

Spring 2002

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Recommended Citation

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GENETICALLY DEFECTIVE: THE JUDICIAL INTERPRETATION OF THE AMERICANS WITH DISABILITIES ACT FAILS TO PROTECT AGAINST GENETIC DISCRIMINATION IN THE WORKPLACE

BRIAN M. HOLT*

*"We're all mutants... [e]verybody is genetically defective."
Michael M. Kaback¹*

INTRODUCTION

In the 1800's geneticists believed that feeblemindedness, criminality, and prostitution were the result of genetic defects.² Laws were passed to prevent genetically defective individuals from reproducing.³ Based on testimony that the United States' gene pool was in danger, Congress set immigration limits in 1924.⁴ As recent as the 1970's, African Americans were subjected to employment discrimination based on their status as sickle cell anemia carriers.⁵ This last example of genetic discrimination is distinguishable from the earlier forms of genetic discrimination because the law promoted the early forms of genetic discrimination⁶ while the absence of law promulgated the more recent form.⁷ Genetic discrimination is a fixture in American

* J.D. Candidate, June 2003. The author is grateful to George Pain for providing valuable insight, Sarah Lindley and the Editorial Board for their excellent editorial assistance, Travis Holt for challenging his ideas, and Al Holt, Sandy Holt, Derek Holt and the soon to be Rebecca Holt for their support and encouragement.

1. John Rennie, *Grading the Gene Tests*, SCI. AM., June 1994, at 88, 90-91. Michael Kaback is a professor and Chief M.D. in the Medical Genetics Division at the University of California at San Diego and a pioneer in population screening. *Id.* at 90.

2. LORI B. ANDREWS, *FUTURE PERFECT: CONFRONTING DECISIONS ABOUT GENETICS* 19 (Columbia University Press 2001).

3. *Id.*

4. *Id.* at 21.

5. *Id.* at 135.

6. See Andrews, *supra* note 2, at 19-21 (explaining that laws were passed in order to protect the gene pool).

7. See Andrews, *supra* note 2, at 135 (describing employment discrimination against African American applicants carrying the sickle cell

history and, with the passage of anti-discrimination laws and the enlightenment of society, one would hope it remains there. However, unless current laws are amended to extend legal protection in the wake of rapid genetic advancements, genetic discrimination will be a part of the American future.

This Comment examines the advancement in genetic technology and its potential misuse by way of employment discrimination. This Comment will then discuss the lack of adequate protection due to court-imposed limitations on existing law. Finally, because one's genetic-makeup is as uncontrollable as one's race or gender, this Comment proposes that an amendment to Title VII of the Civil Rights Act is the only appropriate means of protecting against employment related genetic discrimination.

I. ANTI-DISCRIMINATION LAWS CAUGHT IN THE WAKE OF GENETIC TECHNOLOGY

A. Genetic Technology

Genes contain the instructions for human development.⁸ Genetic research has existed for more than a century;⁹ however, the Humane Genome Project ("HGP") significantly advanced the development of gene research in recent years.¹⁰ The HGP hoped to develop and publish a complete sequence of the human genome¹¹

mutation).

8. Genes are strand of deoxyribonucleic acid (DNA). ANTHONY J.F. GRIFFITHS ET AL., AN INTRODUCTION TO GENETIC ANALYSIS 2 (W.H. Freeman & Co. 5th ed. 1993) (1976). DNA is the hereditary material passed from one generation to the next, dictating the species' inherent properties. *Id.* DNA is composed of four basic molecules: Adenine, Guanine, Cytosin, and Thymine (A,G,C,and T). *Id.* at 307. These molecules store the information for all the protein primary structures. *Id.* An end-to-end arrangement of genes form a chromosome. *Id.* at 785.

9. *Id.* at 2. Gregor Mendel, an Augustinian monk, discovered the biological elements called genes in the 1860s. *Id.*

10. The Human Genome Project ("HGP") is an international body of scientists founded by the U.S. Department of Energy and the National Institute of Health. U.S. Department of Energy Office of Science, Office of Biological and Environmental Research, *Humane Genome Project Information*, at <http://www.ornl.gov/hgmis> (last visited Jan. 10, 2002). The Project was founded in 1990 to identify the 50,000 to 100,000 genes in human DNA and the approximately three billion base pairs that comprise each gene. *Id.* The project has provided the most significant advances in genetic research to date. Some of the project's goals include early disease diagnosis, detection of genetic predispositions, and developing an adequate defense to biological and chemical warfare. *Id.* Thus far the Project has successfully deciphered sequences for Chromosomes 5, 16, 19, 21, and 22. *Id.*

11. A genome is an entire complement of genetic material in a chromosome set. GRIFFITHS ET AL., *supra* note 8, at 789.

by 2005.¹² However, by June 2000 the project was two years ahead of schedule and published its first rough draft in February 2001.¹³

Scientists believe that many diseases, whether inherited or as a result of an environmental response, have a genetic component.¹⁴ An error during cell division, or gene mutation, can contribute to disease development.¹⁵ Armed with this knowledge, the HGP's research is primarily centered on the relationship between genes and diseases.¹⁶

Genetic research will play an important role in early disease diagnosis, detection of genetic predispositions to disease, and gene therapy.¹⁷ Scientists have located several gene mutations associated with diseases and disorders.¹⁸ Individuals bearing a gene marker are genetically predisposed to a disease or disorder.¹⁹

However, there are some limitations to genetic testing. An accurate gene test can only determine whether an individual has a disease-related mutation.²⁰ Some people with the mutation will

12. See source cited *supra* note 10.

13. The draft sequence contained approximately 90% of the humane genome; the remaining gaps will be filled in during the next three years. See *supra* note 10. A genome is an organism's complete set of DNA. GRIFFITHS ET AL., *supra* note 8, at 789.

14. See ANDREWS, *supra* note 2, at 11 (stating that doctors once thought microorganisms were responsible for all human ailments - they now blame genes).

15. The most common gene mutation involves mistakes in copying the gene sequence, i.e., a single "misspelling." LAURALEE SHERWOOD, HUMAN PHYSIOLOGY: FROM CELLS TO SYSTEMS app. B13 (West Publishing Co. 2d ed. 1993) (1989). Enzymes that remove the "misspelling" and allow normal base pairing to continue correct most, but not all, mistakes. *Id.* at B14.

16. See U.S. Department of Energy Office of Science, Office of Biological and Environmental Research, *Potential Benefits of Human Genome Project Research*, at <http://www.ornl.gov/hgmis> (last visited Jan. 10, 2002) (listing the many areas of disease research conducted by the Humane Genome Project).

17. The project expects the benefits to extend to molecular medicine (disease diagnosis, detection of genetic predisposition, etc.), microbial genomics (energy sources, environmental monitoring, toxic waste cleanup), risk assessment (risks caused by exposure to radiation and mutagenic chemicals), bioarcheology (the study of evolution through germ line mutations), DNA forensics (used for criminal identification and matching organ donors with recipients), and applications in agriculture, livestock breeding and bioprocessing (improvements in disease-resistant crops and animals). *Id.*

18. A gene marker is a variant gene that scientists use to track a specific chromosome. GRIFFITHS ET AL., *supra* note 8, at 6. A genetic marker is a landmark for a target gene, either detectable traits that are inherited along with the gene, or distinctive segments of DNA. *Id.* Genes for human diseases can be located through the use of gene markers.

19. See *supra* text accompanying note 18 (explaining the significance of a gene marker).

20. See ANDREWS, *supra* note 2, at 13 (stating that in many cases our genes only predispose us to certain traits or represent the probability that certain diseases will manifest). See also Melinda B. Kaufmann, *Genetic*

develop the disease while others will not.²¹ A genetic mutation may cause severe symptoms, mild symptoms, or no symptoms at all.²²

Despite these limitations, employers have embraced tests that detect genetic predispositions.²³ Employers recognize the

Discrimination in the Workplace: An Overview of Existing Protections, 30 LOY. U. CHI. L.J. 393, 400 (Spring 1999) (stating that most genetic tests only reveal the possibility that a person will develop a disease in the future, but not whether the individual will actually develop that disease).

21. ANDREWS, *supra* note 2, at 4. For example, it is unknown which women with the 185delAG (breast cancer gene mutation) will actually develop breast cancer and which women will not. *Id.* at 2-3. Many people with a genetic propensity for developing Alzheimer's disease never develop the disease while many who have developed Alzheimer's showed no genetic propensity towards development. *Id.* at 4.

22. *Id.* at 5.

23. As early as 1989 a survey conducted by the Office of Technology Assessment revealed a small number of Fortune 500 companies that admitted to conducting genetic tests on employees. Kaufmann, *supra* note 20, at 393-94. Fifteen percent of those surveyed indicated that they planned to use genetic testing as a condition to employment by the year 2000. *Id.* This practice has already led to discrimination against individuals based on their genetic makeup. *Id.* In 1996 a survey revealed more than 200 instances of workplace discrimination based on the detection of genetic predispositions. David J. Wukitsch, *New York's Legal Restrictions on the Employer's Collection and Use of an Employee's Genetic Information*, 9 ALB. L.J. SCI. & TECH. 39, 40 (1998). Discrimination against an individual with a genetic mutation may be wholly misplaced. *Id.* at 43. Indeed, the Executive Director for the American Society of Law and Medicine stated that:

A common misconception equates the presence of a genetic trait with actual disability, absent any demonstrated nexus between current impairment and inability to meet reasonable qualification standards. Genetic discrimination affects not only . . . (unaffected carriers) and "at risk" individuals . . . , but also persons who are asymptomatic or have a minor form of the disease.

Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, 17 AM. J.L. & MED. 109, 118 (1991). Rep. Louise M. Slaughter stated that:

As long ago as 1982, the Office of Technology Assessment studied genetic testing and monitoring in the workplace. At that time, less than two percent of firms surveyed were conducting genetic testing, but [fifteen] percent said they would possibly use the tests by 1987. A 1989 survey of 400 firms conducted by Northwestern National Life Insurance found that [fifteen] percent of companies planned, by the year 2000, to check the genetic status of prospective employees and their dependents before making employment offers. Most recently, a University of Illinois survey of [eighty-four] Fortune 500 companies showed that [thirty-five] percent used medical records—including genetic information—to make decisions about hiring, firing, and promotions.

Hearing on Genetic Information in the Workplace Before Senate Committee on Health, Education, Labor and Pensions, 106th Cong. (2000) (statement of Rep. Louise M. Slaughter, Member, Cong. Biomedical Research Caucus). More than half of 1000 large and midsize companies subjected new hires to medical examinations according to a 1999 survey. ANDREWS, *supra* note 2 at 136.

potential increase in the costs associated with workers' compensation and health benefits.²⁴ Those costs provide the employer with an incentive to locate those applicants who are more likely to develop a disability than others.²⁵ Refusing to hire unacceptably high-risk individuals may be in employers' economic interest.²⁶

Congress has been aware of the potential for genetic discrimination.²⁷ Consequently, the HGP created a program to study the ethical, legal, and social issues surrounding genetic technology.²⁸ Among the many concerns is whether an employer's use of genetic information is ethical. The Ethical, Legal, and Social Issues research team recommended the enactment of federal legislation intended to protect against the abuse of genetic information in the workplace.²⁹ Until such legislation is passed, the analysis surrounding the right of an employer to use genetic information is confined to whether current legislation provides adequate protection for job applicants with genetic predispositions.

B. *The Americans with Disabilities Act*

The Americans with Disabilities Act ("ADA")³⁰ is the only apparent protection from discrimination based on genetic predispositions. The ADA provides protection for disabled

Thirty percent of those companies obtained genetic information from examining family histories. *Id.*

24. See Mark A. Rothstein, *Genetics and the Work Force of the Next Hundred Years*, 2000 COLUM. BUS. L. REV. 371, 401 (2000) (explaining why employers are willing to engage in predictive tests).

25. *Id.*

26. Mark A. Rothstein, et al., *Protecting Genetic Privacy by Permitting Employer Access Only to Job-Related Employee Medical Information: Analysis of a Unique Minnesota Law*, 24 AM. J.L. & MED. 399, 401 (1998).

27. The Ethical, Legal, and Social Issues (ELSI) program is devoted to predicting the effects that genetic research will have on society. James M. Jeffords & Tom Daschle, *Political Issues in the Genome Era*, 291 SCIENCE 1249. Approximately five percent of the projects total funding is dedicated to ELSI. *Id.*

28. *Id.*

29. Many of the recommendations follow President Clinton's 1998 Executive Order prohibiting discrimination in federal employment based on genetic information. Exec. Order No. 13, 145, 65 Fed. Reg. 6877 (Feb. 8, 2000). The order states that:

It is the policy of the Government of the United States to provide equal employment opportunity in Federal employment for all qualified persons and to prohibit discrimination against employees based on protected genetic information, or information about a request for or the receipt of genetic services. This policy of equal opportunity applies to every aspect of Federal employment.

Exec. Order No. 13,145, 65 Fed. Reg. 6877 (Feb. 8, 2000).

30. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2001) ("ADA").

applicants who are, notwithstanding their disability, qualified to perform the essential functions of the job that they were denied.³¹ The ADA also provides protection for non-disabled applicants who were rejected from employment because their potential employer perceived them as disabled.³²

Congress passed the ADA in 1990 to assure equal opportunity for disabled Americans.³³ Congress found the existence of unfair and unnecessary discrimination and prejudice resulting in the denial of opportunity for the disabled to compete on an equal basis.³⁴ According to Congress, such discrimination had the effect of creating a social underclass of disabled Americans.³⁵

The ADA prohibits employment discrimination against qualified individuals based on the existence of a disability.³⁶ The ADA defines a disabled person as one who has “[a] physical or mental impairment that substantially limits one or more of the major life activities³⁷ of such individual; a record of such an

31. Section 12102(2)(A) of the ADA states in relevant part: “[t]he term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of lifes major activities” 42 U.S.C. § 12102(2)(A) (2001).

32. Section 12102(2)(C) of the ADA states that an individual is disabled if that individual is “being regarded as having such an impairment.” 42 U.S.C. § 12102(2)(C) (2001).

33. *Id.* § 12101.

34. The Americans with Disabilities Act states in part that:

[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . ; (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society; (9)the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous

See id. §§ 12101(a)(5), 12101(a)(7), 12101(a)(9) (2001).

35. Section 12101(a)(6) states that “census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.” 42 U.S.C. § 12101(a)(6) (2001).

36. Section 12112(a) states that the general rule is “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *See id.* § 12112(a).

37. The ADA does not provide the definition of a disability that substantially limits one or more of the major life activities. *Id.* § 12102. Courts have developed a definition on a case-by-case basis. *See Bragdon v.*

impairment; or being regarded as³⁸ having such an impairment.”³⁹

The ADA prohibits all medical examinations of an applicant prior to the extension of an offer.⁴⁰ However, an employer is free to conduct an exam once an offer is made and may condition the commencement of work on the satisfactory completion of the exam.⁴¹ The exam must be administered to all entering

Abbott 524 U.S. 624, 638-39 (1998) (stating that the ADA must be construed consistent with the Rehabilitation Act of 1973 including “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working” (quoting 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2) (1997); *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999) (stating that sleeping, engaging in sexual relations, and interacting with others are “major life activities” under the ADA). However, a somewhat helpful definition is “any physiological disorder or condition, disfigurement or anatomical loss affecting any of the major bodily systems.” Gostin, *supra* note 23, at 122. The Equal Employment Opportunity Commission (“EEOC”) has issued regulations for determining when an individual is disabled, although they do not possess the legal effect of a statute. *See infra* note 78 (listing the impairments the EEOC considers as disabling). *See also infra* note 79 (defining the phrase “substantially limits” according to the EEOC). The EEOC defines a major life activity as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(h)(2)(i) (2001).

38. Like the definition of a disability that substantially limits a major life activity, courts have also determined what constitutes a perceived disability. *See Richards v. City of Topeka*, 173 F.3d 1247, 1251 (10th Cir. 1999) (stating that an employer regards an individual as disabled when the employer erroneously believes that the individual has a substantially limiting impairment that the individual does not actually have); *Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1013 (9th Cir. 1999) (stating that an individual is perceived as having a disability if the impairment does not substantially limit work activities but is treated as having such a limitation or has a physical impairment that substantially limits major life activities only as a result of the attitude of others toward such an impairment); *Krocka v. City of Chicago*, 203 F.3d 507, 513-14 (7th Cir. 2000) (finding that in order to make out a claim pursuant to the “regarded as” clause, a covered entity must entertain misperceptions about an applicant, which take the form of either believing that an applicant has a substantially limiting impairment that he does not have or that an applicant has a substantially limiting impairment when, in fact, the impairment is not so limiting).

39. 42 U.S.C. § 12102(2)(A)(B)(C) (2001).

40. Section 12112(d)(2)(A) of the ADA states that “[e]xcept as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability”. *Id.* *See also infra* note 41 (providing the provisions of paragraph 3 of Section 12112(d)).

41. Section 12112(d)(3) of the ADA states:

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results or such examination, if (A) all entering employees are subjected to such an examination regardless of disability

42 U.S.C. § 12112(d)(3) (2001).

employees.⁴² The employer's inquiries regarding any disabilities must be job-related and consistent with a business necessity.⁴³ The employer may only make an adverse employment decision against the applicant if the applicant has a disability that limits the applicant's ability to perform job related functions.⁴⁴

The purpose of the ADA is to protect those individuals suffering from a disability, or perceived as suffering from a disability, from discrimination.⁴⁵ It is not evident from the statute whether the ADA covers those individuals not currently suffering from a disability but who are predisposed to the development of one in the future.⁴⁶ It is apparent, however, that if any protection is provided it must be pursuant to subsection (2)(C) (hereinafter "regards as" clause), which prohibits discrimination against those who are regarded as having a disability.⁴⁷

In 1995, the Equal Employment Opportunity Commission⁴⁸ ("EEOC"), responsible for enforcement of the ADA, issued a short statement that added genetic discrimination under the umbrella of protection provided by the ADA.⁴⁹ However well intentioned this

42. *Id.*

43. Section 12112(d)(4)(A)-(B) of the ADA states:

(A) A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity . . . (B) A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

Id. § 12112(d)(4)(A)-(B).

44. *Id.* § 12112(d)(4)(A).

45. *See id.* § 12101 (stating the congressional purposes behind the Act).

46. ANDREWS, *supra* note 2, at 139 (stating that the ADA raises profound questions about whether a genetic predisposition, without symptoms should be considered a disability).

47. *See Kaufmann supra* note 20, at 413 (discussing the probability that individuals with asymptomatic disorders would be covered by the "regards as" clause of the ADA).

48. The EEOC was formed under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-4 (2002). The EEOC is empowered to enforce and prevent unlawful employment practices involving civil rights violations. 42 USC § 2000e-5 (2001).

49. EEOC Compl. Man. (BNA) 902.8(a). The EEOC states that the "regards as" clause

applies to individuals who are subjected to discrimination on the basis of genetic information relating to illness, disease, or other disorders. Covered entities that discriminate against individuals on the basis of such genetic information are regarding the individuals as having impairments that substantially limit a major life activity. Those individuals, therefore, are covered by the third part of the definition of 'disability.'

Id.

statement may have been, it does not have the force of statutory law and courts are free to disregard it.⁵⁰

C. Predictions of Protection

Many scholars predict that the “regards as” clause of the ADA will provide adequate protection from employment discrimination on the basis of genetic predispositions.⁵¹ This prediction is founded on the statutory language of the ADA itself, the legislative history, and the intent behind the enactment of the ADA.⁵²

Larry Gostin, Executive Director of the American Society of Law and Medicine, maintains that the ADA’s “regards as” clause determines the existence of a disability through evaluation of the subjective perceptions, prejudices, and stereotypes of the discriminating employer.⁵³ Thus, one who discriminates against an applicant on the basis of uncertain predictions regarding the development of future impairment violates the ADA because the applicant is currently able to perform all job functions.⁵⁴ An examination of the legislative history supports the contention that a determination of whether one is qualified to perform job-related functions must take place at the time the employment decision is made, and cannot be based on mere speculation regarding future developments.⁵⁵ Case law, at the time the ADA was enacted, appears to support that notion.⁵⁶ The recent developments discussed in this Comment provide evidence of a potential shift in

50. See Wukitsch, *supra* note 23, at 45 (stating that agency guidelines do not bind courts in its interpretation of federal statutes).

51. See Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, 17 AM. J.L. & MED 109, 124 (1991) (claiming that the ADA adequately equipped the EEOC to provide protection against genetic discrimination). Gostin states that “[l]aw, ethics and public policy suggest that such a person should receive the same protection as the currently disabled” and “both the legislative and judicial branches have made clear that pure asymptomatic infection is protected under disability law”. *Id.* at 126 n.93.

52. *Id.* at 124-26.

53. See Gostin, *supra* note 23, at 124 (arguing that those who discriminate on the basis of uncertain predictions of future impairment foster the harmful stereotypes that Congress recognized and hoped to eliminate because the individual discriminated against is currently able to perform all job related activities).

54. See *supra* note 10 and accompanying text (stating that an individual with a genetic predisposition has no current impairments).

55. 136 CONG. REC. H 4614, 4623 (daily ed. July 12, 1990) (statement of Cong. Owens). Cong. Owens stated that persons may not be discriminated against simply because they are at risk of not being qualified for a job sometime in the future. *Id.*

56. *Dairy Equip. Co. v. Dept. of Indus.*, 290 N.W.2d 330, 335 (Wis. 1980) (stating that it would be “ironic and insidious” if current disabilities were protected but the same protection were denied to those whom employers perceived to be predisposed to future disability).

judicial reasoning.

As recent as 1999, scholars suggested that the “regards as” clause would provide protection from genetic discrimination because it guarded against the employers’ perception, not the existence of a true disability.⁵⁷ This argument focused on the realization that most genetic predispositions would not affect job performance unless the predisposition manifested in the future.⁵⁸

Employment law attorney Melinda Kaufmann predicted that an applicant with a genetic predisposition would be covered by the ADA on the basis that the employer would perceive the applicant as disabled based on the predisposition alone, and not the inability to perform.⁵⁹ Though the employer would argue that the applicant’s rejection was job-related and not an attempt to discriminate, the rejection would still be a violation of the ADA because most courts have held that the avoidance of future liability is not enough to establish a business necessity.⁶⁰

Both Gostin’s and Kaufmann’s predictions were founded on the belief that the ADA limited employers’ ability to inquire into only those disabilities that currently affect applicants’ ability to perform job-related functions.⁶¹ Pursuant to the ADA, it appeared that employers were forbidden from discriminating against applicants possessing a predisposition for developing a disabling impairment, as long as no symptoms were present.⁶² However, a recent federal case illustrates courts’ unwillingness to apply the ADA in that manner.⁶³

57. Kaufmann, *supra* note 20, at 412-13. Kaufmann argued that most genetic disorders exhibit no present symptoms. *Id.* at 411. She determined that individuals with asymptomatic genetic disorders would likely be covered because the discrimination would be based on the genetic anomaly and not the employee’s ability to perform work. *Id.* at 413.

58. A qualified applicant with a predisposition would then be covered by subsection (2)(A) which protects disabled individuals from discrimination so long as the disability did not affect the ability to perform job-related functions. 42 U.S.C. § 12112(a) (2001).

59. *See* Kaufmann, *supra* note 20, at 413 (predicting that if an employer discriminated against an individual because of a genetic predisposition, that employer has regarded the individual as disabled).

60. *Id.* at 423.

61. *See* Gostin, *supra* note 23, at 125 (stating that the determination as to whether an individual is qualified must take place at the time of the employment decision, and the employer may not base its determination on speculation regarding the future).

62. *See id.* at 124 (concluding that it would be inequitable to allow a defendant who intended to discriminate based on predictions of future disability to raise the defense that the person was not currently disabled). *See also* Kaufmann, *supra* note 20, at 413 (discussing the likelihood that the “regards as” clause of the ADA would cover individuals with asymptomatic disorders).

63. *See* EEOC v. Rockwell Int’l Corp., 243 F.3d 1012, 1014-18 (7th Cir. 2001) (holding that the employer corporation did not violate the ADA when it

Between 1992 and 1993 the Rockwell International Corporation rejected job applicants based on a disability the applicants did not have and may never develop.⁶⁴ The corporation required that the applicants submit to a nerve conduction test.⁶⁵ The test was not designed to uncover any hidden disabilities. Rather, the corporation was attempting to assess whether the applicants might develop a disability,⁶⁶ although the test could not predict whether the applicants would actually develop that disability.⁶⁷ The corporation rejected the applicants based on the results of those tests even though, at the time of rejection, the applicants were qualified to perform the functions of the positions.⁶⁸

Predictive tests, like the one employed by Rockwell, have become increasingly popular among employers.⁶⁹ A predictive test does not uncover the existence of a disability, nor determine

rejected seventy applicants based on a nerve conduction test that revealed they had an enhanced likelihood of developing cumulative trauma disorders such as carpal tunnel syndrome, despite the fact that the employer admitted the applicants were qualified and not currently disabled). However, the court was not in complete agreement. *Id.* at 1019 (Wood., J., dissenting). Justice Wood stated that it is not clear whether the ADA permits an employer to refuse to hire a qualified individual simply because a future development of a disability may occur at some unspecified time, thereby rendering the individual unable to perform. *Id.*

64. *EEOC v. Rockwell Int'l Corp.*, 60 F. Supp. 2d 791, 792 (N.D. Ill. 1999) (granting summary judgment to Rockwell because the corporation did not regard the applicants as disabled within the meaning of the ADA), *aff'd*, 243 F.3d 1012 (7th Cir. 2001). The court stated that, although the employer rejected the applicants because of the test results, the employer did not misperceive the effects of any current impairment. *Id.* at 1015.

65. *Rockwell*, 243 F.3d at 1014.

66. *Id.* at 1014. "A nerve conduction test involves placing electrodes on different places on the skin where particular nerves are known to be located." Neurological Services of Orlando, P.A., *Neurology Causes & Types*, available at <http://www.neurologychannel.com/neuropathy/diagnosis.shtml> (last modified Aug. 7, 2001). Small electrical shocks are given. *Id.* Using a TV screen monitor, the nerve function and speed at which an impulse travels can be determined. *Id.* A slower than normal speed suggests the existence of damage to the myelin sheath. *Id.* The results may confirm the existence or possible development of neuropathy. *Id.*

67. *Rockwell*, 243 F.3d at 1014.

68. *Id.*

69. Mark A. Rothstein, et al., *Protecting Genetic Privacy by Permitting Employer Access Only to Job-Related Employee Information: Analysis of a Unique Minnesota Law*, 24 AM. J.L. & MED. 399, 400 (1998). Mr. Rothstein stated that many employers have determined that hiring individuals who may develop medical problems could substantially increase the costs of health benefits and thus have strong motives to refuse to hire individuals who are deemed an unacceptable risk to future illness. *See also supra* note 20 (stating that of the 330 Fortune 500 companies surveyed by the Office of Technology Assessment in 1989, over half would approve pre-employment genetic exams for susceptibility to workplace toxins).

whether an individual will develop a disability. Rather, a predictive test determines whether a person is at a higher risk than others for developing a disability.⁷⁰ Employers use these tests to eliminate qualified applicants based on the fear that they may become disabled.⁷¹ As genetic technology advances, employers are likely to increase the use of genetic tests in order to discriminate against qualified individuals.⁷² That policy, if left unchecked, could result in the discrimination of predisposed job applicants that will never develop any disabilities.

II. JUDICIAL INTERPRETATION OF THE ADA

A. Disabilities as defined by the ADA

The EEOC stated that discrimination based on genetic predisposition violates the “regards as” clause of the ADA.⁷³ An employer violates the “regards as” clause if it discriminates against an individual based on a perceived disability.⁷⁴ To determine whether an employer perceived an individual as disabled hinges on the definition of a disability,⁷⁵ and thus, it is important to understand what constitutes a disability. The following is an examination of the definition of disability and how

70. See Kaufmann, *supra* note 20, at 399 (stating that most genetic tests only reveal the possibility that a person will develop a disease in the future, but not whether the individual will develop that disease). U.S. Department of Health and Human Services, *Understanding Gene Testing*, available at <http://www.accessexcellence.org/AE/AEPC/NIH/index.html> (last visited Oct. 3, 2001). An accurate gene test can only tell if an individual has a disease-related gene mutation, but a variety of factors can influence whether the disease or disability will actually develop. *Id.* See also Rennie, *supra* note 1, at 91 (stating that genetic determinism was “one of these simpleminded errors that we were prone to commit when we thought genes linked to diseases in a kind of inevitable, ineluctable fashion”).

71. See Rothstein, *supra* note 26, at 400 (discussing why employers use predictive tests).

72. Paul Steven Miller, the Commissioner of the EEOC stated that “[a]s of August 1997, the Council for Responsible Genetics (CRG), a national bioethics advocacy organization, had documented over two hundred cases of genetic discrimination.” *Hearing on Genetic Information in the Workplace Before Senate Committee on Health, Education, Labor, and Pensions*, 106th Cong. (2000) (statement of Paul Steven Miller, Commissioner, EEOC). He also stated that the CRG predicted that the testing may increase as the utility of genetic testing expands and becomes cheaper. *Id.*

73. Rebecca Porter, *EEOC Settles First ADA Challenge to Genetic Testing in Workforce* TRIAL 104, 105 (July 2001): EEOC Commissioner Paul Stevens stated that employers who base employment decisions on genetic testing violate the “regards as” clause of the ADA. *Id.*

74. 42 U.S.C. § 12102(2) (2001).

75. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 497 (1999) (stating that the three parts of the definition are not mutually exclusive, but rather overlapping formulas).

that definition relates to genetic predispositions. This analysis focuses on the EEOC's definition and the recent decision of the United States Supreme Court in *Sutton v. United Air Lines, Inc.*⁷⁶

A disability is a physical impairment that substantially limits one or more major life activities.⁷⁷ Though not exhaustive, the EEOC issued a list of impairments that courts have recognized.⁷⁸ As noted above, the impairment must substantially limit a major life activity.⁷⁹ A major life activity is defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."⁸⁰

76. *Id.*

77. 42 U.S.C. § 12102(2)(A).

78. The listed impairments are:

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

29 C.F.R. §§ 1630.2 (h)-(j) (1998).

79. Substantially limited is defined as:

Unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id. § 1630.2(j)(1)(i)-(ii).

80. *Id.* § 1630.2(i). This Comment focuses on the potential coverage of the ADA for individuals whose genetic predispositions, if manifested, would limit the major life activity of working. To be "regarded as" impaired in the major life activity of working an individual must establish that the individual is unable to work in a broad range class of jobs. *Sutton*, 527 U.S. at 491-92. The ADA defines substantially limited in the major life activity of working as:

[S]ignificantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Id. § 1630.2(j)(3)(i).

The EEOC has identified several factors to be considered in determining whether an individual is substantially limited in the major life activity of working. *Id.* § 1630.2(j)(3)(ii)(A)-(C). Those factors are:

- (A) The geographical area to which the individual has reasonable access;
- (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
- (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing

If an individual has an impairment, or a history of an impairment, that substantially limits a major life activity, that individual is protected under the ADA.⁸¹ Further, if an employer perceives an individual as possessing an impairment, though no impairment exists, that individual is also protected.⁸²

B. Perceived Impairments

An applicant who has been the victim of genetic discrimination, due to the existence of a predisposition, can only seek protection under the "regards as" clause of the ADA. Protection is limited to this clause because the predisposition is not a limiting impairment, nor a history of an impairment. Pursuant to the "regards as" clause, the applicant would argue that the employer perceived the genetic predisposition as a substantially limiting impairment. Although many circuit courts have established tests to determine whether an employer has perceived an individual as disabled,⁸³ the Supreme Court directly addressed this issue in *Sutton*.⁸⁴

The Supreme Court asserted that there were two ways in which an individual could fall within the statutory definition of "regards as" disabled.⁸⁵ If either, "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities" then the individual is "regarded as" disabled.⁸⁶ In either case, the employer must actually entertain misperceptions about the existence and effect of an impairment.⁸⁷ Given the Supreme Court's definition of a perceived impairment,⁸⁸ and subsequent appellate case law, it is unlikely that applicants with genetic

similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii)(A)-(C).

81. Kaufmann, *supra* note 70.

82. Congress found that society's accumulated myths and fears about disability and disease are as handicapping as the physical limitations that flow from the actual impairment. *Sutton*, 527 U.S. at 489.

83. See generally *Bryne v. Board of Educ.*, 979 F.2d 560 (7th Cir. 1992); *Wooten v. Farmland Foods*, 58 F.3d 382 (7th Cir. 1995); *Francis v. City of Meriden*, 129 F.3d 281 (2nd Cir. 1997); *Depaoli v. Abbott Labs.*, 140 F.3d 668 (7th Cir. 1998); *Wellington v. Lyon County Sch. Dist.*, 187 F.3d 1150 (9th Cir. 1999).

84. *Sutton v. United Air lines, Inc.*, 527 U.S. 471, 471 (1999).

85. *Id.*

86. *Id.*

87. *Id.*

88. See *id.* at 489. (explaining the two ways an individual can be perceived as disabled pursuant to the ADA).

predisposition will be protected by the clause. The facts of *Sutton* demonstrate the vital role an employer's perceptions play in determining whether an applicant is perceived as impaired.

In *Sutton*, the plaintiffs sought positions as airline pilots.⁸⁹ The airline required individuals to pass an eye exam of 20/100 in an uncorrected form.⁹⁰ The plaintiffs had uncorrected vision of 20/200.⁹¹ However, each wore corrective lenses that rendered their vision 20/20.⁹² When the airline refused to hire the applicants they filed suit claiming that the airline regarded them as disabled due to their uncorrected eyesight.⁹³ The airline defended its actions by asserting that the eyesight requirement was a valid job condition.⁹⁴ Though the Court ultimately agreed with the airline, the decision was disturbing in another aspect. Rather than resting on the valid job requirement defense, the Court stated that the plaintiffs did not have a disability as defined by the ADA.⁹⁵ Because the airline knew that the applicants' eyesight was actually 20/20 with corrective lenses, it did not perceive them as disabled.⁹⁶

C. Genetic Predispositions as Perceived Impairments

The existence of a genetic predisposition would probably be discovered in the post-offer, pre-employment medical examination.⁹⁷ The ADA authorizes the use of post-offer medical

89. *Sutton*, 527 U.S. at 475.

90. *Id.* at 476.

91. *Id.* at 475.

92. *Id.*

93. The applicant agreed that they were not impaired because their active eyesight was 20/20. *Id.* at 489. However, the airline perceived the applicants as impaired because the eye exam established their uncorrected eyesight as 20/200. *Id.* at 490. Although the applicants' vision was not impaired, the employer perceived their eyesight as impaired and rejected them. *Id.* That perceived impairment rendered them disabled as defined by the ADA. *Id.*

94. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 497 (1999).

95. *Id.*

96. The Supreme Court reasoned that the airline only considered the plaintiffs' limited in their ability to perform as airline pilots. *Id.* at 493. However, because the airline was aware that the plaintiffs had 20/20 vision while wearing corrective lenses, the airline did not consider the plaintiffs limited in their ability to find similar employment in the same field. *Id.* Because the plaintiffs' corrected eyesight did not limit their ability to find similar employment, the airline did not consider them substantially limited in the major life activity of working. *Id.* at 492-93. Thus, because the plaintiffs were not actually impaired and could obtain similar employment, the airline did not perceive them as disabled. *Id.* at 493.

97. Covered entities are authorized to require employment entrance exams after an offer has been made but prior to commencement of employment and may condition the offer pending the outcome of the exam. 42 U.S.C. § 12112(d)(3) (2001). All entering employees must be subject to the exam, and the information obtained must be treated as confidential subject to certain exceptions. *Id.* § 12112(d)(3)(A)-(B). However, employers are entitled to reject the entering employee if the results of the exam show the existence of

examinations.⁹⁸ Because the test only establishes the existence of potential impairments, the applicant would be asymptomatic, that is, without symptoms or limitations due to the predisposition.⁹⁹ That is exactly the result the test is designed to achieve. Its purpose is to discover the possibility of future impairments in an otherwise healthy, non-impaired individual.¹⁰⁰ Because the applicant would have no impairment at the time of testing, he would be qualified to fulfill the position. It is evident that the employer considers the individual qualified to fulfill the position because the test is only administered after an offer has been made. Nonetheless, the individual's offer may be revoked as a result of the examination.¹⁰¹

In *EEOC v. Rockwell International Corp.*,¹⁰² seventy-two individual applicants sued Rockwell in the United States District Court for the Northern District of Illinois.¹⁰³ Rockwell required each applicant to undergo a nerve conduction test prior to employment.¹⁰⁴ The purpose of the test was an attempt to uncover a potential development of carpal tunnel syndrome.¹⁰⁵ The positions the plaintiffs applied for required constant repetitive motion.¹⁰⁶ Due to abnormal test results, Rockwell rejected the applicants.¹⁰⁷ The district court explained, and the Seventh Circuit affirmed, that the tests did not establish the existence of carpal tunnel syndrome, but merely the existence of potential development of carpal tunnel syndrome.¹⁰⁸ Because the applicants

impairment if that impairment is job-related and consistent with a business necessity. 29 C.F.R. § 1630.15(b)(1) (2001).

98. 42 U.S.C. § 12112(d)(3) (2001).

99. See Kaufmann, *supra* note 20, at 411 (stating that most genetic disorders do not exhibit present symptoms).

100. See Rothstein, *supra* note 26, at 400 (explaining why employers use predictive tests).

101. Employers revoke the offer because they want to limit their liability under workers' compensation in the event that the genetic predisposition manifests into an impairment and the individual becomes disabled. Rothstein *supra* note 26 (explaining why employers perform medical entrance exams).

102. *EEOC v. Rockwell Int'l Corp.*, 60 F. Supp. 2d 791 (N.D. Ill. 1999) (aff'd by *EEOC v. Rockwell Int'l Corp.*, 243 F.3d 1012 (7th Cir. 2001)).

103. *Rockwell*, 60 F. Supp. 2d at 791.

104. *Rockwell*, 243 F.3d at 1014.

105. Rockwell admitted that it hoped that the tests would identify job applicants susceptible to cumulative trauma disorders. *Id.*

106. *Id.*

107. Rockwell stated its decision to reject the applicants was on the basis that the results revealed an increased likelihood of development of carpal tunnel syndrome. *Id.*

108. The district court stated that it was undisputed that none of the Claimants actually suffered from or had a record of any impairment. *Rockwell*, 60 F. Supp. 2d at 793. The Seventh Circuit stated that, "[w]e hasten to note that the applicants did not suffer from any impairment at the time they were turned away by Rockwell, but Rockwell merely regarded them as

did not have carpal tunnel syndrome they were, at the time of rejection, otherwise qualified to fulfill the position. The Seventh Circuit, nonetheless, affirmed the district court's summary judgment in favor of the employer.¹⁰⁹

Establishing the existence of an ADA disability under the "regards as" clause is no small task. An individual must show some form of misperception on the part of the employer in order to establish the existence of a disability based on a perceived impairment.¹¹⁰ That is, an employer must mistakenly believe that the applicant has an impairment that the applicant does not have, or the employer must believe that an actual impairment is substantially limiting when it is not.¹¹¹ This is where most genetic predisposition claims are likely to fail.

In *Sutton*, the Supreme Court held that an impairment must currently limit an individual's ability to carry-on a major life activity in order to qualify as a disability.¹¹² A literal reading of the "regards as" clause would require an employer to mistakenly believe an individual has an impairment that currently renders the individual substantially limited in his ability to carry-on a major life activity.¹¹³ An employer who discriminates based on the existence of a genetic predisposition is under no such misperception.

A predisposition is, by definition, not a current impairment.¹¹⁴ Rather, it is an increased likelihood of developing an impairment.¹¹⁵ Employers are well aware of this distinction.¹¹⁶ In fact, it is the increased likelihood of developing an impairment

having an enhanced likelihood of developing impairments in the future." *Rockwell*, 243 F.3d at 1015.

109. *Id.* at 1012.

110. *EEOC v. Rockwell Int'l. Corp.*, 60 F. Supp. 2d 791, 792 (N.D. Ill. 1999).

111. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 497 (1999).

112. *See id.* at 483 (stating that the court thinks the language of the ADA is properly read as requiring that a person presently, "not potentially or hypothetically", be substantially limited in order to demonstrate a disability).

113. In *Rockwell*, the parties stipulated that the corporation did not believe the individuals had a substantially limiting impairment. *EEOC v. Rockwell*, 60 F. Supp. 2d 791 (N.D. Ill. 1999); *see also Sutton*, 527 U.S. at 489 (stating that in order for an individual to be considered disabled under this section, the employer must regard the individual as having an impairment that substantially limits a major life activity).

114. *See Kaufmann, supra* note 20, at 411 (stating that most genetic disorders do not exhibit any present symptoms).

115. *Kaufmann, supra* note 20, at 399.

116. In *Rockwell*, the parties also stipulated that the corporation did not believe the applicants were currently impaired, but rather had an increased risk of becoming impaired. *Rockwell*, 243 F.3d at 1014; *see also Christian v. St. Anthony Med. Ctr. Inc.*, 117 F.3d 1051 (7th Cir. 1997) (affirming the district court's ruling that the employer did not violate the ADA by terminating an employee that was ill, because the employer did not believe that the illness was substantially limiting).

employers seek to discover. Employers hope to eliminate individuals who might develop a future impairment in an effort to limit their own potential workers' compensation.¹¹⁷ Employers who discriminate based on existing genetic predispositions would not misperceive the existence of any current impairment. Therefore, the employer has not violated the ADA when it rejects an individual due to the potential existence of a disability. They are fully aware that the individual is not currently disabled.

The Seventh Circuit's decision in *Rockwell* is even more disturbing.¹¹⁸ The matter did not involve applicants that had an actual, but correctable, impairment. The applicants had no impairment,¹¹⁹ rather they had an increased likelihood of developing an impairment.¹²⁰ Due to that increased likelihood of developing the impairment, the applicants were rejected.¹²¹ Again the court stated that they were not perceived as disabled, and thus not protected.¹²² In so ruling, the court stated that there was no evidence of an existing predisposition that would necessarily render the applicants unable to attain employment elsewhere, because the applicants were not currently impaired in their ability to perform similar jobs.¹²³ Thus, the employer did not perceive them as impaired.

The holdings of *Sutton* and *Rockwell* provide clear evidence that the ADA is incapable of protecting applicants who are the subjects of discrimination based on genetic predispositions.¹²⁴ In both cases the plaintiffs had no limiting impairments. Arguably,

117. Rothstein, *supra* note 26 and accompanying text.

118. 243 F.3d 1012 (7th Cir. 2001).

119. The medical exam did not reveal the existence of any current cumulative repetitive stress syndrome or carpal tunnel syndrome. *Id.* at 1015.

120. The results of the nerve conduction test demonstrated that the individuals were at a higher likelihood of developing carpal tunnel syndrome some time in the future. *Id.*

121. *Id.* at 1014.

122. *See generally Rockwell*, 243 F.3d at 1012 (7th Cir. 2001) (affirming the lower court's grant of summary judgment to the defendants on the grounds that the plaintiffs were not disabled as defined by the ADA).

123. The Seventh Circuit stated that "[t]his was not one of the cases in which the claimants' impairments are so severe that their substantial foreclosure from the job market is obvious." *Id.* at 1018. The court went on to say that there was no evidence that the claimants perceived inability to perform jobs requiring frequent repetitive motion actually foreclosed them from obtaining any job. *Id.*

124. *But see Rockwell*, 243 F.3d at 1019 (Wood, J., dissenting) stating that: [I]t is not at all clear that as a matter of law the ADA permits an employer to refuse to hire a person who is fully qualified to perform certain work simply because that individual might at some unspecified time in the future develop a physical or other disability that would render her unable at that later date to meet the employer's reasonable expectations.

however, the employer treated them as having an impairment.¹²⁵

In *Sutton*, the Court emphasized the fact that the employer did not mistakenly believe the plaintiffs' eyesight was substantially limiting because they had 20/20 vision while wearing corrective lenses.¹²⁶ In *Rockwell*, the court focused on the fact that it would be unlikely the plaintiffs would be unable to obtain similar employment elsewhere.¹²⁷ Both cases, however, reach the same conclusion. Because the employers did not have any misconceptions regarding the impairments, the plaintiffs could not be perceived as disabled.¹²⁸ If an employer chooses to discriminate on the basis of a genetic predisposition it will not do so because it mistakenly believes the individual is impaired, and thus, that individual will not be perceived as impaired under the ADA.

D. Burdens of Persuasion

The initial burden of persuasion is on the rejected applicant to show a prima facie case of disability discrimination.¹²⁹ The

125. One regulation appears to at least have the potential to provide protection for individuals who are discriminated against although the employer did not mistakenly believe they were impaired. 29 C.F.R. § 1630.2(l)(3) (2001). The regulation states that an individual is regarded as disabled if that individual has no impairments but is treated by the employer as having a substantially limiting impairment. *Id.* However, neither *Sutton* nor *Rockwell* addressed this issue. *Sutton*, 527 U.S. at 471 (1999); *Rockwell*, 243 F.3d at 1012. In fact, one of the few cases to mention this regulation while denying summary judgment for the discriminating employer did so on other grounds. See *EEOC v. Blue Cross Blue Shield of Conn.*, 30 F. Supp. 2d 296 (D. Conn. 1998) (denying summary judgment only because a material issue of fact existed as to whether the employer mistakenly believed the employee was substantially limited). Furthermore, this case is distinguishable from the hypothetical case of an individual with a genetic predisposition, because in *Blue Cross* the plaintiff did have an impairment in his kidneys, while an individual with a genetic predisposition would have no impairment. *Id.* at 297-300. Finally, although the Supreme Court in *Sutton* was not required to determine the validity of the EEOC's regulations, it made clear the fact that courts, not the EEOC, will determine if the regulations are in line with the policies behind federal statutes. *Sutton*, 527 U.S. at 481. The Supreme Court stated that because both parties accepted the regulations as valid the Court had no occasion to consider what deference they were due, if any. *Id.* However, the Court did state that "no agency has been delegated authority to interpret the term 'disability'." *Id.* at 479.

126. The Court stated that the airline's sight requirement did not necessarily mean that the airline believed that the applicants were substantially limited. *Sutton*, 527 U.S. at 494. That is because the airline did not consider them unable to perform other jobs. *Id.* at 493. However, the only reason the airline considered them qualified for other positions was because they wore corrective lenses. *Id.*

127. *Rockwell*, 243 F.3d at 1018 (citing *DePaoli v. Abbott Labs.*, 140 F.3d 668, 667 (7th Cir. 1998)).

128. *Id.*; see also *Sutton*, 527 U.S. at 493-94.

129. *Wernick v. FRB of N.Y.*, 91 F.3d 379, 383 (2nd Cir. 1996) (citing *Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718 (2nd Cir. 1994), *cert. denied*, 513 U.S.

applicant must establish that he is disabled within the meaning of the ADA.¹³⁰ The applicant must then establish that, notwithstanding the impairment, he is qualified to perform the essential functions of the job.¹³¹ Finally, the applicant must establish that the employer made some form of adverse employment decision as a result of the impairment.¹³²

As previously discussed, an applicant with a genetic predisposition would be qualified, at the time of rejection, to perform the essential functions of the position.¹³³ After the qualification of the applicant has been established, the applicant must then establish some form of adverse employment decision based on the perceived impairment.¹³⁴ The employer's decision not to hire the applicant would amount to an adverse employment decision.¹³⁵ If the applicant could establish that a misperception regarding an impairment caused the rejection, the employer's action would amount to an adverse employment decision based on a perceived impairment.¹³⁶

If the applicant can establish that an adverse employment decision was made on the basis of a perceived impairment the

1147 (1995)).

130. *Heiweil*, 32 F.3d at 721-22.

131. *Id.* The EEOC defined a "qualified individual" as one "who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m) (2001). The regulation further defines "essential function of the job" to mean "[t]he fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." *Id.* § 1630.2(n)(1). A job function may be considered essential because it is the reason the position exists, there are a limited number of employees available whom can perform the job function, and/or because the function is highly specialized so that an individual is specifically hired to perform that function. *Id.* § 1630.2(n)(2)(i)-(iii). The EEOC then specifies what evidence is relevant to determining whether a job function is essential. *Id.* § 1630.2(n)(3)(i)(vii).

132. Section 12112(a) of the ADA prohibits any form of discrimination in regards to job application procedures, hiring, advancement, discharge, compensation, training, and other terms, conditions, and privileges of employment against a qualified person who is disabled as defined by the ADA. 42 U.S.C. § 12112(a) (2001).

133. A genetic predisposition is only an increased likelihood of development of impairment, not a current, disqualifying impairment. Kaufmann, *supra* note 20, at 399.

134. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 471 (1999) (explaining the prohibition against adverse employment decisions based on a disability).

135. An adverse employment decision is any form of discrimination in regards to the application procedure, hiring, advancement or discharge of the employee based on the disability. 42 U.S.C. § 12112(a) (2001).

136. *Sutton*, 527 U.S. at 497.

employer must refute the inference that the impairment was improperly considered.¹³⁷ The employer must demonstrate that the impairment was relevant to the job qualifications.¹³⁸ Thus, the employer must establish that it was appropriate to consider the impairment in its evaluation of the applicant.

Courts have stated that avoidance of potential future liability does not amount to a business necessity. Thus, it would be difficult for an employer to demonstrate how a genetic predisposition was relevant to job qualifications. However, the current interpretation of the ADA makes this point irrelevant because an employer's reasons for rejecting an applicant are only pertinent if the applicant can establish the existence of an impairment. As discussed in Part C of this analysis, it is unlikely that courts will consider genetic predispositions as impairments. The result is the freedom of employers to discriminate against an applicant based on an applicant's genetic predispositions.

III. AMENDING TITLE VII

It is apparent that the ADA is incapable of protecting applicants with genetic predispositions from employment discrimination. It is also apparent that applicants with genetic predispositions should be protected. First, in many instances, a genetic predisposition will not be relevant to an applicant's ability to perform essential job functions.¹³⁹ In fact, the predisposition may never manifest into any form of actual impairment.¹⁴⁰ Second, applicants have no control over their genetic makeup.¹⁴¹ An

137. See *EEOC v. Blue Cross Blue Shield of Conn.*, 30 F. Supp 2d. 296, 307 (D. Conn. 1998) (denying defendant's motion for summary judgment due to the existence of material fact as to whether defendant improperly considered plaintiff's impairment).

138. The use of qualification standards, tests or other criteria in order to weed out individuals with disabilities is a violation of the ADA unless the standards, tests, or criteria is shown to be job-related for the position and consistent with a business necessity. 42 U.S.C. § 12112(b)(6) (2001). A business necessity is one that substantially promotes the businesses needs. *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001) (citing *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621-622 (9th Cir. 1982)). The employer must also show that the qualification standards are necessarily related to the "specific skills and physical requirements of the sought after position." *Id.* (quoting *Belk v. Southwestern Bell Tel. Co.*, 194 F.3d 946, 951 (8th Cir. 1999)).

139. See *Kaufmann*, *supra* note 20, at 407 (stating that a latent genetic disorder has no discernible effect on the employee's ability to perform the job at the present time).

140. See *id.* (stating that while some genetic defects may manifest in the future, some may have no impact on the individual's health); see also *Rennie*, *supra* note 1, at 90 (explaining the flawed reasoning of "genetic determinism").

141. One's genetic makeup is determined by their parents, before birth. *Griffiths*, *supra* note 8, at 2.

applicant's genetic makeup and predispositions are determined before birth and are beyond control.¹⁴² Finally, without protection every American is a potential victim of genetic discrimination.¹⁴³ Every human has some form of genetic mutation resulting in an increased likelihood of developing some form of disability or disease.¹⁴⁴ The law must provide widespread protection against the discrimination based on genetic predispositions.

A. Provisions of Title VII

Title VII of the Civil Rights Act of 1964 protects applicants from employment discrimination based on race, color, religion, sex or national origin.¹⁴⁵ Like genetics, race, color and sex are determined before birth and are beyond the control of any individual.¹⁴⁶ National origin is like one's genetic makeup in that it is beyond the control of a person. These categories bare another similarity to genetic predispositions. All are irrelevant to an applicant's ability to perform job related functions.¹⁴⁷ Amending Title VII to include genetic predispositions as a category for protection is appropriate because eliminating discrimination based on irrelevant personal characteristics is the primary goal of Title VII.¹⁴⁸

This proposal briefly analyzes the protection provided under Title VII. Specifically, this Section discusses the shifting burdens placed on each party to a lawsuit brought under Title VII. An

142. *Id.*

143. See generally Rennie, *supra* note 1, at 90 (explaining how humans are mutants because all humans have genetic defects); see also Kaufmann, *supra* note 20, at 399 (stating that every person carries approximately five to seven lethal recessive genes).

144. Rennie, *supra* note 1, at 90.

145. Section 2000e-2 of the Civil Rights Act of 1964 states in pertinent part that:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2001).

146. Griffiths, *supra* note 8, at 2.

147. NORBERT A. SCHLEI, *Foreword to the Third Edition of BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW* at xi, xviii (3d. ed. 1996). Mr. Schlei stated that Title VII will no longer be needed when employers need not be coerced to eliminate discrimination based on irrelevant personal characteristics. *Id.*

148. *Id.*

amendment to Title VII would force courts to address the real issue in cases of genetic discrimination, which is whether an applicant's denial was truly business related or merely an attempt to reduce potential costs.

B. Plaintiff's Burden of Proving Discrimination

Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.¹⁴⁹ Under Title VII, plaintiffs must prove that the protected status played a role in the decision to reject the applicant.¹⁵⁰ The plaintiff must also present evidence that the employer continued searching for qualified applicants after the plaintiff's rejection.¹⁵¹ Once the plaintiff has established that the rejection was based on the protected status, a prima facie case or inference of unlawful discrimination exists.¹⁵² The employer must then refute that showing by presenting other legitimate reason for rejecting the applicant.¹⁵³ If the employer is successful in presenting evidence of a valid reason for rejection, the plaintiff may then present evidence that the employer's reason was pretextual.¹⁵⁴

Amending Title VII would enable applicants who have been

149. Section 2000e-2 of the Act states in part that "it shall be unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (2001).

150. *Barbano v. Madison County* 922 F.2d 139 (2nd Cir. 1990). In a gender discrimination case the court stated that the plaintiff's burden was to show that gender played a part in the employment decision. *Id.* at 142. In order to establish a prima facie case of discrimination in violation of Title VII the applicant must establish that:

(1) the plaintiff is a member of a protected group; (2) the plaintiff applied for and was objectively qualified to hold a job for which the employer was seeking candidates; (3) the plaintiff was rejected from the position sought; and (4) the position remained open while the employer continued to seek applicants.

BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 714 (3d. ed. 1996).

151. LINDEMANN & GROSSMAN, *supra* note 150, at 714 (stating the four elements of a prima facie case of discrimination under Title VII).

152. *Id.*

153. *Id.* For example, misrepresentation on an employment application has been deemed sufficient to warrant rejection of an applicant. *McGee v. Randall Div. of Textron, Inc.* 680 F. Supp. 241 (N.D. Miss 1987), *aff'd*, 837 F.2d 1365 (5th Cir. 1988), *cert. denied*, 487 U.S. 1209 (1988).

154. LINDEMANN & GROSSMAN, *supra* note 150, at 5. The proof of a pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Id.* at 22. Thus, while evidence of a legitimate reason for rejecting an applicant destroys the mandatory inference of discrimination, an inference of discrimination may still be drawn from the plaintiff's prima facie case evidence or any subsequent evidence of pretext. *Id.* at 22-23.

rejected based on their genetic predispositions to establish a prima facie case of unlawful discrimination. Title VII would render all applicants with genetic predispositions members of a protected group.¹⁵⁵ An inference of unlawful discrimination would arise once the applicants presented evidence that their genetic predispositions played a role in the decision to reject them. Applying this legal standard to the facts of *Rockwell* illustrates how an amendment to Title VII would provide protection.

In *Rockwell*, the applicants applied for four different entry-level positions.¹⁵⁶ Each applicant with a predisposition was rejected although he or she was, at the time of rejection, fully qualified to perform job related functions.¹⁵⁷ *Rockwell* admitted that the applicants were rejected because they were predisposed to carpal tunnel syndrome.¹⁵⁸ Finally, the discrimination in *Rockwell* took place over a period of several months.¹⁵⁹ Thus, the positions remained open after the initial discriminatory act and the defendant continued to seek other qualified applicants. Based on those facts, the plaintiffs would have been protected.

C. Inference by Inquiry Alone

Amending Title VII would further protect applicants with genetic predispositions by discouraging employers from conducting any inquiry into an applicant's genetic makeup. Scholars disagree about the legal consequences of inquiring into the nature of a protected status,¹⁶⁰ but case law suggests that some inquiries are discriminatory per se while others are discriminatory only if they have an actual adverse impact on the protected group.¹⁶¹ At the very least, employer inquiries should raise an inference of discrimination because if the employer does not intend to discriminate based on the results of the inquiry, then why obtain

155. Section 2000e-2 contains the list of groups protected from employment discrimination. 42 U.S.C. § 2000e-2 (2001).

156. *Rockwell v. EEOC*, 443 F.3d 1012, 1014 (7th Cir. 2001).

157. *Id.* at 1015.

158. *Id.*

159. *Rockwell's* policy requiring applicants to undergo a nerve conduction test was in place during 1992 and part of 1993. *EEOC v. Rockwell Int'l Corp.*, 60 F. Supp. 2d 791, 792 (N.D. Ill. 1999).

160. LINDEMANN & GROSSMAN, *supra* note 150, at 715.

161. See *Bailey v. Southeastern Area Joint Apprenticeship Comm.*, 561 F. Supp. 895, 912 (N.D. W. Va. 1983) (stating some questions may be icebreakers simply designed to relax the interviewee and the question is only a violation if it actually had an adverse effect on the protected group). However, questions about pregnancy and childbearing have been considered unlawful per se. *King v. Trans World Airlines Inc.*, 738 F.2d 255 (8th Cir. 1984). See also *Barbano v. Madison County*, 922 F.2d 139, 139 (2nd Cir. 1990) (holding that an interview in which the employer asked a female applicant about family plans and whether her husband approved of her taking the position was discriminatory).

the information?¹⁶² Although the employer may have a valid reason for collecting the information, the validity of that reason must be tested before the court.

D. *Doing Away with Paternalism*

Once the plaintiff/applicant makes a prima facie showing of impermissible discrimination, the burden shifts to the employer to rebut that showing¹⁶³ by proving the discrimination was business related.¹⁶⁴ Under the ADA analysis, some courts have stated that employers can discriminate based on an impairment if the employer can show that, although qualified, the impairment places the applicant at a high risk of harm.¹⁶⁵ This provision allows employers to discriminate because the job functions might aggravate the applicant's predisposition. Title VII contains no similar provision.¹⁶⁶ An employer would comply with the ADA by providing some evidence of an undetermined degree of danger to the applicant. Although that result may appear beneficial to the employee, the inappropriateness of such paternalism is discussed in the following section.

E. *Why Amend Title VII and Not the ADA*

There are three reasons why Title VII is a more appropriate legal remedy than the ADA. First, the ADA allows employers to discriminate based on a disability as long as the employer can establish some degree of danger to the applicant. The debate over

162. See LINDEMANN & GROSSMAN, *supra* note 150, at 716 (stating that it would be difficult for an employer to articulate a legitimate basis for the inquiry).

163. *Id.* at 714.

164. *Id.* Lack of qualification, poor references or the existence of a more qualified applicant would constitute a legitimate business-related purpose for discrimination. *Id.*

165. EEOC v. Blue Cross Blue Shield of Conn., 30 F. Supp. 2d 296, 307 (D. Conn. 1988). In *Blue Cross*, the plaintiff was incorrectly diagnosed with a significant kidney dysfunction. *Id.* at 298. He was later diagnosed with a less dangerous kidney disease. *Id.* at 299. The defendant argued the decision not to employ the plaintiff was based on health risks to the plaintiff. *Id.* at 305. The court held that if the defendant was unaware of the second diagnosis it was permissible to reject the applicant. *Id.* at 307. The ADA's definition of a qualified applicant states in pertinent part that, "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b) (2001). Although the statute is silent as to a threat to the applicant, the EEOC's regulations define direct threat as including "a significant risk of substantial harm to the health or safety of the individual . . ." 29 C.F.R. § 1630.2(r) (2002).

166. *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (stating "the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

this provision is centered on who should be responsible for an applicant's safety.¹⁶⁷ One view is that it is the employer's responsibility.¹⁶⁸ Others believe that, once informed of the potential risk, the applicant should be free to choose to heed the warning or disregard it.¹⁶⁹

The uncertainty surrounding genetic predispositions provides weight to affording applicants the right to choose. An applicant with a genetic predisposition has no current impairments and the safety concerns are much less apparent than a case in which the applicant is currently disabled.¹⁷⁰ Because the likelihood of any potential harm to the applicant is less when the applicant merely has a genetic predisposition it follows that the applicant, not the employer, should decide whether to work. Because Title VII does not authorize employees to make this inappropriate, paternalistic decision on behalf of the employee, Title VII, rather than the ADA, is the more appropriate remedy.

Second, amending Title VII rather than the ADA is a policy consideration. The difficulty in establishing an ADA claim in this context with a genetic predisposition is that the applicant is not disabled as defined by the ADA. For the ADA to become an appropriate remedy, an amendment to the ADA's definition of disabled would have to include genetic predispositions, but defining those with genetic predispositions as disabled furthers, rather than eliminates, the misconceptions surrounding predispositions. The ADA was enacted to eliminate discrimination based on misperceptions and stereotypes surrounding individuals with impairments.¹⁷¹ By amending the ADA to include genetic predispositions, Congress would embrace the conclusion that genetic predispositions amount to impairment when in fact all humans have some form of genetic predisposition, but not all humans are impaired.¹⁷² Classifying genetic predispositions as an impairment would enhance fears surrounding genetic information rather than quell them. Title VII prohibits discrimination based on inappropriate prejudices.¹⁷³ Our genetic makeup is as intimate and personal to us as our race, our color, and our sex. Any form of discrimination based on genetics should be viewed as a prejudice, not a misperception.

167. See Mark A. Rothstein, *Genetics and the Work Force of the Next Hundred Years* 2000 COLUM. BUS. L. REV. 371, 392 (2000)(stating that there are three different positions on who should determine whether the employment poses a risk to the safety of the applicant).

168. *Id.* at 393.

169. *Id.* at 394.

170. Kaufmann, *supra* note 20, at 399.

171. Congressional Findings and Purposes. 42 U.S.C. § 12101(a)(5) (2001).

172. See generally SCHELI *supra* note 147 at xi (explaining all humans have mutated genes).

173. See generally *id.* (explaining the history and development of Title VII).

Finally, an amendment to Title VII balances the interests between employers and applicants. Under the ADA employers are required to make reasonable accommodations for disabled applicants,¹⁷⁴ while Title VII has no such requirement. If an applicant with a genetic predisposition is free to make employment decisions regardless of potential health risks, and accepts those risks, the employer should not be forced to accommodate the applicant as a result of that accepted risk. Amending Title VII, as opposed to the ADA, would allow applicants to take the risk of employment, while not forcing employers to accommodate that chosen risk.

174. Section 12112(b)(5) of the ADA defines *discriminate* as:

- (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
- (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C. § 12112 (b)(5) (A)-(B) (2001).

The EEOC defines *reasonable accommodations* as:

- (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

- (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o). (2002).

F. Creating Support for Genetic Research

The HGP scientists predict that genetic research will result in astonishing benefits.¹⁷⁵ However, sixty-three percent of Americans say they would not undergo genetic testing if their employers had access to the test results.¹⁷⁶ These fears and perceptions will seriously impede the future progress of genetic research.¹⁷⁷ Legislation providing adequate protection from employment discrimination may relieve these fears, allowing people to embrace genetic research and its potential achievements.¹⁷⁸

IV. CONCLUSION

In the early 1990s, academics argued the ADA would protect people with disabilities from employment discrimination. The language and legislative history of the ADA supports that argument. In 1995, the EEOC expanded its definition to include genetic predispositions. However, courts have made it clear that EEOC regulations do not have the same effect as statutory law.

The ADA provides protection for applicants who are not currently impaired but are "regarded as" having an impairment. The only possible protection from employment discrimination for an applicant with a genetic predisposition is under the "regards as" clause because a predisposition is not a current impairment. Though the EEOC has stated that an employer who rejects an applicant based on a genetic predisposition "regards" that applicant as impaired and therefore violates the ADA, the Supreme Court apparently disagrees. The Supreme Court has stated that an employer "regards" an applicant as impaired only if the employer actually perceives an applicant as impaired. An employer that rejects an applicant due to a genetic predisposition is under no such misperception. Thus, the ADA will not protect applicants with genetic predispositions from discrimination. The director of the EEOC stated that the Court's interpretation of the "regards as" clause makes it unclear whether the ADA protects genetically predisposed applicants.

175. See *supra* note 17 and accompanying text (detailing a few of the expected benefits of the HGB's research).

176. Jeffords & Daschle, *supra* note 27, at 1250. For example, a graduate student refused to be genetically tested for hemochromatosis, a fatal disease, even though his father and uncle had it, because he was worried about his job. ANDREWS, *supra* note 2, at 134.

177. Jeffords & Daschle, *supra* note 27, at 1250.

[T]here are more barriers to achieving that era of [personalized an preventive medicine] than the scientific ones have now overcome. A key barrier is the fear that is pervasive in our society that genetic information will be used to deny health insurance or a job . . . Without enactment of legislation, I fear that this new era will be delayed.

178. *Id.*

Employers would argue that it is their right to determine whether applicants are at a higher risk than other applicants of becoming impaired. Employers, through their insurance carriers, bare the cost of an employee's impairment. However, the existence of a genetic predisposition is not conclusive evidence that an applicant will develop an impairment. It is unfair for employers to discriminate based on potential impairments.

Others may argue that it is more appropriate to amend the ADA to include the genetically predisposed as disabled rather than Title VII as a protected class. However, it is inappropriate to consider the genetically predisposed as disabled. A genetic predisposition is not a current impairment. Furthermore, all people have some form of genetic mutation. Classifying a genetic mutation as a disability would create a stigma around genetic predispositions and genetic research. Finally, because Title VII does not require employers to make reasonable accommodations, it affords a level of protection for employers that the ADA would not.

A genetic predisposition is similar to race, color and national origin. Genetic makeup is determined before birth and is beyond the individual's control. Amending Title VII would afford an appropriate level of protection against genetic discrimination without retracting from the ADA's purpose.

