COMMENT

IS THE ADAAA A "QUICK FIX" OR ARE WE OUT OF THE FRYING PAN AND INTO THE FIRE?: HOW REQUIRING PARTIES TO PARTICIPATE IN THE INTERACTIVE PROCESS CAN EFFECT CONGRESSIONAL INTENT UNDER THE ADAAA*

TABLE OF CONTENTS

* This Comment received the Weil, Gotshal & Manges Award for Best Paper in the Area of Civil Rights. The Author would like to thank her friends and family, particularly her husband Ulises, for their unfailing love, patience, and encouragement. The Author also thanks the staff of the Houston and Phoenix district offices of the Equal Employment Opportunity Commission, especially Jim Sacher and Rudy Sustaita, for their help and support. Finally, the Author expresses her gratitude to the editorial staff of the *Houston Law Review* for their invaluable work on this Comment and to the faculty of the University of Houston Law Center for their commitment to developing tomorrow's lawyers.

> *I enjoy being an electrician, and I'm good at it. I wish that GM had given me the chance to prove that I could do the job, and I wish that the ADA had been there to protect me when GM didn't give me that chance. Unfortunately, there are many people with disabilities like me who are not getting the protection they deserve because the courts are telling them that they're not "disabled."*[1]

I. INTRODUCTION

The Americans with Disabilities Act (ADA) passed with widespread support in Congress[2] and was signed into law on July 26, 1990 by former President George H.W. Bush.[3] It was the "world's first human rights law for people with disabilities,"[4] hailed by advocates as the "Emancipation Proclamation for the

1. *Determining the Proper Scope of Coverage for the Americans with Disabilities Act: Hearing of the S. Health, Education, Labor & Pensions Comm.*, 110th Cong. (2008) [hereinafter 2008 Hearings] (prepared statement of Carey L. McClure, plaintiff, McClure v. Gen. Motors Corp., No. 4:01-CV-878-A, 2003 WL 124480 (N.D. Tex. Jan. 10, 2003), *aff'd*, 75 F. App'x 983 (5th Cir. 2003)).

2. The ADA passed in the House by a vote of 377–28 and in the Senate by a vote of 91–6. 136 CONG. REC. 17,296–97, 17,376 (1990).

3. Jacqueline Vaughn Switzer, *The Americans with Disabilities Act: Ten Years Later*, 29 POL'Y STUD. J. 629, 629 (2001).

4. *ADA Watch and the National Coalition for Disability Rights Praise Advocates and Policymakers as President Bush Signs ADA Amendments Act into Law*, AIDS WKLY., Oct. 6, 2008, at 76.

disability community."[5] But less than eight years after it went into effect, a critic charged that "[i]f the ADA was meant to be a revolutionary remaking of America, then the judicial interpretation and implementation of the ADA's employment title has been nothing less than a betrayal of the ADA's promise."[6]

Anecdotal evidence often supports this view.[7] For example, Vanessa Turpin, a machine operator with epilepsy, resigned after her employer required her to work a night shift that would have worsened her seizures.[8] Vanessa experienced nighttime seizures which resulted in "shaking, kicking, salivating, and . . . bedwetting."[9] She also had daytime seizures, which caused her to shake, become "unaware of and unresponsive to her surroundings," and experience memory loss.[10] Yet the court held that Vanessa was not disabled because many other adults "fail to receive a full night of sleep" and "suffer from a few incidents of forgetfulness a week."[11] Cases like this made it difficult to defend the ADA, especially when coupled with the fact that most ADA cases are dismissed on summary judgment.[12] How did this "Emancipation Proclamation" evolve into a "betrayal"?

Part II of this Comment examines the history of Title I of the ADA. Part III describes key elements of Title I, especially the reasonable accommodation mandate, and Part IV explores Supreme Court precedent under both the Rehabilitation Act and the ADA. Part V chronicles Congress's efforts to change the ADA and describes the products of these efforts, the ADA Amendments Act of 2008 (ADAAA). Among other things,[13] the ADAAA drastically changed the definition of disability under the

---

5. Shirley Caudill, *ADA Didn't Remove All Impediments*, LEXINGTON HERALD-LEADER, Sept. 21, 2008, at D3.

6. Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 36 (2000).

7. *See* Meghan Hayes Slack, Note, *ADA Amendments Act of 2008: Implications for Employers and Education Institutions*, 5 J. HEALTH & BIOMEDICAL L. 283, 293–96 (2009) (describing troubling "instances of people who were denied coverage under the ADA despite admitted discrimination by employers and schools").

8. Equal Employment Opportunity Comm'n v. Sara Lee Corp., 237 F.3d 349, 350–51 (4th Cir. 2001).

9. *Id.* at 351.

10. *Id.*

11. *Id.* at 352–53 (internal quotation marks omitted).

12. Amy L. Allbright, *2007 Employment Decisions Under the ADA Title I—Survey Update*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 335, 336 (2008).

13. For a description of all the changes involved in the ADAAA, see generally Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 236–37 (2008).

ADA,[14] a common stumbling block for plaintiffs.[15] Part VI argues that this focus on the definition of disability leaves unaddressed other issues[16] that may hinder effective enforcement of the ADA's mandates by producing similarly restrictive results in other areas of ADA jurisprudence. Part VI also suggests that Congress should further amend the ADA to incorporate and require mandatory participation in a modified version of the interactive process currently contained in the ADA regulations. Such an amendment would effectuate the ADA's intent and encourage a cooperative approach toward reasonable accommodations. At the same time, it would benefit employers and employees by facilitating optimal accommodations without the need to resort to costly litigation.

II. HISTORY OF THE ADA

The ADA was modeled on an earlier statute, the Rehabilitation Act of 1973 ("Rehab Act").[17] The Rehab Act, which was based on Title VI of the Civil Rights Act of 1964,[18] was a "very modest" statute[19] that prohibited federal agencies and programs receiving federal funds from discriminating on the basis of disability.[20] The ADA extended the scope of this protection to the private sector.[21]

In theory, there was little opposition to providing rights to disabled individuals.[22] What debate there was centered largely on

---

14. *See* Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 218–24 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/44/LRColl2008n44Long.pdf (discussing changes to the definition of disability in the ADAAA).

15. *Id.* at 218; *see* Greg Rinckey, *Anticipate More Disability Discrimination Cases*, FED. TIMES, Oct. 20, 2008, at 22 (asserting that "more ADA cases [will] pass initial threshold tests" under the ADAAA).

16. *See* Long, *supra* note 14, at 226–29 (discussing issues the ADAAA leaves unresolved).

17. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. §§ 701–797b (2006)); *see* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 92 (2000) ("[T]he definition of disability in the ADA was taken directly from . . . the Rehabilitation Act."); Feldblum, Barry & Benfer, *supra* note 13, at 188–89 (noting that the ADA was "modeled generally on Section 504 of the Rehabilitation Act").

18. Feldblum, *supra* note 17, at 98.

19. Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 535 (2008).

20. Rehabilitation Act § 504, 87 Stat. at 394 (codified as amended at 29 U.S.C. § 794 (2006)).

21. *E.g.*, Smaw v. Va. Dep't of State Police, 862 F. Supp. 1469, 1474 (E.D. Va. 1994).

22. *See* Selmi, *supra* note 19, at 534.

the definition of "disability" and the potential costs of accommodations.[23] Disability advocates were forced to accept a less expansive definition of "disability" than appeared in the original draft legislation.[24] However, advocates did not undertake a concerted campaign to change public perception or justify a broadening of the definition,[25] perhaps because the courts had generally interpreted the definition in favor of plaintiffs.[26] This inaction produced several unintended side effects. First, media portrayals of the ADA (particularly its reasonable accommodation requirement) often decried it for protecting "lazy" workers and requiring employers to tolerate threatening behavior.[27] The lack of a visible social movement left unchallenged popular perceptions that the statute involved "special treatment" or condoned unacceptable behavior.[28] Second, the lack of significant opposition following the adoption of the Rehab Act definition of "disability" left several key provisions of the ADA vague, which contributed to implementation problems.[29] Operating in an environment without widespread support for the ADA's goals, courts that were initially hostile to civil rights legislation (as the Supreme Court was at the time of the ADA's enactment)[30] had latitude to virtually rewrite the ADA.[31]

With opposition from the business lobby,[32] congressional support was crucial to the bill's passage. Many of the legislators whose assistance proved instrumental were themselves disabled or had family members who suffered from disabilities.[33]

---

23. McGowan, *supra* note 6, at 98–99; Selmi *supra* note 19 at 530.

24. *See* Feldblum, Barry & Benfer, *supra* note 13, at 188–190.

25. *See* Selmi, *supra* note 19, at 542–44 (recounting the strategic decision of the disability community to work almost exclusively with Congress and noting that what public advocacy did occur focused on "traditional" disabilities).

26. Feldblum, *supra* note 17, at 91–92. *But see* Selmi, *supra* note 19, at 538 (asserting that Rehab Act precedent "offered caution, rather than unbridled optimism").

27. Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 911 (2003).

28. Selmi, *supra* note 19, at 542–43; *see also* Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 294–95 (2008) (referring to the disability rights movement of the 1980s as "wimpy" and noting an ongoing lack of "consistent, well-orchestrated, concerted activism" in the disability rights movement today).

29. *See* Selmi, *supra* note 19, at 539 (noting that the definition of disability adopted from the Rehab Act gave resistant courts more discretion).

30. *Id.* at 539–40.

31. *Id.* at 571.

32. *Id.* at 531.

33. McGowan, *supra* note 6, at 33 (noting that several members of the Bush family had disabilities); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 627 (2004) (describing the "'hidden army' of [such] legislators," including Reps. Coelho and Hoyer, as well as Sens.

Arguments involving both equality and economic efficiency were advanced in support of the ADA. First, the ADA was hailed as the most significant antidiscrimination law since Title VII.[34] Second, advocates argued that the exclusion of otherwise qualified disabled workers from the workplace resulted in economic inefficiency by necessitating dependence on various forms of public assistance.[35] Whether due to the legislators' personal ties to the disability community or the arguments supporters presented, there was "virtually no opposition to the ADA in either the House or the Senate,"[36] and the bill's sponsors succeeded in earning the support needed to pass the bill.[37]

Despite the fact that it was preceded by a "substantially similar"[38] statute, the ADA is still unique among antidiscrimination measures. Its goal of preventing "avoidable workplace exclusion of a targeted group" is similar to that of Title VII.[39] But where Title VII presumes that individual differences are irrelevant for employment purposes, the ADA acknowledges that these differences may be relevant.[40] By providing a cause of action for individuals who are "regarded as" disabled, the ADA recognizes that misperceptions about disabilities often play a greater role in disability discrimination than in the group-based classifications protected by Title VII.[41] Moreover, the ADA imposes on employers "an affirmative obligation to take actions to remove obstacles that prevent an individual with a disability from being able to perform a job or some of its essential tasks."[42] While commentators note that disparate impact liability under Title VII

Dole, Harkin, Kennedy, and Hatch).

34. *Broad Disabled Rights Bill OKd*, L.A. TIMES, May 23, 1990, at A1.

35. *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 926–27 (2003) (observing that supporters presented the ADA as a means "to reduce the high societal cost of dependency"); Terrell Tumlinson, *Backers: New Law Good for Business*, TIMES-PICAYUNE (New Orleans), July 17, 1990, at D1 (noting that when the labor market shrinks, disabled individuals are an untapped resource).

36. Selmi, *supra* note 19, at 538–39. Selmi notes that the business lobby may have "de-escalate[d]" opposition in light of this support to focus on drafting a tolerable bill. *Id.* at 542.

37. *See* McGowan, *supra* note 6, at 97 (describing the support needed). The sponsors' attempts to reach compromises prior to introducing the bill also played a part. *Id.* at 97–98.

38. Williams v. City of Charlotte, 899 F. Supp. 1484, 1487 n.2 (W.D.N.C. 1995).

39. Stein, *supra* note 33, at 637.

40. *See* Samuel A. Marcosson, *Of Square Pegs and Round Holes: The Supreme Court's Ongoing "Title VII-ization" of the Americans with Disabilities Act*, 8 J. GENDER, RACE & JUST. 361, 381 (2004) (noting that a central tenet of the ADA is that while individuals with disabilities present "tangible and cognizable" differences, they "should nevertheless be protected against discrimination").

41. *Id.* at 362–63.

42. *Id.* at 363.

may effectively require accommodation as well,[43] the reasonable accommodation requirement of the ADA distinguishes it from other antidiscrimination statutes.[44]

III. MECHANICS OF TITLE I OF THE ADA

As originally worded, the ADA prohibited employers from discriminating "against a qualified individual with a disability because of the disability of such individual."[45] To establish a prima facie case under the ADA, the plaintiff must establish that (1) she is disabled within the meaning of the ADA; (2) she is qualified (with or without a reasonable accommodation) to perform the essential functions of the position she has or desires; and (3) the employer took an adverse employment action because of her disability.[46] This Comment focuses on the scope of coverage, which protects only "qualified individual[s] with a disability,"[47] and discrimination based on failure to accommodate.

A. Definition of Disability

Although each element of the scope of the ADA's coverage has been litigated,[48] the most frequently litigated element of Title I has been whether an individual has a disability within the meaning of the statute.[49] The statute provides three separate ways, frequently referred to as "prongs," in which a plaintiff can establish disability.[50] The first, known as the "actual disability" prong, requires that the individual prove an impairment that

43. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 666 (2001).

44. Stein, *supra* note 33, at 586 (observing that most legal scholars "characterize the ADA as a redistributive measure").

45. 42 U.S.C. § 12112(a) (2006).

46. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999) (quoting Gaul v. Lucent Techs., 134 F.3d 576, 580 (3d Cir. 1998)). Failure to provide a reasonable accommodation is itself an adverse employment action under the ADA. *Infra* note 106 and accompanying text.

47. 42 U.S.C. § 12112(a) (2006); *see* Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 541–42 (2004) (explaining the difference between estimates of the number of individuals with disability-related work limitations and those who are actually protected by the ADA).

48. *See, e.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 399–402 (2002) (reasonable accommodation); Burns v. Coca-Cola Enters., Inc., 222 F.3d 247, 256 (6th Cir. 2000) (qualified individual with a disability).

49. *2008 Hearings*, *supra* note 1 (prepared statement of Jo Anne Simon).

50. 42 U.S.C.A. § 12102(1) (West Supp. 2009); Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 432 (1997).

substantially limits a major life activity.[51] This prong has been parsed into three component parts: whether the individual has an impairment, whether the activity that the impairment limits is a major life activity, and whether the major life activity is substantially limited by the impairment.[52]

The second and third definitions of disability under the ADA provide broader coverage than the first because they protect individuals who may not have a disability at all.[53] The second definition, the "record of disability" prong, allows a claimant to prove a disability within the meaning of the ADA by proving that she has a record of an impairment.[54] The third definition, the "regarded as" prong, brings individuals who are merely viewed as having an impairment within the class of disabled individuals under the ADA.[55] Because the Supreme Court's decisions drastically impacted the definition of disability under the ADA, this precedent is discussed at greater length in Part II.B.

B. Qualified Individual with a Disability

The definition of disability has not been the only difficult issue courts have faced. A plaintiff who establishes that she is a disabled individual must also establish that she is "qualified."[56] The ADA regulations define a qualified individual as "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."[57] Courts have analyzed the second portion of this requirement in two steps, first asking "whether the individual could perform the essential functions of the job."[58] If the court determines that the claimant cannot, then it "must determine whether any reasonable accommodation by the employer would enable [her] to perform those functions."[59]

---

51. 42 U.S.C.A. § 12102(1)(A) (West Supp. 2009).

52. Bragdon v. Abbott, 524 U.S. 624, 631 (1998); McGowan, *supra* note 6, at 66–67.

53. Burgdorf, *supra* note 50, at 434. Burgdorf argues that the restrictive scope of the first prong was intended to maintain limited core coverage for the Rehab Act's affirmative action mandates, while the latter prongs were designed to prohibit a broader range of discriminatory behavior. *Id.* at 432–34.

54. 42 U.S.C.A. § 12102(1)(B) (West Supp. 2009).

55. 42 U.S.C.A. § 12102(1)(C) (West Supp. 2009).

56. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999) (quoting Gaul v. Lucent Techs., 134 F.3d 576, 580 (3d Cir. 1998)).

57. 29 C.F.R. § 1630.2(m) (2006).

58. Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993).

59. *Id.* at 1393–94.

Another consideration is whether the individual "poses 'a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation'" because such an individual is not a "qualified individual."[60] The plaintiff bears the burden of proving that she is qualified.[61]

C. Essential Functions

The essential functions of a job are defined as "functions that bear more than a marginal relationship to the job at issue"[62] or "fundamental job duties."[63] Employees who cannot refrain from using abusive, inappropriate, or threatening language toward customers or coworkers have been held not to be qualified individuals (even when the behavior was undisputedly the result of an impairment) because they could not perform the essential functions of the position.[64]

Though regulatory and judicial guidance exist regarding "essential functions," courts often disagree on what essential functions are and what amount of evidence proves a function is nonessential. By noting that the plaintiff bears the burden of proving that she is a qualified individual, the Fifth Circuit appears to place the burden on the employee to prove that disputed functions are nonessential.[65] By contrast, if the employer disputes that the plaintiff can perform the essential functions of the job, the Eighth Circuit places the burden on the employer to produce evidence establishing the essential functions.[66] As the Eighth Circuit noted, "much of the information which determines those essential functions lies uniquely with the employer."[67] The Eighth

60. Emerson v. N. States Power Co., 256 F.3d 506, 513–14 (7th Cir. 2001) (quoting 42 U.S.C. § 12111(3) (2006)); *see also* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 86 (2002) (describing the "direct threat" defense in detail).

61. *Chandler*, 2 F.3d at 1394.

62. *Id.* at 1393; *accord Emerson*, 256 F.3d at 512 ("[A] marginal duty is not an essential function.").

63. Kammueller v. Loomis, Fargo & Co., 383 F.3d 779, 786 (8th Cir. 2004) (quoting Alexander v. Northland Inn, 321 F.3d 723, 727 (8th Cir. 2003)).

64. *See* Ray v. Kroger Co., 264 F. Supp. 2d 1221, 1228 (S.D. Ga. 2003) (holding that an employer did not violate the ADA by firing an employee with Tourette's syndrome after an outburst of inappropriate language in front of customers); Palmer v. Circuit Court of Cook County, Soc. Serv. Dep't, 905 F. Supp 499, 508 (N.D. Ill. 1995) ("Courts have consistently held that one who displays abusive and threatening conduct towards co-workers is not an otherwise 'qualified individual.'"), *aff'd*, 117 F.3d 351 (7th Cir. 1997).

65. *See Chandler*, 2 F.3d at 1394 (noting that "the burden lies with the plaintiff to show that he is otherwise qualified," and that here plaintiffs did not contest that driving was an essential job function).

66. Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995).

67. *Id.*

Circuit "generally give[s] deference to the employer's judgment of essential job functions."[68] The same opinion goes on to state that "[t]he employer's judgment, however, although highly probative, is merely evidence and is not conclusive."[69] The court listed other evidence to be considered in determining whether particular job functions are essential; the employer's judgment is just one of five types of evidence listed.[70] Overall, there is a strong judicial trend toward noninterference in determining what constitute the essential duties of a job.[71]

D. Reasonable Accommodations

Similarly, despite a wealth of judicial, academic, and regulatory guidance regarding reasonable accommodations, the case law is clearer on what is *not* a reasonable accommodation than what *is*. Rather than attempting to define "reasonable accommodation," the statute provides examples of what "[t]he term 'reasonable accommodation' may include."[72] The list includes changes to existing facilities to make them "readily accessible," altered work structures, assistive devices, changes to existing policies or training materials, and the provision of interpreters or readers.[73] However, the statute gives litigants wide latitude to debate what constitutes a reasonable accommodation by closing the list with "other similar accommodations."[74] Given this language and the lack of clear regulatory guidance, "courts have struggled to give content to the terms reasonable accommodation and undue hardship."[75]

---

68. *Kammueller*, 383 F.3d at 786. Equal Employment Opportunity Commission (EEOC) regulations do not require the courts to give any deference or extra weight to the employer's judgment. *E.g.*, 29 C.F.R. § 1630.2(n)(3)(i) (2006). In light of the lack of deference courts have traditionally accorded to EEOC regulations, this suggests that the judiciary may develop further requirements *sua sponte* in ADA cases in the future. *See* Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 533 (2000) ("The EEOC, however, has historically been given short shrift by litigants and by the judiciary. It is the courts, not the agency, that have given meaning to . . . employment discrimination statutes." (footnote omitted)).

69. *Kammueller*, 383 F.3d at 786.

70. *Id.* (quoting Heaser v. Toro Co., 247 F.3d 826, 831 (8th Cir. 2001)). The remaining items are taken directly from regulations promulgated by the EEOC. 29 C.F.R. § 1630.2(n)(3) (2006).

71. *See* Michel Lee, *Searching for Patterns and Anomalies in the ADA Employment Constellation: Who Is a Qualified Individual with a Disability and What Accommodations Are Courts* Really *Demanding?*, 13 LAB. LAW. 149, 170–72 (1997) (citing cases demonstrating the trend of judicial noninterference).

72. 42 U.S.C. § 12111(9) (2006).

73. *Id.*

74. 42 U.S.C. § 12111(9)(B) (2006).

75. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 136 (2d Cir. 1995). "Undue

Two leading decisions hold that a cost–benefit test should be used to determine whether a proposed accommodation is reasonable.[76] In one case, the plaintiff argued that a "reasonable" accommodation was one that was "tailored to the particular individual's disability."[77] She interpreted the reasonable accommodation inquiry to exclude cost considerations, which she argued were relevant only to the employer's affirmative defense of undue hardship.[78] Judge Posner rejected this argument.[79] Noting that an "inefficacious change would not be an accommodation of the disability at all," he likened the reasonable accommodation inquiry to Judge Learned Hand's formulation for reasonable care.[80] Judge Posner concluded that "[t]he employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs."[81] Upon such a showing, "the employer has an opportunity to prove that . . . the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health."[82] Given that Judge Posner articulated a possible definition of undue hardship later in the opinion,[83] this opportunity seems to be part of the reasonable accommodation inquiry itself.

Judge Calabresi took a similar approach. He noted that "'[r]easonable' is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce. This requires an inquiry not only into the benefits of the accommodation but into its costs as well."[84] He concluded that "an accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it

---

hardship" is an affirmative defense to discrimination under the ADA. 42 U.S.C. §§ 12111(10), 12112(b)(5)(A) (2006). It is discussed here because courts frequently analyze the terms together.

76. *Borkowski*, 63 F.3d at 138 & n.3; Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542–43 (7th Cir. 1995).

77. *Vande Zande*, 44 F.3d at 542.

78. *Id.* Though the statutory definition of "reasonable accommodation" is ambiguous, some of the ADA's drafters assert that it was intended to mean "one that would *effectively* allow a person with a disability to perform a job or benefit from a service." Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159, 177 (2002).

79. *Vande Zande*, 44 F.3d at 542. The Supreme Court also rejected this argument in a later case. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 399–401 (2002).

80. *Vande Zande*, 44 F.3d at 542; *see* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 31–32 (1996) (describing Judge Posner's reasoning and its value in the accommodation context).

81. *Vande Zande*, 44 F.3d at 543.

82. *Id.*

83. *Id.* (citing Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir. 1993)).

84. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995).

will produce."[85] He described the plaintiff's burden as a burden of production, requiring only that the plaintiff "suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits."[86] Noting that the defendant then bears the risk of nonpersuasion on the issue of reasonable accommodation, Judge Calabresi described the relationship between reasonable accommodation and the undue hardship defense:

> [T]he defendant's burden of persuading the factfinder that the plaintiff's proposed accommodation is unreasonable merges . . . with its burden of showing, as an affirmative defense, that the proposed accommodation would cause it to suffer an undue hardship. For in practice meeting the burden of nonpersuasion on the reasonableness of the accommodation and demonstrating that the accommodation imposes an undue hardship amount to the same thing.[87]

These opinions raise two important points. First, while each opinion defines reasonable accommodation slightly differently, both recognize that the accommodation requirement under the ADA is different than the accommodation requirement for religion under Title VII.[88] This is significant because employers must expend only minimal amounts to make accommodations for religious purposes.[89] Next, the circuits' decisions still conflict regarding the allocation of burdens between parties on the reasonable accommodation and undue hardship inquiries.[90] The fact that such a split has existed for so many years illustrates the challenges reasonable accommodations issues present to courts.[91]

---

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.* at 138 n.3 ("Congress fully expected . . . employers to assume more than a *de minimis* cost."); *Vande Zande*, 44 F.3d at 542 (noting that the meaning of reasonable accommodation is "arguably different" under Title VII); *see also* Prewitt v. U.S. Postal Serv., 662 F.2d 292, 308 n.22 (5th Cir. 1981) (discussing why congressional intent in requiring accommodations under the Rehab Act made precedent regarding accommodations for religious purposes under Title VII inapposite); Eric Wade Richardson, *Who Is a Qualified Individual with a Disability Under the Americans with Disabilities Act*, 64 U. CIN. L. REV. 189, 195–96 (1995) (noting that Congress rejected the Title VII *de minimis* standard in defining undue hardship under the ADA).

89. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) ("To require [an employer] to bear more than a *de minimis* cost to [accommodate religious beliefs] is an undue hardship."). *But see* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2002) (stating that *Trans World*'s holding was that "an employer need not adapt to an employee's special worship schedule as a 'reasonable accommodation' where doing so would conflict with the seniority rights of other employees"). For a description of *U.S. Airways, Inc. v. Barnett*, see *infra* text accompanying notes 181–92.

90. *Borkowski*, 63 F.3d at 136–38 (discussing the circuits' approaches).

91. *Cf.* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1578–79 (2008)

Though the opinions emphasize a case-by-case approach,[92] general principles have emerged. Elimination of essential job requirements is not a reasonable accommodation.[93] While the statute provides for job restructuring, attendance is an essential requirement for almost every job[94] and employers are generally not required to allow indefinite leaves[95] or work from home[96] in order to accommodate employees. Moreover, as long as the employer provides a reasonable accommodation, it need not be the accommodation the employee proposes or prefers.[97]

The statute and regulations both provide that "reassignment to a vacant position" may also be a reasonable accommodation.[98] The position must be vacant and the employee requesting the accommodation must be otherwise qualified for the position.[99] In addition, the employer need not create a new position or displace existing employees to provide a reassignment.[100] Nor is the employer required to promote the employee to provide an accommodation.[101] However, if a reasonable accommodation cannot be identified to keep the employee in her current position and there is a vacant position that the employee is otherwise qualified for, she has a right to the transfer (not merely a right to compete with other applicants).[102]

("The courts of appeals are generally hesitant to depart from precedent set in other jurisdictions . . . .").

92. *E.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) (observing that "Congress intended the existence of a disability to be determined" on a case-by-case basis), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

93. *E.g.*, Schwertfager v. City of Boynton Beach, 42 F. Supp. 2d 1347, 1365 (S.D. Fla. 1999) ("Under the ADA, employers are not required to eliminate essential functions of the job.").

94. *See* Paleologos v. Rehab Consultants, Inc., 990 F. Supp. 1460, 1467 (N.D. Ga. 1998) ("[T]he most essential function of any job . . . is attendance at work . . . .").

95. *See* Peter v. Lincoln Technical Inst., Inc., 255 F. Supp. 2d 417, 438 n.7 (E.D. Pa. 2002) ("[M]any courts have found that a request for indefinite leave is inherently unreasonable, particularly where there is no favorable prognosis.").

96. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995). *But see* John E. Matejkovic & Margaret E. Matejkovic, *What Is Reasonable Accommodation Under the ADA?: Not an Easy Answer; Rather a Plethora of Questions*, 28 MISS. C. L. REV. 67, 84 (2009) (noting that some circuits have held that employers must consider working at home as an accommodation).

97. Cravens v. Blue Cross & Blue Shield of Kan. City, 214 F.3d 1011, 1019 (8th Cir. 2000); Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996).

98. 42 U.S.C. § 12111(9)(B) (2006); 29 C.F.R. § 1630.2(o)(2)(ii) (2006).

99. Willis v. Conopco, Inc., 108 F.3d 282, 284 (11th Cir. 1997).

100. *Gile*, 95 F.3d at 499.

101. Malabarba v. Chi. Tribune Co., 149 F.3d 690, 699 (7th Cir. 1998).

102. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1166–67 (10th Cir. 1999). *But see* Equal Employment Opportunity Comm'n v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028–29 (7th Cir. 2000) (holding that reassignment was not a reasonable accommodation where the employer had a policy of hiring the best candidate for the position and the plaintiff was not the best candidate).

E. Unlawful Discrimination

The plaintiff must also prove unlawful discrimination.[103] As originally drafted, the statute began by stating that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability."[104] Although there are seven distinct types of conduct that constitute discrimination under the ADA,[105] this Comment focuses on the requirement to provide reasonable accommodations. The ADA makes the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual" unlawful discrimination.[106] Claims for failure to accommodate account for nearly a third of all discrimination charges under the ADA filed with the Equal Employment Opportunity Commission (EEOC),[107] making them second only to discharge claims.[108] Many plaintiffs have not been able to reach this stage of the analysis.[109]

The reasonable accommodation issues described above as part of the "qualified individual" analysis are also important here. If an employer can demonstrate that an accommodation would constitute an undue hardship, the failure to accommodate does not constitute discrimination.[110] Other issues also arise from failure to accommodate claims. For example, the employer must only accommodate known limitations.[111] The employer's knowledge is thus relevant to a failure to accommodate claim.[112] Also, the employee must usually trigger the duty to accommodate

---

103. *E.g.*, Zwygart v. Bd. of County Comm'rs, 483 F.3d 1086, 1090 (10th Cir. 2007).

104. 42 U.S.C. § 12112(a) (2006) (amended 2008).

105. 42 U.S.C. § 12112(b) (2006).

106. 42 U.S.C. § 12112(b)(5)(A) (2006). Discriminatory conduct includes denying employment opportunities to incumbent employees or applicants based on the need to make such an accommodation, but this type of discriminatory conduct is not addressed at length here. 42 U.S.C. § 12112(b)(5)(B) (2006).

107. Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 919 (2001); *see also* EEOC, FY 2005 Annual Report on the Operations and Accomplishments of the Office of the General Counsel, http://archive.eeoc.gov/litigation/05annrpt/index.html (last visited Mar. 5, 2010) (noting that reasonable accommodations issues accounted for just under 26% of the EEOC's ADA litigation caseload in fiscal year 2005).

108. Acemoglu & Angrist, *supra* note 107, at 919.

109. *2008 Hearings*, *supra* note 1 (prepared statement of Samuel R. Bagenstos, Professor) ("[F]ar too many ADA cases have been thrown out of court at the threshold 'disability' stage . . . .").

110. 42 U.S.C. § 12112(b)(5)(A) (2006); *see also supra* note 75 and accompanying text (describing undue hardship).

111. 42 U.S.C. § 12112(b)(5)(A) (2006).

112. *See* Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 163 (5th Cir. 1996) ("To prove discrimination, an employee must show that the employer knew of [the] employee's substantial physical or mental limitation.").

by requesting an accommodation.[113] The employee need not use any specific language to do so; the employee or a representative (including family members or medical professionals) may inform the employer of the problem and the need for an accommodation.[114]

F. The Interactive Process

Once the employee requests an accommodation, the regulations note that "it may be necessary for the [employer] to initiate an informal, interactive process" to determine the employee's limitations and identify accommodations.[115] Some courts refer to this process as an "obligation"[116] or claim that "[t]he ADA requires" it,[117] but it is not, in fact, a requirement. The language in the regulations is permissive, using "may" rather than "must."[118] There is also a circuit split as to whether the interactive process is required.[119] Even among circuits that require the interactive process, there is disagreement as to the scope of the employer's obligation,[120] perhaps due to the lack of deference the courts generally give EEOC regulations.[121]

IV. SUPREME COURT PRECEDENT

> *Let me be clear: when I was fired, I was told flat out that it was because I had diabetes.*
>
> *. . . However, the U.S. District Court granted summary judgment against me . . . . [In affirming, t]he appeals court*

113. Cutrera v. Bd. of Supervisors of La. State Univ., 429 F.3d 108, 112 (5th Cir. 2005) (quoting 29 C.F.R. pt. 1630 app. § 1630.9 (1995)).

114. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 313 (3d Cir. 1999); *see also* Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1286 (7th Cir. 1996) (holding that a doctor's letter sufficiently notified an employer of the need to accommodate).

115. 29 C.F.R. § 1630.2(o)(3) (2006).

116. *Cutrera*, 429 F.3d at 112.

117. Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 633 (7th Cir. 1998).

118. 29 C.F.R. § 1630.2(o)(3) (2006).

119. *See* Alysa M. Barancik, Comment, *Determining Reasonable Accommodations Under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process*,*"* 30 LOY. U. CHI. L.J. 513, 527–29 (1999).

120. *Compare* Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996) (suggesting that an employer may bear the burden to initiate the interactive process "if it appears that the employee may need an accommodation but doesn't know how to ask for it"), *with* Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996) (stating that "[w]here the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer," the employee bears the initial burden of identifying the disability and limitations as well as suggesting an accommodation).

121. *See* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 54–56 (noting a split among courts as to how much deference to accord EEOC regulations).

> *said that because of Supreme Court decisions narrowing the Federal law, I was not considered "disabled" under the act—for the sole reason that my diabetes is under such good control.*[122]

A. Rehab Act Precedent

Judicial interpretations of the Rehab Act have often provided interpretive guidance for ADA claims.[123] Congress later expressed that in passing the ADA it intended for courts to interpret the definition of "disability" in the ADA consistently with that in the Rehab Act.[124] While commentators have noted that reliance on Rehab Act precedent may be inappropriate,[125] courts have frequently done so.[126] As a result, a brief review of Supreme Court precedent under the Rehab Act is instructive.

In an early decision, the Court upheld a training institution's decision to exclude a hearing-impaired individual from a nursing program, noting that the Rehab Act "by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate."[127] Despite the plaintiff's ability to lip-read, the Court found that the school's decision was based on a "reasonable physical qualification[ ]" and expressed concern that to hold otherwise would be to require the school to lower its standards.[128] As a result, the plaintiff was not a qualified individual.[129] This holding presaged some of the difficulties other courts have had finding the dividing line for reasonable accommodations under the ADA.

---

122. *Restoring Congressional Intent and Protections Under the Americans with Disabilities Act: Hearing of the S. Comm. on Health, Education, Labor & Pensions*, 110th Cong. 21, 22 (2007) [hereinafter *2007 Hearings*] (prepared statement of Stephen Orr, plaintiff, Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002)).

123. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 193 (2002) (observing that the Rehab Act is one of two "sources of guidance" for interpreting the terms of the ADA), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

124. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553 (to be codified at 42 U.S.C. § 12101).

125. *See* Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201, 206 (1993).

126. *E.g.*, Shah v. Upjohn Co., 922 F. Supp. 15, 24 n.13 (W.D. Mich. 1995).

127. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 405 (1979); *see also* Selmi, *supra* note 19, at 535–38 (describing Rehab Act precedent).

128. *Davis*, 442 U.S. at 401, 413–14.

129. *Id.* at 406–07.

A subsequent case challenged a state's imposition of a limit on hospital stays under Medicaid as disparately impacting the disabled.[130] While the Court conceded that the Rehab Act might reach some disparate impact claims, it noted that the Rehab Act did not guarantee the disabled equal results.[131] Ultimately, the Court held that the state did not need to change the limit "simply to meet the reality that the handicapped have greater medical needs."[132] The Court identified "two powerful but countervailing considerations [in cases under the Rehab Act]—the need to give effect to the statutory objectives and the desire to keep [the Act] within manageable bounds."[133] The Court's reasoning foreshadowed decisions in modern ADA cases.

A key decision issued just prior to the ADA's passage gave advocates hope that the Court was ready to support an expansive definition of disability.[134] In *School Board of Nassau County v. Arline*, the Court had to determine whether a teacher who had experienced multiple relapses of tuberculosis was a handicapped individual.[135] The Court found that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of [the statute], which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."[136] Most significantly, the Court noted that by crafting a statute that protected individuals "regarded as" having an impairment, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[137] Though *Arline*'s holding was in the context of the "regarded as" prong, the Court has used similar language to describe congressional intent in determining whether accommodations are "reasonable" under the ADA.[138] This ruling may have given disability advocates the impression that the Court was receptive

130. Alexander v. Choate, 469 U.S. 287, 289–90 (1985).

131. *Id.* at 299, 304.

132. *Id.* at 303.

133. *Id.* at 299.

134. *See* Selmi, *supra* note 19, at 537 (noting that the case "may have appeared to have been the equivalent of a judicial home run").

135. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 276–77 (1987).

136. *Id.* at 284.

137. *Id.*

138. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401 (2002) ("The [ADA] seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in . . . the workplace.").

to a broader definition of disability, despite earlier problematic interpretations.[139]

B. ADA Precedent

Given the tensions between Congress and the Supreme Court at the time the ADA was passed, how the Court would interpret the ADA was an issue of concern.[140] Several early decisions implied that the Court would be receptive to ADA claims. In *Bragdon v. Abbott*, an HIV-positive plaintiff sued her dentist after he refused to fill her cavity in his office.[141] Though HIV was not contained in the list of conditions constituting an impairment in the regulations,[142] the Court determined that HIV was an impairment.[143] Next, the Court held that "reproduction is a major life activity for the purposes of the ADA,"[144] satisfying the second of the three requirements under the actual disability prong.[145] Finally, in rejecting the defendant's contention that plaintiff was not substantially limited because treatment was available, the Court noted that "[t]he Act addresses substantial limitations on major life activities, not utter inabilities."[146] Because the limitation need not be "insurmountable" to be substantial, the plaintiff qualified as disabled.[147]

In another promising decision the following year, the Court held that claiming disability benefits under Social Security did not estop plaintiffs from bringing ADA claims.[148] The plaintiff must only explain why her claim for disability benefits is consistent with her claim that she can perform the essential functions of her job (at least with an accommodation).[149]

---

139. *See* Feldblum, *supra* note 17, at 119–20 (observing that *Arline* "failed adequately to warn" of a need to tailor the ADA's language more carefully to achieve broad coverage).

140. *See* Selmi, *supra* note 19, at 540–41 ("[W]hile the Supreme Court appeared to be in a hostile mood towards civil rights . . . [t]he Congress that passed the ADA was among the most prolific in our nation's history when it came to Civil Rights legislation . . . .").

141. Bragdon v. Abbott, 524 U.S. 624, 628–29 (1998).

142. *Id.* at 633.

143. *Id.* at 637.

144. *Id.* at 639–40.

145. *See supra* text accompanying notes 51–52 (describing the elements of a successful claim under the "actual disability" prong).

146. *Bragdon*, 524 U.S. at 640–41. This decision also set forth the tripartite test for determining whether a disability under the first prong exists. *Id.* at 631; *see supra* text accompanying note 52 (listing the *Bragdon* elements for establishing the "actual disability" prong).

147. *Bragdon*, 524 U.S. at 641.

148. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 797 (1999).

149. *Id.* at 798.

Months later, though, the Supreme Court delivered a trio of cases that shaped the ADA for years to come (referred to as the "*Sutton* trilogy").[150] In the first of this trio, *Sutton v. United Air Lines*, two severely myopic plaintiffs whose vision was corrected with glasses sued when denied employment due to a requirement of uncorrected visual acuity.[151] Both the EEOC and the Department of Justice (DOJ) regulations directed that the "determination of whether an individual is substantially limited in a major life activity must be made . . . without regard to mitigating measures."[152] While the statute was silent on this issue, the administrative agencies' interpretation was consistent with the legislative history.[153]

The majority held that this was "an impermissible interpretation of the ADA."[154] The effects of any mitigating measures that the employee took to alleviate or correct the impairment had to be taken into account in determining whether she was disabled.[155] Though the plaintiffs were impaired, the Court found no substantial limitation because their vision was fully corrected by glasses.[156] The Court extended the *Sutton* ruling in another trilogy case to include all corrective "measures undertaken, whether consciously or not, [by] the body's own systems" as mitigating measures.[157] The Court attempted to limit the scope of these rulings by noting that an individual using mitigating measures could still be found disabled under the first prong, as long as the "limitations [she] . . . *actually* faces are in

---

150. Feldblum, Barry & Benfer, *supra* note 13, at 192–93. The three cases are *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521–22 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

151. *Sutton*, 527 U.S. at 475–76.

152. *Id.* at 480 (quoting 29 C.F.R. pt. 1630 app. § 1630.2(j) (1998) (amended 2000)).

153. *See* S. REP. NO. 101-116, at 23 (1989) ("[W]hether a person has a disability should be assessed without regard to the availability of mitigating measures . . . ."). *But see* Alex B. Long, *"If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 513–14 (2006) ("[S]ome have questioned whether the legislative history is as clear as is often claimed.").

154. *Sutton*, 527 U.S. at 482. The majority's reading of the statute's language led it to conclude that there was "no reason to consider the ADA's legislative history." *Id.*

155. *Id.*

156. *Id.* at 488–89. Because this case centered on corrective lenses, the Court was in the unenviable position of either drastically limiting the ADA's coverage or extending it to anyone who wore corrective lenses. *See* Selmi, *supra* note 19, at 548–52 (discussing *Sutton*'s policy implications).

157. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565–66 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

fact substantially limiting."[158] Justice O'Connor, writing for the majority in *Sutton*, argued that this approach had the benefit of allowing courts to consider the negative side effects of medication in the disability determination.[159]

Sutton's impact was not limited to plaintiffs with actual disabilities. Because the *Sutton* plaintiffs claimed that they had been discriminated against because the employer regarded them as disabled, the Court addressed the "regarded as" prong.[160] The Court held that the plaintiffs had not proven that the employer regarded them as substantially limited in a major life activity.[161] In doing so, the Court interpreted the statutory language to require not only that the employer "entertain misperceptions about the individual,"[162] but also that the employer perceive the plaintiff as substantially limited in a major life activity.[163] Moreover, "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs."[164] This holding was reiterated in another trilogy case, where the Court held that "a person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities."[165] The importation of this requirement created an "essentially insurmountable" barrier to plaintiffs seeking to establish a disability under the "regarded as" prong of the ADA's definition of disability.[166]

Though these are the key aspects of the *Sutton* trilogy, several other issues are worth noting. First, the Court questioned the agencies' regulatory authority to define "disability" under the

158. *Sutton*, 527 U.S. at 488.

159. *Id.* at 484.

160. *Id.* at 489; *see* 42 U.S.C. § 12102(2)(C) (2006) (current version at 42 U.S.C.A. § 12102(1)(C) (West Supp. 2009)) (defining disability as "being regarded as having such an impairment").

161. *Sutton*, 527 U.S. at 491.

162. *Id.* at 489.

163. *Id.* at 490–91.

164. *Id.* at 491. The EEOC had already adopted this interpretation. Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,734 (July 6, 1991) (codified at 29 C.F. R. § 1630.2(j)(3) (2006)). This is often referred to as the "single job rule." Long, *supra* note 14, at 226–27 (discussing the current impact and future applicability of the "single job rule").

165. Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521–22 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

166. Feldblum, Barry & Benfer, *supra* note 13, at 213–14 ("The Court's approach require[d] that an individual essentially both divine and prove an employer's subjective state of mind.").

ADA.[167] Second, the Court questioned whether "working" was a major life activity within the meaning of the ADA.[168] These issues became familiar questions in ADA jurisprudence.

Three years after *Sutton*, the Court decided another key ADA case. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, a plaintiff with carpal tunnel syndrome sued her employer, alleging that the employer failed to accommodate her medical condition.[169] The Court granted certiorari "to consider the proper standard for assessing whether an individual is substantially limited in performing manual tasks,"[170] but the opinion was in fact much broader. The Court again questioned the EEOC's regulatory authority[171] and expressed a reluctance to hold that "working could be a major life activity."[172] These issues remained unresolved.

The Court stated that the definition of disability needed "to be interpreted strictly to create a demanding standard for qualifying as disabled."[173] The Court based this holding in part on the legislative findings in the ADA, which noted that "some 43,000,000 Americans have one or more physical or mental disabilities."[174] The Court reasoned that the number would have been much higher if Congress had intended individuals with any disability, whatever their severity, to be protected by the ADA.[175]

More specifically, the Court held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[176] This effectively defined major life activities

---

167. *Sutton*, 527 U.S. at 479; *see also* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563 n.10 (1999) ("[W]e assume, without deciding, that [EEOC] regulations are valid."); *Murphy*, 527 U.S. at 523 (declining to address the validity of EEOC regulations), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

168. *Sutton*, 527 U.S. at 492.

169. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 187 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

170. *Id.* at 192.

171. *Id.* at 194.

172. *Id.* at 200.

173. *Id.* at 196–97.

174. *Id.* at 197 (quoting 42 U.S.C. § 12101(a)(1) (2000)).

175. *Id.* The Court used the same reasoning in *Sutton*. Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The source of this figure was unclear even then. *See* Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1305 (2000) (observing that the *Sutton* majority "[c]onced[ed] that the source for the number remained unclear").

176. *Toyota*, 534 U.S. at 198.

as those "of central importance to daily life."[177] It also defined "substantial limitation" to mean that an impairment must prevent or severely restrict the individual in a major life activity.[178] Finally, the Court noted that "[t]he impairment's impact must also be permanent or long term."[179] The impact of *Sutton* and *Toyota* cannot be overstated. One scholar notes that even if the 43 million figure in the legislative findings were accurate, far fewer individuals were likely to be protected by the ADA due to the Court's "parsimonious" decisions.[180]

In its last significant pre-ADAAA Title I case, *U.S. Airways, Inc. v. Barnett*, the Court decided whether a job transfer was a reasonable accommodation when an employer's neutral seniority policy would ordinarily award the position to another employee.[181] The Court held that "to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that [it] is not 'reasonable.' . . . [But t]he plaintiff remains free to present evidence of special circumstances that make 'reasonable' a seniority rule exception in the particular case."[182] Though the Court ostensibly rejected the defendant's contention that accommodations that interfere with neutral rules are per se unreasonable,[183] its ruling appears to require the employee to prove that such accommodations do not cause the employer hardship under the circumstances.[184] One scholar suggests that the decision has created a "neutral policy" defense for employers.[185] A broad reading of *Barnett* suggests that an accommodation that interferes with a neutral company policy is not generally reasonable absent special circumstances above and beyond the plaintiff's disability.[186] Such a reading could make it much more difficult

177. *Id.* at 197.

178. *Id.* at 195–96. At the time, the EEOC regulations defined "[s]ubstantially limits" as "[u]nable to perform . . . or . . . [s]ignificantly restricted" in performing a major life activity compared to an average person. 29 C.F.R. § 1630.2(j)(1) (2006).

179. *Toyota*, 534 U.S. at 198.

180. Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 LAB. LAW. 417, 442 (2003).

181. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 393–94 (2002).

182. *Id.* at 394.

183. *Id.* at 398.

184. *See* Cheryl L. Anderson, *"Neutral" Employer Policies and the ADA: The Implications of* US Airways, Inc. v. Barnett *Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 28 (2002) ("[T]he Court's ruling [in *Barnett*] in effect changes 'undue hardship' into 'hardship' and requires the employee to prove its absence.").

185. *Id.* at 35–36.

186. *See id.* ("An accommodation is not 'reasonable on its face . . . in the run of cases' when it requires modification of neutral company policies on transfer, etcetera, unless there are special circumstances that warrant modification." (footnote omitted) (quoting *Barnett*, 535 U.S. at 401)).

for employees to obtain a variety of accommodations, not just transfers.[187]

In deciding *Barnett*, the Court provided guidance on the issue of reasonable accommodations.[188] The plaintiff argued that "reasonable" meant no more than "effective,"[189] because the importation of economic factors into the reasonable accommodation inquiry would make it a "virtual mirror image[ ]" of the undue hardship defense.[190] The Court rejected this argument, holding that to defeat summary judgment the plaintiff must present a facially reasonable accommodation that would be reasonable in "the run of the cases."[191] The employer must then demonstrate "special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."[192] The opinion does not further define plausibility or feasibility.

V. CHANGING THE ADA: THE ADA AMENDMENTS ACT OF 2008

> *Now if the Fifth Circuit was right that my problem is with the Supreme Court's bad reading of your good law, then you are the ones who can do something about those interpretations of the ADA. For the sake of people with disabilities like me who want to work but are discriminated against, I hope you will.*[193]

Members of Congress publicly voiced a desire to amend the ADA following the Supreme Court's decision in *Toyota*.[194] There was a "concurrence that the Supreme Court had gone 'too far.'"[195] Disability advocates had been considering solutions for the

---

187. *See id.* at 36 (noting that a broad reading of *Barnett* may make it more difficult for employees to obtain reassignments, "modification of work schedules, [and] job restructuring"). At present, there is only a limited amount of precedent supporting this. *Id.*; *see, e.g.*, Office of the Architect of the Capitol v. Office of Compliance, 361 F.3d 633, 642 (Fed. Cir. 2004) (wage grade classification system); Mays v. Principi, 301 F.3d 866, 872 (7th Cir. 2002) (neutral hiring practices).

188. *Barnett*, 535 U.S. at 399–402.

189. *Id.* at 399.

190. *Id.* at 399–400.

191. *Id.* at 401–02.

192. *Id.* at 402. The Court's opinion does not mention the burdens of production or persuasion issues discussed in *Borkowski* and other decisions. *Supra* text accompanying note 90.

193. *2008 Hearings*, *supra* note 1 (prepared statement of Carey L. McClure).

194. *See, e.g.*, Steny H. Hoyer, *Not Exactly What We Intended, Justice O'Connor*, WASH. POST, Jan. 20, 2002, at B1.

195. *Hot Topic: The ADA Amendments Act of 2008* (American Bar Association Center for Continuing Legal Education broadcast Oct. 29, 2008) [hereinafter *ABA Hot Topic*] (statement of Lawrence Lorber, Partner, Proskauer Rose).

mitigating measures issue since *Sutton*, and the decision in *Toyota* cemented their resolve.[196] Critics had long objected that plaintiffs were caught in a bizarre catch-22 under *Sutton*: "Only severely limited individuals may establish that they are disabled under the Act, and if they succeed, their limitations are likely to render them unqualified for the positions they seek."[197] The fact that "only prisoner rights cases fare[d] as poorly"[198] as ADA claims and that defendants prevailed on nearly 95% of ADA claims illustrated a need for change.[199]

A. From the ADA Restoration Act to the ADAAA

Though a draft version of the ADA Restoration Act (ADARA)[200] was introduced to Congress in late 2006, it was not passed and had to be reintroduced in 2007.[201] As reintroduced, the bill had support in the House and largely corresponded to a draft developed by the disability community.[202] Three separate congressional hearings were held.[203] Though many of those who testified were supportive of the bill,[204] the business community had two main concerns.[205] First, because the bill defined a disability as an "impairment" (removing the "substantially limits" and "major life activity" language), business advocates predicted that it "would unquestionably expand ADA coverage to encompass almost any physical or mental impairment."[206] Employers feared that removing this language would cover up to 95% of the workforce.[207] Second, the business community expressed concern that the "qualified individual" requirement would become an affirmative defense rather than part of the plaintiff's case.[208] The DOJ also opposed the bill.[209] Given this

196. Feldblum, Barry & Benfer, *supra* note 13, at 193–95.

197. Craver, *supra* note 180, at 450.

198. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999).

199. *Id.* at 108.

200. ADA Restoration Act of 2007, H.R. 3195, 110th Cong.

201. Feldblum, Barry & Benfer, *supra* note 13, at 197–98.

202. *Id.*

203. *Id.* at 198–99.

204. *See, e.g.*, *2007 Hearings*, *supra* note 122, at 5–6, 19–20 (testimony of Jack D. Kemp and Stephen C. Orr) (testifying in support of the ADARA).

205. *ABA Hot Topic*, *supra* note 195 (statement of Lawrence Lorber).

206. *2007 Hearings*, *supra* note 122, at 25 (prepared statement of Camille A. Olson).

207. *ABA Hot Topic*, *supra* note 195 (statement of Lawrence Lorber).

208. *Id.*

209. *See* Letter from Brian A. Benckowski, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to the Hon. George Miller, Chairman, Comm. on Educ. & Labor, U.S. House of Representatives (Jan. 28, 2008) ("[W]e believe that the proposed bill goes

impasse, the bill's sponsors asked the two groups to negotiate.[210]

The disability and business communities began the process with an agreement that both would support the bill if they could agree on compromise language.[211] The groups conducted a meticulous, case-by-case review in drafting the ADAAA.[212] After further hearings, a revised version of the ADAAA was introduced in July.[213] By mid-September, both the Senate and the House had passed the bill.[214] On September 25, 2008, just over eighteen years after President George H.W. Bush signed the ADA, President George W. Bush signed the ADAAA into law.[215]

B. What the ADAAA Changed

The provisions of the ADAAA took effect January 1, 2009, and aim to address many of the problems surrounding the definition of disability.[216] The ADAAA's passage rebuts speculation that the Court's rulings were in fact consistent with congressional intent[217] and reaffirms Congress's commitment to the disability community. The ADAAA overrules both the *Sutton*

---

too far and unnecessarily broadens the scope of ADA protections far beyond . . . what could fairly be termed its 'restoration.'").

210. Feldblum, Barry & Benfer, *supra* note 13, at 229.

211. *Id.* at 229–30.

212. *See generally ABA Hot Topic*, *supra* note 195 (statement of Chai R. Feldblum) (discussing the various changes later made to the ADAAA in response to court decisions).

213. Feldblum, Barry & Benfer, *supra* note 13, at 239.

214. *Id.* at 239–40.

215. *Id.*

216. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a), 122 Stat. 3553, 3553 (to be codified at 42 U.S.C. § 12101) (describing the problems Congress intended to address with the passage of the ADAAA). Though plaintiffs have argued for retroactive application of the ADAAA, every circuit court that has reached this issue has concluded that the ADAAA applies prospectively only, at least in cases involving damages. *See* Becerril v. Pima County Assessor's Office, 587 F.3d 1162, 1164 (9th Cir. 2009) (per curiam); Cody v. County of Nassau, 345 Fed. App'x 717, 720 (2d Cir. 2009); Fredericksen v. United Parcel Serv., Co. 581 F.3d 516, 521 n.1 (7th Cir. 2009); Lytes v. DC Water & Sewer Auth., 572 F.3d 936, 939–40 (D.C. Cir. 2009); Milholland v. Sumner County Bd. Of Educ., 569 F.3d 562, 565–67 (6th Cir. 2009); Equal Employment Opportunity Comm'n v. Agro Distribution, LLC, 555 F.3d 462, 470 n.8 (5th Cir. 2009); Philip A. Kilgore & John T. Merrell, *Redefining "Disabled": The ADA Amendments Act of 2008*, S.C. LAW., July 2009, at 24, 29 ("Assuming other courts follow this lead, the ADA Amendments should apply only in cases where the actions giving rise to the plaintiffs' claims occurred on or after January 1, 2009."); *see also* Jenkins v. Nat'l Bd. of Med. Exam'rs, No. 08-5371, 2009 WL 331638, at *1–2 (6th Cir. Feb. 11, 2009) (holding that the ADAAA applies retroactively to cases pending at the time of its passage when plaintiffs seek exclusively prospective relief rather than damages).

217. *See, e.g.*, Selmi, *supra* note 19, at 567 ("Congress has not sought to overturn its decisions, so the Court's policy preferences have, for the time being, been solidified.").

trilogy and *Toyota* in important ways.[218] First, it rejects *Sutton*'s holding regarding mitigating measures.[219] With the exception of ordinary glasses or contact lenses, the effects of mitigating measures are not to be considered in determining whether an impairment substantially limits a major life activity.[220]

Next, the ADAAA redefines the "regarded as" prong of disability to allow such claims where plaintiffs have been subjected to discrimination "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."[221] This removes a significant barrier for plaintiffs.[222] Congress also resolved a circuit split as to whether individuals who are "regarded as" disabled must be provided with reasonable accommodations, answering in the negative.[223] These amendments are expected to place "regarded as" claims on par with discrimination claims on the basis of protected grounds under Title VII.[224]

The ADAAA also addresses *Toyota*'s "substantial limitation" holding. First, Congress noted in the bill's findings and purposes that it intended to "provide broad coverage."[225] It directs courts to interpret the term "substantially limits" consistently with those findings.[226] Next, it provides that "[t]he definition of disability in this Act shall be construed in favor of broad coverage."[227] Finally, the ADAAA makes clear that the *Toyota* standard for "substantially limits" requires an "inappropriately high level of limitation" and directs the EEOC to revise the regulation defining "substantially limits" to mean "significantly restricted," consistent with the ADAAA.[228]

---

218. ADA Amendments Act sec. 2(b)(2), (4), 122 Stat. at 3554 (specifying the holdings rejected by the ADAAA).

219. ADA Amendments Act sec. 2(b)(2), 122 Stat. at 3554.

220. ADA Amendments Act sec. 4(a), § 3(4)(E), 122 Stat. at 3556 (amending 42 U.S.C. § 12102(4)(E)(i)–(ii) (2006)).

221. ADA Amendments Act sec. 4(a), § 3(3), 122 Stat. at 3555 (amending 42 U.S.C. § 12102(3)(A) (2006)).

222. *See supra* text accompanying notes 160–66 (discussing the difficulty of proving that an employer regarded an employee as disabled within the meaning of the ADA).

223. ADA Amendments Act sec. 6(a), 122 Stat. at 3557–58 (amending 42 U.S.C. § 12201 (2006)); *see also* D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005) (discussing the split that was subsequently resolved by the ADAAA).

224. *See ABA Hot Topic*, *supra* note 195 (statements of Chai Feldblum, Gary Phelan, Lawrence Lorber, and Reed L. Russell) (discussing the future implications and hopes for the ADAAA).

225. ADA Amendments Act sec. 2(a)(1), 122 Stat. at 3553.

226. ADA Amendments Act sec. 4(a), § 3(4), 122 Stat. at 3555 (amending 42 U.S.C. § 12102(4)(B) (2006)).

227. *Id.* (amending 42 U.S.C. § 12102(4)(A) (2006)).

228. ADA Amendments Act sec. 2(b)(5)–(6), 122 Stat. at 3554.

The definition of "major life activities" was amended to provide a nonexhaustive list of activities that qualify as "major life activities."[229] Two changes bear noting. First, it includes "the operation of a major bodily function."[230] Prior to the ADAAA, plaintiffs with impairments that limited bodily functions had to prove that the impairment limited another activity.[231] Under the ADAAA, the plaintiff need only prove that the impairment substantially limits the bodily function.[232] The ADAAA also provides that an individual need only be substantially limited in a single major life activity in order to meet the definition of disability under the first prong.[233] This change responded to concerns that capable plaintiffs who were substantially limited in only one major life activity were not protected under the ADA.[234] Second, resolving the Court's question in *Toyota*,[235] the ADAAA defines working as a major life activity.[236] However, the ADAAA does not change the requirement that plaintiffs alleging a substantial limitation on their ability to work must prove that their ability to work in a broad range of jobs is substantially limited.[237]

There are other important changes as well. Chief among them is a clear grant of regulatory authority to the enforcement agencies, which extends to the definition of disability and rules of construction.[238] Language in the codified findings upon which courts relied in narrowing the scope of coverage has been removed.[239] The ADAAA amends the ADA to prohibit

---

229. ADA Amendments Act sec. 4(a), § 3(2)(A), 122 Stat. at 3555 (amending 42 U.S.C. § 12102(2)(A) (2006)).

230. ADA Amendments Act sec. 4(a), § 3(2)(B), 122 Stat. at 3555 (amending 42 U.S.C. § 12102(2)(B) (2006)). The ADAAA also provides a nonexhaustive list of bodily functions that are considered major life activities. *Id.*

231. *See, e.g.*, Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002) ("In resisting summary judgment, [plaintiff] failed to present evidence explaining either how diabetes substantially affects his major life activities or the duration and frequency of any limitations.").

232. *See* ADA Amendments Act sec. 2(b)(4), 122 Stat. at 3554.

233. ADA Amendments Act sec. 4(a), § 3(4)(C), 122 Stat. at 3556 (amending 42 U.S.C. § 12102(4)(C) (2006)).

234. *See, e.g.*, Littleton v. Wal-Mart Stores, Inc., 231 F. App'x 874, 877–78 (11th Cir. 2007) (stating that a mentally disabled plaintiff's ability to drive might be "inconsistent with his assertion that his abilities to think and learn are substantially limited").

235. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 200 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

236. ADA Amendments Act sec. 4(a), § 3(2)(A), 122 Stat. at 3555 (amending 42 U.S.C. § 12102(2)(A) (2006)).

237. *See supra* note 164 and accompanying text (describing the single job rule).

238. ADA Amendments Act sec. 6(a)(2), § 506 (to be codified at 42 U.S.C. § 12205a); *see also* Kilgore & Merrell, *supra* note 216, at 26–27 (describing the ADAAA's rules of construction and grants of rulemaking authority).

239. ADA Amendments Act sec. 3, 122 Stat. at 3554–55 (amending 42 U.S.C. § 12101 (2006)).

discrimination "on the basis of disability" rather than "because of the disability of [an] individual."[240] Impairments that are episodic or in remission are now disabilities if they "would substantially limit a major life activity when active."[241]

The ADAAA makes several positive changes for businesses as well. The ADAAA requires courts to take the effects of "ordinary eyeglasses or contact lenses" into account when determining if an individual is disabled, effectively removing these individuals from the ADA's scope of coverage.[242] Plaintiffs cannot bring "regarded as" claims predicated on impairments that last or are expected to last less than six months, allaying concerns regarding claims based on common ailments.[243] Lastly, reverse discrimination actions do not state a claim under the ADAAA.[244]

Advocates for the business and disability communities have taken an important step in preserving "both the focus of the ADA and its limits."[245] Legislators have also made strides toward shifting the focus to whether discrimination occurred rather than whether the plaintiff is covered by the ADA.[246]

VI. THE ADAAA AND BEYOND: WHAT COULD POSSIBLY GO WRONG?

The ADAAA was indisputably a key step toward clarifying problems that haunted the ADA. However, its success will ultimately depend on how courts and regulatory agencies address a myriad of other ambiguities present in ADA case law.[247] The

240. ADA Amendments Act sec. 5(a)(1), 122 Stat. at 3557 (amending 42 U.S.C. § 12112(a) (2006)); *see also* Kate S. Arduini, Note, *Why the Americans with Disabilities Act Amendments Act Is Destined to Fail: Lack of Protection for the "Truly" Disabled, Impracticability of Employer Compliance, and the Negative Impact It Will Have on Our Already Struggling Economy*, 2 DREXEL L. REV. 161, 188–89 (2009) ("Perhaps the most significant way in which the ADAAA amends the ADA is . . . [by] chang[ing] the general definition of discrimination under the ADA to mirror that of Title VII.").

241. ADA Amendments Act sec. 4(a), § 3(4)(D), 122 Stat. at 3556 (amending 42 U.S.C. § 12102(4)(D) (2006)).

242. ADA Amendments Act sec. 4(a), § 3(4)(E), 122 Stat. at 3556 (amending 42 U.S.C. § 12102(4)(E)(i)(I) (2006)).

243. ADA Amendments Act sec. 4(a), § 3(3)(B), 122 Stat. at 3555 (amending 42 U.S.C. § 12102(3)(B) (2006)); *see also 2008 Hearings*, *supra* note 1 (prepared statement of Andrew Grossman, Senior Legal Policy Analyst, Heritage Foundation) (expressing concern about claims predicated on hangnails or infected cuts).

244. ADA Amendments Act sec. 6(a), 122 Stat. at 3557–58 (amending 42 U.S.C. § 12201(g) (2006)).

245. *ABA Hot Topic*, *supra* note 195 (statement of Lawrence Lorber).

246. *See id.* (statement of Gary E. Phelan) (noting that post-ADAAA litigation should focus on the existence of discrimination rather than the existence of a disability).

247. *See* Hakop Keshishyan, Comment, *We Shall Overcome . . . If the Courts Allow Us: The United States Supreme Court's Decisions Regarding Mitigating Measures, and*

definition of disability was the "gatekeeper" of the ADA.[248] The judiciary may have seen it, so restricted, as a means of limiting vagueness[249] or curtailing frivolous litigation.[250] Given the unresolved ambiguities in ADA jurisprudence[251] and the likelihood that the ADAAA will result in increased litigation,[252] courts have similar incentives to establish another gatekeeping mechanism. The reasonable accommodation analysis is the most likely candidate for a new gatekeeping measure, due to its centrality in determining whether the plaintiff is a qualified individual and whether the employer has discriminated against the plaintiff.[253] Congress could inhibit the development of such a restrictive body of case law by providing a clear definition of the interactive process and a statutory requirement for mutual participation.[254]

Its Connection to the Circuit Split on Whether Life Accomplishments Should Be Considered in Determining Disability Under the ADA, 38 SW. L. REV. 357, 359–60 (2008) (observing that a circuit split as to whether courts should evaluate the plaintiff's claim of disability in light of his or her life accomplishments remains unresolved under the ADAAA); *supra* Part III (describing existing tensions between various elements of failure to accommodate claims). Commentators also note that Congress has written ambiguities into the ADAAA. *See, e.g.*, John W. Parry & Amy L. Allbright, *The ADA Amendments Act of 2008: Analysis and Commentary*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 695, 696 (2008) (predicting that the ambiguities introduced in the amendments will yield widespread inconsistency in determinations of who is and is not covered by the Act).

248. Timothy J. McFarlin, Comment, *If They Ask for a Stool . . . Recognizing Reasonable Accommodation for Employees "Regarded As" Disabled*, 49 ST. LOUIS U. L.J. 927, 937 (2005).

249. Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 320–21 (2001).

250. Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1, 33 (1999).

251. *See supra* Part III (discussing ambiguities in ADA case law).

252. Edward G. Phillips, *The ADA Amendments Act of 2008: Who Isn't Disabled?*, TENN. B.J., Feb. 2009, at 33, 40 ("[T]he [A]ct should generate increased ADA litigation with the playing field tilted heavily toward coverage of the individual by the [A]ct."); Rinckey, *supra* note 15; *see also* Kilgore & Merrell, *supra* note 216, at 29 ("Employers and lawyers should expect the ADA Amendments to be the subject of litigation for years to come."); *ABA Hot Topic*, *supra* note 195 (statement of Chai R. Feldblum) (expecting "more litigation and more exploitation of essential functions of the job and reasonable accommodation and what an employer can ask for, much of the law that simply wasn't developed because people were often stopped at the coverage stage").

253. *See supra* Part III.D–E (discussing the reasonable accommodation requirement and emphasizing its relevance to a substantial number of claims).

254. Though the EEOC regulations could be revised to make the interactive process mandatory, the lack of deference the courts generally give to EEOC regulations strongly suggests that an effective change of this magnitude requires congressional intervention. *See* White, *supra* note 68, at 533 (describing how the EEOC has been given "short shrift" by the courts).

A. Why Reasonable Accommodation Is an Attractive Gatekeeper

With employers frequently prevailing on summary judgment motions based on the definition of disability,[255] other elements of a prima facie case under the ADA are not as well-developed. Employers can still end the inquiry at the coverage stage based on the plaintiff's qualifications (including whether she can perform essential job functions or whether the accommodation was reasonable),[256] achieving the same result as the restrictive definition of disability.[257] Why is reasonable accommodation a more attractive candidate for a new screening mechanism?

First, Congress considered and rejected an amendment that would have made the plaintiff's qualifications an affirmative defense,[258] demonstrating that it is not politically feasible to expect this requirement to be removed in the near future. Second, information regarding the employee's skills, experience, education, and impairment-related limitations is more readily available to the employee.[259] It is reasonable to place this burden on the party with greater access to the information. Also, where employees do not have ready access to relevant information (such as the essential function inquiry), the courts have been willing to require employers to present the evidence at their disposal.[260] Even though the employee ultimately bears the burden of persuasion regarding her qualifications, the courts have not blindly accepted employers' assertions that a function is "essential."[261]

---

255. Allbright, *supra* note 12, at 336.

256. *See* Kilgore & Merrell, *supra* note 216, at 29 ("Employers will now begin to focus on other issues, such as job qualification, ability to perform 'essential job functions,' 'reasonable accommodation' and the need to engage in the 'interactive process.'"); *see also* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999) (describing the elements of a prima facie case).

257. *See* Robert Pear, *Congress Passes Civil Rights Bill, Adding Protections for Disabled*, N.Y. TIMES, Sept. 18, 2008, at A21 ("Courts have focused too heavily on whether individuals are covered by the law, rather than on whether discrimination occurred." (quoting Rep. Sensenbrenner)).

258. *See ABA Hot Topic*, *supra* note 195 (statement of Lawrence Lorber) (noting confusion among the business community as to whether the ADARA would have made the plaintiff's qualifications an affirmative defense); *supra* text accompanying notes 206–13 (discussing the revision of the draft bill after such concerns were raised).

259. *See 2007 Hearings*, *supra* note 122, at 25, 35 (prepared statement of Camille Olson) ("Plainly, individuals possess and control confidential information about their own health that others do not . . . .").

260. *See supra* text accompanying note 66 (noting that the Eighth Circuit has required employers to provide evidence pertinent to the "essential functions" inquiry).

261. *See, e.g.*, Turner v. Hershey Chocolate U.S.A., 440 F.3d 604, 612–14 (3d Cir. 2006) (reversing summary judgment despite employer's insistence that duty was an "essential function"); Hawkins v. George F. Cram Co., 397 F. Supp. 2d 1006, 1020 (S.D. Ind. 2005) ("[T]he

By contrast, "[t]o the extent accommodation is understood at all, it is viewed as an unwelcome species of affirmative action."[262] Moreover, the reasonable accommodations analysis is crucial in two separate parts of the plaintiff's prima facie case: whether the plaintiff is a "qualified individual,"[263] and whether discrimination occurred.[264] Existing case law about reasonable accommodations is rife with ambiguities, leading a commentator to refer to *Barnett*'s "run of cases" holding as the "we approve or we don't" approach.[265] In fact, courts already bypass the definition of disability in favor of dismissing claims based on reasonable accommodation issues.[266] These factors suggest that reasonable accommodation issues will assume new importance in ADA litigation after the ADAAA.[267]

B. Requiring the Interactive Process Will Help Courts Resolve Reasonable Accommodation Issues and Provide Other Benefits

Requiring employers to provide reasonable accommodations for employees poses unique procedural burdens. It requires an end product that is responsive to the needs of both parties,[268] but requires no mechanism to facilitate its development.[269] This creates problems for courts and litigants.

First, an employee has a "comparative lack of information about what accommodations the employer might allow."[270] If one

---

court should not merely rubber-stamp an employer's assertions about which functions are essential."). *But see* Lee, *supra* note 71, at 170–72 (describing cases to the contrary).

262. Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1819–20 (2005).

263. 42 U.S.C.A. § 12111(8) (West Supp. 2009).

264. 42 U.S.C. § 12112(b)(5)(A) (2006).

265. Anderson, *supra* note 184, at 26.

266. *See, e.g.*, Burchett v. Target Corp., 340 F.3d 510, 517–18 (8th Cir. 2003) (affirming summary judgment when the employee failed to demonstrate she was unable to perform essential functions of her job after the employer provided an accommodation); Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1256–60 (11th Cir. 2001) (affirming the district court's dismissal based on a lack of discrimination because no reasonable accommodation was possible).

267. *See* Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, 60 MERCER L. REV. 1173, 1190 (2008) ("The ADAAA will also result in a renewed emphasis on the requirement for reasonable accommodation under the ADA."); Sandra B. Reiss & J. Trent Scofield, *The New and Expanded Americans with Disabilities Act*, ALA. LAW., Jan. 2009, at 38, 43 (2009) ("We anticipate that there will be a greater emphasis placed on the 'reasonable accommodation' requirements, as well as the 'interactive process' that accompanies such accommodation efforts.").

268. *See* Barancik, *supra* note 119, at 540 (discussing the importance in breaking down "information barriers" to provide "optimal reasonable accommodations").

269. *See id.* at 531 (discussing one court's decision that the interactive process was not mandatory).

270. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 316 (3d Cir. 1999).

accommodation proves unreasonable or unduly burdensome, the employee might not be able to suggest another possibility without the employer's input. If the employer fails to accommodate, proving discrimination is inherently difficult because the "cautious, liability-conscious employer has means, motive, and opportunity to create a plausible record in support of what may in fact be an illegally motivated discharge."[271] This seems equally true in the context of reasonable accommodation. Conversely, the "employer may overestimate the costs of an accommodation"[272] without input from the employee.

Additionally, the interactive process has many of the same benefits as mediated settlements; it is "cheaper than litigation, [and] can help preserve confidentiality, allow the employee to stay on the job, and avoid monetary damages for an employer's initially hostile responses to requests for accommodations."[273] In some instances, courts are better equipped to determine whether the parties engaged in the interactive process in good faith than whether an accommodation would have been unduly burdensome.[274] These aspects of the interactive process benefit both parties (and the judiciary) and comport with the spirit of the ADA.[275]

Despite judicial disagreement as to whether the interactive process is required, legal scholars already recommend that employers participate.[276] Many companies utilize the interactive process (if only to avoid litigation)[277] and employment lawyers recommend it as a proactive approach.[278] The interactive process also offers other benefits. A better understanding of the employee's impairments may reveal potential accommodations and may be helpful in contacting agencies like the Job Accommodation Network (JAN)[279] to seek accommodation advice.

---

271. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1670 (1996).

272. Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 154 (2003).

273. *Taylor*, 184 F.3d at 316 n.6.

274. *Id.* at 316.

275. *See* Barancik, *supra* note 119, at 540–42.

276. *E.g.*, Sam Silverman, *The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More Than a Game of Five Card Stud*, 77 NEB. L. REV. 281, 300 (1998) ("[I]t is best to treat the interactive process as a requirement.").

277. Barancik, *supra* note 119, at 541.

278. *See, e.g.*, Paul Buchanan, *Have a Plan, Be Direct*, BUS. L. TODAY, Nov./Dec. 2003, at 41, 43 (2003) (remarking that employers are unlikely to prevail on motions for summary judgment "if the record does not unambiguously demonstrate that the employer made a genuine and sustained effort to engage in the interactive process").

279. *See Taylor*, 184 F.3d at 317 n.8 (observing that the JAN "provides advice free-of-charge to employers and employees contemplating reasonable accommodation" (quoting

It is another opportunity for employers to obtain information relevant to the employee's qualifications and affirmative defenses such as undue hardship.[280]

Because the needed accommodation may be obvious,[281] it can be argued that the interactive process is yet another unnecessary administrative burden. This argument is unpersuasive. "Traditional," readily identifiable impairments, such as paralysis and missing limbs or fingers, constituted less than five percent of discrimination charges filed under the ADA over a period of fifteen years.[282] In fact, back injuries are among the most commonly filed ADA claims.[283] This charge data indicates that employers may be unable to identify employees who could be protected by the ADA, much less the accommodations that might be needed. The repercussions for errors in judgment can be serious.[284] As a result, participation in the interactive process (even in an "informal way . . . at the most basic level"[285]) is preferable.

As a practical matter, it is counterintuitive to require courts to perform fact-intensive inquiries[286] into reasonable accommodations after litigation ensues when the parties could have gathered the same information earlier in the process and perhaps with better results.[287] The very information required by the reasonable accommodation balancing tests the courts have developed could be obtained during the interactive process, ensuring that employers are able to make well-informed decisions. Requiring participation in the interactive process would provide courts with key information relevant to the state of the employer's knowledge and the parties' good faith.[288]

EEOC ENFORCEMENT GUIDANCE: THE AMERICAN WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES 23 n.56 (1997))).

280. Silverman, *supra* note 276, at 300.

281. *See* 29 C.F.R. pt. 1630 app. § 1630.9(4) (1995) (discussing accommodations for employees in wheelchairs).

282. EEOC, ADA Charge Data by Impairments/Bases – Merit Factor Resolutions FY 1997–FY 2008, http://archive.eeoc.gov/stats/ada-merit.html (last visited Mar. 5, 2010).

283. *2007 Hearings*, *supra* note 122, at 25, 26 (prepared statement of Camille Olson); EEOC, *supra* note 282.

284. *See, e.g.*, Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285–86 (7th Cir. 1996) (reversing summary judgment where employer did not engage in the interactive process with a mentally ill employee who requested a transfer).

285. Amy Renee Brown, *Mental Disabilities Under the ADA: The Role of Employees and Employers in the Interactive Process*, 8 WASH. U. J.L. & POL'Y 341, 367 (2002).

286. Sumner v. Michelin N. Am., Inc., 966 F. Supp. 1567, 1576 (M.D. Ala. 1997).

287. *See* Stein, *supra* note 272, at 166 ("[E]mployers and employees probably each have good information (or at least much better information than courts) about the cost of accommodations and their likely benefits.").

288. *See* Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) ("A

C. What It Should Look Like

Any proposition to make the interactive process mandatory must balance employers' interests with those of employees. Even courts that have required the interactive process have refused to impose per se liability for failure to participate.[289] There are also concerns as to when employers would incur process liability.[290] Accordingly, it is important to describe both what the interactive process consists of and when an employer should incur liability for failing to participate.

1. Components of the Interactive Process. The EEOC regulations provide a good overview of the parties' responsibilities. They provide that the employer should:

> (1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.[291]

It is largely a prophylactic measure, a labor tool designed to allow for early intervention by the employer,[292] despite the potential benefits during litigation. However, precisely because of the potential benefits during litigation, the statute should also require documentation regarding the parties' efforts during the interactive process.[293]

---

party that fails to communicate, by way of initiation or response, may also be acting in bad faith.").

289. *See* Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999) (interpreting the employer's failure to participate in the interactive process as prima facie evidence of bad faith, which defeated the motion for summary judgment, but rejecting per se liability for failure to participate).

290. *See* Barancik, *supra* note 119, at 544–45 ("[I]t is harder to determine the exact point in the interactive process at which employers should incur liability.").

291. 29 C.F.R. pt. 1630 app. § 1630.9 (2009).

292. Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002) ("[T]he interactive process is more of a labor tool than a legal tool, and is a prophylactic means to guard against capable employees losing their jobs . . . ."), *aff'd in part and vacated in part on other grounds*, 386 F.3d 192 (2d Cir. 2004).

293. *See* Barancik, *supra* note 119, at 547–48 (suggesting this and other regulations).

This should not impose undue burdens on employers. As noted, many employers already engage in this process. The benefits employers reap from the interactive process are likely to offset the costs incurred in engaging in and documenting it. Good faith participation serves to protect the employer from compensatory and punitive damage awards.[294] Courts have been reluctant to grant summary judgment in favor of employers who have not participated in the interactive process.[295] Also, adding these requirements to the statute will enhance employers' abilities to assess their liability, as compared to the uneven imposition of new duties by judicial fiat.[296]

2. Liability for Failure to Engage in the Interactive Process. Courts are hesitant to impose liability solely based on failure to engage in the interactive process.[297] They observe that the "ADA . . . is not intended to punish employers for behaving callously" where no accommodation is possible.[298] Even so, courts profess to be "troubled" when employers fail to engage in the interactive process.[299]

In the Third Circuit's formulation, the employee must prove four things: "(1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated" had the employer made a good faith effort to do so.[300] With minor alterations, this formulation resolves many issues in a balanced way.

---

294. Nicholas R. Frazier, Note, *In the Land Between Two Maps: Perceived Disabilities, Reasonable Accommodations, and Judicial Battles over the ADA*, 62 WASH. & LEE L. REV. 1759, 1792–93 (2005).

295. John R. Autry, *Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" But the Law Says "No,"* 79 CHI.-KENT L. REV. 665, 692–93 (2004).

296. *See, e.g.*, Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 315 (3d Cir. 1999) (placing the burden to request additional information on employer once employee's disability and desire for accommodations are known); Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996) (reversing summary judgment because the employer did not initiate the interactive process when it appeared that the employee needed assistance).

297. *See* Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 448 (11th Cir. 1996) (expressing concern that to do so would mean that an "employer would be liable for not investigating even though an investigation would have been fruitless").

298. Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997).

299. *Moses*, 97 F.3d at 448.

300. Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 165 (3d Cir. 1999), *vacated on reh'g on other grounds*, 184 F.3d 296.

First, courts have recognized that where the employer knows or has reason to know of the employee's limitations, the employer has a duty to accommodate without a request.[301] In such situations, the employer should recognize the need to begin the interactive process.[302] Next, the statute should reflect that employees need not use any "magic words" to request accommodations, as long as the employer is aware of her disability and desire for accommodations.[303] Requests for reasonable accommodations should not need to originate with the employee. Both the judiciary and the EEOC have held that third parties (such as family members and medical professionals) can make requests for reasonable accommodations on the employee's behalf.[304] Particularly given the difficulties individuals with mental illnesses may have accessing accommodations,[305] this is reasonable.

Some commentators have suggested that the employee should only have to prove she was disabled in order to prevail on a failure to accommodate claim predicated on the interactive process.[306] This would subject the employer to liability for failing to participate in good faith if the employee proves that she is disabled and requested an accommodation,[307] regardless of whether an accommodation could have been made.[308] While this has the advantage of encouraging participation, it does so by subjecting employers to liability when even a good faith effort would have been fruitless. Moreover, the ADAAA aims to increase the number of individuals who can qualify as "disabled" under the ADA.[309] Employers would face a "perfect storm": an increased pool of potential plaintiffs who could prevail at trial despite the absence of any possible accommodation.

---

301. Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135 (2d Cir. 2008).

302. *See* Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996) ("[I]f it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help.").

303. *See* Jones v. United Parcel Serv., Inc., 502 F.3d 1176, 1194 n.13 (10th Cir. 2007); *Taylor*, 174 F.3d at 158–59.

304. *Taylor*, 174 F.3d at 158.

305. *See* Brown, *supra* note 285, at 367 (noting that mentally ill employees may not have a full understanding of their impairment or be able to articulate it in order to request accommodations).

306. Barancik, *supra* note 119, at 543–44.

307. *See id.* at 543–45 (suggesting that requiring plaintiffs to prove job limitations would be unduly burdensome).

308. *See* Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 448 (11th Cir. 1996) (rejecting per se liability because an "employer [could otherwise] be liable for not investigating even though an investigation would have been fruitless").

309. *See* Shelley S. Bailey, *The New ADA – Expanding Coverage and Redefining Disability*, COLO. LAW., Jan. 2010, at 47, 47–48 (observing that the definition of disability under the ADA "capture[s] many more people . . . than ever before").

In order for plaintiffs to prevail, Congress should continue to require employees to produce a facially reasonable accommodation that could have been made had the employer engaged in the interactive process in good faith. This is most consistent with the balance the ADA strikes between employers and employees.[310] Nevertheless, courts have also recognized that "an employer who has received proper notice cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation that would prevail in litigation."[311] As long as the plaintiff carries her burden of persuasion that a reasonable accommodation existed (even if it is not the accommodation she requested), her burden should be met.[312]

Finally, Congress should also revise the statute to provide for flexibility in the form of the interactive process and to codify the courts' good faith tests. Courts have recognized that while the interactive process is integral to the ADA,[313] employers need flexibility to conduct everyday human resources matters. One court found good faith participation in the interactive process when the employer corresponded with the employee by letter.[314] As long as the employer has participated in good faith, no particular method of communication should be required. Courts have also defined "good faith" in this context to mean that both sides communicate responsively and without delay or attempts to obstruct the process.[315] This standard protects both employers and employees, particularly when the process grinds to a halt after employees fail to respond to requests for information.[316]

---

310. *2007 Hearings*, *supra* note 122, at 25, 28 (prepared statement of Camille Olson) (noting the "careful balance of opportunities and obligations reflected" in the ADA).

311. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 317 (3d Cir. 1999).

312. This places the burden on the employer to bridge the informational gap prior to litigation, but recognizes that employees have greater access to information pertaining to the availability of a reasonable accommodation through discovery during litigation. It is also responsive to the employer's affirmative defense of undue hardship, because an otherwise reasonable accommodation may nevertheless constitute an undue hardship on the business.

313. *E.g.*, Mengine v. Runyon, 114 F.3d 415, 420–21 (3d Cir. 1997).

314. *Id.* at 421.

315. Nichols v. Harford County Bd. of Educ., 189 F. Supp. 2d 325, 339 (D. Md. 2002) (citing Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114–15 (9th Cir. 2000) (en banc), *vacated on other grounds by* 535 U.S. 391 (2002)); *see also* Matejkovic & Matejkovic, *supra* note 96, at 91 (citing Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 772 n.16 (3d Cir. 2004) (listing ways employers can demonstrate good faith participation). The judiciary has also developed standards for determining which party should be held responsible for breakdowns in the interactive process. *See* Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) (stating that courts should look for a "failure to participate in good faith or failure . . . to make reasonable efforts to help the other party determine what specific accommodations are necessary").

316. *See, e.g.*, Peeples v. Coastal Office Prods., 203 F. Supp. 2d 432, 463 n.19 (D.

Including these elements in the statute will provide consistency among the courts and added certainty to potential litigants in assessing litigation risks.

Unfortunately, incorporation of the interactive process in this way leaves largely unaddressed "troubling" instances where employers do not investigate reasonable accommodation requests but plaintiffs are unsure as to whether such accommodations exist. In such situations, the employer's failure to investigate could be due to knowledge that no reasonable accommodation could be made or an unwillingness to search for such an accommodation. In either case, the employer risks an ADA violation if its actions are not consistent with the cooperative process envisioned by the ADA[317] and if the availability of an accommodation is successfully proven in court.[318]

One possible remedy would be to require employers to document requests for reasonable accommodations and participation in the interactive process through an administrative record retention measure. When an employee files a charge with the EEOC, an employer's failure to retain records pertaining to the interactive process could subject it to a fine. This fine would serve to finance enforcement. By imposing fines proportional to the size of the business, such a requirement would avoid imposing undue burdens on small businesses. Although employers are not likely to support such a measure, their burdens should be minimal simply because many employers already engage in the process in some form. Although no other antidiscrimination law imposes such a duty, there is ample precedent for administrative fines to enforce federal policies in other employment contexts, such as provisions in the Occupational Safety and Health Act[319] and the Immigration Reform and Control Act.[320] This would prevent windfalls to employers who simply refuse to engage in the interactive process, while limiting employers' liability when no reasonable accommodation is possible. Although additional investigation into the precise record-keeping requirements and administrative costs would be needed, the success of similar measures in other contexts suggests it may be feasible.

Md. 2002) (holding that the employer was not liable for the breakdown of the interactive process when the employee failed to provide information regarding his medical condition).

317. *See* Jackan v. N.Y. State Dep't of Labor, 205 F.3d 562, 566 (2d Cir. 2000) (noting that the ADA envisions a cooperative process where "employers and employees work together").

318. *Mengine*, 114 F.3d at 420.

319. 29 U.S.C. §§ 655, 657 (2006).

320. 8 U.S.C. § 1324a(b), (e)(5) (2006).

VII. CONCLUSION

Since the ADA went into effect in 1992,[321] it has been called "one of the most effective civil rights laws passed by Congress."[322] Congress passed the ADAAA in response to restrictive interpretations of the definition of disability,[323] which had become the statute's gatekeeper.[324] With this definition greatly expanded under the ADAAA, other terms of art may be candidates to replace it.[325] While other areas of ambiguity exist, the reasonable accommodation inquiry is a prime candidate for a substitute gatekeeping mechanism. Indeed, some argue that it was the courts' reluctance to dive into the murky waters surrounding reasonable accommodation that caused the definition of disability to become progressively restrictive.[326]

Congressional action requiring the interactive process and better defining its contours will not provide the guidance that courts initially lacked as to what constitutes a reasonable accommodation.[327] However, it will provide courts with more evidence regarding the state of the employer's knowledge, whether the parties participated in good faith, and other factors relevant to the balancing tests the judiciary has developed. In addition, it will provide other benefits to both employers and employees by enabling optimal accommodations to be made.[328] Imposing fines for failure to participate in and document the interactive process will incentivize thorough pre-litigation inquiries into accommodations without subjecting employers to liability where no reasonable accommodation could be made. Though the EEOC could revise its regulations to implement many (though not all) of these changes, Congress could forestall

---

321. Peter T. Kilborn, *Major Shift Likely as Law Bans Bias Against Disabled*, N.Y. TIMES, July 19, 1992, at 1.

322. *Rep. Sensenbrenner Issues Statement on ADA Bill*, U.S. FED. NEWS, Sept. 17, 2008, *available at* 2008 WLNR 17693589 (quoting Rep. Sensenbrenner).

323. *See supra* Part IV.B.

324. McFarlin, *supra* note 248, at 937.

325. *See supra* text accompanying notes 249–52 (discussing the likely incentives to establish another gatekeeping mechanism).

326. Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 622–23 (2004).

327. *See id.* (suggesting that courts initially narrowed the definition of disability to avoid the issue of reasonable accommodations, where they had little statutory guidance); *see also* Allison Ara, Comment, *The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problems of Perceived Disabilities?*, 50 SANTA CLARA L. REV. 255, 256 (2010) (noting that in passing the ADAAA "Congress failed to counteract all of the confusion that the courts struggled with before passing the Amendments").

328. Barnett v. U.S. Air, Inc., 196 F.3d 979, 994 (9th Cir. 1999), *vacated on reh'g*, 201 F.3d 1256 (9th Cir. 2000).

concerns regarding the courts' deference to the regulations[329] by effecting the change through amendments.

Perhaps most importantly, requiring the parties to engage in the interactive process is consistent with Congress's original intent in the ADA: "to prevent employers from basing employment decisions on a disability."[330] By requiring the parties to work together to resolve reasonable accommodations issues prior to resorting to the court system, disabled employees may be able to retain their positions and employers may be able to avoid costly litigation. This outcome is faithful to the goals and language of the ADA, as well as the loftier goal of moving America toward true equality.[331]

Hillary K. Valderrama

329. Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1578–79 (1999).

330. Michael Newman & Faith Isenhath, *The Americans with Disabilities Amendments Act of 2008*, FED. LAW., Nov./Dec. 2008, at 12, 12.

331. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 413–14 (1991) (quoting President George H.W. Bush).