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Nicole Buonocore Porter

William & Mary Law School, nbporter@wm.edu

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THE DIFFICULTY ACCOMMODATING HEALTH CARE WORKERS

NICOLE BUONOCORE PORTER*

I. INTRODUCTION

The Americans with Disabilities Act¹ (ADA), enacted in 1990, requires employers to provide reasonable accommodations to employees with disabilities.² Reasonable accommodations can include: making existing facilities accessible, job restructuring, part time or modified work schedules, reassignment to a vacant position, acquisition or modification of devices, and others.³ The reasonable accommodation provision's significance is notably enhanced by the passage of the ADA Amendments Act of 2008,⁴ which dramatically expanded the protected class under the ADA.⁵ Because many more cases are succeeding past the inquiry of whether an individual has a disability and reaching the merits of the case,⁶ courts are being forced to grapple with difficult accommodation issues.⁷ Although employees in all industries may need the protection of the ADA's reasonable accommodation

* Professor of Law, University of Toledo College of Law. I would like to thank Professor Marcia McCormick, Professor Elizabeth Pendo, and the *Journal of Health Law & Policy* for inviting me to participate in this great symposium.

1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2012).

2. *Id.* § 12112(b)(5)(A).

3. *Id.* § 12111(9).

4. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101-12213).

5. See generally Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1 (2014) [hereinafter Porter, *Backlash*]; Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 218 (2008), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1144&context=nulr_online.

6. Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2029 (2013).

7. See generally Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527 (2013) (discussing the difficulty courts have in deciding reasonable accommodation issues).

provision, this essay, as part of a larger symposium,⁸ is focused on reasonable accommodations needed by health care workers.

Specifically, I argue that accommodating health care workers is difficult, perhaps more difficult than accommodating other workers, and I explain why. First, in Part II, I will describe the characteristics of health care jobs that make those jobs difficult for individuals with disabilities. These characteristics include: (1) most health care jobs are physically rigorous, often involving heavy lifting, pushing, and walking and standing for long periods of time; (2) most health care jobs involve long hours and/or shift work; and (3) the majority of jobs in the health care industry are safety-sensitive positions, with life or death often hanging in the balance.

In Part III, I discuss the three most common types of accommodations needed by employees with disabilities in the health care workforce and how employers and courts react to these accommodation requests. Finally, in Part IV, I turn to three over-arching issues I have identified in prior work and analyze how those issues manifest themselves (and are often magnified) in the health care context. Specifically, I will discuss: (1) employers' reluctance to provide modifications to the "structural norms"⁹ of the workplace; (2) "special treatment stigma" in the workplace—the reluctance of employers to provide accommodations that place burdens on other employees or that are seen as preferential treatment; and (3) "withdrawn accommodations"—the situation where employers take away accommodations previously provided.

II. CHARACTERISTICS OF HEALTH CARE JOBS

As stated above, there are three characteristics of many health care industry jobs that make accommodation requests fairly common but also fairly difficult to provide. This Part will discuss these three characteristics.

A. *Physically Rigorous*

Many health care jobs are physically rigorous. They often require standing, walking, and heavy lifting. Even when employees are not required to lift heavy weight unassisted very often, many health care employers consider lifting to be an essential function of the job¹⁰ because when it is required, there often is not

8. Nicole Buonocore Porter, Address at the William C. Wefel Center for Employment Law and the Center for Health Law Studies at Saint Louis University School of Law's Symposium: *The ADA at 25: Disability Rights and the Health Care Workforce* (Mar. 27, 2015).

9. The term "structural norms" is referring to hours, shifts, schedules, attendance policies, etc. Porter, *Backlash*, *supra* note 5, at 5-6.

10. In order for a disabled employee to make out a prima facie case of disability discrimination, she has to prove that she is a qualified individual with a disability. *Keith v. County of Oakland*, 703 F.3d 918, 923 (6th Cir. 2013). In order to prove that she is qualified, a

time to seek assistance. Several cases demonstrate the physically rigorous nature of health care work.

For instance, in *Guneratne v. St. Mary's Hospital*, the employer stated that the physical requirements of the job included lifting or carrying weight up to forty pounds frequently and over forty pounds occasionally.¹¹ The court agreed with the employer, stating that the lifting requirements were essential because nurses must be prepared to react to emergency situations.¹² Thus, the court held that the plaintiff, who had a lifting restriction of not more than five pounds because of a back injury, was not able to perform the essential functions of the job.¹³

In another case, *Lenker v. Methodist Hospital*, the court refused to overturn the jury's determination that lifting was an essential function.¹⁴ The court stated,

The jury heard evidence that Methodist considered lifting an essential function of the job, that it was part of the job description for staff nurses, that at times, staff shortages or emergencies left a nurse without assistance in a lifting task, and that the need for lifting was not always predictable because patients sometimes fell or needed assistance unexpectedly.¹⁵

Similarly, deferring to the employer's judgment that being able to lift forty pounds was an essential function of the plaintiff's position as a nurse, the court in another case held that the plaintiff was not qualified because she could not lift more than twenty-five pounds, per her doctor's orders.¹⁶

In addition to lifting requirements, health care jobs often involve frequent walking and standing. For instance, in *Basith v. Cook County*, the plaintiff was a pharmacy technician in a hospital, whose job included preparation of IV solutions and the delivery and stocking of medications, which involved walking.¹⁷ After a leave of absence following the injury of his leg in a car accident, he came back to work with several restrictions, including that he could not stand for more than ten minutes, walk more than fifty yards, or lift more than ten pounds.¹⁸ The debate in this case was whether the delivery function, which took about forty-five minutes to an hour and required walking

plaintiff must establish that she can perform the essential functions of the job, with or without reasonable accommodations. 42 U.S.C. § 12111(8) (2012).

11. *Guneratne v. St. Mary's Hosp.*, 943 F. Supp. 771, 773 (S.D. Tex. 1996).

12. *Id.* at 774.

13. *Id.* at 772, 774.

14. *Lenker v. Methodist Hosp.*, 210 F.3d 792, 796 (7th Cir. 2000).

15. *Id.*

16. *Griffin v. Prince William Health Sys.*, No. 01:10-CV-359, 2011 WL 1597508, at *2-4 (E.D. Va., Apr. 26, 2011).

17. *Basith v. Cook County*, 241 F.3d 919, 924, 927-28 (7th Cir. 2001).

18. *Id.* at 924.

for that entire time, was an essential function of the job for a pharmacy technician.¹⁹

Some jobs involve both walking and heavy lifting or pushing. For instance, in *Bryant v. Caritas Norwood Hospital*, the plaintiff was a staff nurse in the ambulatory surgery department, which required lifting and transporting patients.²⁰ She had no difficulty with her job for many years until she experienced blurred vision and was diagnosed with a central serous retinopathy, which caused a hemorrhage in her left eye that worsened with any type of straining, sneezing, coughing, and specifically, heavy lifting.²¹ Because of these limitations, she admitted that she could not perform one of the essential functions of the job.²²

B. Long Hours/Shift Work

Many health care jobs, especially those in hospitals, involve long hours and often require employees to work night shifts or rotating shifts. These scheduling requirements are difficult for many individuals with disabilities. For instance, in *Azzam v. Baptist Healthcare Affiliates, Inc.*, the plaintiff's job as a nurse in the surgery unit required her to be on-call one night each week and weekends on a rotating basis.²³ The plaintiff was diagnosed with "symptomatic a[trial]-fib[rillation]" and was put on restrictions with respect to her hours.²⁴ She could only work four hours per day (rather than the normal eight hours) and she could no longer work nights or weekends.²⁵

In *Laurin v. Providence Hospital*, the plaintiff worked as a staff nurse in a twenty-four hour maternity ward.²⁶ All nurses had to work one-third of their scheduled hours on either the evening shift or the midnight shift.²⁷ After she suffered a seizure, her neurologist opined that a day shift was necessary for the plaintiff to continue to work safely.²⁸ Similarly, the plaintiff in *Schott v. Trinity Health Michigan* could not work the normal schedule of thirteen-hour days for seven to eight consecutive days because she suffered from bipolar disorder.²⁹

19. *Id.* at 928-30.

20. *Bryant v. Caritas Norwood Hosp.*, 345 F. Supp. 2d 155, 158 (D. Mass. 2004).

21. *Id.* at 158.

22. *Id.* at 167.

23. *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F. Supp. 2d 653, 655 (W.D. Ky. 2012).

24. *Id.* at 655-56.

25. *Id.* at 656.

26. *Laurin v. Providence Hosp.*, 150 F.3d 52, 54 (1st Cir. 1998).

27. *Id.*

28. *Id.* at 55.

29. *Schott v. Trinity Health Mich.*, No. 11-12468, 2013 WL 1090514, at *1-2 (E.D. Mich., Mar. 15, 2013).

C. *Safety-sensitive Positions*

Certainly, there are other industries where employees are expected to engage in physically rigorous work and long hours or shift work.³⁰ But the health care industry is unique in the sense that many of these jobs are also safety-sensitive. In other words, in many cases, life or death (or at least the physical well-being of the patients) hangs in the balance. Employers and courts often refer to the safety-sensitive nature of these positions.

For instance, in one case, the court said that the plaintiff was not qualified as a staff nurse or a head nurse because of her inability to provide “direct patient care.”³¹ The court pointed favorably to the defendant’s evidence that being able to provide direct patient care was an essential function of the head nurse position: “direct patient care at a large metropolitan hospital requires a nurse to be able to attend to the needs of patients at all times . . . and to respond to emergencies, [which might include] assisting a patient who has collapsed.”³² In a similar case, the court held that modifying the physical functions of the nursing job was not possible “because nurses must be prepared to immediately react in emergency situations.”³³ The court also stated that allowing the plaintiff an accommodation of seeking assistance when she needed help lifting might put patients at risk.³⁴

The court in *Samper v. Providence St. Vincent Medical Center* was very explicit about the safety-sensitive nature of the plaintiff’s position as a nurse in the neonatal intensive care unit (NICU).³⁵ In holding that attendance was an essential function (and that the plaintiff was not entitled to unlimited absences as a reasonable accommodation for her disability), the court stated that the at-risk population in the NICU “cries out for constant vigilance, team coordination and continuity.”³⁶ Agreeing with another case in the First Circuit, the court stated, “[m]edical needs and emergencies—many potentially life-threatening—do not mind the clock, let alone staff-nurse convenience. . . .”³⁷

In some cases, the employer more explicitly relied on the “direct threat” defense. One of the defenses to an employer’s liability under the ADA is if the employer has “qualification standards” that are job-related and consistent with business necessity.³⁸ One of these qualification standards “[might] include a

30. For instance, manufacturing jobs are often physically rigorous and require long hours and/or shift work.

31. *Davis v. N.Y.C. Health & Hosps. Corp.*, 508 F. App’x 26, 28-29 (2d Cir. 2013).

32. *Id.* at 29.

33. *Guneratne v. St. Mary’s Hosp.*, 943 F. Supp. 771, 774 (S.D. Tex. 1996).

34. *Id.* at 775.

35. *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1235 (9th Cir. 2012).

36. *Id.* at 1235, 1238.

37. *Id.* at 1238 (quoting *Laurin v. Providence Hosp.*, 150 F.3d 52 (1st Cir. 1998)).

38. 42 U.S.C. § 12112(b)(6) (2012).

requirement that an individual shall not pose a *direct threat* to the health or safety of other[s]. . . .”³⁹ Direct threat is defined as a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”⁴⁰

For instance, in *Haas v. Wyoming Valley Health Care System*, the doctor was an orthopedic surgeon who had a hypomanic episode while performing a total knee replacement.⁴¹ The court had to decide whether the plaintiff’s mental disability created a direct threat to his patients.⁴² Similarly, the court in *Olsen v. Regional Medical Center* held that the plaintiff was not a qualified individual because she suffered many seizures when she was performing as a mammography technician, creating a direct threat to herself and her patients.⁴³

III. COMMON ACCOMMODATIONS REQUESTED BY HEALTH CARE WORKERS

Broadly speaking, accommodations generally fall into three categories: (1) modifications to the physical functions of the job; (2) modifications to the structural norms of the job; and (3) reassignment to a vacant position.⁴⁴ In the health care context, employers often refuse to grant these accommodations. Many of these cases also include a discussion of the “essential functions” of the job. This inquiry is related to the reasonable accommodation inquiry because an employee cannot proceed with a disability discrimination claim unless the employee can establish that she is “qualified,” which is defined as being able to perform the essential functions of the job, with or without reasonable accommodations.⁴⁵

A. *Modifications to the Physical Functions of the Job*

As discussed above, many health care jobs are physically rigorous; thus, disabilities that affect standing, lifting, walking, and pushing require employees with these disabilities to seek accommodations to the physical functions of the job. For instance, as discussed above, in *Guneratne v. St. Mary’s Hospital*, the plaintiff was a registered nurse at a hospital when she injured her back while lifting a patient and was put on restrictions including no lifting more than five pounds.⁴⁶ The employer alleged that the physical

39. 42 U.S.C. § 12113(b) (2012) (emphasis added).

40. 42 U.S.C. § 12111(3) (2012).

41. *Haas v. Wyo. Valley Health Care Sys.*, 465 F. Supp. 2d 429, 430 (M.D. Pa. 2006).

42. *Id.* at 436-37 (analyzing the direct threat issue, but ultimately holding that there was a genuine issue of material fact regarding whether the risk posed by the plaintiff was a significant one).

43. *Olsen v. Reg’l Med. Ctr.*, 713 F.3d 1149, 1152-54 (8th Cir. 2013).

44. *Id.* § 12111(9).

45. 42 U.S.C. § 12111(8) (2012).

46. *Guneratne v. St. Mary’s Hosp.*, 943 F. Supp. 771, 772 (1996).

requirements of the job included lifting or carrying weight up to forty pounds frequently and over forty pounds occasionally.⁴⁷ The court agreed with the employer, and thus held that the plaintiff was not able to perform the essential functions of the job without an accommodation.⁴⁸ The court separately considered the question of whether the plaintiff could perform the essential functions *with* an accommodation.⁴⁹ The plaintiff suggested that she should have been allowed to avoid heavy lifting and/or been permitted to request assistance when heavy lifting was required.⁵⁰ However, the court held that such an accommodation would eliminate or reallocate essential functions of the job and might put patients at risk.⁵¹ Thus, no accommodation was possible.⁵²

Similarly, in *Lenker v. Methodist Hospital*, the plaintiff was a nurse who had multiple sclerosis (MS).⁵³ After he had an MS symptom that resulted in a ten-day hospitalization, his doctor advised that he should not do any heavy lifting.⁵⁴ The issue in the case turned on whether lifting was an essential function of the plaintiff's job and whether the employer should have accommodated him.⁵⁵ Because the court agreed with the jury's determination that lifting was considered an essential function of the job, the court held that the plaintiff could not be accommodated.⁵⁶

The plaintiff in *Phelps v. Optima Health, Inc.* also had a lifting restriction.⁵⁷ She had worked as a staff nurse for four years and after she injured her back, she quit.⁵⁸ Six years later, the employer rehired her in a position it created that did not require heavy lifting.⁵⁹ Subsequently, the employer was short-staffed so it allowed her to perform some patient care even though she could not do all of the duties of a staff nurse.⁶⁰ She either shared the patient load with her sister, who was also a nurse, or other nurses would help her with lifting tasks.⁶¹ Eventually, the employer refused to let her work without the ability to lift fifty pounds.⁶² Because there was no other position

47. *Id.* at 773.

48. *Id.* at 774.

49. *Id.*

50. *Id.* at 775.

51. *Guneratne*, 943 F. Supp. at 775.

52. *Id.*

53. *Lenker v. Methodist Hosp.*, 210 F.3d 792, 794 (7th Cir. 2000).

54. *Id.* at 795.

55. *Id.* at 796.

56. *Id.* at 796-97.

57. *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 24 (1st Cir. 2001).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Phelps*, 251 F.3d at 24.

for her, she was terminated.⁶³ The court stated that lifting was an essential function and the employer was under no obligation to accommodate the plaintiff's inability to lift.⁶⁴

The employer in *Basith v. Cook County* also had a difficult time accommodating the plaintiff's physical restrictions.⁶⁵ As discussed above, the plaintiff was a pharmacy technician in a hospital and his job included preparation of intravenous (IV) solutions and the delivery and stocking of medications.⁶⁶ After a leave of absence following the injury of his leg in a car accident, he came back to work with several restrictions.⁶⁷ He could not stand for more than ten minutes, walk more than fifty yards, or lift more than ten pounds.⁶⁸ After attempting to return to work with revised restrictions, he asked for a shift change because the current shift required him to stand and move too much.⁶⁹ When the employer tried to accommodate him by having someone else deliver the medications, he complained that the employer did not accommodate him enough and he went on leave.⁷⁰ Eventually, he asked to be assigned to only sedentary tasks.⁷¹ The debate in this case was whether the delivery function, which took about forty-five minutes to an hour and required walking, was an essential function of the job for a pharmacy technician.⁷² If it were, the employer would not be required to eliminate it in order to accommodate the plaintiff.⁷³ Although the court remanded for this factual determination, it seems to me that a task that takes forty-five minutes to an hour could very well be deemed an essential function and thus, it might be difficult for the employer to accommodate this employee.

The court in *Davis v. New York City Health and Hospitals Corp.* also held that the plaintiff could not be accommodated.⁷⁴ The plaintiff was a nurse who could not lift patients, or push a wheelchair, stretcher, or heavy cart.⁷⁵ She acknowledged that, with her limitations, she could not provide direct patient care as a "staff nurse," but there was a question regarding whether she was a "head nurse," and if so, whether direct patient care was required for the head

63. *Id.*

64. *Id.* at 26.

65. *See Basith v. Cook County*, 241 F.3d 919 (7th Cir. 2001).

66. *Id.* at 924.

67. *Id.*

68. *Id.*

69. *Id.* at 925.

70. *Basith*, 241 F.3d at 925.

71. *Id.* at 926.

72. *Id.* at 928-29.

73. *Id.* at 929-30.

74. *Davis v. N.Y.C. Health & Hosps. Corp.*, 508 F. App'x 26, 29 (2d Cir. 2013).

75. *Id.* at 29.

nurse position.⁷⁶ The employer argued that even head nurses are required to perform these “direct patient care” tasks, and, therefore, the plaintiff was not qualified.⁷⁷ She had not presented evidence that there were any possible reasonable accommodations that would allow her to perform those tasks.⁷⁸

In *Hancock v. Washington Hospital Center*, the plaintiff had difficulty with both lifting and walking.⁷⁹ The plaintiff was a medical assistant, the duties of which included triaging patients, among other responsibilities.⁸⁰ Both parties agreed that triaging patients was considered an essential function of her job.⁸¹ The plaintiff discovered she had fibroid cysts in her rectum.⁸² She had surgery to remove them but suffered complications.⁸³ Additional surgery resulted in her spine being punctured, which caused nerve damage.⁸⁴ This nerve damage limited her ability to walk and lift and left her with a permanent limp that precluded her from walking long distances.⁸⁵ When she returned to work, she was placed on light duty and was prohibited from lifting and bending, and she was not supposed to triage patients.⁸⁶ Eventually, the employer refused to accommodate her light duty request and she was terminated.⁸⁷ The court held that there was a genuine issue of material fact regarding whether her restrictions were permanent or temporary, and, thus, whether she was seeking permanent or temporary light duty.⁸⁸ The court stated that the employer had granted light duty for a period of time and could not just withdraw it without establishing that continuing with the light duty assignment would create an undue hardship.⁸⁹ Thus, the court refused to grant the employer’s motion for summary judgment.⁹⁰ Despite this positive result for the plaintiff, the court did infer that if her need for light duty were permanent, the employer would not have to accommodate her.⁹¹

For some positions, it is possible to accommodate a lifting restriction or difficulty pushing heavy wheelchairs. For instance, in *Kauffman v. Petersen Health Care VII, LLC*, the plaintiff worked in a nursing home, but the only

76. *Id.*

77. *Id.*

78. *Id.*

79. *Hancock v. Wash. Hosp. Ctr.*, 908 F. Supp. 2d 18, 21 (D.D.C. 2012).

80. *Id.* at 20.

81. *Id.*

82. *Id.*

83. *Id.* at 20-21.

84. *Hancock*, 908 F. Supp. 2d at 21.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 24.

89. *Hancock*, 908 F. Supp. 2d at 25.

90. *Id.*

91. *Id.* at 24.

heavy lifting required of her job (as a hairdresser) was to push the nursing home residents in their wheelchairs from their rooms to the on-site salon.⁹² After a hysterectomy resulted in complications and a restriction on lifting and pushing any more than fifty pounds,⁹³ the nursing home refused to accommodate her by asking other employees to deliver the residents to the beauty salon.⁹⁴ The court, through Judge Posner, estimated that the time spent wheeling residents was a very small proportion of her overall work day, and considering total staff hours, it would likely not be a hardship to ask other staff members to wheel the residents back and forth to the beauty salon.⁹⁵ Because it was a question of fact regarding whether wheeling the residents was an essential function of the plaintiff's job, the court reversed the trial court's grant of summary judgment to the employer.⁹⁶ The court stated that "[i]f a minor adjustment in the work duties of a couple of other employees would have enabled the plaintiff despite her disability to perform the essential duties of her job as a hairdresser, the nursing home's refusal to consider making such an adjustment was unlawful."⁹⁷ Of course, this case is distinguishable from the other health care cases because, even though it takes place in a nursing home, the plaintiff's actual position was not health care related. She was a hairdresser. For many of the other nursing home employees, the ability to lift patients and push wheelchairs would not be an occasional duty but would be frequently required.

B. *Structural Norms of the Workplace*

As stated above, the structural norms of the workplace are not the actual physical functions of the job, but instead involve the when and where work is performed—hours, schedules, shifts, attendance policies, leaves of absence, etc. Because many health care jobs are in hospitals or other settings that operate 24/7, accommodating schedule changes can be difficult.

For instance, in a case discussed above, *Azzam v. Baptist Healthcare Affiliates, Inc.*, the plaintiff's job as a nurse in the surgery unit required her to be on call one night each week and weekends on a rotating basis.⁹⁸ The plaintiff was diagnosed with "symptomatic a[trial]-fib[rillation]" and was put on restrictions with respect to her hours.⁹⁹ She could only work four hours per

92. *Kauffman v. Petersen Health Care VII, LLC*, 769 F.3d 958, 959 (7th Cir. 2014).

93. *Id.* at 960.

94. *Id.* at 961. In fact, when she asked for an accommodation, her boss told her "we just don't allow people to work with restrictions" *Id.*

95. *Id.* at 961-62.

96. *Kauffman*, 769 F.3d at 962 (stating that wheeling the residents is not an essential function if it can be assigned to other employees without much of a hardship at all).

97. *Id.* at 959.

98. *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F. Supp. 2d 653, 655 (W.D. Ky. 2012).

99. *Id.*

day (rather than the normal eight hours) and she could no longer work nights or weekends.¹⁰⁰ The employer complied with her restrictions for several months, assigning other nurses to take on her on-call responsibilities.¹⁰¹ Eventually, the employer tired of this and asked her to return to being on-call.¹⁰² She refused and they terminated her.¹⁰³ The court held that she was not qualified because she could not perform the eight-hour shifts and the on-call responsibilities of the nursing position, both of which were essential functions, according to the court.¹⁰⁴ Thus, the court held that it was not possible to accommodate her.¹⁰⁵

As is common in many hospitals, the plaintiff in *Laurin v. Providence Hospital* was a nurse who was required to work some evening and midnight shifts.¹⁰⁶ After she was diagnosed with a seizure disorder, her neurologist opined that a daytime only position was necessary for the plaintiff.¹⁰⁷ The employer allowed her a temporary accommodation of working only day shifts, but refused to accommodate her on a permanent basis.¹⁰⁸ The court held that shift rotation was an essential function of the job, and, thus, there was no accommodation possible.¹⁰⁹

C. Reassignment to a Vacant Position

In some cases, the plaintiff acknowledges that she would be unable to perform the essential functions of the job because of her disability, and, thus, requests reassignment to another position as an accommodation. The ADA's reasonable accommodation provision specifically includes "reassignment to a vacant position" as a possible accommodation.¹¹⁰ However, because so many health care jobs involve physically rigorous tasks and/or long hours, it is often difficult for the employer and the plaintiff to find and agree on a suitable position to which the plaintiff can be reassigned. Often, the employer offers reassignment to a position that results in a demotion or less pay for the plaintiff.

For instance, in *Hedrick v. Western Reserve Care System*, the plaintiff worked as a registered nurse for twenty-two years before she developed

100. *Id.* at 656.

101. *Id.*

102. *Id.*

103. *Azzam*, 855 F. Supp. 2d at 656.

104. *Id.* at 661-62.

105. *Id.* at 662.

106. *Laurin v. Providence Hosp.*, 150 F.3d 52, 54 (1st Cir. 1998).

107. *Id.* at 55.

108. *Id.*

109. *Id.* at 59.

110. 42 U.S.C. § 12111(9)(B) (2012).

osteoarthritis in both of her knees and broke her leg.¹¹¹ After her leave of absence, she was unable to perform her normal nursing duties.¹¹² The employer did try to find her an alternative position, but she turned down the offered position because the salary was much lower than she had been making.¹¹³ Because she turned down that offer of reassignment, the court held that she was not a qualified individual with a disability.¹¹⁴

Making reassignment more difficult is the fact that employers are not required to create a position in order to accommodate an employee who can no longer perform the essential functions of her position. Thus, for instance, the employer in *Miller v. Bon Secours Baltimore Health Corp.* was not obligated to continue to staff a position it created for the plaintiff when she could no longer perform her regular job duties.¹¹⁵ In other words, because it was under no obligation to originally create a position that the plaintiff could perform with her disability-related restrictions, it was also under no obligation to continue to employ the plaintiff in that position.¹¹⁶

Of course, situations exist where it is possible to find another job for an individual with a disability in the health care setting, but sometimes employers are not very receptive to doing so. For instance, in *Norville v. Staten Island University Hospital*, the plaintiff was a nurse at a hospital when, after a leave of absence for her disability, she had to avoid heavy lifting, stretching, and bending, which precluded her from performing her position.¹¹⁷ Although she applied to several vacant positions, she either turned them down because they involved a demotion in pay or seniority or the employer said she was unqualified for others, ultimately resulting in her termination.¹¹⁸ The court held that the employer had failed to accommodate her because it was not a reasonable accommodation to offer her a position that would involve a significant diminution in pay and prestige, and there was a factual issue with regard to whether she was qualified for one of the vacant positions to which the employer had refused to reassign her.¹¹⁹ Overall, these cases demonstrate that, although reassignment continues to be an important accommodation to

111. Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 449 (6th Cir. 2004).

112. *Id.*

113. *Id.* at 450.

114. *Id.* at 457-58.

115. *Miller v. Bon Secours Balt. Health Corp.*, No. 98-2046, 1999 WL 731098, at *3 (D. Md. Sept. 20, 1999).

116. *Id.* ("To the extent that Miller contends that she is somehow entitled to lifetime employment because her position was created as an accommodation for her disability, she is incorrect.").

117. *Norville v. Staten Island U. Hosp.*, 196 F.3d 89, 93-94 (2d Cir. 1999).

118. *Id.* at 94.

119. *Id.* at 99-100.

consider, it often is not available to employees with disabilities working in the health care setting.

IV. EXACERBATING THE PROBLEM

In other work, I have identified three themes that play out over and over again in reasonable accommodation cases. These three themes are likely to exacerbate the difficulty accommodating health care workers. The first is employers' reluctance to modify the structural norms of the workplace—hours, shifts, schedules, etc. The second is the concern employers have offering accommodations that are seen as “special treatment” and are therefore resented by coworkers. I call this “special treatment stigma.” Finally, the third theme is what I refer to as “withdrawn accommodations,” where employers provide an accommodation temporarily but ultimately discontinue providing the accommodation. I address each of these three themes in turn, and discuss how they play out in the health care context.

A. *Reluctance to Modify Structural Norms*

As I identified in prior work, employers are more reluctant to provide accommodations that modify the structural norms of the workplace than they are to provide accommodations that seek to modify the physical functions of the job.¹²⁰ Even when an accommodation would seemingly not cause any hardship at all on an employer, the employer is often still unwilling to provide it. For instance, employers have been unwilling to allow employees a variation from a rotating shift, or to allow employees to work less than full-time.¹²¹ This is especially significant in the health care context because so many health care employers are open 24/7 and these jobs often involve long hours and/or shift work.¹²²

In my prior work, I attempted to offer some insights into why employers seem to be less willing to allow modifications to the structural norms of the workplace than they are to the physical functions of the job.¹²³ One explanation is that accommodations given regarding hours, shifts, and schedules worked often have tangible effects on other employees.¹²⁴ This is because employees might be expected to pick up the slack if a disabled employee cannot work a particular shift or must work fewer hours. Employers

120. Porter, *Backlash*, *supra* note 5, at 70-82.

121. See, e.g., *id.* at 74-76 (discussing post-ADAAA cases where courts held that employers were not required to allow an employee an accommodation related to the employee's shift or hours required); Nicole Buonocore Porter, *Special Treatment Stigma after the ADA Amendments Act*, 43 PEPP. L. REV. 213 (2016) (hereinafter Porter, *Stigma*) (collecting cases).

122. See *supra* Part II.B & III.B (discussing some of these cases in the health care context).

123. Porter, *Backlash*, *supra* note 5, at 79-82.

124. *Id.* at 79.

are reluctant to give accommodations that place burdens on other employees.¹²⁵ Doing so causes resentment by those employees, which is what I refer to as “special treatment stigma,” discussed next.

B. *Special Treatment Stigma*

Special treatment stigma is a term I coined to describe the stigma that occurs when individuals are given special treatment in the workplace.¹²⁶ For individuals with disabilities, this special treatment is in the form of reasonable accommodations.¹²⁷ Special treatment stigma manifests itself in two distinct but related ways. First, coworkers resent when individuals with disabilities are given accommodations that either place burdens on the coworkers or are accommodations that those coworkers would also desire.¹²⁸ And second, because employers are reluctant to place burdens on the coworkers or to otherwise create discord between employees, they are less likely to grant accommodation requests when the accommodations are perceived as preferential treatment or placing burdens on other employees.¹²⁹

There are several cases in the health care context that demonstrate this special treatment stigma. For instance, the *Azzam v. Baptist Healthcare Affiliates, Inc.* case involved the situation where an accommodation arguably placed burdens on other employees.¹³⁰ In *Azzam*, a nurse was on light duty and could only work limited hours and could not be on-call for nights or weekends.¹³¹ The employer accommodated her restrictions for a period of time but the other nurses began complaining about having to assume the plaintiff's on-call responsibilities.¹³² Thus, the employer fired her.¹³³

Similarly, in *Laurin v. Providence Hospital*, the plaintiff worked as a nurse in a maternity unit where rotating shifts were required.¹³⁴ After her doctor advised that she keep a regular schedule, her supervisors polled the nurses in the maternity unit and the majority of those nurses objected to a days-only position for the plaintiff and refused to cover her evening and night shifts.¹³⁵

In *Kauffman v. Petersen Health Care VII, LLC*, the employer was not willing to place even a very minor burden on other employees in order to

125. *Id.* at 80; see also Porter, *Stigma*, *supra* note 121.

126. Porter, *Stigma*, *supra* note 121.

127. *Id.*

128. *Id.* at 236-37.

129. *Id.* at 235-36.

130. *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F. Supp. 2d 653, 656 (W.D. Ky. 2012).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Laurin v. Providence Hosp.*, 150 F.3d 52, 54 (1st Cir. 1998).

135. *Id.* at 55.

accommodate the plaintiff's disability-related restrictions.¹³⁶ The plaintiff was a hairdresser in a nursing home, but her only work-related restriction was that she could not transport the nursing home's patients via wheelchair from their room to the salon on-site.¹³⁷ The employer refused to require other employees to wheel the patients for the plaintiff, and, thus, the plaintiff was forced to quit.¹³⁸

In the *Hancock v. Washington Hospital Center* case, the issue was not about accommodations that placed burdens on other employees, but an accommodation that other employees might also covet.¹³⁹ In *Hancock*, the plaintiff was a medical assistant, whose restrictions after a medical leave of absence precluded her from doing her regular job.¹⁴⁰ The employer gave her light duty for a period of time, but then ultimately refused to accommodate her restrictions.¹⁴¹ During a conversation between her supervisors about the plaintiff's restrictions, one supervisor asked another, "Don't we always need staff on the telephone?"¹⁴² The other supervisor responded, "If I only utilize her on the phones (long term), then it sets me up to have to make likewise accommodations for other staff members in the future."¹⁴³ Thus, special treatment stigma affects employers' willingness to accommodate individuals with disabilities.

C. *Withdrawn Accommodations*

In a recent paper, I identified a third common theme in reasonable accommodation cases—withdrawn accommodations.¹⁴⁴ "This scenario occurs when an employer has provided an accommodation to an individual with a disability for some period of time but ultimately withdraws the accommodation, often claiming that the employer did not realize that the need for the accommodation was permanent rather than temporary."¹⁴⁵ The other way in which this scenario arises is when a new supervisor comes onto the scene, and decides that an accommodation that has been given should not have been given in the first place, and, thus, takes it away.¹⁴⁶ The legal issue that arises in these cases is determining the relevance of the prior accommodation

136. *Kauffman v. Petersen Health Care VII, LLC*, 769 F.3d 958, 961 (7th Cir. 2014).

137. *Id.* at 960.

138. *Id.* at 961.

139. *Hancock v. Wash. Hosp. Ctr.*, 908 F. Supp. 2d 18, 25 (D.D.C. 2012).

140. *Id.* at 21.

141. *Id.*

142. *Id.* at 22.

143. *Id.*

144. Nicole B. Porter, *Withdrawn Accommodations*, 63 DRAKE L. REV. 885, 890, 896 (2015).

145. *Id.* at 890.

146. *Id.* at 896.

when deciding whether that particular accommodation is reasonable. There are many health care accommodation cases that involved this issue.

For instance, in *Basith v. Cook County*, the employer temporarily reassigned one of the plaintiff's job duties as a pharmacy technician—delivering medications.¹⁴⁷ After several leaves of absence and several attempts to return to work, the court held that the delivery of medications was an essential function of the job.¹⁴⁸ The court specifically addressed the issue of the withdrawn accommodation.¹⁴⁹ It stated that just because the employer found the plaintiff another job for a period of time does not mean that the delivery of the medication was not an essential function of the job.¹⁵⁰

As discussed above, the plaintiff in *Phelps v. Optima Health, Inc.* worked as a staff nurse for four years until she injured her back, could no longer lift heavy weights, and she quit.¹⁵¹ Six years later, the employer rehired her in a position it created that did not require heavy lifting.¹⁵² Subsequently, the employer was short-staffed so it allowed her to do some patient care even though she could not do all of the duties of a staff nurse.¹⁵³ She either shared the patient load with her sister, who was also a nurse, or other nurses would help her with lifting tasks.¹⁵⁴ Eventually, the employer refused to let her work without the ability to lift fifty pounds.¹⁵⁵ Because there was no other position for her, she was terminated.¹⁵⁶ When the court considered whether lifting was an essential function of the job, it stated that even though the employer had made a special arrangement to account for her disability, the “court must evaluate the essential functions of the job without considering the effect of the special arrangements.”¹⁵⁷ In other words, the court stated that evidence that accommodations were made to avoid a task simply shows that the job “could be restructured, not that the job function was non-essential.”¹⁵⁸ Thus, the court held that the employer was under no obligation to allow the plaintiff to job share.¹⁵⁹

147. *Basith v. Cook County*, 241 F.3d 919, 924-25 (7th Cir. 2001).

148. *Id.* at 929.

149. *See id.* at 930.

150. *Id.*

151. *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 24 (1st Cir. 2001).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Phelps*, 251 F.3d at 24.

157. *Id.* at 25.

158. *Id.* at 26.

159. *Id.*

The court very explicitly discussed this withdrawn accommodation issue in *Laurin v. Providence Hospital*.¹⁶⁰ In this case, as discussed above, the plaintiff asked to only be scheduled for the day shift.¹⁶¹ The employer accommodated her temporarily, but eventually refused to continue to accommodate her scheduling requirement.¹⁶² In discussing whether the change in schedule was a reasonable accommodation, the court stated that just because the employer had allowed her to work part-time hours did not mean that the employer was obligated to continue to do so.¹⁶³ The court stated that an “employer does not concede that a job function is ‘non-essential’ simply by voluntarily assuming the limited burden associated with a temporary accommodation, nor thereby acknowledge that the burden associated with a permanent accommodation would not be unduly onerous.”¹⁶⁴

Similarly, the plaintiff in *Miller v. Bon Secours Baltimore Health Corp.* argued that the employer failed to accommodate her when it withdrew the accommodation it had previously provided to her—an office clerk position that she could perform with her disability-related restrictions.¹⁶⁵ The court held that taking away the temporarily-provided position was not discriminatory, stating, “To the extent that Miller contends that she is somehow entitled to lifetime employment because her position was created as an accommodation for her disability, she is incorrect.”¹⁶⁶

Not all of these cases are decided against the employee. For instance, in *Hancock v. Washington Hospital Center*, the plaintiff was given light duty when she returned to work from her disability-related leave of absence.¹⁶⁷ Ultimately, the employer withdrew the accommodation and terminated her.¹⁶⁸ The court held that because the employer had given her light duty for a period of time, it could not just withdraw it, stating that there was a genuine issue of material fact regarding the reasonable accommodation issue.¹⁶⁹ Interestingly, however, the court could not determine (at the summary judgment stage) whether she was seeking a temporary or permanent accommodation.¹⁷⁰ Thus, it is possible that if her restrictions became permanent (as they often do in these

160. See generally *Laurin v. Providence Hosp.*, 150 F.3d 52, 54 (1st Cir. 1998).

161. *Id.* at 55.

162. *Id.*

163. *Id.* at 60.

164. *Id.* at 60-61.

165. *Miller v. Bon Secours Balt. Health Corp.*, No. 98-2046, 1999 WL 731098, at *2 (D. Md. Sept. 20, 1999).

166. *Id.* at *3.

167. *Hancock v. Wash. Hosp. Ctr.*, 908 F. Supp. 2d 18, 21 (D.D.C. 2012).

168. *Id.*

169. *Id.* at 24-25.

170. *Id.* at 23.

cases), the court would not have held that the employer was required to accommodate her.

V. CONCLUSION: WHERE DO WE GO FROM HERE?

In this essay, I have identified several challenges to accommodating health care workers with disabilities. To be clear, I am not trying to place blame. In fact, if I were, the blame would be spread fairly equally between the nature of the health care industry, the inability of health care employers to consider unique ways of restructuring health care jobs, and the shortcomings in the law.

As discussed above,¹⁷¹ the health care industry is often defined by physically rigorous jobs, long hours and shift work, and safety-sensitive positions. The very nature of these jobs and the intersection of all three characteristics make these jobs more difficult to accommodate than others—although not impossible. Health care employers could do more to think about unique ways of restructuring jobs. For instance, are there technological advances that would make lifting patients easier; thus eliminating the need for all nurses and other hospital employees to be able to lift heavy weight? Are there other ways of scheduling hospital staff so that nurses do not have to work twelve-hour days or rotating shifts? Finally, as I and others have argued, courts should stop viewing structural norms of the workplace (the when and where work is performed) as “essential functions” of the job.¹⁷² Instead, courts should follow the U.S. Equal Employment Opportunity Commission (EEOC) guidance, which states that if an employee can prove that he can perform the actual job tasks that are essential with or without a reasonable accommodation, the employer should have to prove that modifying its rules regarding hours, shifts, etc. would cause an undue hardship.¹⁷³

Finally, my hope is that the 2008 amendments to the ADA, which dramatically expanded the definition of disability, will allow disability to become more commonplace; thus, accommodating individuals with disabilities will become “the new normal” for all employees, including those working in the health care industry.¹⁷⁴

171. See generally *supra* Part II.

172. See, e.g., Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 58-60 (2005); Porter, *Backlash*, *supra* note 5, at 78-79 (stating that courts’ deference to employers’ structural norms is counter-intuitive and contrary to the plain language of the statute).

173. Travis, *supra* note 172, at 62-64. See generally U.S. Equal Emp. Opportunity Comm’n, EEOC ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (October 17, 2002), www.eeoc.gov/policy/docs/accommodation.html.

174. Porter, *Stigma*, *supra* note 121.