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### Withdrawn Accommodations

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# WITHDRAWN ACCOMMODATIONS

*Nicole Buonocore Porter\**

## ABSTRACT

*This Article addresses a phenomenon that often arises in reasonable accommodation cases under the Americans with Disabilities Act, a phenomenon I call “withdrawn accommodations.” This occurs when an employer has agreed to provide an accommodation to an employee with a disability and then later withdraws the accommodation. Employers might withdraw accommodations for a couple of reasons. First, an employer might withdraw an accommodation because it finds out that the employee’s need for the accommodation is permanent, rather than temporary, as the employer might have first believed. Second, a new supervisor might arrive on the scene, and decide to withdraw a previously granted accommodation. The legal issue in these cases is what weight (if any) courts should give the previously provided accommodation in determining whether the accommodation is “reasonable.” In other words, is the employer precluded from asserting that the accommodation is unreasonable or causes an undue hardship if it has already been providing the accommodation successfully for some period of time? This Article explores a body of cases addressing the withdrawn accommodation issue and tackles the policy issue of whether there should be an inference or presumption in favor of the reasonableness of an accommodation when employers have previously provided the accommodation.*

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\* Professor of Law, University of Toledo College of Law. I would like to thank the American Association of Law Schools Sections on Disability Law and Employment Discrimination Law for putting together such a wonderful panel and inviting me to join in the conversation. I also would like to thank the *Drake Law Review* for its willingness to publish these Articles.

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## I. INTRODUCTION

This Symposium is celebrating a momentous event—the passage of the Americans with Disabilities Act (ADA) in 1990.<sup>1</sup> My focus is on the reasonable accommodation provision of Title I of the ADA, which prohibits employment discrimination.<sup>2</sup> Despite the celebration of the 25th anniversary of the ADA, reasonable accommodation issues did not receive very much attention for most of those 25 years. In fact, the U.S. Supreme Court decided only one reasonable accommodation case in the past 25 years—*US Airways, Inc. v. Barnett*<sup>3</sup>—and it granted certiorari in one other case, but certiorari was dismissed when the parties settled.<sup>4</sup> Certainly, plenty of lower court cases discuss reasonable accommodation issues, but compared to all Title I ADA cases, accommodation issues were addressed relatively infrequently. This was because so many cases failed at the dispositive motion stage when courts held that the plaintiff did not fall into the ADA’s protected class.<sup>5</sup> The Supreme Court, beginning in 1999, issued a series of decisions that made it dramatically more difficult to prove the threshold issue that an individual has a disability as defined in the statute.<sup>6</sup> Lower courts began to follow suit,

1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

2. See generally 42 U.S.C. §§ 12111(8)–(9), 12112(5) (2012).

3. See generally *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

4. See *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007), cert. granted in part, 552 U.S. 1074 (2007), cert. dismissed, 552 U.S. 1136 (2008).

5. See Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 192 (2008) (discussing the narrow interpretation of the definition of “disability” under the ADA’s original paradigm).

6. See, e.g., *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 187, 198 (2002), superseded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, as recognized in *Ragusa v. Malverne Union Free Sch. Dist.*, 582 F. Supp. 2d 326 (E.D.N.Y. 2008) (finding that courts must ask whether an alleged disability prevents or restricts an employee “from performing tasks that are of central importance to most people’s daily lives” and requiring that the impact of the impairment “be permanent or long term”); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999) (requiring employees seeking to prove a disability to do so by offering evidence that the disability creates a substantial limitation); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 525 (1999) (requiring a

and shortly thereafter, very few plaintiffs survived summary judgment.<sup>7</sup> Although courts in some of these cases went on to decide, in the alternative, whether the plaintiff could succeed on the merits, which often included issues regarding reasonable accommodations, many courts simply dismissed the plaintiff's case because the plaintiff could not establish the threshold coverage issue—that the plaintiff was an individual with a disability entitled to the protection of the ADA.<sup>8</sup>

This all changed in 2008, when Congress enacted the ADA Amendments Act of 2008 (ADAAA or the Amendments).<sup>9</sup> The purpose of the Amendments was to reverse the line of restrictive cases and restore the ADA to the broad protection Congress originally intended.<sup>10</sup> Through several interpretive provisions, the ADAAA made it significantly easier to establish that one was an individual with a disability, thereby dramatically expanding the protected class.<sup>11</sup> Thus, the Amendments have allowed many more cases to proceed past the stage of determining whether the plaintiff is an individual with a disability and continue to the issue of whether the employer has violated the statute.<sup>12</sup> In many of these cases, courts are forced to

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showing that an individual was “regarded as unable to perform a *class* of jobs” rather than merely a “*particular* job,” to be considered disabled under the ADA (emphasis added)); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, *as recognized in* *Ragusa v. Malverne Union Free Sch. Dist.*, 582 F. Supp. 2d 326 (E.D.N.Y. 2008) (holding “that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment, including . . . eyeglasses and contact lenses”).

7. Feldblum, *supra* note 5, at 188 (citing Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 139–60 (2000)); see Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 220 (2008); Ani B. Satz, Symposium: *Disability Discrimination After the ADA Amendments Act of 2008: Foreword*, 2010 UTAH L. REV. 983, 983–84 (2010).

8. See Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 8, 12–14 (2014) [hereinafter Porter, *Backlash*]; see *Boitnott v. Corning, Inc.*, 669 F.3d 172, 173 n.1 (4th Cir. 2012) (noting that the district court, after determining the plaintiff was not disabled under the ADA, considered, in the alternative, whether he could succeed on the merits).

9. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12213 (2012)).

10. See *id.* § 12102(b); Long, *supra* note 7, at 219; Satz, *supra* note 7, at 985.

11. See Long, *supra* note 7, at 228.

12. See Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the*

address issues of whether the employer failed to accommodate the plaintiff.<sup>13</sup> It is here that my research is focused.

My prior work identifies what I consider to be the main issues surrounding reasonable accommodations under the ADA. First, in *Martinizing Title I of the Americans with Disabilities Act*, I discussed the difficulty employers and courts face in defining and delineating the boundaries of the reasonable accommodation obligation.<sup>14</sup> I also proposed a framework for defining what constitutes a reasonable accommodation.<sup>15</sup>

Second, since there is now a critical mass of cases decided under the Amendments,<sup>16</sup> I reviewed all of the cases discussing the qualified inquiry and the reasonable accommodation obligation that were decided under the Amendments, up until December 31, 2013.<sup>17</sup> This research led me to several conclusions. First, because more plaintiffs are able to establish the threshold issue of having a protected disability, many more cases are proceeding past that threshold question and reaching the issue of whether the plaintiffs are qualified for the job, which is defined as being able to perform the essential functions of the job with or without reasonable accommodations.<sup>18</sup> I also explored whether we were beginning to see a new backlash from the courts—this time, by more strictly interpreting the qualified inquiry or the reasonable accommodation obligation.<sup>19</sup> My conclusion is that there is no evidence courts are unreasonably deciding cases based on the merits; and thus, there is no evidence that there is a new backlash against the ADA.<sup>20</sup> There was

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*ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050–51 (2013); Porter, *Backlash*, *supra* note 8, at 46–47; Satz, *supra* note 7, at 985.

13. See generally Porter, *Backlash*, *supra* note 8, at 55–58.

14. See generally Nicole Buonocore Porter, *Martinizing Title I of the Americans With Disabilities Act*, 47 GA. L. REV. 527, 543–58 (2013) [hereinafter Porter, *Martinizing*].

15. See generally *id.* at 558–79.

16. The Amendments do not apply retroactively. See Befort, *supra* note 12, at 2031 (citing cases from the First, Fifth, and Sixth Circuits that held the ADAAA is not retroactively effective). Thus, even though the Amendments went into effect on January 1, 2009, if the facts of the case occurred prior to that date, the pre-Amendments ADA applies. Courts have only recently begun deciding a significant number of cases under the Amendments.

17. Porter, *Backlash*, *supra* note 8, at 19 n.121; see generally *id.* at 19–78.

18. See *id.* at 19; see generally *id.* at 19–39.

19. See *id.* at 67.

20. *Id.* I use the term “backlash” because this is how scholars referred to the body of caselaw before the Amendments were passed. See generally Matthew Diller, *Judicial*

one area where I did perceive that courts might be heading toward another backlash, regarding what I refer to as the “structural norms” of the workplace.<sup>21</sup> Structural norms are the hours, shifts, schedules, attendance policies, and leaves of absence policies—the policies and practices regarding when and where work is performed.<sup>22</sup> I concluded that courts seem less willing to require employers to grant requested accommodations when those accommodations are modifying the structural norms of the workplace, as opposed to modifying the physical functions of the job.<sup>23</sup>

In my third accommodation Article since the Amendments went into effect, I discussed the effects of “special treatment stigma” when accommodations are given in the workplace.<sup>24</sup> Special treatment stigma manifests itself in two ways. First, coworkers are often resentful of accommodations granted to individuals with disabilities because those accommodations require the coworkers to work longer or harder, or because the accommodations granted are benefits that the coworkers also covet, such as reduced hours or changes to their schedules.<sup>25</sup> The second way special treatment stigma manifests itself in the workplace is that employers are often unwilling to grant accommodations or other special treatment because they are concerned about coworkers’ reactions or because they do not want the perceived expense or hassle of providing accommodations.<sup>26</sup> The purpose of that Article was to explore the effects of special treatment stigma in the workplace and, more importantly, to explore whether this stigma might worsen or improve after the Amendments.<sup>27</sup>

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*Backlash, the ADA, and the Civil Rights Model of Disability*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 62, 64–65 (Linda Hamilton Krieger ed., 2006); Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 356 (2007) [hereinafter Porter, *Reasonable*]. Scholars argued that the overwhelmingly pro-defendant outcomes in ADA employment cases were not the result of confusion or a misunderstanding of the law, but were the result of a backlash against the ADA. Porter, *Reasonable*, *supra* at 356–58.

21. See Porter, *Backlash*, *supra* note 8, at 71.

22. *Id.* at 5, 7.

23. *Id.* at 78.

24. See generally Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, UNIV. TOLEDO COLL. LAW 1, 2–4 (January 20, 2015) [hereinafter, Porter, *Stigma*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2552854](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552854).

25. *Id.* at 18–19.

26. Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 KAN. L. REV. 355, 359 (2010).

27. See Porter, *Stigma*, *supra* note 24, at 3.

In this Article, I have identified a new phenomenon related to these other articles, which I call “withdrawn accommodations.”<sup>28</sup> 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.<sup>29</sup> The legal issue in these cases is what weight to give, if any, to the prior accommodation when determining if a continued accommodation is reasonable.<sup>30</sup> In other words, is the employer precluded from asserting that the accommodation is unreasonable or causes an undue hardship if it has already been providing the accommodation for some period of time? With more employees able to prove that they fall into the protected class under the ADA after the Amendments, the prevalence of this issue is likely to increase. This Article explores these cases and addresses the policy issue of whether there should be an inference or presumption in favor of the reasonableness of an accommodation when employers have previously provided the accommodation.

This Article will proceed in four additional Parts. Part II addresses the history and current state of the reasonable accommodation provision, discussing the original ADA; the narrowing of the ADA’s coverage; the provisions of the ADA Amendments Act; and a snapshot of the reasonable accommodation caselaw decided since the Amendments went into effect. Part III addresses the concept of “withdrawn accommodations.” This Part first discusses cases where courts refused to infer the reasonableness of the accommodation from the fact that there was a prior accommodation that was withdrawn. It then turns to cases where courts ruled in favor of the plaintiffs, giving weight to the fact that the accommodation had been previously provided, successfully, without causing an undue hardship on the employer. Part IV weighs the policy arguments on both sides of this debate and ultimately suggests a possible resolution. Part V concludes.

## II. THE REASONABLE ACCOMMODATION PROVISION BEFORE AND

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28. To be clear, when I describe this as a “new” phenomenon, I do not mean to suggest that cases like this are new. I simply mean that, to my knowledge, no one has identified this concept of “withdrawn accommodations.”

29. See generally *infra* Part III.A. Sometimes this scenario arises because a new supervisor enters the picture and disagrees with an accommodation that was previously given. See, e.g., *Isbell v. John Crane, Inc.*, 30 F. Supp. 3d 725, 730–32 (N.D. Ill. 2014).

30. See, e.g., *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1524–25 (11th Cir. 1997); *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995).

## AFTER THE ADA AMENDMENTS ACT

A. *The Original ADA*

One of the ADA's most unique provisions is the reasonable accommodation provision, which provides that it is unlawful discrimination for an employer to refuse to provide a reasonable accommodation to an employee with a known disability unless providing the accommodation would cause an undue hardship for the employer.<sup>31</sup> "Reasonable accommodation" is not defined in the statute, but the ADA does provide some examples of types of accommodations, including:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.<sup>32</sup>

In the ADA's 25-year history, the Supreme Court has decided only one reasonable accommodation case: *US Airways, Inc. v. Barnett*.<sup>33</sup> In that case, the Court addressed the relatively narrow issue of whether an employer is obligated to accommodate an employee with a disability by assigning the employee to a particular position over other employees who have more seniority than the employee with a disability.<sup>34</sup> The Court held that ordinarily, the reasonable accommodation obligation does not trump a bona fide seniority system.<sup>35</sup> The Court based its decision on the importance of seniority rights and employees' legitimate expectations under those seniority systems.<sup>36</sup> The Court did state, however, that plaintiffs have the opportunity to prove that special circumstances exist that make the requested accommoda-

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31. 42 U.S.C. §§ 12112(a); 12112(b)(5)(A) (2012). "Undue hardship" is defined as "an action requiring significant difficulty or expense, when considered in light of" several factors, most of which involve concerns of cost compared to the resources at the employer's disposal. *Id.* § 12111(10).

32. *Id.* § 12111(9).

33. *See generally* *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

34. *Id.* at 393–94.

35. *See id.* at 403.

36. *Id.* at 404.



tion reasonable despite the existence of a seniority system, including situations in which the employer frequently makes exceptions to the seniority system so that one more departure from the seniority system is not likely to make a difference.<sup>37</sup> The Supreme Court granted certiorari on one other case—*Huber v. Wal-Mart Stores, Inc.*—although certiorari was dismissed when the parties settled.<sup>38</sup> Certainly, plenty of lower court reasonable accommodation cases were litigated prior to the Amendments.<sup>39</sup> But, as I have previously noted, the lack of attention paid to reasonable accommodation issues has left a surprising number of unsettled accommodation issues considering the ADA's 25-year history.<sup>40</sup>

Instead, courts and scholars paid much more attention to the definition of disability under the ADA.<sup>41</sup> Beginning in 1999, the Court began to narrow the ADA's protected class.<sup>42</sup> "Disability" is defined by the ADA as an "impairment that substantially limits one or more major life activities."<sup>43</sup> In three cases referred to as the *Sutton* trilogy, the Court announced a rule that required courts, when determining if someone has a disability under the ADA, to consider the ameliorative effects of mitigating measures, such as medication, assistive devices (such as glasses or hearing aids), and even the brain's ability to compensate for the limitations caused by the impairment.<sup>44</sup> This mitigating measures rule caused a number of lower courts to find many impairments not to be disabilities, including cancer, diabetes, multiple sclerosis, and many others.<sup>45</sup>

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37. *Id.* at 405.

38. *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007), *cert. granted in part*, 552 U.S. 1074 (2007), *cert. dismissed*, 552 U.S. 1136 (2008).

39. *See, e.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512 (2d Cir. 1995).

40. *See generally* Porter, *Martinizing*, *supra* note 14, at 543–52.

41. *Id.* at 544.

42. *See* cases cited *supra* note 6.

43. 42 U.S.C. § 12102(1)(A) (2012). This is referred to as the "actual disability" prong. The definition of disability also refers to individuals who have a "record of" an actual disability or are "regarded as" disabled by the employer. *Id.* § 12102(B)–(C). This Article only refers to the actual disability prong.

44. *See* *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565, 567 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 525 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999).

45. Long, *supra* note 7, at 220 (stating that as a result of the Court's narrow interpretation, "numerous individuals with fairly severe physical or mental impairments have been found not to have a disability under the ADA"); Porter, *Backlash*, *supra* note 8, at 10; Satz, *supra* note 7, at 984.

In 2002, the Court decided *Toyota Motor Manufacturing v. Williams*, where it further restricted the protected class under the ADA by holding that, in determining whether someone is disabled, the ADA's definition must be strictly interpreted, and that in order to be "substantially limited" in a major life activity, the individual must be "prevent[ed] or severely restrict[ed]" in the individual's ability to perform major life activities.<sup>46</sup> The Court also held that "major life activities" include only those things "that are of central importance to most people's daily lives."<sup>47</sup> These Supreme Court cases led to lower courts overwhelmingly finding in favor of employers, usually holding that the plaintiff is not disabled.<sup>48</sup>

### B. The ADA Amendments Act of 2008

Congress did not approve of the narrowed protected class and sought to restore the ADA to its original potential.<sup>49</sup> The ADA Amendments Act of 2008 keeps the definition of disability intact but adds several interpretive provisions that virtually demand a broader interpretation of the definition of disability.<sup>50</sup>

First, the Amendments state that the restrictive rules used in *Toyota* were incorrect, and instead, the Act should be interpreted in favor of broad coverage.<sup>51</sup> Second, the Amendments reject *Sutton's* mitigating measures rule, stating that a court should determine "whether an impairment substantially limits a major life activity . . . without regard to the ameliorative effects

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46. *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, *as recognized in* *Ragusa v. Malverne Union Free Sch. Dist.*, 582 F. Supp. 2d 326 (E.D.N.Y. 2008).

47. *See id.*

48. 29 C.F.R. app. § 1630 (2014) (finding that "[a]s a result of these Supreme Court decisions, lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with disabilities, and thus not protected by the ADA"); *see* Satz, *supra* note 7, at 984.

49. *See* Long, *supra* note 7, at 219 ("The Findings and Purposes section introducing the ADA Amendments Act specifically reject[ed] the Court's 'demanding standard' gloss.").

50. *See* Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1286–89 (2009).

51. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(5), 122 Stat. 3553, 3553 (codified at 42 U.S.C. §§ 12101–12213 (2012)); *see also* Long, *supra* note 7, at 219.

of mitigating measures.”<sup>52</sup> Third, the Amendments expand the list of major life activities<sup>53</sup> and state that major life activities include the operation of “major bodily functions,” including “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>54</sup> Finally, the Amendments address the scenario in which an individual has an impairment that is episodic, such as cancer or multiple sclerosis.<sup>55</sup> The Amendments state that if an impairment is substantially limiting when active, it is still considered substantially limiting even when in remission.<sup>56</sup>

Scholars discussing the Amendments have predicted that the Amendments will likely cause many more individuals to be considered disabled under the ADA, and therefore, many more plaintiffs will have their cases proceed to the merits of the case.<sup>57</sup> Recent work by others and me has revealed that prediction to be true.<sup>58</sup>

First, my review of all of the post-Amendments caselaw reveals strong

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52. 42 U.S.C. § 12102(4)(E)(i); see ADA Amendments Act of 2008 § 2(a)(4), 122 Stat. at 3553.

53. 42 U.S.C. § 12102(2)(A) (stating that “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working”); Long, *supra* note 7, at 222.

54. 42 U.S.C. § 12102(2)(B).

55. *Id.* § 12102(4)(D).

56. See *id.*; see also Long, *supra* note 7, at 221 (“This represents a subtle, but fairly substantial change in meaning. The Supreme Court has repeatedly emphasized that courts should refrain from engaging in hypothetical inquiries as to the severity of impairments and instead must focus on the individual in his or her present state. By directing courts to consider whether an impairment *would* substantially limit a major life activity if it were active, the ADA Amendments Act allows courts to engage in this once-prohibited type of hypothetical inquiry, at least in this one instance.” (footnote omitted)).

57. See, e.g., Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 204 (2010); Long, *supra* note 7, at 228 (“By amending the ADA’s definition of disability, Congress has assured that more individuals will qualify as having disabilities. As a result, more cases in the future will turn on the question of whether the plaintiff’s requested accommodation was reasonable.”); Porter, *Martinizing*, *supra* note 14, at 543 (“[B]ecause more cases will proceed past the initial inquiry into whether an individual has a disability, more courts will have to determine what constitutes a reasonable accommodation.”).

58. See, e.g., NATIONAL COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT 13 (2013), available at <http://www.ncd.gov/publications/2013/07232013/>; Befort, *supra* note 12; Porter, *Backlash*, *supra* note 8, at 19.

evidence that courts have followed Congress's directive to broadly interpret the definition of disability under the ADA.<sup>59</sup> Recent empirical work by Professor Stephen Befort supports this conclusion. In his study, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, Professor Befort compared the pre-ADAAA win rate for employers on the issue of coverage with the post-ADAAA win rate over the same period of time, revealing that courts granted summary judgment to employers on the issue of disability in 74.4 percent of the cases pre-Amendments and only 45.9 percent of the cases post-Amendments.<sup>60</sup>

Second, my research led me to review all of the cases decided after the Amendments<sup>61</sup> that discussed the issue of whether the plaintiff was qualified and whether the employer unlawfully failed to accommodate the plaintiff.<sup>62</sup> That research led me to more tentative conclusions. First, contrary to my prediction before the project began, there was no evidence that courts were using “the qualified inquiry or reasonable accommodation issue to unduly restrict” the reach of the ADA.<sup>63</sup> But the research did reveal a slight difference in how courts handled cases that dealt with the structural norms of the workplace—the issues surrounding hours, schedules, shifts, attendance policies, etc.—as compared to cases involving the physical functions of the job.<sup>64</sup> In the structural norms cases, there was a greater likelihood that the court would side with the employer and hold that attendance policies, rotating shifts, hours requirements, etc. were all essential functions of the job and therefore could not be accommodated.<sup>65</sup> Although this Article does not address this in detail, I believe that some of the withdrawn accommodations phenomenon is related to employers' and courts' reluctance to allow or require the modification of structural norms. In other words, in many of the cases below, the accommodation temporarily given and then withdrawn was a modification of the structural norms of the workplace.

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59. Porter, *Backlash*, *supra* note 8, at 46–47; *see generally id.* at 19–47.

60. Befort, *supra* note 12. He also states that this data likely “understate[s] the actual expansion in coverage” because, in many cases, the employer did not even contest the disability coverage issue. *Id.* at 2051.

61. The cutoff date was December 31, 2013. Porter, *Backlash*, *supra* note 8, at 19 n.121.

62. *See generally id.* at 47–66.

63. *See id.* at 67.

64. *Id.* at 71, 78.

65. *See id.* at 78; *see also id.* at 5, 7.

### III. WITHDRAWN ACCOMMODATIONS CASES

Although some disabilities are genetic and employees are born with them, other employees may become disabled while working, some from workplace accidents but many others from injuries outside of work or diseases that develop during their working lives. When such an employee requests an accommodation to allow the employee to continue to perform the job, it is likely unclear to the employer and the disabled employee whether the accommodation will be needed temporarily or permanently. When what is believed to be a temporary impairment becomes permanent, employers often balk at the realization that the need for the accommodation is also permanent.<sup>66</sup> Withdrawn accommodation issues can also arise when a new supervisor takes over and, for one reason or another, does not want to continue to furnish a previously provided accommodation.<sup>67</sup> In both of these factual scenarios, courts must grapple with whether to draw any inference from the fact that the accommodation had been previously provided.<sup>68</sup> Courts are split on this issue, with both sides making compelling arguments.

#### A. *No Inference of Reasonableness from Withdrawn Accommodation*

In more than half of the cases found, courts were unwilling to give any deference to the fact that the employer had previously provided the accommodation and then took it away. Perhaps the most famous example of this position is Judge Richard Posner's decision in *Vande Zande v. State of Wisconsin Department of Administration*.<sup>69</sup> The accommodation at issue was whether the plaintiff should be allowed to work at home.<sup>70</sup> The plaintiff was a paraplegic, and when an eight-week bout of pressure ulcers caused her to stay home from work, she requested to be able to work at home so that she would not have to use her available sick time.<sup>71</sup> The court followed the ma-

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66. *Cf. Rabb v. Sch. Bd. of Orange Cnty.*, 590 Fed. App'x 849, 852–53 (11th Cir. 2014).

67. *See, e.g., Isbell v. John Crane, Inc.*, 30 F. Supp. 3d 725, 730–32 (N.D. Ill. 2014).

68. *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1524–25 (11th Cir. 1997).

69. *See generally Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995).

70. *Id.* at 544.

71. *See id.* at 543–44.

jority rule that working from home is generally not a reasonable accommodation, especially in jobs where teamwork is required.<sup>72</sup> Even though the employer had provided this accommodation to her in the past,<sup>73</sup> the court stated that the employer is not obligated to continue to do so. As it explained,

[I]f the employer . . . bends over backwards to accommodate a disabled worker—goes further than the law requires—by allowing the worker to work at home, it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation. That would hurt rather than help disabled workers.<sup>74</sup>

Other courts have followed this reasoning.<sup>75</sup>

Similarly, in *Basith v. Cook County*, the plaintiff was a pharmacy technician, who injured his right leg in a car accident, leaving him with several limitations that interfered with some of his job duties.<sup>76</sup> The employer eventually allowed him to return to work with his restrictions.<sup>77</sup> After a second injury when he fell at work, the employer created a new position for him that he could do with his limitations.<sup>78</sup> After two more injuries and two additional leaves of absence, he sued the employer, alleging, among other things, that the employer failed to accommodate him.<sup>79</sup> Because of his difficulty walking, the plaintiff could not deliver medications;<sup>80</sup> thus, the court had to decide whether delivering medications was an essential function of the pharmacy technician job.<sup>81</sup> Even though the delivery job task took only about 45 minutes out of an eight-hour shift, the court held that it was an essential

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72. *Id.* at 544 (“[T]eam work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee’s performance.”).

73. *See id.*

74. *Id.* at 545.

75. *See, e.g., E.E.O.C. v. TriCore Reference Labs.*, 493 F. App’x 955, 960 n.7 (10th Cir. 2012) (citing *Vande Zande*, 44 F.3d at 545); *Terrell v. U.S. Air*, 132 F.3d 621, 626 n.6 (11th Cir. 1998) (holding that, even though the employer had accommodated the plaintiff’s four-hour-per-day schedule, it was not obligated to continue to do so (citing *Vande Zande*, 44 F.3d at 545)).

76. *Basith v. Cook Cnty.*, 241 F.3d 919, 924 (7th Cir. 2001).

77. *Id.* Initially, his employer refused to allow him to return to work because of the restrictions prescribed by his doctor. *Id.* After new restrictions were established, his employer allowed him to return to work. *Id.*

78. *See id.* at 925.

79. *See id.* at 925–26.

80. *Id.* at 924–26.

81. *See id.* at 927–28.

function.<sup>82</sup> The plaintiff argued that because the employer had previously created a position for him that did not involve the delivery task, the job could be restructured and the delivery task was nonessential.<sup>83</sup> The court disagreed, stating that when the employer created the job for him after his initial injuries, they were going beyond what the ADA requires.<sup>84</sup> The court stated, "Absent independent evidence that the function was non-essential, we do not believe it wise to consider the special assignment as proof that delivery was not an essential function because it would punish [the employer] for going beyond the ADA's requirements."<sup>85</sup> Thus, the court held that the employer was not required to create a job for the plaintiff, and it was not required to reallocate the essential functions of the job.<sup>86</sup>

In *Holbrook v. City of Alpharetta*, this issue was discussed more explicitly.<sup>87</sup> The court stated that the specific issue to be decided was what weight to give to the fact that the employer previously had accommodated the disabled employee when determining whether a current accommodation was reasonable.<sup>88</sup> The plaintiff was a narcotics detective with the police department.<sup>89</sup> After "experienc[ing] retinal detachment in both eyes" and undergoing surgery, "he remained without visual function in his right eye," making it impossible for him to drive a car.<sup>90</sup> He was assigned detective work that could be completed in the office, and he occasionally accompanied other detectives.<sup>91</sup> When he was on call in the evening, he required transportation if he was called to a crime scene.<sup>92</sup> Eventually, he was assigned a new supervisor who reduced the number of assignments he was given, though he was able to keep the same title and pay.<sup>93</sup>

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82. *Id.* at 929.

83. *Id.* at 930. But the court stated that this was merely evidence that "the job could be restructured, not that delivery was non-essential." *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 932.

87. *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1524–25 (11th Cir. 1997) (laying out the following issue: "to what extent is evidence of past accommodation of a disabled employee determinative of an employer's ability to accommodate that employee in the future . . . ?").

88. *See id.*

89. *Id.* at 1525.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

The plaintiff's subsequent lawsuit alleged that the police department failed to accommodate him by failing "to assign him the full duties of a police detective and accommodate him."<sup>94</sup> The plaintiff acknowledged that he could not "perform two functions of a police detective, driving an automobile and collecting certain kinds of evidence at a crime scene."<sup>95</sup> The parties disputed whether these functions were essential to his position.<sup>96</sup> The police department argued that the plaintiff could not perform a full-scale investigation of many types of crime scenes and must be accompanied by a fellow detective should the need to investigate arise.<sup>97</sup> The court found that even though these crimes do not happen very often, it is impossible to anticipate when they will occur.<sup>98</sup> In response, the plaintiff argued that he could perform those functions with a reasonable accommodation, and he justified his argument by pointing to the fact that the police department accommodated him in the past, and therefore, the accommodations must "not be unduly burdensome to the department."<sup>99</sup> He argued "that the department easily could have accommodated him with a 'minor shuffling of case assignments' as it had for several years."<sup>100</sup>

While the court agreed that the employer had made adjustments to accommodate the plaintiff in the past, the court still sided with the employer, stating that the employer is not legally required to accommodate the plaintiff's inability to complete the task of collecting evidence.<sup>101</sup> Although the court acknowledged that the employer had accommodated him with little disruption, this "previous accommodation may have exceeded that which the law requires."<sup>102</sup> The court stated that it does not want to discourage other employers from voluntarily accommodating disabled employees; in fact, the employer likely "retained a productive and highly competent employee based partly on its willingness" to accommodate him.<sup>103</sup> But the court ultimately held that ceasing to make those accommodations does not violate the

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94. *Id.* at 1526.

95. *Id.* at 1527.

96. *Id.* at 1526–27.

97. *See id.*

98. *Id.* at 1527.

99. *Id.*

100. *Id.* at 1528.

101. *Id.*

102. *Id.*

103. *Id.*



statute.<sup>104</sup>

Similarly, in *Laurin v. Providence Hospital*, the court discussed the negative consequences of a rule that assumed accommodations were reasonable simply because the employer had voluntarily (and possibly temporarily) provided them in the past.<sup>105</sup> In this case, the plaintiff was a nurse who had worked rotating shifts in a 24-hour maternity unit at the hospital for many years.<sup>106</sup> At some point she “blacked out at the wheel while driving home,” and her doctor diagnosed the event as fainting and recommended that she maintain a regular schedule of work hours and, because she had children, that she work the day shift, which she subsequently reported to her employer.<sup>107</sup> The employer “polled the staff nurses in the maternity unit,” and the majority of them “objected to a days-only position for [the plaintiff] and refused to volunteer to cover her evening and night shifts.”<sup>108</sup> As a temporary accommodation, the employer gave her a days-only shift for six weeks.<sup>109</sup> Shortly thereafter, the plaintiff “suffered a seizure while at home sleeping.”<sup>110</sup> Her neurologist changed her diagnosis to a seizure disorder and “opined that ‘a daytime position [was] absolutely necessary.’”<sup>111</sup> The employer refused to provide the accommodation permanently, but it did extend her temporary accommodation.<sup>112</sup>

After the union refused to pursue her grievance, the plaintiff filed a grievance with the hospital.<sup>113</sup> The plaintiff also refused to return to work, which resulted in her termination.<sup>114</sup> After her employer denied her grievances following a hearing, the plaintiff filed her action in court.<sup>115</sup> The First

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104. *Id.*

105. *See* *Luarin v. Providence Hosp.*, 150 F.3d 52, 60–61 (1st Cir. 1998).

106. *Id.* at 54.

107. *Id.* at 55.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 56. Interestingly, the reason the union refused to pursue the grievance was because of special treatment stigma; specifically, the other nurses objected to the plaintiff being allowed to work a days-only position. *Id.* The court sided with the union and the employer, stating that if the hospital were to waive the rotating shift requirement for the plaintiff, other nurses would be called upon to cover the plaintiff’s evening and night shifts. *Id.* at 60.

114. *Id.* at 56.

115. *Id.*

Circuit rejected the plaintiff's argument that the temporary eight-week accommodation meant that it was reasonable for the employer to continue to accommodate her.<sup>116</sup> The court stated:

From a labor-management policy standpoint, it would be perverse to *discourage* employers from accommodating employees with a temporary breathing space during which to seek another position with the employer. Here, the Hospital actively counseled [the plaintiff] in a *bona fide* attempt to locate a non-rotating position within the Hospital. An employer does not concede that a 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.<sup>117</sup>

Other courts follow this rationale of not wanting to punish employers for trying to temporarily help their employees. For instance, in *Rabb v. School Board of Orange County*, the plaintiff had three strokes and after the third, could not return to her full-time teaching position.<sup>118</sup> She asked for a part-time teaching position, and as evidence of the reasonableness of such an accommodation, she "point[ed] to the fact that she worked as a part-time tutor . . . for over two years after her third stroke."<sup>119</sup> Although the school had allowed her to work as a part-time tutor while she rehabilitated, it eventually had to eliminate the position for budgetary reasons.<sup>120</sup> The court first relied on the well-known rule that an employer is not required to create a new, part-time position in order to accommodate an employee.<sup>121</sup> Furthermore, the court stated that the fact the plaintiff had been given a specially created part-time tutoring position for two years under the belief that she would recover enough to return to full-time teaching did not prove that her request was reasonable.<sup>122</sup> According to the court, "Prior accommodations do not make an accommodation reasonable. As we have explained, [a]n employer that bends over backwards to accommodate a disabled worker . . . must not be punished for its generosity by being deemed to have conceded

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116. *See id.* at 60.

117. *Id.* at 60–61.

118. *Rabb v. Sch. Bd. of Orange Cnty.*, 590 F. App'x 849, 851 (11th Cir. 2014).

119. *Id.* at 852.

120. *Id.*

121. *Id.* at 853.

122. *Id.*

the reasonableness of so far-reaching an accommodation.”<sup>123</sup> Thus, the court held that requiring the employer to continue to fund a part-time tutoring position or to create a new part-time position would not be reasonable.<sup>124</sup>

In another withdrawn accommodation case, the plaintiff was diagnosed with Graves’ disease, which is a disorder of the thyroid gland that caused swelling in her eye socket.<sup>125</sup> The swelling led to the plaintiff’s inability to control her eye movement without significant pain, thus making reading for long periods of time difficult.<sup>126</sup> “When it became apparent that [the plaintiff] could not work with computers because of her eye pain, [her employer] created the new position of Office Clerk for her,” which did not require her to use a computer and required her to work 24 hours rather than 40 hours per week.<sup>127</sup> The company eventually decided to eliminate the plaintiff’s job and divide her duties between several employees.<sup>128</sup> The plaintiff argued that the creation of the office clerk position was a reasonable accommodation, and the employer violated the ADA by taking it away.<sup>129</sup> The court disagreed, stating that the plaintiff failed to prove that her position was eliminated because of her disability, and this failure foreclosed her ability to claim “the withdrawal of the previous accommodation of the Office Clerk position violated the ADA.”<sup>130</sup> The court held, “To the extent that [the plaintiff] contends that she is somehow entitled to lifetime employment because her position was created as an accommodation for her disability, she is incorrect.”<sup>131</sup>

In *Nance v. Quickrete Co.*, the plaintiff, who drove trucks delivering concrete products, had a disability that allowed him to work 10–11 hours per day, rather than the minimum of 14 hours per day that the employer required.<sup>132</sup> The employer allowed the plaintiff’s hour restriction for 10 months

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123. *Id.* (alterations in original) (citations omitted) (internal quotations marks omitted).

124. *Id.*

125. *Miller v. Bon Secours Balt. Health Corp.*, No. 98–2046, 194 F.3d 1305, at \*1 (4th Cir. 1999).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at \*2.

130. *Id.* at \*3.

131. *Id.*

132. *Nance v. Quickrete Co.*, No 4:06CV00058, 2007 WL 1655154, at \*1 (W.D. Va. June 5, 2007).

prior to laying him off.<sup>133</sup> The plaintiff argued that the fact that the employer had promised to “find some way for him to continue working” and had retained him for 10 months with his restriction meant that the accommodation was possible and reasonable.<sup>134</sup> The court disagreed, and stated that the employer’s temporary accommodation was just an attempt to find something that would work with the plaintiff, but that the employer was under no obligation to continue to accommodate him.<sup>135</sup>

Similarly, the court in *Phelps v. Optima Health, Inc.*, held that the employer was under no obligation to continue to allow the plaintiff to job share as an accommodation for her disability.<sup>136</sup> The plaintiff was a nurse who suffered a back injury and subsequently had restrictions placed on her ability to lift.<sup>137</sup> Because she was no longer able to perform all of the tasks of her job, the employer allowed her to job share.<sup>138</sup> When the employer eventually terminated her, the plaintiff sued, claiming a failure to accommodate.<sup>139</sup> The court noted that just because the employer allowed some coworkers to help her with her lifting duties did not mean that it was under an obligation to create a modified job.<sup>140</sup> The court held that the fact that accommodations were made so that an employee could avoid a particular task merely showed that the job could be restructured, not that the function was nonessential, and noted, “To find otherwise would unacceptably punish employers from doing more than the ADA requires, and might discourage such an undertaking on the part of employers.”<sup>141</sup> Thus, the court held that the plaintiff was not qualified and granted summary judgment to the employer.<sup>142</sup>

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133. *Id.* at \*2.

134. *Id.* at \*5. But the court found it “unclear, however, whether this ten month period was an accommodation or whether [the employer] temporarily suspended an essential job function for his position.” *Id.*

135. *Id.* A federal district court in Georgia reached a similar result when the plaintiff (who worked for the department of corrections) was fired after being allowed to work in a light-duty job for two years when they were put on restrictions that involved no inmate supervision. *Pickering v. City of Atlanta*, 75 F. Supp. 2d 1374, 1376–77, 1379 (N.D. Ga. 1999). The court found that just because the employer accommodated the plaintiff by assigning her light duty because it thought her condition was temporary did not mean it was under a continuing obligation to do so. *Id.* at 1379.

136. *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 26 (1st Cir. 2001).

137. *Id.* at 24.

138. *Id.*

139. *See id.* at 26.

140. *Id.*

141. *Id.*

142. *See id.* at 28. Similarly, the court in *Siebers v. Wal-Mart Stores, Inc.*, held that

The Eighth Circuit was motivated by similar concerns when it held that an employer was not required to continue to offer an employee a waiver from the rotating shifts requirement.<sup>143</sup> In *Rehrs v. Iams Co.*, the plaintiff had diabetes and suffered a heart attack.<sup>144</sup> His doctor recommended that he work a straight shift rather than a rotating shift, to better control his diabetes.<sup>145</sup> The employer allowed him to work a straight shift for 60 days, but when it found out that the plaintiff's doctor intended the restriction to be permanent, the employer said that it could no longer accommodate the plaintiff.<sup>146</sup> In arguing that the rotating shifts were not an essential function, the plaintiff pointed to the fact that the employer had allowed him to work a straight shift for 60 days.<sup>147</sup> The court, quoting language reminiscent of *Vande Zande*, held that "[a]n 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."<sup>148</sup>

Finally, some courts do not discuss this issue explicitly, but the facts of the case reveal a withdrawn accommodation.<sup>149</sup> Courts in these cases hold

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the employer is not obligated to find a different job for a blind applicant after it became apparent that the applicant could not work in the job for which the applicant applied. *See Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1023 (7th Cir. 1997). The court stated that even though the employer attempted to find other jobs for which the applicant was qualified, it should not be liable for not finding one. *Id.* at 1021, 1023. The court also noted that an employer "should not be discouraged from doing more than the ADA requires even if the extra effort . . . does not work out." *Id.* at 1023.

143. *Rehrs v. Iams Co.*, 486 F.3d 353, 359 (8th Cir. 2007).

144. *Id.* at 354–55.

145. *Id.* at 355.

146. *Id.*

147. *Id.* at 358.

148. *Id.* (quoting *Laurin v. Providence Hosp.*, 150 F.3d 52, 60–61 (1st Cir. 1998)) (internal quotation marks omitted); *cf. Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995).

149. *See, e.g., Knutson v. Schwan's Home Serv., Inc.*, 711 F.3d 911, 915–16 (8th Cir. 2013) (holding that the plaintiff was not qualified for the job of general manager at a food delivery company once he suffered an eye injury that precluded his ability to be DOT certified (as required for driving the delivery trucks), even though the employer had allowed him to remain a Manager for over nine months after his eye injury); *Kallail v. Alliant Energy Corp. Servs.*, 691 F.3d 925, 928–32 (8th Cir. 2012) (holding that the employer's temporary accommodation of the plaintiff's inability to work rotating shifts does not mean that the employer must waive its rotating shifts permanently); *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003) (holding that the employer was not required

that a continued accommodation is unreasonable or would create an undue hardship.<sup>150</sup>

*B. Employer Is Required to Continue Prior Accommodation*

Contrary to the prior subpart, courts in the cases discussed in this subpart hold that an employer is required to continue an accommodation previously provided to the plaintiff. Courts do not specifically state that any inference should be drawn from the fact that an accommodation has been offered, but do seem to assume that because the accommodation has been provided successfully for a period of time (often a long period of time), the accommodation is reasonable and the employer is therefore obligated to continue to provide it.

For instance, in *Alexander v. Boeing Co.*, the plaintiff suffered from migraine headaches, which caused her to miss work frequently.<sup>151</sup> From approximately 2009 through 2012, the plaintiff would telecommute sporadically because of her migraines. Beginning in 2012, her migraines became more frequent, causing her to miss even more work.<sup>152</sup> In 2012, the employer told all of its employees that they could no longer telecommute or vary their hours.<sup>153</sup> Because the plaintiff could no longer work from home, she had far more frequent absences and was disciplined for those “unexcused” absences.<sup>154</sup> The employer argued that in-person attendance was an essential function of the job, and therefore, working from home was not a reasonable accommodation.<sup>155</sup>

The plaintiff’s job involved managing employees.<sup>156</sup> The job was described as mostly knowledge-based, rather than task-based.<sup>157</sup> The employer admitted that even though it believed her job required regular attendance to troubleshoot problems, most of the job is done over the computer or the

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to continue to grant the plaintiff indefinite leave for his cluster headaches, stating that “prior accommodations do not make an accommodation reasonable,” especially in light of the fact that the plaintiff’s absences increased before his termination).

150. See generally cases cited *supra* note 149.

151. *Alexander v. Boeing Co.*, No. C13-1369RAJ, 2014 WL 3734291, at \*1 (W.D. Wash. July 28, 2014).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at \*8.

156. *Id.* at \*9.

157. See *id.*

phone.<sup>158</sup> When the plaintiff had been allowed to work partial days at home, she would work from home once her migraine subsided.<sup>159</sup> When the employer took the telecommuting privilege away, the plaintiff's performance reviews declined because of decreased productivity caused by her increased absences.<sup>160</sup> As the court stated, "[I]n the past, plaintiff had successfully telecommuted and worked from home during migraine episodes, and received positive performance reviews."<sup>161</sup> Thus, the court held that "there [was] a genuine dispute of material fact regarding whether [the] plaintiff could perform this essential function had she been provided a reasonable accommodation of flexible or partial days that had been successful in the past."<sup>162</sup> Because the telecommuting arrangement had worked so well in the past, the court held that taking that benefit away may have been a failure to accommodate.<sup>163</sup>

Similarly, the court in *Isbell v. John Crane, Inc.* held that the fact that an accommodation was previously offered holds great weight in determining whether that accommodation is reasonable.<sup>164</sup> In this case, the plaintiff was hired to work as a chemical engineer in the employer's Materials Laboratory, a position she held for six years.<sup>165</sup> The plaintiff suffered from attention deficit disorder and bipolar disorder.<sup>166</sup> The medications the plaintiff took made it difficult for her to get to work early in the morning, in part because the medications took quite some time to take effect.<sup>167</sup> For years, her supervisors allowed her to arrive to work late (10 a.m.) as long as she was able to complete her work.<sup>168</sup>

As is typical of some of these cases, a new supervisor objected to her hours.<sup>169</sup> The plaintiff was required to submit new medical documentation to justify the later start time and was required to be at work at 8:30 a.m. while

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158. *Id.*

159. *Id.*

160. *See id.*

161. *Id.*

162. *Id.* at \*10.

163. *See id.*

164. *See Isbell v. John Crane, Inc.*, 30 F. Supp. 3d 725, 734 (N.D. Ill. 2014).

165. *Id.* at 730.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

waiting for her supervisor to make a decision on her requested accommodation.<sup>170</sup> The supervisor then gave her a 9:15 a.m. start time on a temporary basis (60 days) and said that the employer would reconsider her request after expiration of the 60-day period.<sup>171</sup> She submitted documentation providing a new diagnosis, new medication, and a new request for a later start time, and the employer refused to further accommodate her.<sup>172</sup> Ultimately, she was terminated for attendance violations.<sup>173</sup>

The court recognized that this case represented a unique set of facts because the employer had been giving the plaintiff the accommodation of a flexible start time for more than two years without difficulty.<sup>174</sup> When the employer stopped accommodating her, it had no explanation for why she was being subjected to the one-size-fits-all hours policy.<sup>175</sup> As stated by the court, giving variations of the workplace's normal rules is exactly what the ADA was intended to do.<sup>176</sup> The court stated: "Because [the employer] had already made a reasonable accommodation a few years earlier when it permitted [the plaintiff] to start her work day at 10 a.m., the question becomes instead whether it was reasonable for [the employer] to withdraw that existing accommodation."<sup>177</sup> The court held it was unreasonable for the employer to only partially accommodate her with the 9:15 start time and to withdraw the accommodation completely.<sup>178</sup> Because the employer had previously provided the accommodation of a later start time, it could not legitimately state that punctuality was an essential function of the job or that a later start time causes the employer an undue hardship.<sup>179</sup> Thus, the court granted the plaintiff's motion for summary judgment on her failure to accommodate claim.<sup>180</sup>

Similarly, the court in *Johansson v. Prince George's County Public Schools* allowed the plaintiff's failure to accommodate claim to proceed because the employer took away an accommodation that had been effective in

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170. *Id.* at 730–31.

171. *Id.* at 731.

172. *Id.*

173. *Id.* at 733.

174. *Id.* at 734.

175. *Id.*

176. *See id.*

177. *Id.*

178. *Id.* at 734–36.

179. *Id.* at 735.

180. *Id.* at 736.



the past.<sup>181</sup> In this case, the plaintiff was a resource teacher, a job that required conflict resolution with students, sometimes requiring the plaintiff to physically restrain students.<sup>182</sup> The plaintiff hurt her knee at work and could no longer restrain larger students on her own, so the school provided her an accommodation via an intervention partner to help the plaintiff restrain students if necessary.<sup>183</sup> At one point, however, the intervention partner assigned to help the plaintiff was not available when she had to restrain a student.<sup>184</sup> After this incident, she was told that she could no longer be accommodated, and she was encouraged to retire.<sup>185</sup> The court discounted the employer's argument that the plaintiff could not meet the essential function of showing up to work regularly because if the employer had accommodated her by continuing to provide her the intervention assistance, the plaintiff would not need to be on leave and could perform all of the functions of her job.<sup>186</sup> Thus, not continuing her accommodation was deemed a failure to accommodate.<sup>187</sup>

In another withdrawn accommodation case, the court held that an employer could not claim that it was an undue hardship to continue to allow the plaintiff to work part-time because the employer had provided the plaintiff with an accommodation for 18 months.<sup>188</sup> The plaintiff in *Meinen v. Godfrey Brake Service & Supply, Inc.* was hospitalized and diagnosed with multiple sclerosis.<sup>189</sup> He was able to return to work but could only work up to two hours per day, three days a week, so his employer allowed him to work at the parts counter on a part-time basis.<sup>190</sup> In fact, the employer created two part-time positions at the parts counter to hold open a full-time position for the plaintiff in anticipation of him being able to return to work in a full-time

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181. See *Johansson v. Prince George's Cnty. Pub. Sch.*, No. DKC 13-2171, 2014 WL 3345054, at \*1-2, \*8 (D. Md. July 7, 2014).

182. *Id.* at \*1.

183. *Id.*

184. *Id.* During the incident, the plaintiff was ordered by her supervisor to physically restrain the larger child and informed "that she should not be at work if she is unable to 'do her job.'" *Id.*

185. *Id.* at \*1-2.

186. See *id.* at \*7.

187. *Id.* at \*8.

188. *Meinen v. Godfrey Brake Serv. & Supply, Inc.*, No. CIV.10-5077-JLV, 2012 WL 4364669, at \*2 (D.S.D. Sept. 24, 2012).

189. *Id.* at \*1.

190. *Id.*

capacity.<sup>191</sup> After allowing the plaintiff to work in this position for 18 months, the employer terminated him.<sup>192</sup> The court held that the defendant had not demonstrated that continuing to employ the plaintiff on a part-time basis would cause the employer an undue hardship.<sup>193</sup>

In *Holly v. Clairson Industries, L.L.C.*, an employer withdrew an accommodation after 15 years of allowing the plaintiff to be a few minutes late to work and to make up the time later.<sup>194</sup> The plaintiff was a paraplegic as a result of a motorcycle accident and was confined to a wheelchair.<sup>195</sup> He worked in a plant that manufactured industrial and medical devices.<sup>196</sup> He was hired as a mold polisher, where he worked in a tool room polishing molds after they came off the assembly line.<sup>197</sup> His shift was from 7:00 a.m. to 3:00 p.m., but he frequently worked between forty to sixty hours per week.<sup>198</sup> Although the plaintiff never had an attendance problem, his disability frequently caused him to arrive late to work, usually by only a couple of minutes.<sup>199</sup> This tardiness was related to the fact that workplace obstacles often made it difficult for him to get to the time clock on time because of his wheelchair.<sup>200</sup> Either the room that held the time clock had too many tables blocking the time clock or the areas he had to traverse to get to the time clock had pallets of materials in the way of his wheelchair.<sup>201</sup> His supervisors tolerated the tardiness for 15 years because the plaintiff was a good employee and because his position was not very time-sensitive, as long as he completed his work, which he always did.<sup>202</sup> In 2003, the employer hired a

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191. *Id.*

192. *Id.* at \*2; *see id.* at \*1.

193. *Id.* at \*2.

194. *See generally* *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1249–54 (11th Cir. 2007).

195. *Id.* at 1249.

196. *Id.*

197. *Id.* This type of work was not “as time sensitive as other areas, so that if somebody stayed late, as opposed to coming in early, it wouldn’t really matter as long as the work was done.” *Id.* at 1252 (internal quotation marks omitted).

198. *Id.* at 1249.

199. *Id.* at 1249–50.

200. *Id.* at 1250.

201. *Id.* Other obstacles included: long employee lines; car troubles that were difficult for him to fix due to his disability; having to change clothes due to a loss of control of his bowels; and heavy rain because the plaintiff was unable to maneuver his wheelchair and hold an umbrella at the same time, and would be unable to stand and dry himself like his coworkers. *Id.* at 1251.

202. *See id.* at 1250, 1252.

consultant, who advised the company to adopt a no-fault attendance policy, which counted every absence as one occurrence, and a late arrival, even if late by only a few seconds, as one-half of an occurrence.<sup>203</sup> No excuses were allowed for absences or late arrivals, and only 18 late arrivals in one year (nine occurrences) resulted in termination.<sup>204</sup> About a year after the policy was adopted, the plaintiff was automatically terminated as a result of his late arrivals.<sup>205</sup>

The plaintiff argued that the employer “failed to accommodate his disability by not allowing him to occasionally clock in to work late and make up any lost time during breaks or overtime, as he had been allowed to do for fifteen years prior to the implementation of the new policy.”<sup>206</sup> The legal issue debated was whether strict punctuality was an essential function of the job, because if strict punctuality was an essential function, then the plaintiff could not perform this function even with a reasonable accommodation.<sup>207</sup> Ultimately, the court held that strict punctuality was not an essential function of the plaintiff’s position, refusing to give deference to the employer’s statement regarding the essential functions and relying on the fact that the plaintiff had been accommodated for 15 years prior to the implementation of the new attendance policy.<sup>208</sup>

The court in *Lee v. Harrah’s New Orleans* held that a material issue of fact existed regarding whether the employer engaged in an interactive process because it provided the plaintiff with an accommodation and then withdrew that accommodation.<sup>209</sup> The plaintiff in this case had a history of severe back pain and had been diagnosed with fibromyalgia.<sup>210</sup> Consequently, she could not stand for long periods of time.<sup>211</sup> She was a table games supervisor in a casino and, as an accommodation, she asked her supervisor to work in

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203. *Id.* at 1253.

204. *Id.*

205. *Id.* at 1254.

206. *Id.* at 1256.

207. *Id.* at 1256–57.

208. *See id.* at 1260 (“Indeed, it is particularly difficult to imagine an actual increase in overhead costs due to [the plaintiff’s] tardiness since the vast majority of the time he was late by only *one minute*, and the accommodation he was permitted for some fifteen years, and which he seeks again now, involves his making up any lost time *the same business day*.”).

209. *See Lee v. Harrah’s New Orleans*, No. 11-570, 2013 WL 3899895, at \*7 (E.D. La. July 29, 2013).

210. *Id.* at \*1.

211. *See id.*

the sitting “box person” games supervisor position at the craps table, which the plaintiff asserted was a less physically demanding position.<sup>212</sup> The employer provided the position for a period of time but ultimately took it away.<sup>213</sup> The court concluded that the seated position was a reasonable accommodation and thus denied the employer’s motion for summary judgment.<sup>214</sup>

Finally, in *Miller v. Illinois Department of Transportation*, the court concluded that an employer should have continued the accommodation it had offered in the past.<sup>215</sup> In this case, the plaintiff worked on a bridge crew but had difficulty working from extreme heights when in an unsecured environment.<sup>216</sup> He estimated this fear kept him from performing less than three percent of his job description, and he was still able to complete his assigned tasks on all but one occasion.<sup>217</sup> The employer informally accommodated the plaintiff by allowing members of his bridge crew to handle those tasks, just as other team members’ conditions or limitations were accommodated.<sup>218</sup> After the plaintiff had a panic attack when his employer required him to perform a task he was unable to perform, he filed a request for an accommodation to not be required to work on bridge beams and other unsecured areas at heights above 20 to 25 feet.<sup>219</sup> The employer denied the request.<sup>220</sup> The Seventh Circuit reversed the district court’s grant of summary judgment, stating that “a reasonable jury could find that such work was not an essential function of the job and that [the plaintiff] was requesting a reasonable accommodation: after all, he was asking only that he be allowed to work as he had worked successfully for several years.”<sup>221</sup> The court stated that Miller’s request did not require the employer “to do anything it was not already doing,” and that the “jury should be permitted to consider [the plaintiff’s] actual work environment and [the employer’s] past flexibility in delegating tasks amongst the bridge team members in deciding whether [the] request

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212. *Id.*

213. *Id.* at \*5.

214. *Id.* at \*7–8.

215. *See Miller v. Ill. Dep’t of Transp.*, 643 F.3d 190, 200 (7th Cir. 2011).

216. *Id.* at 192.

217. *Id.*

218. *Id.* at 193 (“[T]he team worked effectively as a team, taking advantage of each member’s abilities and accommodating each member’s limitations.”).

219. *Id.* at 193–94.

220. *Id.* at 194.

221. *Id.* at 197.

for accommodation was reasonable.”<sup>222</sup>

Other courts are much less explicit regarding the relevance of the fact that the employer previously accommodated the plaintiff. There are cases in which there was evidence of a prior, effective accommodation that was withdrawn, and the plaintiff ultimately survived summary judgment on the failure to accommodate claim, but the court never explicitly stated that the prior accommodation rose to the level of an inference in favor of the accommodation being deemed reasonable.<sup>223</sup>

#### IV. ARRIVING AT A TENTATIVE SOLUTION

##### A. Policy Arguments

The policy arguments on both sides of this issue are compelling. Courts that have held there is no inference of reasonableness drawn from a prior accommodation argue that employers should not be punished for trying to do the right thing or for trying to be helpful.<sup>224</sup> If a prior accommodation meant that a continued accommodation would be presumed reasonable, employers would have a strong incentive not to provide a temporary accommodation in the first place.<sup>225</sup> This, of course, would hurt individuals with disabilities.<sup>226</sup> Sometimes a temporary accommodation is all that is needed, and

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222. *Id.* at 200.

223. *See, e.g.,* Dunlap v. Liberty Natural Prods., Inc., No. 3:12-cv-01635-SI, 2013 WL 6177855, at \*1–2, \*8 (D. Or. Nov. 25, 2013) (allowing the plaintiff to survive the defendant’s motion for summary judgment when the defendant initially provided the plaintiff help with lifting and taping boxes and then withdrew that accommodation once it found out that the accommodation was going to be permanent); Hancock v. Wash. Hosp. Ctr., 908 F. Supp. 2d 18, 21, 24–25 (D.D.C. 2012) (denying the defendant’s motion for summary judgment and stating that the plaintiff’s temporary restrictions—which included light duty, no bending or triage of patients, and no lifting over 20 pounds—were previously accommodated and should continue to be accommodated temporarily, but not deciding whether the employer would have to accommodate the employee if her restrictions became permanent); Howell v. Michelin Tire Corp., 860 F. Supp. 1488, 1490, 1493 (M.D. Ala. 1994) (holding that there was a genuine issue of material fact regarding whether the employer reasonably accommodated the plaintiff when it withdrew its accommodation of allowing him to work light duty because of several injuries and surgeries).

224. *See, e.g.,* Basith v. Cook Cnty., 241 F.3d 919, 930 (7th Cir. 2001); Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 545 (7th Cir. 1995).

225. *See Vande Zande*, 44 F.3d at 545; *see also* Rabb v. Sch. Bd. of Orange Cnty., 590 F. App’x 849, 853 (11th Cir. 2014).

226. *See, e.g.,* Laurin v. Providence Hosp., 150 F.3d 52, 60–61 (1st Cir. 1998); *Vande*

an employee is able to recover from the injury or illness enough to resume all normal work activity. It also seems unfair to use an employer's generosity against the employer.<sup>227</sup> Attorneys representing employers sometimes caution employers to be careful about being "too nice" or "too generous," knowing that this generosity could later be used against the employer. I used to warn employers about accommodating employees in such a way that might not be required under the reasonable accommodation provision. Employers are incredulous when they are told that doing something nice for one of their employees might end up hurting the employer in the long run.

For instance, imagine this scenario:<sup>228</sup> An employee is undergoing dialysis for kidney failure. He works in the shipping department of a manufacturing company, and all of the employees in the shipping department work rotating shifts: one week on the day shift; one week on the afternoon shift; and one week on the midnight shift. Each of the shifts is staffed with seven employees (there are 21 total employees in the shipping department), and equal staffing is needed to get the work completed. Because of the disabled employee's dialysis schedule, he asks for an accommodation of a straight day shift. His dialysis is in the late afternoons, so he cannot work the afternoon shift, and he is so exhausted from the dialysis that he cannot work the midnight shift. The employer provides the accommodation for about six months, which causes the day shift to be overstaffed (eight instead of seven employees) and either the afternoon or midnight shift to be understaffed (six instead of seven employees). The employer eventually grows weary of providing this accommodation. Perhaps it was hoping that the accommodation would not be needed for so long; but of course, until and unless the employee is able to get a kidney transplant, dialysis is the only thing keeping him alive. I am somewhat sympathetic to the burdens this accommodation was placing on the employer. Having one shift overstaffed and another shift understaffed is not an efficient way to run a department.<sup>229</sup> The employer did not think it

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*Zande*, 44 F.3d at 545.

227. See *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1257 n.3 (11th Cir. 2001); *Vande Zande*, 44 F.3d at 545 (stating that an employer that "bends over backwards to accommodate a disabled worker . . . must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation").

228. This factual scenario is based on an issue I dealt with when I was a practicing attorney.

229. I asked the employer why it did not just require other employees to rotate through the other shifts more often, so as to keep the staffing equal. Its concern was that the other employees would be upset if required to rotate through the other shifts more frequently. I will admit I found this to be a very callous response in light of the severity

should be all bound by what it viewed as a very generous response to the disabled employee's plight. If this accommodation was truly causing a burden on the employer, I am sympathetic to its argument that it should not have to provide the accommodation indefinitely.

On the other hand, in many cases, the fact that an accommodation has been given successfully is very good evidence that it is reasonable.<sup>230</sup> In fact, all kinds of accommodations that employers might automatically presume are unreasonable before they are actually provided turn out to be very easy to accomplish and not at all burdensome. Furthermore, if an accommodation has been given without any trouble or hardship, as a practical matter, this is very good evidence that the accommodation is both reasonable and does not cause an undue hardship.

For instance, consider *Isbell v. John Crane, Inc.*, discussed earlier, where the employee had been allowed a later starting time for two years to accommodate her attention deficit disorder and bipolar disorder.<sup>231</sup> The plaintiff had been successfully working with the later start time and making up the hours she missed by staying later.<sup>232</sup> When the employer stopped accommodating her, the employer had no explanation for why the plaintiff was being subjected to the one-size-fits-all hours policy.<sup>233</sup> Thus, the court held that withdrawal of the accommodation was unreasonable, and therefore the plaintiff's failure to accommodate claim survived.<sup>234</sup> In this case, if the employer had not previously provided the accommodation, the employer might have been able to successfully argue that the accommodation was unreasonable, or stated another way, that prompt attendance was an essential function of the job, which could not be waived or modified through reasonable accommodation. But once the accommodation was offered, the schedule created no problems for the employer.<sup>235</sup> The past experience was good evidence that the accommodation was effective and reasonable.<sup>236</sup> Fortunately,

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of the employee's disability. Dialysis is very unpleasant, and the employee lived with the knowledge that without a kidney transplant, he would be on dialysis indefinitely or he would die.

230. See *supra* Part III.B.

231. *Isbell v. John Crane, Inc.*, 30 F. Supp. 3d 725, 730 (N.D. Ill. 2014).

232. See *id.*

233. *Id.* at 734.

234. *Id.* at 735–36.

235. See *id.* at 734–36.

236. See *id.*

the court agreed.<sup>237</sup>

This policy debate raises the following question: Should the law require that some inference or presumption apply when an accommodation has been offered in the past? When I began researching these cases, I thought my answer would be “yes.” In many cases, like the *Isbell* case above, the past accommodation is good evidence that the accommodation is both feasible and reasonable.<sup>238</sup> But in other cases, an accommodation provided on a temporary basis is burdensome, and providing it permanently would be unreasonable.<sup>239</sup> Yet, if a rule were created that any accommodation that was previously provided is presumed reasonable, it would discourage employers from voluntarily accommodating employees.<sup>240</sup> This would hurt those employees;<sup>241</sup> arguably hurt the employer, who would unnecessarily and perhaps prematurely lose a valuable employee;<sup>242</sup> and hurt society, which might have to pay the expenses of employees who are forced to rely on public assistance if they cannot find another job after the termination.<sup>243</sup>

### B. Possible Solution

For these reasons, a legal presumption or inference is not justifiable. And yet, the prior accommodation *is* relevant in these withdrawn accommodation cases. The goal is to find a way to factor in this information without creating too much of an incentive for employers to refuse to provide the temporary accommodation. One logical solution is to include this information as one of the factors listed in the Equal Employment Opportunity Commission’s (EEOC) regulations defining “qualified individual.”<sup>244</sup> The EEOC’s regulations define a qualified individual as someone who “satisfies the requisite skill, experience, education and other job-related requirements

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237. See *id.* at 736.

238. See *supra* Part III.B.

239. See *supra* Part III.A.

240. See *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995).

241. See *id.*

242. See, e.g., *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1528 (11th Cir. 1997) (stating that “it seems likely that the [employer] retained a productive and highly competent employee” because it had been willing to make temporary accommodations for the plaintiff).

243. See generally RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICAN’S WITH DISABILITIES ACT* 69 (Richard Delgado & Jean Stefancic, eds. 2005) (discussing the poverty rates and unemployment issues individuals with disabilities face).

244. See 29 C.F.R. § 1630.2(m) (2014).



of the employment position such individual holds or desires and [who], with or without reasonable accommodation, can perform the essential functions of such position.”<sup>245</sup> “Essential functions” are defined as “the fundamental job duties of the employment position the individual with a disability holds or desires.”<sup>246</sup> The EEOC also lists evidence courts should consider in determining whether a function is essential. These include:

- i. The employer’s judgment as to which functions are essential;
- ii. Written job descriptions prepared before advertising or interviewing applicants for the job;
- iii. The amount of time spent on the job performing the function;
- iv. The consequences of not requiring the incumbent to perform the function;
- v. The terms of a collective bargaining agreement;
- vi. The work experience of past incumbents in the job; and/or
- vii. The current work experience of incumbents in similar jobs.<sup>247</sup>

I propose the addition to this list of the following factor: “Whether the employer has previously modified or waived the function for this employee.” This is a compromise position. It gives some weight to the prior accommodation without creating a presumption of reasonableness that would deter employers from providing voluntary or temporary accommodations.

Some might react to this proposal by stating that these factors address the essential job function inquiry, not the reasonable accommodation provision. However, the essential functions inquiry is related to the reasonable accommodation issue because the qualified individual inquiry asks whether the individual is qualified to perform the essential functions of the job *with or without reasonable accommodations*.<sup>248</sup> In fact, I previously argued that courts would rather decide a case under the qualified inquiry than under the reasonable accommodation provision because the reasonable accommodation provision is vague, with very little guidance to help courts figure out what is or is not reasonable.<sup>249</sup> As discussed above, the Supreme Court has

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245. *Id.*

246. *Id.* § 1630.2(n)(1).

247. *Id.* § 1630.2(n)(3).

248. 42 U.S.C. § 12111(8) (2012).

249. See Porter, *Backlash*, *supra* note 8, at 67–70. I have previously tried to define the amorphous term “reasonable accommodation,” but as of yet, no court has followed my lead. See Porter, *Martinizing*, *supra* note 14, at 543–46; see also Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1124 (2010) (defining reasonable accommodation as the flip side of undue hardship).

decided only one reasonable accommodation case, on a fairly narrow issue.<sup>250</sup>

The qualified inquiry, on the other hand, has more structure to it. As noted above, the EEOC's regulations elaborate on how to determine the essential functions of the job.<sup>251</sup> Thus, because the qualified inquiry has more structure than the amorphous reasonable accommodation provision, courts have more often decided cases under the qualified inquiry.<sup>252</sup> Furthermore, if the court determines a function is essential, it can often give just a cursory review of whether a reasonable accommodation is possible because courts are not required to eliminate an essential function of the job as a reasonable accommodation.<sup>253</sup> Therefore, because courts are more likely to decide cases under the qualified inquiry rather than the reasonable accommodation inquiry, consideration of the fact that the employer previously waived the function under the qualified inquiry makes sense.

In addition to its regulations, the EEOC also promulgates interpretive guidance.<sup>254</sup> It is here that the EEOC could explain how this factor—"whether the employer has previously modified or waived the function for this employee"—should be interpreted. For instance, on one hand, evidence that the employer waived the job function, but made clear that it was doing so only on a temporary basis because the employer believed that the employee would recover, would not be very good evidence that the accommodation is ultimately reasonable on a permanent basis. On the other hand, evidence that the accommodation was working successfully until a new supervisor took over would be very good evidence that the function is not essential and that reasonable accommodation is possible. Ultimately, the goal is that by listing this factor with the other essential functions factors, courts would have guidance in these cases without creating a disincentive to employers for providing accommodations.

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250. See *supra* text accompanying notes 34–38.

251. See 29 C.F.R. § 1630.2(m), (n)(1)–(3).

252. See Porter, *Backlash*, *supra* note 8, at 69 ("Because this qualified inquiry is much more structured and detailed than the reasonable accommodation inquiry, courts appear more willing to rely on the qualified inquiry rather than the reasonable accommodation inquiry when they . . . grant summary judgment to the employer.").

253. See 29 C.F.R. § 1630.2(m).

254. See ENFORCEMENT GUIDANCES AND RELATED DOCUMENTS, U.S. Equal Emp. Opportunity Comm'n, [http://www.eeoc.gov/laws/guidance/enforcement\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm) (last visited Apr. 15, 2015).

## V. CONCLUSION

Withdrawn accommodations are prevalent and perplexing, with compelling arguments on both sides of the debate. Courts must determine what weight to give the fact that the employer has previously provided the exact accommodation that the employer is currently arguing is unreasonable. Sometimes, employers really do bend over backwards to help their employees, providing accommodations without considering the effects of having to provide the accommodations on a long-term basis. Creating a presumption that a previously provided accommodation is reasonable would deter any well-counseled employer from providing the accommodation in the first place, which would ultimately hurt employees with disabilities. On the other hand, evidence that an accommodation was provided successfully, and was perhaps only withdrawn when a new supervisor arrived on the scene, is very good evidence that the accommodation is reasonable. This Article has argued that the previously provided accommodation should be given *some* weight, as one of several factors, but not so much weight that it deters employers from providing accommodations in the first place. I propose that we add “whether the employer has previously modified or waived the function for this employee” to the EEOC’s list of factors for determining whether a job function is essential. Doing so will prompt courts to consider the relevance of a previous accommodation as one of many factors, without giving it too much weight and deterring future accommodations.