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Disability-Based Harrassment: Standing and Standards for a "New" Cause of Action

Holland M. Tahvonen

DISABILITY-BASED HARASSMENT: STANDING AND STANDARDS FOR A "NEW" CAUSE OF ACTION

The Equal Employment Opportunity Commission (EEOC) received 80,000 ADA-based complaints between 1992 and 1997; twelve percent, or approximately 9600, were harassment related.[1] Like women and minorities, people with disabilities have faced barriers in obtaining and maintaining employment in the American workplace.[2] The eagerly-awaited and much-heralded Americans with Disabilities Act of 1990 (ADA)[3] was enacted to provide legal recourse for individuals who have suffered discrimination on the basis of a disability.[4] Nevertheless, it was not until eleven years later that a federal court of appeals explicitly recognized a cause of action for disability-based harassment.[5]

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1. Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 369 (1997) (citing *Employment Rate of People with Disabilities Increases Since Enactment of ADA*, NEWSL. OF GREAT LAKES DISABILITY & BUS. TECHNICAL ASSISTANCE CENTER REGION V NEWS (Institute on Disability and Human Development, Chicago, Ill.), Summer 1996, at 4).

2. The congressional findings section of the Americans with Disabilities Act provides in part:

> (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
>
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
>
> (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination ....

42 U.S.C. § 12101(a) (2000).

3. *Id.* §§ 12101-12213.

4. *Id.* § 12101(b).

5. Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229 (5th Cir. 2001).

On March 30, 2001, the United States Court of Appeals for the Fifth Circuit held that the ADA embodies a claim for disability-based harassment.[6] A mere two weeks later, the Fourth Circuit followed suit, declaring that a hostile work environment claim is cognizable under the ADA.[7] Though not the only courts to confront the issue,[8] the Fourth and Fifth Circuits were the first to explicitly recognize the cause of action. These cases provide a necessary and critical extension of existing harassment law, but questions remain unanswered regarding who may assert such claims and the appropriate standard to apply in determining whether the alleged conduct is actionable.

Despite the similarity of the holdings in *Flowers v. Southern Regional Physician Services, Inc.*[9] and *Fox v. General Motors Corp.*,[10] the two circuit courts parted ways in their analyses of the elements required to establish a prima facie case of disability harassment. Whereas the *Flowers* court required that a plaintiff prove that she is a member of the "protected class,"[11] the *Fox* court held that a complainant must be a "'qualified individual with a disability.'"[12] To the extent that there is a difference between these two standards, and this Note argues that there is, the effect of accepting one standard over the other could be profound.

A further issue not raised in either *Flowers* or *Fox* is the appropriate standard to determine whether an employer's statements and/or conduct constitute actionable harassment. Although the Supreme Court, at least in the context of sexual harassment, has employed both objective and subjective tests to ascertain whether conduct is sufficiently severe and pervasive to be unlawful under Title VII,[13] scholarly debate continues to rage about whether the "reasonable person" standard provides sufficient protections for the concerns of women, minorities, and people with disabilities. Plaintiffs and disability law scholars have argued that disability-

6. *Id.*
7. Fox v. Gen. Motors Corp., 247 F.3d 169 (4th Cir. 2001).
8. *See infra* notes 42-45 and accompanying text.
9. 247 F.3d 229 (5th Cir. 2001).
10. 247 F.3d 169 (4th Cir. 2001).
11. *Flowers*, 247 F.3d at 235.
12. *Fox*, 247 F.3d at 177 (quoting 42 U.S.C. § 12112(a)).
13. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

based harassment must be judged from the perspective of a "reasonable person with the same disability" in order to adequately protect the wide variation of interests among people with different disabilities.[14]

This Note will address the rationale for extending the availability of hostile work environment claims to individuals with disabilities, explore which types of plaintiffs should be protected, and examine the appropriate standard to determine when conduct constitutes harassment for purposes of the ADA. Part I traces the development of harassment law under Title VII in order to shed light on the methodological approach generally employed in harassment cases and emphasizes the value of a consistent approach to rights-based legislation. Part II sets forth the case for disability harassment, examines the analyses employed by the Fourth and Fifth Circuits, and evaluates the elements of a prima facie disability harassment case. This Part concludes that a plaintiff's qualifications are irrelevant in a harassment suit, and further suggests that courts should consider the effect that limiting the definition of disability will have on these types of cases. Finally, Part III analyzes the appropriate standard for assessing whether an employer's conduct is sufficiently severe and pervasive to be actionable under the ADA, and ultimately argues that the costs of employing a disability-focused standard outweigh the benefits.

I. THE DEVELOPMENT OF HARASSMENT LAW UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex,

14. *See, e.g.*, Pirolli v. World Flavors, Inc., No. 98-3596, 1999 U.S. Dist. LEXIS 18092, at *21 n.9 (E.D. Pa. Nov. 24, 1999), *rev'd in part*, 263 F.3d 159 (3d Cir. 2001); *see also* Casper v. Gunite Corp., No. 99-3215, 2000 U.S. App. LEXIS 16241, at *8-12 (7th Cir. July 11, 2000); Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475 (1994); Christine Neagle, Comment, *An Analysis of the Applicability of Hostile Work Environment Liability to the ADA*, 3 U. PA. J. LAB. & EMP. L. 715 (2001).

or national origin ...."[15] Despite the fact that harassment is nowhere mentioned in the statute, it nevertheless emerged as a cause of action under Title VII as courts began to recognize that it could, in effect, alter the terms and conditions of an individual's employment.[16]

The recognition of sexual harassment as a cognizable legal claim was spurred by the work of Professor Catharine MacKinnon[17] and was first officially acknowledged by the United States Supreme Court in *Meritor Savings Bank v. Vinson.*[18] Two distinct forms of the claim are regularly articulated: quid pro quo harassment[19] and hostile work environment harassment.[20] The *Meritor* Court defined

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15. 42 U.S.C. 2000e-2(a) (2000).

16. *See* BARBARA T. LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 4 (1999).

17. Professor MacKinnon significantly influenced the development of sexual harassment jurisprudence both through her writing and in her role as co-counsel in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). *See* Brief of Respondent Mechelle Vinson, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979). For an overview of influential literature regarding sexual harassment, see Martha Chamallas, Essay, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37 (1993).

18. 477 U.S. 57 (1986).

19. In quid pro quo harassment, employment or promotion is conditioned on sexual favors. *See* Eugene Scalia, *The Strange Career of* Quid Pro Quo *Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307, 308 (1998) (defining quid pro quo harassment, but arguing that it should be abandoned as a separate and distinct category). *But see* Steven H. Aden, Esq., *"Harm In Asking": A Reply to Eugene Scalia and an Analysis of the Paradigm Shift in the Supreme Court's Title VII Sexual Harassment Jurisprudence*, 8 TEMP. POL. & CIV. RTS. L. REV. 477 (1999) (arguing that quid pro quo harassment is and will continue to be a useful tool in Title VII sexual harassment analysis).

20. Hostile work environment harassment occurs when the workplace is permeated with "discriminatory intimidation, ridicule, and insult." *Meritor*, 477 U.S. at 65.

Although this Note will focus primarily on the development of sexual harassment law and its implications for the ADA, it is important to recognize that the hostile environment claim originated in the context of racial discrimination and has been applied in religion and national origin cases as well. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (holding that Title VII prohibits "the practice of creating a working environment heavily charged with ethnic or racial discrimination"); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (holding that the defendant employer's harassment and verbal abuse toward the plaintiff because of his Jewish ancestry and faith amounted to discrimination in violation of Title VII). The use of the hostile environment claim in sex-based harassment cases was largely supported by analogies drawn from the racial context. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 902 (1982). In *Henson*, the court stated:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement

and developed guidelines for analyzing a hostile environment claim, largely adopting the model set forth by the EEOC.[21] According to the Court, a plaintiff can establish a claim for hostile work environment harassment by proving that (1) she encountered "'sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature";[22] (2) the conduct was unwelcome;[23] (3) the conduct had "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment";[24] (4) the conduct was based on her sex;[25] and (5) the harassment was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[26]

However, the Court's opinion in *Meritor* raised as many questions as it answered. Lower courts were left to determine important issues such as

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> that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Id.

21. *Meritor*, 477 U.S. at 65-67.

22. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)). Some argue that this element is too limited. *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1689 (1998) (challenging the "sexual desire-dominance paradigm" as inadequate, and arguing that "[t]he focus should be on conduct that consigns people to gendered work roles that do not further their own aspirations or advantage").

23. *Meritor*, 477 U.S. at 65, 68 (quoting 29 C.F.R. § 1604.11(a) (1985)). For criticisms of the unwelcomeness requirement, see Susan Estrich, *Sex At Work*, 43 STAN. L. REV. 813, 826-34 (1991); Joan S. Weiner, Note, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621 (1997); Casey J. Wood, Note, *"Inviting Sexual Harassment": The Absurdity of the Welcomeness Requirement in Sexual Harassment Law*, 38 BRANDEIS L.J. 423 (2000).

24. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

25. *Id.* at 66.

26. *Id.* at 67 (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (1982)). For criticisms of the "severe or pervasive" requirement, see e. christi cunningham, *Preserving Normal Heterosexual Male Fantasy: The "Severe or Pervasive" Missed-Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence*, 1999 U. CHI. LEGAL F. 199 (1999) (arguing that the "severe or pervasive" requirement reifies sex inequality in the workplace and is contrary to the intent of the 1991 Amendments to the Civil Rights Act of 1964); *see also* Estrich, *supra* note 23.

> whether conduct of a sexual nature was unwelcome, whether such conduct was severe or pervasive enough to support a claim, whether severity or pervasiveness should be judged by a subjective or an objective standard, whether a "reasonable person" or a "reasonable woman" standard should govern assessment of severity or pervasiveness, whether a victim must establish psychological harm and, importantly, under which circumstances an employer may be held liable for sexual harassment engaged in by supervisors, coworkers, or even customers.[27]

Seven years later, in *Harris v. Forklift Systems, Inc.*,[28] the Supreme Court clarified some of these issues. Most notably, the *Harris* Court held that the appropriate standard for determining whether conduct is harassing is both objective and subjective.[29] In other words, to be actionable under Title VII, both the proverbial "reasonable person" and the victim herself must perceive the environment as hostile or abusive. The Court also recognized, however, that a determination of hostility or abusiveness is not "a mathematically precise test,"[30] but "can be determined only by looking at all the circumstances."[31] A trier of fact should consider frequency, severity, the physical or verbal nature of the conduct, and the level of interference with the victim's work performance.[32]

II. THE CASE FOR DISABILITY-BASED HARASSMENT

The ADA is built upon the civil rights approach adopted by Title VII,[33] and consequently, disability harassment as a cause of action

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27. Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 727 (1999) (footnotes omitted).

28. 510 U.S. 17 (1993).

29. *Id.* at 21-22.

30. *Id.* at 22.

31. *Id.* at 23.

32. *Id.*

33. *See* 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, 426-28 (1991); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 31-33 (2000); *see also* Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 388 (2001) (suggesting that "premising the ADA on civil rights premises in general, and on the

is modeled after the Title VII harassment claim.[34] Courts that have explicitly recognized a hostile environment claim under the ADA have posited that the parallel purposes, language, and remedial structures of the statutes not only justify, but "command [a] conclusion that the ADA provides a cause of action for disability-based harassment."[35]

Both statutes share the common purpose of eradicating discrimination against groups historically treated as second-class citizens. Whereas the proclaimed purpose of Title VII is "to eliminate ... discrimination in employment based on race, color, religion, or national origin,"[36] the explicitly stated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[37] The drafters of the ADA recognized that individuals with disabilities, like women and racial minorities, have long faced isolation, segregation, and discrimination not only in the workplace, but in almost every aspect of life, and have often had no recourse to a legal remedy.[38] And as with Title VII, it would be unfathomable for the legislature to open the doors of the American workplace to people with disabilities only to have them forced out by harassing behavior.

Similarly, the language of the ADA mirrors that of Title VII, prohibiting discrimination "against a qualified individual with a disability because of the disability of such individual in regard to [employment-related practices] and *other terms, conditions, and*

Civil Rights Act of 1964 in particular, may have in many respects served to hamper, rather than promote, the ADA's objectives"); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1398 (1993) (comparing the medical model, social pathology model, and the civil rights model, and arguing that "[d]espite [the] civil rights agenda, the ADA is also a medical and social pathology model bill that continues to treat people with disabilities as inherently inferior").

34. Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 235 (5th Cir. 2001) ("A cause of action for disability-based harassment is 'modeled after the similar claim under Title VII.'") (quoting McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998)); Fox v. Gen. Motors Corp., 247 F.3d 169, 177 (4th Cir. 2001) (stating that the elements of a disability-based hostile environment claim "[a]ppropriately modif[ied] the parallel Title VII methodology").

35. *Flowers*, 247 F.3d at 234.

36. *Id.* (quoting H.R. REP. NO. 88-914 (1964)).

37. 42 U.S.C. § 12101(b)(1) (2000).

38. *Id.* §§ 12101(a)(2)-12101(a)(4).

privileges of employment."[39] The Supreme Court has construed the "terms, conditions, and privileges" language in Title VII as a means to "'strike at'" harassing behavior in the workplace.[40] Thus, to provide consistency in statutory interpretation and equality of protection, the language of the ADA is justifiably read as providing a basis for a harassment cause of action.

A. Assuming a Cause of Action

Disability-based harassment is not a rarity in the workplace. As previously noted, the EEOC receives thousands of harassment-related ADA complaints every year.[41] Prior to *Flowers* and *Fox*, when confronted with these types of grievances, appellate courts assumed, without actually tackling the question directly, that a cause of action for disability-based harassment indeed existed under the ADA.[42] Yet, these courts have declined to rule explicitly when the cases were not factually appropriate to make such a determination. For example, in *McConathy v. Dr. Pepper/Seven Up Corp.*,[43] the Fifth Circuit found the defendant's actions to be "insensitive and rude," but "not ... sufficient as a matter of law to state a claim of hostile environment harassment."[44] Therefore, although the court assumed the existence of such a cause of action, the per curiam opinion made clear that the "case should not be cited

39. *Id.* § 12112(a) (emphasis added). The ADA defines a "qualified individual with a disability" as a person "who, with or without a reasonable accommodation, can perform the essential function of the employment position that such individual holds or desires." *Id.* § 12111(8).

40. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). Professor Mark Weber argues that § 12203(b), which makes it unlawful "to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of ... any right granted or protected" by Title I or the ADA, may provide even greater protection against harassment. Mark Weber, *Workplace Harassment Claims Under the Americans with Disabilities Act: A New Interpretation*, 14 STAN. L. & POL'Y REV. (forthcoming 2003).

41. *See supra* note 1 and accompanying text.

42. *See* Casper v. Gunite Corp., No. 99-3215, 2000 U.S. App. LEXIS 16241 (7th Cir. July 11, 2000); Silk v. City of Chicago, 194 F.3d 788 (7th Cir. 1999); Walton v. Mental Health Ass'n, 168 F.3d 661 (3d Cir. 1999); Wallin v. Minn. Dep't of Corr., 153 F.3d 681 (8th Cir. 1998); McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558 (5th Cir. 1998) (per curiam); Miranda v. Wis. Power & Light Co., 91 F.3d 1011 (7th Cir. 1996).

43. 131 F.3d 558 (5th Cir. 1998) (per curiam).

44. *Id.* at 564.

for the proposition that the Fifth Circuit recognizes or rejects an ADA cause of action based on hostile environment harassment."[45]

B. Flowers v. Southern Regional Physician Services, Inc.[46]

Three years later, however, the Fifth Circuit became the first federal circuit court to affirmatively identify disability-based harassment as a cause of action under the ADA. In *Flowers*, the plaintiff, a medical assistant employed by the defendant, filed suit under the ADA, claiming that she was terminated as a result of her disability and was subjected to harassment "designed to force [her] from her position or cast her in a false light for the purpose of terminating her because of her HIV status."[47] Upon learning of Ms. Flowers' diagnosis, Flowers' immediate supervisor, once a close friend, "began intercepting [her] telephone calls [and] eavesdropping on her conversations."[48] The company president "refused to shake [her] hand,"[49] and called her insulting names.[50] Within a one-week period, she was subjected to four random drug tests.[51] Twice she was lured into meetings under false pretenses, during which she was subsequently reprimanded.[52] The court acknowledged that a claim for disability-based harassment was viable under the ADA and outlined the elements a plaintiff must establish to successfully bring such a claim. According to the Fifth Circuit, a plaintiff must prove:

> (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or

45. *Id.* at 563.
46. 247 F.3d 229 (5th Cir. 2001).
47. *Id.* at 231-32 (alteration in original) (quotations omitted).
48. *Id.* at 236.
49. *Id.* at 237.
50. *Id.*
51. *Id.* at 237.
52. *Id.*

> should have known of the harassment and failed to take prompt, remedial action.[53]

Ultimately, the court concluded that although the evidence was sufficient to support a jury's finding of harassment,[54] "Flowers failed to present any evidence of actual injury" that entitled her to anything more than nominal damages.[55]

C. Fox v. General Motors Corp.[56]

Fourteen days after the Fifth Circuit announced its decision in *Flowers*, the Fourth Circuit also found that "a hostile work environment claim [is] cognizable under the Americans with Disabilities Act ...."[57] Robert Fox, a long-time employee of General Motors, suffered a non-work-related back injury in 1980.[58] As a result of this injury, Fox was placed on disability leave several times and subsequently returned to work.[59] In October 1994, Fox once again returned to GM from leave, but was restricted to light duty work by his doctor.[60] During this period, he claimed he was subjected to verbal insults, humiliation, and harassment as a result of his disability. Coworkers and supervisors "took pictures of the tasks that Fox performed, attempting to prove that those tasks were no different, in terms of the effect on Fox's back, than the tasks Fox refused to perform because of his disability."[61] He, and others placed on light duty, were called "handicapped MF's" and "911 hospital people."[62] The general foreman, at a meeting assembled to discuss Fox's work limitations and the ongoing harassment, crudely asked, "[h]ow in the F—— do you take a S-H-I-T

53. *Id.* at 235-36 (quoting McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998)).
54. *Id.* at 237.
55. *Id.* at 239.
56. 247 F.3d 169 (4th Cir. 2001).
57. *Id.* at 172.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 173.
62. *Id.* at 174.

with these restrictions?"[63] In light of such evidence, the court upheld the jury verdict in Fox's favor.[64]

III. EVALUATING THE PRIMA FACIE CASE

Like the Fifth Circuit, the Fourth Circuit in *Fox* agreed that the ADA creates a cause of action for hostile work environment harassment. However, in contrast to the Fifth Circuit's "member of a protected group" standard,[65] the Fourth Circuit required the plaintiff to prove that "he is a qualified individual with a disability."[66] The critical question is whether the difference in the language used by the courts amounts to different standards.

The language employed by the Fourth Circuit is taken directly from the ADA itself, which defines a "qualified individual with a disability" as "an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position ...."[67] The "protected group" language in the *Flowers* opinion, on the other hand, mirrors the element necessary to establish a prima facie case for harassment under Title VII.[68] Arguably, the Fifth Circuit's requirement that a disability-harassment plaintiff must prove that "she belongs to a protected class" extends no further than the ADA "qualified individual with a disability" definition, and is therefore essentially the same standard that the Fourth Circuit used in *Fox*. Equally plausible, however, is the possibility that the "protected class" to which the Fifth Circuit referred is the broader class of people with disabilities.

Evidence within the opinions supports the latter reading. For example, the *Flowers* court in no way indicated or evaluated the plaintiff's qualifications. By contrast, the *Fox* court not only considered Mr. Fox's qualifications, but because he had claimed total temporary disability for workers' compensation benefits, required him "'to proffer a sufficient explanation for any apparent contradiction between the [ADA and workers' compensation]

63. *Id.* at 173 (alteration in original).
64. *Id.* at 179.
65. Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229, 235 (5th Cir. 2001).
66. *Fox*, 247 F.3d at 177.
67. 42 U.S.C. § 12111(8) (2000).
68. *See Flowers*, 247 F.3d at 235.

claims.'"[69] If the prima facie elements enumerated by the Fourth and Fifth Circuits are indeed the same, the disparate emphasis placed on the plaintiff's qualifications in *Fox* and *Flowers* could be the result of the way in which the parties framed the issues, and the defenses the employers raised. The *Flowers* court, however, included a footnote stating, "No party here argues that Flowers was not disabled within the meaning of the ADA, and we assume *arguendo* that she was"[70]—yet the court made no mention of an assumption that Ms. Flowers was qualified. The fact that the court addressed the disability issue even in the absence of argument by the parties, but failed to consider Flowers' qualifications, suggests that a "member of the protected group" is not the same as a "qualified individual with a disability." Thus, based on the plain language of the opinions and the *Flowers* court's failure to address the plaintiff's qualifications, it appears that the evidentiary standards enumerated by the Fourth and Fifth Circuits are indeed distinct.

A. The Qualification Requirement

Proceeding on the assumption that the Fifth Circuit standard requires only that a plaintiff prove that she has a disability as defined by the ADA,[71] it is the standard that should be adopted. Although the *Fox* standard is derived from the language of the ADA, the qualification requirement should be disregarded for two reasons. First, an individual's perceived ability or inability to perform a job function is irrelevant in determining whether she is a victim of harassment. Although clearly a critical element in a standard discrimination case, harassing behavior is not justifiable simply because the subject of that harassment lacks the specific qualifications for a particular position. Second, the imposition of a qualification standard on people with disabilities, when no such requirement is imposed on other civil rights harassment plaintiffs,

69. *Fox*, 247 F.3d at 177 (quoting EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373, 378 (4th Cir. 2000)).

70. *Flowers*, 247 F.3d at 236 n.6.

71. 42 U.S.C. § 12102(2).

perpetuates the stereotype that the disabled are incompetent—precisely the social notion that the ADA was designed to combat.[72]

An inquiry into a candidate's credentials for a particular position or type of employment is not only relevant, but essential to determine whether an employer has impermissibly discriminated against a person protected by Title VII or the ADA. Discrimination in employment involves distinguishing between candidates based on some characteristic or affording different treatment to a person because she has or does not have a specific quality.[73] Employers may give preference in employment decisions for some reasons, but not others. For instance, an employer may permissibly distinguish between job candidates with differing educational backgrounds, or between those that wear yellow socks and those that wear green ones—but an employer that will hire Asian Americans but not African Americans is certain to be on the losing end of a potentially expensive lawsuit.

The courts have developed a now well-established body of law to determine when an employer has unlawfully discriminated on the basis of a characteristic protected by Title VII. The *McDonnell Douglas* burden-shifting test requires a plaintiff to prove that she (1) is a member of a protected class; (2) applied and had the necessary qualifications for the position in question; (3) was rejected; and (4) thereafter, the employer continued to seek applications from persons having the complainant's qualifications.[74] Once a plaintiff has proven these elements and established a prima

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72. *See id.* § 12101(a)(7).

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society ....

Id.

73. According to the *Random House Unabridged Dictionary*, to discriminate is "to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs rather than according to actual merit." RANDOM HOUSE UNABRIDGED DICTIONARY 564 (2d ed. 1993). The definition of "harass" by comparison is "to disturb persistently; torment, as with troubles or cares; bother continually; pester; persecute." *Id.* at 870.

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

facie case, the burden of production shifts to the employer to offer a legitimate, nondiscriminatory rationale for its failure to hire or promote the plaintiff.[75] The plaintiff then must convince the finder of fact that the employer's purported legitimate reason is merely pretext.[76] Note that although the plaintiff must prove that she is qualified for the position, she must only show that she possesses the "base, minimum qualifications the employer uniformly require[s]."[77]

Federal circuit courts have applied a similar analysis to disability discrimination cases. For example, the Sixth Circuit and Eighth Circuits have adopted different formulations, although "in practice they appear to operate in a similar manner."[78] The Sixth Circuit adopted a five-prong requirement to establish a prima facie case.

> [The] plaintiff must show that "(1) he or she is disabled; (2) [he or she was] otherwise qualified for the position, with or without reasonable accommodation; (3) [he or she] suffered an adverse employment decision; (4) the employer knew or had reason to know of the plaintiff's disability; and (5) the position remained open while the employer sought other applicants or the disabled individual was replaced."[79]

A plaintiff in the Eighth Circuit, on the other hand, must establish "(1) that she was a disabled person within the meaning of the ADA, (2) that she was qualified to perform the essential functions of the job, and (3) that she suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination."[80] Despite the variance in language, there is an apparent consensus among courts presiding over both Title VII and ADA cases that, for purposes of ascertaining whether an employer has unlawfully discriminated against an employee or potential

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75. *Id.*

76. *Id.* at 804.

77. HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 140 (2001).

78. *Id.* at 461.

79. *Id.* at 460 (quoting Cehrs v. N.W. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 779 (6th Cir. 1998)) (footnotes omitted).

80. *Id.* (citing Wallin v. Minn. Dep't of Corr., 153 F.3d 681, 686 (8th Cir. 1998), *cert. denied,* 526 U.S. 1004 (1999)).

employee, the plaintiff must establish a minimum level of qualification to avoid summary judgment.

Harassment analysis, however, is distinct from an assessment of discrimination. Although an employer may legitimately distinguish between candidates or employees, it is difficult to imagine circumstances under which an employer would be justified in harassing an employee. For example, simply because a woman hired to be a secretary is not proficient in using Microsoft Word does not mean that Title VII tolerates inappropriate comments about the size of her chest. Rather, the distinction is between actionable and nonactionable types of harassment or, as the Supreme Court stated in *Harris,* whether the conduct is sufficiently frequent or offensive as to be deemed severe or pervasive.[81] Hence, whereas an examination of an employee's qualifications is justified when considering whether an employer impermissibly discriminated, a consideration of an employee's qualifications is wholly irrelevant in determining whether he was the subject of actionable harassment based on a protected characteristic.

Aside from being irrelevant, the imposition of the qualification requirement on a disabled plaintiff tacitly suggests that some people with disabilities are harassed, and permissibly so, because they are in fact unqualified. In passing the ADA, Congress recognized that the unequal treatment experienced by people with disabilities "result[s] from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society ...."[82] Requiring plaintiffs in disability-based harassment suits, but not other harassment plaintiffs, to establish their eligibility for a job reflects just such a "stereotypic assumption."[83] The guidelines set forth in *Meritor* and subsequent

81. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

82. 42 U.S.C. § 12101(a)(7) (2000).

83. Placing the burden of establishing qualification on the person with a disability not only exposes an underlying assumption that at least some of the disabled are incapable; it also reflects some courts' continuing adherence to the so-called medical model of disability. The medical model views disability as a biological or physiological flaw that prevents "normal" human functioning. Harlan Hahn suggests that "[m]edicalizing disability may result from confusing the notion of impairment, which refers to limitations attributable solely to deficits of body or mind, with the notion of disability, which refers to restrictions imposed on the individual by an environment that places the individual at a social or economic disadvantage." Harlan Hahn, *Disputing the Doctrine of Benign Neglect: A Challenge*

"hostile work environment" cases for establishing a claim of sexual harassment do not include any requisite showing of a complainant's qualifications for the job in question.[84] By analogy, a complainant in a disability-based harassment suit should not bear any greater burden.

It may seem that if a person has been hired for a specific position, she has already established her ability to perform the job, and thus the qualification requirement poses no significant burden. However, this ignores the facts of a case like *Fox*, where the plaintiff develops the condition during his tenure of employment. A plaintiff that is injured or acquires a disabling condition and is unable to perform the essential functions of a job even with a reasonable accommodation may become unqualified for purposes of a standard discrimination claim. Nevertheless, this does not justify harassing conduct, nor should it relieve an employer of liability for such behavior.

Yet the question remains whether the ADA can, consistent with general rules of statutory interpretation, be read to protect a person with a disability from harassment in the absence of evidence of his qualifications. A reading of the ADA that omits the qualification requirement is likely to make any good strict constructionist cringe.[85] Despite the traditional canon that a remedial statute should be construed broadly to accomplish its intended purpose,[86] "[l]iberal construction ... has become a very pejorative term in certain political and legal circles."[87] Despite their differences, most liberal and strict constructionists agree that when the "plain meaning" of a statute is "clear and unambiguous," courts are

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to the Disparate Treatment of Americans with Disabilities, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 269, 270 (Leslie Pickering Francis & Anita Silvers eds., 2000) [hereinafter AMERICANS WITH DISABILITIES].

84. *See supra* notes 22-26 and accompanying text.

85. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 681, 681 (1990) (describing the liberal construction of remedial statutes as one of his "most hated legal canards" and "among the prime examples of lego-babble").

86. Richard A. Posner, *Statutory Interpretation—In the Classroom and In the Courtroom*, 50 U. CHI. L. REV. 800, 807-08 (1983) (citing Abbott Labs. v. Portland Retail Druggists Ass'n, 425 U.S. 1, 12 (1976)).

87. Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9, 37 (2000) (footnotes omitted).

obligated to follow the language.[88] Yet even the most devout textualist will, or at least should, reject a liberal interpretation when such a reading leads to absurd results.[89]

The ADA was originally passed to respond to the problem of discrimination.[90] As previously noted, a "qualified individual with a disability" is one "who, with or without a reasonable accommodation, can perform the essential function of the employment position that such individual holds or desires."[91] Because the qualification requirement is tied to the "essential function" and "reasonable accommodation" inquiries,[92] to the extent that this inquiry is irrelevant in assessing a harassment claim, the adjective "qualified" should be disregarded. When courts read the statute expansively to prohibit harassment based on disability, a strict reading of the qualification requirement indeed leads to absurd results: A person who is harassed based on his disability is ineligible for protection under the ADA simply because his condition precludes him from fully performing his job. Harassment and discrimination analyses are distinct. If, with or without a reasonable accommodation, the employee is unable to complete his job, his employer may dismiss him. Harassment, however, is not an acceptable alternative.

B. Defining Disability

Even if the "member of a protected group" standard is accepted in favor of the more narrow requirement in *Fox*, given the dispos-

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88. *Id.* at 45-46.

89. *Id.* at 23-27.

90. *See supra* note 37 and accompanying text.

91. 42 U.S.C. § 12111(8) (2000); *see supra* note 39.

92. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 796 (1999) (contrasting a claim of total disability for SSDI purposes and an ADA claim and holding that these claims can coexist, because unlike the ADA, the SSA "does not take into account the possibility of 'reasonable accommodation'"); Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987) (citing 45 C.F.R. § 84.3(k) (1985)) ("In the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question."); Brennan v. Stewart, 834 F.2d 1248, 1262 (5th Cir. 1988) ("['Reasonable accommodation'] is part of the 'otherwise qualified' inquiry ...."); Burgdorf, *supra* note 33, at 458 ("The interrelationship between qualifications and the obligation of making reasonable accommodations ensures that employers may not summarily determine what qualifications they wish to impose ....").

ition of the current Supreme Court toward the term "disabled,"[93] disability harassment plaintiffs still face a high bar to overcome summary judgment.[94] The ADA's three-prong definition of a disabled person includes any person who (1) has "a physical or mental impairment," (2) has "a record of such [a physical or mental] impairment," or (3) is "regarded as having such [a physical or mental] impairment."[95] To qualify for protection under the statute, the "impairment" must substantially limit the individual's ability to perform a major life function.[96] In contrast to "impairment," "substantial limitation" and "major life function" are not defined within the statute.

In *Bragdon v. Abbott*,[97] the Supreme Court first addressed the meaning of these provisions. The *Bragdon* Court found that Sidney Abbott, an asymptomatic HIV-positive dental patient, was "substantially limited" in her ability to procreate, and therefore, qualified for coverage under the ADA.[98] Ms. Abbott claimed that her dentist had violated Title III in refusing to fill her cavity in his office.[99] Though Abbott's inability to procreate is unrelated to a dental appointment, in order to proceed on her public accommodation claim, she first had to establish that she was disabled within the meaning of the statute. The majority of the Court agreed that procreation is a major life function, and although Abbott was asymptomatic, her status as a carrier of HIV substantially limited her ability to bear children.[100]

Any hopes for a broad definition of disability, however, were dashed the following term. In *Sutton v. United Air Lines, Inc.*,[101]

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93. *See infra* notes 97-112 and accompanying text.

94. Summary judgment is disproportionately used to dismiss ADA-based complaints. Defendants win 92.7% of ADA cases at the trial court level—they win the vast majority of them upon motions for summary judgment. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999).

95. 42 U.S.C. § 12102(2) (2000).

96. *Id.* § 12102(2)(a).

97. 524 U.S. 624 (1998).

98. *Id.*

99. *Id.* at 629. The ADA prohibits discrimination in services by "public accommodations" as well as by employers. 42 U.S.C. § 2000(a).

100. *Bragdon*, 524 U.S. at 639-41.

101. 527 U.S. 471 (1999).

Murphy v. UPS,[102] and *Albertson's, Inc. v. Kirkingburg*,[103] the Court concluded that contrary to the opinion of the EEOC, mitigating measures (including assistive devices and medications, as well as the human body's natural ability to compensate for an impairment) should be considered when determining whether a plaintiff is disabled.[104] Thus, twin sisters with severe myopia were denied protection because their vision improved to 20/20 with the use of corrective lenses;[105] a mechanic with hypertension was found not to be substantially limited in a major life activity because his condition could be controlled with medication;[106] and lower courts were instructed to consider the body's natural ability to compensate when assessing whether a truck driver with monocular vision was disabled within the meaning of the ADA.[107]

In the *Sutton/Murphy/Kirkingburg* trilogy, the Justices' interpretation of when an inability to work constitutes a substantial limitation of a major life activity further restricted the class of protected plaintiffs. According to the *Sutton* Court, "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that the plaintiffs allege they are unable to work in a broad class of

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102. 527 U.S. 516 (1999).

103. 527 U.S. 555 (1999).

104. In light of the Supreme Court's rulings in *Sutton*, *Murphy*, and *Kirkingburg*, the EEOC rescinded several sentences of the Code of Federal Regulations regarding whether an individual is disabled. The sentences had suggested that corrective or mitigating measures should *not* be taken into account when determining whether a person is disabled within the meaning of the ADA. *See* Interpretive Guidance on Title I of the Americans with Disabilities Act, 65 Fed. Reg. 36,327 (June 8, 2000).

The Court justified its refusal to follow agency guidance by stating:

> The agency guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA. The agency approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition.... This is contrary to both the letter and the spirit of the ADA.

Sutton, 527 U.S. at 483-84; *cf.* Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532 (2000) (arguing that *Sutton* was an appropriate case for the Court to employ *Chevron* deference to the agency's interpretation of statutory terms).

105. *Sutton*, 527 U.S. at 487-88.

106. *Murphy*, 527 U.S. at 521.

107. *Kirkingburg*, 527 U.S. at 567.

jobs."[108] Thus, so long as the plaintiff is able to work at *some* job utilizing her skills, it is irrelevant that she is unable to practice a specific job in her chosen field, using her "unique talents."[109]

The Court continued this restrictive trend in a recent disability-related decision. In *Toyota v. Williams*,[110] the plaintiff, who suffered from carpal tunnel syndrome and related impairments, sued Toyota for failing, as her employer, to provide a reasonable accommodation. 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[]" and that such an impairment must also have a long term or permanent impact.[111] Though the Court seemed to agree that Ms. Williams was limited in her ability to perform occupation-specific tasks, and recognized that "her medical conditions caused her to avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens, and drives long distances," the Court ultimately held that "[t]hese changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual-task disability as a matter of law."[112] The Court remanded the matter for trial on the issue.

Despite Congress' original intent to afford expansive protection to people with disabilities[113] and the existence of EEOC guidelines dictating a broad interpretation of the relevant provisions, courts have consistently rendered a narrow construction of disability. The result is a kind of Catch-22 for plaintiffs, placing "a rejected applicant in the untenable position of emphasizing all the things he or she cannot do in order to claim ADA protection, and then, once through the courthouse door, downplaying limitations in order to

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

109. *Id.* at 492.

110. 534 U.S. 184 (2002).

111. *Id.* at 198.

112. *Id.* at 202.

113. *See supra* note 33 and accompanying text. *See generally* Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (describing the ADA and arguing that the Supreme Court's recent decisions are contrary to Congress' intent).

prove he or she is qualified for the job."[114] Many scholars have criticized judicial interpretations of the ADA, concluding that federal courts have "developed no coherent pattern of thought about whether a disease should be classified as a disability," nor "formulated a coherent doctrine or a consistent line of argumentation to account for why one worker is qualified and another is not."[115]

In attempting to explain the increasingly restrictive reading of the ADA, commentators have arrived at widely disparate conclusions to account for the judiciary's reluctance to adhere to legislative intent and agency guidelines. One school of thought argues that society generally, and the Supreme Court specifically, is engaged in a backlash against the ADA.[116] According to these academics, "restrictive judicial interpretations of the ADA reflect, at best, a lack of understanding of the statute and, at worst, a blatant hostility towards the profound goals of the ADA."[117] Still others argue that although federal courts' interpretations may fall short of "blatant hostility," the decisions are nonetheless laden with the historical conceptions of disability and social accretion the drafters of the ADA intended to prohibit.[118] Recently though, a third

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114. Arlene Mayerson & Matthew Diller, *The Supreme Court's Nearsighted View of the ADA*, *in* AMERICANS WITH DISABILITIES, *supra* note 83, at 124.

115. RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE 4-5 (2001).

116. An entire symposium issue of the Berkeley Journal of Employment and Labor Law was devoted to precisely this critique. For an overview of the presenting authors' views, see Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

117. Mayerson & Diller, *supra* note 114, at 125. Aviam Soifer argues that, at least in the context of the Supreme Court's 1999 decisions, the latter is true. Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1327 (2000).

> [M]any of the Justices adamantly refused even to listen to the situations of the individuals whose cases were before the Court. An unholy admixture of ideological preconceptions and poor craftsmanship produced a new, remarkably murky legal regimen in which individuals who claim disabilities must be willing to be scrutinized minutely if they hope to satisfy the Court's new definitional prerequisites.

Id.

118. In her recent book, Ruth O'Brien contends that modern judicial decisions are influenced by the historical baggage of the ADA, and more specifically by the legacy of the postwar rehabilitation movement. She claims that people with disabilities present a threat to the workplace hierarchy because workers requesting accommodation "have the capacity

explanation has been proffered: The Court's response to ADA cases is neither the result of a misunderstanding or a backlash—it is about economics. According to Professor Samuel Issacharoff and Justin Nelson, the Court was faced with a poorly crafted statute and narrowed the definition of disability as a means of imposing a gatekeeping function on the ADA "to define defensible and administrable boundaries for disability accommodation claims."[119] Professor Samuel Bagenstos also posits an economic justification, but suggests that the Court's narrow reading is not a response to the expense of implementing the ADA; rather, the reading effectuates one of the ADA's underlying goals. Far from engaging in a backlash against the ADA, federal courts may be relying on a dependence-avoiding rationale often marshaled to drum up support for the statute both in the legislative debates and in the popular media prior to the passage of the ADA.[120] Although Bagenstos agrees that the courts have read the ADA in an unduly restrictive manner, he argues that the statute was "sold to a significant extent as a means of welfare reform," and that the Supreme Court's interpretation is the result.[121]

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to challenge the logic underlying work rules and regulations instituted by employers to maximize profits." O'BRIEN, *supra* note 115, at 4. In response, work-related disability policy following World War II was an attempt to "normalize" people with disabilities: Rather than have the workplace adapt to them, vocational rehabilitation was an attempt to conform them to the workplace. O'Brien concludes that "public support for the cultural values behind vocational rehabilitation and the commensurate lack of support for the rights orientation help explain why the employment provisions within the ADA have been so ineffectual." *Id.* at 5. For a critique of O'Brien's arguments, see Michael Ashley Stein, *Disability Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607 (2002).

119. 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 (2001).

120. Samuel R. Bagenstos, *The Americans with Disabilities Act As Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003).

121. *Id.* at 927. In another article, Professor Bagenstos proposed a more principled method for reading the statute. In line with the goals of the disability rights movement, "disability" should be understood as a socially defined group status marked by systematic subordination and stigma. Samuel Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 445 (2000). Under the antisubordinationist model, impairments that "substantially limit" a "major life function" must be interpreted as those that have been stigmatized by society either historically or in modern times. *Id.* This approach, Bagenstos contends, conforms with constitutional theory and history, is coherent with civil rights legislation, promotes the elimination of domination and oppression as urged by democratic theorists, provides distributive justice to people with disabilities, forwards the utilitarian

Whatever the Court's rationale, its increasingly narrow interpretation of the ADA has broad ramifications for the effectiveness of disability-based harassment as a cause of action. To the extent that an individual is unable to establish that she is disabled according to the Court's construction of the statute, she cannot sue her employer for harassment based upon her physical impairment. If, for example, one of the Sutton twins was regularly ridiculed for wearing thick glasses, she would be unable to bring a claim in federal court. Similarly, a person with relapsing-remitting multiple sclerosis, who walked with a limp during periods of relapse, could be mocked and mimicked by his employer with no right to legal recourse if a court found that the occasional gait problem did not amount to a substantial limitation on a major life function.

The Court has already made clear that it has no intention to create a general code of civility in the American workplace.[122] The rationale for limiting the availability of harassment claims to protected classes of people, of course, is largely based on the fear of endless litigation and frivolous suits. One way to ensure that people with disabilities are not subject to demeaning comments and crass behavior at work, yet still avoid a flood of ADA litigation, would be to "allow the definition of covered potential employees to remain flexible and use the employer's reasonable accommodation obligation to develop standards through the evolution of case law."[123]

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goal of eliminating dependency, and makes economic sense. *Id.* at 453-64.

Under this theory, Bagenstos claims that the Court's *Bragdon* decision "is eminently justifiable," and although the *Sutton/Murphy/Kirkingburg* trilogy may have in some ways been decided on the wrong grounds, the outcomes of those cases may also be explainable. *Id.* at 400. As a highly stigmatized disease, HIV is properly protected under the ADA. However, Bagenstos suggests that instead of focusing on Sidney Abbott's inability to procreate, the Court would have been on firmer footing if it had focused on the stigma attached to an HIV-positive diagnosis. *Id.* at 402. In *Sutton, Murphy,* and *Kirkingburg,* the Court, in Bagenstos' opinion, correctly judged that the impairments themselves were not necessarily the subject of stigma. *Id.* at 485. Nevertheless, he disagrees with the Court's analysis that to be limited in the life function of working, one must be disqualified from a broad class of jobs. Rather, he suggests, the appropriate standard should be whether the plaintiff suffered a stigmatizing loss of status. *Id.* at 445-46.

122. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998). *But cf.* Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment,* 88 GEO. L.J. 1, 60 (1999) (advancing a "pluralistic" approach that employs both Title VII and tort causes of action to protect those who "experience severe harassment on the job, but who would be hard pressed to assert that their harassment was 'because of sex ....'").

123. Issacharoff & Nelson, *supra* note 119, at 322.

Even if courts adopted such a broad interpretation of "disability," a plaintiff "still cannot prevail on a claim of discrim- ination unless she can prove that the employer took action 'because of' that impairment ... and that she can ... 'perform the essential functions of the job.'"[124] Such an approach would protect those injured by disability-based harassment, and yet maintain safeguards against baseless discrimination claims.

IV. GAUGING SEVERITY AND PERVASIVENESS

Although the initial question in a disability-based harassment case is whether a plaintiff is eligible for protection under the ADA, a court must ultimately determine whether, in fact, the employer has engaged in conduct rising to the level of actionable harassment. Courts and academics alike have wrestled with the appropriate standard to evaluate an employer's conduct. The debate centers around whether conduct should be gauged from the subjective perspective of the complainant, or an abstract objective vantage point. As indicated in Part I of this Note, the Supreme Court in *Harris* held that to bring an actionable claim, a plaintiff must prove that a reasonable person would find the work environment objectively hostile or abusive, and that subjectively, the plaintiff herself found it to be so. Justice Scalia, however, wrote a concurring opinion in *Harris* emphasizing the difficulty of assessing whether a workplace is objectively hostile.

> "Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person['s]" notion of what the vague word means. Today's opinion does list a number of factors that contribute to abusiveness ... but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to

124. *Sutton*, 527 U.S. at 503 (Stevens, J., dissenting) (quoting 42 U.S.C. § 12112(a) ("because of") and § 12111(8) ("essential functions")).

> warrant an award of damages. One might say that what constitutes "negligence" (a traditional jury question) is not much more clear and certain than what constitutes "abusiveness." Perhaps so. But the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under this statute "abusiveness" is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation. Be that as it may, I know of no alternative to the course the Court today has taken.[125]

Justice Scalia is not the only one troubled by the ambiguity surrounding "abusiveness" and the "reasonable person" standards. One problem, of course, is determining to what extent an individual's personal characteristics can be considered without completely stripping the reasonable person standard of its objectivity.

A. The Reasonable Person in Sexual Harassment Analysis

The reasonable person standard has come under fire in the Title VII harassment context for failing to address the unique concerns of harassment victims. Critics contend that the standard reflects the views of white men, upholds the status quo, and fails to account for the experiences of people victimized by harassment.[126] In *Ellison v. Brady*,[127] for example, the Ninth Circuit found that the reasonable person standard "tends to be male-biased and tends to systematically ignore the experiences of women."[128] Reasoning that "[c]onduct that many men may find unobjectionable may offend many women,"[129] the court adopted the "reasonable woman" standard in order to forward the underlying policies of Title VII and "ensure[] that courts will not 'sustain ingrained notions of reasonable behavior fashioned by the offenders.'"[130]

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125. Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (1993) (Scalia, J., concurring).

126. *See, e.g.*, Jane Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151 (1994).

127. 924 F.2d 872 (9th Cir. 1991).

128. *Id.* at 879.

129. *Id.* at 878.

130. *Id.* at 881 (quoting Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting)). In the Sixth Circuit, Judge Keith advocated the use of a reasonable

The reasonable woman standard also has its critics, however. Among the litany of concerns with the standard is that it patronizes and marginalizes women,[131] overemphasizes the similarity of women's experiences and fails to account for their differences,[132] lends itself to overreaction and undue censorship of speech,[133] and sacrifices consistency by inviting a multitude of possible standards.[134] Perhaps more importantly, though, it appears that the

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woman standard in his *Rabidue* dissent. *Rabidue*, 805 F.2d at 626. For other courts employing a gender specific standard, see Little v. Windermere Relocation, Inc., No. 99-35668, 2001 U.S. App. LEXIS 28010 (9th Cir. Sept. 12, 2001); Hurley v. Atl. City Police Dep't, 174 F.3d 95 (3d Cir. 1999); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991).

131. *See, e.g.*, Naomi Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398, 1415 (1992) ("Not only does it remind us of earlier stereotypes of women as more pure and moral than men, but it also reduces women's experiences ... to the margins of acceptance.") (footnote omitted); Dolkart, *supra* note 126, at 204 ("[A] reasonable woman standard marginalizes women. It suggests reasonable women are different from reasonable men, who remain the dominant norm."); Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 635 (1993) ("[T]he reasonable woman standard further entrenches a perceived hierarchy of differences between men and women. Codification of such differences in a legal standard cannot help but interfere with genuine legal and social equality.").

132. Cahn, *supra* note 131, at 1416-17; Johnson, *supra* note 131, at 635-38.

133. Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 819 (1993) ("[C]ompanies faced with potential liability under rapidly evolving and vague standards may feel the need to protect themselves by adopting intrusive and, ultimately, unfair, workplace restrictions.") (footnote omitted). For one perspective on the First Amendment implications of harassment law generally, see Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995). Both Professors Browne and Volokh argue that the promises of the First Amendment and the implementation of antidiscrimination law are frequently incompatible, because a policy designed to ensure equality for one group may have the effect of censoring another's speech. *But cf.* J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999) (contending that collateral censorship resulting from hostile environment restrictions does not offend the First Amendment); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 559 (1995) (arguing that although harassment law may have a chilling effect on some protected speech, "the degree of chilling is not substantial either in quantity or quality and is vastly outweighed by the invidious discrimination prohibited by hostile environment law").

134. Adler & Peirce, *supra* note 133, at 822-24; Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

> [O]ne might argue that the result of this critique is an infinite regress, for a

reasonable woman standard has little to no real impact on the outcome of cases. In a recent series of studies concerning the effect of the standard on participants' evaluation of harassment claims, researchers concluded that "the legal standard had very little impact on judgments, accounting for a maximum of 2% of the variance in respondents' assessment of hostile work environment sexual harassment."[135]

B. The Reasonable Person in Disability Harassment Cases

Many of the criticisms leveled at the reasonable person standard in the context of sexual harassment are equally applicable in cases of disability-based harassment. A standard based on the experiences of white, able-bodied, mentally capable men fails to appreciate the perspective of someone with an atypical physical or mental characteristic. As with the adoption of the reasonable woman standard, one possible response is to adopt a "reasonable person with a disability" standard.

The reasonable person with a disability standard, however, is subject to some of the same infirmities that plague the reasonable woman standard. First, the effect of imposing a specific standard for those with disabilities advances the notion that the disabled are somehow outside of the "norm."[136] Employing a different standard

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> "reasonable black woman" standard would still ignore differences of class, a "reasonable lower class black woman" standard would ignore differences of sexual orientation, etc. But that both misses the point and is the point.... In short, the goal of employing an "objective" test that is unaffected by the judge's (or any other) world-view and that is sufficiently general to apply to all people is simply an illusory one.

Id. at 1218.

135. Barbara A. Gutek et al., *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCHOL. PUB. POL'Y & L. 596, 623 (1999); *see also* Johnson, *supra* note 131, at 655-65 (surveying representative cases and concluding that "the reasonable woman standard cannot be shown to have made such a difference"); Ehrenreich, *supra* note 134, at 1218 ("Encouraging a formalistic reliance on doctrine, [Judge Keith's] reasonable woman test [in *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986)] obscures the fact that doctrinal constructs like consensus are merely vehicles for articulating value choices, not determinants of results.").

136. Distinguishing between a "person" and a "person with a disability" suggests that the former is "normal," but the latter is not. Ron Amundson argues, however, that like race, "normality of function" is not a biological fact, but social myth. True, biological diversity does

for people with disabilities paints them as weak, hypersensitive, or somehow less than objectively rational, and perpetuates the "harmful notion that courts should extend a paternalistic hand" to protect them.[137] Second, the use of a reasonable person with a disability standard presumes that a disability is equivalent to an impairment and ignores the role of socially constructed barriers in an individual's ability to function. In other words, it reinforces the medical model of disability contrary to the intent of the ADA.[138] Further, comparable to the reasonable woman standard, the reasonable person with a disability standard is all at once too objective and too subjective. With regard to the former, the standard does not account for the experience of all people with disabilities, but only for those with what we consider a typical experience.[139] On the other hand, the standard is inherently victim-focused, moving increasingly closer to a subjective, individualized inquiry.[140]

Frank Ravitch proposes an even more specific standard, that of a "reasonable person with the same disability."[141] This standard, according to Ravitch, incorporates the substantive law of the ADA, the structure for Title VII hostile work environment claims, and EEOC definitions of harassment.[142] However, in contrast to the EEOC-proposed "reasonable person in the same or similar circumstances" or traditional "reasonable person" standards, which are "too imprecise to be uniformly applied," Ravitch contends that

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exist, and although there may be more or less common modes and levels of function, one is not "normal" and the other "abnormal." According to Amundson, "[t]o call a typical or average species member 'normal' is to assume a blueprint in the developmental process that simply does not exist." Ron Amundson, *Biological Normality and the ADA, in* AMERICANS WITH DISABILITIES, *supra* note 83, at 102, 105.

137. Johnson, *supra* note 131, at 635.

138. *See* Hahn, *supra* note 83, at 270.

139. *Cf.* Cahn, *supra* note 131, at 1416-17. ("A second problem with the reasonable woman standard is that it does not accommodate the experiences of all women.... Women who have suffered the requisite type of conduct have been harassed or raped; others who suffer different types of behavior, or react differently to accepted behaviors, have no claim.").

140. *Cf. id.* at 1417 ("[T]he reasonable woman standard is victim-focused.").

141. Ravitch, *supra* note 14, at 1505-09. Note that plaintiffs in relatively recent disability harassment cases have forwarded this same argument. *See* Casper v. Gunite Corp., No. 99-3215, 2000 U.S. App. LEXIS 16241 (7th Cir. July 11, 2000); Pirolli v. World Flavors, Inc., No. 98-3596, 1999 U.S. Dist. LEXIS 18092 (E.D. Pa. Nov. 24, 1999).

142. Ravitch, *supra* note 14, at 1505-06.

his proposal is a more clear standard that takes account of the unique concerns and sensitivities of individuals with specific disabilities.[143] A blind person may not be offended by the same conduct that insults a paraplegic, and therefore, he reasons, we should not treat them the same.

Ravitch's proposal, however, faces some unique problems in addition to those posed by the adoption of a reasonable person with a disability standard. First, it is unclear at what level of specificity a trier of fact should consider a complainant's disability. Should a jury make its determination based only on a consideration of the impairment or on the source of the impairment? In other words, should we view the harassment from the perspective of a person who is unable to walk, or from the perspective of someone who is unable to walk because they have multiple sclerosis? Ravitch suggests that the appropriate consideration will be based on the nature of the harassment. Thus, if a person is harassed on the basis of a hearing impairment, the standard should be that of a reasonable person with a hearing impairment, but if the harassment is directed solely at those who are completely deaf, the standard should be that of a reasonable deaf person.[144] Although it may be possible to find experts capable of testifying about the types of behavior that a deaf person might find insulting,[145] this approach potentially requires employers to research and understand the types of comments and conduct that might be insulting to people with rare disabilities and uncommon diseases.

Second, as discussed previously, there is a distinction between an impairment (the actual biological atypicality) and a disability (largely the result of socially imposed barriers). Pursuant to Ravitch's proposal, is there room for this distinction? For instance, imagine two men each of whom is missing his left leg—one uses a wheelchair, the other has a prosthetic leg. Though they may share the same impairment, arguably their disability is different, and arguably they may experience the same harassing words or conduct differently.

Third, Ravitch's reductionist standard minimizes the similarity of experience between people with disabilities and could fracture

143. *Id.*
144. *Id.* at 1506-07.
145. *Id.* at 1507-08.

the unity that made the ADA possible. For example, although light-skinned and dark-skinned blacks may experience harassment differently, we nevertheless view their common experience as more important than their differences. Similarly, the proposed reasonable woman standard in sexual harassment cases does not account for differences between women who are pre-menopausal and those that are post-menopausal, or women with large breasts and those with small breasts. Rather, we presume that because women share a salient characteristic—having breasts, for instance—that it is irrelevant whether a woman is harassed because her chest is larger or smaller than average. Likewise, people with disabilities have something in common—biological atypicality. By analogy, we should not focus on the difference between their disabilities, but rather should emphasize similarity of experience to enhance the civil rights of all people with disabilities.

Fourth, a reasonable person with the same disability standard is especially problematic with regard to its application to people with mental disabilities. According to the court in *Pirolli v. World Flavors, Inc.*:[146]

> [T]he direct application of [the reasonable person with the same disability standard] is problematic, particularly when a mental disability is involved. Unlike gender or race, a mental disability can have such a decisive influence over a plaintiff's perception that even the most innocent of conduct could be found to be objectively abusive or hostile to a reasonable person with a particular mental disorder. If courts were to modify the objective test to account for each particular mental disability suffered by every plaintiff, the objective test could lose its objectivity.[147]

In sum, the court seems to ask whether there is such a thing, for instance, as a reasonable person with schizophrenia?

Finally, as with any type of objective or modified objective standard, Ravitch's standard is, in and of itself, an empty concept. A reasonableness standard "gains meaning only from the content given it by the triers of fact. Simply using the words "reasonable woman" [or "reasonable person with a disability" or "reasonable

146. No. 98-3596, 1999 U.S. Dist. LEXIS 18092 (E.D. Pa. Nov. 24, 1999).
147. *Id.* at *21 n.9.

person with the same disability"] does not provide a context or perspective within which to evaluate conduct."[148] Perhaps this lack of independent meaning explains why the "reasonable woman" standard has had such a modest effect, and by analogy, is the reason any type of disability-centered standard would be subject to the same fate.

Unless and until social attitudes toward minorities (including women and people with disabilities) change, perhaps no standard can adequately address the unique concerns of these groups and yet maintain the necessary objectivity to protect employers from frivolous lawsuits by hypersensitive employees. To make a choice among any of the competing standards necessarily involves a kind of balancing test to weigh the relative costs and benefits. The reasonable person standard is not without its flaws, but given the likely modest effect that the use of a victim-focused standard would have, and the potential cost it would impose on people with disabilities and society at large, the reasonable person standard should be maintained as the standard in disability-based harassment cases. When a finder of fact does employ a contextualized approach, an individual's personal characteristics should be considered only to the extent that those characteristics are apparent to or known by the employer. Though it is useful to understand a victim's characteristics and past experience, there are some aspects of a person's history into which a judge or jury should not inquire and which an employer cannot be expected to know. These aspects suggest the outer limits of a contextualized reasonableness approach.

CONCLUSION

The Fourth and Fifth Circuits' explicit recognition of a hostile environment claim under the ADA was a critical first step in protecting people with disabilities from harassing conduct in the workplace. Nevertheless, courts that are confronted with disability-based harassment suits in the future must decide which plaintiffs are eligible for protection under the ADA, and determine the appropriate standard for analyzing such claims. In such instances, a plaintiff should only have to prove that she is a "member of the

148. Dolkart, *supra* note 126, at 200.

protected group" in order to establish a prima facie case, or in other words, she must prove only that she has a disability within the meaning of the ADA. Courts should not require any showing of qualification, a requirement that is unnecessary in the harassment context and perpetuates stereotypes regarding the competence of people with disabilities—precisely the type of idea the ADA was intended to guard against. Furthermore, in assessing whether an employer's conduct rises to the level of actionable harassment, the traditional reasonable person standard will accomplish the goal of eradicating harassing behavior without the potential costs associated with disability-specific standards. This Note is an attempt to reconcile the framework of Title VII and the mandate of the ADA in order to generate a consistent approach to harassment law. Guided by these analytical tools, courts will be able to develop the appropriate standards for this "new" cause of action.

*Holland M. Tahvonen**

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