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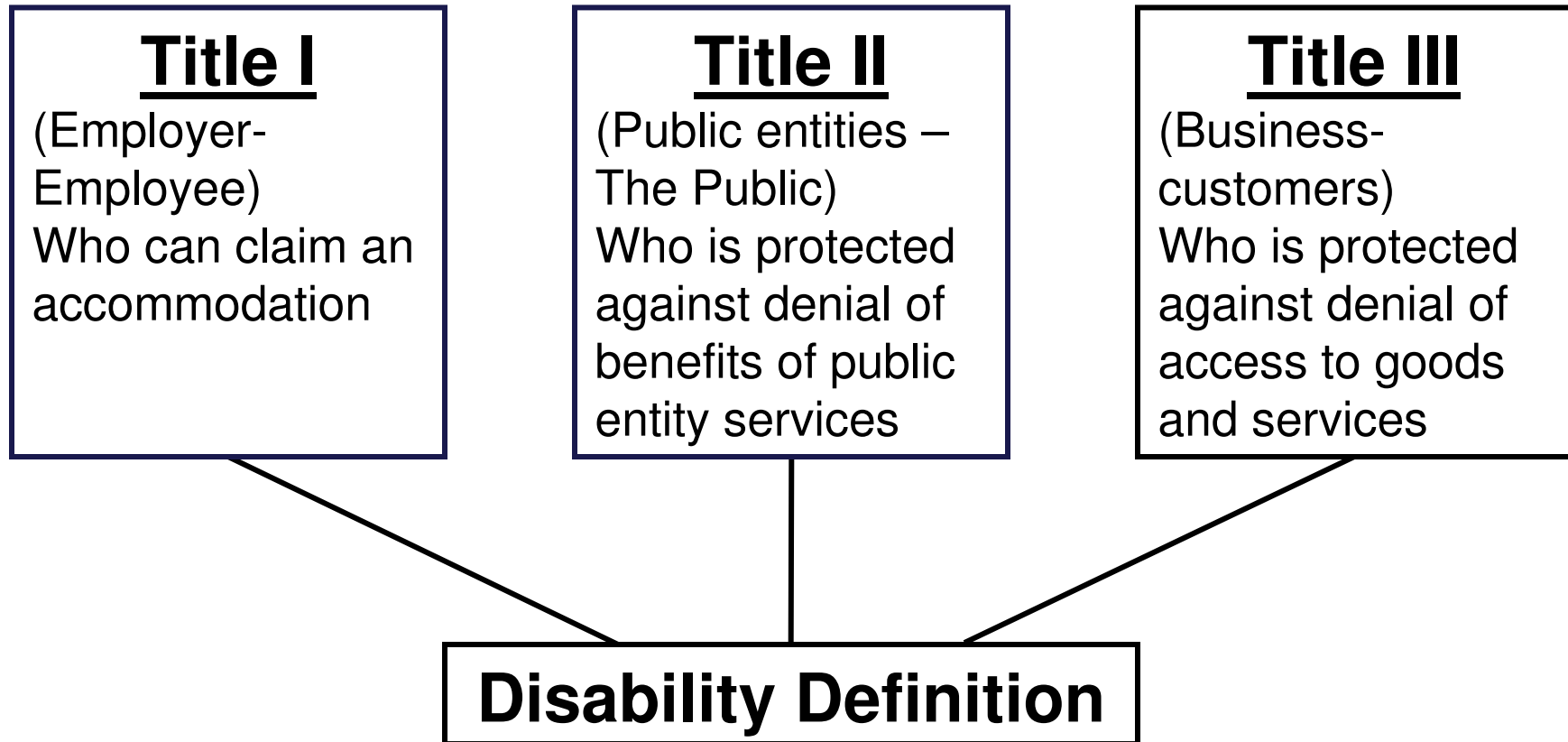
# The New Americans with Disabilities Act

Utah State Bar  
Labor and Employment Law Section

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# The ADA



Increasing Severity of Impairment

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## Not Disabled Enough

- Impairments Don't Meet "Substantially Limits Major Life Activity" Test
- Impairments assessed with mitigating measures (Sutton v. United Airlines)
- Test Strictly interpreted (Toyota Motor)

- Not Qualified to Perform Essential Job Elements

Increasing Severity of Impairment

Not Disabled  
Enough

## Qualified with Disability

- Impairments assessed without regard to mitigating measures (other than corrective lenses) (Reversing Sutton)
- Construe “disability” broadly rather than strictly (Reversing Toyota Motor)
- Major bodily functions added to major life activities

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- Not Qualified to Perform Essential Job Elements

## Old Law

**“Disability” means:**

- A. A physical or mental impairment that substantially limits one or more major life activities**
- B. A record of such an impairment or**
- C. Being regarded as having such an impairment**

## New Law

**“Disability” means:**

- A. A physical or mental impairment that substantially limits one or more major life activities**
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# Same Words but Different Meaning (How Did Congress Tell Us to do That?)

- **Codified Major Life Activities (not defined in 1990 ADA)**
  - Codified case law interpretations
  - Wrote a new class of major life activities (bodily functions)
- **Reversed Sutton, Toyota Motor and years of judicial interpretation of “substantially limits”**

# Major Life Activities Codified

- **IN GENERAL** – Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. (ADA Amendments)
  - Proposed regulations also add sitting, reaching, and interacting with others. (Proposed Regulations)
- **MAJOR BODILY FUNCTIONS** - A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. (ADA Amendments)



# Substantially Limits Redefined

## **ADA amendments:**

- **The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008**
- **That’s it. No other definition**

# 2008 ADA Amendments — Purposes

(Incorporated into “substantially limits” definition)

- **To reinstate broad scope of protection**
- **To reject Sutton requirement:  
Consider mitigating measures when determining whether an impairment substantially limits a major life activity**
- **To reject Sutton reasoning re “Regarded As” section of disability definition and reinstate Nassau County v. Arline (1987) interpretation (under 1973 Rehabilitation Act)**

# 2008 ADA Amendments — Purposes

(Incorporated into “substantially limits” definition)

- **To reject Toyota Motor standards:**
  - “Substantially” and “major” now not to be interpreted strictly to create demanding standard
  - Impairment now need not prevent or severely restrict individual from activities of central importance to most people’s daily lives (rejects Toyota Motor’s analysis of this issue)

# 2008 ADA Amendments — Purposes

(Incorporated into “substantially limits” definition)

- **To convey congressional intent:**
  - Toyota Motors standard for “substantially limits” has inappropriately limited ADA coverage
  - Primary focus of ADA cases should be whether covered entities have complied with their obligations
  - Question of whether an individual’s impairment is a disability should not demand extensive analysis
- **To express expectation EEOC will revise its regulations defining “substantially limits”**



# 2008 ADA Amendments – Substantially Limits: The New Law

- **Impairment = disability if: substantially limits ability to perform major life activity**
  - Compared to most people in general population

## **But**

- **Impairment need not significantly or severely restrict from performing major life activity**
- **So: Test is: equal to or greater than “substantially limits” but less than “significantly restricts”**



# EEOC Proposed Regs (cont.)

## Substantially Limits

The EEOC added this definition:

- **Substantially limits – (1) In general. An impairment is a disability within the meaning of this section if it “substantially limits” the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict the individual from performing a major life activity in order to be considered a disability.**
- **That’s it. No more detail.**



# EEOC Proposed Regs “Substantially Limits”

So, the test is:

- Must prove “substantially limits” ability to perform a major life activity as compared to most people in the general population (New EEOC regs 29CFR§1630.2 (j)(i))
- But no longer have to prove “severely restricts” from performing activities of central importance to most people’s daily lives

# Toyota Motor “Substantially Limits”

“Central importance” phrase takes its meaning from Toyota Motor

▪ Supreme Court reversed Sixth Circuit because it found plaintiff “substantially limited” solely because her carpal tunnel syndrome restricted her ability to perform manual tasks associated only with her job

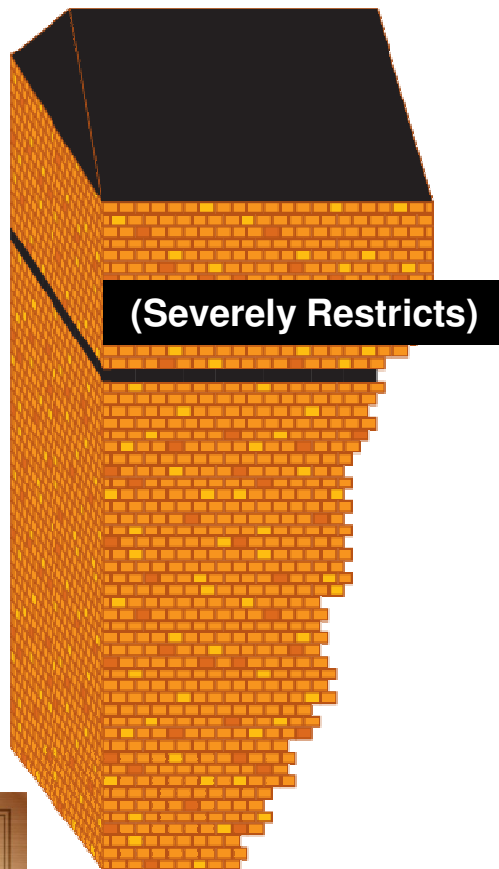
▪ Supreme Court held that test was too easy, and couldn’t be what Congress intended because the ADA’s disability definition applied not only to employment, but also to portions of the act dealing with public accommodations and public transportation, thus covering individuals who are not employed

# Toyota Motor “Substantially Limits”

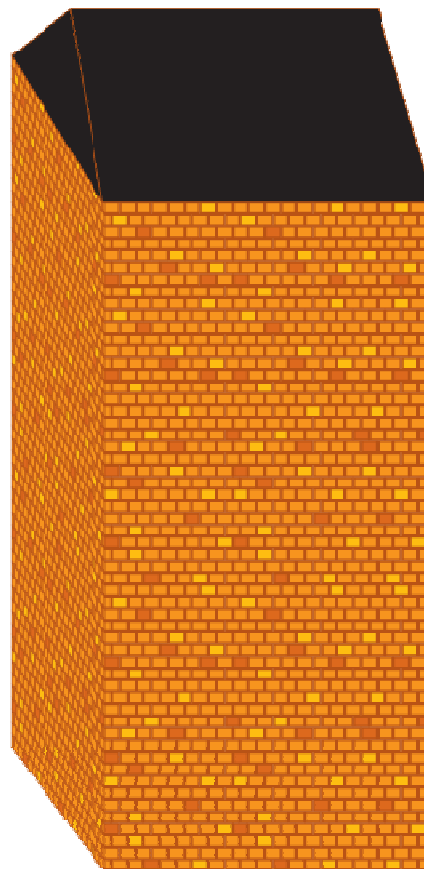
- **Supreme Court held Sixth Circuit erred when it regarded evidence about plaintiff’s ability to tend to her personal hygiene and household chores as immaterial – remanded to District Court to hear evidence on those issues.**
- **This part of Toyota Motor is expressly reversed by the ADA Amendments**

# Required Proof: Substantially Limits Toyota Motor (Sixth Circuit)

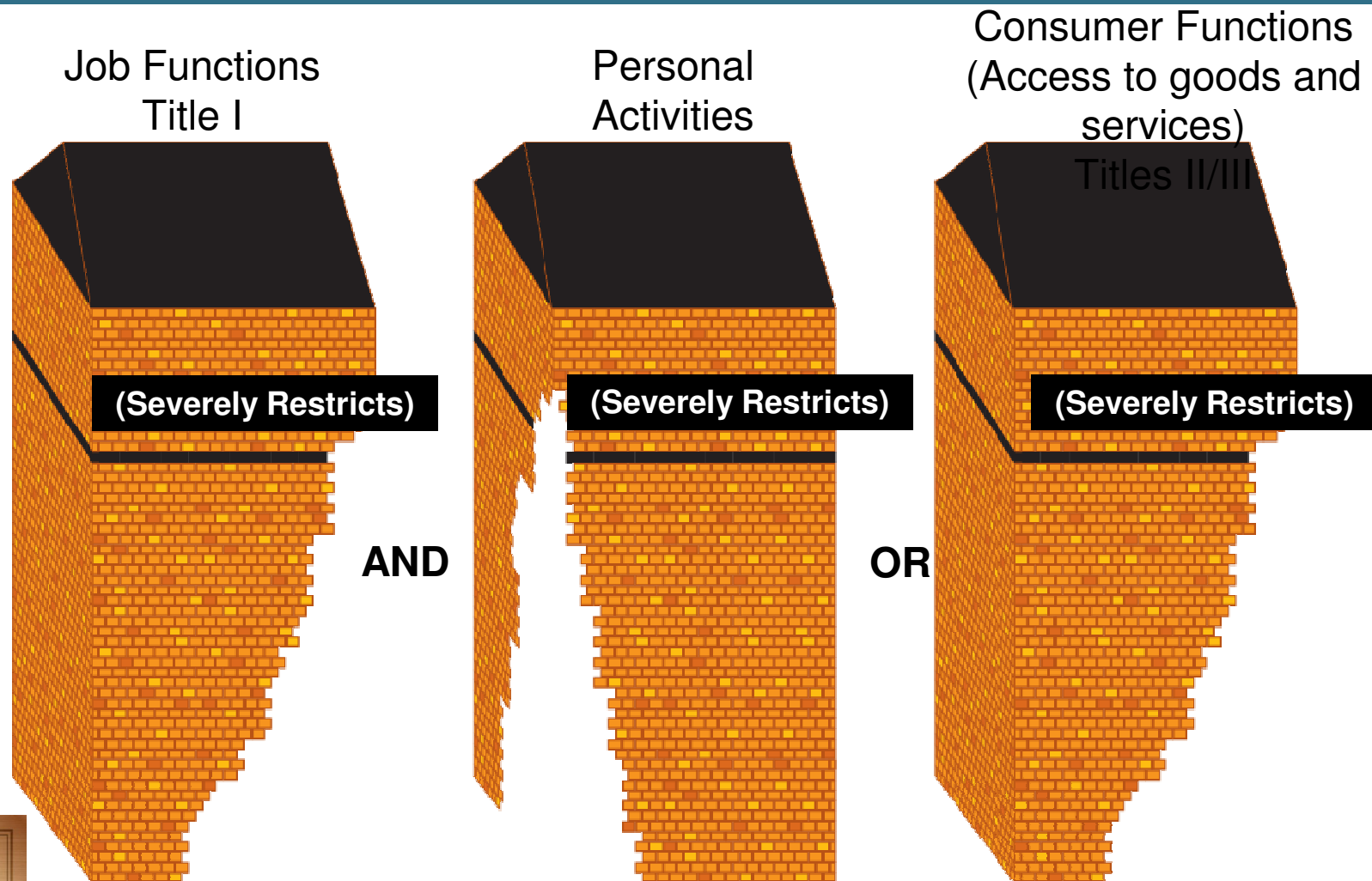
Job Functions  
Title I



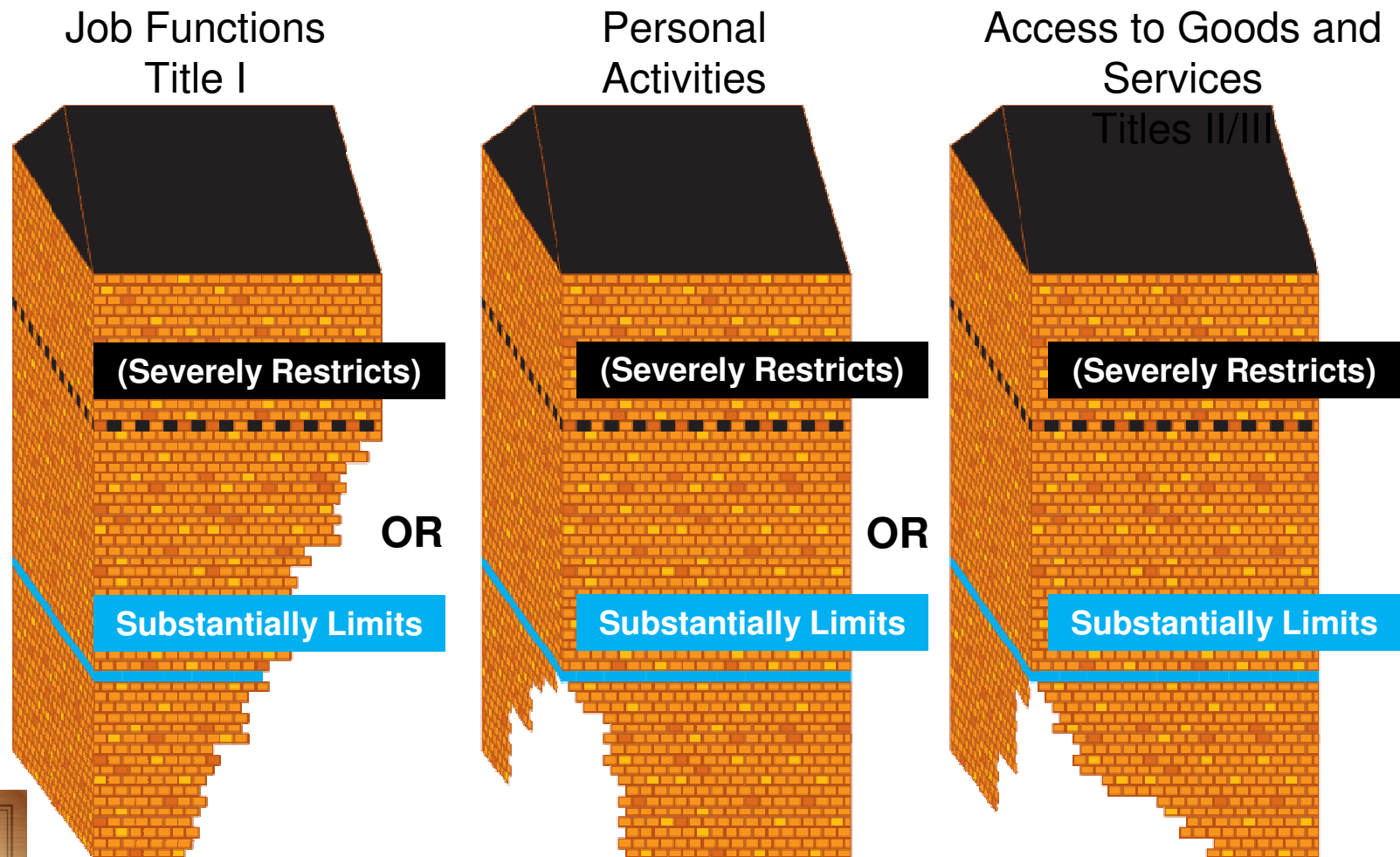
Personal  
Activities



# Required Proof: Substantially Limits Toyota Motor (Supreme Court)



# Required Proof: Substantially Limits 2008 ADA Amendments



# Major Life Activity of Working (A Synthesis)

- **Working now codified as major life activity**
- **Does impairment substantially limit qualification for or ability to perform type of work?**
- **“Type of work” has replaced “class or broad range of jobs”**
- **Type of work includes individual’s job and jobs with similar qualifications or requirements**
- **Type of work may be determined from nature of work (examples: commercial truck driving, assembly line jobs, food service jobs, clerical jobs)**

# Major Life Activity of Working (A Synthesis)

- **Type of work may be determined from job related requirements impaired (examples: jobs requiring repetitive bending, reaching, manual tasks, repetitive or heavy lifting, prolonged sitting or standing, extensive walking, etc.)**
- **Fact individual obtains other employment is not dispositive of substantially limited in working**
- **Whether impairment substantially limits working must be construed as broadly as ADA permits, and should not demand extensive analysis**

# Major Life Activity of Working (A Synthesis)

- Individual with a disability will usually be substantially limited in another major life activity, thus generally making it unnecessary to consider whether individual is substantially limited in working (But remember: an unrelated impairment will not support an accommodation request)
- And note: the examples illustrating how EEOC thinks “substantially limits” applies to working all follow a pattern in which the individual’s impairment is less severe than the general population, but is deemed disabling because the job is atypically hard because of the impairment (This pattern reverses Toyota Motor’s analysis)



# EEOC Regulations

## Impairments That Will Consistently Meet The Definition of Disability

- **“Interpreting the definition of disability broadly and without extensive analysis as required . . . some types of impairments will consistently meet the definition of disability.”**
- **“Because of certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted quickly and easily, and will consistently result in a determination that the person is substantially limited in a major life activity.”**

# EEOC Regulations

## Impairments That Will Consistently Meet The Definition of Disability

- **Deafness, blindness, intellectual disability (formerly termed mental retardation), partially or completely missing limbs, and mobility impairments requiring the use of a wheelchair. (Obvious things from case law)**
- **Other examples provided by the EEOC: (New: interpreting the major bodily function section)**
  - Autism
  - Cancer
  - Cerebral palsy
  - Diabetes
  - Epilepsy
  - Multiple sclerosis and muscular dystrophy
  - Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia

# EEOC Regulations

## Impairments That May Be Disabling for Some Individuals But Not For Others

- **May be disabling for some individuals but not for others, and therefore may require more analysis in order to determine whether or not they substantially limit an individual in performing a major life activity.**
- **Still construe in favor of broad coverage**
- **Should not demand extensive analysis**

# Impairments That Are Usually Not Disabilities

- **Temporary, non-chronic impairments of short duration with little or no residual effects (such as the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely) usually will not substantially limit a major life activity.**
- **Long duration, chronic impairments that do NOT substantially limit a major life activity**

# Impairments That Are Usually Not Disabilities

- **The EEOC made a determination that the H1N1 flu that presented itself in Spring/Summer 2009 was not a disability**
  - Can make inquiries that would normally not be allowed if it was a disability
  - Can send someone home
  - No reasonable accommodation required

# Regarded As

**“Disability” means:**

- A. A physical or mental impairment that substantially limits one or more major life activities**
- B. A record of such an impairment or**
- C. **Being regarded as** having such an impairment**

# Let's Build a “Regarded As” Disability

- **Employee or applicant has localized scleroderma which has caused thickened discolored skin spots on this person's hands and face.**
- **Manager sees the skin condition remembers hearing that people with AIDS have skin discoloration**
- **Manager does not trust government propaganda saying AIDS is not communicable in the workplace**
- **Manager fires/refuses to hire this employee (and tells someone the reason)**
- **A “regarded as” disability has been built**

**(In medical reality the employee's scleroderma was not an ADA disability, but that medical reality became immaterial once the manager created the “regarded as” disability)**



# New Rules About “Regarded As”

- **Plaintiff only has to prove:**
  - Subjected to prohibited action
  - Because of perceived physical or mental impairment
- **Plaintiff need not prove the “REGARDED AS” impairment was serious enough to limit a major life activity – but the perceived impairment must be more than transitory or minor (six month duration – actual or expected)**
- **No duty to accommodate REGARDED AS disabilities (so no lawsuits based on failure to accommodate a regarded as disability)**



# Utah/Federal Law Interaction

- **Parallel but independent statutes**
- **Both require exhausting administrative remedies**
- **Must file charge of discrimination with agency**
  - Utah law = 180 days of last discriminatory event complained of
  - Federal 300 = days



# Utah/Federal Law Interaction

- **Utah UALD and federal EEOC have cross filing agreement and work sharing agreement**
- **Utah administrative cause determination reviewable**
  - ALJ
  - Utah Court of Appeals  
34A-5-107 Utah Code

# Utah/Federal Law Interaction

- **Employee has right to terminate state process – move to (and through) EEOC**
- **90 day Right to Sue letter – Federal Court**

# Utah/Federal Disability Law Interaction

## Utah Antidiscrimination Act says

- **An employer may not refuse to hire, promote, discharge, demote, or terminate any person, or to retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified, because of:**

- Race;
- Color;
- Sex;
- Pregnancy, childbirth, or pregnancy related conditions;
- Age, if the individual is 40 years of age or older;
- Religion;
- National origin; or
- Disability

34A-5-106 Utah Code



# Utah/Federal Disability Law Interaction

- **This is federal Title VII with “disability” and “otherwise qualified” added.**
- **Utah Act expressly incorporates the ADA definition of “disability” 34A-5-102(5)**

# Federal Disability Law

## Reasonable Accommodation Duty

**The federal ADA's reasonable accommodation duty arises under this language:**

**...the term discrimination against a qualified individual on the basis of disability includes –**

**▪ Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or**



# Federal Disability Law Reasonable Accommodation Duty

- **Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.**

**42 U.S.C. § 12112(5)**



# Utah Disability Law

- **Utah law has no equivalent provision, but does mention reasonable accommodation in these provisions:**
- **A person may not be considered “otherwise qualified,” unless that person possesses the following required by an employer for any particular job, job classification, or position:**
  - Education;
  - Training;
  - Ability, with or without reasonable accommodation;  
34A-5-106(1)(a)(ii)

# Utah Disability Law

- **Nothing contained in Utah Antidiscrimination Act shall be construed to prevent:**
  - The termination of employment of an individual who, with or without reasonable accommodation, is physically, mentally, or emotionally unable to perform the duties required by that individual's employment  
34A-5-106(2)(a) Utah Code

# Utah/Federal Disability Law Interaction

## REVERSE DISCRIMINATION

- **Federal: No Reverse Discrimination Claims**  
**Section 6(g) ADA Amendments Act 42**  
**U.S.C. §12201(g)**
- **Utah: Discrimination “because of” disability**  
**is unlawful**  
**34A-5-106 Utah Code**  
**Reverse discrimination claims are founded**  
**on “because of” (Ricci v. DeStefano U.S.**  
**Supreme Court 6/29/2009)**



## Utah Law Rights and Privileges of a Person with a Disability 62A-5b-101 et seq.

- **Rights to use highways, streets, sidewalks, public buildings**
- **Common carrier accommodations**
- **Public/private housing accommodations**
- **Employment in state service or employment supported by public funds**
- **Right to be accompanied by service animal**
- **Violation is class C misdemeanor**