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## The ADA and the Fight Against Employment Discrimination, 52 UIC J. Marshall L. Rev. 51 (2018)

Brianne Perkins

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# THE ADA AND THE FIGHT AGAINST EMPLOYMENT DISCRIMINATION

BRIANNE PERKINS\*

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## I. INTRODUCTION

If surveyed about discrimination, most people would likely deny discriminating against others. As individuals, we believe that we are good people who try to do the right thing. However, implicit bias lurks in our subconscious. Any implicit bias discrimination might truly be unintentional or stem from a lack of understanding.

Many societal groups acknowledged as the targets of discrimination – including race, religion, gender, and sexuality – have movements.<sup>1</sup> Such movements are typically widely publicized.<sup>2</sup> Generally, individuals or groups discriminating against

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\* This article was first written for Professor Ann McGinley at the William S. Boyd School of Law. I would like to thank her for her mentorship. Her classes are what sparked my interest in writing this article. I would also like to thank Chelsea Button, the Lead Articles Editor with the John Marshall Law Review. Her insight and editing skills brought my ideas together more clearly.

1. See generally Anthony Petro, *Race, Gender, Sexuality, and Religion in North America*, OXFORD RES. ENCYCLOPEDIA OF RELIGION (Feb. 2017) [www.oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-488?print=pdf](http://www.oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-488?print=pdf) (describing various cultural movements).

2. Navid Ghani, *Cultural Movements and Their Impact on Business and Marketing*, 5 INT’L J. OF BUS. AND SOC. SCI. 2 (FEB. 2014) (referencing RAY ELDON HEIBERT, *IMPACT OF MASS MEDIA: CURRENT ISSUES* (3d ed. 1998))

these recognized movements face significant consequences.<sup>3</sup> While these societal groups have struggled against discrimination, this Article focuses on a less-acknowledged group. One that has, no doubt, gained ground with regard to discrimination only in the last couple of decades. This Article focuses on the group of our American population that suffers from a disability.

Almost ten years ago, I experienced a life changing event that caused me to reevaluate my life. Just weeks before graduating from college, I was excited to attend law school in the coming fall. While traveling through a mountain pass in Utah in early April, I stopped to help an elderly couple that had been in an accident. I have little memory of that day, and only fuzzy memories of the following four months.

As I was retrieving blankets from my car to help the couple, another car lost control and struck me. Externally, my only injury was a small bit of road rash on my forehead. Internally was an entirely different story. I had broken fifteen vertebrae. My liver was almost fully lacerated. I had a traumatic brain injury with three brain bleeds and had stretched all four of my major arteries to the limit, with one coiled off and the other three with stints. Essentially, I was internally decapitated. Needless to say, the outlook was not good.

The ability to control your limbs after a spinal cord injury depends on two factors: the place of the injury along your spinal cord and the severity of injury to the spinal cord.<sup>4</sup> The lowest normal part of your spinal cord is referred to as the neurological level of your injury.<sup>5</sup> The severity of the injury is often called “the completeness” and is classified as either of the following:

*Complete.* If all feeling (sensory) and all ability to control movement (motor function) are lost below the spinal cord injury, your injury is called complete.

*Incomplete.* If you have some motor or sensory function below the affected area, your injury is called incomplete. There are varying degrees of incomplete injury.<sup>6</sup>

The first vertebrae in my cervical spine (C1) was broken and that is how my injury is referenced: a C1 incomplete quadriplegic. With an injury that high, the diaphragm is also generally paralyzed,

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[www.ijbssnet.com/journals/Vol\\_5\\_No\\_2\\_February\\_2014/2.pdf](http://www.ijbssnet.com/journals/Vol_5_No_2_February_2014/2.pdf).

3. For example, when Unite the Right white nationalists marched in North Carolina in 2017, they faced severe scrutiny, further antagonizing the public when one white nationalist killed protester Heather Heyer. *Charlottesville white nationalist marchers face backlash*, BBC (Aug. 14, 2017) [www.bbc.com/news/world-us-canada-40922698](http://www.bbc.com/news/world-us-canada-40922698).

4. *Spinal Cord Injury*, MAYO CLINIC, [www.mayoclinic.org/diseases-conditions/spinal-cord-injury/symptoms-causes/syc-20377890](http://www.mayoclinic.org/diseases-conditions/spinal-cord-injury/symptoms-causes/syc-20377890) (last visited Dec. 14, 2018).

5. *Id.*

6. *Id.*

and many quadriplegics rely on a ventilator to breathe. I spent four months on a ventilator, but luckily my diaphragm was not paralyzed. I was able to leave that piece of equipment behind. Eventually, after three years of focusing completely on physical therapy, I was able to regain some use of my right arm. It was at this time that I decided to try to tackle academics again. Fortunately, prior to the injury I had been accepted into law school and so I began the part-time program at William S. Boyd School of Law in Las Vegas. Five short years later, I graduated.

The law school and all of my professors were incredible to work with. I had no issues with accommodations. The law school provided me with a note taker, and books in an electronic format. Before my injury, I had no reason to personally understand the Americans with Disabilities Act and the role it would eventually play in my employment. That is what sparked the interest in the topic for this article. My last job was when I was able bodied. How do I fit into the workplace now? Will I have to work harder to prove my worth because I am very obviously physically disabled? To find answers to some of these questions I spoke with individuals gainfully employed after their injuries. I asked these individuals at which stages they encountered difficulties in receiving accommodations that would make them capable of performing the tasks of their job. This Article will examine how the Americans with Disabilities Act (“ADA”) impacted discrimination in the workplace.<sup>7</sup>

President George H.W. Bush signed the ADA into law in 1990.<sup>8</sup> The ADA became the world’s first comprehensive civil rights law for people with disabilities.<sup>9</sup> The ADA prohibits discrimination against people with disabilities in employment (Title I),<sup>10</sup> in public services (Title II),<sup>11</sup> in public accommodations (Title III),<sup>12</sup> and in telecommunications (Title IV).<sup>13</sup> According to the U.S. Census Bureau:

It is extremely difficult to determine with precision just how many individuals meet the definition of disability under the various discrimination statutes. In the area of employment, however, it was estimated by the Centers for Disease Control and Prevention in 2008 that approximately 19 million Americans have a work disability, i.e., a disability lasting six or more months.<sup>14</sup>

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7. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)) [hereinafter collectively referred to as “ADA”].

8. *Introduction to the ADA*, U.S. DEPT. J. CIV. RTS. DIV., [www.ada.gov/ada\\_intro.htm](http://www.ada.gov/ada_intro.htm) (last visited Nov. 15, 2018).

9. *Id.*

10. ADA, Title I, 42 U.S.C. § 12101 (2012).

11. ADA, Title II, 42 U.S.C. § 12115 (2012).

12. ADA, Title III, 42 U.S.C. § 12181 (2012).

13. *The Law*, EQUAL OPPORTUNITY EMPLOYMENT COMM’N, [www.eeoc.gov/eeoc/history/35th/thelaw/index.html](http://www.eeoc.gov/eeoc/history/35th/thelaw/index.html) (last visited Nov. 15, 2018).

14. LAURA F. ROTHSTEIN & ANN MCGINLEY, *DISABILITY LAW: CASES*,

This Article seeks to accomplish a few goals. First, this Article will break down the basic elements of the ADA for employment: who is covered, when disclosure of a disability is required, what is considered a reasonable accommodation, and remedies for those who have been discriminated against. A “reasonable accommodation” is not defined under the ADA, but the ADA gives a list of possible accommodations, which will be discussed. Next, this Article will look at the real-life application of the ADA in the workplace. While the ADA strives to bring equal opportunities and treatment to disabled individuals in the workplace, it still falls short in some areas. Particularly, this Article will explore the difficulty for employees with a disability to receive a reasonable accommodation. Additionally, this Article will examine cases brought by individuals with disabilities who argue why reasonable accommodations were not provided. This examination does not seek to find fault with employers, but rather, to objectively consider whether the requested accommodations were truly reasonable. Finally, this Article will seek to create suggestions for improvements to the implementation of the Title I of the ADA. Implementation of the law itself may be difficult. In many cases, this difficulty may simply be due to employer ignorance or implicit bias. Creating a work environment that allows employees to comfortably speak with their employer regarding issues pertaining to disability will help to reduce barriers on a small scale and diminish discrimination on a large scale.

## II. BACKGROUND

### A. *The Rehabilitation Act*

The Rehabilitation Act attempted to bring about equality to disabled individuals before the passage of the ADA.<sup>15</sup> The Rehabilitation Act was passed in 1973, and until 1990, was the only other major federal statute providing for nondiscrimination on the

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MATERIALS, PROBLEMS 3470-73 (5th ed. 2010) (referencing U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (Mar. 2008)). Because the American Community Survey “replaced the decennial long-form as the source for small area statistics, there is no disability data in the 2010 Census.” *About Disability*, U.S. CENSUS BUREAU, [www.census.gov/topics/health/disability/about.html](http://www.census.gov/topics/health/disability/about.html) (last visited Dec. 14, 2018):

As public perception of disability has changed over time, so have the goals of programs supporting people with disabilities. In the past, the emphasis was to provide support to people with disabilities primarily through cash benefits and other replacements to earned income. Today, the emphasis has shifted to supporting independence and promoting involvement in all aspects of society. *Id.*

15. Rehabilitation Act of 1973, Pub. L. No. 93-112, codified as amended at 29 U.S.C. § 701 *et seq.* (2016) [hereinafter “Rehabilitation Act”].

basis of disability.<sup>16</sup> Section 504 of the Rehabilitation Act, “modeled after previous laws which banned race, ethnic origin and sex based discrimination by federal fund recipients, banned discrimination on the basis of disability by recipients of federal funds.”<sup>17</sup>

Prior to the Rehabilitation Act, unemployment, lack of education, and other problems faced by people with disabilities were inevitable consequences of physical or mental limitations imposed by the disability.<sup>18</sup> The Rehabilitation Act replaced the Vocational Rehabilitation Act of 1920, which focused solely on employment.<sup>19</sup> Congress passed vocational rehabilitation legislation after World War I in response to the growing number of veterans with disabilities.<sup>20</sup> Congress realized that legislation was necessary to eradicate discriminatory policies and practices.<sup>21</sup> Section 504 of the Rehabilitation Act reached not only employment, “but also institutions such as public schools, welfare providers, hospitals, and federally supported transportation.”<sup>22</sup> Most of the private sector, however, was not covered by federal law.<sup>23</sup>

With the enactment of Section 504, Congress recognized that the inferior social and economic status of people with disabilities was not a consequence of the disability itself, but instead was a result of societal barriers and prejudices.<sup>24</sup> Before the ADA, “the Rehabilitation Act of 1973 prohibited federal employers and any employers receiving federal assistance from discriminating against people with disabilities.”<sup>25</sup> Individuals with disabilities “relied on state laws to bring discrimination claims, which were inconsistent

16. *The Rehabilitation Act of 1973 (Rehab Act)*, EMP. ASSISTANCE AND RES. NETWORK ON DISABILITY INCLUSION, [www.askearn.org/topics/laws-regulations/rehabilitation-act/](http://www.askearn.org/topics/laws-regulations/rehabilitation-act/) (last visited Dec. 1, 2018).

17. *Id.*

18. *Id.*

19. Civil Vocational Rehabilitation Act of 1920, Pub. L. No. 66-236, 41 Stat. 735 (1920) (codified as amended at 29 U.S.C. § 701 *et seq.* (1973)).

20. ROTHSTEIN & MCGINLEY, *supra* note 14, at 955–58.

21. Arlene Mayerson, *The History of the Americans with Disability Act: A Movement Perspective*, DISABILITY RIGHTS EDUC. & DEF. FUND (1992), [www.dredf.org/news/publications/the-history-of-the-ada/](http://www.dredf.org/news/publications/the-history-of-the-ada/).

22. Rehabilitation Act, 29 U.S.C. § 794(a) (1973) provides:

No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C.S. § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .” (bracket in original).  
*Id.*

23. With the exception of private schools that accept federal funding. *The Rehabilitation Act of 1973 (Section 504) as Applied to Private Schools*, FINDLAW, [www.corporate.findlaw.com/litigation-disputes/the-rehabilitation-act-of-1973-section-504-as-applied-to.html](http://www.corporate.findlaw.com/litigation-disputes/the-rehabilitation-act-of-1973-section-504-as-applied-to.html) (last visited Dec. 14, 2018).

24. Mayerson, *supra* note 21.

25. Rehabilitation Act, 29 U.S.C. §§ 701–751 (1973).

and often provided little enforcement power.”<sup>26</sup>

Section 504 federally recognized people with disabilities as a protected class for the first time.<sup>27</sup> Previously, “public policy individually addressed the needs of particular disabilities by category based on diagnosis.”<sup>28</sup> Each disability group was seen as separate, with differing needs.<sup>29</sup> Section 504 recognized that “while there are major physical and mental variations in different disabilities, people with disabilities as a group faced similar discrimination in employment, education and access to society.”<sup>30</sup> People with disabilities were seen as a legitimate minority, subject to discrimination and deserving of basic civil rights protections.<sup>31</sup> This “class status” concept has been critical in the development of the movement and advocacy efforts.<sup>32</sup>

Early litigation under the Rehabilitation Act focused on procedural issues.<sup>33</sup> “Subsequent judicial opinions addressed more substantive issues such as whether a particular person is within the protected class, whether the individual is otherwise qualified, whether discriminatory action actually occurred, whether reasonable accommodations are required, and whether defenses such as undue burden apply.”<sup>34</sup> These judicial interpretations are important not only for understanding the Rehabilitation Act, but also because they were incorporated into the language of the ADA.<sup>35</sup>

26. ROTHSTEIN & MCGINLEY, *supra* note 14, at 964–68.

27. *Section 504 of the Rehabilitation Act of 1973*, DISABILITY RTS. EDU. & DEF. FUND, [www.dredf.org/legal-advocacy/laws/section-504-of-the-rehabilitation-act-of-1973/](http://www.dredf.org/legal-advocacy/laws/section-504-of-the-rehabilitation-act-of-1973/) (last visited Dec. 1, 2018).

28. Deborah Leuchovius, TATRA Project & Rachel Parker, Project PRIDE, *ADA Q & A: The Rehabilitation Act and ADA Connection*, PACER CTR. [www.pacer.org/publications/adaqa/adaqa.asp](http://www.pacer.org/publications/adaqa/adaqa.asp) (last visited Dec. 23, 2018) (stating “[t]he integration of people with disabilities into the mainstream of society is also fundamental to both” [the Rehabilitation Act and the ADA]). Separate settings or programs are not acceptable unless necessary to ensure equal benefit. *Id.*

29. *Id.* stating:

Of critical importance is the assumption that people with disabilities – including individuals with the most severe disabilities – can work. This is important because prior to the ADA, government agencies providing rehabilitative services assumed that most people with severe disabilities were not employable. Now they must assume that individuals with even the most severe difficulties can work, and the burden lies with the state rehabilitation program to prove that they cannot. *Id.*

30. Lauren R. S. Mendoza, *Note: Dualing Causation and the Rights of Employees with HIV under § 504 of the Rehabilitation Act*, 13 SCHOLAR 273, 285 (2010) (stating “[a]lthough § 504 did not specifically reference employment discrimination when Congress enacted it, the section unquestionably prohibits it.”).

31. Mayerson, *supra* note 21.

32. *Id.*

33. ROTHSTEIN & MCGINLEY, *supra* note 14, at 966.

34. *Id.*

35. ADA, 42 U.S.C. §§ 12101-12213 (2012).

Congress amended the Rehabilitation Act to “clearly define coverage for individuals with contagious and infectious diseases, to define coverage applicable to individuals who are drug and alcohol users, and to provide that states and state agencies are not immune from suit under the statute.”<sup>36</sup>

### *B. Breaking Down the Americans with Disabilities Act*

The ADA prohibits discrimination against individuals with disabilities.<sup>37</sup> The ADA requirements extend to most employment agencies, labor organizations, and employers, including state and local governments.<sup>38</sup> “Congress enacted the ADA to ensure ‘equality of opportunity, full participation, independent living and economic self-sufficiency’ for disabled individuals.”<sup>39</sup> To achieve these goals, Title I of the ADA provides a “comprehensive national mandate to end discrimination against individuals with disabilities in the workplace.”<sup>40</sup> Congress intended Title I to “remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.”<sup>41</sup> While not conceived as an affirmative action statute, the ADA protects equal opportunity, set forth “to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.”<sup>42</sup>

For an individual to be protected against employment discrimination on the basis of disability under the ADA, “the individual must be one who has an impairment that substantially limits one or more of the individual’s major life activities, has a record of such an impairment, or is regarded as having such an impairment.”<sup>43</sup> These definitions are virtually identical to language

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36. ROTHSTEIN & MCGINLEY, *supra* note 14, at 968–77; *see also* 42 U.S.C. § 12102 and *Thompson v. Davis*, 295 F.3d 890, 896 (9th Cir. 2002) *cert denied* (citing 28 C.F.R. 35.104 (2000) (stating “[d]rug addiction that substantially limits one or more major life activities is recognized disability under ADA” and “[t]he phrase *physical or mental impairment* includes...drug addiction ...”) (emphasis in original).

37. ADA, 42 U.S.C. § 12112(a) (2012).

38. ADA, 42 U.S.C. §§ 12111–12112 (2012).

39. S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 34 CONN. L. REV. 603, 604 (2001).

40. *Id.*

41. *Id.*

42. *See id.* at 605; *see also* Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The “Unfair Advantage” Critique of Perceived Disability Claims*, 78 N.C.L. REV. 901, 903 (2000) (stating “Congress recognized that fears, misperceptions, and stereotypes about the disabled were so pervasive that employment discrimination reached beyond the class of people who actually possess a substantially limiting impairment.”).

43. ADA, Definition of Disability, 42 U.S.C. § 12102(1) (2012).



under the Rehabilitation Act.<sup>44</sup> Under Title I of the ADA, a qualified individual with a disability is one “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>45</sup> After the passage of the ADA, courts continued to rule very narrowly on ADA cases.<sup>46</sup> Congress responded by enacting the Americans with Disabilities Amendments Act (“Amendments”).<sup>47</sup> Enacting the Amendments expressly overruled several Supreme Court rulings<sup>48</sup> that narrowed the definition of disability and rejected a provision within the regulations enacted by that Equal Employment Opportunity Commission (EEOC).<sup>49</sup>

In contrast to other statutes prohibiting discrimination in employment, establishing membership in the ADA’s protected classification is difficult under the ADA. To claim protection under the ADA, a person must be a “qualified individual” – who must be able to perform essential job functions with or without reasonable accommodations.<sup>50</sup> The ADA defines a “disability” as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of... An individual;
- (B) a record of such impairment; or
- (C) being regarded as having such an impairment.<sup>51</sup>

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44. *Compare* Disability, 42 U.S.C. § 12102(1) (2012), *with* Disability, 29 U.S.C. § 705(20) (2012); *see also* 29 U.S.C. § 705(9) (2012) (using similar language to define disability).

45. ADA, Definitions, 42 U.S.C. § 12111(8) (2012); ROTHSTEIN & MCGINLEY, *supra* note 14, at 3407-13.

46. *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Murphy v. United Postal Service*, 527 U.S. 516, 518 (1999); *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

47. *ADA Amendments Act of 2008*, EEOC, [www.eeoc.gov/laws/statutes/adaaa.cfm](http://www.eeoc.gov/laws/statutes/adaaa.cfm) (last visited Feb. 5, 2019).

48. *Sutton*, 527 U.S. at 471 (1999); *Murphy*, 527 U.S. at 516; *see also* *Mercado v. Puerto Rico*, 814 F.3d 581, 587-88 (1st Cir. 2016) (stating the 2008 ADA Amendments “expressly rejected the interpretation of ‘regarded as having such an impairment’ that the Court had set forth in *Sutton*. Pub. L. No. 110-325, sec. 4, § 2(b)(3).” “Congress changed the relevant portion of the ADA by adding [a] new paragraph [that] defined the scope of the term ‘being regarded as having such an impairment,’ *id.* sec. 4, § 3(1)(C), as follows:

An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” *Id.*

49. Lisa A. Baker, *An Overview of the Americans with Disabilities Amendments Act of 2008*, FBI L. ENFORCEMENT BULL. (Aug. 2011), [www.leb.fbi.gov/2011/august/an-overview-of-the-americans-with-disabilities-amendments-act-of-2008](http://www.leb.fbi.gov/2011/august/an-overview-of-the-americans-with-disabilities-amendments-act-of-2008).

50. *Id.*

51. ADA, 42 U.S.C. § 12102; MICHAEL J. ZIMMER ET AL., CASES AND

Congress's efforts focused on the Supreme Court rulings in three cases<sup>52</sup>: *Sutton v. United Airlines, Inc.*,<sup>53</sup> *Toyota Motor Mfg. Kentucky, Inc. v. Williams*,<sup>54</sup> and *Murphy v. United Postal Service*.<sup>55</sup> These cases focused on the interpretation of the definition of disability with the Court stating that the definition must be "interpreted strictly to create a demanding standard for qualifying as disabled."<sup>56</sup> The Court consistently held that the key terms of the definition, including major life activity and substantial limitations, should be interpreted narrowly.<sup>57</sup> Major life activity should only mean those activities of "central importance to most people's daily lives"<sup>58</sup> The Supreme Court interpreted the substantial limitation as requiring a showing that the disability "prevents or severely restricts" an individual from performing a major life activity.<sup>59</sup> The Court interpreted the ADA to require consideration of the effects of corrective measures in determining whether someone is disabled.<sup>60</sup>

In *Sutton*, twin sisters had severe vision problems and were substantially limited in the major life activity of seeing.<sup>61</sup> The Supreme Court held that because the sisters were not disabled *with* corrective lenses, their severe vision problems did not arise to a disability, including the substantially limited major activity of seeing.<sup>62</sup> The Court held that "a person whose physical or mental impairment is corrected by medication or other measures (eyeglasses in this case) does not have an impairment that presently 'substantially limits' a major life activity."<sup>63</sup> Thus, the use of corrective measures that effectively overcame the limitations caused by the impairment led to a lack of protection under the ADA.<sup>64</sup> These decisions narrowed the pool of individuals who could seek protection in federal court under the ADA.<sup>65</sup>

In *Toyota*, a factory line employee was diagnosed with carpal tunnel syndrome.<sup>66</sup> The Supreme Court held that the term "substantially limits" should be interpreted strictly, to create a

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MATERIALS ON EMPLOYMENT DISCRIMINATION 490 (8th ed. 2013).

52. See *ADA Amendments Act of 2008*, EEOC, [www.eeoc.gov/laws/statutes/adaaa.cfm](http://www.eeoc.gov/laws/statutes/adaaa.cfm) (last visited Feb. 5, 2019) (stating that Congressional amendments rejected the decisions in cases like *Sutton*, *Toyota*, and *Murphy*).

53. *Sutton*, 527 U.S. at 482.

54. *Toyota*, 534 U.S. at 197.

55. *Murphy*, 527 U.S. at 518.

56. *Baker*, *supra* note 49.

57. *Sutton*, 527 U.S. at 471; *Murphy*, 527 U.S. at 516; *Toyota*, 534 U.S. at 184.

58. *Baker*, *supra* note 49.

59. *Id.*

60. *Id.*

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

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Toyota*, 534 U.S. at 187.

demanding standard to qualify as disabled.<sup>67</sup> The Court went so far as to say, because the worker could enjoy other facets of normal life, she was not qualified as disabled.<sup>68</sup> Also, in *Murphy*, a UPS mechanic was fired because of his hypertension.<sup>69</sup> The Supreme Court held that because hypertension could be corrected by medication, hypertension did not qualify as a disability.<sup>70</sup>

Congressional amendments rejected *Sutton*, *Toyota*, and *Murphy* by stating that the definition “shall be construed in favor of broad coverage of the individual’s under the act.”<sup>71</sup> The Amendments further stated:

[I]t is the primary intent of Congress that the primary object of attention in cases brought under the ADA should be whether the entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.<sup>72</sup>

With the creation of the Americans with Disabilities Act Amendments of 2008, Congress rejected these Supreme Court cases that allowed any ameliorative effects or mitigating measures to rule out disabilities and prevent otherwise qualified individuals from receiving ADA benefits.<sup>73</sup> These Amendments completely reject this narrow interpretation, providing that the analysis must be conducted without regard to mitigating measures except in certain cases.<sup>74</sup>

### 1. *Expansion of Definitions*

The Amendments also contain a new statutory definition of “major life activity” which expanded activities listed in the Equal Employment Opportunity Commission’s regulations to include eating, sleeping, standing, lifting, bending, reading, thinking, concentrating, communicating, and the operation of “major bodily functions.”<sup>75</sup> The addition of thinking and concentrating as major

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67. *Id.*

68. *Id.*

69. *Murphy*, 527 U.S. at 520.

70. *Id.* at 519.

71. *Id.*

72. Morris, *infra* note 74.

73. *Mercado*, 814 F.3d at 587-88.

74. Frank C. Morris, Jr., *President Bush Signs the ADA Amendments Act, Dramatically Expanding the Americans with Disabilities Act*, EPSTEIN BECKER & GREEN, P.C. (Sept. 29, 2008), [www.ebglaw.com/news/president-bush-signs-the-ada-amendments-act-dramatically-expanding-the-americans-with-disabilities-act/](http://www.ebglaw.com/news/president-bush-signs-the-ada-amendments-act-dramatically-expanding-the-americans-with-disabilities-act/) (excepting “ordinary eyeglasses or contact lenses that are intended to fully correct a person’s vision”).

75. *Id.* (including the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions).

life activities raised a host of reasonable accommodation issues, as successful performance of most jobs presumably requires these activities.<sup>76</sup>

Expanding the list of what could be considered a disability definitely helped those who would otherwise be excluded from this list because of the narrow holdings of the Supreme Court.<sup>77</sup> The Amendments also expanded coverage for individuals who were “regarded as” disabled but who did not qualify as a disabled person.<sup>78</sup> Now, individuals bringing “regarded as” claims need only show that they were subjected to an action prohibited by the ADA because of an actual or perceived impairment, regardless of whether the impairment was perceived to “substantially limits” them in a major life activity.<sup>79</sup> This new provision greatly helps plaintiffs in asserting a “regarded as” claim.<sup>80</sup> It is important to note that while the amendments extend help to disabled individuals, the ADA still provides safeguards for employers.<sup>81</sup> Individuals with transitory and minor impairments are not covered under the “regarded as” claim.<sup>82</sup> A transitory disability is one defined as lasting less than six months.<sup>83</sup> Employers are not required to provide reasonable accommodations to persons who are only “regarded as” having but not actually having a disability.<sup>84</sup>

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76. *Id.*

77. *Mercado*, 814 F.3d at 587-88.

78. *Bishop v. Children's Ctr. for Dev. Enrichment*, 2011 U.S. Dist. LEXIS 104663, at \*11-12 (S.D. Ohio Sept. 15, 2011) (referencing *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1030-31 (6th Cir. 1995) (quoting *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 573 (6th Cir. 1988)) (stating:

In order to show a prima facie case of discrimination, Section 504 requires four elements: (1) The plaintiff is a '[disabled] person' under the Act; (2) The plaintiff is “otherwise qualified” for participation in the program; (3) The plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his [disability]; and (4) The relevant program or activity is receiving Federal financial assistance). *Id.*

79. *Id.*

80. Michelle A. Travis, *Disqualifying Universality Under The Americans With Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1694 (2016).

81. *Id.*

82. See Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 951-55 (2012) (stating “protection from impairment-based discrimination is ‘nearly’ universal because Congress carved out a narrow exclusion for impairments that are both transitory and minor. . . . (codified at 42 U.S.C. § 12102(3)(B))). “‘Transitory’ is defined as having ‘an actual or expected duration of 6 months or less.’” *Id.*

83. *Id.*

84. *Id.*

## 2. ADA Protections at Different Stages of Employment

At the pre-employment stage, “the individual is simply an applicant and the ADA prohibits all medical inquiries by an employer as to whether the individual has a disability or the nature and extent of the disability.”<sup>85</sup> Even medical questionnaires and examinations are not permitted at this stage.<sup>86</sup> Questions seeking information on prior or current illnesses, medication, medical treatment, substance abuse, disabilities, injuries, or Workers’ Compensation claims are prohibited, as are all inquiries into a family’s medical history.<sup>87</sup> However, questions about illegal drug use are permitted.<sup>88</sup>

After a conditional offer of employment, the employer may require that all applicants answer disability-related questions and submit to medical examinations.<sup>89</sup> These are often referred to as employment entrance examinations or preplacement examinations.<sup>90</sup> Any information gleaned by an employer must be kept confidential.<sup>91</sup> An employer is not required to prove that the disability-related questions and medical examinations of an applicant are job-related for the job in question and consistent with business necessity at this stage.<sup>92</sup> Rather, the employer must not use the information to discriminate against the individual on the basis of the individual’s disability.<sup>93</sup> Once the employee has been hired, the employer may conduct a limited examination.<sup>94</sup>

Discrimination issues can arise in this pre-employment phase.<sup>95</sup> For example, before hiring for certain positions, an employer may develop a written job description that lists the essential functions of the job.<sup>96</sup>

A job function may be considered essential for any of several reasons, including but not limited to the following:

- (i) The function may be essential because the reason the position exists is to perform that function;
- (ii) The function may be essential because of the limited number of employees available among whom the

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85. ROTHSTEIN & MCGINLEY, *supra* note 14, at 3815.

86. *Id.*

87. *Id.*

88. DISABILITY RIGHTS CAL., EMPLOYMENT RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT (AND OTHER RELATED LAWS) (4th ed. 2010).

89. ROTHSTEIN & MCGINLEY, *supra* note 14, at 3922–23.

90. *Id.* at 4002.

91. *Id.*

92. Travis, *supra* note 80, at 1709.

93. *Id.* at 3847–48.

94. *Id.*

95. *Id.* at 3846.

96. *Id.* at 3850–51.

performance of that job function can be distributed;  
and/or

- (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.<sup>97</sup>

Employers cannot use evaluations that are not job-related and consistent with business necessity, where such practices have the effect of discriminating on the basis of disability or perpetuate such discrimination.<sup>98</sup> Employment tests must “reflect abilities intended to be measured and may not reflect impairments, except where such skills are the factors to be measured.”<sup>99</sup>

### 3. *Preplacement and Postplacement Examinations*

Preplacement examinations arise in situations where the employer initially determines an individual is eligible for the job and has made a conditional offer.<sup>100</sup> The ADA permits employers to make disability-related inquiries and to require medical examinations after a conditional offer of employment has been extended, but before the individual has started work.<sup>101</sup>

The statutory language of the ADA specifically provides:

[A] covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination.<sup>102</sup>

To be permissible, employment entrance exams must meet the following requirements: 1) all prospective employees are subject to exams regardless of disability; 2) medical history is collected and maintained separately and confidentially treated; and 3) any exam

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97. *Id.* at 3855–57; Definitions, 29 C.F.R. § 1630.2(n)(2) (1991).

98. Standards, Criteria, or Methods of Administration, 29 C.F.R. § 1630.7 (1991); ROTHSTEIN & MCGINLEY, *supra* note 14, at 3855–57; *Prohibited Employment Policies/Practices*, EEOC, [www.eeoc.gov/laws/practices/](http://www.eeoc.gov/laws/practices/) (last visited Dec. 19, 2018).

99. Administration of Tests, 29 C.F.R. § 1630.11 (1991); ROTHSTEIN & MCGINLEY, *supra* note 14, at 3857–63.

100. ROTHSTEIN & MCGINLEY, *supra* note 14, at 4001–02.

101. *Id.* at 4004–06; *see also* Travis, *supra* note 80, at 1709–1710 (describing that at the pre-employment stage, courts are lenient to consider employers’ judgment in assessing the essential nature of the job, including written job descriptions, time spent performing the job, consequences of not requiring the prospective employee performing certain functions, any collective bargaining agreements, and past or current work experience).

102. Employment Entrance Examination, 42 U.S.C. § 12112(d)(3) (2012); ROTHSTEIN & MCGINLEY, *supra* note 14, at 4006–09.

results must be used only for job-related reasons.<sup>103</sup>

There are exceptions to the confidentiality requirements, including: “informing first aid and safety personnel due to potential emergency treatment concerns and government officials investigating compliance.”<sup>104</sup> Although the ADA prohibits employers from basing employment decisions on disability stereotypes, the ADA allows employers to base decisions on an employee’s actual limitations, even if based on the disability.<sup>105</sup>

A prospective employee who was a genetic amputee with only one completely functioning arm, and who was trained and certified as an emergency medical technician (“EMT”), sued an ambulance company that refused to hire her as an EMT.<sup>106</sup> The ambulance company required that its employees be able to lift with both hands.<sup>107</sup> The EMT offered to visit a hospital for examination where the doctor originally documented her suitable “raw strength” and “lifting mechanics”<sup>108</sup> but subsequently reneged after speaking with his supervisor.<sup>109</sup> The ambulance service identified “the sole reason” the EMT was not hired was her inability to lift with two hands, otherwise she was qualified.<sup>110</sup> The district court granted summary judgment, reasoning that the employee did not have a disability within the meaning of the relevant statutes.<sup>111</sup> The district court also found she could not have performed the essential functions of the job.<sup>112</sup>

The First Circuit vacated the district court’s judgment and held that the EMT successfully argued genuine issues of material fact.<sup>113</sup> Those genuine issues included: whether the EMT was disabled under the ADA, whether she otherwise was a qualified individual, and whether the ambulance service discriminated against her based on her disability.<sup>114</sup> The court first discussed the definition of disability and found lifting to be a “major life activity.”<sup>115</sup> Next, the First Circuit agreed with the district court

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103. ADA, 42 U.S.C. §§ 12112(b)(6), 12112(d)(3) (2012); ROTHSTEIN & MCGINLEY, *supra* note 14, at 4011-16.

104. Discrimination, 42 U.S.C. § 12112(d)(3)(B) (2012).

105. Discrimination, 42 U.S.C. § 12112 comment I(A)(1) (2012); Gillen v. Fallon Ambulance Serv., 283 F.3d 11 (1st Cir. 2002).

106. Gillen, 283 F.3d at 16-17.

107. *Id.*

108. *Id.* at 18.

109. *Id.* at 19.

110. *Id.*

111. *Id.* at 17.

112. Gillen, 283 F.3d at 17.

113. *Id.* at 33.

114. *Id.* at 20 (referencing the test laid out in Laurin v. Providence Hosp., 150 F.3d 52, 56 (1st Cir. 1998)).

115. *Id.* at 21 (interpreting Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(j)(1) (1991)). The Regulations define the term “substantially limits” in this context as:

that the EMT had “no substantial limitation on her ability to lift” and found “[a] missing hand is a more profound impairment than a simple inability to lift objects over a certain weight.”<sup>116</sup> Relying on the Supreme Court’s decision in *Albertson’s, Inc. v. Kirkingburg*, the court held that an individual’s body often will adjust to account for an impairment.<sup>117</sup> Under the law, an individual with a disability “must proffer evidence demonstrating the extent of the limitation on the designated major life activity”<sup>118</sup> “[T]his burden is modest and indicated that, as a general rule, [even] monocular individuals will satisfy the ADA’s criteria for disability.”<sup>119</sup>

Having established that the EMT’s disability was a genuine issue of material fact, the court next considered whether she was a qualified individual under the ADA.<sup>120</sup> A qualified individual “satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and . . . with or without reasonable accommodation, can perform the essential functions of such position.”<sup>121</sup> Courts consider “*but are not limited to*” employers’ judgment on which job functions are essential.<sup>122</sup> After considering multiple affidavits, the court determined that a genuine issue of material fact existed regarding whether lifting with two hands was an essential function.<sup>123</sup> Finally, the court held that the ambulance service’s reliance on the medical preemployment examination did not absolve it of discrimination liability.<sup>124</sup> “[The] mere obtaining of such an opinion does not automatically absolve the employer from liability under the ADA. [citation omitted] Thus, an employer cannot slavishly defer to a physician’s opinion without first pausing to assess the objective reasonableness of the physician’s conclusions.”<sup>125</sup>

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

116. *Id.* at 22.

117. *Id.*

118. *Gillen*, 283 F.3d at 23 (citing *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999)).

119. *Id.* at 23.

120. *Id.* at 24.

121. *Id.* at 25 (citing 29 C.F.R. § 1630.2(m) (1991)).

122. *Id.* (emphasis in original).

123. *Id.* at 27-28.

124. *Gillen*, 283 F.3d at 31.

125. *Id.* at 31-32 (1st Cir. 2002) (referencing two decisions: *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) and *Holiday v. City of Chattanooga*, 206 F.3d 637, 645 (6th Cir. 2000)).



Once an individual has been hired, there are two circumstances under which medical examinations may be given, “these are where the exam is job-related, such as OSHA-mandated medical examinations, and where it is voluntary, including employee assistance programs.” Other examinations are impermissible.

### C. Reasonable Accommodation and Undue Hardship

The ADA prohibits discrimination against a “qualified individual on the basis of disability.”<sup>126</sup> Disability discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”<sup>127</sup> “A plaintiff has the burden of establishing she is disabled as defined in the ADA.”<sup>128</sup> In seeking to bring an employment discrimination claim, a plaintiff must first exhaust all administrative remedies.<sup>129</sup> The ADA relies on a different vision of equality to address workplace discrimination:

Disabilities, unlike race, often have a direct impact on a person's ability to perform certain jobs. Therefore, unlike race, disability is frequently a legitimate consideration in employment decisions. Under the reasonable accommodation principle, the employer is not just required to treat a person with a disability like a non-disabled person. Rather, the statute requires the employer to take the disability into consideration and modify the workplace accordingly.<sup>130</sup>

The reasonable accommodation requirement does not simply mandate that a group be treated differently; it requires that each person within a group be treated differently.<sup>131</sup> The ADA expressly requires that employers will take affirmative steps on behalf of employees and applicants with disabilities that they do not take for employees without disabilities.<sup>132</sup> Therefore, Congress based the reasonable accommodation requirement upon a more complex conception of equality than the simple notion that disabled and non-disabled should be treated the same.<sup>133</sup>

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126. ADA, 42 U.S.C. § 12112(a) (2012).

127. ADA, 42 U.S.C. § 12112(b)(5)(A) (2012).

128. *Hobson v. Mattis*, No. 18-5306, 2018 U.S. App. LEXIS 31852, at \*9 (6th Cir. Nov. 8, 2018) (referencing *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 869 (6th Cir. 2007)).

129. *Id.* at \*9 (referencing *Mayers v. Sedgwick Claims Mgmt. Servs., Inc.*, 101 F. App'x 591, 593 (6th Cir. 2004)).

130. Malloy, *supra* note 39, at 608–09.

131. Travis, *supra* note 80, at 1692.

132. *Id.* at 1722.

133. *Id.* at 1706.

### III. REAL LIFE EXPERIENCE DEALING WITH THE ADA IN EMPLOYMENT

Although I have not faced disability discrimination in the workplace, I met individuals with disabilities who have experienced workplace discrimination. Anna<sup>134</sup> was injured in 1993. At the age of 17, she was driving in New Hampshire when a bee flew into her car, and distracted her. As a result, Anna's car tumbled off the road, rolled three times, and she was ejected from her vehicle. As a result, she suffered a complete spinal cord injury from the mid-chest down and lost one of her kidneys. Anna is a paraplegic and has been bound to a wheelchair since that day.

Anna submitted a limited request for workspace accommodations at her job. Anna's employer gave her a larger cubicle to accommodate both her wheelchair and a regular office chair. When the wheelchair becomes too uncomfortable, Anna sits in the office chair periodically throughout the day. Her employer also provided her with an ergonomic adjustable keyboard to help with the different positions of the office chair and wheelchair. In addition to her accommodated workspace, Anna was also provided a reserved handicap parking space. Handicap spaces are essential to Anna not only for proximity to her office and accessibility of the handicap aisle, but also for peace of mind that a parking space will be routinely available for her. A lot of parking spaces do not have an accessible aisle next to the spot so that Anna can pull her wheelchair from the car and transfer herself into the wheelchair. Safety is also an important issue. Once, Anna fell while transferring herself into her wheelchair and ended up burning her leg on the pavement.

I asked Anna if she experienced discrimination in the workplace or if her employers were open to working with her on accommodations. She detailed an occasion where, at an interview for another position, the employer abruptly informed Anna that she should have notified the interviewer of her wheelchair prior to the interview. That she had wasted everyone's time. Anna had applied for a desk job.

Thankfully, Anna's current employer responded well to her disability and worked to accommodate her. Anna feels like her employer was willing to assist her and offer her accessible work conditions. She believes that her employer went above and beyond what she requested. Anna's coworkers have also been generally considerate of her disability. The only issue Anna had involved others with impairments wanting reserved handicap parking.<sup>135</sup>

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134. "Anna" is a friend of the author. Anna's real name will not be used in order to protect her identity. Anna provided the author information about her experiences through email several years ago.

135. *See also* Travis, *supra* note 80, at 991 (acknowledging that:

Anna also spoke of the pressure to prove herself in the workplace. She explained that many non-disabled coworkers take more sick leave than she does. Although Anna experiences pain every day, related to her disability, Anna's strong work ethic pushes her through it. While this does cause excessive pain on some days, she's proud to be hard working and reliable. Anna also feels the stigmatism of being the "handicapped" employee. Therefore, she works harder to avoid that stereotype.

When Anna's disability becomes unbearable or unmanageable, she has to file for Family Medical Leave ("FMLA").<sup>136</sup> Under FMLA she may miss work for certain issues related to bowel or bladder accidents, pain issues and shoulder issues. While not common knowledge, individuals in manual wheelchairs often have shoulder issues because of over-use in pushing the wheelchair and transferring to and from the wheelchair.<sup>137</sup> FMLA, in conjunction with the ADA, aids her accommodations in the workplace. The insurance company only allows three unplanned absences a year for employees. Additional absences are disciplined. The FMLA protects Anna's additional unforeseen absences caused by her disability and provides her with job security. She expressed great appreciation for the ADA because it gave her a voice and an ability to get equal rights in the workplace.

Anna was injured in her car accident three years after the ADA was made a law. At first, because she was new to having a disability, Anna thought the ADA meant everything had to be disability accessible. In the first few years of her employment, she would demand accommodations in places without wheelchair accessibility. She later learned that the ADA was a work in progress and it would take time for some places to become fully accessible.

#### IV. WHAT IS CONSIDERED REASONABLE?

Once a disabled employee submits a request for accommodation, the employer must determine whether the request is reasonable.<sup>138</sup> Although the employer is required to consider each

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if an employer accommodates an employee with a perceived disability by redistributing that employee's marginal job functions to a coworker, the coworker is likely to resent the accommodation because of the increased workload, particularly if the redistributed tasks are undesirable. When actual disabilities are involved, coworker morale decreases the most when the disability is nonobvious and the coworker does not know (or believe) that it exists.) *Id.*

136. Family Medical and Leave Act, Pub. L. 103-3, 107 Stat 6, codified at 29 U.S.C. § 2601, et. seq. (1993) (hereinafter "FMLA").

137. Periodic Video, Kristin Kaupang, *Protecting Your Shoulders and Staying Active After Spinal Cord Injury*, NW. REG'L. SPINAL CORD INJURY SYS. (Apr. 10, 2012), [www.sci.washington.edu/info/forums/reports/shoulder\\_health.asp](http://www.sci.washington.edu/info/forums/reports/shoulder_health.asp).

138. *See generally Enforcement Guidance: Reasonable Accommodation and*

request, the duty to accommodate is not limitless.<sup>139</sup> The employer does not have to accommodate an employee who poses a direct threat to others.<sup>140</sup> In addition, accommodation is not required if the requested accommodation would pose an “undue hardship” for the employer.<sup>141</sup> The undue hardship defense protects employers from being forced to undertake accommodations that may result in a materially detrimental economic impact on business operations.<sup>142</sup> Other factors that determine undue hardship include:

1. The nature and cost of the accommodation.
2. The overall financial resources of the facility involved in providing the accommodation; the number of employees at that facility; the effect or impact on the facility operation.
3. The overall financial resources of the covered entity; the overall size of the business (number of employees); the number, type, and location of facilities.
4. The type of operation of the entity, including the composition, structure, and function of the workforce; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.<sup>143</sup>

The ADA treats “reasonable accommodation” and “undue hardship” as distinct concepts.<sup>144</sup> However, a number of courts blend the analysis of undue hardship when the analysis should be specific to reasonable accommodation.<sup>145</sup> Courts that find a requested accommodation “reasonable” are unlikely to exempt

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*Undue Hardship Under the Americans with Disabilities Act*, EEOC, [www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html) (last visited Dec. 15, 2018) (outlining the procedures for employers to comply with reasonable accommodations).

139. Travis, *supra* note 80, at 1709-1710.

140. EEOC, *supra* note 138.

141. *Id.*

142. Malloy, *supra* note 39, at 10-13.

143. ADA, Undue Hardship, 42 U.S.C. § 12111(10) (2012); Undue Hardship, 29 C.F.R. § 1630.2(p)(2) (1991).

144. ADA, Definitions, 29 C.F.R. § 1630.2(o) defines “reasonable accommodation” distinct from “undue hardship” under 29 C.F.R. § 1630.2(p).

145. See Jeremy Holt, *Reasonable Accommodation: Who Should Bear the Burden?*, 28 STETSON L. REV. 1229, 1237 (1999) (stating the [Willis Terrell v. USAir, 1998 WL 2372 (11th Cir. Jan. 6, 1998)] court addressed yet another contention). Several circuits, including the Second and Third, have held that whether an accommodation is reasonable or whether it would impose an undue hardship encompasses, in reality, the same issue. *Id.*

employers from undertaking it.<sup>146</sup> Courts that find a requested accommodation poses an “undue hardship” are unlikely to demand that an employer provide it.<sup>147</sup> Thus, although critics of the ADA argued that the reasonable accommodation requirement of the statute unfairly requires employers to “subsidize” employees with disabilities, the costs that would be borne by employers are substantially limited by the requirement that those accommodations not impose an “undue hardship.”<sup>148</sup>

The reasonable accommodation requirement also forces employers to recognize that workplaces are not structured neutrally.<sup>149</sup> Workplaces are shaped in a way that preferences the nondisabled majority.<sup>150</sup> Employers cannot be faulted if they do not know an individual has a disability.<sup>151</sup> Employers that do not accommodate disabilities unwittingly give a competitive edge to non-disabled individuals.<sup>152</sup> However, providing disabled individuals with reasonable accommodations does not give preference to disabled individuals.<sup>153</sup> Rather, providing accommodations allows disabled individuals to perform their job with little or no impairment.<sup>154</sup> Employers and non-disabled

146. ADA, Defenses, 29 C.F.R. § 1630.15(d) (1991).

147. See Travis, *supra* note 80, at 991-92 (stating: “[a]n accommodation may pose an undue hardship if it is ‘unduly disruptive’ to other employees, and an accommodation will be deemed ‘unduly disruptive’ only if it actually impacts other employees’ ability to perform their jobs”).

148. Malloy, *supra* note 39, at 10–13.

149. Travis, *supra* note 80, at 960 (stating, “[t]he ADA requires employers to view the workplace as mutable and to adjust the physical or structural work environment, equipment, or operations so that individuals with disabilities can compete on level ground with the nondisabled majority, around whom the environment was originally constructed”).

150. *Id.* at 958-59.

151. Unless the employer has reason to know of the disability:

[T]he interactive process for finding a reasonable accommodation may be triggered by the employer's recognition of the need for such an accommodation, even if the employee does not specifically make the request. The exception to the general rule that an employee must make an initial request applies, however, only when the employer “(1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

Foster v. City of Oakland, 649 F. Supp. 2d 1008, 1021-22 (N.D. Cal. 2009) (citing Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114 (9th Cir. 2000) (en banc), *vacated on other grounds*, U.S. Airways v. Barnett, 535 U.S. 391, (2002)); Brown v. Lucky Stores, 246 F.3d 1182, 1188 (9th Cir. 2001); Surrell v. Cal. Water Serv., 518 F.3d 1097, 1109 (9th Cir. 2008).

152. Travis, *supra* note 80, at 959 (quoting 29 C.F.R. § 1630: “The reasonable accommodations rule is ‘a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated’”).

153. *Id.*

154. *Id.* at 958-59 (“Allowing an employer to require the same output from

employees must understand that those with disabilities are fighting for a level playing field to compete on an equal basis.<sup>155</sup>

### A. *Types of Accommodations*

Plaintiffs bear the burden of proving they are a qualified individual with a disability when any disagreement arises.<sup>156</sup> Unfortunately, it is difficult for plaintiffs to meet this burden. In order to succeed, plaintiffs must prove that they can perform the essential functions of the job with or without a reasonable accommodation.<sup>157</sup> This requires a decision about the essential functions of the job, analyzing the plaintiff's objective qualifications and whether he or she is qualified to perform the essential functions of the particular job in question.<sup>158</sup> Next, plaintiffs must show a lack of reasonable accommodations.<sup>159</sup> This leads to the discussion of whether the proposed accommodation is reasonable.<sup>160</sup> Further, the employer may argue the accommodation imposes an undue hardship.<sup>161</sup> Difficultly lies in distinguishing the difference between an essential function and a reasonable accommodation.<sup>162</sup>

Fortunately, the ADA's definition of discrimination includes a requirement for reasonable accommodations.<sup>163</sup> An employer may be required to alter certain characteristics of a job in response to the individual's disability.<sup>164</sup> Failure to provide this reasonable accommodation constitutes unlawful employment discrimination.<sup>165</sup> The first effect of the reasonable accommodation mandate forces employers to recognize subtle ways in which the workplace is biased against the disabled.<sup>166</sup> Employers are often not consciously aware

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a nondisabled employee and a disabled employee whose wheelchair is too wide to pass through the doorway of the work site, for example, would continue to subordinate an otherwise equally capable individual").

155. *Id.*

156. Travis *supra* note 80, at 909-10 (quoting Definition of a Disability, 42 U.S.C. 12102(2)(A)). A plaintiff may establish a disability by either having 'a physical or mental impairment that substantially limits one or more major life activities,' or being regarded as having such an impairment. *Id.*

157. *Id.*

158. Gauri P. Punjabi, *Clearly Defining the Essential Functions of the Job Can Make or Break An ADA Case*, MINTZ (May 10, 2016), [www.mintz.com/insights-center/viewpoints/2226/2016-05-clearly-defining-essential-functions-job-can-make-or-break](http://www.mintz.com/insights-center/viewpoints/2226/2016-05-clearly-defining-essential-functions-job-can-make-or-break).

159. *Id.*

160. *Id.* Employers are encouraged to engage in an interactive process with the employee in good faith. *Id.*

161. *Id.*

162. ROTHSTEIN & MCGINLEY, *supra* note 14, at 6048-54.

163. Definition of a Disability, 42 U.S.C. 12102(2)(A)); Definitions, 29 C.F.R. § 1630.2(o) (1991).

164. Travis, *supra* note 80, at 960.

165. *Doherty*, 862 F.2d at 573.

166. Travis, *supra* note 80, at 915 ("[W]ith the passage of the ADA, Congress intended not to erect impenetrable spheres of protection around the disabled,

of their own biases against disabilities.<sup>167</sup> Any statute that simply prohibits intentional discrimination would likely have little effect on employer conduct. The reasonable accommodation requirement helps employers focus on this unintentional discrimination and whether an employee with a disability can be enabled to perform the essential elements of the job.<sup>168</sup> An employer may realize that the person would be able to perform the job if certain adjustments are made.

First, the employee is obligated to make the requested accommodation.<sup>169</sup> However, case law recognizes an affirmative action by employers.<sup>170</sup> Because the law affirmatively obligates employers to provide reasonable accommodations to allow disabled employees to perform essential job functions, the failure to do so results in a form of disability discrimination.<sup>171</sup> Employers have been required to provide different equipment and furniture for disabled employees and allow disabled employees to maintain more flexible work schedules and break times.<sup>172</sup> In general, reasonable accommodation includes any type of modification or adjustment to the operational work environment, including the manner or circumstances in which the position is customarily performed, to allow a disabled employee to do the job.<sup>173</sup> The obligation to provide reasonable accommodation compels employers to change the requirements and working conditions of a job to provide individuals with disabilities an equal opportunity for participation.<sup>174</sup>

Typically, reasonable accommodation involves “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.”<sup>175</sup> Thus, the ADA protects disabled persons whose physical or mental impairments prevent them from performing the current job, by requiring the

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but hoped merely ‘to level the playing field’ for them.” *Deane v. Pocono Med. Ctr.*, 7 AD Cases (BNA) 198, 208, 1997 U.S. App. LEXIS 22606 (3d Cir. 1997) (quoting *Siefken v. Vill. of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995)), *rev'd on other grounds*, 142 F.3d 138 (3d Cir. 1998) (en banc).

167. Valerie Martinelli, *The Truth About Unconscious Bias in the Workplace*, TALENTCULTURE (Mar. 31, 2017), [www.talentculture.com/the-truth-about-unconscious-bias-in-the-workplace/](http://www.talentculture.com/the-truth-about-unconscious-bias-in-the-workplace/).

168. Travis, *supra* note 80, at 905.

169. Telephone Interview with Rachel M. Weisberg, Staff Attorney/Employment Rights Helpline Manager, Equip for Equality (Dec. 20, 2018) (providing Legal Briefings prepared by Barry C. Taylor and Rachel M. Weisberg, *Reasonable Accommodations Under the ADA*, Brief No. 29, EQUIP FOR EQUALITY (Sep. 2017)).

170. *Barnett*, 228 F.3d at 1112; *see Barnett*, 535 U.S. 391 (affirming test).

171. *Id.*

172. These are some examples of reasonable accommodations.

173. Malloy, *supra* note 39, at 10–13.

174. *Id.*

175. *Id.*

employer to reconfigure the accommodations to some degree.<sup>176</sup> The statute and the regulations also provide that reasonable accommodation is not required if it would result in undue hardship, defined as “an action requiring significant difficulty or expense.”<sup>177</sup>

### *B. Circuit Analysis*

Thankfully, my friend Anna has not needed to resort to legal action in order to receive an accommodation for her disability. However, the Equal Employment Opportunity Commission (“EEOC”) has filed more than 200 lawsuits involving claims of discrimination based on disability under the ADA of 1990 and the 2008 Amendments since 2011.<sup>178</sup> Since 2011, the EEOC recovered approximately \$52,000,000 and important injunctive relief in cases involving disability discrimination.<sup>179</sup> The EEOC secured other “make whole” relief through “jury verdicts, appellate court victories, court-entered consent decrees, and other litigation-related resolutions.”<sup>180</sup>

The EEOC sought relief for victims of discrimination with a variety of impairments.<sup>181</sup> These discrimination cases included failure to provide reasonable accommodation, asking prohibited pre-employment and post-employment disability-related questions of prospective and current employees.<sup>182</sup> Other cases sought relief for qualified applicants who were discriminated against based on “myths, fears, or stereotypes concerning certain impairments, and discharging qualified workers on the basis of disability.”<sup>183</sup>

In *EEOC v. Supervalu*, the EEOC sought reasonable accommodations for disabled employees of grocery chains.<sup>184</sup> The EEOC filed this case in September 2009, alleging that defendants had a policy and practice of terminating employees with disabilities at the end of medical leaves of absence rather than bringing them back to work with reasonable accommodations, in violation of the

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176. *Id.*

177. Definitions, 42 U.S.C. § 12111(10) (2012); Reasonable Accommodation, 29 C.F.R. § 1630.2(p) (1991).

178. *Fact Sheet on Recent EEOC Litigation-Related Developments Under the Americans with Disabilities Act (Including the ADAAA)*, EEOC (June 18, 2015), [www.eeoc.gov/eeoc/litigation/selected/ada\\_litigation\\_facts.cfm](http://www.eeoc.gov/eeoc/litigation/selected/ada_litigation_facts.cfm).

179. *Id.*

180. *Id.*

181. Including cancer (e.g., breast cancer, basal cell carcinoma, and colon cancer), dwarfism, emphysema, epilepsy, deafness, blindness, traumatic brain injury, HIV, multiple sclerosis, spinal stenosis, neuropathy, herniated discs and other back impairments, diabetes, anemia, coronary artery disease, end-stage renal disease, PTSD, narcolepsy, depression, anxiety disorder, and dyslexia. *Id.*

182. EEOC, *supra* note 178.

183. *Id.*

184. *EEOC v. Supervalu, Inc.*, 2014 WL 6791853 (N.D. Ill. Dec. 2, 2014), (resolved Jan. 14, 2011).



ADA.<sup>185</sup> The EEOC recovered \$400,000 in attorneys' fees and costs after prevailing in a contempt proceeding against defendants, Supervalu, Inc. and Jewel-OSCO.<sup>186</sup> The district court affirmed the magistrate's finding that defendants failed to comply with an earlier consent decree requiring reasonable accommodation for employees seeking to return to work from disability leave.<sup>187</sup> The finding was based on the EEOC's evidence, presented during a three-day hearing, that three employees asked to return to work after disability leave and that defendants refused to allow them to return to work with or without an accommodation.<sup>188</sup> Finding defendants in contempt, the court required defendants to pay fees and costs to the EEOC and the parties later settled.<sup>189</sup>

In January 2011, the defendants agreed to pay \$3.2 million to settle the case and entered a consent decree which required them to ensure that its employees involved in making accommodation decisions, undergo training on the requirements of the ADA, and understand the types of accommodations available to reinstate employees to the workplace.<sup>190</sup> It also required defendants to create a medical accommodation administration team to facilitate a cooperative process with employees on a disability leave.<sup>191</sup> Finally, the settlement required the grocery chains to notify disabled employees in writing when an accommodation has been put in place so that the employee may return to work.<sup>192</sup>

### *C. Retaliation Claims – Was the Employer's Reason Pretextual?*

In order to establish ADA retaliation, a disabled employee must prove that "(1) [the employee] 'engaged in a protected activity;' (2) [the employee] was 'subjected to [an] adverse employment action subsequent to or contemporaneous with the protected activity;' and (3) ... 'a causal connection [existed] between the protected activity and the adverse employment action.'"<sup>193</sup>

When an employee with a disability brings a retaliation claim against an employer based on circumstantial evidence instead of direct evidence, courts generally consider the *McDonnell Douglas*

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185. *Id.*

186. *Id.* at \*3.

187. *Id.* at \*4.

188. *Id.*

189. *Id.* at \*15.

190. *Supervalu/Jewel-Osco to Pay \$3.2 Million Under Consent Decree for Disability Bias*, EEOC, (Jan. 5, 2011), [www.eeoc.gov/eeoc/newsroom/release/1-5-11a.cfm](http://www.eeoc.gov/eeoc/newsroom/release/1-5-11a.cfm).

191. *Id.*

192. *Id.*

193. *Foster v. Mt. Coal Co., LLC*, 830 F.3d 1178, 1178 (10th Cir. 2016) (citing *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1187 (10th Cir. 1999)).

burden-shifting test.<sup>194</sup> The test requires the disabled employee to establish a prima facie case of retaliation and then “[t]he burden must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”<sup>195</sup> If successful, the burden shifts back to the employee to prove pretext, “which requires a showing that the proffered nondiscriminatory reason is unworthy of belief.”<sup>196</sup>

In *Foster*, the Tenth Circuit reversed the district court’s granting of summary judgment, finding genuine issues of material fact in the maintenance supervisor’s retaliation claims against his employer.<sup>197</sup> The supervisor suffered an adverse employment action when his employer fired him.<sup>198</sup> The employer argued that the supervisor did not engage in protected activity; however, the supervisor claimed his two requests for accommodations were protected activities.<sup>199</sup>

Alleging reasonable accommodations as a protected activity under the ADA for retaliation required the supervisor to show: “an adequate request for an accommodation sufficient to qualify as protected activity”<sup>200</sup> and “a reasonable, good faith belief that he was entitled to an accommodation.”<sup>201</sup>

First, a request is adequate if it is “sufficiently direct and specific, giving notice that [the employee] needs a special accommodation.”<sup>202</sup> The request must simply state that the employee wants assistance for the disability.<sup>203</sup>

However, situations arise where an employee cannot make a formal request. The Supreme Court in *Barnett* upheld the Ninth

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194. *Foster*, 830 F.3d at 1187.

195. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

196. *EEOC v. Picture People, Inc.*, 684 F.3d 981, 988 (10th Cir. 2012).

197. *Foster*, 830 F.3d at 1187.

198. *Id.*

199. *Id.*

200. *Id.* (referencing *Jones v. U.P.S., Inc.*, 502 F.3d 1176, 1194-95 (10th Cir. 2007)).

201. *Id.* at 1187 (citing *Jones*, 502 F.3d at 1194).

202. *Id.* at 1188 (citing *Calero-Cerezo v. U.S. Dep’t of Justice*, 355 F.3d 6, 23 (1st Cir. 2004)).

203. *Foster*, 830 F.3d at 1188; see *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011) (citing Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, 1999 WL 33305876, at \*4 (Mar. 1, 1999): “[t]o request accommodation, an individual may use ‘plain English’ and need not mention the ADA or use the phrase ‘reasonable accommodation’); see also *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) (stating “while the notice does not have to be in writing, be made by the employee, or formally invoke the magic words ‘reasonable accommodation,’ the notice nonetheless must make clear that the employee wants assistance for his or her disability); see also *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) (quoting *Barnett*, 228 F.3d at 1114 n.5 “[a]n employee is not required to use any particular language when requesting an accommodation but need only ‘inform the employer of the need for an adjustment due to a medical condition’”).

Circuit’s “interactive process” test, where “once an employee requests an accommodation or employer recognizes the employee needs an accommodation, but the employee cannot request it because of a disability, an employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation.”<sup>204</sup>

Followed by all circuits, the Ninth Circuit’s interactive process test requires: “(1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee’s request; and (3) offering an accommodation that is reasonable and effective.”<sup>205</sup> An employer who fails to provide reasonable accommodations opens itself up to liability for discrimination.<sup>206</sup>

#### *D. Where Disability Law Stands Today – Undue Hardship and Leave*

Courts have found the ADA covers gender dysphoria,<sup>207</sup> pregnancy-related impairments,<sup>208</sup> and “regarded as” disabilities.<sup>209</sup> However, the recent Seventh Circuit opinion in *Severson v. Heartland Woodcraft, Inc.* addresses the real and pressing issue of disability leave.<sup>210</sup> Employers rarely succeed on the undue burden defense unless they run a small company.<sup>211</sup> However, courts routinely find an employee’s indefinite leave as an undue hardship on the employer.<sup>212</sup> With the sporadic and intense problems that disabilities can cause, it becomes difficult to estimate how long an employee needs to recover.<sup>213</sup> Much of this depends on the type of

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204. *Barnett*, 228 F.3d at 1112; *see also Barnett*, 535 U.S. 391 (affirming test).

205. *Zivkovic*, 302 F.3d at 1089 (9th Cir. 2002).

206. *Id.*; *see Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) (stating that an employer must know of the employee’s physical or mental disability). “An employer that has no knowledge of an employee’s disability cannot be held liable for not accommodating the employee.” *Id.*

207. *Blatt v. Cabela’s Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. May 18, 2017) (holding employers may not exclude disabling conditions of persons who identify with a different gender, and substantial limitations in major life activities were implicated – social and occupational interaction and reproduction).

208. EEOC Settlement with Allsup’s Convenience Stores, 15-cv-863 (D.N.M. Settlement Reached Sept. 25, 2017) (holding reasonable accommodations include modifying lifting restrictions for pregnant employees and allowing leave extensions).

209. *EEOC v. Amstead Rail Co., Inc.*, 280 F. Supp. 3d 1141 (S.D. Ill. 2017); *Shell v. Burlington Northern Santa Fe Railway Co.*, 2018 WL 1156249 (N.D. Ill. Mar. 5, 2018); *EEOC v. STME d/b/a Massage Envy-South Tampa*, 17-cv-977 (M.D. Fla. Feb. 15, 2018); *see also Travis*, *supra* note 80, at 947 (discussing the “regarded as” prong, which is beyond the scope of this article).

210. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017).

211. *Weisberg*, *supra* note 169.

212. *Id.*

213. *Recovering and Establishing a New Identity After Injury or Acquired*

disability involved and the extent of the recovery time needed for flare-ups, treatment, and other issues.<sup>214</sup> The question becomes: at what point does a continual request for leave extension rise to indefinite leave?<sup>215</sup>

In *Severson*, the Seventh Circuit held that “[a]n employee who needs long-term medical leave *cannot* work and thus is not a “qualified individual” under the ADA.”<sup>216</sup> The court distinguished between intermittent or short leave from long-term leave as a couple of days or weeks.<sup>217</sup> “A multi-month leave of absence is beyond the scope of a reasonable accommodation under the ADA.”<sup>218</sup> The Seventh Circuit also previously held that a request for leave limited to six months was unreasonable under the ADA.<sup>219</sup> This ruling leaves disabled employees with limited options to consider other types of leave: FMLA, employer policies, or other accommodations such as telework and part-time work.<sup>220</sup>

The Northern District of Illinois distinguished *Severson* recently in *EEOC v. S&C Electric Inc.*, where an employee was

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*Disability*, HEALTHTALK, [www.healthtalk.org/peoples-experiences/disability-impairment/londoners-experiences-life-changing-injuries/recovering-and-establishing-new-identity-after-injury-or-acquired-disability](http://www.healthtalk.org/peoples-experiences/disability-impairment/londoners-experiences-life-changing-injuries/recovering-and-establishing-new-identity-after-injury-or-acquired-disability) (last updated Dec. 23, 2018) (suggesting that different people respond in a variety of ways due to the severity of the disability, the availability of insurance, community support systems, medical treatment, and a variety of other factors).

214. *Id.*

215. Weisberg, *supra* note 169.

216. *Severson*, 872 F.3d at 479 (citing and affirming *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003)). The Seventh Circuit qualified “long-term” as:

Long-term medical leave is the domain of the FMLA, which entitles covered employees “to a total of 12 work-weeks of leave during any 12-month period ... [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.” 29 U.S.C. § 2612(a)(1)(D). The FMLA protects up to 12 weeks of medical leave, recognizing that employees will sometimes be *unable* to perform their job duties due to a serious health condition. In contrast, “the ADA applies only to those who can do the job.”

*Id.* at 481.

217. *Id.* at 481, stating:

Intermittent time off or a short leave of absence—say, a couple of days or even a couple of weeks—may, in appropriate circumstances, be analogous to a part-time or modified work schedule, two of the examples listed in § 12111(9). But a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job. To the contrary, the “[i]nability to work for a multi-month period removes a person from the class protected by the ADA.”

218. *Id.* at 479.

219. *Golden v. Indianapolis Hous. Agency*, 698 Fed. Appx. 835 (7th Cir. 2017).

220. Weisberg, *supra* note 169.

entitled to twelve months of disability leave per the company policy and then was fired when the employee tried to return to work.<sup>221</sup> Because the employee as ready, willing, and able to return to work when he was fired, the court denied the motion to dismiss.<sup>222</sup> Also, inflexible leave policies violate the ADA.<sup>223</sup> The Northern District of Illinois also held in *EEOC v. UPS*, that a company cannot automatically fire an employee when they reach twelve months of disability leave.<sup>224</sup>

Lastly, although indefinite leave may be viewed by most courts as an undue hardship on the employer, taking leave for a short-term disability without an anticipated return date was not an undue burden on the employer.<sup>225</sup> “Ordinarily, the ADA does not require an employer to hold an employee’s job open under such indefinite circumstances.”<sup>226</sup> However, a court looks to the factual circumstances involved to make the determination whether the request was an undue hardship.<sup>227</sup>

Eerily reminiscent of the narrowing Supreme Court precedent in *Sutton*, *Murphy*, and *Toyota*, the Seventh Circuit unnecessarily narrowed the right of a disabled employee to obtain needed medical and recovery time from work. This unfortunate decision goes against the congressional intent of the ADA’s reasonable accommodations. By limiting the “reasonable” amount of leave from work to a couple of days or a couple of weeks, the Seventh Circuit improperly leaves disabled people to fight for their jobs in other ways. Rather, the proper analysis would align the ADA with the FMLA and provide leeway for disabled people.

### *E. Recent Statistics – Does the Law Measure Up?*

Studies done ten years after the enactment of the ADA showed

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221. *EEOC v. S&C Electric Co.*, 303 F. Supp. 3d 687, 689 (N.D. Ill. Apr. 10, 2018). Particularly noteworthy is the court stating:

. . . defendant argues that the Seventh Circuit has definitively held that an individual who was on long-term medical leave is not a qualified individual because “inability to work for a multi-month period removes a person from the class protected by the ADA.” Thus, according to defendant, the fact that [plaintiff] had been on medical leave of almost twelve months prior to his attempt to return to work removes him from the protections of the ADA. Nonsense. *Id.*

222. *Id.*

223. Press Release, EEOC, *UPS to Pay \$2 Million to Resolve Nationwide EEOC Disability Discrimination Claims*, (Aug. 8, 2017), [www1.eeoc.gov/eeoc/newsroom/release/8-8-17.cfm](http://www1.eeoc.gov/eeoc/newsroom/release/8-8-17.cfm).

224. *Id.*

225. *Hunter v. BASF Corp.*, 2017 WL 958382, at \*11 (N.D. Ala. Mar. 13, 2017).

226. *Id.* (referencing *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003) and *Duckett v. Dunlop Tire Corp.*, 120 F.2d 1222, 1226 (11th Cir. 1997)).

227. *Id.*

that people with disabilities continued to see virtually the same disadvantages in the labor market that they experienced prior to the enactment of the ADA.<sup>228</sup> The disabled have not seen a decrease in their unemployment rate since 1990.<sup>229</sup> Aggravating the problem, studies show that employers win an astonishingly high percentage of Title 1 cases under the ADA.<sup>230</sup> Some commentators have said that the ADA's track record and improving employment opportunities for individuals with disabilities appears dismal.<sup>231</sup> These findings have led many disability advocates to question whether the ADA can lead to an improvement in employment opportunities for disabled persons.<sup>232</sup> But that was ten years after the ADA was enacted; now it has been twenty-nine years. I personally know that there are still some issues that cause problems for me. But my injury was only ten years ago and so I have had the good fortune of many changes being made from 1990 through 2009 to make it far easier for me to be a part of society.

A study done twenty-five years after the enactment of the ADA found that whether purposeful or subconscious, statistics showed otherwise capable workers with some form of mental or physical handicap were treated differently than employees without a disability.<sup>233</sup> In fact, a recent short-term study performed by the Kessler Foundation and the National Organization on Disabilities reported that while barriers in the workplace are decreasing, they still exist.<sup>234</sup> Similarly, while reasonable accommodations in the

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228. *Disabled Workers Still Face Discrimination in the Workplace*, MCCARTHY WEISBERG CUMMINGS, P.C. (Aug. 26, 2010), [www.disabled-world.com/disability/discrimination/workplace-discrimination.php](http://www.disabled-world.com/disability/discrimination/workplace-discrimination.php).

229. *Id.*

230. *Id.*

231. Peter Blanck, *et al.*, *Is It Time to Declare the ADA a Failed Law?*, in *THE DECLINE OF EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE* 301 (David C. Stapleton ed., 2003).

232. Malloy, *supra* note 39, at 2–3.

233. Michelle Maroto & David Pettinicchino, *Twenty-Five Years After the ADA: Situating Disability in America's System of Stratification*, 35 *DISABILITY STUD. Q.* 3 (2015).

234. “The 2015 Kessler Foundation National Employment and Disability Survey was a telephone survey of randomly selected working-age adults with a self-reported disability across the U.S.” *Compare the Report of Main Findings*, KESSLER FOUNDATION NATIONAL EMPLOYMENT AND DISABILITY SURVEY (Oct. 2010), [www.adminitrustllc.com/wp-content/uploads/2013/12/Kessler-NOD-2010-Survey.pdf](http://www.adminitrustllc.com/wp-content/uploads/2013/12/Kessler-NOD-2010-Survey.pdf) (“2010 Kessler survey”) with the 2015 Kessler survey, *Report of Main Findings*, KESSLER FOUNDATION NATIONAL EMPLOYMENT AND DISABILITY SURVEY, (June 2015), [www.kesslerfoundation.org/sites/default/files/filepicker/5/KFSurvey15\\_Results-secured.pdf](http://www.kesslerfoundation.org/sites/default/files/filepicker/5/KFSurvey15_Results-secured.pdf) (“2015 Kessler survey”) (showing that while 16.5% of participants experienced less pay, 38.6% overcame this barrier.) Also, stating that while 15.7% of participants experienced problems with a superior with a negative attitude, 41.3% were able to overcome this barrier. *Id.* Another highlighted barrier was 15.5% of participants experiencing problems with negative attitudes from coworkers, 54.4% overcame this barrier. *Id.* Finally, 5.5% of participants experienced

workplace have increased, less than 30% of the participants surveyed received these accommodations.<sup>235</sup>

## V. PROPOSAL

As evidenced throughout this Article, the ADA has made great strides in bringing equality to the workplace. Although there is still much to be done, whether it be through education, accessibility, or acceptance, this does not mean that it cannot be done.

An area that may prove to be successful is to educate both employers and employees. Educating employers and employees will decrease implicit and subconscious bias and promote productive communication throughout the workplace. Furthermore, educating employers will provide greater opportunities for disabled employees and stability by increasing the workforce.

However, some employers may fear that hiring an individual with a disability will result in expenses to their business such as granting additional sick leave or meeting the requested accommodations. It may be necessary to provide a monetary incentive for small businesses and businesses in the private sector to ensure compliance. Therefore, I propose that monetary incentives be provided to promote education of employers and employees on the ADA. To ensure that people with disabilities are seen as full and equal employees, change in the cultural values of organizations – from top level leadership, to hiring managers, to employees and coworkers is necessary.

## VI. CONCLUSION

While the ADA definitely made positive changes for the disabled in the workplace, in some instances it is still hard for the disabled to gain employment. The ADA attempts to remedy discrimination against disabilities at different stages of employment and limit the questions employers can ask. However, for my friend Anna and I who are both in wheelchairs, showing up to a job interview with an obvious disability generally garners conscious or subconscious bias. Many employers are aware that a disability does not prevent an applicant from fulfilling job expectations. However, implicit bias will always exist. Although there are laws against hiring people based on race, religion, gender, disability, etc., if the employer can show that there was a legitimate nondiscriminatory reason for not hiring the individual, the employer will likely prevail.

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barriers with job counseling, 33.3% overcame this barrier. *Id.*

<sup>235</sup> 2015 Kessler survey, *supra* note 234 (showing in Tables 16 and 17 that 28.4% of participants reported having flexible schedules, 14% had modified job duties, and 13.6% had building accessibility addressed and remedied).

The EEOC has been able to file and succeed in many cases to help those that were discriminated against.<sup>236</sup> Ideally, solutions before litigation should be reached. If an employee requests an accommodation, the employee and the employer have a duty to work something out. Encouraging open communication between employers and employees would assist the employer in not having to worry about being sued. The employee should be able to request reasonable accommodations. Both parties may be surprised at the willingness of the other to cooperate. One of the major barriers is ignorance on either sides. With productive communication in the workplace and nondiscriminatory workplace practices, these barriers could be eliminated.

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236. EEOC, *supra* note 178.



