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A New Category of “Color”: Analyzing Albinism Under Title VII and the Americans with Disabilities Act

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- I. INTRODUCTION
- II. MEDICAL IMPLICATIONS OF ALBINISM
- III. PSYCHOSOCIAL IMPACTS OF ALBINISM
- IV. ALBINISM AS “COLOR” UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964
 - A. *Background of Title VII and Related Statutes*
 - B. *Analysis of Cases Under Title VII and Other Statutes Prohibiting Discrimination on the Basis of Race or Color*
- V. THE AMERICANS WITH DISABILITIES ACT
 - A. *Background on the Americans with Disabilities Act*
 - B. *Albinism as a Disability Under the Americans with Disabilities Act*
 - 1. Albinism as a Physical Impairment
 - 2. Albinism as a Perceived Disability
 - a. A physical impairment that does not substantially limit major life activities
 - b. A physical impairment that substantially limits major life activities only as a result of attitudes of others
 - c. No physical impairment but is treated as having such an impairment
- VI. CONCLUSION

I am with my brother at the grocery store, doing the weekly family shopping. As we wander down the aisles I feel the other customers’ stares follow us. Some look and then quickly glance away. Others let their stares linger until I stare directly back, hard and unflinching, and they let their eyes drop and contemplate something on a nearby shelf. We continue through the store, me hoping that my brother hasn’t noticed the customers’ reactions, and simultaneously knowing that he has noticed—he expects it because it follows him everywhere he goes. Passing the pharmacy area, we pick up some sunscreen with SPF 45, the highest protection available but insufficient to guard my brother against the sun’s burning rays. In addition to the sunscreen, he will wear a T-shirt, a brimmed cap, and sunglasses and studiously avoid the outdoors during most daytime hours. At the check-out station, the cashier

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comments on my brother's beautiful hair. Thankfully she does not reach out to touch it as others have done in the past. After purchasing our groceries, we head out to the parking lot. I get in the driver's seat because it is dark and my brother is not allowed to drive when headlights are necessary. We head home, another public excursion behind us, neither of us voicing what occurred at the store; after all, it is nothing unusual. Most people have never seen an albino.¹

I. INTRODUCTION

Albinism is a genetic disorder that is characterized by an absence or severe reduction of pigment in the skin, hair, and eyes.² It is relatively rare, occurring in approximately one in 17,000 births.³ Approximately 18,000 persons with albinism live in the United States.⁴ It is seen in all racial and ethnic groups.⁵ Many persons with albinism are legally blind.⁶ Very few people have had contact with albinism and even fewer people have any knowledge of its medical basis or the challenges faced by persons with albinism. Persons with albinism are a marginalized group who are discriminated against on different levels.⁷ The discrimination faced by persons with albinism shares some similarities with discrimination toward persons of color.⁸ The prejudice towards

1. I have expressly chosen not to use the term "albino" (after this initial use) to refer to persons with albinism, because of the negative and dehumanizing connotations associated with the term. See National Organization for Albinism and Hypopigmentation, *Social Aspects of Albinism* (visited Apr. 6, 1999) <<http://www.albinism.org/publications/social-aspect.html>> (stating that "the terms 'person with albinism' and 'people with albinism' put the person first and the condition second").

2. DANETTE L. NELSON-ANDERSON & CYNTHIA V. WATERS, *GENETIC CONNECTIONS* 235 (1995) (discussing the physical manifestations of albinism).

3. *Id.*

4. International Albinism Center, *Facts About Albinism* (visited Apr. 1, 1999) <<http://www.cbc.umn.edu/iac/facts.htm>> (providing medical information about albinism).

5. NELSON-ANDERSON & WATERS, *supra* note 2, at 237.

6. BENJAMIN A. PIERCE, *THE FAMILY GENETIC SOURCEBOOK* 160-61 (1990) (providing medical information about albinism). Legal blindness is considered vision of 20/200 or worse in the better eye with the best correction possible. See National Organization for Albinism and Hypopigmentation, *What is Albinism* (visited Apr. 6, 1999) <<http://www.albinism.org/publications/what-is-albinism.html>>.

7. See National Organization for Albinism and Hypopigmentation, *supra* note 1 (discussing how persons with albinism are marginalized from both the dominant culture and subordinated groups).

8. See National Organization for Albinism and Hypopigmentation, *Adults with Albinism Board* (visited Apr. 6, 1999) <<http://www.albinism.org/webboard/adult/webboard.html>> (providing an open forum for discussion of albinism). Reading these comments by adults with albinism provides an interesting view of albinism. When one comment queried whether people were prejudiced against persons with albinism, several affirmative responses followed, including the following: "Most people with albinism, because of our treatment in the past, bring our baggage with us. We look around a room looking for people who are staring at us . . . [W]e listen for whispers [sic] or for a room to grow silent

persons with albinism is embedded within our society; this is evidenced by the negative treatment of them in popular culture, including films.⁹ Persons with albinism are portrayed as oddities and as villains.¹⁰ Hollywood's fixation on equating albinism with evil or alien demonstrates that prejudice towards persons with albinism is socially acceptable.

Albinism has largely been ignored in the courts. Few cases have considered issues of albinism and there is no case authority for albinism as the basis of any legal cause of action for discrimination.¹¹ It is important to begin a dialogue concerning the need for legal protection for persons with albinism.

Persons with albinism have important voices to contribute to legal literature. They offer a unique perspective because of their role outside the dominant culture.¹² The law should provide legal remedies for persons with

when we enter."

9. See Luna Eterna, *Albinism in Film* (visited Apr. 6, 1999) <<http://www.mindspring.com/~lunaeterna/artpop/opening.htm>> (providing examples of films including: THE PRINCESS BRIDE (Act III 1987), in which one of the "bad guys" is referred to as "The Albino," both by the film's characters and in the closing credits; and POWDER (Hollywood Pictures 1995) in which the protagonist is a person with albinism. However, in addition to having albinism, he has pink eyes, has the ability to conduct electricity over his body, and ends up electrocuting himself after being rejected by everyone around him).

10. See Vail Reese, *Albinism in Hollywood* (visited Apr. 1, 1999) <www.skinema.com> (asserting that "[c]haracters with albinism in films tend to lack morals as well as lacking pigment," and providing more examples of negative portrayals of albinism in film).

11. Research revealed no cases in which albinism was a primary issue, and few in which it was considered as a collateral issue. In *Knowles v. Postmaster General*, 656 F. Supp. 593, 595 (D. Conn. 1987), the plaintiff had ocular albinism and was legally blind. He brought a claim under the Rehabilitation Act of 1973, arguing his employer had failed to make reasonable accommodations for his disability. *Id.* at 596. The court held that the plaintiff's failure to take a compulsory written examination rendered his discrimination claim void. *Id.* at 601.

In *Pitre v. Opelousas General Hospital*, 530 So.2d 1151 (La. 1988), a malpractice suit was brought against a physician based on a failed tubal ligation which resulted in the mother having an unwanted child. *Id.* at 1153. The child was born with albinism. *Id.* The court dismissed the tort action for "wrongful life," holding that the physician did not owe a duty to the unborn child to "protect her from the risk of being born with albinism." *Id.* at 1158. Significantly, in its opinion, the court stated that albinism was a "deformity." *Id.* at 1153. In addition, the court held that the parents could not collect special damages for emotional distress for having a child born with albinism. *Id.* at 1162.

The most significant treatment of albinism was in *Brijjal v. Medical Associates of Woodhull*, P.C., No. 98 CIV.2972 (AGS), 1998 WL 386435, at *1 (S.D.N.Y. July 9, 1998). In *Brijjal*, the plaintiff brought a claim under the Americans with Disabilities Act (ADA) based on her albinism. *Id.* The court dismissed the case without addressing the merits and specifically declined to consider whether albinism is a disability under the ADA. *Id.* at *3.

12. See Tina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 408-09 (discussing the danger of appropriating others' experiences as analogous to one's own because "[w]e share a primal, and not unreasonable, fear that if we open ourselves enough to comprehend another's pain, we will lose our right to feel our own, especially if ours cannot compete in the pain sweepstakes").

albinism who are discriminated against in the workplace.¹³ Specifically, albinism should be protected as “color” under the Civil Rights Act of 1964¹⁴ and protected as an actual or perceived disability under the Americans with Disabilities Act.¹⁵

Part I of this paper provides a medical overview of albinism and its genetic causation, as well as the medical risks associated with albinism. Part II briefly examines the psychosocial impacts of albinism. In Part III, existing case law under the Civil Rights Act of 1964 is analyzed, and this Comment argues that albinism should be construed as “color” to be protected under the Civil Rights Act. Finally, Part IV examines cases decided under the Americans with Disabilities Act and argues that the definition of “disability” should be interpreted to include albinism.

II. MEDICAL IMPLICATIONS OF ALBINISM

It is true that my brothers are privileged. They are male; they are white. Their identification as racially white helps perpetuate institutional racism. No one accuses my younger brother of being admitted to college based on his race. It also means they can live in our town without being hassled by the police for being “suspicious.” Their identification as male helps maintain institutional sexism. They can go out at night without much fear of being assaulted. Growing up, it also meant they were excused from much of the care for our younger siblings and subject to later curfews. But it is wrong to say they are only privileged. They are forever excluded from a societal norm of beauty because of their physical appearance. They will always be the guys with the white hair, constantly mistaken for one another (even though seven years separate them) because they both have albinism (don’t they all look the same?).

Albinism is, in the simplest terms, a disease involving lack of pigmentation.¹⁶ The two primary forms of albinism are ocular, affecting

13. Specifically, this paper addresses employment discrimination. The arguments here clearly could encompass other areas covered under anti-discrimination statutes, including public accommodations. However, persons with albinism are most likely to be discriminated against in the employment realm because of the exposed nature of the workplace, both in working with other employees and working with the public.

14. 42 U.S.C. § 2000e-2(a)(1) (1994).

15. 42 U.S.C. § 12102(2) (1994). This analysis applies equally to the Rehabilitation Act of 1973, which prohibits discrimination on the basis of a disability by federal employers and employers receiving federal funds. See 29 U.S.C. § 794 (1994).

16. Pigmentation is coloration and is particularly identified with the color of the skin.

primarily the eyes, and oculocutaneous, affecting the eyes, hair, and skin.¹⁷ Oculocutaneous albinism encompasses both tyrosinase-negative and tyrosinase-positive albinism.¹⁸ Tyrosinase-negative albinism is the most severe type of albinism because no pigment is produced in the individual.¹⁹ Individuals with tyrosinase-negative albinism have white hair, pink skin, and blue or gray eyes.²⁰ People with tyrosinase-positive albinism accumulate some pigment over time and generally have less severe vision problems.²¹ Most forms of albinism are autosomal recessive disorders, meaning that a child born with albinism has two parents carrying the albinism gene who both pass on the gene to their child.²²

Persons with albinism may have several vision difficulties, including nystagmus,²³ strabismus,²⁴ astigmatism,²⁵ and iris translucency.²⁶ Vision problems occur because the eye needs melanin²⁷ to develop normally.²⁸ Persons with albinism are often born with developmental abnormalities in the retinas²⁹ or in nerve pathways from the retinas to the brain.³⁰ These developmental problems generally cannot be corrected through surgery because there is no

17. James W. Haefemeyer & Janice L. Knuth, *Albinism*, 10 J OPHTHALMIC NURSING & TECH. 55, 55-62 (1991).

18. *Id.* at 55.

19. PIERCE, *supra* note 6, at 160.

20. *Id.*

21. *Id.*

22. *Id.* at 161. Approximately one in 70 people carries the gene for oculocutaneous albinism. See International Albinism Center, *supra* note 4.

23. See Haefemeyer & Knuth, *supra* note 17, at 57 (stating that nystagmus, a condition in which the eyes jerk back and forth, often forces persons with albinism to read by tilting their heads in order to find a "null point" for their nystagmus).

24. See International Albinism Center, *supra* note 4 (stating that strabismus, or crossed eyes, likely results from disorganized nerve signals from the eye to the brain in persons with albinism).

25. *Id.* (explaining that astigmatism causes diminished sharpness in vision because the lens does not focus light evenly on the retina, resulting in a distorted image).

26. Haefemeyer & Knuth, *supra* note 17, at 56 (asserting that the iris' lack of pigment impairs the eye's ability to screen out excess light, resulting in extreme sensitivity to light).

27. Melanin is the pigment that provides dark coloration of the skin and eyes. See International Albinism Center, *supra* note 4.

28. National Organization for Albinism and Hypopigmentation, *supra* note 6 (stating visual effects of albinism).

29. Haefemeyer & Knuth, *supra* note 17, at 56 (stating that a part of the retina, the fovea, fails to develop normally, leading to a loss in visual sharpness).

30. NELSON-ANDERSON & WATERS, *supra* note 2, at 235.

way to replace the melanin necessary for proper development.³¹ Visual acuity varies considerably and averages about 20/200.³² Persons with albinism have a heightened risk of skin cancer because of the lack of pigment in their skin.³³

III. PSYCHOSOCIAL IMPACTS OF ALBINISM

My brother's senior year of high school was a nightmare. He wanted to graduate early, but I pressed him to stay and enjoy all the perks of being a senior—like off-campus lunch privileges and the prom. I was wrong. I didn't know that kids were still calling him "Blindy," and that he would be left behind at school when his "friends" went out to lunch. I didn't know how isolated he felt at school where there was no one with whom to commiserate. He wore a letter jacket like everybody else. He is smart, funny, and incredibly kind. I thought others must see him the way that I saw him. I was wrong. People do not bother to look beyond his coloring.

There is little research available on the psychosocial impacts of albinism.³⁴ The available information is found mostly in newspaper "human-interest" stories. The National Organization for Albinism and Hypopigmentation has a web page available and publishes biannual newsletters concerning different facets of albinism, including social aspects.³⁵

One of the major psychosocial impacts on persons with albinism results from the misconceptions held about the disorder. One of the most popular beliefs is that persons with albinism have red or pink eyes.³⁶ Underlying this misconception is the belief that persons with albinism are mystical creatures or are the consequence of prior wrongdoing.³⁷ Persons with albinism are often

31. *Id.*

32. Haefemeyer & Knuth, *supra* note 17, at 57. Legal blindness is vision of 20/200 in the better eye with the best correction. See National Organization for Albinism and Hypopigmentation, *supra* note 6.

33. PIERCE, *supra* note 6, at 160.

34. Haefemeyer & Knuth, *supra* note 17, at 60.

35. National Organization for Albinism and Hypopigmentation (visited Apr. 6, 1999) <<http://www.albinism.org>>. See also The International Albinism Center, *supra* note 4 (providing medical information about albinism).

36. Haefemeyer & Knuth, *supra* note 17, at 60. The eyes of persons with albinism are generally blue or gray. Persons with albinism often have iris translucency. This means that if a direct light is shined on their irises, they may appear violet.

37. *Id.* (discussing some of the misconceptions about albinism that are held, both by persons with albinism and society as a whole).

equated with evil as evidenced by an old urban legend about an Ohio factory guarded by "armed and menacing albinos."³⁸

Persons of African descent with albinism experience discrimination both from whites and from other persons of African descent.³⁹ African-Americans with albinism generally have yellow hair, cream colored skin, and hazel or green eyes.⁴⁰ Often people erroneously believe they are the product of an interracial relationship which may result in false accusations of infidelity in families with two black parents.⁴¹ Similarly, some people believe that whites with albinism are actually of African descent who try to "pass" as white.⁴²

In parts of Africa, persons with albinism were once smothered at birth based on the belief they were witches.⁴³ In rural Zimbabwe, the belief persists that albinism is somehow contagious. As a result, persons with albinism are ostracized from society.⁴⁴ Many persons with albinism in Africa do not attend school because of uncorrected vision problems or the refusal of their parents

38. See Steve Bennish, *Man Sheds Light on 'Old Albino' Tale*, DAYTON DAILY NEWS, Feb. 7, 1997, at 1A, available in 1997 WL 3926802. On a radio call-in show, over 100 people from the Dayton area called in to give their versions of this urban legend. See also Carolyn Strange & Tina Loo, *Spectacular Justice: The Circus on Trial, and the Trial as Circus, Picton, 1903*, 77 CAN. HIST. REV. 159 (1996), for another enlightening portrayal of albinism. In the early 1900s, two brothers with albinism "were presented as ambassadors from Mars who were discovered near the remains of their crashed space ship in the Mojave Desert." *Id.*

39. Haefemeyer & Knuth, *supra* note 17, at 60. See also National Organization of Albinism and Hypopigmentation, *People of Color Board* (visited Apr. 6, 1999) <<http://www.albinism.org/webboard/poc>> (providing a forum for persons of color with albinism). The comments demonstrate the dual exclusion faced by persons of color with albinism. A healthy sense of irony was displayed by the comment on the title "people of color" to describe a group that is "without color." *Id.*

40. National Organization for Albinism and Hypopigmentation, *African Americans with Albinism* (visited Apr. 6, 1999) <<http://www.albinism.org/publications/african-americans.html>> (discussing the physical characteristics of African Americans with albinism and the difficulties they face).

41. Haefemeyer & Knuth, *supra* note 17, at 60.

42. *Id.* (citing the difficulty people have understanding albinism and its physical manifestations). Alternatively, persons with albinism of African descent are also accused of trying "to pass" as white. *Id.*

43. See Donald J. McNeil, Jr., *Black, Yet White: A Hated Color in Zimbabwe*, N.Y. TIMES, Feb. 9, 1997, §1, at 1. This view of persons with albinism as witches culminates in the view that adults with albinism do not die, but simply vanish. *Id.*

44. *Id.*

to pay for school.⁴⁵ Persons with albinism who do not attend school may have little social contact and remain further segregated from their communities.⁴⁶

A common problem for persons with albinism is a feeling of isolation.⁴⁷ Because albinism is relatively rare, most persons with albinism have no contact with others like them⁴⁸ and have no role models.⁴⁹ The media's portrayal of albinism is almost nonexistent, and the few persons with albinism who are shown represent the stereotype of being evil or sinister.⁵⁰

Persons with albinism are also affected by the social construction of "disability." The social construction of disability has been defined as "the way an able bodied conception of disability magnifies its consequences."⁵¹ Judging persons with disabilities by so-called "objective" standards (i.e. from an able-bodied perspective) results in the constant inadequacy of persons with disabilities.⁵² This construction of disability silences persons with disabilities and perpetuates feelings of failure and isolation.⁵³ The absence of a word for the systemic discrimination against persons with disabilities evidences society's refusal to acknowledge how disability is socially constructed and maintained.⁵⁴

45. *Id.* Many parents believe their children with albinism will die at an early age and thus do not want to spend money for their education. *See id.*

46. *Id.* The Zimbabwe Albino Trust is an organization striving to fight discrimination against persons with albinism. Its goals are to raise money for sunscreen and glasses for needy persons with albinism and to survey persons with albinism in Zimbabwe about their needs. As of 1997, the Trust had received approximately \$800 and 50 bottles of sunscreen.

47. *See* Kathleen Donnelly, *Somebody Like Me! People with Hypopigmentation—It Used to be Called Albinism—Can Share Experiences*, FT. WORTH STAR-TELEGRAM, July 21, 1996, at 3. In commenting on her childhood, an adult woman with albinism stated: "[Y]ou become very isolated. I knew I was incredibly different from a very young age, and I did not understand why." *Id.*

48. Haefemeyer & Knuth, *supra* note 17, at 61.

49. *See* Donnelly, *supra* note 47, at 3 (stating "that there are few people with albinism in the public eye").

50. *Id.* Donnelly discusses the lack of public figures with albinism and the media's preoccupation with treating albinism as sinister or as an oddity. *See also supra* note 9 and accompanying text.

51. *See* Dianne Pothier, *Miles to Go: Some Personal Reflections on the Social Construction of Disability*, 14 DALHOUSIE L.J. 526, 526 (1991).

52. *Id.* at 534. Pothier gives the example of an oral presentation in which her visual impairment required her to hold her notes very close to her eyes and block her face from time to time. Although her audience was aware of her vision impairment, she received a poor evaluation on the style of her presentation.

53. *Id.* at 527-28.

54. *Id.* at 543. The author proposes the word "disabilityism" as a word comparable to racism and sexism. *Id.*

Reactions to persons with disabilities further marginalizes the disabled. These reactions often take one of two approaches. First, the person may pretend not to notice anything unusual about the disabled person.⁵⁵ For example, adults with children are often overheard quieting their child when she asks, “what is wrong with *that* person?” By pretending that persons with disabilities do not exist, this approach further isolates the disabled person.⁵⁶ The second approach is to behave in a “jovially patronizing” manner.⁵⁷ Typically, the stranger not only takes notice of the disability but dismisses its severity and attempts to give it positive attributes.⁵⁸ One common example from my brothers’ lives is the comment, “what beautiful hair! What a gorgeous color!” The speaker then often reaches out to touch the hair in question. This type of response forces the person with albinism to acknowledge their difference which violently rips off the “mask”⁵⁹ so carefully put into place.

There may be no single “correct” response to persons with disabilities. However, it is always appropriate to treat a person with a disability with respect and as befitting her age. The disability rights movement champions the independence of persons with disabilities and calls for an end to the childlike portrayal of them.⁶⁰ A person with a disability is not impaired in all aspects of her life. Recognizing a person’s disability without maximizing its effects conveys respect and acknowledgement.⁶¹ Alternatively, applying an able-bodied standard to a person with a disability minimizes the disability’s influence and “reflects a preoccupation with ‘normalcy’ that excludes the disabled person.”⁶²

Whether to classify albinism as a disability is a difficult question. It may not be desirable to label persons with albinism as disabled because it perpetuates the idea that they are somehow “abnormal” or less than an able-

55. Sucheng Chan, *You’re Short Besides!*, in MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 265, 269-70 (Asian Women United of California ed., 1989) (discussing strangers’ responses to her physical disability).

56. *Id.* at 269.

57. *Id.* at 270.

58. *Id.*

59. See generally Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1, 13-14 (1994) (discussing how members of oppressed groups assume a mask, making them more pleasing to the dominant society, and how attempting to mask immutable traits involves an element of self-hate).

60. JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 4 (1993).

61. See Pothier, *supra* note 51, at 526 (discussing the social construction of disability).

62. *Id.*

bodied person.⁶³ Furthermore, it calls attention to their physical differences which forces persons with albinism to acknowledge their marginalization. There is no agreement among persons with albinism over whether to classify themselves as "disabled."⁶⁴ However, classifying albinism as a disability grants them membership in a larger community—a community of people with disabilities—as well as provides a vehicle for challenging the discrimination they face.

IV. ALBINISM AS "COLOR" UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

I remember the first time that I saw a person with albinism outside of my family. We were at Dairy Queen ordering ice cream when I saw a boy who looked more like my brothers than anyone I had ever seen. I didn't know how to react. I didn't want to stare and yet I wanted to thoroughly examine him. I wanted to explain to him that I was comforted by his existence and question him about how he coped everyday. Neither of my brothers was with me that day. Oddly enough I was glad because I would have felt uncomfortable if they had seen this boy. We don't talk about the fact that my brothers have albinism. It's interesting because their albinism has shaped their lives and yet we refuse to name it. To name it would acknowledge their difference, would acknowledge that all the cruel comments are really directed at them because they have albinism and society denigrates persons with albinism.

A. Background of Title VII and Related Statutes

The Civil Rights Act of 1964 was enacted primarily to combat the discrimination faced by African-Americans in multiple spheres of life including employment, public accommodations, and education.⁶⁵ Title VII focuses specifically on discriminatory employment practices on the basis of "race, color, religion, sex, or national origin."⁶⁶ The act prohibits discrimination by all private, state, county, and municipal employers with at least fifteen employees

63. See generally National Organization for Albinism and Hypopigmentation, *supra* note 1 (discussing whether to classify albinism as a disability and stating that "albinism can be seen as a very unique condition . . . [which] has led to separateness and isolation for many people").

64. See *id.* (discussing disagreement among persons with albinism over whether to classify albinism as a disability).

65. H.R. REP. NO. 88-914 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2393.

66. 42 U.S.C. § 2000e-2(a)(1) (1994) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . .").

engaged in interstate commerce.⁶⁷ Although Title VII primarily has been a vehicle for combating discrimination aimed at racial minorities, the United States Supreme Court has held that Title VII is equally applicable to discrimination against whites.⁶⁸ Title VII has been held to proscribe both intentional discrimination⁶⁹ and discrimination that has a "disparate impact" upon a protected group.⁷⁰

In order to have an actionable claim under Title VII, plaintiffs must meet standing requirements. The constitutional requirements of standing arise from Article III, Section 1 of the Constitution. They include: (1) an actual injury; (2) the injury is "fairly traceable" to the defendant's conduct; and (3) the injury may be redressed by a favorable outcome.⁷¹ Standing also includes prudential requirements.⁷² However, many courts recognize standing for plaintiffs who only meet the minimum constitutional requirements.⁷³

The predecessor to Title VII is the Civil Rights Act of 1866.⁷⁴ The Supreme Court has interpreted Section 1981 (as the Act of 1866 is referred to) to prohibit racial discrimination in the making of both private and public

67. 42 U.S.C. § 2000e(a), (b).

68. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that terminated white employees had actionable Title VII claim against employer for racial discrimination).

69. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (explaining prima facie requirements for an intentional racial discrimination case: (1) plaintiff belongs to a racial minority; (2) plaintiff applied for and was qualified for a job for which the employer sought applicants; (3) despite being qualified, plaintiff was rejected; and (4) after plaintiff was rejected, the position remained vacant and employer sought applicant from persons with similar qualifications). This prima facie case creates an inference of discriminatory intent. See generally *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988) (discussing the prima facie case and shifting evidentiary burdens for "disparate treatment" cases). Plaintiffs arguing other adverse employment actions (i.e., termination) can adapt these elements accordingly. See *Felix v. Marquez*, No. 78-2314, 1981 WL 275, at *10 n.88 (D.D.C. Mar. 26, 1981) (stating that the principles of *McDonnell Douglas* have been applied in cases involving allegations of a failure to promote and discriminatory termination).

70. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (asserting that Title VII is directed at "the consequences of employment practices, not simply the motivation" of the employer).

71. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (listing the requirements for standing).

72. *Id.* Prudential requirements are imposed by the Court and include: (1) the injury must fall within the "zone of interests" protected by the statute; (2) no generalized grievances are permitted; and (3) the legal rights asserted must be one's own and not another's. *Id.*

73. See *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971) (holding that "a person . . . aggrieved" under Title VII evidences congressional intent to "define standing as broadly as is permitted by Article III"); *Stewart v. Hannon*, 675 F.2d 846, 849 (7th Cir. 1982) (stating standing is only limited by Article III). But see *Childress v. City of Richmond*, 134 F.3d 1205, 1207 (4th Cir. 1998) (affirming dismissal of white police officers' hostile environment claim based on lack of standing).

74. 42 U.S.C. § 1981 (1866) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .").

contracts.⁷⁵ The Civil Rights Act of 1991 expanded Section 1981's reach to prohibit discrimination—not only in the making or enforcement of contracts—but also during the term of employment.⁷⁶ An aggrieved party may bring claims under both Title VII and Section 1981 as long as the necessary requirements are met.⁷⁷ There are significant differences between Title VII and Section 1981. Section 1981 prohibits discrimination solely on the basis of race⁷⁸ in contrast to Title VII's broader scope.⁷⁹ Section 1981 only prohibits intentional discrimination⁸⁰ while Title VII prohibits both intentional discrimination and discrimination having a disparate impact.⁸¹ Section 1981 applies to all private employers without regard to the number of employees or whether the employer is engaged in interstate commerce. Title VII and Section 1981 are distinct claims; however, cases decided under Section 1981 are useful in analyzing Title VII cases because of the similarity between the legal elements necessary for a cause of action under both statutes.⁸²

Several remedies are available under Title VII. Remedies include: obtaining a particular job, being reinstated in a previous position, or promotion.⁸³ Other remedies include monetary awards of backpay and attorneys' fees.⁸⁴ Injured parties who are not covered under Section 1981 (because they are discriminated against on account of a characteristic other than race) have an additional remedy. Under the 1991 Civil Rights Act they can recover compensatory and punitive damages.⁸⁵ A cap is put on the amount of

75. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987) (holding Section 1981 applicable to dispute involving a private institution).

76. Section 101 of the Civil Rights Act of 1991 provides that the right to make and enforce contracts includes "making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981.

77. *See generally Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) (stating that some overlap exists between Title VII and Section 1981).

78. *Id.* at 171 (reaffirming its previous holding in *Runyon v. McCrary*, 427 U.S. 160 (1976), that "§ 1981 prohibits racial discrimination in the making and enforcement of private contracts").

79. *See supra* note 65 and accompanying text.

80. *Patterson*, 491 U.S. at 186.

81. *See supra* notes 69, 70 and accompanying text.

82. *See Hansborough v. City of Elkhart Parks and Recreation Dep't.*, 802 F. Supp. 199, 203 (N.D. Ind. 1992) (citing Section 1981 opinions as helpful precedent).

83. 42 U.S.C. § 2000e-5(g) (1994).

84. 42 U.S.C. § 2000e-5(g)-(k).

85. 42 U.S.C. § 1981a (1994). Punitive damages are only available if the discrimination is "with malice or with reckless indifference."

damages recoverable based on the size of the employer.⁸⁶ Similar remedies are available under Section 1981 including backpay, compensatory damages, and punitive damages.⁸⁷

B. Analysis of Cases Under Title VII and Other Statutes Prohibiting Discrimination on the Basis of Race or Color

Title VII explicitly prohibits discrimination on the basis of “race” and “color.” With the enactment of the Fifteenth Amendment in 1870,⁸⁸ “color” has been a prohibited basis for discrimination in Title VII and other civil rights statutes.⁸⁹ There is neither legislative history defining “color” nor precedent for an authoritative interpretation of “color.”⁹⁰ Few cases have considered the question of what constitutes “color” under Title VII because claims based on color have largely been subordinated to claims based on race.⁹¹ Often courts have used “color” and “race” interchangeably.⁹² However, Congress’ inclusion of both “race” and “color” as prohibited bases for discrimination shows that the terms are distinct and may be asserted independently of one another.⁹³

86. 42 U.S.C. § 1981a(b)(3).

87. *See generally* Patterson v. McLean Credit Union, 491 U.S. 164, 182 (1989) (comparing the remedies available under Section 1981 with those available under Title VII before the Civil Rights Act of 1991).

88. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

89. *See Felix v. Marquez*, No. 78-2314, 1981 WL 275, at *10 n.11 (D.D.C. Mar. 26, 1981) (citing federal statutes, including Title VII, the National Industrial Recovery Act, and the Unemployment Relief Act of 1933, proscribing color as a basis for discrimination).

90. *Id.* at *11 n.11.

91. *See id.* at *10 (“Color is a rare claim, but . . . it can be an appropriate claim for a Puerto Rican to present.”); *see also Gomez v. Pima County*, 426 F. Supp. 816, 818 (D. Ariz. 1976) (holding Mexican Americans have actionable color discrimination claim under Section 1981).

92. *See Rodriguez v. Gattuso*, 795 F. Supp. 860, 865 (N.D. Ill. 1992) (stating that “race” and “color” discrimination are often viewed as identical); *Waller v. Int’l Harvester Co.*, 578 F. Supp. 309, 314 (N.D. Ill. 1992) (asserting that Section 1981 only applies to racial discrimination, not color discrimination); *Sere v. Board of Trustees*, 628 F. Supp. 1543, 1546 (N.D. Ill. 1986) (stating that courts should not be placed “in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit”).

93. *See Walker v. Secretary of the Treasury, Internal Revenue Service*, 713 F. Supp. 403, 405 (N.D. Ga. 1989) (arguing that “race” and “color” are distinct grounds for a Title VII action, based on the plain meaning of the statute); *Felix v. Marquez*, No. 78-2314, 1981 WL 275, at *10 (D.D.C. Mar. 26, 1981) (finding an uncommon “allegation of color discrimination that is not subordinated to a more familiar claim of racial discrimination”).

In *Saint Francis College v. Al-Khzraji*,⁹⁴ the Supreme Court held that a U.S. citizen of Arabian ancestry had a viable employment discrimination claim under Section 1981. At issue in *Saint Francis* was whether a Caucasian could claim racial discrimination by another Caucasian.⁹⁵ In a lengthy discussion, the Court asserted that the understanding of "race" had changed considerably since the 1800s, and today many scientists claim that "racial classifications are for the most part socio-political, rather than biological, in nature."⁹⁶ The Court held that Section 1981 encompasses discrimination against an individual "because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens,"⁹⁷ but that "a distinctive physiognomy is not essential to qualify for § 1981 protection."⁹⁸

Saint Francis has been cited by several courts as support for discrimination claims based on color.⁹⁹ The lengthiest discussion is found in *Walker v. Secretary of the Treasury, IRS*.¹⁰⁰ In *Walker*, the court held that a light-skinned African-American employee had an actionable Title VII claim of color discrimination against a dark-skinned African-American employer.¹⁰¹ The court cited *Saint Francis* and the canon of statutory interpretation that the plain meaning of the statute prevails.¹⁰² The *Walker* court emphasized the differences in both color and physical characteristics between persons of African descent.¹⁰³ The court acknowledged the difficulties inherent in discrimination

94. 481 U.S. 604 (1987).

95. *Id.* at 609.

96. *Id.*

97. *Id.* at 613.

98. *Id.* See also *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 616 (1987) (deciding on the same day as *Saint Francis College v. Al-Khzraji*, 481 U.S. 604 (1987), that Jews are an identifiable group and had an actionable racial discrimination claim under 42 U.S.C. § 1982, which prohibits discrimination with respect to property rights).

99. See *Rodriguez v. Gattuso*, 795 F. Supp. 860, 865 (N.D. Ill. 1992) (holding that discrimination based on skin color is actionable under the Fair Housing Act); *Walker v. Secretary of the Treasury, Internal Revenue Serv.*, 713 F. Supp. 403, 408 (N.D. Ga. 1989) (holding that discrimination based on skin color is actionable under Title VII). But see *Waller v. Int'l Harvester Co.*, 578 F. Supp. 309, 314 (N.D. Ill. 1984) (stating that Section 1981 applies to discrimination on the basis of race, but not on the basis of color).

100. *Walker*, 713 F. Supp. at 407.

101. *Id.* at 408.

102. *Id.* at 405 (concluding that "when Congress and the Supreme Court refer to race and color in the same phrase, that 'race' is to mean 'race,' and 'color' is to mean 'color'").

103. *Id.* at 407 (citing the *Saint Francis* Court's discussion of the various sub-groups found under the label "Caucasian"). See also *Vigil v. City and County of Denver*, No. 77-F-197, 1977 WL 41, at *1 (D. Colo. May 23, 1977) (discussing the considerable variation in skin color among Mexican-Americans and holding that they may bring color discrimination claims under Section 1981).

claims based on color but found a factual question as to whether the plaintiff's termination was a result of color discrimination.¹⁰⁴

In *Rodriguez v. Gattuso*,¹⁰⁵ the court followed *Walker*, holding that a discrimination claim based on color was actionable under the Fair Housing Act of 1968¹⁰⁶ even though the plaintiff and defendants were members of the same race.¹⁰⁷ In *Rodriguez*, the plaintiff, a dark-skinned Latino, was denied rental of an apartment which was later offered to his light-skinned Latina wife.¹⁰⁸ The court stated that a color discrimination claim was appropriate because the defendants treated the plaintiff and his wife differently based on their varying shades of skin color.¹⁰⁹

Saint Francis's holding has also been interpreted to mean that "a person's physical appearance as a [C]aucasian is not determinative in discrimination cases"; rather, "it is the perception, by the discriminator, of the discriminatee's race that is important for purposes of § 1981."¹¹⁰ Under this interpretation, the court's inquiry is directed to the defendant's perception of the plaintiff—rather than toward determining into which racial classification the plaintiff fits. The focus in these opinions is on the expansion of the term "race" without regard to "color."¹¹¹ These opinions may support the assertion that color is only relevant in terms of race; alternatively, they may argue for an acknowledgment of the very limits of racial classifications.

The Supreme Court's opinions in *Saint Francis* and *Shaare Tefila Congregation*,¹¹² acknowledge the changing definition of race in the United States.¹¹³ The Court emphasized that in 1866 Congress intended to protect identifiable groups discriminated against because of their ethnic and ancestral

104. *Walker*, 713 F. Supp. at 407. On remand, the court found the plaintiff had failed to prove her termination was because of color discrimination. *Walker v. Secretary of the Treasury, Internal Revenue Serv.*, 742 F. Supp. 670 (N.D. Ga. 1990).

105. 795 F. Supp. 860 (N.D. Ill. 1992).

106. 42 U.S.C. § 3604(b) (1994).

107. *Rodriguez v. Gattuso*, 795 F. Supp. 860, 865 (N.D. Ill. 1992).

108. *Id.* at 862.

109. *Id.* at 865.

110. *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712, 721 (D.P.R. 1992).

111. *Id.* at 723. See also *Hansborough v. City of Elkhart Parks and Recreation Dep't.*, 802 F. Supp. 199, 204-06 (N.D. Ind. 1992) (focusing on intraracial discrimination under the prohibited basis of "race," rather than "color").

112. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 616-17 (1987) (holding that Section 1982 which prohibits racial discrimination in property rights applied to Jews as a distinct protected group).

113. *Id.*

characteristics.¹¹⁴ Although Title VII was aimed primarily at decreasing discrimination towards African-Americans by white employers,¹¹⁵ the spirit of Title VII and other Civil Rights Acts is furthered by expanding their protection to other identifiable groups who suffer discrimination on the basis of an immutable characteristic like color (or the lack thereof).¹¹⁶

Persons with albinism should be protected from discrimination based on their "color." Classifying persons with albinism as white or African-American does not provide sufficient protection for them. African-Americans with albinism may be perceived as white.¹¹⁷ Whites with albinism may be perceived as African-American.¹¹⁸ People do not know how to perceive persons with albinism because of the existing misconceptions about albinism.¹¹⁹ Persons with albinism may be discriminated against because they defy racial classification. The inability to pigeonhole persons with albinism into discrete racial categories results in discrimination because society's rules and norms apply contingent upon one's racial identification.¹²⁰ Once that basis for guiding individual and societal behavior is lacking, people do not know how to respond.¹²¹ Ignorance breeds fear which produces discrimination and prejudice.¹²²

Providing persons with albinism a cause of action based on their color would enable them to bring suit against an employer or prospective employer

114. *Saint Francis College v. Al-Khzraji*, 481 U.S. 604, 613 (1987).

115. H.R. REP. NO. 88-914 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2393 ("Most glaring, however is the discrimination against Negroes which exists throughout our Nation.").

116. The Equal Protection Clause of the Fourteenth Amendment arguably offers protection from discrimination based on the classification of "persons with albinism." Persons with albinism have an "immutable characteristic"—their albinism—an important consideration in equal protection analysis. See generally *Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982) (discussing characteristics of suspect classifications, and stating that "[legislation] imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish"). However, an equal protection argument is outside the scope of this Comment.

117. *See supra* notes 41, 42 and accompanying text.

118. *Id.*

119. *See discussion supra* Part II.

120. Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 885 (1995) (asserting that people categorize others by race, using race as a starting point for our conceptions of others).

121. *See Judy Scales-Trent, Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305 (1990) (discussing how others do not know how to respond to her as a light-skinned African-American because she does not fit into a recognized racial category).

122. *See Ozzie Roberts, Making It*, SAN DIEGO UNION & TRIB., July 29, 1996, at E1, available in 1996 WL 2172125 (discussing intolerance in small town towards children with albinism).

for discriminatory action based on their albinism. An employment setting provides an unique opportunity for persons with albinism to be included within a larger community. In an integrated working environment other employees are forced to confront their misconceptions and fears about persons with albinism.¹²³

No statistics are available for the incidence of job discrimination faced by persons with albinism.¹²⁴ Persons with albinism have lacked a strong voice¹²⁵ for asserting not only their rights, but their very existence. Persons with albinism have not been heard, in part because they lack numbers,¹²⁶ but more significantly because they are a marginalized group who have been deemed outside the norms of the dominant culture. "Color" is a distinct category protected by Title VII and other civil rights statutes. Persons with albinism are included within the definition of "color" as it has been interpreted by the courts. Therefore, persons with albinism should be allowed to sue under Title VII and other civil rights statutes to seek redress for the discrimination they face.¹²⁷

123. See generally Eric Schnapper, *The Varieties of Numerical Remedies*, 39 STAN. L. REV. 851, 907-08 (1987) (arguing that white employees in all-white agencies are more likely to engage in discriminatory conduct because they are not exposed to African-American colleagues).

124. See National Organization for Albinism and Hypopigmentation, *Careers Board* (visited Apr. 6, 1999) <<http://www.albinism.org/webboard/careers>> (containing comments showing some of the difficulties in seeking employment faced by persons with albinism).

125. One voice that has spoken out loudly for persons with albinism is the National Organization for Albinism and Hypopigmentation (NOAH). See *supra* notes 1, 6, 7, 8, 35, 39, 40, 124 and accompanying text. NOAH holds annual conferences for persons with albinism, operates a website, and offers publications on albinism. NOAH also has both a video and book project on albinism in process.

126. The fact that persons with albinism have little or no contact with others sharing their albinism exacerbates their extreme isolation and inability to be heard by the dominant society. See Haefemeyer & Knuth, *supra* note 17, at 61.

127. Although beyond the scope of this Comment, critical race theory also provides a useful framework for analyzing color discrimination claims. The critical race theory movement was first organized in 1989 but has origins going back to the 1970s. See RICHARD DELGADO, INTRODUCTION TO CRITICAL RACE THEORY: THE CUTTING EDGE xiii-xiv (Richard Delgado ed., 1995). Its themes include the assertion that racism is so ingrained in society that it has become normalized, *id.* at xiv; that "race" itself is socially constructed and its definition changes over time, see Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 70 (1995); and the concept of intersectionality, which considers whether factors of class, race, and sex can be considered separately or only with respect to each other, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography 1993, A Year of Transition*, 66 U.COLO. L. REV. 151, 161 (1993). Critical race theory also advocates a "call to context," which refers to a focus on real world perspectives of persons in oppressed groups and personal experiences negotiating race, class, gender, and other facets of the individual. DELGADO, INTRODUCTION TO CRITICAL RACE THEORY, *supra* at xv.

Critical race theory's premises assert that change can only occur by reevaluating how identities are socially constructed and artificially constrained. Beginning a dialogue about the oppression of persons with albinism requires deconstructing white supremacy and the able-bodied norm. "White privilege" in reality means "white, able-bodied, 'normal-looking' privilege." Persons with albinism

V. THE AMERICANS WITH DISABILITIES ACT

My older brother is legally blind. This means that he uses a magnifying glass to read, he is not authorized to drive a car, and he is forced to sit within about a foot of the television set in order to see the picture. I don't think he considers himself disabled but I know that he sees himself as different. My brother refuses to wear his glasses because he claims they are of little help. He resists wearing sunscreen even though he often spends hours outside. He would ideally like to spend all of his time working with dogs—in a place where he would be surrounded by affection and protected from the harm that comes with being different, and different in a way which is undesirable.

A. Background on the Americans with Disabilities Act

The Americans with Disabilities Act was enacted in 1990 to prohibit discrimination against persons with disabilities in areas such as employment, public accommodations, and housing.¹²⁸ Congress found that persons with disabilities are a “discrete and insular minority” who encountered many forms of discrimination on a daily basis.¹²⁹ In order to establish a *prima facie* case of discrimination under the ADA, an employee must show: s/he has a disability; s/he is a “qualified individual”; and s/he was discriminated against because of the disability.¹³⁰ Once the employee has made a *prima facie* showing, the burden shifts to the employer to show a legitimate reason for the disputed action.¹³¹ Disability is defined using a three-prong test.¹³² Most courts have focused on the first prong of the definition: specifically whether or not the aggrieved employee had a “physical or mental impairment that substantially

do not share in many of the privileges afforded by this paradigm. The concept of intersectionality asserts how different facets of people's lives place them simultaneously in both subordinate and privileged positions. See Wildman & Davis, *supra* note 120, at 881. This concept is applicable to persons with albinism. Persons with albinism “exist at the intersection of race and color” and their very existence requires that they “transgress boundaries” of racial categories. See Scales-Trent, *supra* note 121, at 305. Persons with albinism have no group of people with which to identify; they are left at the margins of both the dominant culture and subordinated groups.

128. 42 U.S.C. § 12101(a), (b) (1994).

129. 42 U.S.C. § 12101(a).

130. Pritchard v. Southern Co. Services, 92 F.3d 1130, 1132 (11th Cir. 1996).

131. See generally Valentine v. American Home Shield Corp., 939 F. Supp. 1376, 1396-97 (N.D. Iowa 1996) (discussing application of the *McDonnell Douglas* burden shifting framework and stating that once *prima facie* case is made, the burden of production shifts to the employer to show a nondiscriminatory reason for its actions).

132. 42 U.S.C. § 12102(2): “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”

limits . . . major life activities”¹³³ Physical impairments include “physiological disorders,” “cosmetic disfigurement,” and “anatomical loss affecting . . . [a] body system.”¹³⁴ However, “simple physical characteristics such as the color of one’s eyes, hair, or skin” do not constitute a physical impairment.¹³⁵

The significance of the third prong of the disability definition has not been overlooked.¹³⁶ The legislative history behind this provision indicates Congress’ focus on the employer’s perception of the aggrieved employee as disabled regardless of whether or not the employee is actually disabled.¹³⁷ The legislative history states that this provision is “particularly important for individuals with stigmatic conditions that are viewed as physical impairments . . . for example, severe burn victims.”¹³⁸ In *School Board v. Arline*,¹³⁹ the Supreme Court articulated the rationale for an identical provision found in the Rehabilitation Act of 1973.¹⁴⁰ The Court stated that “society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”¹⁴¹ Other cases have followed the Supreme Court in holding that a perceived disability is an actionable claim under the Rehabilitation Act.¹⁴²

133. 42 U.S.C. § 12102(2)(A); see *Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1132 (11th Cir. 1996) (stating that depression is a “mental impairment” under the first definition); *Vande Zande v. State of Wisconsin Dep’t of Admin.*, 44 F.3d 538 (7th Cir. 1995) (holding that an employee’s pressure ulcers as a result of her paralysis constitute a recognized disability).

134. 29 C.F.R. § 1630.2(h)(1) (1999).

135. Eq. Empl. Compl. Man. (CBC) § 902.2(c)(2) (1995).

136. See H.R. No. 101-485, at 53 (1990). Three situations are covered by the third prong: (1) an individual who has a physical or mental impairment that does not substantially limit any major life activity, but is treated by her employer as having such a limitation; (2) an individual who has a physical or mental impairment that substantially limits a major life activity only because of the attitudes of others toward the impairment; (3) an individual who has no impairment but is treated by her employer as having an impairment. *Id.*

137. S. REP. NO. 101-116, at 23-24 (1989).

138. *Id.* at 24.

139. 480 U.S. 273, 289 (1987) (holding that plaintiff with tuberculosis was a “handicapped individual” under Rehabilitation Act of 1973).

140. 29 U.S.C. § 794 (1994). The Americans with Disabilities Act is modeled on the Rehabilitation Act of 1973, and contains an identical definition of disability. 42 U.S.C. § 12102(2) (1994).

141. *Arline*, 480 U.S. at 284.

142. See *Cook v. Rhode Island Dep’t of Mental Health, Retardation, and Hosp.*, 10 F.3d 17, 22 (1st Cir. 1993) (finding that an applicant had a sufficient perceived disability claim based on the employer’s reaction to her obesity); *Doe v. Centinela Hosp.*, 57 U.S.L.W. 2034, No. CV 87-2514-P AR (C.D. Cal. June 30, 1988) (finding an HIV-positive plaintiff was perceived as disabled based on

This Comment advances two alternative ways in which persons with albinism may be protected from discrimination¹⁴³ under the ADA.¹⁴⁴ First, as a “physical impairment” under the first definition of a disability,¹⁴⁵ and second, as a “perceived disability” under the third definition.¹⁴⁶

B. Albinism as a Disability Under the Americans with Disabilities Act¹⁴⁷

1. Albinism as a Physical Impairment

“Disability” is defined under the first prong of the definition as “a physical or mental impairment that substantially limits one or more of the major life activities.”¹⁴⁸ The regulations implementing the ADA define a physical impairment as including “cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems [including] skin,”¹⁴⁹ as well as “special sense organs.”¹⁵⁰ Based on this language, albinism should be construed as a disability due to the lack of pigmentation in the skin or because of its effect on vision. However, it is not enough to have a physical impairment—the impairment must substantially limit a major life activity.¹⁵¹ This requirement may be more problematic for persons with albinism.¹⁵² Courts have largely

fear of contagion).

143. See 42 U.S.C. § 12112(b) (1994) (defining “discrimination” to include among others, segregating individuals with disabilities and failing to make reasonable accommodations).

144. In order to be covered under the ADA, individuals must be “qualified” in addition to meeting the definition of disability. See 42 U.S.C. § 12111(8) (defining “qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”). This paper only addresses the threshold question of fulfilling the disability definition.

145. 42 U.S.C. § 12102(2)(A).

146. 42 U.S.C. § 12102(2)(C).

147. A recent case signified the possibility that the question of whether albinism is a disability under the ADA may be resolved soon. In *Brijlal v. Medical Associates of Woodhull, P.C.*, No. 98 CIV.2972 (AGS), 1998 WL 386435 (S.D.N.Y. July 9, 1998), the plaintiff brought a claim under the ADA based on her albinism. The court dismissed the case without reaching the merits and declined to address whether albinism is a disability under the ADA.

148. 42 U.S.C. § 12102(2)(A).

149. 29 C.F.R. § 1630.2(h)(I) (1999).

150. *Id.*

151. 42 U.S.C. § 12102(2)(A).

152. See generally *Lindloff v. Schenectady Int'l*, 972 F. Supp. 393, 395 (S.D. Tex. 1997) (holding that a plaintiff with leukoderma, which causes white spots to form on the body, although physically impaired, was not substantially limited in any major life activities).

focused on this latter requirement and increasingly require plaintiffs to meet a heightened standard.¹⁵³

In *University of Maryland v. Boyd*,¹⁵⁴ the court held that a police officer's skin condition was a "handicap" under Maryland's statute. The state statute at issue is similar to the ADA in its three-pronged requirement of a physical impairment which has a substantial limitation on a major life activity. The police officer in *Boyd* suffered from pseudofolliculitis (PFB), brought on by shaving resulting in skin irritation, sores, and scarring.¹⁵⁵ The court held that the officer was a "handicapped individual" because of his skin condition and its interference with the major life activity of socialization.¹⁵⁶ The court's decision was based on evidence that the officer's skin condition caused him to isolate himself from the general public out of embarrassment, which in turn damaged his marital relationship.¹⁵⁷

Boyd offers a framework to analogize the common loss of socialization felt by persons with albinism. Although the federal regulations interpreting the ADA do not list socialization among "major life activities," the list does not present itself as a complete and exclusive catalog of major life activities.¹⁵⁸ The listed activities are all basic life functions, and socialization is arguably as important as learning and working.¹⁵⁹ In addition, the Equal Employment

153. See generally Hileman v. City of Dallas, 115 F.3d 352, 354-55 (5th Cir. 1997) (stating that in order to meet her prima facie case, plaintiff must show that no alternative adequate jobs are available that could accommodate her disability); Gordon v. E.L. Hamm & Associates, Inc., 100 F.3d 907, 912 (11th Cir. 1996) (holding that side effects of chemotherapy treatments, including numbness, weakness, and vomiting do not substantially limit major life activity of working); Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993) (holding that insulin-dependent diabetic was not substantially limited in the activity of working).

154. 612 A.2d 305, 312 (Md. Ct. Spec. App. 1992) (quoting the MD. ANN. CODE art. 49B, § 15(g) (1979) which defines a physical handicap as "any physical disability . . . or disfigurement which is caused by bodily injury . . . or illness").

155. *Id.* at 311.

156. *Id.* at 312 (citing COMAR 14.03.02.03 (1979) (guidelines interpreting the Maryland discrimination laws) which define a "handicapped individual" as one who "has a physical . . . handicap . . . and which constitutes . . . a substantial limitation on one or more of a person's major life activities . . . includ[ing] socialization").

157. *Id.* ("I was ashamed of how I looked and I did not want to be seen in public looking like that.").

158. See 29 C.F.R. § 1630.2(i) (1999) (listing "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working") (emphasis added); see also Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 146 n.20 (1997) (stating that the EEOC list of major life activities is not "meant to be an exhaustive list").

159. See generally Bragdon v. Abbott, 118 S. Ct. 2196 (1998) (holding that asymptomatic HIV disease is a disability for purposes of the ADA). *Bragdon* is the first U.S. Supreme Court decision regarding the definition of "disability" under the ADA. In its opinion, the Court stated that "the

Opportunity Commission's Compliance Manual does list "interacting with others" as a major life activity.¹⁶⁰ The EEOC's Compliance Manual is not binding as law,¹⁶¹ but does provide guidance in determining whether the legal definition of disability is met.¹⁶²

In determining whether a disability substantially impairs a person's life, the focus is on the effect the impairment has on the individual.¹⁶³ The effect on the individual includes the severity and duration of the impairment.¹⁶⁴ For persons with albinism, their physical impairment is permanent. As a result, they are constantly negotiating situations based on their identity as a person with albinism. Persons with albinism are wary of encountering others, because they are often mistreated.¹⁶⁵ Thus, "normal" socialization is not only challenging for persons with albinism, but potentially impossible to achieve.¹⁶⁶ The court in *Boyd* recognized the significance that socialization plays in an individual's life.¹⁶⁷ The ADA should be interpreted to include socialization as a major life activity. Like the plaintiff in *Boyd*, who suffered from a skin condition which interfered with his interactions with others, persons with albinism are significantly impaired in the activity of socialization and should be granted similar protection under the ADA.

Persons with albinism should also be protected under the ADA based on the vision problems associated with albinism. Persons with albinism often have

"touchstone" for what constitutes a major life activity "is its significance." *Id.* at 2205 (quoting *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997)).

160. Eq. Empl. Comp. Man. (CBC) § 902.3 (b) (1995).

161. See *Soileau v. Guilford of Maine*, 105 F.3d 12, 15 n.2 (1st Cir. 1997) (asserting that while the EEOC Compliance Manual may be helpful, it is not law).

162. See *Bragdon*, 118 S. Ct. at 2207-09 (citing federal agency interpretations for support in holding that asymptomatic HIV is an impairment which substantially limits reproduction).

163. Eq. Empl. Compl. Man. (CBC) § 902.4(c)(1) (1995). ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.").

164. 29 C.F.R. §1630.2(j)(2) (1999) (citing factors to be considered: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment").

165. See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137 (1982) (making an analogy between race and physical disfigurements and stating that stigmatized persons expect "pain at the prospect of contact with 'normals,'" thus impairing their relationship with others).

166. See *supra* notes 47-50 and accompanying text.

167. *University of Maryland v. Boyd*, 612 A.2d 305, 312 (Md. Ct. Spec. App. 1992).

substantially limited vision.¹⁶⁸ Seeing is listed as a major life activity.¹⁶⁹ Legal blindness is considered a visual acuity of 20/200 or worse in the better eye with the best correction possible.¹⁷⁰ Vision varies among persons with albinism but averages about 20/200.¹⁷¹ Therefore, many persons with albinism are legally blind. However, some persons with albinism can correct their vision to exceed the threshold for legal blindness. If corrected vision is used to measure the existence of a disability, many persons with albinism will be left unprotected.¹⁷²

There is disagreement among courts as to whether the determination of "disability" under the ADA should be made with or without regard to the availability of mitigating measures, such as hearing aids, medicines, and most relevant here, eyeglasses or other vision correctional devices.¹⁷³ In *Sicard v. City of Sioux City*, the court held that the existence of a "disability" should be determined without regard to mitigating measures.¹⁷⁴ The issue in *Sicard* concerned a firefighter whose visual acuity measured 20/200 in both eyes without correction, but 20/20 with contact lenses.¹⁷⁵ His uncorrected vision substantially limited his ability to work as a firefighter, as well as the more general life activities of walking and seeing.¹⁷⁶ Whether Sicard had a legal disability was dependent on whether his uncorrected vision or his corrected

168. *See supra* notes 23-32 and accompanying text.

169. 29 C.F.R. § 1630.2(i) (1999) (defining major life activity to include seeing).

170. National Organization for Albinism and Hypopigmentation, *supra* note 6. There is some disagreement among courts over this standard. *Compare* *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993) (holding that "a person is not handicapped if his vision can be corrected to 20/200"), *with Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) (holding that plaintiff's total permanent blindness in one eye constituted a disability).

171. Haefemeyer & Knuth, *supra* note 17, at 57.

172. *See generally Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) ("It makes little sense to deprive an entire class of disabled individuals—the legally blind who have correctable vision—of the protection of the Act merely because it is so easy to accommodate their disability.").

173. *Sicard v. City of Sioux City*, 950 F. Supp. 1420 (N.D. Iowa 1996).

174. *Id.* at 1438. *See also Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898, 907 (E.D. Pa. 1997) (concluding that whether plaintiff is substantially limited in the major life activity of seeing should be resolved without regard to his use of corrective lenses); *Canon v. Clark*, 883 F. Supp. 718, 721 (S.D. Fla. 1995) (holding that diabetic plaintiff's dependence on insulin constituted a disability under the ADA). *But see Sutton v. United Air Lines*, 130 F.3d 893, 902 (10th Cir. 1997) (holding that mitigating measures should be taken into consideration in determining whether a major life activity is substantially limited); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) (finding that an interpretation that does not consider the effect of mitigating measures conflicted with statute's requirement of impairment substantially limiting a life activity).

175. *Sicard*, 950 F. Supp. at 1424.

176. *Id.* at 1430. Additionally, without correctional lenses, Sicard could not drive a car, read street signs, watch television, or perform any kind of job without extensive re-training. *Id.*

vision was the applicable standard.¹⁷⁷ In its opinion, the court noted the deference given the EEOC's interpretative guidelines¹⁷⁸ by the courts and the plain meaning of the statute.¹⁷⁹

The prevailing standard appears to focus on whether an individual with a visual impairment is substantially limited without regard to the use of mitigating (corrective) measures. Therefore, persons with albinism should be protected by the first prong of the disability definition based on their visual impairments without regard to any mitigating measures employed.

Some of the vision problems associated with albinism may not on their own be sufficient to constitute an impairment which substantially limits a major life activity.¹⁸⁰ Persons with albinism learn to adapt to some of their visual difficulties. For example, persons with albinism may learn to tilt their head when reading to still their nystagmus,¹⁸¹ or improve their memory so they do not have to rely on text.¹⁸² Courts may consider these adaptations when determining whether a person with albinism is substantially limited in seeing or working. This entails applying an able-bodied standard to persons with albinism—in effect using their very survival tactics to argue they have no need for civil rights protection.¹⁸³ Such a result disregards the discrimination that persons with albinism face and violates the remedial intent of the ADA by artificially constraining its scope.¹⁸⁴

177. *Id.*

178. *Id.* "The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630.2(h) (1999).

179. *Sicard*, 950 F. Supp. at 1436 ("The plain meaning of 'impairment' is only the untreated condition.").

180. See *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985) (holding that plaintiff's strabismus (crossed eyes), although a physical impairment, did not substantially interfere with the major life activity of working).

181. See *supra* note 23 and accompanying text.

182. See *Pothier*, *supra* note 51, at 534 (discussing her accommodations for oral presentations which include no use of notes).

183. See *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997) (holding that plaintiff's own adaptations to his monocular vision, including adjusting his head to increase his peripheral vision, are not considered in determining that he is substantially limited in seeing).

184. See 42 U.S.C. § 12101(a), (b) (1994) (discussing the congressional findings underlying the ADA and its purposes, including the provision of "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities") § 12101(b)(1).

2. Albinism as a Perceived Disability¹⁸⁵

The Supreme Court has interpreted “disability” expansively¹⁸⁶ and has emphasized Congress’ concern with the effects that a person’s impairment has on others.¹⁸⁷ The perceived disability prong provides additional protection for persons with albinism under the ADA. Viewing albinism as a perceived disability puts the focus on the employer’s perception of the individual as disabled without requiring the individual to view herself as disabled. Focusing on the employer’s perception is important because it forces those reacting negatively to persons with albinism to confront their own biases. Framing the question of disability within the perceived disability definition empowers persons with albinism and is a critical part of the deconstruction of “white, able-bodied, normal looking privilege.”¹⁸⁸

a. A physical impairment that does not substantially limit major life activities

Courts have noted the significance personal appearance plays in employment decisions. At issue in *Hodgdon v. Mt. Mansfield Co.*¹⁸⁹ was the first part of the perceived disability definition: the existence of a physical impairment that does not substantially limit major life activities.¹⁹⁰ In *Hodgdon*, the plaintiff worked as a chambermaid in a ski resort.¹⁹¹ She was fired for refusing to wear her dentures, based on the employer’s belief that this rendered

185. The Code of Federal Regulations defines the phrase, “Is regarded as having such an impairment” as meaning:

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a covered entity as constituting such limitation; (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) Has none of the impairments . . . but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l) (1999).

186. See *School Bd. v. Arline*, 480 U.S. 273, 286 (1987) (holding that tuberculosis is a disability under the Rehabilitation Act).

187. *Id.* at 283 (citing as an example a case in which a woman who was “crippled by arthritis” was not given a job because “college trustees [thought] ‘normal students shouldn’t see her,’” see 118 CONG. REC. 36761 (1972)).

188. See *supra* note 127 and accompanying text.

189. 624 A.2d 1122 (Vt. 1992).

190. *Id.* at 1130.

191. *Id.* at 1124.

her unfit to work with customers.¹⁹² The court found that the plaintiff's lack of upper teeth was a physical impairment because it was a "cosmetic disfigurement" and an "anatomical loss" affecting both the digestive and musculoskeletal systems.¹⁹³ The court then held that although the impairment did not substantially limit any major life activity, the employer treated the plaintiff as though her lack of teeth limited her ability to work.¹⁹⁴ The court reasoned that the termination of the plaintiff evidenced the employer's belief that "an employee with a visible physical impairment is not fit to work in a position involving any customer contact,"¹⁹⁵ and implied that the employer perceived the impairment as substantially limiting the employee's ability to work.¹⁹⁶

Albinism may fit most easily under this first prong of the perceived disability definition. It is arguably a physical impairment because of its genetic cause and medical consequences. Courts have required that the employer believe the perceived impairment also substantially limits a major life activity. Thus, the same difficulties with respect to showing a substantial limitation on a major life activity exist under this definition. Applying the *Hodgdon* court's analysis is a helpful alternative for persons with albinism. It may be necessary to assert that the major life activity at issue is working. Courts have required that in order for "working" to be substantially limited, an individual must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs . . .".¹⁹⁷ Because of the strict construction given "working" by the courts, it may be necessary to assert that persons with albinism are perceived as substantially limited in working both with customers and coworkers. If an employer refuses to employ a person with albinism in a position involving considerable client contact, this evidences the employer's belief that albinism will substantially limit the person's ability to work.¹⁹⁸ A similar argument exists

192. *Id.*

193. *Id.* at 1130.

194. *Id.* at 1131.

195. *Hodgdon*, 624 A.2d at 1132.

196. *But see Talanda v. KFC Nat'l Management Co.*, 140 F.3d 1090, 1098 (7th Cir. 1998) (finding that moving an employee with a cosmetic disfigurement (missing teeth) from waiting on customers to working as a cook or prep person did not show that the employer perceived the employee as substantially limited in working).

197. *Id.* at 1097 (quoting 29 C.F.R. § 1630.2(j)(3)(i)).

198. *See Van Sickle v. Automatic Data Processing, Inc.*, 952 F. Supp. 1213, 1221 (E.D. Mich. 1997) (holding that employer may have perceived a discharged employee with a six-inch facial scar as substantially limited in work as salesman); *Talanda*, 140 F.3d at 1097 n.13 (setting forth circumstances in which facial disfigurements may be perceived as substantially limiting a major life activity, including "when an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee" and "when an employer

for an employer who refuses to employ a person with albinism in any position in which there is significant interaction with coworkers. Such a refusal also supports a claim that the employer perceives albinism as significantly limiting the ability to work.

The dilemma of distinguishing between those persons with albinism whose eyesight reaches the level of legal blindness and those whose eyesight does not may be abated under this definition. The physical impairment does not have to be substantially limiting. Rather, it is the employer's perception that the impairment is limiting that is important.¹⁹⁹ Persons with albinism often adapt to their visual impairments.²⁰⁰ Thus, they may be able to fulfill job duties that surpass an employer's belief of their capabilities. An employer's erroneous belief and resulting refusal to hire²⁰¹ is discrimination under the ADA.

b. A physical impairment that substantially limits major life activities only as a result of attitudes of others

The second provision of the perceived disability definition provides another means for arguing that albinism is covered under the ADA as a perceived disability. A physical impairment that substantially limits a major life activity only as a result of the attitudes of others is a perceived disability.²⁰² An example cited is a child born with a facial disfigurement who is refused admittance into a day care program on the ground that she would upset the other children.²⁰³ Clearly this second prong would apply to persons with albinism. Persons with albinism have a genetic condition which alters their appearance. Others' reactions to their appearance results in feelings of inferiority and may result in an employer's refusal to hire them so as to appease customers or other employees. An employer may not even consider a person with albinism for a position based on her perception that customers and other employees would be bothered or at least distracted by an employee with albinism. The employer may refuse to hire a person with albinism without consideration of the applicant's skills based solely on her concern with

discriminates against the person because of the complaints of customers") (citing 29 C.F.R. pt. 1630 app. § 1630.15(a), 1630.2(l)).

199. *See supra* notes 163-64 and accompanying text.

200. *See supra* notes 181-82 and accompanying text.

201. *See Doane v. City of Omaha*, 115 F.3d 624, 628 (8th Cir. 1997) (holding that police officer with monocular vision was regarded as substantially limited in working because of the police chief's belief that only binocular vision provided sufficient peripheral vision to perform the duties of a police officer).

202. 29 C.F.R. § 1630.2(l)(2) (1999).

203. CIVIL RIGHTS DIV., DEP'T OF JUSTICE, TECHNICAL ASSISTANCE MANUAL SS-14 (1992).

maintaining a particular image. Part of the social construction of disability is viewing persons with disabilities as less skilled and less resourceful than able-bodied persons.²⁰⁴ Persons with albinism have as much variance in their skills and education as individuals without albinism. If an employer focuses solely on what complications a person with albinism may bring to the workplace, she disregards the individual's potential value and unique skills—one of which is the ability to sensitize others to differences.

c. No physical impairment but is treated
as having such an impairment

A perceived disability claim may rest on a third ground which protects individuals with no physical or mental impairments but who are perceived by their employer as having an impairment.²⁰⁵ A recent case concerning obesity as a recognized disability provides a useful analogy to albinism.²⁰⁶ In *Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals*, the court held that a perceived disability claim based on morbid obesity could prevail on either of two bases.²⁰⁷ First, the court found that the plaintiff's morbid obesity could constitute a physical impairment based on expert testimony that it is a physiological disorder adversely affecting several bodily systems.²⁰⁸ Second, the court held, regardless of whether or not morbid obesity is an actual physical impairment, the employer treated the plaintiff as though it was for purposes of the third prong²⁰⁹ of the perceived disability provision.²¹⁰ The court then found that the employer treated the plaintiff as though her obesity "substantially limited" the major life activity of working.²¹¹

204. Pothier, *supra* note 51, at 526.

205. 29 C.F.R. § 1630.2(l)(3) (1999).

206. *Cook v. Rhode Island Dep't of Mental Health, Retardation, and Hosp.*, 10 F.3d 17 (1st Cir. 1993) (holding that morbid obesity was a perceived disability based on employer's belief that plaintiff was physically impaired and unable to work as an attendant for mentally retarded individuals).

207. *Id.* at 22.

208. *Id.*

209. An individual who "has none of the impairments . . . but is treated by a covered entity as having a substantially limiting impairment." 29 C.F.R. § 1630.2(l)(3) (1999).

210. *Cook*, 10 F.3d at 21. This result was based on the defendant's claim that the plaintiff's obesity would interfere with her ability to evacuate patients in case of an emergency and increase her risk of developing other illnesses.

211. *Id.* at 26 (stating that rejecting an applicant for a single job which requires no unique physical skills can constitute treating an applicant as if her condition substantially limited the major life activity of working).

Society makes assumptions about the capabilities of persons with albinism as it does for persons who are obese. Albinism may not be a physical impairment,²¹² but others' perception of albinism as an impairment can result in discriminatory conduct. Employers may perceive persons with albinism as being entirely without sight. Employers may be extremely uncomfortable around persons with albinism, particularly if they have never before had contact with a person with albinism. The perception of persons with albinism as physically impaired results in barring them from employment opportunities. Employers may not want to hire a person with albinism if there is someone else available who does not invoke these concerns about (dis)ability.

Employers who perceive albinism as an impairment and act on that perception to the detriment of persons with albinism should be held accountable. The third prong of the perceived disability definition provides an additional means to redress the injustices inflicted upon persons with albinism in employment. Applying this prong may ultimately be the most desirable choice because it does not equate albinism with impairment.

VI. CONCLUSION

Persons with albinism deserve protection from employment discrimination. Currently there is no explicit legal protection granted to persons with albinism nor case authority for such protection. Title VII and other civil rights statutes explicitly provide protection against discrimination based on color.²¹³ Persons with albinism should be protected on the basis of their own distinct "color."

Persons with albinism constitute a small, isolated group and share similarities with both racial and ethnic minorities and with persons with disabilities. The Americans with Disabilities Act acknowledges the history of discrimination that persons with disabilities have faced and is intended to protect against continuing discrimination. The ADA's broad scope prohibits discrimination on the basis of actual disability and the employer's perception of disability. Persons with albinism should be protected under the ADA because they have a physical impairment that substantially limits their ability to engage in major life activities. Moreover, regardless of whether persons with albinism have a physical impairment, they often suffer from others' misperceptions of them as being substantially limited in major life activities and are correspondingly treated as being unable to work.

Albinism has been socially constructed to mean inferior, bizarre, and sinister. These stereotypes serve to construct a wall between persons with albinism and the dominant culture which results in decreased employment

212. *But see supra* Part IV.B.1 for an argument that albinism is a physical impairment.

213. 42 U.S.C. § 2000e-2(a)(1)(1998).

opportunities for persons with albinism. Persons with albinism need to be heard and heard to speak not only against who they are perceived to be, but about who they are.

*"O God of black and brown and white and albino children and of those all mixed together. . . . help us to love and respect and protect them all."*²¹⁴

214. Marian Wright Edelman, Forty-Sixth Cardozo Memorial Lecture: Leave No Child Behind (Dec. 17, 1992), in 15 CARDOZO L. REV. 1591, 1604.