courts to decide 'borderline' issues on a case-by-case basis").

15. James Bovard, *The Disabilities Act's Parade of Absurdities*, WALL ST. J., June 22, 1995, at A16. Mr. Bovard discussed numerous ADA claims to support his

The ADA defines a "disability" as a "physical or mental impairment that substantially limits one or more . . . major life activities."<sup>16</sup> Before the ADA's passage, business representatives urged Congress to include a list of disabilities in the statutory provisions rather than utilizing the broad definition.<sup>17</sup> Many business owners deemed it "simply ridiculous" to expect them to know which disabilities would fall within the broad statutory definition.<sup>18</sup> Business owners claimed that unless Congress included a comprehensive list of disabilities, they would not know "if they [had] guessed right or wrong until a complaint [was] filed and a decision rendered."<sup>19</sup>

Despite these arguments, Congress declined to include a list of disabilities in the ADA, finding it impossible to ensure the "comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future."<sup>20</sup> Since the passage of the ADA, however, interpretive problems have, never-

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opinion that the ADA fosters absurd results. *Id.* For example, he cited one case in which a telephone operator sued her ex-employer alleging that "chronic lateness syndrome" was a disability. *Id.* Mr. Bovard cited another case in which a Boston University professor, fired for sexually assaulting a female professor, alleged that he was mentally handicapped under the ADA because prescription drugs "loosened his inhibitions." *Id.*

16. 42 U.S.C. § 12102(2)(A) (1994).

17. John J. Motley III of the National Federation of Independent Business voiced his concerns before the House Judiciary Committee:

*At the very least, a list of disabilities, with a layman's description of each disability, should be included in the bill.* When necessary, it can be amended to add or delete disabilities as technology and research bring us closer to understanding and addressing various disabilities. . . . But without such a list to provide guidance, business owners will not know what is covered and will never be safe from the threat of litigation. And individuals with less well known disabilities will never know if they can expect accommodation.

*The Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 101st Cong., 1st Sess. 90 (1989) (statement of John J. Motley III, Director of Federal Governmental Relations, National Federation of Independent Business) (emphasis added) [hereinafter HEARINGS].*

18. *Id.* at 1913.

19. *Id.*

20. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 51 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 333.

theless, arisen. Unresolved issues include: what level of obesity is a disability;<sup>21</sup> what behavioral disorders, such as phobias and anxiety disorders, are covered;<sup>22</sup> and when a past drug addiction is a disability.<sup>23</sup>

Two recent cases addressing the issue of whether infertility is a disability likewise illustrate the courts' struggles with the ADA's definitional framework. In *Pacourek v. Inland Steel Co.*<sup>24</sup> and *Zatarain v. WDSU-Television, Inc.*,<sup>25</sup> the plaintiffs contended that infertility was a disability under the ADA and that their employers fired them because of their disability, in contravention of the ADA.<sup>26</sup> In *Pacourek*, the U.S. District Court for the Northern District of Illinois denied the defendant's motion to dismiss the ADA claim, concluding that the plaintiff's allegations "clearly state[d]" a claim within the ADA's definition of disability.<sup>27</sup> Conversely, the U.S. District Court for the Eastern District

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21. See 29 C.F.R. § 1630.2(j) (1995) (noting that "except in rare circumstances, obesity is not considered a disabling impairment"). But see William C. Taussig, Note, *Weighing in Against Obesity Discrimination: Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans with Disabilities Act*, 35 B.C. L. REV. 927 (1994) (arguing that obesity in general, rather than just morbid obesity, is a disability); Steven M. Ziolkowski, Case Comment, *The Status of Weight-Based Employment Discrimination Under the Americans with Disabilities Act After Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals*, 74 B.U. L. REV. 667, 684-85 (1994) (arguing that obesity fits the definition of disability under the ADA and calling for the EEOC to amend its regulations to resolve the existing ambiguity).

22. See John M. Casey, Comment, *From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the Americans with Disabilities Act*, 17 U. PUGET SOUND L. REV. 381, 383 (1994) (calling for the EEOC to issue definitive guidance on what constitutes a mental disability under the ADA).

23. See *Wormley v. Arkla, Inc.*, 871 F. Supp. 1079, 1084 (E.D. Ark. 1994) (holding that plaintiff's drug use was recent enough that it constituted use even though he had successfully completed a rehabilitation program); *McDaniel v. Mississippi Baptist Med. Ctr.*, 877 F. Supp. 321, 327-28 (S.D. Miss.), *aff'd*, 74 F.3d 1238 (5th Cir. 1995) (holding that a person who participates in a supervised drug rehabilitation program and who has not had drugs for several weeks still is not an otherwise qualified employee).

24. 858 F. Supp. 1393 (N.D. Ill. 1994) (denial of defendant's motion to dismiss for failure to state a claim upon which relief can be granted).

25. 881 F. Supp. 240 (E.D. La. 1995), (granting of defendant's motion for summary judgement), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

26. *Pacourek*, 858 F. Supp. at 1397; *Zatarain*, 881 F. Supp. at 242-44.

27. *Pacourek*, 858 F. Supp. at 1404-05.

of Louisiana soundly dismissed Ms. Zatarain's ADA claim on summary judgment, refusing to engage in what it viewed as "a conscious expansion of the law."<sup>28</sup>

While *Zatarain* and *Pacourek* differ over whether infertility is a disability under the ADA, the significance of the infertility-disability debate is not clear until one looks at the remedies required under the ADA. The ADA mandates "reasonable accommodation" of an individual with a disability.<sup>29</sup> Recognition of infertility as a disability, therefore, has broad ramifications for millions of infertile couples. If infertility is considered a disability, an employer may be required to "accommodate" the employee.<sup>30</sup> "Reasonable accommodation" could include permitting a reduced or modified work schedule to enable the employee to take time off from work to undergo the countless procedures necessary for some types of fertility treatments.<sup>31</sup> Without this protection, an employee who is desperately attempting to conceive a child may face discriminatory termination because of her absences.

Perhaps even more significant is the Equal Employment Opportunity Commission's (EEOC) determination that the ADA prohibits disability-based discrimination in employer-provided health insurance.<sup>32</sup> An example of a disability-based distinction is one that singles out a particular disability, such as deafness, and excludes, caps, or limits coverage for that disability.<sup>33</sup> Fer-

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28. *Zatarain*, 881 F. Supp at 243.

29. 42 U.S.C. § 12112(b)(5)(A) (1994). If an employee or applicant belongs to the protected class, an employer must offer the individual "reasonable accommodation" that will enable the employee or applicant to perform the essential functions of the job, unless the "reasonable accommodation" will cause the employer to suffer "undue hardship." See *id.*

30. See *id.* § 12111(4) (defining "employee" under the ADA).

31. See *id.* § 12111(9)(B) (stating that reasonable accommodation may include part-time or modified work schedules).

32. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, INTERIM ENFORCEMENT GUIDANCE ON THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990 TO DISABILITY-BASED DISTINCTIONS IN EMPLOYER PROVIDED HEALTH INSURANCE, EEOC NOTICE N-915.002 at 2 (1993) [hereinafter INTERIM ENFORCEMENT GUIDANCE], reprinted in U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N TECHNICAL ASSISTANCE PROGRAM, DISABILITY DISCRIMINATION: EMPLOYMENT DISCRIMINATION PROHIBITED BY THE AMERICANS WITH DISABILITIES ACT OF 1990 app. E. (1995) [hereinafter EEOC TECHNICAL ASSISTANCE PROGRAM]. The EEOC enforces the ADA's employment provisions. 29 C.F.R. § 1630 (1995).

33. See INTERIM ENFORCEMENT GUIDANCE, *supra* note 32, at 7-8. The ADA does

tility treatment caps or exclusions may, thus, violate the ADA if infertility were considered a disability.<sup>34</sup>

Given the high cost of some infertility treatments, insurance coverage is a significant issue. According to some estimates, many couples using assisted reproductive technology incur costs as high as \$31,000 per cycle,<sup>35</sup> with no guarantee of conceiving a child. In-vitro fertilization (IVF), a high-tech option, can cost from \$6000 to \$50,000 per live birth.<sup>36</sup> Although Americans spent approximately \$1 billion on infertility services in 1987,<sup>37</sup> individuals desiring to conceive nevertheless opted not to follow forty-one percent of recommended infertility procedures because of the high cost of the services.<sup>38</sup> If the ADA prohibited infertility treatment limits in employer-provided health insurance, many couples who could not previously have afforded infertility services may seek treatment because the restructured insurance coverage would make the treatment financially feasible.

This Note explores the infertility-disability debate and proposes that the EEOC adopt a position recognizing that the broad language of the ADA encompasses infertility as a disability. As a starting point, this Note briefly describes the history of the ADA

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provide, however, that employers can establish or observe the terms of a health insurance plan, including terms or provisions based on a disability, so long as the plan is "bona fide" and not being used as a form of "subterfuge" to evade the ADA's purposes. 42 U.S.C. § 12201(c); see INTERIM ENFORCEMENT GUIDANCE, *supra* note 32, at 7-8.

34. See EEOC's *Interim Guidance on the Application of the ADA to Health Plans Bears Little Resemblance to the Statute*, 2 ERISA LITIG. REP. 17 (Aug. 1993), available in Westlaw, ERISALR Database (concluding that employers may face great expense if limiting fertility treatment is found to be a disability-based distinction). The prohibition on disability-based exclusions was at issue in *Krauel v. Iowa Methodist Medical Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995), in which the plaintiff contended that her employer's insurance plan's exclusion of infertility treatments violated the ADA. *Id.* at 104. The court held that infertility was not a disability and therefore the infertility exclusion was not a disability-based distinction. *Id.* at 108.

35. Rhonda S. Tischler, Note, *Infertility: A Forgotten Disability*, 41 WAYNE L. REV. 249, 254 (1994).

36. Philip Elmer-Dewitt, *Making Babies*, TIME, Sept. 30, 1991, at 56, 58. Some estimates approach \$100,000 for standard IVF. Larry Thompson, *Fertility with Less Fuss*, TIME, Nov. 14, 1994, at 79.

37. Tischler, *supra* note 35, at 255.

38. *Id.* at 251.

and the requirements for asserting a disability under Title I.<sup>39</sup> The second section discusses the various causes and treatments of infertility,<sup>40</sup> while the third section examines the *Zatarain* and *Pacourek* decisions.<sup>41</sup> Finally, this Note argues that *Zatarain* was incorrectly decided and that infertility does, indeed, fall within the ADA's broad definition of a disability.<sup>42</sup>

## THE AMERICANS WITH DISABILITIES ACT OF 1990

### History

Except for the Air Carrier Access Act of 1986<sup>43</sup> and the Fair Housing Amendments Act of 1988,<sup>44</sup> no federal antidiscrimination laws protected disabled persons in the private sector before the enactment of the ADA in 1990.<sup>45</sup> Although the Rehabilitation Act of 1973<sup>46</sup> prohibits discrimination against the disabled in the private sector, only those programs or activities receiving federal financial assistance fall within its scope.<sup>47</sup> Before the ADA, therefore, most private employers could discriminate against disabled persons with impunity.<sup>48</sup>

In 1986, after recognizing the necessity for a comprehensive federal law to prevent discrimination against the disabled, Con-

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39. See *infra* notes 43-106 and accompanying text.

40. See *infra* notes 107-82 and accompanying text.

41. See *infra* notes 183-232 and accompanying text.

42. See *infra* notes 233-331 and accompanying text.

43. Pub. L. No. 99-435, 100 Stat. 1080 (codified as amended at 49 U.S.C. §§ 1301, 1374(c) (1988)) (current version at 49 U.S.C.A. § 41705 (1996)) (prohibiting discrimination by air carriers against persons with disabilities).

44. Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 29 U.S.C. §§ 2341-2342 and in scattered sections of 42 U.S.C.) (prohibiting discrimination against the disabled in the sale or rental of private housing).

45. A PRACTICAL AND LEGAL GUIDE, *supra* note 2, at 26.

46. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

47. 29 U.S.C. § 794(a) (1994).

48. See A PRACTICAL AND LEGAL GUIDE, *supra* note 2, at 26-28. Twenty-five percent of disabled individuals responded in a 1986 telephone poll that they had encountered job discrimination. *Id.* Forty-seven percent of those who were unemployed stated that employers failed to recognize that they could hold a full-time job despite their disabilities. *Id.* Seventy-five percent of business managers interviewed in a 1987 telephone poll reported that disabled persons "often encounter job discrimination from employers." *Id.* at 28.



gress directed the National Council on Disability to present legislative recommendations "to enhance the productivity and quality of life of people with disabilities."<sup>49</sup> The Council's report, *Toward Independence*, included forty-five legislative proposals, including a proposal for a "single comprehensive bill. . . . The Americans with Disabilities Act of 1986'.<sup>50</sup> Two years later, the Council published a follow-up report and presented a draft ADA bill to Congress.<sup>51</sup> Subsequently, both the Senate and the House introduced ADA bills, but both died in committee.<sup>52</sup>

United in their goal to "bring[] people with mental and physical disabilities into the mainstream of American life,"<sup>53</sup> Democrats and Republicans co-sponsored identical bills in the House and the Senate in 1989.<sup>54</sup> Despite bipartisan support<sup>55</sup> and a ringing endorsement from President Bush,<sup>56</sup> the ADA had a "bumpy road to final passage."<sup>57</sup> Major debates erupted over whether punitive damages could be assessed against employers who violated the Act, whether the Act should be phased in for small employers, and whether various types of physical, emotional, and mental impairments should be classified as disabilities.<sup>58</sup>

While debating which impairments should be considered disabilities, Senator Armstrong of Colorado argued that the term "disability" should be clearly defined; specifically, he wanted the bill to list the precise categories of disabilities to be covered.<sup>59</sup>

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49. *Id.* at 29.

50. *Id.* (quoting NATIONAL COUNCIL ON DISABILITY, *TOWARD INDEPENDENCE* 18 (1986)).

51. *Id.* at 30.

52. *Id.*

53. *Id.* at 35.

54. S. 933, 100th Cong., 1st Sess. (1989); H.R. 2273, 100th Cong., 1st Sess. (1989).

55. See A PRACTICAL AND LEGAL GUIDE, *supra* note 2, at 37.

56. See *id.* at 37-38.

57. *Id.* at 37.

58. See *id.* at 36-62.

59. 135 CONG. REC. S10,772 (daily ed. Sept. 7, 1989) (statement of Sen. Armstrong). "I think the proper way to proceed . . . is . . . to list the specific protected categories." *Id.*

Senator Armstrong continued his objections even after voting for the ADA:

I voted for the ADA with some reluctance. I was reluctant to vote for the bill because it will create an adversarial relationship between people with disabilities and the proprietors of small businesses, because its definition of disabilities is vague, and because it may be used to advance

The National Federation of Independent Business likewise argued that because the bill's proponents often said that Congress intended the ADA to cover over 900 separate categories of physical and mental disorders, employers should not be burdened with a vague definition of disability.<sup>60</sup>

Although unwilling to list all the disabilities covered by the Act, Congress did specifically *exclude* some conditions from its coverage. Homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and sexual behavior disorders were excluded, as were compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal drug use.<sup>61</sup> With the exception of current illegal drug use,<sup>62</sup> no other diseases, illnesses, conditions, or disorders, besides those listed above, were expressly excluded from the ADA's definition of disability.

The disagreements over certain provisions notwithstanding,

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political agendas that have nothing to do with the rights of handicapped people.

136 CONG. REC. S9694 (daily ed. July 13, 1990) (statement of Sen. Armstrong). Others expressed fears similar to Senator Armstrong's: "This bill is too vague in its definition of a disability and too inflexible in its mandates for me to support [it]." 136 CONG. REC. E1774-75 (daily ed. May 24, 1990) (statement of Rep. Craig). *See also* 136 CONG. REC. H2621 (daily ed. May 22, 1990) (statement of Rep. Cox) (stating that "[t]he definition of who is disabled is in large measure left to the courts."); *Americans with Disabilities Act: Hearings Before the Comm. on Small Business*, 101st Cong., 2d Sess. 63 (1990) (statement of Rep. DeLay) (stating that: "[t]he definition of disability must be clarified. The intent of the ADA is to protect the disabled. The bill now covers more than 900 unknown disabilities. This broad application includes drug addicts, alcoholics, people with contagious diseases and individuals with 'voluntary' conditions such as being overweight.").

60. *See* HEARINGS, *supra* note 17, at 1913-14 (statement of John J. Motley III, Director of Federal Governmental Relations, National Federation of Independent Business).

61. 42 U.S.C. § 12211 (1994) (codifying these sections).

62. Individuals who are "currently engaging in the illegal use of drugs" are not considered disabled. *Id.* § 12114(a). Nevertheless, Congress recognized that past drug addiction sometimes forms the basis for unfair discrimination. *See id.* § 12114(b). As such, if the individual no longer uses illegal drugs and participates in or successfully completes a supervised drug rehabilitation program or "has otherwise been rehabilitated successfully," an employer may not discriminate on the basis of that person's past drug use. *Id.* § 12114(b)(1)-(2).

Congress passed the ADA and President Bush signed it into law on July 26, 1990.<sup>63</sup> Various provisions of the ADA received staggered effective dates: Title I (employment) went into effect July 26, 1992 for employers with 25 or more workers,<sup>64</sup> and on July 26, 1994 for employers with 15 or more workers;<sup>65</sup> most provisions of Titles II (public services) and III (public accommodations and services) became effective on January 26, 1992;<sup>66</sup> and Title IV (telecommunications) requirements were to be adhered to by July 26, 1993.<sup>67</sup>

### *What Is a "Disability" Under the ADA?*

Although the ADA has a broad scope, covering discrimination against the disabled in employment,<sup>68</sup> public services and transportation,<sup>69</sup> public accommodations,<sup>70</sup> and telecommunications services,<sup>71</sup> this Note limits its discussion to the Title I employment provisions.

Under Title I, an employer cannot discriminate against a "qualified individual with a disability because of the disability" with respect to "the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>72</sup> If the individual is disabled, but can perform the "essential functions of the employment position," with or without "reasonable accommodation," the individual is "qualified" and, therefore, protected, under the ADA.<sup>73</sup> A claimant, however, must first qualify as an "individu-

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63. A PRACTICAL AND LEGAL GUIDE, *supra* note 2, at 35.

64. See 42 U.S.C. §§ 12111(5)(A), 12111 note (1994).

65. *Id.*

66. See *id.* §§ 12131 note, 12161 note, 12181 note (1992).

67. 47 U.S.C. § 225(c) (Supp. V 1993).

68. See 42 U.S.C. §§ 12111-12117 (1994).

69. *Id.* §§ 12131-12134, 12141-12150, 12161-12165.

70. *Id.* §§ 12181-12189.

71. 47 U.S.C. §§ 152, 221, 225, 611 (Supp. V 1993).

72. 42 U.S.C. § 12112(a) (1994). For simplicity, this Note consistently uses the term "employer" although § 12112(a) actually prohibits a "covered entity" from discriminating. *Id.* A "covered entity" is "an employer, employment agency, labor organization, or joint labor-management committee." *Id.* § 12111(2).

73. *Id.* § 12111(8).

al with a disability.”<sup>74</sup>

An “individual with a disability” is an individual with “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”<sup>75</sup> This definition includes three prongs: (1) whether the asserted condition is a physical or mental impairment, (2) whether the impairment affects one or more major life activities, and (3) whether the major life activity is substantially limited by the impairment.<sup>76</sup>

### *Impairment*

Although the ADA’s substantive provisions do not define impairment, EEOC implementing regulations define a physical or mental impairment as:

[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>77</sup>

The regulations do not list any specific conditions that are considered “per se” impairments.<sup>78</sup> The legislative history reveals, however, that “orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus [HIV], cancer, heart disease, diabetes, mental retardation, emotional illness . . . drug addiction, and alcoholism” are the

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74. *Id.*

75. *Id.* § 12102(2)(A). The term “individual with a disability” also includes those who have a “record of” or are “regarded as having” an impairment. *Id.* § 12102(2)(B)-(C). Under these two provisions, an individual who is not currently disabled is nonetheless treated as being disabled because either the individual in the past suffered from a condition that was disabling (i.e., a former cancer patient) or is erroneously believed by others to be disabled (i.e., an employee rumored to be HIV-infected). See 29 C.F.R. § 1630.2(k),(l) (1995).

76. See 29 C.F.R. § 1630.2(h)-(j) (1995).

77. *Id.* § 1630.2(h)(1)-(2).

78. See *id.*

types of conditions that the ADA was intended to cover.<sup>79</sup>

As an additional aid in determining what conditions are impairments, EEOC guidelines emphasize that the origin of the impairment must be physiological in its nature:

[S]imple physical characteristics . . . such as eye or hair color, lefthandedness, or height or weight within a normal range, are not impairments. A physical condition that is not the result of a physiological disorder, such as pregnancy, or a predisposition to a certain disease would not be an impairment. Similarly, personality traits such as poor judgment, quick temper or irresponsible behavior, are not themselves impairments. Environmental, cultural, or economic disadvantages, such as lack of education or a prison record also are not impairments.<sup>80</sup>

Notwithstanding these exclusions, almost any physiological or mental ailment can meet the ADA's definition of impairment. Hypothetically, the common cold may qualify as an impairment because it affects the respiratory system.<sup>81</sup> Determining whether the individual has a physical or mental impairment, however, is only the first step under the ADA. Although a person may be impaired, to rise to the level of a disability the impairment must substantially limit one or more "major life activities."<sup>82</sup>

### *Major Life Activities*

The ADA does not define "major life activity," but the EEOC regulations define "major life activities" as "those basic activities that the average person in the general population can perform with little or no difficulty."<sup>83</sup> The EEOC regulations continue by stating that, "[m]ajor life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking,

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79. H.R. REP. NO. 485, *supra* note 20, at 51, *reprinted in* 1990 U.S.C.C.A.N. at 333.

80. EEOC TECHNICAL ASSISTANCE PROGRAM, *supra* note 32, at II-2.

81. See 29 C.F.R. § 1630.2(j) (1995) (describing temporary, nonchronic conditions, such as influenza, as impairments).

82. See 42 U.S.C. § 12102(2)(A) (1994).

83. 29 C.F.R. § 1630.2(i) (1995) (adopting the definition of "major life activities" from the regulations at 34 C.F.R. § 104, implementing § 504 of the Rehabilitation Act).

breathing, learning, and working.”<sup>84</sup> In addition, activities such as reading,<sup>85</sup> sitting,<sup>86</sup> standing,<sup>87</sup> lifting,<sup>88</sup> and reaching<sup>89</sup> are major life activities. A House report also lists “participating in community activities” as a major life activity.<sup>90</sup>

It is important to note that the list of major life activities is not all-inclusive; the activities listed are merely examples.<sup>91</sup> The EEOC has recognized that others may be included as the case law develops.<sup>92</sup> In fact, the EEOC issued new guidance in March 1995, adding “[m]ental and emotional processes such as thinking, concentrating, and interacting with others” to the list of major life activities.<sup>93</sup>

### *Substantially Limits*

Once a claimant establishes that she suffers from an impairment that in some manner affects a major life activity, for the impairment to rise to the level of a “disability,” it must “substantially limit” one or more of the affected major life activities.<sup>94</sup> EEOC regulations define the term “substantially limits”<sup>95</sup> and list several factors requiring analysis to determine whether an impairment is substantially limiting.<sup>96</sup>

In essence, the individual must be less able to perform the major life activity than is “the average person in the general

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84. *Id.*

85. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, 2 EEOC COMPLIANCE MANUAL, EEOC ORDER 915,002, SECTION 902, DEFINITION OF THE TERM “DISABILITY” 902-15 (1995) [hereinafter EEOC COMPLIANCE MANUAL], reprinted in EEOC TECHNICAL ASSISTANCE PROGRAM, *supra* note 32, at app. E.

86. 29 C.F.R. § 1630.2(i) (1995).

87. *Id.*

88. *Id.*

89. *Id.*

90. See H.R. REP. NO. 485, *supra* note 20, at 52, reprinted in 1990 U.S.C.C.A.N. at 334.

91. See 29 C.F.R. § 1630.2(i) (1995) (noting that “[t]his list is not exhaustive.”).

92. See EEOC COMPLIANCE MANUAL, *supra* note 85, at 902-14 (“In most cases, courts have simply stated that an impaired activity is a major life activity.”).

93. *Id.* at 902-15.

94. 42 U.S.C. § 12102(2)(A) (1994).

95. 29 C.F.R. § 1630.2(j) (1995).

96. *Id.* § 1630.2(j)(2).

population . . . ."<sup>97</sup> Determining whether the impairment is substantially limiting requires case-by-case analysis; thus, the issue is whether the impairment is substantially limiting with reference to the specific individual, rather than to afflicted people in general.<sup>98</sup> Specific factors requiring consideration are: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact . . . resulting from the impairment."<sup>99</sup>

Under the ADA the impairment need not limit the major life activity of working.<sup>100</sup> So long as the impairment substantially limits a major life activity, the claimant's ability or inability to work is of no consequence.<sup>101</sup> Hypothetically, then, an employee may suffer from dyslexia which substantially limits her ability to read, but if the employee's work does not require her to read, she is nevertheless "disabled" under the ADA. In sum, an employer cannot discriminate against an employee because of a disability regardless of whether the disability affects the employee's ability to work.

### *Employers' Obligations Under the ADA*

Reasonable accommodation is the key nondiscrimination requirement of the ADA.<sup>102</sup> The requires employers to make "reasonable accommodation" to the known physical or mental limitations of the qualified disabled individual, unless the employer would suffer "undue hardship" in providing the accommodation.<sup>103</sup>

Reasonable accommodation may include making existing facil-

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97. *Id.* § 1630.2(j)(1)(i)-(ii).

98. EEOC COMPLIANCE MANUAL, *supra* note 85, at 902-15 to 902-16.

99. 29 C.F.R. § 1630.2(j)(2) (1995).

100. *See id.* § 1630.2(j) ("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.").

101. *See id.*

102. EEOC TECHNICAL ASSISTANCE PROGRAM, *supra* note 32, at III-1.

103. 42 U.S.C. § 12112(b)(5)(A) (1994). "Undue hardship" is defined as "an action requiring significant difficulty or expense" after considering factors such as the overall financial resources of the employer, the size of the business, and the nature and cost of the accommodation. *Id.* § 12111(10).

ities "readily accessible to and usable by individuals with disabilities."<sup>104</sup> An employer may also be required to restructure a job so as to allow a part-time or modified work schedule or to reassign the employee to a vacant position that the disabled employee can perform.<sup>105</sup> Further discussion of these requirements is beyond this Note's limited scope. For the purposes of this Note it is sufficient to say that much debate exists regarding what constitutes a "reasonable accommodation" or "undue hardship."<sup>106</sup>

#### UNDERSTANDING INFERTILITY: CAUSES AND TREATMENT

A thorough discussion of the causes of infertility and the various treatment options is well beyond the scope of this Note. Nonetheless, to appreciate fully the plaintiffs' position in *Zatarain* and *Pacourek*, this topic warrants a brief discussion.

##### *Causes of Infertility*

Defined as the "inability of a couple to conceive after 12 months of unprotected intercourse,"<sup>107</sup> infertility has been categorized as "a disease, a disorder, a disability, a handicap, an illness, a syndrome, a condition, as well as a condition caused by a disease."<sup>108</sup> Though estimates vary, approximately five million Americans suffer from infertility.<sup>109</sup> Some commentators have

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104. *Id.* § 12111(9).

105. *Id.*

106. See Renée L. Cyr, *The Americans with Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 BROOK. L. REV. 1237, 1238 (1992) (arguing that "by explicitly identifying job reassignment as one form of reasonable accommodation required by the ADA, Congress has mandated that all employers must reassign" disabled employees to vacant positions); Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 398 (1995) (proposing a standard that clarifies the point "at which an employer's obligation to accommodate reaches the level of undue hardship"); Schumaker, *supra* note 14, at 283-84 (discussing accommodation issues such as leave of absence, job reassignment, and job restructuring).

107. JOHN YEH & MOLLY U. YEH, *LEGAL ASPECTS OF INFERTILITY* 1 (1991).

108. Joel N. Ephross, *In Vitro Fertilization: Perspectives on Current Issues*, 32 JURIMETRICS J. 447, 449 (1992).

109. See Joan Hamilton, *Infertility: What You Should Know*, BUS. WK., Mar. 14, 1994, at 88; see generally Susan Caminiti, *The Ordeal of Infertility*, FORTUNE, Aug.



concluded that "America today is in the midst of an infertility epidemic . . . ." <sup>110</sup>

Although infertility is generally "overlooked as a serious life problem [and] ignored as a legitimate health issue," <sup>111</sup> for an infertile couple desiring to have children, it "exacts a terrible emotional and physical toll." <sup>112</sup> Infertility causes feelings of envy as the couple watches others with small children. <sup>113</sup> Often, feelings of frustration and lack of control envelop an infertile couple as the desire to have children becomes all-consuming. <sup>114</sup> "The inability to have a baby can turn a couple's life upside down. . . . [and] test[] even the strongest marriages." <sup>115</sup>

Although infertility is most often thought of as a woman's problem, it affects men as well as women. <sup>116</sup> Forty percent of the total cases of infertility in the United States arise from problems with the female. <sup>117</sup> "The male factor" <sup>118</sup> causes an additional forty percent. <sup>119</sup> The remaining twenty percent of infertility cases result from a combination of male and female

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8, 1994, at 98 (discussing the medical, psychological, and social aspects of infertility treatment).

As compared to the number of people with disabilities clearly within the scope of the ADA, this number is quite high. For instance, 2 million people are deaf, 1 million are confined to wheelchairs, 1.6 million are missing an arm or a leg, less than 1 million are legally blind, and an estimated 1 million are HIV-positive. FERSH & THOMAS, *supra* note 6, at 8.

110. Elmer-Dewitt, *supra* note 36, at 56.

111. Melissa R. O'Rourke, Comment, *The Status of Infertility Treatments and Insurance Coverage: Some Hopes and Frustrations*, 37 S.D. L. REV. 343, 343 (1992) (quoting Patricia Schroeder, *Infertility and the World Outside*, 49 FERTILITY & STERILITY 765 (1988)).

112. Tischler, *supra* note 35, at 251.

113. See Caminiti, *supra* note 109, at 99.

114. See *id.*

115. *Id.*

116. See JOSEPH H. BELLINA & JOSLEEN WILSON, YOU CAN HAVE A BABY: EVERYTHING YOU NEED TO KNOW ABOUT FERTILITY 49 (1985); Hamilton, *supra* note 109, at 88. Dr. Bellina and Ms. Wilson provide a comprehensive lay person's guide to infertility. They devote a substantial portion of their book to describing the male and female reproductive systems and detailing the causes of male and female infertility. See BELLINA & WILSON, *supra*, at 3-96.

117. YEH & YEH, *supra* note 107, at 6-7.

118. See *id.* at 113.

119. *Id.* at 6-7.

factors.<sup>120</sup>

Very little is known about the "male factor."<sup>121</sup> Currently, the identified causes of male infertility fall into three broad categories: (1) defects associated with poor sperm production, (2) blockages in the passageways that transport sperm, and (3) problems concerning the deposit of sperm in the vaginal canal.<sup>122</sup>

One of the most prominent causes of male infertility is varicocele, a varicose vein of the testicle.<sup>123</sup> Between thirty and forty percent of all infertile men have a varicocele, which is believed to cause overheating in the sperm production centers of the testicles, either killing the sperm or resulting in the production of immature or deformed sperm.<sup>124</sup> Approximately five percent of infertile men have a blockage in the sperm transport system caused by injuries, surgeries performed in early childhood, or bacterial infections.<sup>125</sup> Male sexual dysfunction, such as impotence caused by physical or psychological factors, can also cause a couple's infertility.<sup>126</sup>

Female infertility is also attributable to numerous causes. More than fifty percent of all women's fertility problems involve a defect of the ovulatory system.<sup>127</sup> Most often the defect results in the ovaries' failure to produce the mature egg necessary for successful conception.<sup>128</sup> A mechanical obstruction or blockage of the fallopian tubes also commonly causes female infertility.<sup>129</sup> Blockages inside the fallopian tubes can prevent sperm and egg from uniting.<sup>130</sup> Partial blockages can entrap a fertilized ovum and cause a tubal pregnancy.<sup>131</sup> Obstructions may result from endometriosis, a disease that causes scarring of the

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*Id.* at 7.  
*Id.* at 113.  
BELLINA & WILSON, *supra* note 116, at 276-306.  
*Id.* at 278.  
*Id.* at 278-79.  
*Id.* at 296-97.  
*Id.* at 303-04.  
*Id.* at 221.  
*Id.*  
*Id.* at 235.  
*Id.* at 45.  
*Id.*

ovaries and fallopian tubes.<sup>132</sup> The incidence of infertility among women who have endometriosis is nearly fifty percent.<sup>133</sup>

Endometriosis is not the only disease that results in scarring of the fallopian tubes. The most common cause of scarring of the fallopian tubes and of the reproductive organs is pelvic inflammatory disease (PID), which is almost always caused by sexually transmitted bacteria.<sup>134</sup> A single episode of PID presents a woman with a fifteen percent risk of becoming infertile, and the infertility rate increases with each subsequent infection.<sup>135</sup> After two PID infections, a fifty percent chance of infertility occurs; after three infections, the risk increases to seventy-five percent.<sup>136</sup>

A number of socioeconomic factors may contribute to the current incidence of infertility. Because of the women's movement and the economy, many women now work and thus postpone having children until well beyond their most fertile years.<sup>137</sup> Also, vast numbers of women currently in their thirties and forties were born with malfunctioning reproductive systems resulting from their mothers' use of the drug DES during the 1940s and 1950s.<sup>138</sup> Further, because the female reproductive system is vulnerable to scarring resulting from sexually transmitted diseases, the sexual revolution may have also contributed to the current infertility rate.<sup>139</sup>

More recently, a previously unrecognized threat to human

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132. *Id.* at 247.

133. *Id.*

134. *Id.* at 235.

135. *Id.*

136. *Id.*

137. Elmer-Dewitt, *supra* note 36, at 56. After age 35, the infertility rate in females increases significantly. The results of one study showed that for married women between the ages of 25 and 34 there is an 11.1% infertility rate and for women between the ages of 35 and 44 there is a 25.9% infertility rate. See YEH & YEH, *supra* note 107, at 2. Moreover, in the older age group there are also higher rates of chromosomal defects. *Id.* For instance, the risk of bearing a child with Down's syndrome increases steadily as a woman ages. BELLINA & WILSON, *supra* note 116, at 335. Women aged 25 to 30 experience from 2.1 to 2.6 incidences of Down's syndrome per 1000 live births. *Id.* Between age 35 and 40, the rate rises to 15.8. *Id.*

138. Elmer-Dewitt, *supra* note 36, at 56.

139. *Id.*

fertility has been identified. Environmental groups and scientists warn that chemical pollutants found in the air, water, and soil, even in minuscule amounts, can interfere with human fertility.<sup>140</sup> Despite regulatory efforts, chemical compounds and waste by-products of processes such as paper making and waste incineration, continue to permeate the environment.<sup>141</sup> Some scientists believe that these compounds disrupt the hormonal action necessary for successful human reproduction.<sup>142</sup>

No evidence exists to prove conclusively that these chemical pollutants affect human fertility.<sup>143</sup> The argument, however, becomes more persuasive by examining evidence showing that incidences of several hormone-related disorders, such as low sperm counts and endometriosis, have risen since certain chemicals were first used.<sup>144</sup> If no method can feasibly and completely rid the environment of these compounds and if they continue to accumulate in the environment, infertility may become an even more significant health issue in the future.

### *Treating Infertility*

Of the millions of infertile couples in the United States, an increasing number seek treatment.<sup>145</sup> In 1988 alone, 1.4 million women sought treatment for infertility.<sup>146</sup> The number of clinics offering infertility services grew from thirty to 300 in the last ten years, resulting in a \$350 million a year business.<sup>147</sup>

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140. Michael D. Lemonick, *Not So Fertile Ground: Some Scientists Fear That Pollutants Are Damaging Human Reproductive Systems*, TIME, Sept. 19, 1994, at 68.

141. *Id.*

142. *Id.*

143. *See id.* (noting that "[t]he existing evidence is largely circumstantial").

144. *See id.* Additionally, studies conducted on various animal species resulted in numerous reproductive dysfunctions, such as smaller sex organs, reduced sperm counts, feminized sexual behavior, or inability to procreate. *Id.* at 69. Some of the studies showed that even small amounts of the chemicals, particularly dioxin, caused damage. *Id.* Dioxin is particularly hazardous because the body metabolizes it in much the same way as natural chemicals, and it interacts with almost every hormone system in the body. *Id.* at 69-70.

145. *See* Elmer-Dewitt, *supra* note 36, at 58. The number of couples seeking treatment for fertility problems tripled from 1968 to 1984. *Id.*

146. Shannon Brownlee et al., *The Baby Chase*, U.S. NEWS & WORLD REP., Dec. 5, 1994, at 84, 86.

147. Trip Gabriel, *High-Tech Pregnancies Test Hope's Limits*, N.Y. TIMES, Jan. 7,

Conducting an evaluation to determine the cause of infertility is the first step in its treatment.<sup>148</sup> The basic infertility evaluation includes a complete history and physical examination of the couple, semen analysis, and an evaluation of the woman's ovulatory and hormonal status.<sup>149</sup> Treatments vary depending on the cause of infertility. To treat female infertility, scar tissue or an obstruction can be removed surgically and various infertility drugs can be administered to encourage ovulation.<sup>150</sup> Depending on the cause, male infertility is likewise treatable by surgery or by drug therapy.<sup>151</sup>

When treatment of the underlying cause of infertility fails, assisted reproductive technology offers an infertile couple several options. Techniques such as artificial insemination (AI) and in-vitro fertilization (IVF) have become increasingly popular.<sup>152</sup>

AI is a technique whereby semen, from either a woman's husband (AIH) or an anonymous donor (AID), is placed in the cervical canal or uterus without sexual intercourse.<sup>153</sup> On the day of ovulation or shortly before, AI is accomplished by using a small plastic tube or syringe to implant the sperm.<sup>154</sup> AIH's most common use occurs when a husband has an abnormal or low sperm count.<sup>155</sup> A doctor can perform AIH or the couple can accomplish it in their own home.<sup>156</sup> AID, the use of donor sperm, employs the same implantation methods as AIH except that the sperm is frozen from a sperm bank, rather than fresh from the

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1996, at A1, A18.

148. BELLINA & WILSON, *supra* note 116, at 102-03.

149. YEH & YEH, *supra* note 107, at 7-8.

150. See BELLINA & WILSON, *supra* note 116, at 222-73.

151. *Id.* at 278-306.

152. See YEH & YEH, *supra* note 107, at 61. Births resulting from assisted reproductive technologies increased sixfold from 1985 to 1990. *Id.* In 1988, just over 22,000 assisted reproductive cycles were initiated, *id.*, compared with the 40,000 now performed in a year, probably due to the rapid increase in the number of infertility clinics. Gabriel, *supra* note 147, at A18.

153. BELLINA & WILSON, *supra* note 116, at 309. Although probably thought of as a modern development, AI was first used in the 1600s but it was limited to use of the husband's sperm. YEH & YEH, *supra* note 107, at 35. Perhaps because of the moral debate, i.e., whether the woman had committed adultery, use of donor sperm did not start until the 19th century. See *id.* at 34, 39.

154. BELLINA & WILSON, *supra* note 116, at 309-11.

155. *Id.* at 310-11.

156. *Id.*

husband.<sup>157</sup> Pregnancy rates with AIH and AID correspond to those of natural pregnancy.<sup>158</sup>

Unlike AI, the IVF procedure involves fertilization of mature eggs outside the uterus.<sup>159</sup> IVF involves removing mature eggs from the ovaries, fertilizing them in a laboratory, and reinserting them into the uterus.<sup>160</sup> IVF has been called a "test of human endurance"—especially for the woman.<sup>161</sup> As one woman stated after completing her first IVF treatment, "[y]our whole life is consumed by it."<sup>162</sup>

Though IVF is conceptually simple, if a couple elects to use it, the woman must be prepared to devote a substantial amount of time to ensure its success. To prepare for the removal of mature eggs, the woman receives injections of fertility drugs so that multiple eggs mature in a single month, rather than the usual one.<sup>163</sup> Medical personnel then administer daily blood tests and ultrasound examinations to monitor the growth of the eggs.<sup>164</sup> Timing is critical; the eggs must be removed at the precise moment when they are ready to be released from the ovary or else removal will be impossible.<sup>165</sup> When the eggs are ready for removal, a laparoscope is inserted through the woman's navel and the mature eggs are suctioned from the ovary.<sup>166</sup>

Once removed, each egg is placed in a culture dish and combined with the husband's or donor's sperm.<sup>167</sup> After fertilization occurs and the preembryos<sup>168</sup> have grown to either four or eight cells, a number of them are transferred to the uterus.<sup>169</sup>

Upon completed transfer, the woman may require another

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157. *Id.* at 312-14.

158. *Id.* at 309.

159. *Id.* at 366.

160. *Id.*

161. Thompson, *supra* note 36, at 79.

162. Caminiti, *supra* note 109, at 99.

163. See BELLINA & WILSON, *supra* note 116, at 368.

164. *Id.* at 368-69.

165. *Id.* at 369.

166. *Id.*

167. *Id.* at 369-70.

168. A "preembryo" is the fertilized egg prior to its fourteenth day of development. Jean Voutsinas, *In Vitro Fertilization*, 12 PROB. L.J. 47, 50 (1994). After the fourteenth day, the term "embryo" is used. *Id.*

169. BELLINA & WILSON, *supra* note 116, at 371.

round of daily blood tests so that doctors can monitor various hormone levels necessary to support a pregnancy.<sup>170</sup> The time following the IVF procedure is critical because it is during that time the preembryo must attach to the uterine wall.<sup>171</sup> Thirty-three percent of transferred preembryos spontaneously abort<sup>172</sup> and eighty to eighty-five percent of the preembryos, for reasons only recently being understood, fail to implant in the uterus wall.<sup>173</sup>

As is evident, selecting IVF as the answer to infertility is time-consuming for the woman. If she works, she must spend a considerable amount of time away from her job, in doctors' offices and hospitals. Because the average success rate for IVF is only 15.2% for a single IVF cycle or procedure,<sup>174</sup> many couples undergo multiple IVF cycles in the hopes of conceiving a child,<sup>175</sup> thus increasing the amount of time absent from work.

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170. *Id.*

171. *Id.*

172. *Id.*

173. Elmer-Dewitt, *supra* note 36, at 61. As implantation does not always succeed, multiple preembryos are fertilized and transferred to the uterus to increase the chances of a live birth. See Voutsinas, *supra* note 168, at 49. Because the rate of multiple deliveries increases with the number of preembryos transferred, however, doctors must determine the optimal number to transfer. *Id.* Doctors freeze ("cryopreserve") any unused preembryos for future use. *Id.* Because preembryos can be preserved for an estimated two to 600 years, Christine A. Djalleta, Comment, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 335 (1994), cryopreservation has led to a heated debate over whether preembryos should be treated as a "person" or as "property." See, e.g., Voutsinas, *supra* note 168, at 79-81 (concluding that the preembryo should be treated as neither person nor property, but, instead, should receive a special classification of its own).

Two new procedures have increased implantation rates, which may decrease the need to remove and fertilize multiple eggs. See Elmer-Dewitt, *supra* note 36, at 61. One procedure, gamete intra-fallopian transfer (GIFT), involves the injection of sperm and mature eggs directly into the fallopian tube, allowing fertilization to occur as it would naturally. *Id.* Another variation is zygote intra-fallopian transfer (ZIFT) where the eggs are fertilized in a dish and then the preembryos, or zygotes, are placed directly into the fallopian tubes. *Id.* With ZIFT and GIFT, implantation rates have doubled. *Id.*

174. Caminiti, *supra* note 109, at 103.

175. See, e.g., Brownlee et al., *supra* note 146, at 84, 89 (describing one couple's seven-year attempt to conceive a child, including seven IVF attempts, and another couple that underwent five IVF procedures); Caminiti, *supra* note 109, at 100 (describing a couple that underwent five cycles of artificial insemination and two IVF

Although modern technology offers potential solutions to infertility, many couples simply cannot afford procedures such as IVF. IVF can cost as much as \$6000 to \$14,000 per cycle.<sup>176</sup> Because several attempts may be necessary to ensure success, the ultimate cost can range from \$50,000 to \$100,000 per live birth.<sup>177</sup> Even more standard treatments can be expensive. AI costs from \$800 to \$3000 per cycle.<sup>178</sup> An initial fertility evaluation in a doctor's office can cost as much as \$2000.<sup>179</sup> Although a number of states require insurers to cover fertility treatments,<sup>180</sup> some insurance companies in other states either do not cover IVF or limit coverage to a single IVF cycle.<sup>181</sup> Because of the lack of insurance coverage, patients bear eighty-five percent of the treatment costs.<sup>182</sup>

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procedures).

176. Hamilton, *supra* note 109, at 89.

177. See Elmer-Dewitt, *supra* note 36, at 58 (cost can surpass \$50,000 per live birth); Thompson, *supra* note 36, at 79 (standard IVF can cost more than \$100,000).

178. Hamilton, *supra* note 109, at 89.

179. *Id.*

180. See, e.g., CAL. HEALTH & SAFETY CODE § 1374.55 (West Supp. 1996) (requiring every health care service plan that covers hospital, medical or surgical expenses on a group basis to offer coverage for infertility treatment); CONN. GEN. STAT. ANN. § 38a-536 (West 1995) (requiring insurance companies to offer entities providing group hospital or medical insurance coverage for their employees a group hospital or medical service plan providing "medically necessary expenses for the diagnosis and treatment of infertility"); ILL. ANN. STAT. ch. 215, para. 5/356m (Smith-Hurd 1995) (requiring group accident or health insurance policies that provide coverage for more than 25 employees and provide pregnancy-related benefits to contain coverage for the diagnosis and treatment of infertility); MASS. GEN. LAWS ANN. ch. 176A, § 8K (West Supp. 1995) (requiring any policy that provides pregnancy-related benefits to also provide as a benefit for all subscribers, to the extent that benefits are provided for other pregnancy-related procedures, "coverage for medically necessary expenses of diagnosis and treatment of infertility"); R.I. GEN. LAWS § 27-18-30(a) (1994) ("Any health insurance contract, plan, or policy ... which includes pregnancy related benefits, shall provide coverage for medically necessary expenses of diagnosis and treatment of infertility").

181. See, e.g., CAL. HEALTH & SAFETY CODE § 1374.55 (West Supp. 1996) (excluding coverage for IVF); HAW. REV. STAT. § 431:10A-116.5 (Supp. 1992) (stating that policies providing pregnancy-related benefits must include "a one-time only benefit for all outpatient expenses arising from in vitro fertilization procedures," but the couple must have a history of infertility of at least five years duration, or the infertility must be caused by endometriosis, exposure to DES, blockage of fallopian tubes, or abnormal male factors, and the couple must have tried other infertility treatments prior to trying IVF.); MD. ANN. CODE art. 48A, § 354DD (1994) (listing the same requirements as Hawaii).

182. Gabriel, *supra* note 147, at A18. Some large companies, both private and



DIVERGENT VIEWS OF INFERTILITY AS A DISABILITY UNDER THE ADA: *PACOUREK V. INLAND STEEL CO.*<sup>183</sup> AND *ZATARAIN V. WDSU-TELEVISION, INC.*<sup>184</sup>

Regardless of whether infertility is classified as a disease, syndrome, or condition,<sup>185</sup> it is nonetheless a physiological disorder affecting the reproductive system. Despite this fact, determining whether infertility qualifies as a "disability" under the ADA depends upon the willingness of the courts to accept the ADA's broad definition of that term.<sup>186</sup> *Pacourek* and *Zatarain* illustrate the divergent views that courts have taken on the matter.

*Pacourek v. Inland Steel Co.*<sup>187</sup>

*Factual Background*

Charline Pacourek began working for Inland Steel in 1975.<sup>188</sup> In 1986, she "was diagnosed with esophofical reflux, a medical condition preventing her from becoming pregnant naturally."<sup>189</sup> She decided to undergo experimental infertility treatment at the University of Chicago, becoming its first IVF patient.<sup>190</sup> In October 1986, she informed Inland of her efforts to become pregnant.<sup>191</sup> Though the court's opinion does not detail what transpired between 1986 and 1992, Ms. Pacourek alleged that in 1992, an Inland manager, Thomas Wides, "verbally abused [her] concerning her pregnancy related condition by expressing doubt as to her ability to become pregnant and her

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public, do, however, provide infertility coverage. A 1992 survey conducted by A. Foster Higgins & Co. showed that 34% of 1695 companies surveyed offered some type of infertility coverage. Caminiti, *supra* note 109, at 103. These companies view infertility as "something catastrophic that can seriously affect worker productivity... ." *Id.*

183. 858 F. Supp. 1393 (N.D. Ill. 1994).

184. 881 F. Supp. 240 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

185. See *supra* note 108 and accompanying text.

186. See *supra* note 74 and accompanying text.

187. 858 F. Supp. 1393 (N.D. Ill. 1994).

188. *Id.* at 1396.

189. *Id.*

190. *Id.*

191. *Id.*

ability to combine pregnancy and her career.”<sup>192</sup> She claimed that she was “treated like she had an infectious disease”<sup>193</sup> and that one top-level manager told her, “I don’t give a damn about the law. I only care about Inland Steel. If God had wanted you to have children, . . . he would have given them to you.”<sup>194</sup>

In March 1992, a manager told Ms. Pacourek that she was a “high risk” and that it was “inevitable that she would be terminated.”<sup>195</sup> After relaying the conversation to Inland’s personnel manager, Ms. Pacourek was told that a letter from her physician would “alleviate any problems.”<sup>196</sup> She provided the letter in July 1992.<sup>197</sup>

Though Ms. Pacourek missed twenty-six work-days in one year, she claims that her work never suffered and that she got approval for the absences, making up the missed days by working overtime.<sup>198</sup> Despite assurances from the personnel department that she would not be fired,<sup>199</sup> she was, indeed, terminated in June 1993.<sup>200</sup> She sued under the ADA, claiming that Inland discriminated against her because of a physical impairment that substantially limited the major life activity of reproduction.<sup>201</sup>

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192. *Id.* at 1397.

193. Stanley Holmes, *Efforts To Get Pregnant Led to Firing, Woman Says*, BUFF. NEWS, Apr. 3, 1994, at A10.

194. *Id.*

195. *Pacourek*, 858 F. Supp. at 1397.

196. *Id.*

197. *Id.*

198. Holmes, *supra* note 193, at A10.

199. *Id.*

200. *Pacourek*, 858 F. Supp. at 1396.

201. *Id.* at 1404. Ms. Pacourek also alleged that her termination violated the Pregnancy Discrimination Act (PDA), *id.* at 1400, which prohibits discrimination on the “basis of pregnancy, childbirth, or related medical conditions.” 42 U.S.C. §§ 2000e(k), 2000e-2 (1994). Inland contended that the “inability to become pregnant” is not a condition covered under the PDA. *Pacourek*, 858 F. Supp. at 1401. The court rejected Inland’s argument, finding that:

[i]t makes sense to conclude that the PDA was intended to cover a woman’s intention or potential to become pregnant, because all that conclusion means is that discrimination against persons who intend to or can potentially become pregnant is discrimination against women, which is the kind of truism the PDA wrote into law.

*Id.* Moreover, as the PDA prohibits discrimination against a woman because she has had an abortion, the court “could find no reason why [the scope of the PDA’s protection, which included] termination of a pregnancy[,], would not also include the initia-

*Analysis of the ADA Claim*

Moving to dismiss the ADA claim, Inland contended that Ms. Pacourek's alleged impairment, esophofical reflux, was not a disability under the ADA.<sup>202</sup> After analyzing the three definitional prongs of an ADA disability,<sup>203</sup> the court concluded that Ms. Pacourek was disabled as defined by the ADA.<sup>204</sup> Though the court only briefly discussed the ADA claim, its logic was clear.

First, the court looked at whether esophofical reflux was an impairment under the ADA.<sup>205</sup> Because the reproductive system was specifically listed as one of the systems that a physiological disorder may affect, the court easily concluded that Ms. Pacourek's condition was an impairment.<sup>206</sup> In fact, Inland did not dispute whether Ms. Pacourek's condition was an impairment as that term is defined under the ADA.<sup>207</sup>

Second, the court considered whether reproduction was a "major life activity" under the ADA.<sup>208</sup> The court gave two reasons for its conclusion that reproduction qualified as a major life activity.<sup>209</sup> Although reproduction was not expressly listed as a major life activity in the EEOC regulations, the court did not believe that the reproductive system could be the subject of an impairment without reproduction correspondingly being considered a major life activity.<sup>210</sup> The court reasoned that because an asserted physical impairment could be one of the reproductive system, "it logically follow[ed]" that reproduction was a major life activity.<sup>211</sup> The court's second reason was based on dicta found in the Seventh Circuit Court of Appeals case of *McWright v. Alexander*.<sup>212</sup>

In *McWright*, the Seventh Circuit interpreted Rehabilitation

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tion of a pregnancy." *Id.* at 1403.

202. *Id.* at 1397, 1404.

203. *See supra* note 75 and accompanying text.

204. *Pacourek*, 858 F. Supp. at 1404-05.

205. *Id.* at 1404.

206. *Id.*

207. *Id.*

208. *Id.* at 1404-05.

209. *Id.*

210. *Id.* at 1404.

211. *Id.*

212. 982 F.2d 222 (7th Cir. 1992).

Act provisions, substantially identical to the ADA, prohibiting employment discrimination by federal agencies "on the basis of handicap."<sup>213</sup> *McWright*, an employee of the Department of Energy (DOE), alleged that the department discriminated against her because of her handicap—sterility.<sup>214</sup> She specifically alleged that the DOE failed to reasonably accommodate her handicap by denying her leave to care for her newly adopted child.<sup>215</sup>

The DOE did not dispute that *McWright* was handicapped,<sup>216</sup> but the court noted that among the "protected class of handicapped individuals [is a] person with a physiological disorder affecting the reproductive system."<sup>217</sup> Because the Rehabilitation Act's definition of "handicapped" and the ADA's definition of "disability" were substantially identical, *Pacourek* found *McWright* apposite and supportive of its finding that reproduction is a major life activity.<sup>218</sup>

The last prong of the disability definitional requirement addressed by the court was whether the impairment substantially limited a major life activity.<sup>219</sup> The court, again, found little difficulty in answering the question affirmatively.<sup>220</sup> It held that "[t]he conclusion that infertility substantially limits the major life activity [of reproduction] is a matter of common sense."<sup>221</sup> Under the ADA, EEOC regulations specifically define "substantially limits" as a significant restriction in the manner in which a major life activity is performed as compared to an average person.<sup>222</sup> Because Ms. *Pacourek* could not have a child naturally, she was significantly restricted in the manner in

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213. *Id.* at 225-26. The applicable Rehabilitation Act provision read: "No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a) (1988). This section has since been amended replacing the term "handicaps" with "disability." *See* 29 U.S.C. § 794(a) (1994).

214. *McWright*, 982 F.2d at 227.

215. *Id.*

216. *Id.* at 226.

217. *Id.* at 226-27.

218. *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404-05 (N.D. Ill. 1994).

219. *Id.* at 1405.

220. *Id.*

221. *Id.*

222. *See* 29 C.F.R. § 1630.2(j) (1995).

which she could procreate as compared to the average person in the general population.<sup>223</sup> Thus, her impairment substantially limited the major life activity of reproduction.<sup>224</sup>

*Pacourek* demonstrates the manner in which a court may broadly construe the ADA disability definition. Determining whether infertility is a disability under the ADA rests simply upon deciding whether reproduction is a major life activity. Although EEOC regulations do not list reproduction as a major life activity, the EEOC has expressly stated that the list of major life activities is merely representative and not exhaustive.<sup>225</sup> Despite the need to retain flexibility under the ADA, however, the outcome of a plaintiff's claim under that Act depends on a court's willingness to recognize that the ADA's broad language encompasses nontraditional disabilities such as infertility. The case of *Zatarain v. WDSU-Television, Inc.*<sup>226</sup> illustrates a narrower interpretation.

*Zatarain v. WDSU-Television, Inc.*<sup>227</sup>

*Factual Background*

From 1983 to November 1992, WDSU employed Lynn Gansar Zatarain as a reporter and anchor person.<sup>228</sup> Beginning in August or September 1990, Ms. Zatarain was the only anchor person for three evening newscasts at 5:00 p.m., 6:00 p.m., and 10:00 p.m.<sup>229</sup> She worked approximately eight hours a day, arriving at work at 3:00 p.m. and leaving sometime after 10:00 p.m.<sup>230</sup>

In July 1992, Ms. Zatarain began receiving fertility treatments, which consisted of hormone shots given between 4:00 and 6:00 p.m. daily.<sup>231</sup> She informed WDSU of her efforts to become pregnant and WDSU management allowed her to report for

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223. *Pacourek*, 858 F. Supp. at 1405.

224. *Id.*

225. See 29 C.F.R. § 1630.2(i) (1995); EEOC COMPLIANCE MANUAL, *supra* note 85, at 902-15.

226. 881 F. Supp. 240 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

227. *Id.*

228. *Id.* at 241.

229. *Id.*

230. *Id.* at 241-42.

231. *Id.*

work later than her usual 3:00 p.m. arrival time so that she could receive the necessary hormone shots.<sup>232</sup>

In November 1992, Ms. Zatarain informed WDSU that her doctor recommended a reduced work schedule during the time she was to receive fertility treatments.<sup>233</sup> She requested that WDSU modify her schedule so that she could do the 6:00 p.m. newscast, then go home and return to work in time to do the 10:00 p.m. newscast.<sup>234</sup> Ms. Zatarain requested that she be allowed to work this reduced schedule for a four-month period.<sup>235</sup> She also offered to do a series of special reports on infertility.<sup>236</sup>

WDSU did not agree to the arrangement proposed by Ms. Zatarain and did not renew her personal services contract, which had expired the previous month.<sup>237</sup> Ms. Zatarain brought suit against WDSU alleging that her discharge violated the ADA.<sup>238</sup> As in *Pacourek*, the defendant claimed that infertility or a reproductive disorder did not qualify as a disability under the ADA.<sup>239</sup>

### *Analysis of the ADA Claim*

The court began its analysis of Zatarain's claim by examining the impairment prong of the ADA disability definition.<sup>240</sup> In its effort to show that Ms. Zatarain did not have a physiological impairment, WDSU argued that Ms. Zatarain's condition merely implicated stress or age.<sup>241</sup> They asserted that neither job-related stress nor age is a physiological impairment; therefore Ms. Zatarain was not disabled.<sup>242</sup> The court rejected WDSU's asser-

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232. *Id.* at 242.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 242-43.

241. *Id.* at 242. Ms. Zatarain was nearly 40 years old when she began the fertility treatments. *Id.* at 242 n.1. Her doctor testified during a deposition that her "biological clock had almost ticked." *Id.*

242. *Id.* at 243. WDSU relied on EEOC regulations stating that advanced age is not in itself an impairment and that general stress relating to a job or personal life

tion, instead accepting Ms. Zatarain's doctor's testimony that although the exact cause of her infertility was unknown, Ms. Zatarain suffered from a "disorder of the reproductive system . . . separate and apart from age and stress."<sup>243</sup> Ms. Zatarain thus met the ADA definition of impairment.<sup>244</sup>

The court next examined whether Ms. Zatarain's impairment substantially limited a major life activity.<sup>245</sup> Ms. Zatarain relied on *Pacourek* and asserted that reproduction is a major life activity.<sup>246</sup> The court, however, did not find *Pacourek* dispositive.<sup>247</sup>

In declining to classify reproduction as a major life activity, the court reasoned that a "major life activity . . . [must be] separate and distinct from the impairment that limits it. Plaintiff's construction is faulty because it would allow her to bootstrap a finding of substantial limitation of a major life activity on to a finding of an impairment. . . . This analysis is circular and unpersuasive."<sup>248</sup> Additionally, the court reasoned that considering reproduction to be a major life activity was "inconsistent with the illustrative list of major life activities provided in the ADA regulations . . . [as] [r]eproduction is not an activity engaged in with the same degree of frequency as the listed activities of walking, seeing, speaking, breathing, learning, and working."<sup>249</sup> Though a person is "required to walk, see, learn, speak, breath [sic], and work throughout the day, day in and day out . . . [a] person is not called upon to reproduce throughout the day, every day."<sup>250</sup> Therefore, based on a review of the illustrative list of major life activities, the court concluded that finding reproduction to be a major life activity would be a "conscious expansion of the law."<sup>251</sup> After concluding that the major life activity of working was not substantially limited by her infertili-

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pressures is also not an impairment. See *id.* at 242-43, nn.1-2.

243. *Id.* at 243.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

ty, the court dismissed Ms. Zatarain's ADA claim.<sup>252</sup>

### RECOGNITION OF INFERTILITY AS A DISABILITY

In light of the conflicting decisions of *Zatarain* and *Pacourek*, it is impossible to predict on which side of the infertility-disability question the next case may fall.<sup>253</sup> As the incidence of infertility increases and new reproductive technology affords increasing numbers of infertile couples the opportunity to conceive children, the EEOC must issue definitive guidance. Without that guidance, employees will be at the mercy of unpredictable courts attempting to restrict the broad language of the ADA to preclude nontraditional disabilities such as infertility. Moreover, employers will be forced to litigate claims in order to determine the nature of their responsibilities under the ADA.

When formulating guidance to address these concerns, the EEOC should reject *Zatarain's* finding that reproduction is not a major life activity. The rejection would be supportable given that *Zatarain* ignored crucial aspects of the ADA regulations, interpretive guidelines issued by the EEOC, the legislative history of the ADA, and precedent under analogous provisions of the Rehabilitation Act. *Zatarain* likewise ignored the importance of procreation in our society when it interpreted the major life activity prong.

#### *The ADA Regulations and Reproduction As a Major Life Activity*

In holding that reproduction is not a major life activity, and thus that infertility is not a disability, *Zatarain* overlooked

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252. See *id.* at 243-45.

253. Several months after *Zatarain*, two courts again split on the issue of whether infertility qualifies as a disability under the ADA. Compare *Erickson v. Northeastern Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995) with *Krauel v. Iowa Methodist Medical Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995). *Krauel*, relying on *Zatarain*, refused to recognize reproduction as a major life activity. See *Krauel*, 915 F. Supp. at 108. The court distinguished reproduction from the listed major life activities because reproduction is a "lifestyle choice[]." *Id.* at 106. The court supported its holding with the statement: "Some people choose not to have children, but all people . . . walk, see, hear, speak, breathe, learn, and work . . ." *Id.* at 106 n.1. Conversely, the court in *Erickson* held that reproduction is a major life activity under the ADA, rejecting *Zatarain's* analysis. See *Erickson*, 911 F. Supp. at 323.



crucial aspects of the ADA regulations and of EEOC interpretive guidelines. First, *Zatarain* criticized as "circular" the argument that an impairment to the reproductive system could "substantially limit" the major life activity of reproduction.<sup>254</sup> The court reasoned that "the structure of the ADA and its regulations indicate that the major life activity . . . allegedly limited is separate and distinct from the impairment that limits it."<sup>255</sup>

Contrary to the court's observation, however, two elementary examples suggest that an impairment and a major life activity need not be separate and distinct. For example, a person who has a hearing impairment may be substantially limited in the major life activity of hearing. Additionally, a person who has a vision impairment may be substantially limited in the major life activity of seeing. In both instances the impairment and the major life activity are inseparable. Nevertheless, depending on the severity of the impairment, both are recognized disabilities under the ADA.<sup>256</sup>

Moreover, the EEOC has implicitly endorsed "circular analysis." In its March 1995 Compliance Manual, used by the EEOC when investigating charges of discrimination under the ADA, the EEOC noted: "There has been little controversy about what constitutes a major life activity. In most cases, courts have simply stated that an impaired activity is a major life activity."<sup>257</sup> Given this statement, the EEOC could easily reject *Zatarain's* criticism. A reproductive disorder is not required to impair an activity other than the major life activity of reproduction. Indeed, *Pacourek*<sup>258</sup> may have appropriately concluded that if reproduction were not a major life activity, "it would have made no sense to include the reproductive system among the systems that can have an ADA physical impairment."<sup>259</sup>

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254. *Zatarain*, 881 F. Supp. at 243.

255. *Id.*

256. See, e.g., *Sawinski v. Bill Currie Ford, Inc.*, 881 F. Supp. 1571, 1573 (M.D. Fla. 1995) (holding that a deaf employee was disabled under the ADA); *Galloway v. Superior Court*, 816 F. Supp. 12, 19 (D.D.C. 1993) (holding that excluding blind persons from a jury violated the ADA).

257. EEOC COMPLIANCE MANUAL, *supra* note 86, at 902-14.

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

259. *Id.* at 1404.

The second reason *Zatarain* rejected reproduction as a major life activity was because the court found that reproduction was inconsistent with the illustrative list of activities because it was an activity occurring with less frequency than walking, seeing, or breathing.<sup>260</sup> Neither the ADA nor the EEOC regulations, however, expressly or implicitly require that a major life activity be engaged in with any degree of frequency.<sup>261</sup> Nevertheless, even if frequency were a touchstone, viewing reproduction as a continual process involving complex biological processes, rather than viewing it as the single act of conception, would satisfy *Zatarain's* "frequency" requirement.<sup>262</sup> In the female reproductive system, hundreds of eggs mature each month in response to complex hormonal signals from the brain, and in the male reproductive system, millions of sperm are produced every day.<sup>263</sup> Both processes are continual; thus the process of reproduction is engaged in on a daily basis.

Although *Zatarain* examined the illustrative list of major life activities to support its reasoning, it did not review the specific exclusions under the ADA. Had the court chosen to do so, it could have concluded that infertility was inconsistent with those excluded conditions.

In excluding conditions such as homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, compulsive gambling, kleptomania, and pyromania from the definition of disability,<sup>264</sup> Congress was concerned that the ADA would protect individuals from discrimination on the basis

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260. *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

261. See 42 U.S.C. § 12102(2)(A) (1994); 29 C.F.R. § 16302(i) (1995).

262. In finding that reproduction is a major life activity, at least two courts have refused to view reproduction in this narrow sense. See *Abbott v. Bragdon*, 912 F. Supp. 580, 586 (D. Me. 1995) (limiting reproduction to conception ignores the "process of raising and caring for offspring upon which successful reproduction depends"); *Erickson v. Northeastern Ill. Univ.*, 911 F. Supp. 316, 322 (N.D. Ill. 1995) (reasoning that *Zatarain's* view ignores the "processes that occur continually in both male and female reproductive systems in order to achieve conception"). The medical definition contemplates a much broader view of reproduction as well. See *STEDMAN'S MEDICAL DICTIONARY* 1344 (25th ed. 1990) (defining reproduction as the "total process" by which organisms produce offspring).

263. See *BELLINA & WILSON*, *supra* note 116, at 33-34, 63.

264. See 42 U.S.C. §§ 12208, 12211 (1994).

of a variety of socially unacceptable, immoral, and often illegal behaviors.<sup>265</sup> Infertility does not call into question any of these concerns. Recognizing reproduction as a major life activity thus would not undermine Congress's intent to disallow conditions that are socially, morally, or legally unacceptable.

*Legislative History and Judicial Interpretation of Reproduction As a Major Life Activity Under the ADA*

Notwithstanding the fact that reference to the statutory provisions and administrative guidance undermine support of *Zatarain's* arguments, the court additionally failed to consider the legislative history of the ADA. Although using legislative history as an interpretive tool has been criticized,<sup>266</sup> the Supreme Court continues to rely on legislative history to guide its statutory analysis.<sup>267</sup>

A review of the legislative history of the ADA reveals some discussion of reproduction, or, more specifically, procreation, as a major life activity. The references arise in those instances in

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265. See, e.g., 135 CONG. REC. S10,796 (daily ed. Sept. 7, 1989) (statement of Sen. Rudman):

[W]e are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand. Where we as a people have through a variety of means, including our legal code, expressed disapproval of certain conduct, I do not understand how Congress can create the possibility that employers are legally liable for taking such conduct into account when making employment-related decisions.

266. See, e.g., Peter H. Carroll III, *Literalism, The United States Supreme Court's Methodology for Statutory Construction in Bankruptcy Cases*, 25 ST. MARY'S L.J. 143 (1993) (discussing the Court's abandonment of legislative history and policy in discerning the meaning of a statute); Gregory E. Maggs, *The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?*, 1994 PUB. INTEREST L. REV. 57, 58 (concluding that the Supreme Court has become increasingly reluctant to "stray from statutory text"); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992) (detailing Justice Scalia's text-based approach to statutory interpretation and discussing decisions in which the Court applied this approach).

267. See, e.g., *Babbitt v. Sweet Home Chapter of Communities for a Greater Or.*, 115 S. Ct. 2407, 2416-18 (1995) (considering the legislative history of the Endangered Species Act); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1072-74 (1995) (considering the legislative history of the Securities Act of 1933).

which Congress debated whether AIDS or HIV infection was a disability under the ADA.<sup>268</sup> Though analogizing infertility to a fatal disease is pointless, the importance of the debate lies with the interpretation of "major life activity" given by Congress in concluding that AIDS or HIV infection is a disability.

After debating the issue, Congress concluded that AIDS or HIV infection is covered under the ADA.<sup>269</sup> As part of the ADA legislative history, a House Education and Labor Committee Report specifically states that HIV infection is an ADA disability because of a "substantial limitation to *procreation* and intimate sexual relationships."<sup>270</sup> The Report also cites a memorandum issued by the Department of Justice regarding the applicability of the Rehabilitation Act to HIV-infected individuals.<sup>271</sup> In part, that memorandum provides:

[I]t is reasonable to conclude that the life activity of procreation—the fulfillment of the desire to conceive and bear healthy children—is substantially limited for an asymptomatic HIV-infected individual . . . . HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child. Because of the infection in their system, they will be unable to fulfill this basic human desire. *There is little doubt that procreation is a major life activity . . . .*<sup>272</sup>

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268. See, e.g., H.R. REP. NO. 485, *supra* note 20, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); *id.* at H4626 (statement of Rep. Waxman).

269. See H.R. REP. NO. 485, *supra* note 20, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334 (stating that a person infected with the Human Immunodeficiency Virus is covered under the definition of the term "disability"); 136 CONG. REC. H4623, *supra* note 268 (statement of Rep. Owens) ("People with HIV disease are individuals who have any condition along the full spectrum of HIV infection—asymptomatic HIV infection, symptomatic HIV infection or full blown AIDS. These individuals are covered under the definition of disability in the ADA"); *id.* at H4626 (statement of Rep. Waxman) ("[T]here exists a continuum of disease among those who are HIV infected. All such individuals are covered under the . . . definition of disability in the ADA.").

270. H.R. REP. NO. 485, *supra* note 20 at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334 (emphasis added).

271. *Id.*

272. *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 347-48 (1989) (emphasis added).

The EEOC cites this same memorandum with approval in its Compliance Manual.<sup>273</sup> Though some may consider legislative history suspect, the interpretation given by the agency charged with administering a statute must receive "substantial deference."<sup>274</sup> Thus, a determination that reproduction is a major life activity coincides with both the legislative history of the ADA and the EEOC's own interpretation of "major life activity."

In addition to the legislative history, the limited case law construing "major life activity" as it applies to the ADA also coincides with a finding that reproduction or procreation is a major life activity. The case of *Doe v. Kohn Nast & Graf, P.C.*<sup>275</sup> is illustrative.

In *Kohn Nast & Graf, P.C.*, an HIV-infected attorney brought an ADA action against his employer alleging that he was terminated because of his infection.<sup>276</sup> Defendants moved for summary judgment, asserting that the plaintiff's condition was not "disabling."<sup>277</sup> Plaintiff argued that the ability to procreate without uninfected progeny was a major life activity under the ADA, thus bringing him within the protection of the statute.<sup>278</sup> Defendants argued that to find that HIV qualified as a condition covered under the ADA would "stretch the language and the purpose of the statute beyond the breaking point."<sup>279</sup> Quite simply, the plaintiff was not "hired to practice procreation."<sup>280</sup>

After concluding that the plaintiff suffered from an "impairment" because HIV is a disorder which affects the hemic and lymphatic systems, the court examined the "major life activity" requirement.<sup>281</sup> The court focused primarily on whether the activity affected must be one associated with work.<sup>282</sup> In that regard, the court deemed it "significant that the Congress chose to

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273. See EEOC COMPLIANCE MANUAL, *supra* note 86, at 902-14 n.18.

274. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386 (1994).

275. 862 F. Supp. 1310 (E.D. Pa. 1994).

276. *Id.* at 1313.

277. *Id.* at 1318.

278. *Id.*

279. *Id.* at 1319.

280. *Id.* at 1318.

281. *Id.* at 1319-20.

282. *Id.* at 1320.

use the broad term 'life,' as in: 'major *life* activities,'" rather than "work" or "work-life."<sup>283</sup> Because the statute chose the term "major life activity" rather than "major work activity," the court concluded that the argument that plaintiff's HIV status did not affect his ability to perform his work was without merit.<sup>284</sup> Simply put, "the language of the statute does not preclude procreating as a major life activity."<sup>285</sup>

In the more recent case of *Abbott v. Bragdon*,<sup>286</sup> the U.S. District Court for the District of Maine considered the question of whether HIV is a disability under Title III (public accommodations and services) of the ADA.<sup>287</sup> In *Abbott*, the plaintiff alleged that the defendant, a dentist, refused to treat her because she was HIV-positive.<sup>288</sup> She asserted that reproduction was the sole activity limited in that the "risk of transmitting HIV to a potential child . . . deterred her from having children."<sup>289</sup> On a motion for summary judgment, the defendant disputed that asymptomatic HIV is a disability under the ADA.<sup>290</sup> Concluding that the plaintiff was disabled as a matter of law, the court found *Zatarain* unpersuasive.<sup>291</sup>

Specifically, the court agreed with *Kohn Nast & Graf, P.C.*, deeming it significant that Congress chose the term "major life activities" rather than a more limited term.<sup>292</sup> The court also found that the "broad language" of the ADA and the interpretative guidelines illustrated that the major life activities were not limited to those listed.<sup>293</sup> Moreover, the court noted that the "interests in conceiving and raising one's own children have been recognized as essential and basic civil liberties"<sup>294</sup> and that reproduction is "one of the most fundamental of human activi-

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283. *Id.* (emphasis added).

284. *Id.*

285. *Id.*

286. 912 F. Supp. 580 (D. Me. 1995).

287. *Id.*

288. *See id.* at 583-84.

289. *Id.* at 586.

290. *Id.* at 584.

291. *Id.* at 586.

292. *Id.*

293. *Id.*

294. *Id.*

ties."<sup>295</sup> The court thus concluded that reproduction qualified as a major life activity under the ADA.<sup>296</sup>

As the legislative history, *Kohn Nast & Graf, P.C.*, and *Abbott* reveal, restrictively interpreting "major life activity" is not supportable. If Congress intended to recognize reproduction as a "major life activity" solely for the purpose of recognizing AIDS as a disability, it would have said so. Cases decided under analogous provisions of the Rehabilitation Act of 1973 are likewise inconsistent with such a restrictive approach.

### *"Major Life Activity" Under the Rehabilitation Act*

For purposes of interpreting the term "disability" under the ADA, Congress intended that cases decided under analogous provisions of the Rehabilitation Act provide guidance.<sup>297</sup> Specifically, in discussing the definition of "major life activities" under the ADA, EEOC regulations provide that "[t]his term adopts the definition of the term 'major life activities,' found in the regulations implementing section 504 of the Rehabilitation Act . . . ."<sup>298</sup> If the Rehabilitation Act recognized reproduction as a "major life activity," that term must likewise qualify as a "major life activity" under the ADA. The early AIDS discrimination cases, again, are instructive; they demonstrate a consensus that reproduction or procreation is a major life activity.

In *Doe v. Dolton Elementary School District No. 148*,<sup>299</sup> the parents of a child infected with HIV brought an action against the school district seeking a preliminary injunction requiring the school to permit the child to attend regular classes.<sup>300</sup> In granting injunctive relief, the court gave an expansive reading to the term "major life activity":

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295. *Id.*

296. *Id.*

297. See H.R. REP. NO. 485, *supra* note 20, at 50, reprinted in 1990 U.S.C.C.A.N. at 332 ("It is the Committee's intent that the analysis of the term 'individual with handicaps' by the Department of Health, Education, and Welfare of the regulations implementing section 504 [of the Rehabilitation Act] . . . apply to the definition of the term 'disability' included in this legislation.").

298. 29 C.F.R. § 1630.2(i) (1995).

299. 694 F. Supp. 440 (N.D. Ill. 1988).

300. *Id.* at 442.

[The child's] physiological disorders substantially limit [his] major life activities . . . . His involvement in contact sports is limited to that of an observer, forcing him to sit on the side while his classmates engage in these activities. Also, he may not engage in reproductive functions without endangering the lives of others. While [he] may not yet be of an age where such activity is appropriate, the mere prospect of such a limitation is certain to restrict social interaction with those of the opposite sex.<sup>301</sup>

In the factually similar case of *Thomas v. Atascadero Unified School District*,<sup>302</sup> the U.S. District Court for the Central District of California granted a permanent injunction against a school district that wanted to prevent a young HIV-infected child from attending kindergarten classes.<sup>303</sup> Though the child was too young to engage in sexual activity, the court reasoned: "Persons infected with the AIDS virus suffer significant impairments of their major life activities . . . . Even those who are asymptomatic have abnormalities . . . making procreation and childbirth dangerous to themselves and others."<sup>304</sup> Thus, the court concluded that the child was a handicapped individual and was, therefore, protected by the Rehabilitation Act.<sup>305</sup>

In *Doe v. District of Columbia*,<sup>306</sup> a more recent case in accord with the others, the plaintiff was HIV-positive and alleged that the District of Columbia violated the Rehabilitation Act by withdrawing an offer of employment when it learned of his HIV-positive status.<sup>307</sup> The District of Columbia did not dispute that Doe was an individual with a handicap, and the court held that Doe's physical impairment substantially limited the major life activities of "procreation, sexual contact, and normal social relationships."<sup>308</sup> These cases demonstrate with unanimity that

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301. *Id.* at 445.

302. 662 F. Supp. 376 (C.D. Cal. 1987).

303. *Id.* at 381-82.

304. *Id.* at 379.

305. *Id.* at 381.

306. 796 F. Supp. 559 (D.D.C. 1992).

307. *Id.* at 569.

308. *Id.* at 568. The holding was cited with approval in a magistrate's report and recommendation two years later in the same district. See *Liff v. Secretary of*



reproduction is a major life activity under the Rehabilitation Act. In holding that reproduction is not a major life activity under the ADA, *Zatarain* ignored the congressional and EEOC mandates that the Rehabilitation Act and any cases interpreting its provisions be used as interpretative tools under the ADA. Once more, the EEOC could easily reject *Zatarain's* restrictive interpretation of major life activity.

### *Supreme Court and Congressional Recognition of "Reproductive Rights"*

As demonstrated, *Zatarain's* rejection of reproduction as a major life activity is questionable based on the legislative history of the ADA, statutory provisions, and EEOC interpretive guidelines. The Court's rejection is equally unfounded given judicial and congressional recognition of an individual's right to conceive children.<sup>309</sup> Procreation, unlike the recognized major life activities such as performing manual tasks, sitting, or standing, is one of constitutional import and given statutory protection.<sup>310</sup>

Beginning with *Skinner v. Oklahoma*,<sup>311</sup> the Supreme Court has held, in a number of settings, that what may be broadly termed "reproductive rights" are protected by the Constitution. In *Skinner*, the Court held that an Oklahoma statute permitting sterilization of those individuals who were convicted of larceny but not those convicted of embezzlement violated the Equal Protection Clause.<sup>312</sup> Justice Douglas wrote: "This case touches a[n] . . . important area of *human rights*. Oklahoma deprives certain individuals of a *right* which is basic to the perpetuation

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Transp., No. CIV.A.93-0118 TFH/DAR, 1994 WL 579912, at \*5 (D.D.C. Sept. 22, 1994) (stating that "this court has expressly held that 'major life activities' include such non-work related activities as 'procreation, sexual contact, and normal social relationships'") (citing *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992)). The magistrate's report subsequently was adopted by the district court. See *Liff v. Secretary of Transp.*, No. CIV. 93-0118 TFH/DAR, 1995 WL 231246, at \*1 (D.D.C. Feb. 21, 1995).

309. See *supra* notes 275-96 and accompanying text.

310. See *Abbott v. Bragdon*, 912 F. Supp. 580, 586 (D. Me. 1995) (holding that reproduction constitutes a major life activity under the ADA); *Erickson v. Northeastern Ill. Univ.*, 911 F. Supp. 316, 321 (N.D. Ill. 1995) (holding the same).

311. 316 U.S. 535 (1941).

312. *Id.* at 541-43.

of a race—the *right to have offspring*.<sup>313</sup>

Almost thirty years later, in *Eisenstadt v. Baird*,<sup>314</sup> the Court struck down a Massachusetts statute prohibiting the sale of contraceptives to single persons.<sup>315</sup> Writing for the Court, Justice Brennan stated: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>316</sup>

Two recent cases also emphasize the importance of “reproductive rights.” In *Hodgson v. Minnesota*,<sup>317</sup> the Court held that a Minnesota statute requiring parental notification of a minor’s abortion decision was unconstitutional.<sup>318</sup> The importance of procreative liberty is evidenced by two statements written by Justice Kennedy: “A woman’s decision to conceive or to bear a child is a component of her liberty that is protected by the . . . Constitution.”<sup>319</sup> “The rights to conceive and to raise one’s children have been deemed ‘essential,’ ‘basic civil rights of man,’ and, ‘[r]ights far more precious . . . than property rights.’”<sup>320</sup> More recently, in *Casey v. Planned Parenthood*,<sup>321</sup> the Court reiterated: “[o]ur law affords constitutional protection to personal decisions relating to marriage, *procreation*, contraception, family relationships, child rearing, and education.”<sup>322</sup>

In addition to the constitutional mandate prohibiting government infringement upon this right, the trend has been to enact legislation recognizing certain “reproductive rights” as well. In 1978, Congress enacted the Pregnancy Discrimination Act<sup>323</sup>

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313. *Id.* at 536 (emphasis added).

314. 405 U.S. 438 (1971).

315. *Id.* at 446-52.

316. *Id.* at 453 (citations omitted).

317. 497 U.S. 417 (1990).

318. *Id.* at 423.

319. *Id.* at 434.

320. *Id.* at 447 (citations omitted).

321. 505 U.S. 833 (1992).

322. *Id.* at 851 (citation omitted) (emphasis added).

323. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1994)). This section provides:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related

(PDA) in response to a Supreme Court decision<sup>324</sup> holding that Title VII of the Civil Rights Act of 1964,<sup>325</sup> prohibiting sex discrimination in employment, did not ban pregnancy discrimination.<sup>326</sup> The PDA effectively recognized that a woman has a right to reproduce. The statute ensured that exercising that right cannot form the basis of discriminatory employment practices.<sup>327</sup>

The Family and Medical Leave Act enacted by Congress in 1993 demonstrates a similar understanding.<sup>328</sup> Finding that "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting,"<sup>329</sup> Congress mandated that employers allow eligible employees leave from work to care for a newborn child.<sup>330</sup> This mandate inherently recognizes certain "reproductive rights"—such as an individual's rights to conceive a child and to raise a family.

medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. §2000e(k) (1994).

324. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

325. 42 U.S.C. § 2000e-17.

326. *Gilbert*, 429 U.S. at 145-46.

327. 42 U.S.C. § 2000e(k).

328. Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 2 U.S.C. §§ 60m, 60n; 5 U.S.C. §§ 2105, 6381-6387; 40 U.S.C. § 166b-7; and scattered sections of 29 U.S.C. (1994)).

329. 29 U.S.C. § 2601(a)(3) (1994).

330. *Id.* § 2612 (a)(1)(A)-(C). An "eligible employee" is an employee who has worked for the employer for at least 12 months, giving at least 1250 hours of service to the employer during the previous 12-month period. *Id.* § 2611(2)(A)(i)-(ii). An "eligible employee" does not include "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." *Id.* § 2611(2)(B)(ii).

Although none of these statutory provisions or cases specifically address the right of infertile couples to reproduce, at bottom they embrace one undeniable principle: reproduction is a fundamental human right. As at least one court has explained, "[i]t takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included . . . the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."<sup>331</sup>

To find that reproduction cannot be a major life activity, though it warrants constitutional and statutory protection, is disingenuous. Recognition of reproduction as a major life activity would properly invoke the Supreme Court's and Congress's traditional recognition of reproduction as a fundamental right. *Zatarain* was short-sighted in its failure to do so. Moreover, finding that reproduction is not a major life activity creates a chilling effect on an infertile woman's right to bear a child. Faced with the prospect of being fired from her job, a woman may forego the opportunity that modern technology offers her. Recognizing that reproduction is a major life activity under the ADA gives substance to an infertile woman's right to reproduce.

### CONCLUSION

Congress enacted the ADA to protect millions of disabled persons from discrimination. Congress explicitly refused to adopt a definitive listing of disabilities, implicitly acknowledging that the term "disability" could be broadly construed to encompass either new or nontraditional disabilities.<sup>332</sup> Although the EEOC has identified infertility as one of the "tough issues" under the ADA,<sup>333</sup> *Zatarain's* restrictive analysis is insupportable.

Specifically, *Zatarain's* elimination of reproduction as a "major

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331. *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990).

332. See *supra* notes 56-59 and accompanying text; see also *School Bd. v. Arline*, 480 U.S. 273, 280 n.5 (1987) (noting that the definition of disability under the Rehabilitation Act is a "broad definition, one not limited to so-called 'traditional handicaps'") (citation omitted).

333. *Key Disability Interpretations Await Confirmation of Three EEOC Commissioners*, Daily Lab. Rep. (BNA) No. 188, at D13 (Sept. 30, 1994), available in LEXIS, Employ Library, Dlabrt File.

life activity" is inconsistent with a reasoned interpretation of the ADA and its implementing regulations. Although reproduction is not expressly listed as a major life activity in the regulations, this absence does not mean that reproduction cannot, in fact, qualify as a major life activity under the ADA. The list of major life activities is merely illustrative, not exhaustive.<sup>334</sup>

Moreover, frequency cannot be the touchstone for finding that an activity is a major life activity and, even assuming that it were, viewing reproduction as a continual process rather than the single act of conception satisfies this requirement. Additionally, requiring the major life activity and impairment to be separate and distinct means that persons who are blind or deaf would be excluded from the ADA's protection, a result that undoubtedly is at odds with what Congress intended when it enacted the ADA.

*Zatarain's* holding likewise ignores the legislative history of the ADA and Congress's finding that reproduction is a major life activity for those infected with HIV. Cases such as *Doe v. Kohn Nast & Graf, P.C.*<sup>335</sup> and *Abbott v. Bragdon*<sup>336</sup> coincide with Congress's intent, and emphasize the fact that Congress chose the broad term major "life" activity.

Rejecting reproduction as a major life activity also runs contrary to the majority of courts that have addressed the issue under the Rehabilitation Act.<sup>337</sup> Again, in the HIV context, courts have construed broadly the term major life activity to encompass activities such as "reproductive functions,"<sup>338</sup> "procreation and childbirth,"<sup>339</sup> and "sexual contact and normal social relationships."<sup>340</sup> *Zatarain's* failure to recognize this view is contrary to Congress's express mandate that the Rehabilitation Act provisions guide courts in their interpretations of the

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334. See 29 C.F.R. § 1630.2(i) (1995).

335. 862 F. Supp. 1310 (E.D. Pa. 1994).

336. 912 F. Supp. 580 (D. Me. 1995).

337. See *supra* notes 299-308 and accompanying text.

338. *Doe v. Dolton Elementary Sch. Dist.* No. 148, 694 F. Supp. 440, 444 (N.D. Ill. 1988).

339. *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 379 (C.D. Cal. 1987).

340. *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992).

ADA requirements.

Perhaps more importantly, *Zatarain's* conclusion that reproduction is not a major life activity runs contrary to the long-standing acceptance of reproduction as a fundamental human right.<sup>341</sup> The Supreme Court and Congress have both recognized the importance of reproduction in people's lives.<sup>342</sup> In *Zatarain*, the court frustrated the achievement of those rights for those who suffer from infertility, yet wish to bear children and maintain a career.

Infertility touches the lives of millions of couples. For those who are in the work force, the words "[i]f God had wanted you to have children, . . . he would have given them to you"<sup>343</sup> are insensitive and callous. They are not, however, illegal. On the other hand, if an employer refuses to modify a work schedule or allow an employee time away from work, or if the employer terminates the employee or caps insurance benefit plans for infertility treatment while providing unlimited coverage for other conditions, the ADA protects the employee.

To prevent such divergent views as *Pacourek* and *Zatarain*, the EEOC must issue administrative guidelines. By adopting *Pacourek's* holding and the case law developed under the Rehabilitation Act, the EEOC would send a message that the lay opinion of a "disability" cannot be the touchstone for courts interpreting the ADA. In short, a "disability" under the ADA is what Congress has said it is—a broadly defined statutory requirement transcending the lay view of a disability and encompassing nontraditional disabilities such as infertility.

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341. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (listing personal rights protected by the Fourteenth Amendment); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) (holding that the right of privacy includes the right to make decisions concerning procreation free of governmental interference); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1941) (holding that procreation is "a fundamental right").

342. See *Casey*, 505 U.S. 833; *Eisenstadt*, 405 U.S. 438; *Skinner* 316 U.S. 595; *supra* notes 270-96 and accompanying text.

343. Holmes, *supra* note 193, at A10 (quoting remarks allegedly made by a manager at Inland Steel to Charline Pacourek).