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Disability Stigma and Intraclass Discrimination

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*Jeannette Cox**

ABSTRACT

By dramatically enlarging the Americans with Disabilities Act's (ADA) protected class, the recent amendments to the ADA increase the opportunities for employers to replace one member of the ADA's protected class with another. Although disparities in the social stigma associated with different disabilities suggests that such employment decisions are not automatically free from disability-based animus, many courts historically regarded such decisions as immune from ADA scrutiny. They held that the ADA only prohibited discrimination between persons inside and outside the ADA's protected class. Today, this "no intraclass claims" approach persists in a modified form: Some courts limit intraclass claims to situations in which employers disfavor persons with more biologically severe disabilities vis-à-vis those with less biologically severe disabilities. Although this approach benefits individuals with more biologically severe disabilities, it compounds the disadvantage experienced by persons whose disabilities carry the most significant social stigma, a burden that does not directly correlate with the biological severity of a person's disability. This Article argues that just as courts' traditional refusal to permit intraclass disability discrimination claims inappropriately obscured the negative social responses to disabilities the ADA was designed to address, courts' current emphasis on the biological severity of disabilities departs from the ADA's core purpose: remedying the stigma and stereotypical assumptions experienced by individuals with disabilities.

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INTRODUCTION

By dramatically enlarging the Americans with Disabilities Act’s (ADA)¹ protected class, the recent amendments to the ADA increase the opportunities for employers to replace one member of the ADA’s protected class with another. Prior to the ADA Amendments Act of 2008 (ADAAA),² the ADA’s protected class encompassed an estimated 13.5 million individuals, or approximately 4% of the U.S. population.³ Today, by contrast, the ADA’s protected class includes at least 43 million persons, or 14% of the U.S. population, though the actual number is likely much higher.⁴ The previously excluded individuals include persons with mild forms of previously included disabilities as well as individuals whose relatively severe disabilities can be ameliorated with medication.⁵ Accordingly, the large umbrella of the newly amended ADA’s protected class includes individuals with disabilities as diverse as diabetes, depression, back pain, deafness,

1. 42 U.S.C. §§ 12101–12213 (2006).

2. ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (2008).

3. Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 14 (2007) (arguing that prior to the ADA Amendments Act of 2008, the Supreme Court’s interpretation of the ADA left “fewer than 13.5 million Americans protected by the ADA—most of whom are unlikely to be able to take advantage of the statute’s employment protections”).

4. Adopted in 1990, the ADA’s original text noted that 43 million Americans have some form of a disability, and that this number will likely increase over time. 42 U.S.C. § 12101(a)(1). The ADAAA removed this provision in order to emphasize that courts should regard the 43 million estimate as a floor, not a ceiling, on the number of persons in the ADA’s protected class. ADA Amendments Act of 2008 § 3.

5. ADA Amendments Act of 2008 § (2)(b)(6) (“The purposes of this act are . . . to express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term ‘substantially limits’ as ‘significantly restricted’ to be consistent with this Act, including the amendments made by this Act.”); *id.* § 2(b)(2) (“The purposes of this Act are . . . to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures . . .”).

schizophrenia, monocular vision, and missing limbs. It also includes people who do not actually have a disability but whom a defendant-employer perceives to have a disability.⁶

The social barriers experienced by the members of the ADA's protected class vary widely. For example, while a missing limb may appear to be a more biologically severe disability than depression, a person with depression may experience greater social and vocational obstacles in the modern workplace, which often emphasizes a positive outlook.⁷ Similarly, while Asperger's syndrome, a relatively mild neurological condition related to autism, may appear less biologically severe than paraplegia, an individual with Asperger's syndrome may experience more significant socially imposed barriers in many employment sectors. Thanks to the universal design movement, which has improved architectural accessibility for persons with physical disabilities, many work environments pose greater obstacles to persons who have difficulty navigating complex social structures than to persons with mobility limitations. In addition, corporate incentives to achieve visible diversity in the workforce may motivate employers to prefer persons with mobility limitations and other physically obvious disabilities. Comparatively, employers have little incentive to hire persons with less obvious disabilities whose disability-related traits are more likely to elicit negative responses from fellow employees.⁸

The ADA, which prohibits discrimination on the basis of disability, would appear to be the natural vehicle to address employment decisions that single out persons with uniquely stigmatized disabilities for negative treatment. Nonetheless, plaintiffs with the most stigmatized disabilities face difficulty using the ADA to challenge negative treatment they experience.⁹ In part, this difficulty arises from the ADA's built-in limitations on employers' obligations to reshape the

6. *Id.* § 4(a)(3)(A).

7. See Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 272 (2000) ("For many years, research has also consistently shown that people with psychiatric disabilities are subject to more severe employment discrimination than people with other kinds of disabilities.") (citing Marjorie Baldwin, *Can the ADA Achieve Its Employment Goals?*, in ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1997, at 37, 37-52; Edward H. Yelin & Miriam G. Cisternas, *Employment Patterns Among Persons with and Without Mental Conditions*, in MENTAL DISORDER, WORK DISABILITY, AND THE LAW 25, 35 (Richard J. Bonnie & John Monahan eds., 1997) [hereinafter MENTAL DISORDER]; Sue E. Estroff et al., "No Other Way to Go": Pathways to Disability Income Application Among Persons with Severe, Persistent Mental Illness, in MENTAL DISORDER 55, 60).

8. Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187 (2009).

9. See Stefan, *supra* note 7, at 273 ("[A]n examination of both reported cases and research supports the conclusion that people with psychiatric disabilities have received minimal benefit from the ADA's protections against employment discrimination.").

workplace to include individuals with disabilities—i.e., the “reasonable accommodation” and “undue hardship” provisions.¹⁰ Both of these provisions allow employers to use cost concerns to justify their refusal to make disability-related adjustments to the workplace.¹¹ However, these limitations on employers’ accommodationary responsibilities cannot explain all the difficulties persons with the most stigmatized disabilities face in ADA litigation. These persons—many of whom have mental and psychological disabilities—often do not need expensive modifications to the employer’s physical facilities; instead, these workers more often simply require supervisors and co-workers to look past the stigma associated with their disability.¹²

The more direct obstacle to individuals with the most stigmatized disabilities is courts’ reluctance to embrace intraclass disability discrimination claims.¹³ Although rarely acknowledged in the employment discrimination literature, many courts initially confronted with the ADA, and § 504, the statutory precursor to the ADA, refused to characterize disability-motivated termination decisions as discriminatory unless the employer replaced the terminated employee with a nondisabled person.¹⁴ These courts regarded the identification of a nondisabled comparator as not merely helpful, but essential to establishing a disability discrimination claim. Accordingly, an employer could often avoid liability for a disability-motivated termination decision by replacing the terminated employee with another member of the ADA’s protected class. Today, although many courts have wholly or partially abandoned the requirement that ADA plaintiffs identify a comparator outside the ADA’s protected class, many courts continue to

10. 42 U.S.C. § 12111(9)–(10) (2006).

11. *Id.* § 12111(10)(B).

12. *See* Stefan, *supra* note 7, at 274 (“[I]n the traditional form of discrimination claim, . . . the employee is not asking for accommodations but simply to be treated the same as everyone else. Many people with psychiatric disabilities, and most whose claims are based on perceived psychiatric disabilities, fall into this category.”). The more formidable obstacle to discrimination claims by persons with the most stigmatized disabilities—the restricted scope of the ADA’s protected class—was removed by ADA Amendments Act of 2008. Pub. L. No. 110-325, § 3, 122 Stat. 3553 (2008). Prior to the amendments, courts barred many persons with mental and psychological disabilities from the ADA’s protected class because their medications reduced the “substantial limitation” they would otherwise experience. The amendments, however, rejected this overly literal interpretation of the ADA’s text and thus brought into the ADA’s protected class many persons with pharmacologically treatable, but nonetheless stigmatized, conditions such as bipolar disorder, depression, and epilepsy. *Id.*

13. *Cf.* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 194 (2009) (noting that the general phenomenon of courts assessing the presence or absence of a comparator in discrimination cases, “though scarcely invisible, has received little attention”).

14. Section 504 of the Rehabilitation Act of 1973 prohibits recipients of federal funds from discriminating on the basis of disability. 29 U.S.C. § 794(a) (2006).

limit intraclass disability discrimination claims by requiring plaintiffs to demonstrate that their disabilities are more biologically severe than the disabilities of persons who received more favorable treatment.

To date, disability scholars have not focused on problem of courts limiting intraclass claims, perhaps due to the relatively limited number of intraclass discrimination claims.¹⁵ The 2008 amendments' expansion of the ADA's protected class, however, makes intraclass disability discrimination claims more salient. By bringing a broader range of individuals into the ADA's protected class—including a large number of persons whose disabilities are less biologically severe—the amendments increase opportunities for employers to choose amongst members of the ADA's protected class.¹⁶ Similarly, the amendments' expansion of the number of persons able to sue under the ADA will increase the number of employees and prospective employees who will consider filing intraclass claims.

The manner in which courts deal with the oncoming wave of intraclass disability discrimination claims will reveal a great deal about the extent to which courts have abandoned the welfare model of disability policy in favor of the civil rights model that aligns the ADA with traditional civil rights statutes such as Title VII of the Civil Rights Act of 1964. The welfare model of disability policy gives priority to persons with biologically severe disabilities, based on the assumption that disability policy should compensate for biological limitations. It also emphasizes maximizing aggregate benefits to “the disabled” as a class even when doing so disadvantages persons with the most stigmatized disabilities.

A civil rights model, by contrast, focuses on the socially-imposed obstacles faced by people with disabilities and attempts to remove those obstacles. It emphasizes an individual's right to be free from disability-based animus, unnecessary paternalism, and harmful stereotypes.¹⁷

15. The notable exception is Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 859–61 (2002), (collecting cases). Cf. Cox, *supra* note 8, at 214–17 (raising the issue briefly).

16. Although the ADAAA codifies judicial conclusions that the ADA does not permit “reverse discrimination” suits by persons who claim that they were “subject to discrimination because of [their] lack of disability,” the ADAAA says nothing about whether persons who fall within the ADA's protected class can challenge employers' decisions to disadvantage them because of their relatively lesser disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6(a), 122 Stat. 3553 (2008); *see also* H.R. REP. NO. 110-730, pt. 1, at 17 (2008) (“The bill prohibits reverse discrimination claims by disallowing claims based on the lack of disability. . .”).

17. *See* Cox, *supra* note 8, at 190–93 (describing the competing civil rights and welfare models of disability policy that have defined the debate surrounding the interpretation of the ADA).

The civil rights model suggests that the ADA's purpose is not to provide preferential treatment to individuals with the most biologically severe disabilities, but is instead to challenge disability animus and to remove socially imposed barriers to persons with disabilities. While a welfare model—embodied in legislation such as the Social Security Disability program—might reasonably prioritize benefit allocations to individuals whose disabilities are the most biologically severe, the ADA should not enshrine a similar preference for biological severity. Litigation under the ADA should focus on disability animus and stereotypes rather than the biological severity of various disabilities. Accordingly, the ADA should account for the possibility that an employer who refuses to hire an individual with Asperger's syndrome in favor of a less qualified wheelchair user may have engaged in disability discrimination even though the wheelchair user possesses a more biologically severe disability. Just as the historical bar on intraclass disability discrimination claims obscured the negative social responses to disability that the civil rights model emphasizes, courts' current focus on the biological severity of disabilities also obscures negative social responses to disabilities.

This argument proceeds as follows. Part I identifies the primary rationale for courts' initial reluctance to permit intraclass claims: the ADA's limited protected class. Courts emphasized that, unlike Title VII, which prohibits race and sex discrimination against every employee of a covered employer, regardless of the employee's race or sex, the ADA prohibits disability discrimination only against the members of the ADA's protected class. Focusing on the language that then defined the ADA's protected class—individuals who possess “a substantial limitation upon one or more of [their] major life activities”—courts concluded that the ADA prohibited discrimination only between persons who fell within that definition and those that fell without it. In 1996, however, the Supreme Court's treatment of the Age Discrimination in Employment Act (ADEA), the other federal statute with a limited protected class, deflated this “limited protected class” rationale for restricting intraclass claims under the ADA. With the “limited protected class” rationale now discredited, Part II argues that courts' continued resistance to intraclass disability discrimination claims stems from a welfare model justification: the belief that the ADA should maximize aggregate benefits to the ADA's protected class as a whole even when it disadvantages persons with the most stigmatized disabilities. Part II also argues that, although courts may regard the ADA as encompassing a continuum of individuals whose disabilities range from more to less biologically severe, courts should not conclude that the ADA prohibits intraclass discrimination only in situations where employers disfavor persons with disabilities that are more

biologically severe. The ADA's text indicates that the ADA is not solely concerned with the biological severity of individuals' disabilities; instead, the statute is targeted to address "restrictions and limitations," "unequal treatment," and "stereotypic assumptions,"¹⁸ or, in other words, socially imposed difficulties to persons with disabilities.

I. THE RISE AND FALL OF THE "LIMITED PROTECTED CLASS BARRIER" TO INTRACLAS DISABILITY DISCRIMINATION CLAIMS

A. Courts' Traditional Refusal to Allow Intraclas Claims

In the first two decades of disability discrimination litigation, many courts held that the ADA categorically barred intraclas claims. These courts regarded the identification of a nondisabled comparator as not merely helpful, but essential, to establish a disability discrimination claim. They broadly concluded that the ADA only prohibits policies and practices that disadvantage "the disabled" vis-à-vis "the nondisabled."¹⁹

18. 42 U.S.C. § 12101(a)(7) (2006).

19. *Lewis v. Kmart Corp.*, 180 F.3d 166, 172 (4th Cir. 1999) (noting "the ADA and the Rehabilitation Act permit preferential treatment between disabilities"); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1019 (6th Cir. 1997) ("[T]he ADA, like the Rehabilitation Act, prohibits discrimination between the disabled and the non-disabled."); *Brennen v. Comptroller of N.Y.*, No. 95-7559, 1996 WL 19057, at * 1 (2d Cir. Jan. 16, 1996) ("To state a claim under the ADA, plaintiffs must allege that defendants treated them differently from *non-disabled* employees, or that defendants' practices have a disparate impact upon disabled employees relative to non-disabled employees. . . . At bottom . . . plaintiffs are claiming that the defendants are discriminating among disabled persons. Like the Rehabilitation Act, however, whose case law we may look to for guidance . . . the ADA does not proscribe such conduct.") (emphasis added); *Johnson by Johnson v. Thompson*, 971 F.2d 1487, 1494 (10th Cir. 1992) ("Section 504 proscribes discrimination between the nonhandicapped and the 'otherwise qualified' handicapped."); *Colin K. v. Schmidt*, 715 F.2d 1, 9 (1st Cir. 1983) ("[W]e have serious doubts whether Congress intended § 504 to provide plaintiffs with a claim for discrimination vis-à-vis other handicapped individuals . . ."); *Rogers v. Dep't of Health & Envtl. Control*, 985 F. Supp. 635, 639 (D.S.C. 1997) ("[T]he ADA proscribes only discrimination between the disabled and the non-disabled. The gravamen of Rogers' claim, discrimination between individuals with different disabilities, is not governed by the ADA."); *Rome v. MTA/N.Y. City Transit*, No. 97-CV-2945, 1997 WL 1048908, at *4 (E.D.N.Y. Nov. 18, 1997) ("In order to establish a claim of discrimination under the ADA, plaintiffs must show that they have been treated differently than similarly situated non-disabled persons. Merely distinguishing among disabilities does not constitute discrimination under the ADA."); *Harding v. Winn-Dixie Stores, Inc.*, 907 F. Supp. 386, 391 (M.D. Fla. 1995) ("[T]he ADA and the Rehabilitation Act apply only to discrimination between or among disabled and non-disabled persons."); *Wolford v. Lewis*, 860 F. Supp. 1123, 1134 (S.D. W. Va. 1994) (stating that § 504 requires "only that disabled individuals receive the same treatment as those who are not disabled"); *People First of Tenn. v. Arlington Developmental Ctr.*, 878 F. Supp. 97, 101 (W.D. Tenn. 1992) ("Plaintiffs are claiming, *inter alia*, that some Arlington residents are being excluded from community services, because of the severity of their retardation or physical disabilities, but that other handicapped persons are receiving such services. However, an action asserting that certain plaintiffs have been the victim of discrimination vis-a-vis other handicapped people must fail because § 504 does not cover

Reasoning that “[i]t is not a violation of [§ 504 or the ADA] to differentiate among applicants [based on] attributes of handicap, . . . severity of handicap, . . . or level of handicap,”²⁰ these courts repeatedly rejected intraclass discrimination claims, informing plaintiffs that they “cannot use the ADA to complain about a disparity in treatment among individuals with different disabilities.”²¹

Based on this determination, many lower courts concluded that public and private entities that exclusively serve persons with disabilities could never violate disability nondiscrimination mandates because such agencies did not serve persons without disabilities.²² For example, in a case involving a New York disability agency, the Second Circuit explained that the plaintiff’s claims under § 504 and the ADA were “beyond tenuous given [the agency]’s sole purpose in assisting the disabled.”²³ Accordingly, until the Supreme Court’s decision in *Olmstead v. L.C. ex. rel. Zimring*,²⁴ many state facilities that institutionalized persons with disabilities evaded challenges to their terms and conditions of confinement by emphasizing that the facility only institutionalized persons with disabilities.²⁵

Courts’ refusal to permit intraclass disability claims also

discrimination among similarly handicapped persons Accordingly, plaintiffs’ claims under the Rehabilitation Act and Title II of the ADA are dismissed.”); *Cramer v. Florida*, 885 F. Supp. 1545, 1551 (Fla. 1995) (concluding that “the ADA applies only to discrimination against disabled persons compared to non-disabled persons”).

20. *Wagner v. Fair Acres Geriatric Ctr.*, 859 F. Supp. 776, 782, (E.D. Pa. 1994), *vacated on other grounds*, 49 F.3d 1002 (3d Cir. 1995). Section 504 of the Rehabilitation Act of 1973 prohibits recipients of federal funds from discriminating on the basis of disability. 29 U.S.C. § 794(a) (2006).

21. *Lenox v. Healthwise of Ky., Ltd.* 149 F.3d 453, 457–58 (6th Cir. 1998).

22. *See, e.g., Freilich v. Bd. of Dirs. of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679, 697–99 (D. Md. 2001) (holding that “because Dr. Freilich has alleged only a difference in the way oversight and quality assurance is provided among hospital patients (who are arguably all disabled), she fails to make the showing, as the statutes require, that the treatment of the dialysis patients involves any difference in treatment between the disabled and the non-disabled”).

23. *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998).

24. 527 U.S. 581 (1999).

25. The courts’ pre-*Olmstead* understanding of the ADA and § 504 as prohibiting only disparate treatment between persons within and without the statutes’ protected class understandably provided state governments an incentive—directly contrary to the ADA’s nonsegregation objective—to segregate disability service facilities and programs from service agencies that served other populations. *See, e.g., People First of Tenn. v. Arlington Developmental Ctr.*, 878 F. Supp. 97, 101 (W.D. Tenn. 1992) (dismissing plaintiffs’ claim that “some Arlington residents are being excluded from community services, because of the severity of their retardation or physical disabilities, but that other handicapped persons are receiving such services” with the explanation that “an action asserting that certain plaintiffs have been the victim of discrimination vis-à-vis other handicapped people must fail because § 504 [and the ADA] does not cover discrimination among similarly handicapped persons”).

significantly limited the scope of disability discrimination litigation in employment settings. Many courts concluded that to prove disability discrimination in a termination case, a plaintiff must show that “he or she was replaced by a non-disabled person,”²⁶ a showing that employers could easily foreclose by replacing the plaintiff with another member of the ADA’s protected class.²⁷ For example, the District Court of the Eastern District of Michigan concluded that a plaintiff with a disability had “failed to allege any discriminatory event” when her employer offered her desired job to another person with a disability.²⁸ Even though the sole issue before the court was whether the plaintiff had alleged sufficient facts in her EEOC complaint to toll the applicable statute of limitations, a lenient pleading standard, the court reasoned that the plaintiff’s EEOC complaint could not satisfy this minimal requirement because the “plaintiff’s complaint of discrimination involves one handicapped person (the plaintiff) vis-à-vis another handicapped person.”²⁹ Similarly, the District Court of the Southern

26. *Price v. S-B Power Tool*, 75 F.3d 362, 365 (8th Cir. 1996); *see also* *Hancock v. Potter*, 531 F.3d 474, 479 (7th Cir. 2008) (“[E]ven if [the plaintiff] could somehow establish that she was disabled under the ADA, her claim would still fail on the grounds that she cannot point to a single similarly situated employee outside the protected class who was treated more favorably.”); *Lawrence v. Nat’l Westminster Bank N.J.*, 98 F.3d 61, 68 (3d Cir. 1996) (“[T]o establish a prima facie case for discriminatory employment termination, the plaintiff must prove by a preponderance of the evidence that . . . he was ultimately replaced by a person sufficiently outside the protected class to create an inference of discrimination.”) (reasoning later rejected by *Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 356 (3d Cir. 1999)); *Reiter v. Taylor Corp.*, No. 97 C 3861, 1998 WL 801796, *3 (N.D. Ill. Nov. 13, 1998) (“Because Reiter has not made the most basic showing—that people whom NuArt continued to employ were not disabled—this Court cannot find that those outside the protected class, whether similarly situated or not, were treated more favorably than the protected employees. . . . [Accordingly,] Reiter’s prima facie case fails”); *Kalekirstos v. CTF Hotel Mgmt. Corp.*, 958 F. Supp. 641, 654 n.12 (D.D.C. 1997) (“[T]his Court, as many other trial courts have, shall include a fourth element to the prima facie case for disability discrimination: *that the plaintiff was replaced by a non-disabled person.*”); *see id.* at 664 (explaining that the plaintiff has “failed to prove that his replacement fell outside the protected class. In fact, the plaintiff repeatedly states he does not know who replaced him. . . . [T]he plaintiff also suggested the names [of] two people as his replacements, but he made no assertions regarding these persons’ abilities or disabilities. Needless to say, the plaintiff has failed to establish the fourth element of the prima facie case”).

27. *See Hutchinson v. United Parcel Serv., Inc.*, 883 F. Supp. 379, 395 (N.D. Iowa 1995) (noting that the practice of barring intraclass claims under the ADA effectively allows “employers to control whom the ADA protects”); *cf.* *Howard v. Roadway Exp., Inc.*, 726 F.2d 1529, 1535 (11th Cir. 1984) (inquiring whether an African American plaintiff’s “replacement by another black was a pretextual device specifically designed to disguise an act of discrimination”).

28. *Fowler v. Frank*, 702 F. Supp. 143, 146 (E.D. Mich. 1988).

29. *Id.* at 146 (“[The] plaintiff’s complaint of discrimination involves one handicapped person (the plaintiff) vis-à-vis another handicapped person [T]he Court cannot accept the offer of [the plaintiff’s desired job] to another handicapped employee as a valid discriminatory event, as contemplated under section 504. Thus, the plaintiff has failed to allege any

District of Indiana dismissed an ADA claim because the plaintiff failed to present sufficient evidence to establish that the individuals her employer treated more favorably lacked disabilities.³⁰ Although courts in many circuits have since relaxed this categorical bar on intraclass disability discrimination claims, the Seventh Circuit, as recently as 2008, opined that lower courts within its jurisdiction must dismiss ADA claims in which the plaintiff “cannot point to a single similarly situated employee outside the protected class who was treated more favorably.”³¹

To justify limitations on intraclass claims, many courts cite *Traynor v. Turnage*,³² but this case does not actually support this restrictive reading of the ADA. In *Traynor*, the Supreme Court concluded that a longstanding statute, which denied to veterans with “primary alcoholism” a veterans’ disability benefit, was not repealed by Congress’s enactment of § 504, the statutory predecessor to the ADA.³³ The *Traynor* Court reasoned that the benefits statute, which dealt “with a narrow, precise, and specific subject, [was] not submerged by [§ 504, a] later enacted statute covering a more generalized spectrum, [because] the later statute [did not] expressly contradict the original act.”³⁴ In explaining why § 504 did not expressly contradict the benefits statute,

discriminatory event.”).

30. *Johnson v. Wal-Mart Stores, Inc.*, No. IP-99-0848-C-M/S, 2001 WL 396953, at *7 (S.D. Ind. Jan. 17, 2001).

31. *Hancock v. Potter*, 531 F.3d 474, 479 (7th Cir. 2008). Relatedly, a larger number of courts continue to categorically conclude that the ADA’s nondiscrimination mandate does not apply to employer-provided long-term disability plans or health insurance plans, even though the ADA’s text, 42 U.S.C. § 12201(c) (2006), provides that insurance plans may differentiate amongst disabilities only if the differentiation is not a subterfuge to evade the purposes of the ADA. *See, e.g.*, *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 150 (2d Cir. 2000) (holding that the ADA bars intraclass disability discrimination challenges to insurance plans); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1019 (6th Cir. 1997) (opining, in a case challenging an insurance plan, that “[t]he ADA simply does not mandate equality between individuals with different disabilities [but instead] prohibits discrimination between the disabled and the non-disabled”); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, 1044 (7th Cir. 1996) (concluding that the ADA permits long-term disability plans to differentiate between physical and mental disabilities); *Hess v. Allstate Ins. Co.*, No. 99-384-P-C, 2000 WL 1186262, at *8 n.7 (D. Me. Aug. 2, 2000) (holding that the ADA permits long-term disability plans to differentiate between physical and mental disabilities).

32. 485 U.S. 535 (1988).

33. 38 U.S.C. § 1662(a)(1) (1972). The applicable regulations, which excluded veterans from a waiver of a 10-year time limit for the use of an educational benefit, defined “primary alcoholism,” as alcoholism not directly caused by a psychiatric disorder. *Veneral Disease, Alcoholism, and Drug Usage*, 37 Fed. Reg. 20,335-20,336 (Sept. 29, 1972) (to be codified in 38 C.F.R. pt.3).

34. *Traynor*, 485 U.S. at 548 (internal citations omitted); *see also id.* at 552 (“[I]t is by no means clear that § 504 and the characterization of primary alcoholism as a willfully incurred disability are in irreconcilable conflict.”).

the Court noted that

Congress is entitled to establish priorities for the allocation of the limited resources available for veterans' benefits, . . . and thereby to conclude that veterans who bear some responsibility for their disabilities have no stronger claim to an extended eligibility period than do able-bodied veterans. Those veterans are not, in the words of § 504, denied benefits "solely by reason of [their] handicap," but because they engaged with some degree of willfulness in the conduct that caused them to become disabled.³⁵

The Court further reasoned—in language that lower courts later quoted—that "the 'willful misconduct' provision does not undermine the central purpose of § 504, which is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals."³⁶

Although this language led many lower courts to reason that § 504's nondiscrimination mandate—as well as the ADA's parallel mandate—was limited to cases in which a plaintiff could demonstrate that she did not receive "evenhanded treatment" in relation to nondisabled persons, the exchange between the majority and dissenting Justices in *Traynor* reveals that the *Traynor* majority did not in fact endorse a categorical bar on intraclass disability discrimination claims. Instead, the exchange suggests that the *Traynor* majority believed that some policies which disadvantage persons with certain disabilities vis-à-vis persons with other types of disabilities would violate § 504.³⁷ Responding to the dissenters' argument that Congress lacked a substantial basis for concluding that primary alcoholism is always "willfully acquired," the *Traynor* majority conceded that *if* the dissenters were correct—if there was in fact no "substantial basis" for treating alcoholics less favorably than persons with other disabilities—§ 504 would prohibit Congress from singling out alcoholics for lesser treatment.³⁸ In other words, contrary to lower courts' subsequent usage of the *Traynor* opinion, the *Traynor* majority acknowledged that § 504 indeed prohibited disability-based discrimination amongst members of § 504's protected class. The majority explained:

It would arguably be inconsistent with § 504 for Congress to distinguish between categories of disabled veterans

35. *Id.* at 549–50 (citations omitted).

36. *Id.* at 548.

37. *Id.* at 550.

38. *Id.*

according to generalized determinations that lack any substantial basis. If primary alcoholism is not always “willful,” as that term has been defined by Congress and the Veterans’ Administration, some veterans denied benefits may well be excluded solely on the basis of their disability.³⁹

Accordingly, the *Traynor* majority acknowledged that policies disfavoring persons with certain disabilities vis-à-vis persons with other types of disabilities would survive § 504 scrutiny only if the disparate treatment had a “substantial basis.”⁴⁰ In other words, treating persons with specific disabilities less favorably than similarly situated persons with other disabilities could violate § 504 (and also, presumably, the subsequently enacted ADA).

Given that *Traynor* did not require lower courts to prohibit intraclass disability discrimination claims, the lower courts’ prohibition of such claims starkly departs from their approach toward parallel race and sex discrimination litigation. Although a handful of courts initially suggested that race and sex discrimination statutes might require a terminated employee to prove that her employer replaced her with a person of a different race or sex, this reading of Title VII and § 1981 was short-lived. In 1989, the Supreme Court made clear that replacing a female employee with another female employee would not immunize an employer from liability when gender stereotypes motivated the employer’s termination decision.⁴¹ Similarly, in 1987, the Supreme Court held that § 1981’s prohibition on race discrimination proscribes racial discrimination between persons who are members of the same race.⁴² This conclusion led lower courts to permit darker skinned African Americans to allege racial discrimination when employers discriminated against them in favor of lighter skinned African Americans (and vice versa).⁴³ Thus, by the late 1980s, courts

39. *Id.*

40. *Id.*

41. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249-51 (1989); *see id.* at 250 (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).

42. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4, 613 (1987) (acknowledging that “[c]lear-cut [racial] categories do not exist . . . [and] that racial classifications are for the most part sociopolitical, rather than biological, in nature,” the Court concluded that “a distinctive physiognomy is not essential to qualify for § 1981 protection”). Unlike Title VII, which prohibits national origin and color discrimination in addition to race discrimination, § 1981 only prohibits discrimination on the basis of race. 42 U.S.C.A. §§ 2000e(2006); 42 U.S.C. § 1981 (2006).

43. *Curley v. St. John’s Univ.*, 19 F. Supp. 2d 181, 192–93 (S.D.N.Y. 1998) (“[A] broad body of precedent recognizes that intra-group discrimination exists, especially against those with often-disfavored status within the group, such as the darkest-skinned among people of

consistently held that evidence showing that an employer relied on the plaintiff's race- or gender-based characteristics in making an employment decision alleviated any need for the plaintiff to identify a comparator outside the plaintiff's protected class.⁴⁴

In light of courts' readiness to permit intraclass claims for race and sex discrimination litigation, courts' reluctance to embrace intraclass claims for disability discrimination litigation is counterintuitive. In many ways it would seem that intraclass discrimination would be at least as much of a problem in the disability context as in the race or gender context. Just as employers may prefer employees whose race and sex characteristics conform to majority norms, employers may prefer persons whose disabilities are minor and elicit minimal negative responses from co-workers. In addition to the manner in which intraclass disability discrimination parallels race and sex discrimination, intraclass disability discrimination also reflects the scope of intraclass diversity, which is far more multifaceted for the ADA's protected class than for race or gender categories. Unlike the relatively uniform genetic and phenotypic characteristics associated with specific races and genders, the only common theme across the ADA's protected class is variation from the able-bodied norm. Accordingly, while it is often safe to assume that an employer's attitude toward one Hispanic employee will be related to that employer's attitude toward other Hispanic employees, it is more difficult to assume that an employer's attitude toward a person with a physical disability like paraplegia is related to that employer's attitude toward a person with a mental illness like bipolar disorder.⁴⁵

color.”).

44. See *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) (“That one’s replacement is of another race, sex, or age may help to raise an inference of discrimination, but it is neither a sufficient nor a necessary condition.”); *Meiri v. Dacon*, 759 F.2d 989, 995–96 (2d Cir. 1985) (holding that a standard requiring a plaintiff to demonstrate that he was replaced by a person outside of his Title VII protected class was “inappropriate and at odds with the policies underlying Title VII”); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1534 (11th Cir. 1984) (rejecting contention that “there can be no racial discrimination against a black person who is not selected for a job when the person who is selected for the job is black”); *Jones v. W. Geophysical Co. of Am.*, 669 F.2d 280, 284 (5th Cir. 1982) (noting that “proof that the employer replaced the fired minority employee with a nonminority employee is not the *only* way to create . . . an inference” of discrimination); cf. *Miles v. Dell, Inc.*, 429 F.3d 480, 486 (4th Cir. 2005) (“[E]very other circuit has held that a Title VII plaintiff does not always have to show replacement outside the protected class in order to make out a *prima facie* case.”); *id.* at 488–89 (internal citation omitted) (noting “replacement within the protected class does not always give rise to an inference of non-discrimination. One clear example of this is when the defendant hires someone from within the plaintiff’s protected class in order ‘to disguise its act of discrimination toward the plaintiff’ . . . [A]nother such category of cases is that wherein the firing and replacement hiring decisions are made by different decisionmakers”).

45. The conclusion that the ADA only prohibits discrimination between persons with and

B. The “Limited Protected Class” Rationale

In order to justify barring intraclass claims for ADA litigation while allowing them for Title VII litigation, many courts stressed the limited scope of the ADA’s protected class. They noted that unlike Title VII, which prohibits race and sex discrimination against every employee of a covered employer regardless of the employee’s race or sex, the ADA prohibits disability discrimination only against members of the ADA’s protected class.⁴⁶ Focusing on the language that then defined the ADA’s protected class—individuals who possess a disability that “substantially limits one or more major life activities”⁴⁷—courts concluded that the ADA prohibited discrimination only between persons who fell within that definition and those that fell without it.⁴⁸ Based on this reasoning, the D.C. Circuit concluded that the ADA permitted employers to disfavor persons with specific disabilities “so long as [the employer] did not distinguish between [a condition] that ‘substantially limit[ed] one or more . . . major life activities’ and [a condition] that did not have such an impact.”⁴⁹

This analysis, of course, disregarded the history of disability-based discrimination, which indicates that the animus directed by an employer toward a person with a disability does not hinge solely—or often even primarily—on whether the person’s impairment arises to the level of a substantial limitation. Susan Stefan, an expert on mental disability discrimination, has noted that “[t]he depth of discomfort caused by the revelation that an individual has a mental illness is not related to any perception that the individual is substantially limited in major life activities.”⁵⁰ Instead, Stefan explains, “[l]ike people who are HIV-positive or have AIDS, the degree to which people with mental illness are limited in major life activities is largely irrelevant to the uneasiness

without disabilities also ignored the ADA’s “regarded as” provision, which permits individuals who are not actually substantially limited in a major life activity to sue for disability discrimination when their employer nonetheless takes adverse action against them on the basis of a perceived disability. 42 U.S.C. § 12102(1)(C) (2009). This section of the ADA strongly suggests that the ADA is focused on addressing disability-based animus rather than on providing a benefit based on the biological severity of the plaintiff’s disability.

46. 42 U.S.C. § 12102(2) (2006).

47. *Id.*

48. *Moddero v. King*, 82 F.3d 1059, 1061 (D.C. Cir. 1996) (quoting 29 U.S.C. § 706(8)(B)(i) (1994)).

49. *Id.* at 1061; *see also id.* at 1065 (Ginsburg, J., concurring) (“[D]isparate treatment . . . between physical impairment on the one hand and mental impairment on the other . . . is permissible . . . because it is unrelated to *disability*, [which § 504 and the ADA define] as a substantial limitation upon one or more of a person’s major life activities.”) (citing 29 U.S.C. § 706(8)(B)(i) (1994)) (emphasis added).

50. Stefan, *supra* note 7, at 273.

and fear the conditions engender in others.”⁵¹ Because disability-specific animus is grounded more in discomfort and fear than in an individual’s degree of limitation, a person substantially limited in one major life activity, such as walking, may experience very different social responses than a person substantially limited in another major life activity, such as communicating. Nonetheless, many courts that prohibited intraclass disability discrimination claims in the 1980s and early 1990s appeared to infer from the limited nature of the ADA’s protected class that, for purposes of discrimination claims, all members of the protected class are identically situated.

C. The Age Discrimination in Employment Act and the Erosion of the “Limited Protected Class” Rationale

Many courts began to allow intraclass disability discrimination claims after the Supreme Court held in *O’Connor v. Consolidated Coin Caterers Corp.*⁵² that intraclass claims were available under the ADEA, the other federal employment discrimination statute with a limited protected class.⁵³ Resolving a case in which an employer replaced a 56-year-old worker with a 40-year-old worker, both of whom were members of the ADEA’s protected class, the *O’Connor* Court sided with the many courts of appeal that had concluded that “[t]he fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost out *because of his age*.”⁵⁴ Reasoning that “the ADEA prohibits discrimination on the basis of age and not class membership,” the Court explained that “[t]he discrimination prohibited by the ADEA is discrimination ‘because of [an] individual’s age,’ though the prohibition is ‘limited to individuals

51. *Id.* at 271–74.

52. 517 U.S. 308 (1996).

53. The ADEA’s protected class consists of persons “at least 40 years of age.” 29 U.S.C. § 631(a) (2006).

54. *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *see Roper v. Peabody Coal Co.*, 47 F.3d 925, 926 (7th Cir. 1995); *Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 (3d Cir. 1995); *Kralman v. Ill. Dep’t of Veterans’ Affairs*, 23 F.3d 150, 155 (7th Cir. 1994); *Rinehart v. City of Independence*, 35 F.3d 1263, 1266 (8th Cir. 1994); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1374 (2d Cir. 1989); *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1334–35 (1st Cir. 1988); *Maxfield v. Sinclair Int’l*, 766 F.2d 788, 792 (3d Cir. 1985); *Douglas v. Anderson*, 656 F.2d 528, 532–33 (9th Cir. 1981). *But see O’Connor v. Consol. Coin Caterers Corp.*, 56 F.3d 542, 546 n.1 (4th Cir. 1995) (noting that Fourth Circuit cases required plaintiffs to show that their replacement was outside of the protected class); *La Pointe v. United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993) (stating that Sixth Circuit precedent requires replacement by someone outside of the protected class); *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1557 (11th Cir. 1987) (noting that a person alleging “that he was unlawfully discharged because of age must demonstrate . . . [that] a person outside the protected class replaced him”).

who are at least 40 years of age.’’⁵⁵

In *O'Connor*'s wake, many courts concluded that intraclass claims were also available under the ADA.⁵⁶ For example, the District Court for the District of New Hampshire reasoned that because

the ADEA is violated by hiring a forty-five-year-old over an otherwise qualified sixty-five-year-old based on age . . . [i]t logically follows that the ADA is violated by a policy that disadvantages schizophrenics based on their disability, despite the fact that individuals confined to wheelchairs are benefitted.⁵⁷

Similarly, the District Court for the District of New Mexico reasoned that just as

55. *O'Connor*, 517 U.S. at 312–13 (citing 29 U.S.C. § 623(a)(1) (citations omitted); 29 U.S.C. § 631(a)); see 517 U.S. at 312 (explaining that “[t]his language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older”).

56. See, e.g., *Pivrotto v. Innovative Sys., Inc.* 191 F.3d 344, 356 (3d Cir. 1999) (“In a number of cases brought under the Americans with Disabilities Act (“ADA”) and the Age Discrimination in Employment Act (“ADEA”), we have expressed the fourth element of the *prima facie* case in a manner that might appear to require proof of replacement by someone outside of the relevant class But . . . we [have] *rejected* a defendant’s argument that an ADEA plaintiff must prove that he or she was replaced by someone outside of the protected class, a conclusion later ratified by *O'Connor*.”); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1185–86 n.11 (6th Cir. 1996) (“Given the somewhat unique characteristics of various disabilities, and the differences between individuals afflicted with a particular disability, replacement of one disabled individual with another disabled individual does not necessarily weaken the inference of discrimination against the former individual. . . . We do not believe that the plaintiff need necessarily establish that he or she was replaced by a person outside the protected class as an element of his or her *prima facie* case.”).

57. *Boots v. Nw. Mut. Life Ins. Co.*, 77 F. Supp. 2d 211, 219 (D.N.H. 1999); see also *Salcido ex rel. Gilliland v. Woodbury County*, 119 F. Supp. 2d 900, 937 (N.D. Iowa 2000) (“Nor does exclusion of *all* persons with a specified disability, whatever the degree, from benefits provided to other disabled persons excuse discrimination by reason of that particular disability. The Supreme Court recently, and emphatically, rejected such a contention in *Olmstead* Thus, the County’s contention that there has been no discrimination by reason of *Salcido*’s disability, dementia, when all persons with dementia are excluded from services, cannot be sustained. Indeed, the County’s contention is as ludicrous as the suggestion that it wouldn’t be discrimination ‘by reason of race’ if all black persons were excluded from public services, but Asians and Hispanics were not excluded.”). Similarly, a pre-*Olmstead* district court opinion which was reversed on appeal relied on *O'Connor* to conclude that the ADA permitted intraclass claims. *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1168 (E.D. Va. 1997), *rev’d*, 180 F.3d 166, 171 (4th Cir. 1999). Based on *O'Connor*, the court concluded that “the ADA must be construed to prohibit discrimination against individuals based on their specific disability, and not merely to prohibit discrimination that negatively affects the disabled as a class.” *Id.* at 1169.

the fact that an ADEA plaintiff was replaced by someone outside the protected class ‘lacks probative value[,]’ the fact that [the defendant] may have hired a blind or a deaf person, for example, lacks probative value on the issue of whether [the plaintiff] was discriminated against because of *his* disability.⁵⁸

In *Olmstead v. L.C. ex. rel. Zimring*, the Supreme Court also signaled that *O’Connor*’s reasoning applied to the ADA.⁵⁹ *Olmstead* involved two women with mental disabilities who argued that their continued confinement in the psychiatric unit of a state hospital in Georgia violated the ADA because state treatment professionals had determined that they were eligible for a less restrictive placement in the community.⁶⁰ The plaintiffs’ argument relied on Department of Justice regulations which concluded that the ADA prohibited “unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community.”⁶¹ The state countered this argument by invoking the traditional bar on intraclass disability discrimination claims.⁶² It argued that because the institution that confined the plaintiffs only served persons with disabilities, the plaintiffs could not prove disability discrimination.⁶³ Sidestepping this argument to focus on the ADA’s “findings and purposes” provisions which suggested that unnecessary institutionalization could constitute discrimination on the basis of disability, the Supreme Court held that the plaintiffs’ unjustified confinement violated the ADA.⁶⁴ In response to Justice Thomas’s dissent, which echoed the state’s contention that disability discrimination claims required a comparator outside the protected class,⁶⁵ the majority cited *O’Connor* and explained that

58. EEOC v. Wal-Mart Stores, Inc., 11 F. Supp. 2d 1313, 1320 (D.N.M. 1998).

59. *Olmstead v. L.C. ex. rel. Zimring*, 527 U.S. 581 (1999).

60. *Id.* at 587–88.

61. *Id.* at 596 (citing 28 CFR § 35.130(d) (1998)).

62. *L.C. ex. rel. Zimring v. Olmstead*, 138 F.3d 893, 896 (11th Cir. 1998).

63. *Id.* (arguing that “Title II of the ADA affords no protection to individuals with disabilities who receive public services designed only for individuals with disabilities,” and that the plaintiffs’ claims must fail because they had “not shown that they were denied community placements available to non-disabled individuals because of disability”).

64. *Olmstead*, 527 U.S. at 588 (quoting 42 U.S.C. § 12101(a)(3) (“[D]iscrimination against the disabled persists in such critical areas as . . . institutionalization.”)). The majority also explained that “[w]e are satisfied that Congress had a more comprehensive view of the concept of discrimination” in mind when it enacted the ADA. *Id.* at 598.

65. *Id.* at 626 (Thomas, J., dissenting); *see id.* (emphasizing that “community placement simply is not available to those without disabilities”); *id.* at 622 (opining that the majority’s conclusion that “it is sufficient to focus exclusively on members of one particular group” and permissible to conclude that “discrimination [has] occur[red] when some members of a protected group are treated differently from other members of that same group . . . is a remarkable and novel proposition”).

Justice Thomas's "notion that . . . 'a plaintiff cannot prove "discrimination" by demonstrating that one member of a particular protected group has been favored over another member of that same group,' . . . is incorrect as a matter of precedent and logic."⁶⁶

Despite the Court's extension of *O'Connor*'s reasoning to ADA claims, some lower courts still refused to embrace its application to intraclass disability discrimination claims. For example, the District Court for the District of Massachusetts concluded that the

argu[ment] that the [U.S.] Supreme Court's decision in *Olmstead v. Zimring* altered the legal landscape [and] stands for the proposition that [an ADA plaintiff] can prove discrimination by showing different treatment of two members of the same class . . . is not compelling . . . [because] [d]isparate treatment of different disabilities was not at issue [in *Olmstead*].⁶⁷

Similarly, the District Court for the District of Maine rejected the argument that "disparate treatment between different categories of people within a protected class can amount to discrimination" because the relevant portion of the *Olmstead* opinion "constitutes dicta" and therefore "does not create new law to aid ADA claimants."⁶⁸ More

66. *Id.* at 598–99 n.10 (majority opinion) (citing *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996)). The Court further noted that, even if the ADA's definition of discrimination required reference to a comparison group,

[d]issimilar treatment . . . exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.

Id. at 601; *see also id.* at 612 (Kennedy, J., concurring) (suggesting that if the plaintiffs "could show that persons needing psychiatric or other medical services to treat a mental disability are subject to a more onerous condition than are persons eligible for other existing state medical services . . . then the beginnings of a discrimination case would be established"); *id.* at 612 ("[I]f respondents could show that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities) . . . it would demonstrate discrimination on the basis of mental disability.").

67. *Wilson v. Globe Specialty Prods., Inc.*, 117 F. Supp. 2d 92, 97 (D. Mass. 2000).

68. *El-Hajj v. Fortis Benefits Ins. Co.*, 156 F. Supp. 2d 27, 30, 31 (D. Me. 2001); *see also id.* at 30–31 ("[S]everal courts specifically have found that *Olmstead* does not alter the validity of the line of cases holding that an insurer does not transgress the ADA by treating mental and physical disabilities differently."); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1117–18 (9th Cir. 2000) ("Applying *Olmstead* to insurance classifications would conflict with

recently, the First Circuit, citing tension between *Olmstead* and an out-of-circuit case which predated *Olmstead*, expressly declined to address an argument that a Title II violation would “occur if a public entity decided to make benefits available only to disabled individuals but then proceeded to distribute those benefits only to those disabled people who could access an administrative office on the second floor of a building lacking wheelchair ramps or elevators.”⁶⁹ Similarly, in 2008, the Seventh Circuit opined, without discussing *Olmstead*, that courts must dismiss ADA claims in which the plaintiff “cannot point to a single similarly situated employee outside the protected class who was treated more favorably.”⁷⁰ Accordingly, despite the erosion of the limited

the Court’s decisions in *Alexander v. Choate* . . . and *Traynor v. Turnage*, . . . which both endorse distinctions between types of disabilities”); *Freilich v. Bd. of Dirs. of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679, 697–99 (D. Md. 2001) (“[B]ecause Dr. Freilich has alleged only a difference in the way oversight and quality assurance is provided among hospital patients (who are arguably all disabled), she fails to make the showing, as the statutes require, that the treatment of the dialysis patients involves any difference in treatment between the disabled and the non-disabled.”). *But see Johnson v. KMart Corp.*, 273 F.3d 1035, 1052–54 (11th Cir. 2001) *reh’g en banc granted, opinion vacated as moot*, 273 F.3d at 1070 (11th Cir. 2001) (“Prior to the Supreme Court’s decision in *Olmstead*, a number of circuits had dismissed cognate claims challenging mental-health caps based on the rationale that the ADA ‘prohibits [only] discrimination between the disabled and the non-disabled.’ . . . We conclude that these cases are undercut by *Olmstead*. . . . *Olmstead* leads us to the conclusion that K Mart’s LTD plan—which differentiates between individuals who are totally disabled due to a mental disability and individuals who are totally disabled due to a physical disability because of the given individual’s type of disability—appears *prima facie* to distinguish among beneficiaries on a basis that constitutes a form of discrimination contravening Title I of the ADA.”); *Fletcher v. Tufts Univ.*, 367 F. Supp. 2d 99, 111 (D. Mass. 2005); *Iwata v. Intel Corp.* 349 F. Supp. 2d 135, 149 (D. Mass. 2004) (“This Court agrees with the *Johnson* court’s analysis of *Olmstead*. Title I of the ADA prohibits discrimination amongst classes of the disabled.”); *Hahn ex rel. Barta v. Linn County*, 130 F. Supp. 2d 1036, 1054–55 (N.D. Iowa 2001) (“[T]he court must first address Discovery Living’s assertion that since it is a facility providing accommodations only to the disabled, Mr. Hahn cannot demonstrate that he suffered from disparate treatment compared to the non-disabled, as is required under Title III of the ADA. The Supreme Court recently, and emphatically, rejected this assertion . . . in *Olmstead* Thus, Mr. Hahn can set forth a claim of discrimination even if it is only between members of his protected class, namely, the disabled.”); *Salcido ex rel. Gilliland v. Woodbury County*, 119 F. Supp. 2d 900, 937 (N.D. Iowa 2000) (“Nor does exclusion of *all* persons with a specified disability, whatever the degree, from benefits provided to other disabled persons excuse discrimination by reason of that particular disability. The Supreme Court recently, and emphatically, rejected such a contention”); *Boots v. Nw. Mut. Life Ins. Co.*, 77 F. Supp. 2d 211, 218 (D.N.H. 1999) (“[T]he Supreme Court has just rejected the argument that disparate treatment of different members of a protected class is not discrimination.”).

69. *Buchanan v. Maine*, 469 F.3d 158, 175 n.10 (1st Cir. 2006); *see id.* (explaining that “[o]n this point, there is tension between [*Doe v. Pfrommer*, 148 F.3d 73, 83 (2d Cir. 1998)] and the Supreme Court’s decision in *Olmstead*”).

70. *Hancock v. Potter*, 531 F.3d 474, 479 (7th Cir. 2008). Relatedly, a larger number of courts continue to categorically conclude that the ADA’s nondiscrimination mandate does not apply to employer-provided long-term disability plans or health insurance plans, even though

protected class rationale for prohibiting intraclass claims, the current scope of intraclass disability discrimination litigation remains unclear in at least two circuits.

II. THE FUTURE SCOPE OF INTRAClass DISABILITY DISCRIMINATION CLAIMS

A. *The Lingering “Collective Welfare” Rationale*

Courts’ continued reluctance to permit intraclass disability discrimination claims after *O’Connor* and *Olmstead* may stem, in part, from a unique justification for prohibiting disability intraclass claims that courts have never applied to age, sex, or race discrimination statutes. Some courts have suggested that *O’Connor*’s reasoning, which makes clear that a limited protected class in itself poses no bar to intraclass discrimination claims, should not apply to the ADA because the ADA, unlike Title VII and the ADEA, should maximize aggregate benefits to its protected class.⁷¹ For example, in *Modderno v. King*,⁷² an influential opinion issued three weeks after the Supreme Court’s *O’Connor* opinion, the D.C. Circuit reasoned that § 504, the ADA’s statutory predecessor, did not permit intraclass litigation because, in the court’s view, such litigation could harm § 504’s protected class in the aggregate.⁷³ In *Modderno*, persons with mental disabilities challenged a government employer’s health insurance plan that provided less comprehensive coverage for healthcare costs associated with mental disabilities than for comparable costs associated with physical disabilities.⁷⁴ The plan imposed a stringent lifetime cap on mental health care expenses (\$75,000) but no comparable cap on physical health care

the ADA’s text, 42 U.S.C. § 12201(c), provides that insurance plans may differentiate amongst disabilities only if the differentiation is not a subterfuge to evade the purposes of the ADA. *See, e.g.*, *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 152–53 (2d. Cir. 2000) (holding that the ADA bars intraclass disability discrimination challenges to insurance plans); *Parker v. Metro. Life Ins. Co.* 121 F.3d 1006, 1015 (6th Cir. 1997) (opining, in a case challenging an insurance plan, that “the ADA does not mandate equality between individuals with different disabilities [but instead] prohibits discrimination between the disabled and the non-disabled”); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, 1044 (7th Cir. 1996) (concluding that the ADA permits long-term disability plans to differentiate between physical and mental disabilities); *Hess v. Allstate Ins. Co.*, No. 99-384-P-C, 2000 WL 1186262, at *9 & n.7 (D. Me. Aug. 2, 2000) (holding that the ADA permits long-term disability plans to differentiate between physical and mental disabilities).

71. *See, e.g.*, *Modderno v. King*, 82 F.3d 1059, 1062 (D.C. Cir. 1996); *cf. Lewis v. Kmart Corp.*, 180 F.3d 166, 171–72 (4th Cir. 1999) (“[R]eliance on *O’Connor* simply does not make intuitive sense.”).

72. 82 F.3d 1059 (D.C. Cir. 1996).

73. *Id.* at 1062.

74. *Id.* at 1060–61.

expenses.⁷⁵ After acknowledging that “[p]erhaps mentally disabled individuals are more vulnerable to discrimination than the physically disabled,” the D.C. Circuit concluded that § 504 should nonetheless prohibit intraclass discrimination claims because “the disabled *as a class*—mentally and physically disabled individuals in the aggregate—are *better off* under [a plan that disadvantages persons with mental disabilities] than under a plan in which mental and physical health benefits are each subject to a lifetime limit of \$75,000.”⁷⁶ Assuming that employers would respond to intraclass litigation by reducing the benefits provided to currently-advantaged persons, the court explained that “[w]e simply cannot believe that [§ 504,] a statute enacted for the benefit of the disabled, produces this result” of disadvantaging “disabled individuals in the aggregate.”⁷⁷

In effect, the D.C. Circuit prioritized the preservation of employer goodwill toward currently-advantaged persons with disabilities over the elimination of discrimination against other persons with disabilities.⁷⁸ This refusal to question why employers treat some members of § 504’s protected class less favorably than others is in tension with § 504’s (and the ADA’s) nondiscrimination mandate, which aims to eliminate discrimination on the basis of disability. It also starkly contrasts with the Supreme Court’s repeated rejection of employers’ attempts to use similar arguments under Title VII. Emphasizing that “[t]he principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole,” the Supreme Court has consistently concluded that Title VII does not “give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees’ group.”⁷⁹

75. *Id.* at 1060.

76. *Id.* at 1062. The court’s assumption that the government would simply treat currently-advantaged persons with disabilities worse in order to equalize the disparate treatment starkly contrasts with the Equal Pay Act, which expressly prohibits employers from “cur[ing] the disparity between male and female wage rates by lowering the male wage rate to the rate for females.” *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 988 (6th Cir. 1992); *see* Equal Pay Act of 1963, 29 U.S.C. § 206 (1994) (“[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the [nondiscrimination] provisions of this subsection, reduce the wage rate of any employee.”); *Corning Glass Works v. Brennan*, 417 U.S. 188, 207 (1974) (“The objective of equal pay legislation . . . is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases where discrimination is still practiced.”).

77. *Moddero*, 82 F.3d at 1062.

78. The court ignored the fact that prohibiting intraclass claims would serve to isolate the already marginalized employees with mental disabilities and further reduce their bargaining power for better health coverage.

79. *Connecticut v. Teal*, 457 U.S. 440, 453–55 (1982); *see also id.* at 455–56 (“Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been

wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory. Every *individual* employee is protected against both discriminatory treatment and practices that are fair in form, but discriminatory in operation.”) (internal quotation omitted); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1979) (“A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination. . . . It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant’s race are already proportionately represented in the work force.”); *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) (concluding that fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because “the statute’s focus on the individual is unambiguous”); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 341–42 (1977) (noting that an employer’s treatment of other members of the plaintiffs’ group can be “of little comfort to the victims of . . . discrimination”); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543–45 (1971) (per curiam) (holding that a rule barring employment of all married women with preschool children, if not a bona fide occupational qualification under § 703(e), violated Title VII, even though female applicants without preschool children were hired in sufficient numbers that they constituted 75% to 80% of the persons employed in the position plaintiff sought).

Title VII case law also expressly conflicts with *Modderno*’s treatment of insurance plans that prioritize some members of the ADA’s protected class over other class members. Title VII case law indicates that just as insurance plans that provide more comprehensive coverage for Caucasians than for African Americans violate Title VII, insurance plans that provide more comprehensive coverage for the health care costs incurred by lighter skinned African Americans than for darker skinned African Americans would violate Title VII. *Cf. Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983) (“[P]etitioner’s plan is unlawful, because the protection it affords to married male employees is less comprehensive than the protection it affords to married female employees.”); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (holding that an employer violates Title VII if it fails to meet the “special or increased healthcare needs associated with a woman’s unique sex-based characteristics . . . to the same extent, and on the same terms, as other healthcare needs”); *see also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LAWS & GUIDANCE: DECISION ON COVERAGE OF CONTRACEPTION, available at <http://www.eeoc.gov/policy/docs/decision-contraception.html> (last visited Nov. 13, 2009) (concluding that an employer’s exclusion of prescription contraceptives from a health plan that otherwise comprehensively covered pharmaceuticals violates Title VII).

By contrast, the ADA’s text makes clear that insurance plans need not provide equally comprehensive coverage to persons with disparate disabilities. Section 501 of the ADA, often termed the “safe harbor provision,” permits employers to maintain insurance coverage distinctions that produce unequal benefits to persons with different disabilities so long as the distinctions are not a subterfuge for disability discrimination, a standard that the EEOC has translated to simply require that the coverage distinctions be “actuarially justified.” 42 U.S.C. § 12201(c) (2006); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DIRECTIVES TRANSMITTAL: EEOC COMPLIANCE MANUAL (2000), available at <http://www.eeoc.gov/policy/docs/benefits.html> (last visited Nov. 13, 2009); *see* Mary Crossley, *Discrimination Against the Unhealthy in Health Insurance*, 54 U. KAN. L. REV. 73, 93–94 (2005) (“The thinness of this protection stands in marked contrast to the substantial protection provided by Title VII’s prohibition of race- and sex-based distinctions in employer-provided coverage regardless of any actuarial justification.”); Sharon Hoffman, *Aids Caps, Contraceptive Coverage, and the Law: An Analysis of the Federal Anti-Discrimination Statutes’ Applicability to Health Insurance*, 23 CARDOZO L. REV. 1315, 1347 (2002) (concluding that § 501(c) “allows

Although in recent years, the discussion surrounding intraclass discrimination claims has focused largely on the *O'Connor* Court's interpretation of the ADEA's limited protected class rather than *Modderno's* "aggregate benefits" analysis, many courts—both before and after *O'Connor*—have, in keeping with *Modderno*, assumed that while intraclass claims are available under Title VII and the ADEA, they are not available under the ADA.⁸⁰ Perhaps these courts' unstated rationale parallels the *Modderno's* Court's rationale: Disallowing intraclass disability discrimination claims will maximize collective benefits to the ADA's protected class. Moreover, courts may implicitly assume that employers will be more receptive to hiring members of the ADA's protected class when they know that courts will not evaluate their decisions to choose amongst members of the ADA's protected class. Even though most employer decisions that require choosing amongst people with different disabilities will not violate the ADA, employers might prefer to know that all such choices—even those motivated by animus toward particular types of disabilities—will not trigger ADA scrutiny.

While a higher employment level for the ADA's protected class is obviously a laudable goal, *Modderno's* aggregate benefits reasoning reflects a welfare-based model of disability policy that is in tension with the civil rights rhetoric that surrounded the passage of the ADA.⁸¹ By

employers to retain discriminatory insurance terms if they can prove a basis for them in sound actuarial principles"). While the safe harbor provision did not apply to the insurance plan the *Modderno* opinion discussed, many other opinions categorically held that the ADA bars intraclass claims, and did not acknowledge the safe harbor provision and its potential applicability to the case at hand. These courts bypassed § 501 to hold more broadly that the ADA's nondiscrimination mandate encompasses no intraclass claims, an odd conclusion since § 501 appears to be a special exception to the ADA's nondiscrimination mandate that Congress adopted as a concession to the insurance industry. *See, e.g.*, *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 147 n.3 (2d. Cir. 2000) (concluding that the ADA does not encompass intraclass claims to long-term disability plans even though the plaintiff had argued that the specific plan at issue fell within the ADA's safe harbor provision); *Parker v. Metro. Life Ins. Co.* 121 F.3d 1006, 1019 (6th Cir. 1997) (declining to discuss the ADA's safe harbor provision and deciding that "[t]he ADA simply does not mandate equality between individuals with different disabilities [but instead it] prohibits discrimination between the disabled and the non-disabled"); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, 1044 (7th Cir. 1996) (declining to discuss the ADA's safe harbor provision and concluding that the ADA permits long-term disability plans to differentiate between physical and mental disabilities); *Hess v. Allstate Ins. Co.*, No. 99-384-P-C., 2000 WL 1186262, at *9 n.7 (D. Me. 2000) (holding that the ADA permits long-term disability plans to differentiate between physical and mental disabilities while explicitly declining to "reach the alternative arguments of MetLife and Allstate that . . . the Plan falls within the ADA safe harbor").

80. *See supra* note 19 and cases cited therein.

81. The ADA was enacted amidst fanfare characterizing the statute as "a civil rights act for people with disabilities." 135 CONG. REC. S4984, at S4986 (daily ed. May 9, 1989) (statement of Sen. Lieberman). The Senators who introduced the ADA in 1989 expressly

accepting, rather than challenging, employers' tendency to disfavor persons with certain disabilities, *Modderno's* emphasis on the aggregate welfare of the ADA's protected class limits the ADA's capacity to address disability-based animus and to protect individual rights. It also undercuts the ADA's standing as a civil rights statute that parallels Title VII.

B. *Intraclass Claims by Persons Whose Disabilities Are Less Severe*

The welfare-based framework that *Modderno* and other courts have used to disallow intraclass disability discrimination claims also influences the many courts that permit such claims. To date, the courts permitting intraclass discrimination claims have done so primarily in situations in which a plaintiff alleges that he suffered discrimination because his disability is more *biologically severe* than the disabilities of individuals who received superior treatment. This practice suggests that some courts may continue to regard the ADA's primary goal as improving the aggregate welfare of people with disabilities rather than eliminating disability discrimination.⁸²

invoked the memory of the Civil Rights Act, describing persons with disabilities as a "minority" that has experienced discrimination and segregation analogous to that experienced by African Americans. Senator Kennedy championed the ADA as a design to "end this American apartheid." 101 CONG. REC. S4979 (daily ed. May 9, 1989) (remarks of Sen. Kennedy); see also 101 CONG. REC. S4979 at 8507-14 (daily ed. May 9, 1989) (remarks of Sen. Kennedy and Sen. Harkin).

82. See *Wagner by Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1016 n.15 (3d Cir. 1995) ("[A] program barring all severely retarded persons from a program available to mildly retarded persons may be discriminatory."); *Messier v. Southbury Training Sch.*, 916 F. Supp. 133, 140-42 (D. Conn. 1996) (noting that "under both statutes [the ADA and § 504], [covered entities are] prohibited from refusing to consider certain residents for possible community placement, merely based upon the degree of their disabilities"); *Homeward Bound v. Hissom*, No. 85-C-437, 1987 WL 27104, at *20-21 (N.D. Okla. July 24, 1987) (indicating that discrimination against persons whose disabilities are more severe violates § 504); *Klostermann v. Cuomo*, 481 N.Y.S. 2d 580 (Sup. Ct. 1984) (holding that it would violate § 504 to treat mentally ill persons differently with respect to the provision of services based on the severity of their mental illnesses); cf. *Plummer by Plummer v. Branstad*, 731 F.2d 574, 578 (8th Cir. 1984) ("[W]e assume [without deciding] that the *severity* of the plaintiffs' handicaps is itself a handicap which, under section 504 of the 1973 Rehabilitation Act, cannot be the sole reason for [adverse treatment]."); *Lynch v. Maher*, 507 F. Supp. 1268, 1278-81 (D. Conn. 1981) (suggesting obliquely that severity qualifies as a disability under § 504); see also *Messier*, 916 F. Supp. at 141 ("[N]umerous courts have recognized that both Section 504 and the ADA prohibit discrimination on the basis of the severity of a person's disability."); *Jackson by Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1243, 1298-99 (D.N.M. 1990), *rev'd in part on other grounds*, 964 F.2d 980 (10th Cir. 1992) (concluding that "[t]he severity of plaintiffs' handicaps is itself a handicap," such that "failure to accommodate the severely handicapped . . . while serving [their] less severely handicapped peers is unreasonable and discriminatory."); *Garrity v. Gallen*, 522 F. Supp. 171, 214-15 (D.N.H. 1981) ("[T]he spirit of

The post-*O'Connor* ADEA case law has encouraged this trend. Since *O'Connor*, which prompted many courts to conclude that the ADA permits intraclass claims, the Supreme Court has clarified that the scope of intraclass age discrimination claims only encompasses claims by older workers challenging preferences for comparatively younger workers. In *General Dynamics Land Systems, Inc. v. Cline*,⁸³ the Court held that although, read literally, the ADEA appears to bar *all* age-motivated employment decisions, this prohibition actually extends only to employment decisions that disadvantage older workers vis-à-vis comparatively younger workers.⁸⁴ In other words, a forty-five year-old has no ADEA claim when an employer decides, based on age, to replace him with a fifty-five year-old. In reaching this conclusion, the Court noted that the word “age,” unlike the word “race,” clearly suggests a one-way continuum, such that “discrimination on the basis of age” does not encompass all forms of age-based decision-making.⁸⁵ The Court also emphasized the ADEA’s limited protected class, reasoning that “[i]f Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under forty.”⁸⁶

This reasoning appears to have led some courts to conclude that Congress similarly did not intend to protect members of the ADA’s protected class with less biologically severe disabilities from employers’ decisions to favor persons whose disabilities are more biologically severe. For example, in an opinion issued soon after *O'Connor*, the District Court for the Northern District of Iowa concluded that the ADA requires a plaintiff to show that he or she “was

the law is violated when certain [persons with disabilities] are afforded qualitatively different and better facilities than their more profoundly handicapped peers.”); *Goebel v. Colo. Dep’t of Insts.*, 764 P.2d 785, 804 (Colo. 1988) (“[T]he failure to provide the more severely disabled persons access to services constitutes discrimination solely on the basis of particular handicaps, in violation of section 504.”). *But see Clark v. Cohen*, 613 F. Supp. 684, 692–96 (D.C. Pa. 1985) (suggesting that the severity analysis should apply in both directions).

83. 540 U.S. 581 (2004).

84. *Id.* at 598 (“[T]he prohibition of age discrimination is readily read more narrowly than analogous provisions dealing with race and sex. That narrower reading is the more natural one in the textual setting, and it makes perfect sense because of Congress’s demonstrated concern with distinctions that hurt older people.”); *see* 29 U.S.C. § 623(a)(1) (2006) (“It shall be unlawful for an employer—to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual’s age.*”) (emphasis added); *id.* § 631(a) (“The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.”); *Gen. Dynamics Land Sys., Inc.*, 540 U.S. at 590–91 (“[T]he ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young.”).

85. *Gen. Dynamics Land Sys., Inc.*, 540 U.S. 581, 598,

86. *Id.* at 591.

replaced by a non-disabled person, one with a lesser disability, or one whose disability is more easily accommodated.”⁸⁷

Limiting intraclass claims in this manner, however, threatens to exempt some disability-motivated employment decisions from the ADA’s reach. While the replacement of a person with a disability by “a non-disabled person, one with a lesser disability, or one whose disability is more easily accommodated,”⁸⁸ may often be good evidence of disability discrimination, replacement by a person with a *greater* disability or a disability that requires more costly accommodation should not necessarily prevent a terminated employee from demonstrating that disability-specific animus influenced his employer’s decision. Unlike age, which operates on a linear continuum, the term “disability” is far more variegated. Although disability-related welfare policies often regard disability as involving a severity-based continuum, sociological studies demonstrate that the social stigma and stereotypes surrounding various disabilities often do not correlate with biological severity.⁸⁹ Mental disabilities, for example, often carry a far greater social stigma than physical disabilities, even when compared to physical disabilities that are more biologically severe and more costly to accommodate.⁹⁰

C. *Intraclass Claims and the ADA Amendments Act of 2008*

The ADAAA’s expansion of the ADA’s protected class underscores the ADA’s focus on addressing socially-imposed obstacles to persons with disabilities. Unlike the ADA’s original text, which limited the ADA’s protected class to persons substantially limited in a major life activity, the ADA now extends protected class status to all persons who possess a physical or mental impairment that is not minor or transitory.⁹¹ This change indicates that the ADA aims to prohibit all

87. *Hutchinson v. United Parcel Serv., Inc.*, 883 F. Supp. 379, 394–95 (N.D. Iowa 1995); *see id.* (“[O]r, [in the alternative, that] the plaintiff was treated less favorably than non-disabled employees, those with lesser disabilities, or those whose disabilities are more easily accommodated.”); *id.* at 395 (“A plaintiff has been terminated ‘because of’ his or her disability just as surely where the employer terminates the plaintiff in favor of another who also fits within the ADA’s definition of ‘disabled,’ but whose disability is more cheaply or easily accommodated, as when the plaintiff is terminated in favor of a non-disabled person.”); *see also* *Muller v. Hotsy Corp.*, 917 F. Supp. 1389, 1408–11 (N.D. Iowa 1996); *Fink v. Kitzman*, 881 F. Supp. 1347, 1374–76 (N.D. Iowa 1995).

88. *Hutchinson*, 883 F. Supp. at 394–95.

89. *See* Stefan, *supra* note 7, at 273–74.

90. *Id.* at 272.

91. The ADA’s original text provided that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual on the basis of disability.” 42 U.S.C. § 12112(a) (2006). It defined disability as “a physical or mental impairment” that “substantially limits” one or more of an individual’s “major life activities.” *Id.* § 12102(1)(A). The amendments, by contrast, provide more simply that “[n]o covered entity

forms of disability-based discrimination rather than to encourage preferences for persons whose disabilities are more biologically severe.⁹² Similarly, the amendments' reinvigoration of the ADA's "regarded as" provision, which permits individuals who do not have a physical or mental impairment to sue for disability discrimination when their employer takes adverse action against them on the basis of a perceived disability, strongly suggests that the ADA is focused on addressing disability-based animus rather than on providing a benefit based on the biological severity of the plaintiff's disability.⁹³

The fact remains, however, that in addition to reducing the textual justifications for prohibiting intraclass disability discrimination claims, the ADAAA also makes such claims more likely. By bringing a broader range of individuals into the ADA's protected class, the amendments will likely increase allegations that an employer refused to hire a plaintiff because of his disability and instead hired another member of the ADA's protected class.⁹⁴

The manner in which courts deal with these claims will reveal a great deal about the extent to which courts have abandoned the welfare model of disability policy in favor of the civil rights model that aligns the ADA with Title VII. Courts adhering to a welfare model might point to the amendments' codification of ADA case law which concludes that the ADA does not permit "reverse discrimination" suits by persons without disabilities claiming an employer treated them less favorably than disabled persons and thus "subject[ed them] to discrimination

shall discriminate against a qualified individual on the basis of disability." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a), 122 Stat. 3553 (2008). However, the amendments further provide that a plaintiff who sues for a reasonable accommodation must still demonstrate a substantial limitation of a major life activity. *Id.* § 4(a).

92. In fact, the ADAAA's legislative history makes clear that Congress intended the amendments to bring into the ADA's protected class many individuals with stigmatizing disabilities that are not necessarily the most biologically severe disabilities. The legislative history indicates that Congress was concerned that the ADA's protected class encompass persons with disabilities that continue to carry a large social stigma—such as epilepsy, bipolar disorder, and depression—that may lead to disability discrimination in employment even though case law suggests that courts have not regarded them as severe, due to the availability of medication. H.R. REP. NO. 110-730, pt. 1, at 20 (2008).

93. ADA Amendments Act of 2008, at § 4(a).

94. Although the ADAAA codifies judicial conclusions that the ADA does not permit "reverse discrimination" suits by persons who claim that they were "subject to discrimination because of [their] lack of disability," the ADAAA says nothing about whether persons who fall within the ADA's protected class can challenge employers' decisions to disadvantage them because of their relatively less severe disability. ADA Amendments Act of 2008, at § 6(a); *see also* H.R. REP. NO. 110-730, pt. 1, at 17 (2008) ("The bill prohibits reverse discrimination claims by disallowing claims based on the lack of disability (e.g., a claim by someone without a disability that someone with a disability was treated more favorably by, for example, being granted a reasonable accommodation or modification to services or programs).").

because of [their] lack of disability.”⁹⁵ Courts might use this prohibition on reverse discrimination claims to reason that the ADA, like the ADEA, is only concerned about discrimination on a linear continuum.

Courts should resist this impulse. Congress’ choice to prohibit “reverse discrimination” claims does not indicate that Congress intended to restrict the claims that members of the ADA’s protected class may bring against their employers. Similarly, Congress’ initial choice to limit the right to sue under the ADA to persons “substantially limited in a major life activity” does not indicate that Congress was concerned only about discrimination that disadvantages persons with more medically severe disabilities vis-à-vis persons whose disabilities are less medically severe. Instead, the ADA’s text indicates that Congress was concerned with “restrictions and limitations,” “unequal treatment,” and “stereotypic assumptions,”⁹⁶—in other words, socially imposed difficulties that do not always strictly correlate with the medical severity of a disability.⁹⁷

CONCLUSION

Due to the variegated nature of stereotypes and myths about different disabilities, the ADA should permit intraclass disability discrimination claims. While social welfare plans—such as Social Security Disability Insurance or even congressionally-crafted affirmative action plans—might reasonably prioritize benefit allocations to individuals whose disabilities are more biologically severe, the ADA should not enshrine a similar preference for biological severity in employment. Such an emphasis on biological severity would inappropriately obscure the negative social responses to disability that do not necessarily correlate with a disability’s biological severity.

95. The ADAAA provides that “[n]othing in [the ADA] shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.” ADA Amendments Act of 2008, at § 6(a); *see also* H.R. REP. NO. 110-730, pt. 1, at 17 (2008) (“The bill prohibits reverse discrimination claims by disallowing claims based on the lack of disability. . . .”). Even before the ADAAA codified the ADA’s prohibition of reverse discrimination suits, the ADA’s limited protected class made this conclusion easy to reach as a textual matter because unlike Title VII, which prohibits discrimination on the basis of “race, color, religion, sex, or national origin,” the ADA prohibited disability discrimination only against “individual[s] with a disability.” 42 U.S.C. 12112(a) (2006). *But see* *Woods v. Phoenix Soc’y of Cuyahoga County*, No. 76286, 2000 WL 640566, at *3 (Ohio Ct. App. May 18, 2000) (permitting a reverse discrimination suit to proceed).

96. 42 U.S.C. § 12101(a)(7) (2006).

97. *Id.*